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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3102/2018*, **

Communication submitted by:	Jesús María Hermosilla Barrio (represented by counsel, César Pinto Cañon)
Alleged victim:	The author
State party:	Spain
Date of communication:	25 July 2017 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 19 January 2018 (not issued in document form)
Date of adoption of Views:	25 October 2022
Subject matter:	Lack of recourse to compensation; arbitrary arrest and detention
Procedural issues:	Exhaustion of domestic remedies; lack of substantiation; submission to another procedure of international investigation or settlement
Substantive issues:	Arbitrary detention; right to redress; equality before the law
Articles of the Covenant:	9 (1), (4) and (5); and 26
Articles of the Optional Protocol:	5 (2)

* Adopted by the Committee at its 136th session (10 October–4 November 2022).

** The following members of the Committee participated in the examination of the communication: Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Furuya Shuichi, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Soh Changrok, Kobauyah Tchamdja Kpatcha, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi. Pursuant to rule 108 of the Committee's rules of procedure, Carlos Gómez Martínez did not participate in the examination of the communication.

1. The author of the communication is Jesús María Hermosilla Barrio, a national of Spain born on 25 June 1955. He claims that the State party has violated his rights under article 9 (5), read in conjunction with article 9 (1) and (4), and article 26 of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The author is represented by counsel.

Facts as submitted by the author

2.1 On 6 December 2004, the author, who was serving six prison sentences handed down by various judicial bodies, requested the aggregation of the penalties in accordance with article 76 of the Criminal Code and article 988 of the Criminal Procedure Act.[1] On 13 April 2005, Burgos Criminal Court No. 1 denied the request to aggregate the author's custodial penalties. In response to this denial, the author filed an appeal in cassation with the Criminal Chamber of the Supreme Court. In a judgment upholding the appeal, issued on 29 June 2006, the Supreme Court declared that the requested aggregation of penalties was admissible and sent the case back to the referring court, noting that the key requirement for the aggregation of penalties was temporal proximity.

2.2 On 26 October 2006, Burgos Criminal Court No. 1 found that it lacked jurisdiction to rule on the author's request for the aggregation of sentences because a new sentence of 1 year and 9 months' imprisonment for bodily harm had been issued by Vitoria-Gasteiz Criminal Court No. 2 on 8 June 2004 in connection with acts that had been committed on 9 and 15 February 2002. Burgos Criminal Court No. 1 agreed to cede jurisdiction to Vitoria-Gasteiz Criminal Court No. 2 (the court that had issued the most recent decision against the author). The author submitted an appeal to the First Chamber of Burgos Provincial Court against the decision of Burgos Criminal Court No. 1. The appeal was dismissed on 18 December 2006.

2.3 On 3 April 2007, Vitoria-Gasteiz Criminal Court No. 2 agreed to aggregate five of the prison sentences handed down to the author but not the other two, basing its decision on its interpretation of article 76 of the Criminal Code as it stood at the time. The author submitted a new appeal in cassation against this decision to the Criminal Division of the Supreme Court, which, on 22 November 2007, upheld the appeal and referred the case back to Vitoria-Gasteiz Criminal Court No. 2. The Supreme Court reiterated its ruling of 29 June 2006, stating that, in the author's case, the principle of temporal proximity applied, as the acts had all been committed prior to the date of the first decision and could therefore all have been tried in the same proceedings. Furthermore, the Supreme Court reiterated that its previous decision of 29 June 2006 must be respected as res judicata.[2]

[1] See https://www.boe.es/eli/es/rd/1882/09/14/(1)/con.

[2] The 2015 reform of the Criminal Code and subsequent decisions of the Supreme Court confirmed the applicability of the criterion of temporal proximity. The Supreme Court recalled that "these limits are of great importance because they have a constitutional basis in that they fulfil the need to avoid excessively long prison sentences that could hinder the re-education and social reintegration provided for in article 25.2 of the Constitution as essential purposes of custodial sentences. The social rehabilitation of offenders is an essential goal of the enforcement of sentences, although it is also compatible with the general and particular preventive purposes of sentencing. Consequently, the maximum punishments established in article 76 of the Criminal Code must be interpreted in a manner intended to ensure the fulfilment of the different purposes of the sentence: promoting the social rehabilitation of the convicted person and, at the same time, avoiding situations of impunity or criminal conduct relating to possible future offences. The Chamber has therefore been flexible in its interpretation of article 76 of the Criminal Code in order to prevent the vicissitudes of trials from frustrating lawmakers' aims by causing legal limits to be exceeded and constitutional principles to be violated in cases where the overall sentences handed down for minor offences committed at the same time in a convicted person's life are disproportionate simply because the offences were tried separately. … it was necessary to adopt a criterion favourable to the defendant in interpreting the requirement of proximity established in article 988 of the Criminal Procedure Act and article 76 of the Criminal Code in relation to the legal aggregation of penalties in view of the fact that, in order for penalties to be consolidated, the temporal proximity between the related acts is more important than the analogy or relationship between them; that is, it must have been possible for the acts to have been prosecuted in a single trial, taking into account the time of their commission." Supreme Court, Judgment No. 367/2015, 11 June 2015. Available at

2.4 On 9 January 2008, Vitoria-Gasteiz Criminal Court No. 2 agreed to comply with the ruling of the Second Chamber of the Supreme Court on the criterion for the aggregation of custodial sentences and transmitted the decision to Burgos prison, where the author was incarcerated. In a letter dated 16 January 2008, the prison authorities requested that the court inform it of the end date of the sentence once it had been calculated, given that, according to their calculations, the consolidated sentence had ended on 17 June 2007.

2.5 On that same day, 16 January 2008, after the clerk of Vitoria-Gasteiz Criminal Court No. 2 had determined that the end date of the sentence had been 17 June 2007, it issued an urgent order for the author's release, which took place on the same day.

2.6 On 30 April 2008, the author, acting on his own behalf, applied to the Second Chamber of the Supreme Court for recognition of the miscarriage of justice committed by Burgos Criminal Court No. 1, Burgos Provincial Court and Vitoria-Gasteiz Criminal Court No. 2, invoking articles 292 and 293 of the Organic Act on the Judiciary and requesting compensation. The author claimed that, owing to an error in the enforcement of the aggregation of sentences and the execution of the Supreme Court's decisions, he had been deprived of his liberty for longer than he should have been. On 8 October 2008, the First Section of the Second Criminal Chamber of the Supreme Court declared that it lacked jurisdiction to rule on the request for compensation, specifying that the concept of "miscarriage of justice" must be interpreted restrictively, that article 293 of the Organic Act on the Judiciary may apply only to clear and evident miscarriages of justice affecting the determination of the facts and that, for there to have been a miscarriage of justice, the law must have been applied to the case in question in a manner that was illogical, anomalous or devoid of any legal or doctrinal basis. In addition, the Supreme Court stated that "regarding imprisonment, whether on remand or under a sentence, article 294 of the Organic Act on the Judiciary is known to provide for a specific procedure for obtaining compensation in connection with such imprisonment. The request must be addressed directly to the Ministry of Justice; this Chamber has no jurisdiction in relation to such claims." The Supreme Court ordered the closure of the proceedings and decided to inform the petitioner that, where there is an irregularity in the administration of justice, it is sufficient to submit a brief to the Ministry of Justice.[3]

2.7 On 29 September 2008, the author submitted a claim for financial compensation to the Ministry of Justice, invoking an irregularity in the administration of justice on the grounds that the sentence he had served was longer than it should have been (specifically, seven months longer). In the brief, the author assessed the compensation due to him for damages at €32,508.57. On 30 January 2009, the Ministry of Justice decided not to admit the author's claim on the grounds that the application for reparation for any harm caused by the alleged miscarriage of justice should be dealt with by the Supreme Court.

2.8 On 24 September 2009, the Ministry of Justice partially upheld the author's discretionary appeal for reconsideration and requested a report of the General Council of the Judiciary. On 28 January 2010, the General Council of the Judiciary concluded that there had not been a miscarriage of justice, specifying that:

> "the sole issue at stake, which lies at the heart of the exercise of judicial power, is the criterion that such bodies applied when selecting and interpreting the laws relevant to the case in question. It is not a matter on which a position may be taken in connection with an application for compensation for an irregularity in the administration of justice."[4]

On 23 September 2010, the Council of State upheld the decision of the General Council of the Judiciary, affirming that it was not a question of an irregularity in the administration of justice but rather one of courts having differing opinions as to the legal provisions applicable to the case.

https://noticias.juridicas.com/actualidad/noticias/10316-el-ts-establece-criterios-para-la-refundicion-de-condenas-tras-la-entrada-en-vigor-de-la-reforma-del-codigo-penal/.

[3] Supreme Court, Criminal Division, Order No. 20214/2008 of 8 October 2008.

[4] General Council of the Judiciary, Case file No. 198/09, 28 January 2010.

2.9 On 9 May 2011, the author submitted an administrative appeal against the decision of the Council of State to the Third Chamber of the Administrative Litigation Division of the National High Court. On 14 June 2012, the National High Court dismissed the appeal, while observing that the case dealt with a possible miscarriage of justice. In its decision, the National High Court upheld the claim that the sentence served by the author had been 210 days longer than the aggregated penalties handed down to him and that he had possibly suffered harm. However, it specified that article 294 of the Organic Act on the Judiciary[5] applies to "pretrial detention in cases where an acquittal or final dismissal has been ordered, not to cases in which there is a final conviction." A motion for annulment submitted by the author to the same body was dismissed on 4 October 2012. In this decision, the National High Court ruled that, "in the case of Mr. Hermosilla Barrio, since there was no irregularity in the administration of justice, which was ruled out by the judgment of this Chamber and Section, nor was there any miscarriage of justice, which was ruled out in the order of the Supreme Court". On 4 November 2015, the Constitutional Court decided not to admit the author's application for *amparo* on the grounds that there was no apparent violation of a fundamental right eligible for protection under the remedy of *amparo*.

2.10 On 16 April 2016, the author submitted an application to the European Court of Human Rights. In a letter dated 16 June 2016, the author was informed that the Court, sitting in a single-judge formation, had decided to dismiss the application on the grounds that it did not meet the admissibility requirements set out in articles 34 and 35 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

Complaint

3.1 The author alleges a violation of article 9 (5) of the Covenant, read in conjunction with article 9 (1) and (4). He argues that the various State bodies involved did not question the fact that he remained in prison for seven months unjustifiably, which in itself amounts to a violation of article 9 (1) of the Covenant. The author further claims that the laws in force and institutions in place at the time when he submitted his various claims for compensation failed to ensure his right to compensation for unlawful detention in line with article 9 (5) of the Covenant. In this connection, he points out that the judiciary declared that there had been no miscarriage of justice and that the administrative proceeding to determine whether the executive branch bore pecuniary liability ruled that there had been no irregularity in the administration of justice. According to the author, this means that, in the Spanish legal system, there are cases, such as the present one, where, even if a person has been imprisoned for longer than the terms to which he or she has been sentenced, as a result of the way in which the aggregation of penalties has been processed, such imprisonment is not unlawful or is not compensable.

3.2 The author alleges a violation of article 26 of the Covenant on the grounds that, under the law in force at the time when the present communication was submitted, there were cases of wrongful imprisonment for which compensation was payable, such as those set out in article 294 of the Organic Act on the Judiciary, and other cases which, despite being wrongful, were not eligible for compensation. The author argues that this case concerns his right to equality before the law.

[5] At the time when the complaint was filed, article 294 of the Organic Act on the Judiciary provided that:

"1. Persons who, having undergone pretrial detention, are acquitted on the grounds that **no offence has been committed** or, **on the same grounds**, are released by court order shall, if they have suffered harm, be entitled to compensation.

2. The amount of compensation shall depend on the duration of the deprivation of liberty and its consequences for the individual concerned and his or her family.

3. The request for compensation shall be processed in accordance with paragraph 2 of the preceding article."

It should be noted that the highlighted parts of para. 1 were declared unconstitutional and invalid by the Constitutional Court in its Decision No. 85/2019 of June 2019.

State party's observations on admissibility

4.1 In its observations of 23 March 2018, the State party argues that the communication is inadmissible under article 5 (2) (a) of the Optional Protocol and rule 96 (e) of the Committee's rules of procedure.[6] The State party notes that the same matter was referred to the European Court of Human Rights and was found to be inadmissible by a decision of the Court of 9 June 2016. The State party adds that the fact that the European Court of Human Rights referred to article 35 of the European Convention on Human Rights in its inadmissibility decision shows that it considered the merits of the case.

4.2 The State party invokes a manifest lack of substantiation and refers to the judgment rejecting the application for *amparo* before the Constitutional Court, according to which there has been no explicit infringement of a fundamental right.

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

5.1 In his comments of 18 June 2018, the author argues that the European Court of Human Rights did not specify the grounds on which it had found the author's application to be inadmissible, which is why it is not possible to know precisely why his application was not admitted. The author refers to the Committee's jurisprudence[7] and reiterates that the European Court's communication contains no more than an open-ended statement that does not allow the Committee to assume that the review included sufficient consideration of the merits. The author adds that there is no exact correspondence between the rights recognized in the Covenant and those recognized in the European Convention on Human Rights. In that connection, he refers to what he describes as discrepancies between article 9 (5) of the Covenant and its counterpart article 5.5 of the European Convention on Human Rights and argues that the latter does not expressly provide for a right to reparation when a person has been unlawfully or unduly detained in prison.

5.2 The author reiterates his claim that the State party is denying his right to reparation for the additional seven months that he spent in detention. In addition, he asserts that the harm caused is not attributable to a specific judicial body but to a system of sentence enforcement that, owing to undue delays, can give rise to situations such as his. The author notes that the present communication goes beyond his individual case, as the same situation occurs in a large number of cases involving the State party's sentence aggregation procedures.[8]

5.3 According to the author, the fact that the Constitutional Court did not admit his application for *amparo* does not automatically mean that his communication is unfounded. In this regard, he notes that filing an application for *amparo* fulfils part of the obligation to exhaust domestic remedies. The author argues that the Constitutional Court's refusal constitutes one of the reasons why he submitted a communication to the Committee. He adds that the Constitutional Court's decision is completely unfounded and that the right provided for in article 9 (5) of the Covenant is not classified as a fundamental right under Spanish law.

5.4 The author specifies the forms of reparation that he seeks, which include a statement by the Committee that the State party has violated the rights he has cited and recognition of his right to financial compensation for the period during which he was unduly detained, assessed by the author at €32,508.57, to which must be added the interest that may legally be charged since 29 November 2008. The author is also seeking financial compensation in the amount of €520 to cover the cost of his legal representation, which is double the amount paid by the Ministry of Justice to court-appointed lawyers for an *amparo* appeal to the Constitutional Court. The author explains that this sum is merely symbolic and is intended as an indirect claim for better remuneration for duty lawyers. Lastly, the author requests that the Committee ask the State party to review and revise its laws concerning the right to reparation for unlawful imprisonment in order to ensure that these regulations are clear and precise.

[6] CCPR/C/3/Rev.8.

[7] See *Achabal Puertas v. Spain* (CCPR/C/107/D/1945/2010).

[8] The author provides no further information to substantiate this claim.

State party's additional observations on admissibility and observations on the merits

6.1 On 26 July 2018, the State party submitted its observations on the admissibility and merits of the communication submitted by the author. The State acknowledges that the author served seven months more than the applicable period pursuant to the regulations governing the aggregation of custodial sentences as interpreted by the court in question. However, the State party contends that the author did not make the argument before the Spanish courts that the principle of equality before the law enshrined in article 26 of the Covenant had been violated. Furthermore, it adds that the first time that the author put forward the argument that the State was responsible for undue delays was when he filed an appeal with the National High Court, which, given its status as a review body, could not assess this allegation. The State party requests the Committee to find the allegations relating to the violation of article 9 (5), read in conjunction with article 9 (4), and article 26 of the Covenant to be inadmissible for failure to exhaust domestic remedies.

6.2 The State party argues that article 9 of the Covenant has not been violated and that the author does not claim that any of the seven sentences handed down involved his being subjected to "arbitrary arrest or detention". Basing its argument on paragraph 20 of the Committee's general comment No. 35 (2014), the State party adds that the aim of the assessment, for the purposes of the Covenant, is to determine whether the judicial decisions on sentence aggregation were arbitrary, a question that the author answers himself by not alleging that these decisions were erroneous. With regard to article 9 (4) of the Covenant, the State party refers to paragraphs 39 and 41 of general comment No. 35 (2014) and argues that this article is not applicable to the case as "the object of the right is release (either unconditional or conditional) from ongoing unlawful detention". The State party, citing paragraph 51 of the Committee's general comment No. 35 (2014) and two of the Committee's communications, also argues that article 9 (5) of the Covenant recognizes the right to reparation only for persons who have been unlawfully detained.[9] In this regard, the State party notes that the fact that a criminal defendant was ultimately acquitted does not in and of itself render any preceding detention unlawful.[10] In the State party's view, the only argument that the author could make is that the terms "unlawfully" or "unlawful" equate to "undue delay", which is not the case, as the Covenant refers to "undue delay" only in article 14. The State party adds that, in any event, the author has not raised this argument before the national courts.

6.3 With regard to the author's claim under article 26 of the Covenant, the State party argues that the first time that this claim has been made by the author is before the Committee. It adds that the author has also failed to argue before the national courts that his case is equivalent to a case of pretrial detention under article 294 of the Organic Act on the Judiciary or a case of miscarriage of justice under article 293 of the same Act. It points out that pecuniary liability for undue delay is covered by article 292 of the Act. It adds that the allegation relating to article 294 of the Act was not made to the administrative authorities but directly before the courts, which, as bodies responsible for reviewing administrative actions, cannot rule on something that has not been requested through administrative channels.

6.4 The State party argues that article 9 (5) of the Covenant applies only when a detention can be considered unlawful, which is not the case when the issue at stake is undue delay. It adds that undue delay is regulated only in article 14, which the author does not invoke and is not applicable to the case. Furthermore, the State party argues that the present case does not involve unlawful or arbitrary detention but the implementation of prison policy on the aggregation of sentences handed down in accordance with the law, resulting in non-arbitrary court decisions. It adds that article 292 of the Organic Act on the Judiciary regulates pecuniary liability for undue delay.

[9] *Uebergang v. Australia* (CCPR/C/71/D/963/2001), para. 4.4; and *W.B.E. v. the Netherlands* (CCPR/C/46/D/432/1990), para. 6.5.

[10] General comment No. 35 (2014), para. 51.

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

7.1 In his observations of 11 November 2020, the author reiterates that he was deprived of his liberty when, according to Spanish law and the interpretation of the courts, his detention lacked any legal basis. The author stresses that the deprivation of his liberty for seven months was arbitrary and unlawful and exceeded the term established by the judiciary in applying article 76 of the Criminal Code.

7.2 The author states that, since his release on 16 January 2008, he has submitted applications for compensation for unlawful imprisonment to the various competent authorities of the State party. He adds that, since he is not an expert in law, he used his own words and did not always employ the appropriate terminology, but he has always pursued the same line of argument, citing a violation of his right to liberty, his undue deprivation of liberty for seven months by the Spanish authorities and his claim for reparation for this violation.

7.3 The author argues that Spanish law on the right to obtain reparation in cases of unlawful arrest or detention is clearly flawed. In this regard, he recalls the refusal of the Criminal Chamber of the Supreme Court to recognize a miscarriage of justice and the refusal of the Ministry of Justice and the National High Court to recognize an irregularity in the administration of justice. The author argues that differences in the criteria applied in the different procedural channels for obtaining reparation should not result in a failure to compensate persons who have been improperly deprived of their liberty.

7.4 With regard to article 26 of the Covenant, the author reiterates that a violation of the right to equality before the law was invoked before the National High Court and in his application for *amparo*, in connection with which he cited article 14 of the Constitution, which provides for this right.

7.5 In order to support his claim that his detention was unlawful or arbitrary, the author points out that the list of possible cases of arbitrary or unlawful detention contained in paragraphs 16 and 17 of the Committee's general comment No. 35 (2014) is not closed but open-ended. He argues that failing to consider a detention lacking in any legal basis as being arbitrary because of the way that sentences have been aggregated under article 76 of the Criminal Code would leave it to the discretion of the courts to apply this article effectively, to uphold the principle of the aggregation of sentences and to determine the duration of aggregated sentences, contrary to the principles of legal certainty and criminal law. The author notes that paragraph 20 of the Committee's general comment No. 35 (2014) explicitly states that convicted persons are entitled to have the duration of their sentences administered in accordance with domestic law.

7.6 The author argues that arbitrary detention caused by undue delay, among other reasons, is not excluded from the forms of arbitrary arrest or detention for which compensation is due under article 9 (5). He stresses that, under article 9 (5), a person is entitled to reparation if he or she has been unlawfully imprisoned, irrespective of the cause of the unlawful imprisonment. He adds that articles 14 and 9 (4) of the Covenant supplement article 9 (5). The author notes that this argument was explicitly raised before the National High Court and that, as is clear from the previous proceedings, delays were incurred by the national courts, which implies that this same line of argument was pursued from the beginning.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

8.2 The Committee notes that, under article 5 (2) (a) of the Optional Protocol and the State party's reservation to this provision, the Committee is precluded from examining a matter that is being examined or has been examined under another procedure of international investigation or settlement. The Committee recalls its jurisprudence according to which the "same matter", within the meaning of article 5 (2) (a), must be understood as relating to the

same author, the same facts and the same substantive rights.[11] The Committee notes that the author's application to the European Court of Human Rights was based on the same facts and concerned the same substantive rights as those raised in the present communication. The Committee must therefore determine whether the Court "examined" the same matter within the meaning of article 5 (2) (a) of the Optional Protocol. The Committee notes that, on 16 June 2016, the European Court of Human Rights found the author's application inadmissible on the grounds that it did not meet the admissibility criteria set out in articles 34 and 35 of the European Convention on Human Rights. The Committee recalls its jurisprudence according to which, when the European Court of Human Rights has based a declaration of inadmissibility not solely on procedural grounds but on reasons that include a certain consideration of the merits of the case, however limited, then the same matter has been "examined" within the meaning of the respective reservations to article 5 (2) (a) of the Optional Protocol.[12] In the present case, the Committee notes that the succinct nature of the Court's decision prevents it from determining with certainty whether the Court considered the merits of the case, even in a limited manner.[13] Consequently, the Committee considers that there is no obstacle to examining the present communication under article 5 (2) (a) of the Optional Protocol.

8.3 The Committee notes the State party's argument that the author has not exhausted all available domestic remedies because he did not argue before the national courts that his alleged arbitrary detention was due to undue delay and did not allege a violation of article 9 (5) of the Covenant, read in conjunction with article 9 (4), or a violation of the right to equality before the law enshrined in article 26. The Committee notes the author's argument that the violation of the right to equality before the law was invoked before the National High Court and in his application for *amparo*, wherein he cited article 14 of the Constitution, which sets out this principle. The Committee further notes that the author's claim of a violation of article 26 of the Covenant lacks the necessary level of detail and does not provide a comprehensive explanation of how his right to equality before the law was allegedly violated. Accordingly, the Committee considers that the author has failed to sufficiently substantiate his claims under article 26 of the Covenant and that these claims are therefore inadmissible under article 2 of the Optional Protocol.

8.4 The Committee notes that the author was deprived of his liberty until 16 January 2008 because he had been convicted by final judgments and that neither the lawfulness of these convictions nor their compliance with the relevant national and international standards has been called into question. However, the Committee notes that the State party does not contest the fact that the author sought reparation because he was deprived of his liberty for a period of time that exceeded the maximum period established by the judicial authorities under the sentence aggregation procedure. In order to determine the State party's responsibility for the failure to provide reparation, it is necessary to consider the allegation concerning the unlawful nature of the author's detention during the seven months following the most recent decision on the aggregation of sentences in his favour. In the light of the foregoing, the Committee considers that the author has sufficiently substantiated his claims to having been unlawfully deprived of his liberty for seven months, finds the communication admissible on the basis of the claims that he raised under article 9 (5) of the Covenant, read in conjunction with article 9 (1) and (4), and proceeds to consider the communication on the merits.

Consideration of the merits

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

9.2 The Committee notes the author's claim that the State party has violated his right under article 9 (5) of the Covenant because it refused to provide him with reparation for the

[11] *Petersen v. Germany* (CCPR/C/80/D/1115/2002), para. 6.3.

[12] *Bertelli Gálvez v. Spain* (CCPR/C/84/D/1389/2005), para. 4.3; *Wdowiak v. Poland* (CCPR/C/88/D/1446/2006), para. 6.2; *Alzery v. Sweden* (CCPR/C/88/D/1416/2005), para. 8.1; and *Quliyev v. Azerbaijan* (CCPR/C/112/D/1972/2010), para. 8.2.

[13] *Achabal Puertas v. Spain* (CCPR/C/107/D/1945/2010), para. 7.3; and *X. v. Norway* (CCPR/C/115/D/2474/2014), para. 6.2.

harm caused to him by his deprivation of liberty for seven months in excess of the time determined by the judiciary. In this connection, the author refers to the Committee's general comment No. 35 (2014), which states that convicted persons are entitled to have the duration of their sentences administered in accordance with domestic law.

9.3 Given that article 9 (5) of the Covenant provides for an effective right to reparation for "anyone who has been the victim of unlawful arrest or detention", the Committee must determine whether the seven months during which the author was deprived of his liberty and the possible harm that this may have caused him can be classified as unlawful arrest or detention within the meaning of article 9 (1).

9.4 The Committee notes that, although its jurisprudence has focused on pretrial detention and the implementation of procedural rights and guarantees up to the moment of conviction or sentencing, it should be noted that States parties have the obligation to ensure the protection and promotion of the relevant rights enshrined in the Covenant during the sentence enforcement stage as well. In this regard, it should be recalled that the Committee has stated that unauthorized confinement of prisoners beyond the length of their sentences is arbitrary as well as unlawful; the same is true for unauthorized extension of other forms of detention.[14] The Committee has also considered that the term "detention" refers to the deprivation of liberty that begins with the arrest and continues in time from apprehension until release.[15]

9.5 The Committee notes the State party's argument that the deprivation of liberty for the seven months in question should not be considered as arbitrary arrest or detention. In that connection, the State party cites the Committee's general comment No. 35 (2014) and points out that the fact that a criminal defendant was ultimately acquitted does not in and of itself render any preceding detention unlawful. Furthermore, the State party argues that the undue delays that could have given rise to this detention are covered only by article 14 of the Covenant, not by article 9.

9.6. The Committee has repeatedly determined that "the notion of 'arbitrariness' must not be equated with 'against the law' but be interpreted more broadly to include such elements as inappropriateness and injustice".[16] The Committee has also specified that the notion of arbitrariness "must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law".[17] In this regard, the Committee notes that the examples given in paragraphs 16 and 17 of its general comment No. 35 (2014) do not comprise an exhaustive list of the types of situations that may be considered to constitute arbitrary or unlawful detention under article 9 (1) of the Covenant; they are simply a list of examples based on its observations and doctrine as at the date of publication of the general comment. In determining whether detention or imprisonment is unlawful or arbitrary, the Committee considers whether the procedural safeguards provided for in other articles of the Covenant, such as articles 9 (4) and 14, have been respected.[18]

9.7 The Committee recalls that, under article 9 (4) of the Covenant, the authorities must decide on the lawfulness of a given instance of detention as soon as possible. As noted earlier:

> This right applies to all detention by official action or pursuant to official authorization, including detention in connection with criminal proceedings, military detention, security detention, counter-terrorism detention, involuntary hospitalization, immigration detention, detention for extradition and wholly groundless arrests.[19]

[14] General comment No. 35 (2014), paras. 11 and 35; *Chambala v. Zambia* (CCPR/C/78/D/856/1999), para. 7.3; and Human Rights Committee, *Mpandanjila et al. v. Zaire*, communication No. 138/1983, para. 10.

[15] General comment No. 35 (2014), para. 13.

[16] *A. v. Australia* (CCPR/C/59/D/560/1993) para. 9.2.

[17] *Mukong v. Cameroon* (CCPR/C/51/D/458/1991), para. 9.8; and *Van Alphen v. the Netherlands* (CCPR/C/39/D/305/1988), para. 5.8.

[18] *A. v. Australia*, para. 9.5; *Santullo Valcada v. Uruguay*, communication No. 9/1977, paras. 12 and 13; and general comment No. 35 (2014), para. 51.

[19] General comment No. 35 (2014), para. 40.

Persons deprived of liberty are entitled not merely to take proceedings, but to receive a decision and for this to be done without delay and as soon as possible.[20] Under article 76 of the Criminal Code, the aggregation of sentences must be in keeping with these principles and must be implemented without undue delay to ensure that the time that a person remains deprived of his or her liberty is not prolonged unjustifiably or unnecessarily.

9.8 The State party argues that the present case did not involve unlawful or arbitrary detention but rather the implementation of correctional policy on the aggregation of sentences handed down in accordance with the law, which served as a basis for non-arbitrary legal decisions. The author argues that the harm to which he has been subjected is not attributable to a specific court among those involved, but rather to a system of sentence enforcement that, owing to undue delays, can give rise to situations such as the present one. The Committee observes that the author's first request for the aggregation of his sentences was made on 6 December 2004, four years after his first conviction, more than two years after his initial imprisonment and approximately six months after his most recent conviction, which was handed down by Vitoria-Gasteiz Criminal Court No. 2 on 8 June 2004. The aggregation of sentences provided for in article 76 of the Criminal Code was ultimately granted to the author on 9 January 2008, more than three and a half years after the filing of the initial application, despite the fact that the Criminal Chamber of the Supreme Court had authorized such aggregation in a decision issued on 29 June 2006. The right of the accused to be tried without undue delay, provided for by article 14 (3) (c) of the Covenant, is not only designed to avoid keeping persons too long in a state of uncertainty about their fate and, if held in detention during the period of the trial, to ensure that such deprivation of liberty does not last longer than necessary in the circumstances of the specific case, but also to serve the interests of justice.[21] What is reasonable has to be assessed in the circumstances of each case, taking into account mainly its complexity, the conduct of the accused and the manner in which the matter was dealt with by the administrative and judicial authorities.[22]

9.9 During this time, none of the remedies intended to ensure the application of the safeguards established in Spanish law and forming part of the State party's institutions, including representation by a lawyer of the author's choosing or one provided by the State, and/or the possibility for the judiciary or the Public Prosecution Service to request the aggregation of sentences ex officio under article 76 of the Criminal Code, among other safeguards, prevented the author's undue detention for seven months, which could have caused him harm, as confirmed by the State party and the judiciary.

9.10 The Committee considers that it is generally for national courts to review facts and evidence, or the application of domestic legislation, in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice.[23] In the present case, the Committee considers that the State party has not demonstrated that the procedure for the aggregation of sentences under article 76 of the Criminal Code was completed within a reasonable time period, taking into account the level of complexity of the case and the jurisprudence established by the Supreme Court relating to the aggregation of sentences. Furthermore, the State party has neither argued nor demonstrated that it ensured the observance of all procedural safeguards in order to prevent the delay in question and the seven-month period of detention, which could have resulted from a lack of predictability[24] for the author and the various judicial bodies as to the proper implementation of the system for aggregating sentences and custodial penalties. It should be recalled that the principle of predictability must be upheld in relation to both the definition of an offence and the corresponding penalty.[25] It should be noted that, in every instance of detention, the burden of establishing the legal basis and the reasonableness, necessity and

[20] Ibid., para. 47.

[21] General comment No. 32 (2007), para. 35.

[22] Ibid.

[23] *Riedl-Riedenstein et al. v. Germany* (CCPR/C/82/D/1188/2003), para. 7.3; and *Schedko v. Belarus* (CCPR/C/77/D/886/1999), para. 9.3.

[24] European Court of Human Rights, *Del Rio Prada v. Spain*, judgment of 21 October 2013, paras. 124–132.

[25] Ibid., paras. 91 and 111–117; and *Alimuçaj v. Albania*, judgment of 7 February 2012, paras. 154–162.

proportionality of the detention lies with the authorities responsible for the detention.[26] The State party has not demonstrated that the manner in which it has acted in the present case has been effective in preventing or avoiding the delay in the sentence aggregation proceedings that gave rise to the author's improper detention. By contrast, the author has been diligent in exhausting the available remedies to ensure that the length of his sentence was in compliance with domestic law.[27] The Committee considers that, in the circumstances of the case before it, the seven-month period of detention that is the subject of this communication, which was served by the author between 17 June 2007 and 17 January 2008, was arbitrary within the meaning of article 9 (1) of the Covenant and that the State party has violated its obligation to protect the author's right to liberty and security of person under article 9 of the Covenant.

9.11 In line with its relevant jurisprudence, the Committee hereby concludes that the facts before it disclose a violation of article 9 (1) and declares that the author is entitled to reparation under article 9 (5).[28] The Committee recalls that article 9 (5) of the Covenant obliges States parties to establish the legal framework within which compensation may be afforded to victims of unlawful arrest or detention, as a matter of enforceable right, not as a matter of grace or discretion.[29] Article 9 (5) of the Covenant does not specify a precise procedure, which may include remedies against the State party itself or against individual State officials responsible for the violation, so long as they are effective.[30] Article 9 (5) of the Covenant does not require that a single procedure be established for providing compensation for all forms of unlawful detention, but only that an effective system of procedures should be in place that provides compensation in all of the cases covered by article 9 (5) of the Covenant.[31]

9.12 The Committee notes that the author has been unable to obtain reparation for his arbitrary detention, to which he is entitled under article 121 of the Constitution, despite the fact that he has exhausted all relevant domestic remedies, which he sought between 30 April 2008 and 4 November 2015, using the different judicial and other procedures for obtaining reparation in accordance with the Organic Act on the Judiciary. The Committee observes that the plain language of article 9 (5) of the Covenant does not allow for exceptions to the requirement that States parties must provide compensation for unlawful arrest or detention.[32] Therefore, the Committee considers that, even in the present case, where the State party claims that the detention was not due to a miscarriage of justice or an irregularity in the administration of justice, but rather to the implementation of correctional policy on the aggregation of sentences handed down in accordance with the law on the basis of non-arbitrary court decisions, the obligation to protect the effective right to obtain reparation for arbitrary detention, in accordance with article 9 (5) of the Covenant, still applies.[33] The Committee observes that no assessment of the arbitrary or unlawful nature of the seven-month period of detention was conducted by means of any of the available procedures for securing reparation for arbitrary or unlawful detention. Instead, the scope of these procedures was limited to the strict application of the laws related to reparation in force at the time. The Committee recalls that, in cases of unlawful or arbitrary arrest or detention, compensation to the victim should not undermine judicial independence but should rather strengthen accountability and trust in the judiciary by providing reparation for a wrong.[34]

10. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of the author's rights under article 9 (5) of the Covenant, read in conjunction with article 9 (1) and (4) of the Covenant.

[26] United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (A/HRC/30/37), principle 13.

[27] General comment No. 35 (2014), para. 20.

[28] *Van Alphen v. the Netherlands*, para. 5.8.

[29] General comment No. 35 (2014), para. 50; and *Thompson v. New Zealand* (CCPR/C/132/D/3162/2018), para. 7.3.

[30] General comment No. 35 (2014), para. 50; and *Thompson v. New Zealand*, para. 7.3.

[31] General comment No. 35 (2014), para. 50; and *Thompson v. New Zealand*, para. 7.3.

[32] *Thompson v. New Zealand*, para. 7.5.

[33] A/HRC/30/37, annex, paras. 88 and 90. See also, mutatis mutandis, *Thompson v. New Zealand*, para. 7.5.

[34] *Thompson v. New Zealand*, para. 76.

11. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is required, inter alia, to take the necessary steps to: (a) provide the author with adequate compensation for its violation of article 9 (5) of the Covenant; (b) give the author access to a compensation mechanism through which he can claim redress for his excessively prolonged detention; and (c) take all steps necessary to prevent similar violations from occurring in the future, including by reviewing its domestic legislation, regulations and/or practices to ensure that individuals who have been unlawfully or arbitrarily arrested or detained may apply to receive adequate compensation, in accordance with the obligation set forth in the Covenant.

12. 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 or 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 the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them widely in the State party's official languages.