



**International covenant
on civil and
political rights**

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HUMAN RIGHTS COMMITTEE
Eighty-fifth session
17 October – 4 November 2005

DECISION

Communication No. 1323/2004

<u>Submitted by:</u>	Amando Lozano Aráez, Francisco Aguilar Martínez, José Lozano Rodríguez, Felicita Baño Franco and Juana Baño Franco (represented by counsel, Mr. Jose Luis Mazón Costa)
<u>Alleged victims:</u>	The authors
<u>State party:</u>	Spain
<u>Date of initial communication:</u>	4 November 2004
<u>Date of decision:</u>	28 October 2005

* Made public by decision of the Human Rights Committee.

Subject matter: Aggravation of sentence on appeal without further possibility of having conviction reviewed by a higher court

Procedural issues: Incompatibility of claim *ratione materiae*

Substantive issues: Right to have conviction and sentence reviewed by a higher tribunal according to law

Articles of the Covenant: 14, paragraph 5

Articles of the Optional Protocol: 3

[ANNEX]

ANNEX

DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER
THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS

Eighty-fifth session

concerning

Communication No. 1323/2004**

Submitted by: Amando Lozano Aráez, Francisco Aguilar Martínez, José Lozano Rodríguez, Felicita Baño Franco and Juana Baño Franco (represented by counsel, Mr. Jose Luis Mazón Costa)

Alleged victims: The authors

State party: Spain

Date of initial communication: 4 November 2004

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

Meeting on 28 October 2005

Adopts the following:

DECISION ON ADMISSIBILITY

1 The authors of the communication, dated 4 November 2002, are Armando Lozano Aráez, Francisco Aguilar Martínez, José Lozano Rodríguez, Felicita Baño Franco and Juana Baño Franco. They claim to be victims of a violation of article 14, paragraph 5, of the Covenant by Spain. The Optional Protocol entered into force for Spain on 25 April 1985. The authors are represented by counsel, Mr. Jose Luis Mazón Costa.

Factual background

2.1 On 26 February 1991, the authors created a limited company, “A.B.L. Alimentación, S.L.”, domiciled in Spain, with the trade purpose of producing and repairing canned food

** The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O’Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

machinery. In November 1993, this company incurred debts amounting to almost 8,000,000 PTA (48,000€ approx.) with two other commercial companies, “Comercial Stainless Steel, S.A.” and “Comercial Industrial García, S.A.” (creditor companies). In March 1994, the authors created a new commercial company with the same trade purpose, the same premises, machinery and workers as the former company. According to the judgement of the Court of First Instance of Murcia, through this operation, the authors “emptied the previous company of every content, asset and activity without liquidating or dissolving it.”

2.2. On 25 May 2001, the Criminal Court of First Instance (*Juzgado de lo Penal*) of Murcia, convicted the authors for concealment of property to the prejudice of creditors (*alzamiento de bienes*) to four months imprisonment. The judgment made no reference to the author’s civil liability.

2.3 The sentence was appealed by the representatives of both creditor companies, which claimed inclusion of civil liability of the authors for the amounts due. The public prosecutor adhered to this appeal. On 20 October 2001, the Court of Appeal (*Audiencia Provincial*) of Murcia upheld the conviction of the authors and additionally declared their liability, considering that, according to existing evidence, the debt was due and payable, and sentenced them to pay 9,163,330 PTA (55,000€ approx.) to the creditor companies as compensation for damages.

2.4 The authors acknowledge that they did not file an appeal (*amparo*) in the Constitutional Court. They consider this remedy to be futile, because the Constitutional Court has ruled that the fact that an accused acquitted at the first instance who is later convicted by a court of second instance, without possibility to appeal, is not contrary to article 14, paragraph 5, of the Covenant. The jurisprudence of the Constitutional Court relies on the assumption that the judges of the Court of Appeal have a better insight, experience and skills than those of the lower court.

The complaint

3 The authors claim a violation of article 14, paragraph 5, of the Covenant, because the Court of Appeal aggravated their conviction, depriving them of the possibility of having this conviction reviewed by a higher tribunal. According to article 847 of the Spanish Criminal Procedure Act (*Ley de Enjuiciamiento Penal*), no appeal is possible against the judgments of the Court of Appeal (*Audiencia Provincial*). The authors contend that, unlike other States parties, Spain has not made any reservation to article 14, paragraph 5, of the Covenant.

Consideration of the Committee

4.1 Pursuant to rule 93 of its Rules of Procedure, before considering any claim contained in a complaint, the Human Rights Committee must determine whether it is admissible under the Optional Protocol to the Covenant on Civil and Political Rights.

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

4.3 With regard to the alleged violation of article 14, paragraph 5, the Committee recalls that this provision enshrines the right to appeal a criminal conviction to a higher court. The

Committee notes that the Court of Appeal reviewed and confirmed the authors' criminal conviction, which was not imposed at the appellate level but at first instance level. The imposition of compensation for damages does not amount to an aggravation of the criminal conviction but is of civil nature. It, therefore, falls outside the scope of article 14, paragraph 5. Accordingly, the Committee finds that this claim is incompatible *ratione materiae* with article 14, paragraph 5, or the Covenant, and declares it inadmissible under article 3 of the Optional Protocol.

4.4 The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under article 3 of the Optional Protocol;
- (b) That the decision be transmitted to the State party and to the author.

[Adopted in English, French and Spanish, the English 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.]
