



International Covenant on Civil and Political Rights

Distr.: General
11 November 2014
English
Original: Spanish

Human Rights Committee

Communication No. 2105/2011

Views adopted by the Committee at its 112th session (7–31 October 2014)

<i>Submitted by:</i>	Mr. S.S.F., Mr. S.S.E. and Mr. E.J.S.E. (represented by Mr. José Luis Mazón Costa)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Spain
<i>Date of communication:</i>	15 August 2011 (initial submission)
<i>Document reference:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 19 October 2011 (not issued in document form)
<i>Date of decision:</i>	28 October 2014
<i>Subject matter:</i>	Scope of reviews in cassation by the Spanish Supreme Court
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; non- substantiation of claims
<i>Substantive issues:</i>	Right to have the conviction and sentence reviewed by a higher tribunal; prohibition of double jeopardy (<i>ne bis in idem</i>)
<i>Article of the Covenant:</i>	14, paras. 1, 5 and 7
<i>Articles of the Optional Protocol:</i>	2, 3 and 5, para. 2 (b)



Annex

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (112th session)

concerning

Communication No. 2105/2011*

<i>Submitted by:</i>	Mr. S.S.F., Mr. S.S.E. and Mr. E.J.S.E. (represented by Mr. José Luis Mazón Costa)
<i>Alleged victims:</i>	The authors
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<i>Date of communication:</i>	15 August 2011 (initial submission)

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

Meeting on 28 October 2014,

Adopts the following:

Decision on admissibility

1. The authors of the communication are Mr. S.S.F. and his sons, Mr. S.S.E. and Mr. E.J.S.E., Spanish nationals born on 2 April 1945, 23 June 1970 and 26 November 1974, respectively. They claim to be victims of a violation by Spain of their right under article 14 (para. 5) of the Covenant. Mr. S.S.F. and Mr. E.J.S.E. also claim that the State party violated their rights under article 14 (paras. 1 and 7) of the Covenant. The authors are represented by counsel.

The facts as presented by the authors

2.1 In 1994, the authors purchased Jamones La Umbría S.L. (hereinafter referred to as "the company"), a company selling dry-cured ham. In 1995, the company experienced liquidity problems, which left it unable to honour outstanding payments to its creditors in connection with 26 commercial transactions. As a result of this non-payment, several complaints were brought against the authors in 1995, which gave rise to three criminal cases. The authors allege that the company's lack of liquidity occurred unexpectedly owing to the unlawful removal of goods by another company.

* The following members of the Committee took part in the consideration of this communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Víctor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Mr. Dheerujlal B. Seetulsingh, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili, Ms. Margo Waterval and Mr. Andrei Paul Zlătescu.

2.2 Mr. S.S.F. and Mr. E.J.S.E. were accused of fraud by the companies Hermanga S.A. and Fricuencia S.A., in accordance with articles 528 and 529 (para. 7) of the amended Criminal Code of 1973. On 4 February and 9 September 2004, Murcia Provincial Court acquitted the authors of fraud in the proceedings arising from the complaints brought by Hermanga S.A. and Fricuencia S.A., respectively. The Provincial Court found that the established facts did not constitute fraud, insofar as it had not been proved that the actions of the main defendant, Mr. S.S.F., were intended to deceive the companies Hermanga S.A. and Fricuencia S.A. by feigning solvency so that they would supply him with goods; that the company's financial difficulties were due to the unlawful removal of their goods by another company, an incident beyond the authors' control; and that it could not be concluded that a crime had been committed on the sole basis of the losses incurred by the complainants. Moreover, given his young age and student status, the involvement of Mr. E.J.S.E. was of a merely formal nature, since, although he was listed as a company director, he visited the premises only sporadically in the presence of his father, who showed him which documents to sign.

2.3 Meanwhile, the companies Cárnicas Poveda S.A. and Ganadera del Segura S.L. brought a complaint against the authors and other persons for the continuing offences of fraud and forgery of an official document, under articles 248, 249, 250 (paras. 6 and 7) and 74 of the Criminal Code of 1995, and articles 303, 302 (paras. 1, 4 and 9) and 69 bis of the amended Criminal Code of 1973. On 30 June 2008, the Provincial Court ruled that the established facts constituted the continuing offence of fraud with aggravating circumstances and sentenced the authors to 3 years and 6 months' imprisonment, under articles 248, 249, 250 (para. 1, subparas. 6 and 7) and 74 of the Criminal Code of 1995.¹ Moreover, the Provincial Court held that its judgements of 4 February and 9 September 2004 did not prevent it from conducting a new trial, insofar as it involved allegations brought by different natural and legal persons who had not participated in the earlier trial, in addition to different facts.

2.4 On 30 October 2008, the authors appealed against their conviction through the remedy of cassation before the Supreme Court. On 2 December 2008, Mr. E.J.S.E. alleged a violation of the right to an effective legal remedy and claimed that the existence of the constituent elements of fraud had not been established. On 3 December 2008, Mr. S.S.F. and Mr. S.S.E. argued, inter alia, that the Provincial Court had acquitted Mr. S.S.F. and Mr. E.J.S.E. of criminal liability in relation to the company's commercial activities in its judgements of 4 February and 9 September 2004; that the ruling did not give a clear and precise indication of what the established facts were considered to be; that their defence team's offer to submit documentary evidence to prove that the company was solvent had been rejected; that the ruling against the authors was insufficiently substantiated; and that the existence of the elements of the offence of fraud could not be established. Subsidiarily, the authors maintained that the aggravating factors under article 250, paragraph 1, subparagraphs 6 and 7, of the Criminal Code had been unduly applied; that the classification of the penalty was inappropriate, given that undue delays in the proceedings constitute a mitigating factor; and that the Provincial Court had committed an error in its evaluation of the evidence.

2.5 On 16 October 2009, the Supreme Court rejected the allegations made by Mr. E.J.S.E. and found the cassation appeal lodged by Mr. S.S.F. and Mr. S.S.E. to be partially substantiated, extending the favourable outcome to Mr. E.J.S.E. The Supreme Court upheld

¹ The authors point out that one judge submitted a dissenting opinion, disagreeing with the finding of aggravation under article 250, paragraph 1, subparagraph 7, of the Criminal Code (Aggravation by exploitation of business credibility), on the grounds that, in her opinion, it had not been demonstrated that there was no evidence of any situations or relationships that differed from those generated by behaviour typical of fraud and would specifically constitute aggravation.

the conviction and penalty imposed by the Provincial Court, quashing only the aggravating factor under article 250, paragraph 1, subparagraph 7 (Aggravation by exploitation of business credibility), of the Criminal Code. The authors provided the Committee with a copy of the judgement, in which the Supreme Court stated, inter alia, that the legality principle had not been breached, since the trials that led to the judgements of 4 February and 9 September 2004 had differed not only in terms of the identity of the parties but also in terms of the purpose of the trials. The criminal proceedings that had resulted in judgements in 2004 had dealt only with individual contracts. In the trial that had given rise to the Provincial Court judgement of 2008, however, the purpose had been to determine whether a continuing offence was being committed, which had involved a number of facts related to the authors' commercial activity within the company that had not been reviewed in the acquittals of 2004. The right to a defence had not been infringed, as the evidence declared inadmissible by the Provincial Court had been submitted after the due date, and there had been no unexpected revelations or retractions rendering new evidence necessary.

2.6 Meanwhile, regarding the allegations that the body of evidence was insufficient and that an error had been committed in its evaluation, the Supreme Court found that it could evaluate all the evidence, examine whether it was sufficient to overturn the presumption of innocence and determine whether it had been evaluated rationally by the Provincial Court. Nevertheless, it was not, generally speaking, in a position to assess the credibility of subjective evidence, such as witness statements, police statements or plenary records of the court of first instance, since such assessments depended, to a great extent, on the direct perception of that court. The Supreme Court then took note of the witness statements and other elements of proof, found that the authors had not put forward evidence to support the conclusion that the Provincial Court's interpretation of the facts was erroneous, and ruled that the involvement of the authors in the continuing offence of fraud had been demonstrated.

2.7 On 30 November 2009, the authors submitted an application for *amparo* before the Constitutional Court and alleged a violation of articles 24 (para. 1) (Right to an effective remedy) and 25 (*ne bis in idem*) of the State party's Constitution. The authors alleged that the Provincial Court had assessed their criminal liability in relation to the company's commercial activities three times; that the three trials should, in fact, have been merged into one, pursuant to article 17, paragraph 5, of the Criminal Procedure Act; that, during the criminal proceedings, they had not been allowed to submit documentary evidence; and that they had been convicted despite there not being sufficient proof.

2.8 In a ruling issued on 24 February 2010, the Constitutional Court decided not to admit the application for *amparo* on the grounds that the authors had not satisfied the requirement to demonstrate the constitutional relevance of the case, as established in article 49, paragraph 1, of Organic Act No. 6/2007 on the Constitutional Court, of 24 May.

2.9 The authors maintain that they have exhausted all domestic remedies as required to satisfy the provisions of article 5, paragraph 2 (b), of the Optional Protocol.

The complaint

3.1 The authors maintain that they are victims of a violation of their right under article 14, paragraph 5, of the Covenant, as they did not have access to an effective appeal against their conviction and the sentence imposed by Murcia Provincial Court. The sentence handed down by the Provincial Court could only be appealed in cassation before the Supreme Court. However, appeals to the Supreme Court are restricted in their scope, as it is not empowered to review the entire proceedings that gave rise to the Provincial Court's judgement. Moreover, the Supreme Court itself stated that it could not examine the evidence brought before the court of first instance, such as witness evidence.

3.2 Mr. S.S.F. and Mr. E.J.S.E. allege that the Murcia Provincial Court ruling of 30 June 2008 violated article 14, paragraph 7, of the Covenant. The Court had already assessed their criminal liability in relation to the company's commercial activities and they had been acquitted of fraud in the judgements of 4 February and 9 September 2004.

State party's observations on admissibility

4.1 On 14 December 2011, the State party submitted its observations on admissibility and asked for the communication to be declared inadmissible under articles 2, 3, and 5 (para. 2 (b)) of the Optional Protocol on the grounds, respectively, of insufficient substantiation, abstract doubts raised regarding its legal system and failure to exhaust domestic remedies.

4.2 Domestic judicial remedies were not exhausted, as the application for *amparo* lodged with the Constitutional Court was declared inadmissible on the grounds that it was irremediably flawed owing to a lack of procedural expertise on the part of the authors, insofar as they failed to account in their petition for the special constitutional significance of the application. Moreover, the authors did not make the allegations regarding article 14, paragraph 5, of the Covenant before the domestic courts, either in their cassation appeal or in their application for *amparo*. Indeed, in their submission, the authors themselves admit that these allegations had not been a feature of their application for *amparo* before the Constitutional Court.

4.3 The allegations regarding article 14, paragraphs 5 and 7, of the Covenant are insufficiently substantiated. With regard to the allegations under article 14, paragraph 5, the State party maintains that, in response to the authors' appeal in cassation, the Supreme Court reviewed the facts, the evidence and the application of the law in relation to the proceedings conducted at first instance by Murcia Provincial Court. The mere fact that the authors are dissatisfied with the conviction and sentence imposed by the Supreme Court does not, in itself, constitute a violation of the Covenant. Moreover, the authors' complaints in relation to article 14, paragraph 5, are general in scope and do not specify exactly which arguments in their cassation appeal were not considered by the Supreme Court. It adds that, in the past, the Committee has declared communications relating to violations of article 14, paragraph 5, of the Covenant inadmissible on the grounds of insufficient substantiation.² Lastly, it states that the procedure for appeals in cassation has, in practice, been adapted to comply with the obligations laid down in the Covenant.

4.4 The Provincial Court judgement of 30 June 2008 did not violate the rights of Mr. S.S.F. and Mr. E.J.S.E. under article 14, paragraph 7, since there was no *res judicata* as regards the facts or purpose of the criminal proceedings at which the judgement was passed. The criminal proceedings that led to the judgements of 4 February and 9 September 2004 examined the possible commission of fraud only in relation to individual contracts. The purpose of these trials was therefore to consider only concrete facts concerning specific relationships with certain suppliers. On the other hand, the trial that led to the Provincial Court judgement of 2008 examined the possible existence of a continuing offence in relation to the authors' involvement in the company's commercial activities. The State party points out that, in its judgement of 2008, the Supreme Court itself determined that it could not pass judgement on matters that had already been adjudicated, stating that: "It is clear that the facts that gave rise to the earlier acquittals can no longer be adjudicated, nor

² The State party refers to the Committee's case law in communications Nos. 1305/2004, *Villamón Ventura v. Spain*, decision on admissibility adopted on 31 October 2006; 1489/2006, *Rodríguez Rodríguez v. Spain*, decision on admissibility adopted on 30 October 2008; 1490/2006, *Pindado Martínez v. Spain*, decision on admissibility adopted on 30 October 2008; and 1617/2007, *L.G.M. v. Spain*, decision on admissibility adopted on 26 July 2011.

do they warrant a criminal sanction, although civil proceedings would not have been precluded. However, any other facts that are similar or could even have been tried jointly on the grounds that they related to a continuing offence, but which were, at that time, excluded, may be adjudicated, [...] without prejudice to *ne bis in idem*.”

Authors’ comments on the State party’s submission on admissibility

5.1 The authors submitted their comments on the State party’s observations on the admissibility of the communication on 13 February 2012.

5.2 The authors maintain that they have exhausted all domestic remedies. They argue that an application for *amparo* is not a remedy that must be exhausted, since it is extraordinary and is not an effective remedy. In similar cases,³ the Committee held that it was not precluded from considering communications in which an application for *amparo* had not been lodged with the Constitutional Court, since this Court had, and still has, settled jurisprudence to the effect that the remedy of cassation complies with the obligations laid down in the Covenant with regard to the right to a second hearing in criminal matters. Moreover, the cassation appeal before the Supreme Court did not refer specifically to the lack of a second hearing, since this claim is not among the possible grounds for lodging an appeal, which are laid down explicitly in the Criminal Procedure Act.

5.3 The authors reiterate their allegations of a violation of article 14, paragraph 5, and point out that the Supreme Court itself stated that it could not review the evaluation of witness evidence brought before the court of first instance.⁴

5.4 The Murcia Provincial Court judgement of 30 June 2008 constituted a violation of the rights of Mr. S.S.F. and Mr. E.J.S.E. under article 14, paragraph 7, insofar as the trial entailed prosecuting the same defendants again, for the same offence and the same facts, namely the company’s insolvency, of which they had previously been acquitted by the same court. Under article 17 of the Criminal Procedure Act, related offences must be prosecuted in a single trial. Had the State party prosecuted all the offences in the first trial, the authors would have benefited from the court’s assessment of the evidence at that time. To put it another way, the lack of diligence by the State party’s judicial authorities in not merging the trials, so that the authors’ criminal liability in connection with related facts could be evaluated in a single trial, constitutes a violation of article 14, paragraph 1.

5.5 The authors request that the Committee recommend to the State party that it ensure full reparation in respect of their rights, including: (a) a comprehensive review of the trial that resulted in the conviction; (b) a reversal of the conviction; and (c) payment of compensation commensurate with the material and moral harm suffered, to include the costs of proceedings before domestic courts and the Committee.

State party’s observations on the merits

6.1 On 12 April 2012, the State party submitted its observations on the merits of the communication and reiterated its arguments concerning the failure to exhaust domestic remedies.

6.2 With regard to article 14, paragraph 5, it maintains that the Supreme Court judgement gave an extensive and comprehensive review of the Provincial Court judgement

³ The authors refer to the Committee’s case law in relation to communications Nos. 1101/2002, *Alba Cabriada v. Spain*, Views adopted on 1 November 2004, para. 6.5, and 1325/2004, *Conde Conde v. Spain*, Views adopted on 31 October 2006, para. 6.3.

⁴ The authors refer to the Committee’s case law in relation to communications Nos. 1363/2005, *Gayoso Martínez v. Spain*, Views adopted on 19 October 2009, and 701/1996, *Gómez Vásquez v. Spain*, Views adopted on 20 July 2000.

of 30 June 2008. In view of the formal absence of a court of appeal to review criminal matters, the Supreme Court has itself determined, in its jurisprudence,⁵ that it is competent to review all the evidence considered in the judgement subject to review in cassation, subject to the limitation that it was not the court before which subjective evidence was brought, since the assessment of such evidence depends, to a great extent, on the direct perception of the court before which it is brought. Thus, in the authors' case, the Supreme Court held that it could not reassess the subjective evidence brought before the court of first instance, but that it had to, and indeed did, establish whether there was sufficient inculpatory evidence of the commission of the acts and the involvement of the defendants before the court of first instance; that fundamental rights and freedoms had been respected in obtaining the evidence; that the principles of orality, public access, immediacy and *audi alteram partem* had been upheld in the collection of evidence during oral proceedings; and that the conviction had been sufficiently substantiated.

6.3 The State party reiterates its observations regarding the authors' allegations of a violation of article 14, paragraph 7, and points out that the criminal proceedings that resulted in the judgements in 2004 and the conviction of 30 June 2008 were not objectively identical, as they related to different facts.

6.4 The State party rejects the authors' allegations of a violation of article 14, paragraph 1, on the grounds that the three criminal proceedings had not been merged into a single trial. This allegation was not included in the initial submission to the Committee and should therefore be declared inadmissible. In any case, there was, strictly speaking, no need to merge the proceedings, as they dealt with different facts.

Authors' comments on the State party's submissions on the merits

7.1 On 11 June 2012, the authors submitted their comments on the State party's submissions on the merits of the communication. The authors reiterated their allegations under article 14, paragraphs 5 and 7. The State party did not question the Committee's jurisprudence according to which the remedy of *amparo* is ineffective in relation to the allegations of a violation of article 14, paragraph 5, nor did it comment on or question the Committee's jurisprudence according to which it found that the Supreme Court's review in cassation of the conviction did not constitute a review within the meaning of this provision of the Covenant.

7.2 To safeguard the principle of *ne bis in idem* contained in article 14, paragraph 7, the State party's courts should have grouped together the criminal charges against the authors in order to examine all the closely related facts simultaneously, in a single trial.

Issues and proceedings before the Committee

Consideration of admissibility

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

8.2 The Committee has ascertained that the same matter is not being examined under any other procedure of international investigation or settlement, as required by article 5, paragraph 2 (a), of the Covenant.

8.3 The Committee takes note of the State party's arguments that the communication is inadmissible, under article 5, paragraph 2 (b), of the Optional Protocol, on the grounds of

⁵ The State party refers to Supreme Court judgement STS 249/2004 of 4 March, p. 31.

the authors' non-exhaustion of domestic remedies, since their application for *amparo* was declared inadmissible by the Constitutional Court on the grounds that it was irredeemably flawed because they had failed to demonstrate its special constitutional relevance. The State party also argues that the authors did not allege a violation of the right to a second hearing either in their cassation appeal or in their application for *amparo*. The Committee recalls its settled jurisprudence, according to which it is necessary to exhaust only those remedies that have a reasonable prospect of success. The authors' application for *amparo* did not have a reasonable prospect of success in respect of a possible violation of article 14, paragraph 5, given the Constitutional Court's case law.⁶ In addition, the Committee observes that the authors challenged the Murcia Provincial Court judgement through an appeal in cassation, which was ultimately dismissed by the Supreme Court on 16 October 2009, and that they subsequently submitted an application for *amparo* against this judgement, which was found inadmissible by the Constitutional Court on 24 February 2010. The Committee therefore finds that there is no impediment under article 5, paragraph 2 (b), of the Optional Protocol to consideration of the present communication.

8.4 The Committee notes the authors' allegations that they were denied the right to have their conviction and sentence reviewed by a higher tribunal, since they had access only to the remedy of cassation before the Supreme Court, which in practice implied a denial of the right to appeal against the conviction handed down by Murcia Provincial Court. The Committee further notes the State party's arguments that the remedy of cassation allows the Supreme Court to review the evidence considered by the lower court extensively, since it is possible to review judgements with regard to the facts, the evidence and points of law.

8.5 The Committee observes that, in its judgement of 16 October 2009, the Supreme Court examined all the grounds for cassation put forward by the authors, including respect for the principle of *ne bis in idem*, the refusal to admit documentary evidence submitted by the authors and the classification of the penalty imposed. The Supreme Court did not restrict its examination to the formal aspects of the Murcia Provincial Court judgement and found that there was sufficient evidence to uphold the assessment of the facts made by the court of first instance, that the authors had failed to provide evidence showing that the interpretation of the facts by the court of first instance was erroneous, and that nevertheless there was insufficient evidence to demonstrate that there were aggravating circumstances under article 250, paragraph 1, subparagraph 7, of the Criminal Code. The Court therefore upheld the sentence imposed by Murcia Provincial Court with the exception of the aggravating circumstances. Thus, the Committee considers that the allegations under article 14, paragraph 5, of the Covenant have been insufficiently substantiated for the purposes of admissibility and it concludes that they are inadmissible under article 2 of the Optional Protocol.

8.6 The Committee takes note of the allegations by Mr. S.S.F. and Mr. E.J.S.E. that Murcia Provincial Court tried them twice for fraud in connection with their involvement in the company's commercial activities and that they had initially been acquitted of the offence in the final judgements of 4 February and 9 September 2004. Nevertheless, the Committee observes that, in those judgements, the Provincial Court examined the criminal liability of Mr. S.S.F. and Mr. E.J.S.E. only in connection with their involvement in the commercial exchanges between the company and the complainants, Hermanga S.A. and Fricuena S.A., respectively. However, the criminal proceedings that led to the Murcia Provincial Court conviction of 30 June 2008 resulted from complaints brought by the companies Cárnicas Poveda S.A. and Ganadera del Segura S.L. and established the authors' criminal liability for the continuing offence of fraud in connection with their involvement in the company's commercial activities in general and in relation to various natural and legal

⁶ See communication No. 1892/2009, *J.J.U.B. v. Spain*, Views adopted on 29 October 2012.

persons. The Committee therefore considers that the allegations under article 14, paragraph 7, of the Covenant have not been sufficiently substantiated for the purposes of admissibility and concludes that they are inadmissible under article 2 of the Optional Protocol.

8.7 The Committee notes the authors' allegations in relation to article 14, paragraph 1, of the Covenant that the State party's judicial authorities should have grouped together the criminal charges against them in order to examine them during a single trial, as they were founded on related facts. The Committee considers that this complaint has been insufficiently substantiated for the purposes of admissibility and deems it to be inadmissible under article 2 of the Optional Protocol.

9. Therefore, the Committee decides:

- (a) That the communication is inadmissible under article 2 of the Optional Protocol;
- (b) That this decision shall be transmitted to the State party and to the authors.
