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International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3305/2019*, **, ***

Communication submitted by:	Apostolos Ioannis Mangouras (represented by counsel, Antonio Quirós)
Alleged victim:	The author
State party:	Spain
Date of communication:	8 November 2018 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 6 February 2019 (not issued in document form), and decision on admissibility taken on 23 July 2020 (CCPR/C/129/D/R.3305/2019)
Date of adoption of Views:	14 July 2023
Subject matter:	Right to a second hearing
Procedural issue:	Exhaustion of domestic remedies
Substantive issues:	Right to a fair trial; equality of arms; right to review by a higher tribunal
Article of the Covenant:	14 (1)–(3) and (5)
Articles of the Optional Protocol:	3 and 5 (2) (a)

1.1 The author of the communication is Apostolos Ioannis Mangouras, a national of Greece born in 1935. He claims that the State party has violated his rights under article 14 (1)–(3) and (5) of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The author is represented by counsel.

1.2 The author was the captain of an oil tanker that was caught in a storm off the coast of Galicia, Spain, on 13 November 2002. The ship sank six days later, spilling an estimated

* Adopted by the Committee at its 138th session (26 June–26 July 2023).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Farid Ahmadov, Wafaa Ashraf Moharram Bassim, Rodrigo A. Carazo, Yvonne Donders, Mahjoub El Haiba, Laurence R. Helfer, Marcia V.J. Kran, Hernán Quezada Cabrera, José Manuel Santos Pais, Soh Changrok, Kobauyah Tchamdja Kpatcha, Hélène Tigroudja and Imeru Tamerat Yigezu. Pursuant to rule 108 of the Committee's rules of procedure, Carlos Gómez Martínez did not participate in the examination of the communication.

*** The joint opinion (concurring) of Committee members Farid Ahmadov, Rodrigo A. Carazo, Yvonne Donders, Laurence R. Helfer and José Manuel Santos Pais is annexed to the present Views.

63,000 tons of oil into the sea. On 13 November 2013, following a trial that lasted nine months and involved 115 witnesses to the facts and 82 expert witnesses, the Provincial Court of A Coruña concluded that the author was not guilty of the charge of gross negligence causing environmental damage. Nevertheless, the author was convicted for the offence of disobeying orders in connection with the delay in accepting a towline and was given a prison sentence of 9 months. The Provincial Court found that none of the accused parties was liable for damages under civil law and that the author's failure to obey orders did not cause the loss and damages that resulted from the oil spill. On 20 November 2013, the author lodged an appeal in cassation against that sentence before the Supreme Court on the grounds that it had been based on an error of fact in the assessment of the evidence and the misapplication of article 556 of the Criminal Code, on serious disobedience of the authorities. The appeal hearing was held on 29 September 2015 and lasted half a day.

1.3 In a decision of 14 January 2016, the Supreme Court overturned the author's acquittal for causing environmental damage, found him guilty of that offence and sentenced him to 2 years in prison. The Supreme Court overturned the author's conviction for disobeying orders, as it was of the view that he had been convicted of causing environmental damage on the basis of that conduct and that he could not therefore be found guilty of both offences. On 23 February 2016, the author filed before the Supreme Court a motion for the annulment of the proceedings; the motion was denied in a decision issued on 11 April 2016. On 3 May 2016, the Provincial Court ordered a three-year suspension of the 2-year prison sentence that the author had been given. On 20 May 2017, the author submitted an application for *amparo*, in which he claimed that his right to due process had been violated, to the Constitutional Court. On 22 February 2017, the Constitutional Court rejected the application for want of constitutional relevance. The author claims that his conviction by the Supreme Court violated his rights under articles 14 (1) and (2) of the Covenant in that it altered the facts that had been considered established by a lower court and reached entirely new findings of fact without giving him the opportunity to be heard. He also claims that he is a victim of a violation of his right to equality of arms under article 14 (3) because he was not allowed to participate in the underwater inspections of the wreckage or informed of all the results of the tests conducted on the wreckage. Lastly, the author alleges a breach of article 14 (5) of the Covenant because the first court to convict him on charges of causing environmental damage, a conviction that he was unable to have fully reviewed, was the Supreme Court.

1.4 On 6 February 2019, pursuant to rule 92 (5) of its rules of procedure, the Committee, acting through its Special Rapporteurs on new communications and interim measures, decided to examine the admissibility of the communication separately from the merits and requested the State party to submit observations relating only to the question of admissibility.

1.5 On 23 July 2020, the Committee, acting under article 4 (2) of the Optional Protocol and rule 101 of its rules of procedure, found the communication partially admissible and asked the parties to submit their comments on the merits of the communication. The Committee was of the view that the author's claims under article 14 (1)–(3) of the Covenant had already been examined by the European Court of Human Rights and therefore found them inadmissible under article 5 (2) (a) of the Optional Protocol. However, the author's claim relating to the right to a review of his conviction by a higher court, as recognized in article 14 (5) of the Covenant, had not been examined by the European Court of Human Rights. The Committee therefore declared admissible the author's claim under article 14 (5) of the Covenant and requested the parties to submit information on the merits of those claims. For further information about the facts, the author's claims, the parties' observations and comments on admissibility and the Committee's decision thereon, see *Mangouras v. Spain*.[1]

State party's observations on the merits

2.1 In its observations of 28 May 2021, the State party adds further claims regarding the admissibility of the communication and requests the Committee to review its admissibility decision insofar as the author has not exhausted domestic remedies in relation to his claims under article 14 (5) of the Covenant. It argues that the author did not present his arguments on the right to a second hearing before the European Court of Human Rights because he did

[1] CCPR/C/129/D/R.3305/2019.

not raise the issue either in the motion filed before the Supreme Court for the annulment of the proceedings or in the application for *amparo* submitted to the Constitutional Court. In other words, the first time that the author raised the issue of a second hearing was in his application to the Committee, in which he offered no reason for not having alleged a violation of article 14 (5) of the Covenant during the domestic proceedings.

2.2 The State party submits that, under rules 99 and 102 (2) of the Committee's rules of procedure, the Committee must consider all grounds on which the communication may be found inadmissible, irrespective of whether they have been raised by the parties.[2] It argues that the Committee, having chosen to examine admissibility separately, must, before proceeding to an examination of the merits, review its decision on admissibility by taking into account all possible reasons to find the communication inadmissible, including non-exhaustion of domestic remedies. However, the Committee failed to consider article 5 (2) (b) of the Optional Protocol. The State party emphasizes that, since it is the Optional Protocol that establishes the Committee's mandate, the Committee has no authority to consider a communication that is inadmissible for any of the reasons for which a communication is to be found inadmissible. Moreover, the Committee itself has reviewed or overturned admissibility decisions if it has subsequently found a communication inadmissible.[3]

2.3 The State party, proceeding to its comments on the merits of the communication, argues that there is no violation of article 14 (5) of the Covenant. It points out that the Supreme Court, in the decision in which it convicted the author, did not review the established facts; rather, it simply reviewed the legal assessment made by the court of first instance. The State party emphasizes that, in fact, in outlining the grounds for its decision, the Supreme Court refers to the doctrine of the European Court of Human Rights on the review of acquittals and the limits that must be applied thereto.[4] The State party argues that the author did not question the Supreme Court's competence to review an acquittal in the motion for annulment of the proceedings, the application for *amparo* or his application to the European Court of Human Rights. The author merely argued that, in his case, he was not afforded the guarantees required by the doctrine of the European Court of Human Rights to conduct a review without hearing the convicted person or reviewing the evidence more generally. In other words, by his own actions during the domestic proceedings, the author did not raise the possibility of such a review or claim that the ruling of the Supreme Court undermines the right to appeal against a decision issued by a second instance.

2.4 The State party argues that it is clear from the content of the 118-page judgment that the Supreme Court conducted an exhaustive examination of the arguments made by the author in the criminal proceedings and that the Committee's doctrine under article 14 (5) regarding the review of acquittals by a higher court would therefore apply. For example, in a case in which the Supreme Court overturned a conviction on one charge and handed down a conviction on another charge while also imposing a stiffer sentence, the Committee declared inadmissible the claim of a violation of article 14 (5) made on the grounds that the evidence that was deemed decisive to the conviction was not reviewed by a higher court owing to the limited scope of the appeal in cassation.[5] The State party contends that the right to a second hearing does not include the right to appeal against a decision issued by a second instance, as recognized in article 2 (2) of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).[6] This clarification is a consequence of the need to set a logical limit on the right of appeal and also

[2] *O.K. v. Latvia* (CCPR/C/110/D/1935/2010), para. 7.4.

[3] *García Pons v. Spain* (CCPR/C/55/D/454/1991), para. 9.2, and *Gauthier v. Canada* (CCPR/C/65/D/633/1995), para 13.2.

[4] Supreme Court, Criminal Chamber, judgment No. 865/2015, 14 January 2016, pp. 34–36.

[5] *Conde v. Spain* (CCPR/C/88/D/1325/2004), para. 6.4.

[6] "Right of appeal in criminal matters: 1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this rights, including the grounds on which it may be exercised, shall be governed by law. 2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal."

reflects the importance of the higher courts, which, as a matter of principle, are higher courts because of their greater knowledge, experience and so on.

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

3.1 In his comments of 15 October 2021 on the State party's observations, the author submits that the State party's additional observations on the admissibility of the communication are ill-founded. Firstly, the author argues that the Committee has already considered the issue of exhaustion of domestic remedies in its decision on admissibility and found that there was no obstacle under article 5 (2) (b) of the Optional Protocol or rule 102 of its rules of procedure.[7] As the Committee itself acknowledged in its decision, the State party did not challenge in a timely manner the author's claim that he had exhausted domestic remedies.[8] The author emphasizes that the State party had the opportunity to do so in its observations of 6 February and 21 July 2019. He adds that the additional claims concerning admissibility do not raise any new facts or explanations that were not contained in his initial communication. Therefore, the State party's request for the Committee to review its decision on admissibility constitutes an unreasonable attempt to reopen the decision in circumstances where the State party had already had every opportunity to address the issues prior to the Committee's decision but failed to do so.

3.2 Secondly, the author argues that exhausting domestic remedies pursuant to articles 2 and 5 (2) (b) of the Optional Protocol requires the author to exhaust only those domestic remedies that have a reasonable prospect of success.[9] He stresses that, even in its recent additional submissions, the State party has not explained how the motion for annulment or the application for *amparo* would have constituted effective remedies for the alleged violation of article 14 (5) of the Covenant. He claims that the Constitutional Court has repeatedly stated that the right to a review of a conviction secured only on appeal against acquittal is not guaranteed by Spanish constitutional law,[10] in an express rejection of the Committee's jurisprudence,[11] and invokes the exceptions set forth in article 2 (2) of Protocol No. 7 to the European Convention on Human Rights.[12] He adds that, although in the case Hachuel *Moreno v. Spain* the author alleged a violation of article 14 (5) of the Covenant in his application for *amparo*, he also argued that it was not necessary to exhaust that remedy, an argument that was confirmed by the Committee.[13] Consequently, as recognized in the Committee's jurisprudence, neither the application for *amparo* nor the motion for annulment of the proceedings had a reasonable prospect of success.[14] In addition, the Constitutional Court's review of an application for *amparo* does not satisfy the standard of review required by article 14 (5).[15] Therefore, according to the Committee's jurisprudence, it was not necessary for the author to file an application for *amparo* alleging a violation of that rule.[16] Lastly, the author argues that the motion for annulment is not an effective remedy for the denial of the right to the review of a conviction. The motion for annulment is not filed before a higher tribunal; rather, it involves a review by the same court of its own decision.[17] It does not, therefore, constitute a review of a conviction by a higher tribunal.[18]

[7] *Mangouras v. Spain* (CCPR/C/129/D/R.3305/2019), para. 6.6.
[8] Ibid.
[9] *Hachuel Moreno v. Spain* (CCPR/C/90/D/1381/2005), para. 6.3, *Gomaríz Valera v. Spain* (CCPR/C/84/D/1095/2002), para. 6.4, *García Sánchez and González Clares v. Spain* (CCPR/C/88/D/1332/2004), para. 6.3, and *Conde v. Spain*, para. 6.3.
[10] Judgments No. 16/2011 of 28 February, p. 8, and No. 60/2008 of 26 May, pp. 20 and 21.
[11] See *Gomaríz Valera v. Spain*.
[12] Judgments No. 60/2008 of 26 May, p. 8, No. 296/2005 of 21 November, p. 10, and No. 120/1999 of 28 June, pp. 8 and 9.
[13] *Hachuel Moreno v. Spain*, para. 6.3.
[14] *Gomaríz Valera v. Spain*, para. 6.4.
[15] *Hachuel Moreno v. Spain*, para. 7.2.
[16] *Gomaríz Valera v. Spain*, para. 6.4.
[17] Organic Act No. 6/1985 on the Judiciary, art. 241.
[18] Human Rights Committee, general comment No. 32 (2007), para. 48, *Bandajevsky v. Belarus* (CCPR/C/86/D/1100/2002), para. 10.13, and *Velásquez Echeverri v. Colombia* (CCPR/C/129/D/2931/2017), para. 8.3.

3.3 On the merits, the author argues that the State party appears to assert that article 14 (5) of the Covenant is satisfied in all circumstances where the domestic criminal procedure provides for second instance proceedings. According to the State party, article 14 (5) does not guarantee the right to a review of a conviction handed down by a higher tribunal, even if the conviction is handed down when the prosecution appeals against an acquittal. However, this interpretation is clearly erroneous. This norm guarantees the right to a review of convictions and sentences by a higher tribunal. The author argues that an appeal against an acquittal does not constitute a review of a conviction by a higher tribunal.[19] He adds that the expression "according to law", in article 14 (5) of the Covenant, is not intended to leave the very existence of the right to a review of a conviction to the discretion of States parties; rather, it refers to the modalities through which such a review must be carried out.[20] The author emphasizes that the State party did not enter a reservation to the article in question and therefore has an obligation to guarantee this right in all circumstances, irrespective of the provisions of article 2 (2) of Protocol No. 7 to the European Convention on Human Rights.[21] Thus, the absence of any possibility of a review of a conviction by a higher tribunal, including in circumstances where the person is convicted on appeal, constitutes a clear violation of article 14 (5) of the Covenant.

3.4 Lastly, with regard to the State party's claims concerning the Committee's position in *Conde Conde v. Spain* (see para. 2.4), the author argues that: (a) the Committee declared inadmissible only the part of the communication that referred to the manner in which the Supreme Court had conducted the review of the acquittal; (b) the Committee declared the author's communication admissible in relation to the fact that he was convicted by a second instance, the Supreme Court, on charges of which he had previously been acquitted and that his sentence was stiffened for other offences, without the possibility of a review by a higher tribunal; and (c) the Committee ultimately found that the State party had violated the author's right under article 14 (5) of the Covenant, recalling that "the absence of any right of review in a higher court of a sentence handed down by an appeal court, where the person was found not guilty by a lower court, is a violation" of that article.[22]

Issues and proceedings before the Committee

Consideration of admissibility

4.1 The Committee notes the State party's request for the Committee to review its decision on admissibility insofar as the author did not claim a violation of article 14 (5) during the domestic proceedings, thereby, according to the State party, making the communication inadmissible pursuant to article 5 (2) (b) of the Optional Protocol (see paras. 2.1 and 2.2). In this regard, the Committee also notes that, in accordance with rule 101 (5) of its rules of procedure, it may review in whole or in part a decision that a communication is admissible in the light of any new information brought to its attention.[23] In the present case, the Committee notes the author's argument that the Committee had already decided that there was no obstacle under the terms of article 5 (2) (b) of the Optional Protocol and that, in its observations of 6 February and 21 July 2019, the State party itself had the opportunity, which it did not avail itself of, to challenge in a timely manner the author's claim that he had exhausted domestic remedies (see para. 3.1). The Committee is of the view that the arguments now made by the State party could have been made when it submitted its observations on admissibility.

4.2 The Committee also notes that the author, in his motion for annulment, expressly emphasized that he had been convicted by a higher tribunal following an acquittal at first instance in connection with an environmental offence. The Committee notes that the motion for annulment was used precisely because the ordinary and extraordinary appeals procedures

[19] *Gomaríz Valera v. Spain*, para. 7.1.

[20] Human Rights Committee, general comment No. 32 (2007), paras. 45 and 48, *Gomaríz Valera v. Spain*, para. 7.1, *Terrón v. Spain* (CCPR/C/82/D/1073/2002), para. 7.4, and *García Sánchez and González Clares v. Spain*, para. 7.2.

[21] *Gomaríz Valera v. Spain*, paras. 4.4 and 7.1.

[22] *Conde v. Spain*, para. 7.2.

[23] See, mutatis mutandis, *Gauthier v. Canada*, para. 13.2, and *García Pons v. Spain*, para. 9.2.

could not be used to challenge the Supreme Court judgment (Criminal Procedure Act, art. 904). Therefore, even if it is understood that the author did not expressly invoke article 14 (5) of the Covenant, he did expressly invoke the ultimate aim of the right enshrined in this article – namely, that convictions and sentences should be reviewed by a higher tribunal.

4.3 The Committee also notes the author's argument that neither the motion for annulment of the proceedings nor the application for *amparo* would have been effective remedies for the alleged violation of article 14 (5) of the Covenant (see para. 3.2). In addition, the Committee notes the author's argument that the Constitutional Court has repeatedly stated that national constitutional law does not guarantee the right to appellate review of a conviction following an acquittal. The Committee recalls that only those remedies that have a reasonable prospect of success need be exhausted.[24] The Committee also recalls that, when the case law of the highest domestic court has settled the point, ruling out any chance of a successful appeal to the domestic courts, authors are not required under the Optional Protocol to exhaust domestic remedies.[25] Lastly, the Committee recalls its jurisprudence according to which, in cases where an individual is convicted at second instance having previously been acquitted at first instance, an application for *amparo* is not an effective remedy for the purposes of an alleged violation of article 14 (5) of the Covenant.[26] In view of the author's arguments on the jurisprudence of the Constitutional Court in force at the time of his conviction and the State party's lack of arguments on the effectiveness of the remedies available in the present case, the Committee is of the view that there is nothing to justify a departure from the Committee's established jurisprudence on the matter. The Committee is therefore of the opinion that a review of its admissibility decision is not warranted and that article 5 (2) (b) of the Optional Protocol is not an obstacle to the admissibility of the communication, and proceeds to its consideration of the merits.

Consideration of the merits

5.1 The Committee has considered the present communication in the light of all the information submitted to it by the parties, as required under article 5 (1) of the Optional Protocol.

5.2 The Committee notes the author's argument that the first court that convicted him of causing environmental damage was the Supreme Court and that he was unable to obtain a full review of his conviction.[27] The Committee also notes the State party's argument that the Supreme Court conducted a thorough review of the author's criminal case, meaning that the Committee's doctrine on the review of acquittals by a higher court would be applicable (see para. 2.4). However, the Committee notes that the author's claims under article 14 (5) of the Covenant relate not to the level of the review conducted by the Supreme Court but to the impossibility of obtaining a review of his conviction, which was handed down at second instance by the highest court. Accordingly, the Committee takes the view that the substantive issue on which it must make a determination is whether, by not providing an opportunity for the author to have his conviction at second instance reviewed by a higher tribunal, the State party violated his rights under article 14 (5) of the Covenant.

5.3 The Committee notes that article 14 (5) of the Covenant recognizes the right of anyone convicted of an offence to have his or her conviction and sentence reviewed by a higher tribunal according to law. The Committee recalls that this right is violated if the conviction of a person previously acquitted at first instance cannot be reviewed by a higher court.[28] In other words, the right to a review of convictions and sentences cannot be impaired by the fact

[24] *García Sánchez and González Clares v. Spain*, para. 6.3, *Conde Conde v. Spain*, para. 6.4, and *Gomaríz Valera v. Spain*, para. 3.3.

[25] *García Sánchez and González Clares v. Spain*, para. 6.3, *Conde Conde v. Spain*, para. 6.4, and *Gomaríz Valera v. Spain*, para. 3.3.

[26] *García Sánchez and González Clares v. Spain*, para. 6.3, *Conde Conde v. Spain*, para. 6.4, and *Gomaríz Valera v. Spain*, para. 3.3.

[27] *Mangouras v. Spain* (CCPR/C/129/D/R.3305/2019), para. 3.5.

[28] *Jaddoe v. Netherlands* (CCPR/C/135/D/3256/2018), para. 11.3, general comment No. 32 (2007), para. 47, *Hachuel Moreno v. Spain*, para. 7.2, *García Sánchez and González Clares v. Spain*, para. 7.2, *Conde Conde v. Spain*, para. 7.2, and *Gomaríz Valera v. Spain*, para. 7.1.

that a person acquitted at first instance is convicted on appeal by a court of second instance,[29] even when the court in question is the highest judicial instance.[30]

5.4 The Committee takes note of the State party's argument that the Supreme Court judgment in which the author was convicted of gross negligence causing environmental damage does not review the established facts, but simply reviews the legal assessment made by the court of first instance, within the limits imposed by the doctrine of the European Court of Human Rights (see para. 2.3). However, the Committee notes the author's argument that a review of an acquittal does not constitute a review of a conviction by a higher tribunal (see para. 3.3). The Committee also notes the State party's argument that the right to a second hearing does not include the right to appeal against a decision issued by a second instance, as recognized in article 2 (2) of Protocol No. 7 to the European Convention on Human Rights (see para. 2.4). However, the Committee notes that the wording of article 14 (5) is different from that of article 2 (2) of Protocol No. 7 to the European Convention on Human Rights and does not provide for exceptions. The Committee also notes the author's argument that the State party did not enter a reservation to article 14 (5) of the Covenant and is therefore under an obligation to guarantee this right in all circumstances, irrespective of the provisions of article 2 (2) of Protocol No. 7 to the European Convention on Human Rights.

5.5 In the present case, the Committee notes that the Provincial Court of A Coruña sentenced the author to 9 months' imprisonment for the offence of disobeying orders but acquitted him of gross negligence causing environmental damage.[31] The Committee notes that the Supreme Court overturned the author's acquittal for the environmental offence and sentenced him to 2 years' imprisonment for it, and at the same time overturned his conviction for disobeying orders, deeming it to be subsumed by the environmental offence.[32] The Committee emphasizes that, even when a conviction handed down in the context of an appeal against an acquittal is based on purely technical grounds such as the statute of limitations, the convicted person is entitled to have the conviction and sentence reviewed under the terms set forth in article 14 (5) of the Covenant.[33] Thus, irrespective of whether the Supreme Court included new findings of fact or simply assessed points of law,[34] the Committee notes that the author was first convicted at second instance for an offence of which he had been acquitted at first instance and given a stiffer sentence and that he did not have the possibility of obtaining a review of his conviction and sentence as required under the Covenant. The Committee thus concludes that the State party has violated the author's right under article 14 (5) of the Covenant.

6. The Committee, acting under article 5 (4) of the Optional Protocol, finds that the facts of which it has been apprised constitute a violation by the State party of article 14 (5) of the Covenant.

7. In accordance with article 2 (3) (a) of the Covenant, the State party must provide the author with an effective remedy to make it possible for his conviction and sentence to be reviewed under the terms set forth in article 14 (5) of the Covenant. The State party is also under an obligation to take all steps necessary to preventing similar violations from occurring in the future. In this connection, the Committee reiterates that, in accordance with its obligation under article 2 (2) of the Covenant, the State party should ensure that the relevant legal framework is in conformity with the requirements of article 14 (5) of the Covenant.

8. 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 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 and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from

[29] See also *García Sánchez and González Clares v. Spain*, para. 7.2.

[30] See, mutatis mutandis, general comment No. 32 (2007), para. 47, *Terrón v. Spain*, para. 7.4, and *Garzón v. Spain* (CCPR/C/132/D/2844/2016), para. 5.12.

[31] *Mangouras v. Spain* (CCPR/C/129/D/R.3305/2019), para. 2.7.

[32] Ibid., para. 2.9.

[33] *Hachuel Moreno v. Spain*, para. 7.2, and *Conde Conde v. Spain*, para. 7.2.

[34] *Mangouras v. Spain* (CCPR/C/129/D/R.3305/2019), para. 3.3.

the State party, within 180 days, information about the measures it has taken to give effect to the present Views. The State party is also requested to publish the present Views and the Committee's decision on admissibility and to have them widely disseminated.

Annex

[Original: English]

Joint opinion of Committee members Farid Ahmadov, Rodrigo A. Carazo, Yvonne Donders, Laurence R. Helfer and José Manuel Santos Pais (concurring)

1. We agree with the Committee's finding of a violation of article 14 (5) of the Covenant. We write separately to clarify the relationship between article 14 (5) of the Covenant and article 2 (2) of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). In particular, where a State is a party to both treaties without an applicable reservation, it is bound to comply fully with both provisions through their careful and harmonious interpretation.[1] This means – contrary to the position of the State party and its Supreme Court in the present case (see paras. 2.3 and 2.4) – that a State party cannot rely on the narrower scope of article 2 (2) of Protocol No. 7 as a justification for failing to give effect to the right to appeal guaranteed by article 14 (5) of the Covenant, which has a wider scope.[2]

2. The Committee correctly recognizes that "the wording of article 14 (5) is different from that of article 2 (2) of Protocol No. 7 … and does not provide for exceptions" (see para. 5.4). The former provision has a wider application than the latter provision in several respects. For example, it guarantees the right to appeal even when a person is tried at first instance by the highest tribunal of a State party, as is provided for certain high-level officials in some countries. Article 14 (5) of the Covenant also applies to a conviction imposed by a court of final instance following an acquittal by a lower court, as well as when an appellate court enhances the sentence imposed by a tribunal of first instance.[3]

3. In recognition of this more expansive scope, a number of States parties to the Covenant have submitted reservations to article 14 (5) to exclude the right to appeal in these situations (although several of these reservations were later withdrawn).[4] Spain, however, has not filed such a reservation (see para. 5.4), and the Committee has repeatedly found violations by Spain of article 14 (5) of the Covenant that likely would not have contravened article 2 (2) of Protocol No. 7 to the European Convention on Human Rights.[5]

4. The State party and its courts have nevertheless continued to rely on article 2 (2) of Protocol No. 7 as reflecting "the need to set a logical limit on the right of appeal" (see para. 2.4). This argument may appear to be superficially attractive. If an individual is criminally prosecuted before a country's highest court or is convicted by such a court following an acquittal by a lower tribunal, one may reasonably ask: what other judicial institution can further review the conviction and sentence?

[1] A/CN.4/L.682, para. 34.

[2] This view is reinforced by article 53 of the European Convention on Human Rights, which expressly precludes interpreting the provisions of the Convention as "*limiting* or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or *under any other agreement* to which it is a party" (emphasis added).

[3] See the Committee's general comment No. 32 (2007), para. 47; and *Conde Conde v. Spain* (CCPR/C/88/D/1325/2004), para. 7.2.

[4] See https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND; and William A. Schabas, *Nowak's CCPR Commentary*, third revised edition (Norbert Paul Engel, 2019), p. 432.

[5] See, for example, *Hachuel Moreno v. Spain* (CCPR/C/90/D/1381/2005), *García Sánchez and González Clares v. Spain* (CCPR/C/88/D/1332/2004), *Gomariz Valera v. Spain* (CCPR/C/84/D/1095/2002) and *García Pons v. Spain* (CCPR/C/55/D/454/1991).

5. In fact, several countries have established procedures to review criminal convictions handed down by their highest tribunals, either at first instance or following acquittals by lower courts. For example, in response to the Committee's conclusion that Colombia violated article 14 (5) of the Covenant by failing to provide an appeal of a conviction by the Supreme Court of Colombia following acquittals by lower tribunals,[6] the country amended its Constitution to create a mechanism for second instance review before a new chamber of the Supreme Court.[7] In Argentina, the highest criminal tribunal (the Cámara Federal de Casación Penal) reviews convictions by that tribunal following acquittals by lower courts by forming a new chamber with different judges.[8] That procedure was created by the country's Supreme Court in response to a judgment of the Inter-American Court of Human Rights, whose jurisprudence on the right to appeal is essentially identical to that of the Committee.[9] Spain itself has also adopted a similar procedure for certain judgments by its Supreme Court's Sala de lo Contencioso Administrativo. When that Chamber renders judgments acting in the first instance, a new chamber formed by the President of the Supreme Court, the Presidents of the Chambers and the oldest and newest member of each Chamber can review those judgments.[10]

6. These examples illustrate some of the ways in which States parties can guarantee the right to appeal under article 14 (5) of the Covenant even where a criminal conviction or sentence has been imposed by the highest tribunal. The argument by Spain that article 2 (2) of Protocol No. 7 supports the notion that there must be "a logical limit on the right of appeal" is therefore unpersuasive, in our view.[11] The argument is also inconsistent with the pro homine principle.[12] According to that principle, "where States have undertaken obligations under parallel co-existing instruments of protection of human rights", the treaty provision that is most favourable to the individual must prevail.[13]

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[6] See *Calderón Bruges v. Colombia* (CCPR/C/104/D/1641/2007).

[7] See Legislative Act No. 1 of 2018 (modifying arts. 186, 234 and 235 of the Political Constitution and implementing the right of appeal and to challenge the first sentence imposed upon conviction). The Constitutional Court later confirmed the retroactivity of this constitutional amendment, in judgment SU 146/20.

[8] "Duarte, Felicia s/ recurso de casación", *Fallos* 337:901, paras. 7, 9 and 10; and "Recurso de hecho deducido por la defensa en la causa P., S.M. y otro s/ homicidio simple", *Fallos* 342:2389, paras. 8–13.

[9] Inter-American Court of Human Rights, *Mohamed v. Argentina*, decision of 23 November 2012, paras. 92–95 (rejecting the State's attempt to restrict the right to appeal guaranteed by art. 8 (2) (h) of the American Convention on Human Rights in the light of art. 2 (2) of Protocol No. 7, and instead interpreting art. 8 (2) (h) in parallel with art. 14 (5) of the Covenant).

[10] Organic Law No. 6/1985, art. 61.

[11] In this regard, we respectfully disagree with the contrary views expressed in the separate opinions of Committee members Gentian Zyberi and Imeru Tamerat Yigezu in *Jaddoe v. Netherlands* (CCPR/C/135/D/3256/2018) and Ruth Wedgwood in *Gomariz Valera v. Spain*.

[12] The *pro homine* principle is embodied in numerous international human rights instruments. See, for example, the Covenant, art. 5 (2); the European Convention on Human Rights, art. 53; and the American Convention on Human Rights, art. 29 (b).

[13] A.A. Cançado Trindade, "Co-existence and coordination of mechanisms of international protection of human rights (at global and regional levels)", *Collected Courses of the Hague Academy of International Law*, vol. 202 (1987), p. 121. See also Inter-American Court of Human Rights, Compulsory membership in an association prescribed by law for the practice of journalism, advisory opinion, 13 November 1985, para. 52 ("if in the same situation both the American Convention and another international treaty are applicable, the rule most favourable to the individual must prevail").