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International Covenant on Civil and Political Rights

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Views

Communication No. 1398/2005

Submitted by:	Mark Possemiers (not represented by counsel)
Alleged victim:	The author
State party:	Spain
Date of communication:	26 November 2003 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 31 May 2005 (not issued in document form)
	CCPR/C/89/D/1398/2005: decision on admissibility adopted on 5 March 2007
Date of adoption of Views:	20 October 2009
Subject matter:	Alleged irregularities in criminal proceedings for fraud and forgery
Procedural issues:	Victimhood; substantiation of allegations; exhaustion of domestic remedies
Substantive issues:	Compulsory labour; right of anyone who is arrested to be tried within a reasonable time; right of accused persons to be segregated from convicted persons; liberty of movement; right to a fair hearing by an independent and impartial tribunal; right not to be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence at the time when it was committed; right not to be subjected to

* Made public by decision of the Human Rights Committee.

	arbitrary interference with one's privacy or family
Articles of the Covenant:	8, para. 3; 9, para. 3; 10, para. 2 (a); 12; 14, paras. 1 and 2; 14, para. 3 (a), (b), (c), (d), (f) and (g); 15, para. 1; and 17, para. 1
Articles of the Optional Protocol:	1, 2 and 5, para. 2 (b)

On 20 October 2009 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. 1398/2005.

[Annex]

Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (ninety-seventh session)

concerning

Communication No. 1398/2005*

Submitted by:	Mark Possemiers (not represented by counsel)
Alleged victim:	The author
State party:	Spain
Date of communication:	26 November 2003 (initial submission)
Decision on admissibility:	5 March 2007

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

Meeting on 20 October 2009,

Having concluded its consideration of communication No. 1398/2005, submitted to the Human Rights Committee by Mr. Mark Possemiers 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, dated 26 November 2003, is Mr. Mark Possemiers, a Belgian national born on 10 September 1953, who claims to be the victim of violations by Spain of articles 8, 9, 10, 12, 14, 15 and 17 of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The author is not represented by counsel.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

1.2 On 2 February 2006, the Special Rapporteur on New Communications and Interim Measures decided that the admissibility of the communication should be considered separately from the merits.

The facts as submitted by the author

2.1 The author claims that his home was searched in 1995 under a court order for the seizure of a rubber stamp in connection with proceedings brought by an insurance company. The police carrying out the order seized data from a company belonging to him. He alleges that he was arrested and held incommunicado for three days, until a judge granted his release on bail. He claims he was not informed of the reason for his arrest.

2.2 In August 1997, the author answered a summons to appear in court in connection with the documentation seized from his home. He claims that he was assigned a lawyer with whom he was unable to speak before the hearing and that the judge had assumed that he did not need an interpreter. The judge, at the request of the public prosecutor, ordered his pretrial detention. The author maintains that he was not informed of the offence(s) for which he was detained.

2.3 The author states that he remained in pretrial detention until 15 September 1999 and was not informed of the reasons for his detention until one and one-half years after the fact. He alleges that he was forced to work while in prison and was kept in a cell with convicted offenders.

2.4 The author maintains that he was defended by an inexperienced court-appointed lawyer who did not defend him effectively. Furthermore, contact with his lawyer was restricted while he was in prison, since he was allowed a limited number of telephone calls (only one or two per week) and since personal contact was not permitted during visits. He maintains that the lawyer visited him only once.

2.5 The author states that the Madrid Provincial High Court in charge of his case rescinded the order to commence the oral proceedings and that he was never notified of the charges against him. He did not learn what the charges were until he was notified of the judgement handed down in his case.

2.6 On 12 February 2001, when he was in the Canary Islands, he received a telephone call in which he was told that he was to appear in court to attend oral proceedings on 14 February. In mid-May 2001, he was arrested on a warrant issued by the Provincial High Court and was held in Tenerife, Canary Islands, for one and one-half months. He was subsequently transferred to Madrid two days before the start of his trial. He was not able to speak with his lawyer until five minutes before the trial. The Provincial High Court would not allow him to defend himself, even though he had made a request in writing to that effect. Nor did he have an interpreter at the trial.

2.7 On 25 June 2001, he was sentenced to 42 months in prison by the Madrid Provincial High Court for fraud and for forgery of a public commercial document of an official nature.[1] The author was informed of his conviction on 13 July 2001. He claims that he lodged an appeal on 18 July 2001, within the legal deadline, but that the Court failed to rule on this appeal, and his conviction stood. In April 2002, he was released on parole (under supervision). He requested a copy of the appeal from the prison authorities but his requests were ignored.

[1] According to the judgement, the offences were committed against the Public Treasury, the National Social Security Institute and the National Employment Institute.

2.8 The author maintains that he was found guilty on the basis of a 1996 amended version of the Criminal Code that was not in force at the time the acts of which he was accused were committed.

2.9 The author asserts that, even though he had been released on parole, the State party would not allow him to visit his children or his mother.

The complaint

3.1 The author alleges a violation of article 8, paragraph 3, of the Covenant on the grounds that he was forced to work while in pretrial detention.

3.2 The author also alleges a violation of article 9, paragraph 3, of the Covenant on the grounds that his pretrial detention was unduly extended beyond the time limit for such detention (i.e., one year, renewable for a further year) as provided for in articles 503 and 504 of the Criminal Procedures Act. According to the author, the Provincial High Court refused to release him on bail in July 1999, by which date the author had spent almost two years in pretrial detention, in order to justify the extension of his period of detention to the maximum permissible extent, as there was no other reason to prolong it. He also argues that the fact that he was held incommunicado for three consecutive days when his house was searched in 1995 was "without just cause".

3.3 The author also states that he was the victim of a violation of article 10, paragraph 2 (a), of the Covenant because he was held with convicted prisoners during his pretrial detention. Also, he was not allowed to see his children or mother, even though he had been released on parole, which constitutes a violation of article 12, paragraph 2, of the Covenant.

3.4 The author claims to have been the subject of violations of the following paragraphs of article 14:

(a) Paragraph 1, on the grounds that the judges took into account his previous police and criminal record, even though he had been acquitted;

(b) Paragraph 2, on the grounds that he was continually denied the possibility of release on bail, the court having decided in July 1999 that his deprivation of liberty was not excessive and that two years was the maximum period of pretrial detention established by law for offences carrying a sentence of less than six years;

(c) Paragraph 3 (a), on the grounds that he was not informed of the charges against him. The first notification, 14 months after he was imprisoned, was rescinded, and the first time he learned of the charges was when he was informed that he had been found guilty;

(d) Paragraph 3 (a), taken in conjunction with article 9, paragraph 2, of the Covenant, as he was not informed in detail of the charges against him at the time of his detention;

(e) Paragraph 3 (b), on the grounds that he was not informed in advance of the date of his trial. He was notified of the summons on 12 February 2001, two days before the start of his trial. He was held in prison in Tenerife, Canary Islands, in 2001 for six weeks and was transferred to Madrid two days before the trial; he was not able to speak with his lawyer until five minutes before the trial began;

(f) Paragraph 3 (c), on the grounds that his trial lasted from 1995 to 2001;

(g) Paragraph 3 (d), on the grounds that the court-appointed lawyer visited him only once and did not defend him properly. He alleges that the State pays €12 to court-appointed lawyers for each prison visit, does not oversee the lawyers in any way and

assigns cases to inexperienced lawyers. In addition, he considers that this provision of the Covenant was also violated when the Provincial High Court refused to allow him to defend himself, even though he requested to be allowed to do so on several occasions;

(h) Paragraph 3 (f), on the grounds that he did not have the assistance of an interpreter during the trial, even though he had requested such assistance in writing. In addition, the notification of his conviction was in Spanish, which seriously hampered his ability to appeal;

(i) Paragraph 3 (g), on the grounds that he was pressured into declaring himself guilty by being promised that he would be released after three months if he confessed and threatened with a delay in the opening of his trial if he did not. In addition, he considers this provision to have been violated because a mortgage was cancelled without the beneficiary of the mortgage — an Irish company — being subpoenaed;

(j) Paragraph 5, on the grounds that, although he lodged an appeal within the legal deadline of five days, the court failed to deal with his application and proceeded to enforce the judgement against him. In addition, the prison authorities denied him a copy of the appeal.

3.5 The author alleges a violation of article 15, paragraph 1, of the Covenant, as he was convicted on the basis of the new Criminal Code in respect of events which occurred before it entered into force. He points out that the new Criminal Code did away with a prison privilege established in the previous code, under which a prisoner needed to serve only half his sentence to be eligible for parole.

3.6 Finally, the author alleges a violation of article 17, paragraph 1, of the Covenant, on the grounds that the search of his home was illegal, as it was not confined to the terms set out in the search warrant.

State party's observations on admissibility and the merits

4.1 By notes verbales dated 2 August 2005 and 18 January 2006, the State party submitted its observations on the admissibility of the communication. It contends that the communication is inadmissible under articles 2 and 3 of the Optional Protocol because the author has not exhausted domestic remedies and because the communication constitutes an abuse of the right to submit communications. It maintains that the author should have submitted an appeal in cassation, in accordance with the procedure indicated in the judgement against him, and that he should also have submitted the corresponding application for amparo.

4.2 The State party adds that the guilty verdict handed down by the Madrid Provincial High Court gives a sufficiently clear picture of the general behaviour of the author, who makes a string of unjustified and unfounded allegations without providing any solid evidence or documentation in support of his complaints.

Author's comments

5.1 In his comments of 7 August 2006, the author indicates that he did lodge an appeal against his sentence and that he has still not been informed of the outcome of that appeal. He adds that an appeal in cassation can be submitted only once a decision has been taken on that appeal. He states that, in Spain, when an appeal is filed, both a lawyer and a solicitor (*procurador*) have to be appointed, which makes a mockery of the right to defend oneself. In addition, in a number of cases, the Spanish courts have refused to grant any form of compensation, and there is very little chance that an appeal will be allowed.

5.2 With regard to the exhaustion of domestic remedies, he argues that there was an excessive delay, since the proceedings started in 1995 and ended in 2001. He cites a ruling

by the European Court of Human Rights in which it acknowledged that a five-year delay was excessive.[2] In his case he has waited for 12 years and is not in a position to pay €12,000 for a lawyer and solicitor simply to see his case continue for another 10 or 12 years. The high cost of hiring a lawyer and solicitor makes the exhaustion of remedies impossible.

The Committee's decision on admissibility

6.1 The Committee examined the admissibility of the communication during its eighty-ninth session, held in March 2007. With regard to the complaints relating to article 14, paragraph 1, and article 15, paragraph 1, the Committee considered that the author had not explained how the events to which the complaints referred had affected him personally or had caused him specific harm. The Committee consequently decided that, under those circumstances and in accordance with its settled jurisprudence,[3] the author could not be considered a victim within the meaning of article 1 of the Optional Protocol in respect of the aforementioned complaints. It therefore found that this part of the communication was inadmissible under article 1 of the Optional Protocol.

6.2 With regard to the complaints relating to articles 8; 9; 10; 12; 14, paragraph 2; 14, paragraph 3 (a), (b), (d), (f) and (g); and 17 of the Covenant, the Committee noted that the author had provided no proof whatsoever to back up those allegations and considered that he had not substantiated his claims sufficiently for the purposes of admissibility. In conclusion, that part of the communication was inadmissible under article 2 of the Optional Protocol.

6.3 In relation to the author's complaint of an excessive delay in the criminal proceedings, which allegedly lasted from 1995 to 2001, in violation of article 14, paragraph 3 (c), the Committee took note of the State party's general argument concerning the non-exhaustion of domestic remedies. The Committee also observed that the author had provided no information about the appeals he claims to have attempted to lodge with the domestic courts in connection with his allegation. The Committee therefore considered that this part of the communication was inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.4 With respect to the claim relating to article 14, paragraph 5, the Committee also took note of the State party's argument that the author had not exhausted domestic remedies and that he should have submitted an appeal in cassation, which would have been the proper procedure for appealing the judgement of the Provincial High Court. The Committee also noted, however, that the State party had not contradicted the author's claim that he had lodged an appeal and that it had furnished no information on the existence of any second hearing in this case or on the legislation providing the basis for the procedure followed in respect of the author on this point. The Committee recalled its decisions in which it had found that a review in cassation was not a substitute for an appeal before a court of second instance,[4] although, in certain particular cases, an appeal in cassation might include a reconsideration of the trial court's decisions that was sufficient to meet the requirements of

[2] European Court of Human Rights, *Soto Sanchez v. Spain*, Application No. 66990/01.

[3] See communications Nos. 1329/2004 and 1330/2004, *Pérez Munuera and Hernández Mateo v. Spain*, 25 July 2005, para. 6.3.

[4] See the Committee's decisions in communications No. 701/1996, *Cesario Gómez Vázquez v. Spain*, Views adopted on 20 July 2000; No. 986/2001, *Semey v. Spain*, Views adopted on 30 July 2003; No. 1007/2001, *Sineiro Fernández v. Spain*, Views adopted on 7 August 2003; No. 1101/2002, *Alba Cabriada v. Spain*, Views adopted on 1 November 2004; and No. 1104/2002, *Martínez Fernández v. Spain*, Views adopted on 29 March 2005.

the Covenant. The Committee therefore found that this part of the communication was admissible and should be examined on the merits.

State party's observations on the merits

7.1 On 17 October 2007 the State party submitted observations on the merits and declared that the Covenant had not been violated. It reiterated that the author had not exhausted domestic remedies, since he had not filed an appeal in cassation, which was the procedure indicated in the judgement against him,[5] or an application for amparo. The judgement of the Provincial High Court provided telling indications of the nature of the general behaviour of the author, who had made a string of unfounded allegations without providing any solid, documented evidence concerning the action he had taken to address the alleged violations of his rights.

7.2 The author offers the State party no proof that he filed any appeal against the judgement of the Provincial High Court. The fact that, in its observations on admissibility, the State party stated that none of the proper appeals available for exhausting domestic remedies had been used does not imply that the author had lodged inadmissible appeals. The author does not sufficiently substantiate his complaint, has not submitted any evidence to support his allegations and has not supplied any information about the remedies he allegedly sought in the domestic courts.

7.3 According to the State party, it is a clear abuse of the system of individual communications to use it for alleging violations which, by their very nature, leave a paper trail, without providing the slightest proof, thus placing on the State party the burden of challenging allegations concerning imaginary facts, documents or procedures. The State party cannot base its actions on speculation about the possible content of a review undertaken pursuant to an appeal of which there is no evidence and which, had it been brought, would necessarily have been rejected as inadmissible. Nor can it do so on the basis of suppositions about the scope of the review in an appeal in cassation when the author himself admits that he has sought no such remedy.

Author's comments on the State party's submission

8. On 14 September and 23 December 2008 the author informed the Committee that he had requested a copy of the appeals application that had been sent from Valdemoro Prison from the Directorate General of Prisons, the Ministry of Justice, the Ministry of the Interior and Valdemoro Prison, but had received no reply. On telephoning the Directorate General, he had been tersely informed that instructions had been given not to provide him with any information/copy. He adds that it would be very easy for the State to check the Valdemoro Prison records in order to determine that he did indeed send an appeals application.

Consideration of the merits

9.1 The Committee has considered the merits of the present communication in the light of all the information made available to it by the parties.

9.2 The author claims to have been the victim of a violation of article 14, paragraph 5, of the Covenant. He alleges that, although he lodged an appeal against the conviction handed down by the trial court, the court did not pursue it but instead proceeded to enforce the judgement. In its observations regarding the question of admissibility, the State party asserts that the author did not file an application for cassation or for amparo, but it makes

[5] The conviction, a copy of which is to be found in the file, notes that the appropriate procedure for appealing it is an appeal in cassation.

no mention of a possible appeal. In its observations concerning the merits of the case, the State party contends that the author did not file an application for cassation and maintains that there is no proof that he did so. The author does not provide any details about the remedy which he claims to have sought or any evidence that it was actually submitted. The author's contention that the prison authorities did not respond to his requests for a copy of his written appeals application does not exempt him from his obligation to provide the Committee with the means of substantiating his claims. The Committee therefore lacks sufficient evidence to find that article 14, paragraph 5, of the Covenant was violated.

10. In the light of the above, 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 do not reveal any violation of article 14, paragraph 5, of the Covenant.

[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.]