



**International covenant
on civil and
political rights**

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Ninety-fifth session
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VIEWS

Communication No. 1473/2006

Submitted by: Isabel Morales Tornel, Francisco Morales Tornel and
Rosario Tornel Roca (represented by counsel, José Luis
Mazón Costa)

Alleged victim: The authors and Diego Morales Tornel

State party: Spain

Date of the communication: 17 April 2006 (initial submission)

Documentation references: Special Rapporteur's rule 97 decision, transmitted to the State
party on 10 May 2006 (not issued in document form)

Date of adoption of Views: 20 March 2009

Subject matter: Death of a person serving a prison sentence as a result of
AIDS

Procedural issue: Failure to substantiate, lack of victim status

* Made public by decision of the Human Rights Committee.

Substantive issue: Right to life, right not to be subjected to arbitrary interference with family life

Articles of the Covenant: 6, paragraph 1; 17, paragraph 1

Articles of the Optional Protocol: 2

On 20 March 2009 the Human Rights Committee adopted the annexed draft as the Committee's Views under article 5, paragraph 4, of the Optional Protocol regarding communication No. 1473/2006.

[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-fifth session

concerning

Communication No. 1473/2006**

Submitted by: Isabel Morales Tornel, Francisco Morales Tornel and
Rosario Tornel Roca (represented by counsel, José Luis
Mazón Costa)

Alleged victim: The authors and Diego Morales Tornel

State party: Spain

Date of the communication: 17 April 2006 (initial submission)

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

Meeting on 20 March 2009,

Having concluded its consideration of communication No. 1473/2006, submitted on behalf
of the authors 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. The authors of the communication are Isabel Morales Tornel, Francisco Morales Tornel
and Rosario Tornel Roca, siblings and mother respectively of the deceased

** The following members of the Committee participated in the examination of the present
communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati,
Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Lazhari Bouzid,
Ms. Zonke Zanele Majodina, Mr. Rafael Rivas Posada, Sir Nigel Rodley,
Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

Diego Morales Tornel. They claim that the latter was the victim of a violation by Spain of article 6, paragraph 1; article 7; article 14, paragraph 1; and article 17 of the Covenant. The authors are represented by counsel. The Optional Protocol entered into force for the State party on 25 April 1985.

Factual background

2.1 Diego Morales Tornel, born in 1957, was sentenced to 28 years in prison for miscellaneous property crimes. He was held in pretrial detention from September 1981 until December 1982. On 20 June 1984 he was transferred to Murcia Prison to serve his sentence and stayed there until 12 October 1985. He was subsequently incarcerated alternately in Murcia Prison and prisons in Puerto de Santa María and Gijón, and was eventually moved to El Dueso Prison (Santander).

2.2 A medical report dated 28 November 1990 issued at the time of his arrival at Gijón Prison noted that he had been diagnosed as HIV-positive on 4 April 1989. He was treated with intravenous Retrovir (AZT) in that prison from 11 July to 19 August 1991, and underwent medical check-ups to assess his tolerance of the drug, which proved negative. In October 1991 he applied to the Directorate General of Penal Institutions for a transfer to Murcia Prison or a nearby facility so that he could be closer to his family, but his application was rejected on 25 November 1991.

2.3 According to the authors, there is no evidence in the records of the other prisons in which he was incarcerated, including El Dueso Prison to which he was transferred on 7 December 1991, of any medical examination on arrival. On 11 March 1993 the medical service of the latter facility treated him for various ailments and ordered his admission to hospital the following day. He remained in hospital until 10 April 1993. During his stay, he was diagnosed with and treated for AIDS, pulmonary tuberculosis, probable pneumonia and an intestinal infection. The authors claim that during the period from December 1991 to March 1993 he received no medical care and underwent no AIDS tests or check-ups.

2.4 On his return, the prison doctor requested the Director, on 29 April 1993, that Mr. Morales Tornel be given access to prison benefits for persons suffering from a serious and incurable disease. She noted in the medical report that the prisoner had been diagnosed with AIDS, that his condition had seriously deteriorated and that he was incurably ill.

2.5 On 4 May 1993 he was again hospitalized, suffering from dyspnoea, asthenia and general discomfort. He was discharged on 10 May 1993 after receiving two transfusions of concentrated red blood corpuscles, and was transferred to the prison infirmary. The hospital had given him two medical appointments for 28 May and 11 June 1993 but he was not escorted to the second appointment. From August 1993 he received antiretroviral treatment with Didanosina.

2.6 On 11 May 1993, the El Dueso Prison Treatment Board applied to the Directorate General of Penal Institutions for conditional release of the prisoner on health grounds. Commenting on his conduct in prison, the Board stated that after an initial period of maladjustment, Mr. Morales Tornel had gradually adapted to the regime of the prisons through which he had passed. His conduct in El Dueso could be characterized as normal. The Directorate General of Penal Institutions did not respond to the request.

2.7 On 10 May 1993, the El Dueso Prison Treatment Team issued a social report in which it noted that Mr. Morales Tornel was on good terms with his family, although their visits were rare on account of the geographical distance and his father's poor state of health due to cancer. The social officer had informed the prisoner's mother of his state of health and his admission to hospital. When the question of conditional release had been raised, his mother had no objection to taking him into the family home.

2.8 On 13 October 1993, the El Dueso Prison Treatment Board reiterated its request for conditional release, invoking the risk of death. The Directorate General of Penal Institutions turned down the request on 25 October 1993. It stated in the decision that a fresh application should promptly be filed by fax in the event of a significant worsening in the prisoner's condition.

2.9 In mid-October Mr. Morales Tornel abandoned his medical treatment for TB, claiming that it upset his stomach, causing him to vomit. On 26 October 1993 he was examined in his cell by the prison medical officer who, while noting his poor condition, did not have him transferred to the infirmary. On 11 December 1993 he was again visited in his cell by the prison doctor. He had then been suffering severe loss of liquid for 15 days, which resulted in cachectic syndrome, characterized by a gradual pathological loss of weight. He was admitted to hospital again on 13 December 1993.

2.10 The authors found out about the latest admission to hospital when they phoned Mr. Morales Tornel in prison to inform him of his father's death on 14 December 1993. They then spoke to the social officer, who advised them to refrain from informing him of the event until his physical and emotional condition had improved. Having been put in contact with the hospital, his mother decided to visit him, but Mr. Morales Tornel died on 1 January 1994 before the trip could be arranged.

2.11 The authors allege that the Directorate General had not been informed promptly, as it had requested, of the worsening of the prisoner's state of health. Moreover, notwithstanding the rapid deterioration in his state of health, he had received virtually no medical care in the prison before being admitted to hospital, the doctor having merely noted that he had stopped taking the TB medication.

2.12 On 28 December 1994 the authors filed a petition with the Ministry of Justice and the Interior concerning the inadequate functioning of penal institutions, invoking the pecuniary responsibility of the State. Specifically, they complained of the refusal to transfer the prisoner to Murcia Prison so that he could be visited by his family; the lack of adequate medical care; the denial of conditional release on account of illness; failure to inform the Directorate General of the deterioration in his state of health; and failure to inform his family of his terminal condition in December 1993. The authors requested compensation on all those grounds. The petition was, however, rejected.

2.13 The authors filed an administrative appeal with the National High Court. In that administrative appeal, they claimed that it was not known when Mr. Morales Tornel had been declared HIV-positive, since, despite their request, the administrative file does not contain medical records for the period from 1984 to 1990. Thus, he could have even contracted the infection while serving his prison sentence. While in the Gijón Prison from 11 July

to 19 August 1991, he was treated with retroviral medication but the treatment had to be suspended because he could not tolerate it. On transferring to the El Dueso Prison in December of that year, he was again administered the same treatment. In light of his previous negative reaction to it, Mr. Morales Tornel abandoned it voluntarily. From December 1991 to March 1993, he was not administered any type of medication and did not undergo any AIDS tests or check-ups. By March 1993, not only had he developed AIDS but he had also contracted pulmonary tuberculosis, pneumonia and an intestinal infection while in prison.

2.14 The appeal was dismissed on 27 October 1999. The Court's judgement acknowledges that Mr. Morales Tornel had been diagnosed as a terminal AIDS patient on 12 March 1993, that no effective treatment was available at that time, and that the antiretroviral treatment would not improve the final prognosis. The judgement also notes that the isolation of the patient in such circumstances could not have improved his quality of life and life expectancy. It also notes that it could be concluded from the evidence, and, in particular, from the results of the expert medical opinion, that the medical treatment received by Mr. Morales Tornel during his imprisonment at El Dueso Prison was the correct treatment for his illness and in line with the procedures normally recommended and applied at the time.

2.15 According to the authors, the judgement disregards the fact that Mr. Morales Tornel had been declared HIV-positive on 4 April 1989, as noted in his administrative file. With regard to the denial of conditional release, the authors show that the grounds invoked by the Court are unrelated to that decision, since it had nothing to do, in their view, with release on account of a risk to the prisoner's life.¹

2.16 The authors filed an appeal in cassation with the Supreme Court against the National High Court judgement. The application was dismissed on 29 April 2004. On 8 March 2005 they filed an application for *amparo* with the Constitutional Court, alleging violations of Mr. Morales Tornel's right to life and the right to family life as well as their own right to family life and right not to be subjected to inhuman treatment. The application was dismissed on 23 March 2006. With regard to the violation of the right to life and the right not to be subjected to inhuman treatment invoked by the authors, the Court affirmed that they were not holders of

¹ The judgement states: "release (...) clearly cannot cure a disease that has been diagnosed as incurable but may be justified solely on the ground that it promotes a relative improvement and slower progression of the disease with fewer acute episodes, since the change of environment has a positive impact on a human being's psychosomatic well-being, whereas remaining in prison has a correspondingly negative impact. This is so, we wish to stress, provided that the other legal and regulatory preconditions for conditional release (...) have been met. In short, only a serious and incurable illness, the progression of which would be unfavourably affected by remaining in prison, entailing a deterioration in the patient's health and thus shortening his or her life, even where there is no imminent risk of death, can justify the release of the prisoner concerned, provided that the other conditions laid down in the Criminal Code have also been met." The conditions in question include a record of good conduct and an individually established favourable prospect of social reintegration.

such rights inasmuch as it was their deceased relative who had suffered the alleged shortening of his life and inhuman treatment. An application for *amparo* could only serve to protect the rights of those directly affected, in other words the holders of the subjective right that had allegedly been violated. In view of its basically subjective character, an application for *amparo* could not give rise to rulings concerning the fundamental rights of third parties. With regard to the right to family life, the Court held that the right in question did not include mere expectations of enjoyment of a particular kind of life, either within the family or as an individual, that one of the parties to the dispute considered to be desirable.

The complaint

3.1 The authors claim that the refusal to grant Mr. Morales Tornel conditional release seven months before his death constitutes a violation of article 6, paragraph 1, of the Covenant. Furthermore, although Mr. Morales Tornel was hospitalized after the decision by the Directorate General of Penal Institutions of 25 October 1993, the circumstances of his custody were not reviewed as requested in the Directorate General's decision. That was equivalent to disregard of the sick prisoner's right to life.

3.2 The authors further allege that a large number of prisoners with AIDS have died in Spanish prisons. These prisoners are not only deprived of the necessary medical care but are also particularly at risk of contracting infectious diseases, which constitute an additional health hazard. In the case of Mr. Morales Tornel, the antiretroviral treatment only began in 1992, although he had been diagnosed as HIV-positive in April 1989.²

3.3 The authors claim to be victims of inhuman treatment in violation of article 7 of the Covenant. This is due to the fact that the prison failed to inform them that Mr. Morales Tornel was permanently confined to his cell, that he was too weak to call them, and that he was at an advanced stage of AIDS with imminent risk of death. The prison health service was aware of the seriousness of his condition but his family was not.

3.4 The authors assert that Mr. Morales Tornel was denied the right of contact with his family because of the distance of the prison from his family's place of residence. His request to be transferred to a prison close to Murcia was rejected in 1991. Moreover, the family was not informed of the seriousness of his condition. They learned of his final admission to hospital only when they attempted to inform him of his father's death. Those facts constitute a violation of the right to family life of both Mr. Morales Tornel and of the authors under article 17 of the Covenant.

3.5 Lastly, the authors claim that the Constitutional Court denied them the right to justice in violation of article 14, paragraph 1, of the Covenant, by maintaining that they were not holders of the rights they invoked.

² The application to the National Court notes that he was treated with Retrovir from 11 July until 19 August 1991 but proved allergic to the drug.

State party's observations on admissibility and on the merits

4.1 In its observations of 10 July 2006, the State party notes that the complaint regarding failure to inform the family of the state of health of Mr. Morales Tornel was not raised at the domestic level. The complaint is in any case unwarranted. In fact, the file before the Committee contains a report by the El Dueso Prison Treatment Team, dated 10 May 1993, which states that the prisoner's mother had been kept informed by telephone of her son's condition and hospitalization. The application filed with the National Court explicitly acknowledges that Mr. Morales Tornel's mother was informed of his admission to hospital and that she decided to visit her son.

4.2 The complaint filed by the authors in the domestic courts concerned pecuniary responsibility for compensation for the alleged moral and psychological damage suffered as a result of the abnormal functioning of the prison administration. No allegation of criminal failure to render assistance to the prisoner was made and no specific complaint of that nature was filed. No recourse was had either to the special procedure for judicial protection of fundamental rights. The Supreme Court judgement, which the authors did not provide to the Committee, states in response to the authors' allegations concerning lack of medical care that those allegations are contrary to the established facts: "There are medical visit sheets in the record attesting to the fact that the appellant underwent medical examinations on a number of occasions before the illness was diagnosed; for example, on 11 September 1990 an inflammation of the ear was diagnosed; he was examined on 12 November 1990; treatment was provided on 19 December 1990, 2 July 1991, 10 July 1991, 19 September 1991 and 10 December 1991, and an examination was conducted on 14 January 1992. In general, the lack of a record of any other medical examinations and treatment of the prisoner does not in itself imply that they did not take place. It is due to the fact that the administrative complaint was initially filed on the basis of the appellant's death from AIDS, so that the administrative file and the decision on the administrative complaint contain no record of previous medical care."

4.3 There is no record either of any appeal against the decision refusing conditional release, although the General Prison Act authorizes the Prison Oversight Judge to deal with complaints from prisoners concerning the prison regime and treatment whenever their fundamental rights or prison rights and benefits are affected. That accounts for the Constitutional Court's finding that the application for *amparo* related solely to issues pertaining to the claim for compensation. It can be held, under those circumstances, that the complainants acted exclusively in defence of their own rights in the domestic courts and that they lack the status of victims of the alleged violations for the purposes of the Optional Protocol. They cannot claim either to have exhausted domestic remedies, since no domestic complaint or application was filed by the prisoner regarding many of the alleged facts that occurred long before the prisoner's death, when he was still fit and entitled to do so.

4.4 The State party argues that the rights invoked are not covered by the Covenant, which contains no right to serve a sentence in a penal institution of the prisoner's own choosing or a right to conditional release.

4.5 The State party draws attention to the domestic courts' thorough examination of the facts, especially the medical care received by the prisoner, which cannot be challenged as unreasonable or arbitrary. Thus, the Supreme Court held in its judgement that the medical care provided to the

prisoner during his stay at El Dueso Prison was the correct treatment for his illness. The medical care received was in line with the procedures normally recommended and applied at the time, and there was no causal relationship either between the patient's death and the medical treatment, or between the medical treatment and the deterioration in his condition or the increase in his physical and psychological suffering.

4.6 With regard to the violation of article 14, paragraph 1, alleged by the authors, the State party affirms that there is nothing in the Covenant that would support a right of access to a constitutional court in defence of the rights of third parties. Their right of access to justice was in no way impeded by the mere fact the Constitutional Court refused on solid grounds to attribute to the right in question the scope asserted by the authors.

4.7 In the light of the foregoing, the State party requests the Committee to declare the communication inadmissible on the ground that the authors lack the status of victims; that domestic remedies have not been exhausted; that the claims have not been adequately substantiated under article 2 of the Optional Protocol; and that the communication is clearly an abuse of the provisions of the Covenant, in accordance with article 3 of the Protocol. The State party further requests the Committee to declare that it has in no way violated the Covenant.

4.8 On 6 September 2006 the State party replied on the merits, making the same observations as on the question of admissibility.

Authors' comments on the State party's observations

5.1 On 22 January 2007 the authors submitted comments on the State party's observations. With regard to their status as victims, they claim that no doubt was cast on their status either by the Ministry of Justice, the National Court or the Supreme Court. The Constitutional Court was alone in holding that only the deceased had standing to defend his right to life. With regard to the exhaustion of domestic remedies, the authors point out that they pursued their case as far as the Constitutional Court, invoking the same complaints as had been raised before the Ministry of Justice and the Interior.³

5.2 The authors reiterate their initial complaints, claiming that the State party has distorted their petitions, for instance regarding the failure to communicate information concerning the patient to his family when his condition seriously deteriorated in December 1993.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 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 it is admissible under the Optional Protocol to the Covenant.

³ See paragraphs 2.12 to 2.16.

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

6.3 The Committee takes note of the State party's argument that the communication should be considered inadmissible on the ground that the authors lack the status of victim of the alleged violations, since their legal action at the domestic level was taken exclusively in defence of their own rights and not in defence of the rights of the deceased. The Committee notes, however, that some of the complaints raised by the authors with the Committee refer to violations of their own rights under the Covenant.

6.4 The authors claim that their deceased relative's right under article 6, paragraph 1, of the Covenant was violated because of the refusal to grant him conditional release when he had only a few months to live, and because he did not receive the medical care that his condition required. The Committee recalls its jurisprudence, as well as rule 96 (b) of its rules of procedure, in support of the finding that the authors are entitled to submit a communication alleging that the rights of a deceased relative were violated. The fact that the alleged victim is deceased therefore cannot constitute an impediment to the admissibility of the communication. Furthermore, the Committee considers that the claims regarding the violations of article 6, paragraph 1, of the Covenant have been adequately substantiated for the purposes of admissibility and that the authors exhausted the domestic remedies. This part of the communication is therefore declared admissible.

6.5 The authors claim that Mr. Morales Tornel's right to family life under article 17 of the Covenant was violated because he was kept in prisons that were a long way away from his family's place of residence and because his family was not informed of the seriousness of his condition. The Committee notes that Mr. Morales Tornel applied to the Directorate General of Penal Institutions for a transfer in October 1991 but there is nothing in the file to show that he attempted to obtain a transfer by other means when this request was turned down. Nor is there any evidence in the file that he attempted to inform his family of the seriousness of his condition in the months prior to his death. Consequently the Committee finds this part of the communication inadmissible under article 2 of the Optional Protocol, as insufficiently substantiated.

6.6 The authors also claim that their right not to receive inhuman treatment, under article 7 of the Covenant, was violated because they were not informed by the prison of the seriousness of their deceased relative's condition. They further claim that this same fact constitutes a violation of the right to family life under article 17 of the Covenant. The Committee notes that these complaints were filed in the form of administrative litigation and *amparo* proceedings before the Constitutional Court. Thus, the available domestic remedies were exhausted.

6.7 Having made these findings, the Committee considers it unnecessary to rule on admissibility in respect of the authors' allegations pertaining to a possible violation of article 14, paragraph 1, of the Covenant, because of the refusal of the Constitutional Court to find that the authors were victims.

6.8 As there are no other impediments to admissibility, the Committee decides that the communication is admissible to the extent that it raises issues pertaining to article 6, paragraph 1, with regard to Mr. Morales Tornel; and articles 7 and 17 of the Covenant with regard to the authors.

Examination of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, in keeping with article 5, paragraph 1, of the Optional Protocol.

7.2 The authors claim that the rights of their deceased relative were violated under article 6, paragraph 1, of the Covenant because of the refusal to grant him conditional release when he had only a few months to live, and because he did not receive the medical care that his condition required. The Committee notes that Mr. Morales Tornel had been diagnosed as incurably ill when the application was filed and that, given the characteristics of his disease, there are no grounds for establishing a causal relationship between his death and his continuing incarceration. With regard to the claim that he did not receive the medical care in prison that his condition required, the Committee notes the lack of sufficient information in the file to enable it to find that the medical treatment was inadequate and that the evaluation of facts and evidence by the domestic courts in that regard suffered from arbitrariness. The Committee therefore does not have sufficient evidence to affirm that Mr. Morales Tornel's rights were violated with respect to article 6 of the Covenant.

7.3 The Committee must also decide whether the fact that the prison administration failed to inform the authors of the seriousness of Mr. Morales Tornel's condition during the final months of his life constitutes a violation of the right of the authors not to be subjected to arbitrary interference with their family. The Committee recalls its jurisprudence to the effect that arbitrariness within the meaning of article 17 is not confined to procedural arbitrariness, but extends to the reasonableness of the interference with the person's rights under article 17 and its compatibility with the purposes, aims and objectives of the Covenant.⁴

7.4 The Committee notes that in April 1993 Mr. Morales Tornel was diagnosed as an incurably ill patient whose health was seriously deteriorating. In May 1993 the prison in which he was incarcerated conveyed this information to his family, which stated its willingness to take care of the patient if he were granted conditional release. Although his condition continued to deteriorate, the prison, according to the information in the file, did not resume contact with the family. Nor did it inform the Directorate General of Penal Institutions of this deterioration, despite the fact that, in turning down the request for conditional release, on 25 October of that year, the Directorate General had stated that a fresh application should promptly be filed in the event of a significant worsening in the prisoner's condition. The prison also failed to inform the family of his final admission to hospital, on 13 December 1993, when the patient was already terminally ill. The family only discovered that he was in hospital when they themselves tried to contact Mr. Morales Tornel. Under the circumstances, the Committee considers that the passive

⁴ See communication No. 558/1993, *Canepa v. Canada*, Views of 3 April 1997, para. 11.4.

attitude of the prison deprived the authors of information which undoubtedly had a significant impact on their family life, and which may be characterized as arbitrary interference with the family and as a violation of article 17, paragraph 1, of the Covenant. At the same time, the State party has not demonstrated that such interference was reasonable or compatible with the purposes, aims and objectives of the Covenant.

7.5 Having made this finding, the Committee considers it unnecessary to rule on the possible existence of a violation of article 7 on the basis of the same allegations.

8. In the light of the foregoing, the Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, finds that the facts before it disclose a violation of article 17, paragraph 1, of the Covenant.

9. Pursuant to article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including appropriate compensation for the violation that occurred. The State party is also under an obligation to ensure that similar violations do not occur in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, 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, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to these Views. The State party is also requested to publish the Committee's Views.

[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.]
