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Ninety-second session
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VIEWS

Communications Nos. 1351/2005 and 1352/2005

Submitted by:	Luis Hens Serena (represented by Ms. Pilar García González) and Juan Ramón Corujo Rodríguez (represented by Ms. Elena Crespo Palomo)
Alleged victim:	The authors
State party:	Spain
Date of communications:	24 May 2004 (initial communication)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 26 January 2005 (not issued in document form) CCPR/C/86/D/1351-1352/2005, admissibility decision adopted on 8 March 2006
Date of adoption of Views:	25 March 2008
Subject matter:	Conviction by the highest ordinary court
Procedural issues:	Exhaustion of domestic remedies, insufficient substantiation

* Made public by decision of the Human Rights Committee.

Substantive issues:	Right to the review of the conviction and sentence by a higher tribunal according to law; right to an impartial tribunal; right to be tried without undue delay; non-retroactive application of criminal law
Articles of the Covenant:	14 (1), 14 (3) (c), 14 (5) and 15 (1)
Article of the Optional Protocol:	2 and 5 (2) (b)

On 25 March 2008, 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 communications Nos. 1351/2005 and 1352/2005.

[ANNEX]

Annex

Views of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights

(Ninety-second session)

concerning

Communications Nos. 1351/2005 and 1352/2005*

Submitted by:	Luis Hens Serena (represented by Ms. Pilar García González) and Juan Ramón Corujo Rodríguez (represented by Ms. Elena Crespo Palomo)
Alleged victim:	The authors
State party:	Spain
Date of communications:	24 May 2004 (initial communication)
Date of admissibility decision:	8 March 2006

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

Meeting on 25 March 2008,

Having concluded its consideration of communications Nos. 1351/2005 and 1352/2005 submitted on behalf of Luis Hens Serena and Juan Ramón Corujo Rodríguez 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 authors 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 communication No. 1351/2005 is Luis Hens Serena, a Spanish national, born in 1957. The author of communication No. 1352/2005 is Juan Ramón Corujo Rodríguez, a

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

Spanish national, also born in 1957. Both communications were submitted to the Committee on 24 May 2004 and concern the same facts. The authors claim to be victims of violations by Spain of article 14, paragraphs 1, 3 (c) and 5, and article 15, paragraph 1, of the Covenant. The Optional Protocol came into force for the State party on 25 April 1985. The authors are represented by counsel Pilar García González and Elena Crespo Palomo, respectively.

1.2 On 28 April 2005, the Special Rapporteur on New Communications and Interim Measures, acting on behalf of the Committee, granted the State party's request for the admissibility of the communications to be considered separately from the merits.

1.3 Under rule 94 of its rules of procedure, the Committee has decided to consider the two communications together since they refer to the same facts and complaints and put forward the same arguments. The Committee declared the communication admissible at its eighty-second session.

Factual background

2.1 On 29 July 1998, the Plenary of the Second Chamber of the Supreme Court sentenced the authors to five years' imprisonment and eight years' general disqualification for the offence of illegal detention. The sentence established that on 4 December 1982 the police detained Mr. Segundo Marey Samper in the south of France and took him to a cabin in Cantabria, Spain, where he remained until he was freed on 14 December of that year. The detention was the result of an error by the security forces, who were endeavouring to capture a member of Euskadi Ta Askatasuna (ETA) whom they could exchange for Spanish police officers abducted in France. The authors helped to guard the captive while he remained in the cabin.

2.2 The authors say that because a former Minister of the Interior and former member of parliament was involved, the case was heard in sole instance by the Supreme Court; this meant that they were unable to lodge an appeal to have their conviction and sentence reviewed by a higher court. Proceedings were initiated in January 1988 before central court of investigation No. 5 in connection with a number of acts committed by the so-called Anti-Terrorist Liberation Groups (GAL). On 23 March 1988, several citizens submitted a complaint against two suspects and any other person who appeared to be part of the GAL. The incidents cited included the abduction of Mr. Marey Samper. On 14 March 1989, the National High Court decided that this abduction would be investigated by central court of investigation No. 5. On 16 December 1994, two suspects convicted in 1991 of other offences confessed to taking part in Mr. Marey's abduction and implicated four other people. The authors of the communication made statements and became involved in the proceedings in April 1995. On 17 July 1995, they acknowledged their involvement in the incident. In October 1995 the investigation was transferred to an investigating magistrate at the Supreme Court when evidence emerged that a member of parliament had also been involved. According to the Spanish Constitution, offences attributable to members of parliament must be tried by the Supreme Court. The investigation was concluded on 4 April 1997, when the case was sent to the Criminal Chamber of the Supreme Court for the oral proceedings.

2.3 The authors say that some days before the Supreme Court judgement was drafted and communicated to the parties, the judges of the Criminal Chamber of the Supreme Court leaked information about the deliberations on the convictions and sentences to the press. On

23 July 1998, the newspaper *El País* reported that the Court had concluded its deliberations and decided to convict the accused, but the judgement would not be announced for a week since the reporting judge had to draft it and submit it to the Court. The article gave the names of some of the accused and the sentences handed down. It stated that the information came from "legal and judicial" sources and that "the outcome of the vote [was] irreversible".

2.4 On 24 July 1998, *El País* published the order in which the judges had voted on each point and the names of the judges who had voted for and against for each of the offences the accused were convicted of (abduction, illegal detention and embezzlement). On 25 July 1998, the press reported that the President of the Supreme Court had ordered an investigation, which included the 11 members of the Criminal Chamber, to find out who was responsible for leaking the information.

2.5 On 26 July 1998, *El País* reported that the President of the Court had questioned the 11 magistrates. According to the article, "sources in the Second Chamber" had admitted the possibility that the 13-year sentences could be modified if the Court considered that there had been concurrent offences, either arising from a single act or with one offence arising out of another. According to the report, the Court had not discussed this possibility but were it to do so, those of the accused who would have received heavier sentences would benefit but those less deeply involved, including the authors, would not be affected. On 28 July 1998, the press announced that the reporting judge was to submit the draft judgement to the Court that day, and that the judges would continue discussing what penalties to impose. On 30 July, *El País* reported the judgement: two of the accused were sentenced to 10 years in prison, another three, to 9 years and 6 months; one was given 7 years, two were given 5 years and 6 months, the authors, 5 years and another accused, 2 years and 4 months.

2.6 The authors state that the proceedings in which they were convicted began on 23 March 1988, when an investigation into the members of the Anti-Terrorist Liberation Groups was launched, while the Supreme Court rendered judgement on 29 July 1998, 10 years later. The Constitutional Court's judgement on the remedy of *amparo* was handed down on 17 March 2001, nearly 13 years after the start of the investigation. In the authors' view, the proceedings were unreasonably prolonged.

2.7 In the opinion of the authors, their conviction was contrary to law because they had been obeying superior orders and this, under the Criminal Code in force at the time, exonerated them from responsibility. They further contend that criminal liability was time-barred because when proceedings against them began, more than 10 years had passed since the incident had occurred (December 1983). The Supreme Court considered that the 10-year prescription period had been interrupted by the submission in March 1988 of a criminal complaint against any individual who might in the course of the investigation prove to have participated in the activities of the GAL. In the opinion of the authors, this interpretation of the interruption of the prescription period was not in keeping with the Criminal Code, which stipulates that interruption takes effect when there is an investigation into the offender. According to the authors, this happened only in February 1995, 11 years after the incident, when for the first time they were identified and cited as defendants.

2.8 With regard to the authors' argument that they had acted in accordance with their duty and were following superior orders, the Supreme Court decided that exoneration from criminal

liability on grounds of superior orders did not apply to them. It considered that such exoneration only applied in the case of lawful orders, and holding the victim for nine days in inhuman conditions was manifestly not lawful.

2.9 The Supreme Court dwelt at length on the authors' argument about the prescription period. According to article 132 of the Criminal Code, the prescription period begins on the day an offence is committed and is interrupted "when proceedings are opened against the offender". Up to 1991, the Supreme Court's case law held that the interruption took effect when an investigation was initiated to establish an offence and identify the perpetrators. Beginning in 1992, however, this position shifted, the Court now holding that, for proceedings to be understood to be directed against the offender, he or she must be individually identified in some form or other. In the case of the authors, the Supreme Court ruled that the predominant view since 1992 applied only to offences committed by one or a few persons, not to offences committed by a group. The Court concluded that the prescription period had been interrupted in March 1988, when a criminal complaint was filed, not in 1995 when a first statement was taken from the authors.

2.10 The authors filed for *amparo* with the Constitutional Court, alleging a violation of the right to a second hearing, the right to be tried by an independent and impartial tribunal and the principle of legality in criminal proceedings. On 17 March 2001, the Constitutional Court rejected the application, finding that the fact that the authors had been tried by the Supreme Court as required by article 71.3 of the Constitution because one of the defendants was a member of parliament did not infringe their right to a fair trial. It found that other European countries had adopted similar solutions and referred to article 2, paragraph 2, of Protocol No. 7 to the European Convention on Human Rights and the European Commission on Human Rights decision of 18 December 1980 in *Tanassi and others*. With regard to the Supreme Court's alleged lack of impartiality, the Constitutional Court found that it had not been demonstrated that the press reports had influenced the verdict or made the Court less impartial. As to the interruption of the prescription period, the Constitutional Court found that the Supreme Court's interpretation was neither arbitrary nor novel, and was based on reasonable grounds.

2.11 Three individuals who were convicted along with the authors filed a complaint with the European Court of Human Rights, claiming violations of the principle of legality in criminal proceedings, the right to an impartial tribunal and the right to a second hearing. On 30 November 2004, the Court decided that the claim of a violation of the right to a second hearing was clearly unfounded and thus inadmissible, and ordered the remaining allegations to be made known to the State party. The Court considered that, in respect of the Supreme Court judgement, the complainants had filed for *amparo* with the Constitutional Court and thereby availed themselves of a remedy before the highest domestic court.[1]

[1] European Court of Human Rights, judgement of 30 November 2004, complaints Nos. 74182/01, *Francisco Saiz Oceja v. Spain*; 74186/01, *Julio Hierro Moset v. Spain*; and 74191/01, *Miguel Planchuela Herrera Sánchez v. Spain*.

Complaint

3.1 The authors contend that there was a violation of article 14, paragraph 5, of the Covenant, since, having been convicted by the highest ordinary court, they did not have the right to a review of the conviction and sentence by a higher court. They state that one of the Constitutional Court judges in explaining his vote found that there had been a violation of article 14, paragraph 5, of the Covenant.

3.2 They contend that there was a violation of article 14, paragraph 1, of the Covenant, because they were not tried by an independent and impartial tribunal, as a result of the information leaked to the press on the content and likely outcome of the deliberations. In the authors' view, the fact that one or more of the judges involved in sentencing were responsible for the leak affected the court's independence and impartiality and, since the information published gave rise to a national public debate, the court's objectivity was impaired and this influenced the penalty handed down. They say that article 233 of the Organization of the Judiciary Act states that the deliberations of the courts are secret, as are the results of the judges' voting.

3.3 They state that there was a violation of their right to be tried without undue delay (art. 14, para. 3 (c)) since more than 10 years had passed between the start of the investigation and the date on which they were pronounced guilty, and nearly 13 years between the start of the investigation and the date on which the Constitutional Court ruled on the remedy of *amparo*. They regard the delay of 13 years as excessive in itself and not the fault of the accused or their counsel.

3.4 The authors allege a violation of article 15, paragraph 1, of the Covenant, because the Supreme Court did not recognize the prescription of the offence of unlawful detention, although the period provided for in criminal legislation had expired. According to the authors, the Supreme Court applied a broad interpretation that was not in accordance with the principles of legality and prior definition of criminal offences under article 15 of the Covenant.

State party's observations on admissibility

4.1 The State party claimed that the communications were inadmissible because the authors submitted them in May 2004, more than three years after the Constitutional Court ruled on their remedy of *amparo* on 17 March 2001. The State party considered that the delay in submitting the communications was significant, constituting an abuse of the right to submit communications. In the State party's view, although neither the Covenant nor the Optional Protocol establishes a specific period within which communications must be submitted, they allow a significant delay to be deemed an abuse of the right to submit communications under article 2 of the Optional Protocol.

4.2 With regard to the alleged violation of article 14, paragraph 5, of the Covenant, the State party said that the authors had not raised that complaint before the domestic courts, only before the Committee six years after being convicted. It explained that the authors had been able to apply for and in fact had obtained a review of their conviction since their case had been considered by the Constitutional Court under the remedy of *amparo*. It added that 4 of the 10 persons convicted in the same case as the authors had applied to the European Court of Human Rights alleging a violation of the right to a second hearing, and that the Court had

rejected the complaints on the grounds that the right to a second hearing, although not expressly embodied in the European Convention on Human Rights, had been observed in the authors' case by means of the remedy of *amparo* lodged with and disposed of by the Constitutional Court.

4.3 With regard to the authors' complaint concerning article 14, paragraph 1, of the Covenant, the State party contended that the authors had not demonstrated that there had been a leak of information attributable to the court that had tried them or that, had there been such a leak, it would have affected the impartiality of the court. It pointed out that the authors had simply stated that a newspaper had published information on certain judicial processes and had jumped to the conclusion that the information had been leaked by one or more judges of the sentencing court and that that had affected the penalty imposed, but they had failed to substantiate their statements with any evidence.[2]

4.4 The State party maintained that the alleged leaks had no bearing whatsoever on the impartiality of the Court. It stated that the 23 July 1998 issue of *El País* did not refer, as the authors claim, to a leak regarding the deliberations and voting of the judges in the Chamber of the Supreme Court that convicted them, but reported the outcome of the deliberations and voting and said that the decision "is irreversible and this is why *El País* is reporting the result". For the State party, the fact that the information published in the press was no different from the information given in the judgement showed that the complaint was unfounded and confirmed that the advance publication had had no effect at all on the judgement or on the Court's impartiality. The State party quoted a paragraph of the Constitutional Court judgement stating that "the thrust of the report that appeared in the media the effect of which would be to give out information on part of the deliberations and on the verdict before the parties had been notified cannot lead to the conclusion either that the verdict was amended on the basis of that information, or that a 'parallel trial' ensued that could have diminished the impartiality of the sentencing court, since the oral proceedings had been completed and all the evidence produced, and indeed a final decision on the convictions had been reached". The State party concluded that not only was there no evidence of the Court's alleged bias, it was also unlikely that it had been influenced at all.

4.5 The State party claimed that the authors' complaint of undue delays had never been raised before the domestic courts, including the Constitutional Court. It added that, according to the European Court of Human Rights, in determining whether there has been undue delay, the starting point should be the moment at which the investigation or the criminal proceedings have a substantial effect on the suspect, and in the authors' case the proceedings had taken three years from the date on which their statements had been taken (January 1995) to the date of the judgement convicting them (29 July 1998); in its view that period could not be considered excessive given the specific circumstances of the case.

4.6 The State party claimed that the authors' complaint concerning article 15, paragraph 1, of the Covenant was inadmissible for lack of substantiation. It contended that the offence of which

[2] The State party cites the judgement of the European Court of Human Rights of 26 October 1984 in the case of *De Cubber v. Belgium*, and the judgement of 1 October 1982 in the case of *Piersack v. Belgium*.

the authors had been convicted and the penalty imposed had been provided for in criminal law before the offence had been committed. It also argued that the authors' interpretation of prescription was tantamount to giving lawbreakers the right to evade punishment, since even if the authorities were investigating an offence, the fact that a suspect had not been named would allow the suspect to benefit from prescription. The State party maintained that prescription applied when an offence was not followed up and went unpunished for some time, but was not applicable if the authorities had been diligent in investigating an offence. It could not be made contingent on a suspect's ability to hide. From the moment action was taken against someone who might be guilty, the prescription period was interrupted. In the authors' case, the prescription period had been interrupted when a group of citizens had lodged a complaint in 1988. The Supreme Court's interpretation had been that, in offences committed by a group, the prescription period was interrupted when the investigation targeted the group, even if individual perpetrators were not identified.

Authors' comments

5.1 In their comments of 8 July 2005, the authors argued that in the absence of a specific time period for the submission of communications, the passage of time alone could not render their communications inadmissible.

5.2 The authors argued that a simple perusal of their *amparo* application showed that they had in fact claimed a violation of the right to a second hearing before the Constitutional Court. They added that the remedy of *amparo* did not permit a full review of the applicant's conviction and sentence, but was limited to formal or legal aspects of the judgement, and therefore did not comply with article 14, paragraph 5.

5.3 The authors maintained that there had indeed been a leak, and it had taken place before the judgement had been drafted; that, they maintained, lent credence to the notion that the court had been influenced by public opinion and was therefore biased.

5.4 The authors repeated their view that the starting date for calculating undue delay was that of the submission of the complaint on 23 March 1988, and that more than 10 years had elapsed between then and the date of the Supreme Court judgement of 27 July 1998, while 13 years had elapsed between the submission of the complaint and the Constitutional Court ruling of 17 March 2001. Consequently, the time taken over the proceedings had been excessive, regardless of their complexity.

5.5 The authors maintained that the State party's claims about prescription related to the merits of the communication, not its admissibility.

Committee's decision on admissibility

6. On 8 March 2006, at its eighty-sixth session, the Committee found the complaints under articles 14, paragraph 1, and 15, paragraph 1, of the Covenant inadmissible under article 2 of the Optional Protocol as they had not been sufficiently substantiated. The Committee also found the complaints under article 14, paragraph 3 (c), of the Covenant inadmissible under article 5,

paragraph 2 (b), of the Optional Protocol as the authors had raised no such complaint in the domestic courts. The Committee found the communications admissible in respect of the complaints under article 14, paragraph 5, of the Covenant.

State party's observations on the merits of the communications

7.1 On 15 September 2006, the State party submitted its comments on the merits of the communications. The State party denies any violation of article 14, paragraph 5, of the Covenant and refers to the Constitutional Court ruling of 17 March 2001 on the authors' application for *amparo*. That ruling recalls that the purpose of the privileged jurisdiction for members of parliament and the Senate is to safeguard the independence of both legislature and judiciary, a purpose that is legitimate and of enormous importance. In addition, the nature and characteristics of the offences being prosecuted were such that, in order to ensure the proper administration of criminal justice, all the defendants had to be tried together, and the Supreme Court was therefore competent to try all concerned. The State party also argues that the fact that the authors were tried in the Criminal Chamber of the Supreme Court is in itself a guarantee.

7.2 As to article 14, paragraph 5, of the Covenant, the State party argues that "no objections were made by other States parties, and no questions raised by the Human Rights Committee", in respect of the reservations entered by other States parties to the application of this article. Lastly, the State party again points out that, in the European Court of Human Rights, 4 of the 10 co-defendants claimed a violation of the right to a second hearing but the Court declared these complaints inadmissible on the grounds that applications for *amparo* had been lodged with the Constitutional Court.[3]

Comments by the authors

8.1 On 12 December 2006 the authors wrote that, since they are citizens who are not covered by special jurisdiction, the Supreme Court's competence to try the offences they were charged with needs qualifying. They further argue that, even if there are certain guarantees associated with trial by the Criminal Chamber of the Supreme Court, that does not affect everyone's right to have their sentence reviewed by a higher court.

8.2 As regards the right to review in *amparo*, the authors state that *amparo* does not permit a full review of the conviction and sentence, review being limited to the formal and legal aspects of the sentence, which means it does not meet the requirements of article 14, paragraph 5, of the Covenant. The authors cite the Committee's case law.[4]

8.3 On the matter of reservations to article 14, paragraph 5, of the Covenant, the authors point out that the State party did not enter any reservations to that provision. They argue that to institute a review of the sentences handed down by the Criminal Chamber of the Supreme Court

[3] See footnote 1.

[4] Communications Nos. 701/1997, *Gómez Vázquez v. Spain*, Views of 20 July 2000; and 1101/2002, *Alba Cabriada v. Spain*, Views of 1 November 2004.

would have very little impact on the State party. They also state that, according to the Committee's case law,[5] the phrase "according to law" in article 14, paragraph 5, does not mean that the very existence of a right to review should be left to the discretion of States parties. Lastly, the authors repeat that their trial in the Supreme Court at sole instance constituted an effective, real and irreparable violation of the right to a second hearing in criminal proceedings.

Consideration on the merits

9.1 The Human Rights Committee has considered the present communications in the light of all the information made available to it by the parties, in accordance with the provisions of article 5, paragraph 1, of the Protocol.

9.2 The Committee recalls that the authors were tried by the highest court because one of the co-defendants in the abduction of Mr. Marey Samper was the Minister of the Interior, so that, under criminal procedural law, the case should be tried by the Criminal Chamber of the Supreme Court. The Committee takes note of the State party's argument to the effect that the authors' conviction by the highest court is compatible with the Covenant and that the ultimate aim - of safeguarding the independence of the judicial and legislative branches - is a legitimate one. However, article 14, paragraph 5, of the Covenant states that a person convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

9.3 The Committee points out that the expression "according to law" is not intended to mean that the very existence of a right to review, which is recognized in the Covenant, is left to the discretion of States parties. The State party's legislation may well provide that certain individuals, by virtue of their position, should be tried in a higher court than would normally be the case, but that cannot in itself detract from the accused's right to have their conviction and sentence reviewed by a higher court. The Committee further notes that the remedy of *amparo* may not be considered an appropriate remedy within the meaning of article 14, paragraph 5, of the Covenant. The Committee therefore finds a violation of article 14, paragraph 5, of the Covenant.[6]

10. The Human Rights 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.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to furnish the authors with appropriate redress, including compensation, and to take the necessary measures to ensure that similar violations do not occur in the future.

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[5] Communication No. 1211/2003, *Oliveró Capellades v. Spain*, Views of 11 July 2006.

[6] See communications Nos. 1073/2002, *Terrón v. Spain*, Views of 5 November 2004, para. 7.4, and 1211/2003, *Oliveró Capellades v. Spain*, Views of 11 July 2006, para. 7.

12. In becoming a party to the Optional Protocol, Spain recognized the competence of the Committee to determine whether or not 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 provide an effective and enforceable remedy in the event that a violation has been established. The Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is requested to publish the Committee's Views.

[Done 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.]
