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HUMAN RIGHTS COMMITTEE
Eighty-second session
18 October-5 November 2004

VIEWS

Communication No. 1073/2002

Submitted by:	Jesús Terrón (represented by counsel, Ms. Antonia Mateo Moreno)
Alleged victim:	The author
State party:	Spain
Date of communication:	13 February 2001 (initial submission)
Document references:	Special Rapporteur's rule 91 decision, transmitted to the State party on 1 May 2002 (not issued in document form)
Date of adoption of Views:	5 November 2004

On 5 November 2004, the Human Rights Committee adopted its Views, under article 5, paragraph 4, of the Optional Protocol, in respect of communication No. 1073/2002. The text of the Views is appended to the present document.

[ANNEX]

* Made public by decision of the Human Rights Committee.

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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

Eighty-second session

concerning

Communication No. 1073/2002*

Submitted by:	Jesús Terrón (represented by counsel, Ms. Antonia Mateo Moreno)
Alleged victim:	The author
State party:	Spain
Date of submission:	13 February 2001 (initial submission)

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

Meeting on 5 November 2004,

Having concluded its consideration of communication No. 1073/2002, submitted by Mr. Jesús Terrón under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all 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. The author of the communication of 13 February 2001 is Jesús Terrón, of Spanish nationality, born in 1957. He claims to be a victim of violations of article 2, paragraph 3 (a), article 14, paragraph 5, and article 26 of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The author is represented by counsel.

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* The following members of the Committee took part in the discussion of the communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Maxwell Yalden.

The facts as submitted

2.1 The author was a member of the Regional Assembly (*Cortes*) of Castilla-La Mancha. He was tried by the Supreme Court for forging of a private document and sentenced on 6 October 1994 to two years' imprisonment and one hundred thousand pesetas in compensation.

2.2 The author did not submit an application for *amparo* (enforcement of constitutional rights) with the Constitutional Court, considering that it would serve no purpose in view of the Court's repeated denial of applications for *amparo* for the purpose of reviewing facts established in the judgements of the ordinary courts.

The complaint

3.1 The author claims that his right to the review of his conviction and sentence by a higher tribunal (article 14, paragraph 5, of the Covenant) was violated since he was tried by the highest ordinary criminal court, the Supreme Court, whose judgements are not susceptible to judicial review. He alleges that his right to file an effective remedy (article 2, paragraph 3 (a) of the Covenant) in respect of the sentence handed down at first instance was violated.

3.2 The author claims that he was the victim of a violation of article 26 of the Covenant, owing to a difference in treatment in Spanish legislation to do with which courts hear cases involving a member of the *Cortes* (Parliament). If a Madrid member of Parliament commits an offence in Madrid, or a member of a regional Parliament commits an offence in that region, he has the right to be tried by the High Court of Justice of the jurisdiction in question and may then submit an application for judicial review to the Supreme Court. A member of a regional Parliament who commits an offence in Madrid is tried directly by the Supreme Court and has no right to apply for judicial review. In the author's view, this difference in treatment is discriminatory.

3.3 As regards the requirement that domestic remedies must be exhausted, the author maintains that it was pointless to apply to the Constitutional Court for *amparo*. He states that the Constitutional Court has repeatedly held it has no authority to review sentences handed down by the ordinary courts and is not competent to revisit facts established in judicial proceedings since this is expressly prohibited by law. The author further asserts that the inadequacy of the remedy of *amparo* is demonstrated by the Constitutional Court's consistently held view that the special guarantees associated with membership of the *Cortes* and Senate excuse the lack of a second level of jurisdiction.

Observations of the State party on admissibility and merits

4.1 The State party contends that the communication is inadmissible since domestic remedies have not been exhausted. According to the State party, the author should have submitted an application for *amparo* to the Constitutional Court.

4.2 The State party attaches a document stating that the first lawyer who defended the author in domestic proceedings was found guilty at first instance of conducting a negligent defence, not having submitted an application for *amparo*. The author's first lawyer declared that applying for

amparo had been proposed, but he had instead submitted an application for judicial review which had been declared inadmissible. The court which found the lawyer guilty considered that he should have known that the time allowed for applying for *amparo* continued to run if his application for judicial review was clearly inadmissible, and concluded accordingly that his conduct was negligent. The proceedings in the domestic courts against the author's first lawyer were brought by the person acting as the author's representative before the Committee. In the State party's view, such action by the author's representative is inconsistent with the author's claim that there was no need to submit an application for *amparo*.

4.3 On the merits, the State party contends that article 14, paragraph 5, of the Covenant does not apply when an individual is tried at first instance by the court of highest jurisdiction, for example, the Supreme Court, because of his personal situation. In the author's case, he was tried by the Supreme Court because he held a publicly elected post. In the State party's view, the author, as a member of the *Cortes*, occupied a different position from that of the majority of defendants, and was therefore to be treated differently. The State party considers that judgement at sole instance by the court of highest jurisdiction is the consequence of the purely objective circumstance of occupying a specific public post. It also considers that the absence of a review of sentence is counterbalanced by trial by the court of highest jurisdiction.

4.4 The State party contends that this is a frequent situation in many States and that it is equally common to have procedures for waiving the immunity of certain persons in public posts when they face criminal charges.

4.5 The State party points out that the Statute of Autonomy of Castilla-La Mancha, approved by Organization Act 9/1982 of 10 August 1982, provides in article 10.3 for the prosecution of members of Parliament and stipulates that "it shall in all cases be incumbent on the High Court of the region to decide whether to indict, imprison, prosecute or try them. Outside the region, they may be held to account in the same way before the Criminal Division of the Supreme Court". The State party maintains that the author never objected to being tried at sole instance, and did so only once he had been sentenced. He further enjoyed all the guarantees of a fair trial and was able to challenge all the evidence submitted against him.

4.6 The State party considers that in cases of very minor offences the establishment of a review procedure in a higher court is self-defeating, in view of the cost incurred and the unnecessary prolongation of proceedings. In this regard it cites article 2, paragraph 2, of Protocol No. 7 to the European Convention on Human Rights, which excepts from review cases of "offences of a minor character".

4.7 With regard to the alleged violation of article 26 of the Covenant, the State party contends that under the legislation in force, the court competent to try an offence committed by a member of Parliament within the territory he was elected to represent is the High Court of the region, while if the offence with which he is charged was committed outside his region, the Supreme Court has jurisdiction. In the State party's view, this difference of treatment is based on objective and reasonable criteria. The State party further claims that this provision is not discriminatory in that it applies to all cases in which a member of Parliament is tried for an offence committed outside the region he represents.

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

5.1 With regard to the admissibility of the communication, the author acknowledges that he sued the first lawyer who defended him in the criminal proceedings against him. He says, however, that in the proceedings against him, the lawyer always maintained that the *amparo* application could not have succeeded owing to its limitations. In passing sentence, furthermore, the court made it clear that while it found the lawyer guilty of negligence, he could not be held responsible for all the consequences of the author's conviction, since *amparo* was an exceptional remedy, which, owing to its limitations, was not always effective, and under no circumstances would failure to apply for *amparo* deprive the author of a hearing at second instance and a ruling on the offence for which he had been convicted by the Supreme Court.

5.2 On the merits, the author maintains that the State party's assertion that he had a fair trial is incorrect, since during the oral proceedings his lawyer refused to call most of the witnesses for the defence.

5.3 The author insists that his conviction was based on purely circumstantial evidence and could not be reviewed by a higher tribunal because he was tried by the highest court at sole instance.

5.4 The author does not agree with the State party's argument that the absence of a review of sentence was offset by the fact that he was tried by the highest court. In the author's view, being tried by the highest court does not imply that that court cannot make mistakes that need to be reviewed by a higher tribunal.

5.5 The author contends that the arguments of the State party referring to Protocol No. 7 of the European Convention do not apply to the complaint before the Committee, since the scope of article 14, paragraph 5, of the Covenant differs considerably from that of Protocol No. 7. The State party has not entered any reservation to this provision of the Covenant.

5.6 The author insists that the difference in trial arrangements for members of Parliament established in the Organization Act is discriminatory, since if a member of the *Cortes* is charged with an offence committed in a region he has the right to a second hearing, whereas if he is charged with an offence committed in Madrid, he is judged at sole instance by the Madrid Supreme Court.

Issues and proceedings before the Committee

6.1 In accordance with rule 87 of its rules of procedure, before considering any claims contained in a communication, the Human Rights Committee must decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement, so that the provisions of article 5, paragraph 2 (a), of the Optional Protocol do not preclude its consideration of the complaint.

6.3 The State party has asserted that domestic remedies have not been exhausted since the author did not submit an application for *amparo* to the Constitutional Court. The author maintains that it was unnecessary to do so since the application stood no chance of succeeding. The author claims that all applications for *amparo* submitted to the Constitutional Court against the Criminal Division of the Supreme Court have been denied, and repeated rulings by the Constitutional Court have established that *amparo* does not constitute a third instance or permit reappraisal of the facts or review of sentences handed down by the ordinary courts.

6.4 As proof of the failure to exhaust domestic remedies the State cited the judgement of the civil court of first instance No. 13, which shows that the author sued the first lawyer who defended him in criminal proceedings against him for damages, because the lawyer had not applied to the Constitutional Court for *amparo*. The court sentenced the lawyer to pay compensation. It found he had been negligent in allowing the deadline for applying for *amparo* to lapse and in filing another, inappropriate appeal. In the view of the Committee, this argument is not conclusive since the court, in determining the compensation payable, took account of the fact that the damage to the author was relative since *amparo* is an exceptional measure and the Constitutional Court could not have acted as a court of second instance owing to the limited scope of that remedy.

6.5 The Committee's established jurisprudence states that it is only necessary to exhaust those remedies that have some prospect of success. With regard to the alleged violation of article 14, paragraph 5, of the Covenant, the Committee notes that the State party has not contested the fact that *amparo* is not a remedy that permits a review of conviction and sentence as the Covenant requires. Nor has the State party contested the existence of precedent in the Constitutional Court establishing that the remedy of *amparo* is not to be used to reappraise facts or review sentences handed down by domestic courts. Neither has it contested the fact that, under domestic legislation, no remedies are available against convictions by the Supreme Court. The Committee considers that where the alleged violation of article 14, paragraph 5, of the Covenant is concerned, the author has exhausted the domestic remedies. The complaint raises points that may affect the right recognized in article 14, paragraph 5, of the Covenant, rendering this part of the communication admissible.

6.6 The Committee's established jurisprudence states that article 14, paragraph 5, of the Covenant is a *lex specialis* in relation to article 2, paragraph 3 (a) of the Covenant, such that since the Committee has decided that the alleged violation of article 14, paragraph 5, is admissible, it is unnecessary for it to take a decision on the alleged violation of article 2, paragraph 3, of the Covenant.

6.7 With regard to the alleged violation of article 26 of the Covenant, the author asserts that the distinction established in domestic legislation as to which court is competent to hear proceedings involving members of Parliament is discriminatory because in some cases the individual concerned has the right to review of sentence by a higher tribunal while in others he is tried at sole instance with no possibility of a review. The State party says that the distinction is established in law which applies throughout the country and in all cases where a member of Parliament is put on trial for an offence committed outside the region he was elected to represent.

The Committee considers that the author has substantiated this claim sufficiently for the purpose of admissibility, and that the matter appears to raise issues of relevance under article 26 of the Covenant. The Committee therefore finds this part of the communication admissible.

Consideration on the merits

7.1 The Committee must decide whether the author's conviction at first instance by the Supreme Court with no possibility of review of the conviction and sentence constitutes a violation of article 14, paragraph 5, of the Covenant.

7.2 The State party contends that in the case of minor offences, the requirement of review by a higher tribunal is not applicable. The Committee recalls that the right set out in article 14, paragraph 5, refers to all individuals convicted for an offence. It is true that the Spanish text of article 14, paragraph 5, refers to "*un delito*", while the English text refers to a "*crime*" and the French text refers to "*une infraction*". Nevertheless the Committee is of the view that the sentence imposed on the author is serious enough in any circumstances to justify review by a higher tribunal.

7.3 The State party claims that the author at no time objected to being subject to the jurisdiction of the Supreme Court; it was only when found guilty that he contested the lack of the possibility of a second hearing. The Committee cannot accept this argument since the author's being tried by the Supreme Court did not depend on his wishes but was established by the criminal procedure of the State party.

7.4 The State party contends that in situations such as the author's, if an individual is tried by the highest ordinary criminal court, the guarantee set out in article 14, paragraph 5, of the Covenant does not apply; the absence of a right to review by a higher tribunal is offset by the fact of being tried by the highest court, and this situation is common in many States parties to the Covenant. Article 14, paragraph 5, of the Covenant stipulates that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. The Committee points out that "according to law" is not intended to mean that the very existence of a right to review is left to the discretion of the States parties. Although the State party's legislation provides in certain circumstances for the trial of an individual, because of his position, by a higher court than would normally be the case, this circumstance alone cannot impair the defendant's right to review of his conviction and sentence by a court. The Committee accordingly concludes that there has been a violation of article 14, paragraph 5, of the Covenant with regard to the facts submitted in the communication.

7.5 Having concluded that the State party violated article 14, paragraph 5, of the Covenant, the Committee deems it unnecessary to consider whether there has been a violation of article 26 of the Covenant.

8. 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.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to furnish the author with an effective remedy, including adequate compensation.

10. 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 90 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.]
