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Consideration of communications under the Optional Protocol to the Covenant

Communication No. 1802/2008

Decision adopted by the Committee on 31 October 2011, 103rd session

<i>Submitted by:</i>	L.O.P. (represented by counsel, José Luis Mazón Costa)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	15 April 2008 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 14 August 2006 (not issued in document form)
<i>Date of Decision:</i>	31 October 2011
<i>Subject matter:</i>	Unjustified prison transfers, discrimination
<i>Procedural issues:</i>	Exhaustion of domestic remedies; substantiation of the complaint; abuse of the right to submit a communication
<i>Substantive issues:</i>	Right not to be subjected to arbitrary or unlawful interference with one's privacy and family; right to equal protection of the law without discrimination
<i>Articles of the Covenant:</i>	Article 17, paragraph 1, and article 26
<i>Articles of the Optional Protocol:</i>	Articles 2 and 3

[Annex]

* Made public by decision of the Human Rights Committee.

Annex

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (103rd session)

concerning

Communication No. 1802/2008*

Submitted by: L.O.P. (represented by counsel, José Luis Mazón Costa)

Alleged victim: The author

State party: Spain

Date of communication: 15 April 2008 (initial submission)

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

Meeting on 31 October 2011,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 14 April 2008, is L.O.P., a Spanish citizen born in 1946. He claims to be the victim of a violation by Spain of article 17, paragraph 1, and article 26 of the Covenant. The Optional Protocol entered into force for Spain on 25 April 1985. The author is represented by counsel, José Luis Mazón Costa.

The facts as submitted by the author

2.1 The author is serving a prison sentence in connection with various drug trafficking convictions and offences against public health. In 2003, while being held in Alcalá Meco prison in the province of Madrid, he was moved without explanation to Zuera prison (Zaragoza). He was subsequently transferred to prisons in Valladolid and Daroca (Zaragoza). The author claims that the transfers failed to take account of his right to family life, as his daughters were living in Guadalajara, near Madrid.

2.2 The author was placed on the list of prisoners under special observation (FIES list). He maintains that his inclusion on the list was based not on the General Prisons Act but on internal circulars issued by the Directorate-General of Prisons. The consequences of inclusion on the FIES list include transfers between prisons, cell changes, cell searches at

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Raisoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

any time of the day or night, surveillance of all activities and interception of correspondence.

2.3 With regard to the exhaustion of domestic remedies, the author maintains that the domestic courts reject the contention that prison transfers affect detainees' fundamental right to family life. In this connection, he refers to a judgement issued by the Madrid High Court which upheld this rejection. With regard to inclusion on the list of inmates under special observation, the author says that the Constitutional Court has upheld the constitutionality of FIES status.

2.4 The author maintains that it would have been futile to submit an application for *amparo* in this case. He states that, since the reform of the Constitutional Court Act, an application for *amparo* is appropriate only in cases that have "special constitutional significance". This makes it a procedure with no prospect of success, on a par with an application for extraordinary review of sentence.

The complaint

3.1 The author maintains that the arbitrary transfers to prisons far from his home, which impeded contact with his family, constitute a violation of article 17, paragraph 1, of the Covenant.

3.2 He also contends that his inclusion, without any legal basis, on the FIES list of prisoners under special observation, forcing him to serve his sentence in conditions that are far more stringent than those existing for other inmates, constitutes a violation of article 26 and article 17, paragraph 1, of the Covenant.

State party's observations on admissibility and merits

4.1 In a note verbale dated 15 October 2008 the State party maintains that the communication is inadmissible. It claims that the author provides no explanation or reasoning to support his allegations of a violation of the Covenant and that he did not exhaust all domestic remedies in relation to the complaints raised. The author provided no evidence of having filed a complaint with the prison authorities, the prison inspection judge, the Provincial High Court or the Constitutional Court in relation to any of the complaints raised. It also notes that the author has made repeated submissions to the Committee,¹ always without exhausting domestic remedies and without substantiation, and that his recourse to the Committee is therefore an abuse of the communications system.

4.2 The State party argues that neither the Constitution nor the Covenant recognizes a right to serve a sentence in a particular place or within a given maximum distance from the family home. The author provides no proof that his family home is in Guadalajara. Furthermore, the complaint hinges on his transfer to a prison (i.e. Daroca prison) which is just 146 kilometres from Guadalajara.

4.3 The State party requests that the Committee declare the author's submission inadmissible on the ground of failure to exhaust domestic remedies, in accordance with article 2 of the Optional Protocol, and because the communication is clearly an abuse of the purpose of the Covenant, in accordance with article 3 of the Optional Protocol. Failing that, it asks the Committee to declare that there has been no violation of the Covenant.

¹ The Human Rights Committee has considered two previous submissions from the author. On 11 August 2006 the Committee declared communication No. 1387/2005 inadmissible, concluding that "the claim under article 14, paragraph 5, is insufficiently substantiated for purposes of admissibility". On 18 April 2008, in its decision on communication No. 1360/2005, the Committee concluded that the facts did not reveal any violation of article 14, paragraph 5, of the Covenant.

Author's comments on the State party's submission

5.1 The author submitted comments on the State party's observations on 15 February 2009. He claims that the High Courts and the Constitutional Court have rejected appeals against transfers lodged by other prisoners and that domestic remedies are therefore ineffective.

5.2 The author recalls the Committee's jurisprudence according to which it is not necessary to exhaust remedies that have no prospect of success.² He also maintains that he has gone to great lengths, which are detailed in his prison record, to obtain transfers to other places of detention in which to serve his sentence.

5.3 With regard to his inclusion on the list of prisoners under special observation, the author reiterates that he was subjected to an inhumane and discriminatory prison regime. He describes the measures imposed upon prisoners whose names appear on this list, which include unscheduled prison transfers, body and cell searches at any time of day, the interception of correspondence (including letters), restricted contact with the outside world as compared to other prisoners, round-the-clock surveillance, and restricted access to work.

5.4 He claims that there is no possibility of challenging the imposition of this status, in view of the case law of the courts of Spain, which have repeatedly upheld the legality of the FIES system. He reiterates that it is no longer possible to file an application for *amparo* before the Constitutional Court as the Court is limited to hearing cases that have "special constitutional significance".

State party's observations on the merits

6.1 The State party submitted observations on the merits on 10 February 2009.

6.2 The State party reiterates that the author offers no explanation or reasoning to support his allegations of a violation of the Covenant, that he did not exhaust domestic remedies and that his recourse to the Committee is an abuse of the communications system.

6.3 It adds that the author is a known drug dealer with repeated convictions as the leader of a major drug trafficking ring. He served 4 years and 4 months for offences against public health and is currently serving a consolidated sentence of 13 years, 5 months and 25 days for two convictions on charges of illegal drug trafficking and offences against public health, in this case aggravated by his position as ringleader.³ He was transferred several times, on occasions for judicial reasons (to attend trials and hearings), on others because of his assignment to a specific prisoner category or activity or for regime- or security-related reasons.

6.4 According to the State party, the author has been serving his sentence in Daroca prison since July 2007 and is currently classified as a level-two prisoner, i.e., a prisoner subject to the ordinary prison regime. The distance between his usual home in Guadalajara and the prison in Daroca is under 150 kilometres. By way of example, between 26 January and 26 April 2008, he received two family visits from his daughter and nine visits from his girlfriend.⁴ With regard to the conditions of detention to which the author is subject, the State party indicates that since being admitted to Daroca prison he has never had to change cell and his cell has been searched only as a matter of routine and never during night-time hours.

² See communication No. 1305/2004, *Victor Villalón Ventura v. Spain*, Decision of 31 October 2006.

³ The State party attaches hereto a summary of the evidence and the text of the convictions.

⁴ Four conjugal visits, three family visits and two ordinary visits.

6.5 The State party reiterates that serving one's sentence in a place of detention close to the family home is not a right recognized as such in the Covenant. It refers to the Standard Minimum Rules for the Treatment of Prisoners, in which it is stated that the different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment.

6.6 It notes that the allocation of prisoners to the different institutions is based on an assessment of procedural and criminal factors and the criminal record, prisoner status and personal situation of each inmate, taking account of the different aims of each facility (social rehabilitation, detention and custody, etc.). The author was placed on the FIES list, and more specifically in the organized crime category, on the basis of his criminal activities and in line with the definition established in article 2 of the United Nations Convention against Transnational Organized Crime, by a decision of the Directorate-General of Prisons which is challengeable in court.

6.7 With regard to the author's status as a prisoner under special observation, the State party explains that a prisoner's inclusion on the FIES list does not give them a status distinct from that of other prisoners with equivalent personal, criminal and criminological characteristics, does not change the prison regime to which they are subject, and is without prejudice to the right to equality before the law established in article 26 of the Covenant. The FIES list is a database that was created to meet the need for extensive information about certain groups of highly dangerous inmates and the need for special protection. Prisoners are assigned to a specific prison or detention regime (closed, ordinary or open) according to criteria established in domestic legislation that are unrelated to whether or not the prisoner is included on the FIES list.

6.8 The State party notes that, in those cases where the prison system fails to respect the rights of inmates, the courts have a duty to remedy any abuse that may have occurred. In the author's case there is no record of abuse having occurred or of the courts having been petitioned.

6.9 The State party therefore reiterates its request that the Committee declare the communication inadmissible on the grounds that the domestic remedies available in the State party have not been exhausted and that the communication is clearly an abuse of the purpose of the Covenant.

Author's comments on the State party's submission

7.1 The author responded to the State party's observations on 13 August and 14 December 2009.

7.2 He reiterated the comments submitted previously and referred to the Madrid High Court judgement of 8 July 2009 which refutes a prisoner's right to be transferred to a facility close to their family home.⁵ The author believes that he has demonstrated that domestic remedies are ineffective.

7.3 He adds that he has been subjected to further transfers — first to Villena, in the province of Alicante, 360 kilometres from Madrid, and subsequently to Salamanca — since submitting his communication to the Committee. He emphasizes that he endured seven prison transfers between 2003 and 2009 and that all the prisons to which he was taken,

⁵ "The right to be assigned to — or detained in — a specific prison or a prison close to the prisoner's usual place of residence is neither a right recognized to detainees under prison regulations nor, of course, a right recognized in the Constitution", Madrid High Court, Administrative Division, Eighth Section, No. 1413/2009, rec. 622/2008, of 8 July 2009.

except those in Madrid, were a long way from his family home.⁶ It is obvious that the prisoner's transfer to prisons far from his family home was detrimental to the free development of his personality. The lack of reasoned justification for the transfers to different places far from the author's family home constitutes abusive or unjustified interference with his family life and for this reason the author maintains that there was a violation of article 17, paragraph 1, of the Covenant.

7.4 With regard to his inclusion on the FIES list, the author reiterates the restrictive measures imposed upon prisoners under special observation and refers to the consideration by the Committee against Torture of Spain's fourth periodic report in 2002.⁷ The author notes that inmates are not informed in writing either of their inclusion on the FIES list or of available procedures for appealing against their inclusion, despite the severe consequences.

7.5 The author says that he was subjected to restrictive measures because of his FIES status⁸ while being held in Zuera (twice) and Villena prisons. In Daroca and Valladolid prisons he was treated normally. Currently, the author is being held in Topas prison (Salamanca), where he is treated normally as an ordinary prisoner. On 3 September 2008 he filed a complaint with the General Secretariat of Prisons concerning the interception of correspondence from his lawyer.

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 87 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the International Covenant on Civil and Political Rights.

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

8.3 With regard to the exhaustion of domestic remedies, the Committee notes the State party's claims that domestic remedies had not been exhausted because the alleged violations raised before the Committee had not previously been raised before the domestic courts. The Committee also notes the author's claims that the judicial remedies available had little prospect of success given the existence of settled case law which is at variance with his claims.

⁶ Since 2003, the author has been transferred to the following locations (in chronological order): Alcalá Meco, in the province of Madrid, Zuera, prisons in Madrid, Zuera, Valladolid, Daroca, Villena and Topas (Salamanca).

⁷ Document CAT/C/CR/29/3, para. 11 (d): "The Committee also expresses its concern at [...] [t]he severe conditions of imprisonment of some of the prisoners whose names appear on the list of inmates under close observation (FIES). According to information received, prisoners under level one of the close observation regime have to remain in their cells for most of the day, and in some cases are allowed only two hours in the yard, are excluded from group, sports and work activities, and are subjected to extreme security measures. Generally speaking, it would seem that the physical conditions of imprisonment of these prisoners are at variance with prison methods aimed at their rehabilitation and could be considered prohibited treatment under article 16 of the Convention."

⁸ While being held in Villena prison, he was subjected to restrictive measures including unscheduled cell searches, being forced to remain naked, cell changes and searches, and opening of correspondence (including correspondence from his lawyer).

8.4 The Committee recalls its jurisprudence that mere doubts about the effectiveness of a remedy do not absolve the author from the obligation to attempt it.⁹ The Committee notes that domestic case law, as it appears in the present communication, does not make it clear that an application for judicial or administrative review would be ineffective in his case. The author provides no information about complaints he may have submitted to the authorities in relation to either his separation from his family or the restrictive measures associated with his status as a FIES prisoner. The Committee therefore considers that the communication is inadmissible on the ground of failure to exhaust domestic remedies, in accordance with article 5, paragraph 2 (b), of the Optional Protocol.

9. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be transmitted to the State party and to the author.

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

⁹ See, for example, communication No. 1623/2007, *Guerra de la Espriella v. Colombia*, Views adopted on 18 March 2010; and communication No. 1511/2006, *García Perea v. Spain*, Decision of 27 March 2009, para. 6.2.