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Communication No. 1943/2010

Decision adopted by the Committee at its 107th session (11–28 March 2013)

Submitted by:	H.P.N. (represented by counsel, Didier Rouget)
Alleged victim:	The author
State party:	Spain
Date of communication:	3 February 2010 (initial submission)
Document reference:	Special Rapporteur's rule 92/97 decision, transmitted to the State party on 14 May 2010 (not issued in document form)
Date of decision:	25 March 2013
Subject matter:	The author's conviction for the same offence for which he had allegedly already been convicted in the past
Procedural issues:	Failure to exhaust domestic remedies; failure to substantiate allegations
Substantive issues:	Prohibition of cruel treatment; rehabilitative aim of sentencing; right to have a conviction and sentence reviewed by a higher tribunal; prohibition of double jeopardy
Articles of the Covenant:	Articles 7, 10 and 14 (paras. 5 and 7)
Articles of the Optional Protocol:	Articles 2 and 5 (para. 2 (b))

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Annex

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (107th session)

concerning

Communication No. 1943/2010*

Submitted by:	H.P.N. (represented by counsel, Didier Rouget)
Alleged victim:	The author
State party:	Spain
Date of communication:	3 February 2010 (initial submission)

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

Meeting on 25 March 2013,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. H.P.N., a French national born on 6 January 1948. He claims to be the victim of a violation by Spain of his rights under articles 7, 10 and 14 (paras. 5 and 7) of the Covenant. He is represented by counsel, Mr. Didier Rouget. At the time of the communication's submission, the author was being detained in Puerto III Prison in Cádiz.

The facts as submitted by the author

2.1 The author is a member of Euskadi Ta Askatasuna (ETA). He was arrested by the Spanish authorities on 2 April 1990 in Santiponce (Seville) and charged with involvement in numerous attacks connected to the ETA organization. He was subsequently tried and convicted, on different dates, on 26 charges for which he received prison sentences totalling 5,145 years. Among these was an 11-year sentence handed down on 18 December 1990 by the National High Court (*Audiencia Nacional*) on the charge of membership of an armed group. Under the 1973 Criminal Code in force at the time the offences were committed, the maximum term of sentence execution could not exceed 30 years. This limit, combined with

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kaelin, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabian Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

the sentence-reducing credits provided for by law, meant that the author should have been freed at the end of 2009.

2.2 A total of 64 ETA members serving prison sentences in excess of 30 years were freed between 1996 and 2004 in application of the aforementioned legal provision, generating a huge public outcry. Faced with this situation, the executive and judicial branches of Government announced that they would use all possible means to prevent the release of prisoners sentenced in similar circumstances. The author alleges that the Minister of Justice stated that he would do everything in his power to bring new charges against these persons and thus prevent their release, in view of their continuing ties with the ETA organization.

2.3 On 26 November 2002, the French authorities searched a house in Bergerac (Dordogne, France), which had been occupied by Mr. J.A.O.G. and Mr. A.M.G. These persons had been arrested and charged with planning acts of terrorism and other offences connected to ETA. During the search, the authorities found a letter apparently written by the author from prison and addressed to these two members of the ETA cell in France. As a result, Madrid Investigating Court No. 5 instituted proceedings against the author on charges of "membership of an armed group" and "conspiracy or intent to commit terrorist offences".

2.4 On 2 February 2007, the National High Court acquitted the author on the charge of "conspiracy or intent to commit terrorist offences" but ruled that the author had re-established links with the ETA leadership. It therefore found him guilty of the offence of "membership of an armed group", with the aggravating circumstance of recidivism, and sentenced him to an additional prison term of 11 years. The National High Court ruled that, even if against his will, the author's detention in 1990 had interrupted his active involvement with ETA. However, he had managed to re-establish his links with the organization in 2001. According to the judgement, the seized letter showed that the author had resumed his active involvement with ETA, playing an active part in the organization and inciting acts of terrorism using car bombs in 2001 and 2002.

2.5 The author filed an appeal in cassation with the Supreme Court, citing a violation of criminal law and constitutional provisions and claiming that the National High Court's judgement violated the fundamental principles of legality in criminal proceedings in connection with the *non bis in idem* rule, as the Supreme Court's case law established that membership of an armed group was an offence of a continuing nature that was not limited in time. Consequently, in order for the same offence to have been committed again, the period of membership of the armed group would need to have been ended and a new decision to join the organization subsequently taken. This did not apply in his case since he had not ceased to be a member of ETA. The letter seized in France on which the new charge was based could be viewed only as material evidence of the associative links for which he had already been convicted. The author also claimed that the main purpose of the new charge was to prevent his release, and that his right to be presumed innocent, his right to a defence and his right to a fair trial had been violated as he had been convicted without sufficient evidence.

2.6 On 2 November 2007, the Supreme Court dismissed the appeal in cassation. According to the judgement, which the author provided, the Supreme Court observed that the offence of membership of an armed group might be considered to consist of three strata: a primary stratum, requiring the existence of an armed group or terrorist organization; a subjective stratum, requiring the intent to belong to or join this group on a permanent basis or for an indefinite period, during which the militant agrees to contribute to the ends pursued by the illegal group; and a material or objective stratum, entailing carrying out or being able to carry out collaborative activities which help the group to achieve these ends. On this basis, in line with the National High Court's reasoning, the Supreme Court found

that upon the author's admission to prison there had been a physical rupture of his association with ETA and that this rupture was evident for some time. This "physical" or material rupture was followed by the judicial rupture associated with the conviction for membership of an armed group which interrupted a period of association with ETA for the author. From the legal point of view, this meant the end of a period of criminal activity within the group. The Supreme Court adds that the author's intent, as manifested in acts of cooperation and collaboration, to maintain his association with the terrorist organization after being convicted of membership constituted an additional transgression and did not involve a violation of the *non bis in idem* principle. Rather, the author committed another offence of the same nature through different acts or activities that had not until then been prosecuted. The Supreme Court also found that the author had had the opportunity to defend himself on all the charges, which were based on objective facts, not on personal considerations or considerations underpinned by political reasons, and that the evidence was valid and proved that he was a member of ETA. According to the Supreme Court, the letter seized in France made reference to other earlier correspondence, demonstrating that the author's contact with ETA was not isolated and that he had managed to re-establish a stable channel of active communication with the organization. It therefore upheld the author's conviction on the charge of membership of an armed group.

2.7 On 2 January 2008, the author applied to the Constitutional Court for *amparo* against the judgements issued by the National High Court and the Supreme Court on 2 February and 2 November 2007, respectively, alleging violations of his right to effective judicial protection, his right to a defence, his right to be informed of the charges against him, his right to a public hearing subject to all legal safeguards and his right to equality before the law and also of the principles of legality and legal certainty. The application made an opening reference to violations of the latter two principles, on the basis that the aim of custodial sentences and security measures should be rehabilitation and social reintegration.[1]

2.8 On 18 February 2009, the Constitutional Court dismissed the author's application for *amparo* as it failed to discern in his case the special constitutional significance that is a condition of admissibility pursuant to article 50.1 (b) of the Organic Act on the Constitutional Court.

2.9 The author claims that he has exhausted all domestic remedies and adds that there is no specific domestic remedy for challenging the cumulative sentencing system and the violations of articles 7 and 10 of the Covenant to which this system gives rise.

The complaint

3.1 The author claims that the State party breached its obligations under articles 7, 10 and 14 (paras. 5 and 7) of the Covenant.

3.2 The State party's cumulative sentencing system allows for persons to be sentenced notionally to hundreds of years' imprisonment, although in practice the maximum term of imprisonment permitted under the Criminal Code in force in 1995 was 40 years. This system constitutes inhuman treatment and is in breach of articles 7 and 10 of the Covenant. In accordance with the Covenant, no one should be subjected to cruel, inhuman or degrading treatment or punishment and the essential aim of the penitentiary system should in all cases be the reformation and social rehabilitation of offenders. Although in the final analysis cumulative sentences are purely notional, a total sentence that exceeds a person's

[1] However, the Committee notes that these allegations were not substantiated subsequently in the course of the *amparo* appeal.

life expectancy has a serious impact on a detainee's psychological health and keeps them in a state of mental despondency devoid of future prospects, this being at odds with a system that should be seeking to achieve offenders' effective social reintegration.

3.3 The author maintains that the State party violated article 14, paragraph 5, of the Covenant, in that it denied him the right to appeal and to have a higher tribunal review the conviction and sentence handed down by the National High Court in 2007. Organic Act No. 19/2003, amending Organic Act No. 6/1985 on the judiciary, does not fully guarantee access to a second hearing in criminal cases. Sentences imposed by the National High Court can be appealed in cassation before the Supreme Court. However, access to the Supreme Court is restricted as the Court is not able to review every element considered in the proceedings that resulted in the first instance judgement. Thus, since there was no possibility of appealing against the first instance judgement, the State party violated article 14, paragraph 5, of the Covenant.

3.4 In relation to article 14, paragraph 7, the author claims that after his arrest in 1990, as a member of ETA he was convicted for the offence of "membership of an armed group". However, in 2005, while in prison, the author was again charged with the same offence and on 2 February 2007 he was convicted by the National High Court. The author maintains that he could not be convicted a second time for belonging to ETA and that the National High Court's 2007 judgement constitutes double punishment in violation of the *non bis in idem* principle established in article 14, paragraph 7, of the Covenant. In accordance with the Supreme Court's case law,[2] membership of an armed group does not cease with the commission of an offence but is maintained by the author's criminal intent for as long as the unlawful situation created continues, the offence being of a continuing nature that is not limited in time. The offence ends either when the perpetrator decides to put an end to the unlawful situation by leaving the armed group or upon his expulsion from it. Thus, for a new offence to be found without violating the *non bis in idem* principle, the period of membership of an armed group would need to have been ended and a new decision to rejoin the group subsequently taken. The author further alleges that the aim of the new charge against him was to prevent his release. This explains why the judicial proceedings were initiated in 2005, whereas the events on which the new criminal trial was based, that is, the seizure of the letter in France, occurred at the end of 2002. The author denies being the writer of the letter dated 1 June 2001 that had allegedly been addressed to ETA members. He points out, moreover, that for a new offence to have been committed, specific concrete activities, which in his case did not exist, would have to have been carried out. A simple expression of ideological support for an organization such as ETA, from within a prison cannot constitute the basis for a charge of membership of the organization, and does not in itself provide evidence of this offence.

State party's observations on admissibility

4.1 On 14 July 2010, the State party submitted its observations on admissibility to the Committee and asked for the communication to be declared inadmissible under articles 5, paragraph 2 (b), 3 and 2 of the Optional Protocol on the grounds of failure to exhaust domestic remedies and manifest lack of substantiation, respectively.

4.2 Domestic judicial remedies were not exhausted, as the application for *amparo* lodged with the Constitutional Court was dismissed owing to an inexcusable omission attributable to a lack of procedural expertise on the part of the author, in that he failed to explain in his petition the special constitutional significance of the application.

[2] The author refers to Supreme Court judgements No. 1117/2003 of 19 July and No. 149/2007 of 12 February.

4.3 In relation to articles 7 and 10 of the Covenant, the State party likewise argues that the author did not exhaust domestic remedies. In neither the appeal in cassation nor the application for *amparo* was any reference made to the cumulative sentencing system, nor did the author state that the system constitutes cruel, inhuman or degrading treatment. Furthermore, these allegations are not sufficiently substantiated, as the author limits himself to making a general reference to the cumulative sentencing system without specifying which facts allegedly constituted violations. The 1973 Criminal Code, under which the author was tried for the offences committed prior to his arrest and imprisonment in 1991, established a cumulative sentencing system, although in practice the maximum term of imprisonment allowed was 30 years. Subsequently, the 1995 Criminal Code maintained this system but raised the maximum prison term allowed to 40 years. The State party further adds that, in another procedure initiated by the author, the Supreme Court issued a ruling on the execution of cumulative sentences and the criterion for determining the date of definitive sentence completion, taking account of ordinary and extraordinary sentence reductions earned through work.[3] The application of this ruling was being queried before the Constitutional Court by the author, as well as by others, at the time of submission of the State party's observations.[4] However, these issues were addressed neither in the judgement issued by the National High Court nor in the Supreme Court's 2007 judgement, both of which are relevant to the facts of this communication. The author's attempt to challenge the term of imprisonment to which he had previously been sentenced by various final judgements of the National High Court handed down between 1991 and 1996 is therefore unjustified. These sentences are cumulative in accordance with the 1973 Criminal Code and their execution is unconnected to the trials at the origin of this communication.

4.4 In relation to the allegations concerning article 14, paragraph 5, of the Covenant, the State party likewise observes that domestic remedies were not exhausted, since none of the appeals filed by the author challenged the fact that the conviction and sentence handed down by the National High Court could not be reviewed by a higher tribunal, as provided in article 14, paragraph 5, of the Covenant. In addition, this allegation is not sufficiently substantiated and is limited to generic references to alleged restrictions on the Supreme Court's powers of review in appeals in cassation, without specifying which facts or allegations were not taken into consideration and reviewed by the Supreme Court when it heard the appeal in cassation brought before it. In fact, in the appeal in cassation filed by the author the Supreme Court was able to review the National High Court's judgement on the basis of the facts, evidence and law. The State party recalls that the Committee has declared communications relating to violations of article 14, paragraph 5, of the Covenant inadmissible on grounds of insufficient substantiation.[5]

State party's observations on the merits

5.1 On 16 November 2010, the State party submitted its observations on the merits of the communication and asked the Committee to declare the communication inadmissible or, alternatively, that there has been no violation of the Covenant.

5.2 The State party reiterates the arguments put forward with regard to the admissibility of the communication. It also observes that the author was arrested on 2 April 1990 in a car

[3] The State party refers to judgement No. 197/2006 of 28 February.

[4] The State party refers to applications for *amparo* Nos. 893/2006, 5560/2006, 7325/2006, 7991/2006, and 10112/2006.

[5] The State party refers to the Committee's case law in relation to communications No. 1305/2004, *Villamon Ventura v. Spain*, decision on admissibility adopted on 31 October 2006; No. 1489/2006, *Rodríguez Rodríguez v. Spain*, decision on admissibility adopted on 30 October 2008; and No. 1490/2006, *Pindado Martínez v. Spain*, decision on admissibility adopted on 30 October 2008.

laden with 300 kilograms of explosives with which he was planning to blow up the central police station in Seville and, furthermore, that he was arrested on suspicion of being responsible for the commission of serious offences, including attacks that killed 82 people and injured more than 200 others. He was convicted of offences including murder, attempted murder, attempted homicide, serious injury, injury, terrorism, mayhem, attack, attack resulting in death, weapons storage, membership of an armed group, falsification of identification documents, falsification of official documents, replacement and falsification of car licence plates, unlawful use of a motor vehicle and public use of an assumed name. The seizure of the letter in Bergerac was carried out by the French police in the presence of a French investigating judge and in compliance with all procedural safeguards. Although the author denied having written and sent this letter, expert tests carried out and the details it contained, which included a description of the prison, plans and diagrams, left no doubt as to its authorship.

5.3 In relation to articles 7 and 10 of the Covenant, the National High Court judgement that gave rise to this communication sentenced the author to 11 years' imprisonment for the offence of membership of an armed group, without addressing any issue connected to the sum of his previous convictions. Neither the 1973 Criminal Code, under which the author was tried initially, nor the 1995 Criminal Code allow for life imprisonment. In the case of multiple convictions for a range of offences, various rules have been established to limit the maximum period of sentence execution. For example, article 70.2 of the 1973 Criminal Code stated that the maximum period of sentence execution could be no more than three times the length of the longest sentence handed down and subject to an absolute limit of 30 years' imprisonment. Thus, any person in the author's situation knows from the outset that, at most, they will have to serve 30 years in prison, irrespective of the number of offences committed. The Supreme Court's interpretation of this article is very broad, excluding the possibility of cumulating sentences only for acts committed after a guilty verdict has been returned for prior offences. Furthermore, as established in the Constitution and the General Prisons Act, the prison system is designed to achieve the rehabilitation and reintegration of offenders.

5.4 With regard to the author's claims in relation to article 14, paragraph 5, the State party points out that the rules governing appeals in cassation were subject to interpretation by the Constitutional Court in part on the basis of views previously issued by the Committee. As a result, appeals in cassation against convictions satisfy the requirements of article 14, paragraph 5, of the Covenant. The higher tribunal is able to verify whether the first instance proceedings were conducted correctly, with regard not only to the application of the law but also to the assessment of the evidence. In the author's case, the Supreme Court reviewed the conviction handed down by the National High Court on 2 February 2007 in great depth, with regard both to the facts and evidence and the application of the law. The author's allegations on this point are generic. They challenge the State party's legal system in the abstract but make no specific mention of any question of fact or evidence that could not have been raised before the higher tribunal.

5.5 With regard to the author's claims in relation to article 14, paragraph 7, the State party observes that its legal system prohibits in criminal matters both substantive double jeopardy, which prohibits the prosecution of the same person on more than one occasion on the same grounds for the same acts, and procedural double jeopardy, which prohibits duplication of criminal proceedings where the "triple identity" criteria (i.e. same parties, same facts, same grounds) are met. The author was convicted of criminal acts carried out between the date on which he joined ETA in 1978 and the date of his arrest in 1990. After his imprisonment in 1990, he became disassociated from ETA and was assigned to the prison rehabilitation programme. From that date until 2002 no sign that the author had any contact with ETA was detected. The National High Court's judgement of 2 February 2007, which was upheld by the Supreme Court on appeal, convicted the author on the grounds

that he managed to re-establish contact with the ETA leadership, issuing instructions and recommendations about its criminal strategy from inside the prison in which he was being held. More specifically, the State party's judicial bodies deduced from the letter seized by the French authorities on 26 November 2002 that the author had reactivated his membership of ETA, that he was advising the ETA leadership on strategic lines of action, potential targets for terrorist attacks and weapons to be used, and that ETA leaders were receiving this advice and even indicating that they planned to follow the lines of action he was proposing. Thus, the existence of acts completely separate to those tried between 1991 and 1996 was proven in the trial, with the author being convicted on a new offence of membership of an armed group.

Author's comments on the State party's submission

6.1 On 18 April 2011, the author submitted his comments on the State party's observations on the admissibility of the communication.

6.2 The author reiterates that he exhausted domestic remedies in relation to all his allegations with the submission of the application for *amparo* that was dismissed by the Constitutional Court on 18 February 2009. The application's dismissal cannot be invoked as grounds to claim that he did not exhaust domestic remedies. The fact that the Court failed to appreciate the special constitutional significance of the *amparo* application and the substantiation he provided regarding the violation of his fundamental rights cannot be a ground of inadmissibility for the Committee, since the Court's decision exhausts all domestic remedies, and, furthermore, provides evidence of a violation of his right to an effective judicial remedy. The author adds that the State party's legal framework lacks a system of specific appeals in accordance with articles 7 and 10 of the Covenant, and that the violation of these rights is a consequence of a violation of the system of guarantees for litigants, the right to a defence, the principle of equality before the law and, in particular, the right to freedom. In his case, the violation of these rights resulted in unequal treatment, which in turn constituted cruel, inhuman and degrading treatment. Lastly, he maintains that all his allegations in relation to articles 7, 10 and 14 (paras. 5 and 7) of the Covenant were invoked at the domestic level and/or were the basis of both the appeal in cassation filed with the Supreme Court and the application for *amparo* filed with the Constitutional Court.

6.3 The author reiterates that the proceedings that gave rise to the second criminal trial on the charge of membership of an armed group were not a response to an assumed criminal offence but a bid to prevent his release; that it was proven in the trial neither that he was the author of the letter seized by the French authorities nor that the letter had come into the hands of ETA's leaders; that the procedural safeguards established in the French legal system were not fully respected when this document was seized or impounded; and, in addition, that evidence gathered in foreign countries should be evaluated in accordance with prevailing legal principles in the State party and for this reason the evidence submitted should be declared invalid. Perusal of the records kept by the French police officers involved in the seizure formalities was not sufficient to substantiate the facts on which the charge was based or to give the documents evidentiary value. On the other hand, the court's refusal to allow these officers to give direct evidence constituted a violation of the right to defence and the principles of adversarial procedure and immediacy. The author also maintains that the State party took other arbitrary measures to prolong his detention.

6.4 The author reiterates his allegations in relation to articles 7 and 10 of the Covenant. He affirms that the complaint and prosecution brought against him by the National High Court were part of a series of measures taken by the State party in an attempt to transform a criminal law system predicated on offender rehabilitation and reintegration into one based on the "victim satisfaction" model, particularly in cases considered to be terrorist cases. To this end, the new Criminal Code of 1995 extended the maximum sentence from 30 to 40

years' imprisonment, established that sentences must be served in full, and eliminated sentence-reducing incentives in the form of prison credits. As these provisions could not be applied to prisoners who, like the author, were tried under the 1973 Criminal Code, the authorities sought to justify prolonged prison terms by refusing requests to have all prior convictions consolidated or combined and thus extending the maximum prison term served, reinterpreting in a manner contrary to practice at that time the rules for the application of prison credits in place for the past 12 years, and instigating new criminal proceedings in order to prevent the release of those under investigation. He maintains that in another procedure he initiated in relation to the execution of sentences previously handed down for other offences, the National High Court and the Supreme Court denied his request that two sentences, each for 30 years, should be consolidated so that he would have to serve only the maximum term of 30 years established under the 1973 Criminal Code. The Supreme Court also ruled that sentence-reducing prison credits should be calculated on each individual conviction and not on the maximum term of sentence execution of 30 years.[6] This situation, coupled with the author's classification as a category I prisoner and inclusion in the FIES list of prisoners placed under special observation, the fact that his sentence had been served in solitary confinement since his admission to prison in 1990, the constant transfers between prisons with the aim of making stability impossible and his separation and estrangement from his family and social environment, constituted cruel treatment and impeded his social rehabilitation, in violation of articles 7 and 10 of the Covenant.

6.5 The author reiterates that there is no second instance tribunal competent to review or challenge facts considered proven in the National High Court's judgement in application of the principles of objectivity, equality between the parties and neutrality, and thus capable of assessing whether the sentence applied was fair and commensurate. Therefore, the State party's legal system does not respect the right recognized in article 14, paragraph 5, of the Covenant.

6.6 The criminal proceedings brought against the author and the sentence handed down by the National High Court and upheld by the Supreme Court on 2 February and 2 November 2007, respectively, constituted a violation of article 14, paragraph 7, of the Covenant. The author reiterates that he had already been convicted of the offence of membership of an armed group, that he was serving his sentence and his term had not been discharged, and that for this reason a new conviction for the same act constituted criminal double jeopardy. It was demonstrated in the criminal trial that his membership of ETA was continuous and permanent from before his arrest and throughout his time in prison. For this reason, a new charge for a "new membership" of ETA was not possible. Although the Central Intelligence Unit's report simply notes that the author was linked to ETA between 1999 and 2004 while in prison, the author contends that it should be borne in mind that the same report also states that ETA members do not stop being ETA militants, or considering themselves as such, simply because they have been arrested and admitted to prison. The prison regime and prisoner category to which he was assigned upon admission to prison were based on his membership of an armed group. Furthermore, the State party's observations state that the author was convicted for "collaborating with the terrorist group in acts completely separate to those for which he was sentenced in the 1990 and 1996 judgements". However, he was convicted not for collaborating but for membership, for which there is no legal justification.

[6] The communication refers to the National High Court's decision of 26 April 2005 and Supreme Court judgement No. 197/2006 of 28 February.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

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

7.3 The Committee notes the State party's arguments that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol because the author did not exhaust domestic remedies since his application for *amparo* was dismissed by the Constitutional Court owing to an inexcusable omission attributable to the author, in that he failed to explain in his petition the special constitutional significance of the application. The Committee also notes the author's claims that the fact that the Constitutional Court did not appreciate the special constitutional significance of his application for *amparo* and the substantiation he provided regarding the violation of his fundamental rights cannot be invoked before the Committee as a failure to exhaust domestic remedies. The Committee considers that the Constitutional Court's dismissal of the application for *amparo* for the reasons stated does not mean that the author failed to satisfy the formal requirements established by law for the submission of such applications and does not, therefore, constitute an obstacle to admissibility with regard to article 5, paragraph 2 (b), of the Optional Protocol.

7.4 The Committee notes the author's arguments that, because of the cumulative sentencing system established in the 1973 Criminal Code, he was sentenced on various charges to a total of 5,145 years in prison and that, although this cumulative sentence is notional and in practice the maximum prison term was 30 years (40 years under the current Criminal Code), a total sentence that exceeds a person's life expectancy has a serious impact on a detainee's psychological health, is at odds with a system that should be seeking to achieve the prisoner's effective social rehabilitation and, coupled with the conditions of the author's detention and the criminal proceedings brought against him in 2007, constitutes discriminatory treatment with respect to the law and a violation of articles 7 and 10 of the Covenant. The Committee also notes the author's assertion that these arguments formed the basis of his legal argument when he complained to the judicial authorities of violations of the system of guarantees for litigants, his right to a defence, the principle of equality before the law and, in particular, the right to freedom.

7.5 The Committee notes that in the criminal proceedings against the author which resulted in the Supreme Court judgement of 2 November 2012, the Supreme Court limited itself to establishing criminal liability with regard to the offences of membership of an armed group and conspiracy or intent to commit terrorist offences. Since no copy of the appeal in cassation is included in the case file, the Committee cannot ascertain whether the allegations related to articles 7 and 10 of the Covenant were raised by the author. The Committee also notes that the statement of grounds for the *amparo* application filed with the Constitutional Court did not include the allegations that the author presented to the Committee in relation to articles 7 and 10 of the Covenant and contained only a simple opening reference to possible violations arising from the fact that custodial sentences and security measures should be predicated on offender rehabilitation and social reintegration which was not developed in the course of the appeal. Furthermore, according to the information contained in the case file, some of these allegations relate to judicial proceedings initiated by the author which are separate to those at the origin of this communication. Therefore, the Committee considers that domestic remedies were not

exhausted and declares the allegations submitted in relation to articles 7 and 10 of the Covenant inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

7.6 The Committee notes the author's claims that the State party's legal system does not guarantee access to a second criminal hearing and does not guarantee that convictions and sentences handed down by the National High Court are submitted to and reviewed fully by a higher tribunal, since in appeals in cassation the Supreme Court is not vested with full powers to review every element considered in the proceedings and set forth in the first instance judgement with regard to both the facts and the application of the law.

7.7 The Committee notes that the Supreme Court considered the conviction and sentence handed down by the National High Court in depth in its judgement of 2 November 2007 and concluded that there was sufficient evidence to uphold the assessment of the facts made at first instance; that the evidence submitted was valid and that the author's right to a defence was not impaired; and that his conviction on the charge of membership of an armed group was properly obtained. The Committee also notes that the author has not indicated which specific aspects of his appeal were not subject to review because of the limitations of the appeal in cassation. Thus, the Committee considers that the claims under article 14, paragraph 5, of the Covenant have been insufficiently substantiated for purposes of admissibility and concludes that they are inadmissible under article 2 of the Optional Protocol.

7.8 The Committee notes the author's arguments that the conviction and sentence handed down by the National High Court on 2 February 2007 on the charge of membership of an armed group constitute a violation of article 14, paragraph 7, of the Covenant, since the National High Court had already sentenced the author to 11 years' imprisonment for this offence on 18 December 1990 and the author was still serving this sentence when he was sentenced again; that a new conviction for this offence would be possible only if the author had terminated his ETA membership and subsequently taken a new decision to rejoin the group on an active basis; and that this was never proven in the trial since, contrary to the contention of the Spanish authorities, before being arrested and throughout his time in prison the author was at all times actively associated with ETA. The Committee also notes the State party's argument that, after his admission to prison in 1990, the author became disassociated from ETA; that until 2002 no sign that the author had any contact with this organization was detected; that in the criminal trial heard before the National High Court in 2007, it was proven that the author had re-established his active membership of ETA; and that, therefore, in the sentence handed down by the National High Court on 2 February 2007 on the charge of membership of an armed group, the author was tried for new offences distinct to those tried in 1990.

7.9 The Committee notes that the allegations made under article 14, paragraph 7, relate mainly to the evaluation of the facts and evidence made by the National High Court and the Supreme Court. The Committee recalls its case law, according to which it is incumbent on the courts of States parties to evaluate the facts and evidence in each specific case, or the application of domestic legislation, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice.[7] The Committee has studied the materials submitted by the parties, including the Supreme Court's ruling on the author's appeal in cassation. The Committee is of the opinion that these materials do not show that the criminal proceedings against the author were flawed. The Committee considers, therefore, that the author has failed to sufficiently substantiate

[7] See communications No. 1616/2007, *Manzano and others v. Colombia*, decision adopted on 19 March 2010, para. 6.4, and No. 1622/2007, *L.D.L.P. v. Spain*, decision adopted on 26 July 2011, para. 6.3.

his claim of a violation of article 14, paragraph 7 (a), and that the communication is therefore inadmissible under article 2 of the Optional Protocol.

8. The Committee therefore decides:

(a) That the communication is inadmissible under article 2 and article 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be transmitted to the State party and to the authors.

[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.]