



International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2205/2012*, **

<i>Submitted by:</i>	Yashar Agazade and Rasul Jafarov (represented by Rashid Hajili and Nani Jansen)
<i>Alleged victim:</i>	The authors
<i>State party:</i>	Azerbaijan
<i>Date of communication:</i>	2 November 2012
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 20 November 2012 (not issued in document form)
<i>Date of adoption of Views:</i>	27 October 2016
<i>Subject matter:</i>	Access to radio broadcasting licence
<i>Procedural issues:</i>	Sufficient substantiation of claims
<i>Substantive issues:</i>	Freedom of expression, fair trial
<i>Articles of the Covenant:</i>	14 (1) and 19
<i>Article of the Optional Protocol:</i>	3

1.1 The authors of the communication are Yashar Agazade and Rasul Jafarov, Azerbaijani nationals born in 1979 and 1984, respectively. They claim to be victims of a violation of articles 14 (1) and 19 of the Covenant. They are represented by Rashid Hajili, of the Media Rights Institute in Baku, and Nani Jansen, of the Media Legal Defence Initiative in London. The Optional Protocol entered into force for the State party on 27 February 2002.

1.2 On 22 July 2013, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided not to grant the State party's request to examine the admissibility of the case separately from the merits.

* Adopted by the Committee at its 118th session (17 October-4 November 2016).

** The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Ahmet Amin Fathalla, Yuji Iwasawa, Ivana Jelić, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Víctor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval.



The facts as presented by the authors

2.1 Mr. Agazade is a journalist and editor-in-chief of the weekly Azerbaijani newspaper *Muhakima*, which is often critical of government policies and decisions. Mr. Jafarov is co-founder and chair of the Azerbaijani public union for television and alternative media development. From March 2009 to December 2010, he headed a monitoring group on television broadcasting of the Institute for Reporters Freedom and Safety.¹ He is the author of several reports containing criticism of the country's situation in the field of television broadcasting. He is also a reputed human rights activist in Azerbaijan.

2.2 On 11 March 2010, the authors wrote to the National Television and Radio Council,² the State institution charged with regulating television and radio broadcasting in the country, requesting information on radio frequencies available for use and inquiring as to why no list of available frequencies had been published and no tender had been held for such frequencies, as required by law.³ On 12 March 2010, the Council responded that there were empty radio frequencies and admitted that no list of available frequencies had been published.

2.3 On 19 May 2010, the authors applied to the Council for a licence for radio broadcasting in Baku and the Absheron peninsula. On 25 May 2010, the Council responded that television and radio broadcasting required a special permit (licence) issued according to the law on a competitive basis, and that the authors could participate in licence tenders announced by the Council in areas "considered to be necessary for broadcasting activity". The authors note that the Council did not indicate whether any list of available frequencies would be published or whether any tenders for broadcasting licences would be held in the future.

2.4 On 10 June 2010, the authors filed a complaint with the Sabail District Court, arguing that by failing to publish a list of available radio frequencies and hold tenders despite the existence of available frequencies the Council had violated their right to freedom of expression. The authors noted that the only time in which the Council had announced a tender for radio broadcasting had been in September 2008 and that, since then, licences had been granted without competition, thereby "ensuring a political monopoly over television and radio broadcasting" in the country. The authors requested that the Court require the Council to issue a licence to them. On 26 August 2010, the Court declared the authors' complaint ill-founded because the Council had provided prompt, well-founded and informative answers. The Court concluded that, after having "generally evaluated the [authors'] arguments, it did not find any violation of their rights or freedoms" as a result of the administrative act.

2.5 On 3 October 2010, the authors appealed to the Baku Court of Appeal to raise the same claims as they had to the Sabail District Court. In addition, the authors argued that the District Court had failed to address their submissions and had not substantiated its decision, thereby violating their rights to freedom of expression and to fair trial. On 3 March 2011, the Court of Appeal dismissed their claims by also concluding that the Council had acted according to law by informing the authors of the legal requirements for obtaining a radio broadcasting licence. The Court held that the rejection of the authors' application had been lawful because no competition had been announced. However, the Court did not respond to their submissions on the need to publish information on available empty radio frequencies, the Council's failure to hold tenders resulting in a lack of pluralism in the broadcasting media and the Council's awarding of radio broadcasting licences without competition.

2.6 On 13 April 2011, the authors filed a cassation complaint with the Supreme Court, claiming a violation of their rights to freedom of expression and fair trial. On 5 July 2011,

¹ A local Azerbaijani non-governmental organization founded in 2006 by two Azerbaijani journalists, established as a response to "growing government restrictions on freedom of expression and freedom of press".

² Founded by the President of Azerbaijan in 2002. All of its nine members are appointed by the President.

³ See para. 2.9.

the Supreme Court dismissed their complaint, again concluding that the acts of the Council had been lawful and therefore no right had been violated.

2.7 The authors contend that there is an almost total absence of independent broadcasters in Azerbaijani electronic media, including radio and television. By regulating the distribution of frequencies, licences and advertising, the Government of Azerbaijan controls the broadcasting media, resulting in lack of pluralism in this area. All members of the Council are appointed by the President and its regulations do not provide for any public consultation or other transparent procedures for the appointment of its members.

2.8 The authors note that there are only 14 national radio channels in Azerbaijan, although additional empty frequencies remain available. The Council explains the empty frequencies by stating that there is no need for new television and radio stations.

2.9 The Law on Television and Radio Broadcasting places an obligation on the Council to publish lists of available frequencies at least once a year and to hold tenders for available frequencies.⁴ Despite these legal provisions, the Council has never published a list of all available frequencies allocated to broadcasting and has only held tenders for the allocation of available frequencies on two occasions: in September 2008 and November 2010. On both occasions, only one licence was allocated. The authors note that neither of those tenders was free, open or fair. The 2008 tender was awarded to the company “Digital Media MMC”, which was established and registered only 13 days before the Council announced the tender, and the name of its owner was never released. In the 2010 tender, the license was also awarded to a newly established company, named “Golden Prince”, owned by the former managing director of the Azerbaijani Press House, known to have ties with the Government of Azerbaijan.⁵ The Council has however previously granted broadcasting licences without holding tenders to radio stations that broadcast pro-Government content.⁶

2.10 On 30 December 2008, the Council announced that it would ban international radio stations from broadcasting on national FM frequencies. As a result, on 1 January 2009, Radio Liberty, Voice of America and the BBC were deprived of their frequencies and licenses. The authors note that those three frequencies, together with the frequencies that became available after the termination of the licences of eight other international and foreign radio stations (three Russian stations, three Turkish television stations and the FM radio stations Radio France and Radio Europa Plus) in 2006 and 2007, remain unused to date. No frequencies have been granted to local radio stations except in the cities of Baku (12 frequencies) and Nakhchivan (two frequencies).

2.11 The authors note that the lack of media pluralism in Azerbaijan has been a matter of concern for international organizations and independent observers for years. They cite reports by the Council of Europe,⁷ the Organization of Security and Cooperation in Europe

⁴ The authors cite articles 14.1, 15.1 and 16.5 of the Law on Television and Radio Broadcasting of 25 June 2002. According to article 14.1, “television and radio broadcasting is carried out on the basis of a special agreement (license) in accordance with the present law”. According to article 15.1, “a special agreement (license) is issued on the basis of a tender except for the State and social television and radio broadcasting”. According to article 16.5, “the institution conducting the tender issues the frequency list [of used and free frequencies] at least once a year”.

⁵ The authors do not elaborate on this statement.

⁶ In their response to the Secretariat’s request dated 14 July 2016 for further information regarding the allocation of licences without competition, the authors note that, since the Council was established in 2003, five licenses have been granted without holding a public tender, to the following radio stations: Ictimai Radio (public), in May 2005; ANS CN Radio (private), in April 2007; Xezer Radio (private), in September 2007; Auto FM (private), in April 2013; and ASAN Radio (public) in September 2015.

⁷ The authors cite reports by the Council of Europe Commissioner for Human Rights following his visits to the country in 2007 and 2010, in which he mentioned several serious concerns regarding freedom of expression in the country, including “threats, harassment and violence against journalists or human rights activists which have not been investigated”, “a number of media workers sentenced under defamation provisions” and “the existence of a blacklist of racketeering newspapers, published by the Press Council, containing the names of 90 newspapers which allegedly have breached ethical rules of journalism and have been accused of resorting to blackmail”. Available from <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900016806db809>.

(OSCE)⁸ and the European Parliament,⁹ as well as the Committee's concluding observations on Azerbaijan.¹⁰ Upon its application for membership of the Council of Europe, Azerbaijan undertook to transform the "government-controlled" radio and television station AzTV into an independent public service broadcaster. The authors note that, despite that commitment, AzTV remains under the strict legal control of the Government and its Chair continues to be appointed by the President. Although other stations appear to be operating on the market as independent broadcasters, in reality, they are owned by persons "connected to the Government". The authors note, for example, that Lider TV and Lider FM radio, owned by Media Holding, is in fact directed by A. Aliev, the cousin of the President of Azerbaijan. ATV, 106 FN, Azad Azerbaijan Radio and ATV International are owned by family members of Minister Nazim Ibrahimov. In fact, all television and radio companies are "under strict political and economic control of the Government". As noted by International Partnership Group for Azerbaijan upon their visit to the country in September 2010, "almost all broadcast media in Azerbaijan follow a pro-Government line in their news coverage. The National Television and Radio Council ... has been criticized for a lack of transparency in its decisions to issue or suspend broadcast licenses".¹¹

The complaint

3.1 The authors claim that, by refusing to grant them a radio broadcasting license following their application to the National Television and Radio Council in May 2010 and by failing to hold regular and fair tenders to award such licenses, the State party has violated their right to freedom of expression enshrined in article 19 of the Covenant. The decision to refuse their application would only be lawful were there a real prospect of tenders being regularly held, offering a genuine opportunity for broadcasters critical of the Government to obtain a licence. Since the Council is not complying with the broadcasting law by not holding regular and fair tenders for broadcasting licences, it cannot rely on such a law to justify the refusal to grant them a licence. In any event, the broadcasting law lacks the required clarity and quality to meet the requirement of lawfulness of article 19 (3) of the Covenant because it gives the Council absolute discretion as to when tenders should be held and fails to set out criteria to assess applications for licences.

3.2 The authors argue that the State party has failed to fulfil its positive obligation under article 19 to ensure that the public have access to impartial and accurate information and a range of opinions and comments through television and radio. The State party has failed to do so, in particular, by refraining from holding regular competitions for broadcasting licenses, by not granting licences in response to applications made outside the context of such competitions and by not ensuring that the broadcasting licence system is operated and administered in such a way as to ensure a diversity of voices and opinions within the State party's broadcasting media. Such a failure has, in turn, seriously hampered the exercise of democratic rights in Azerbaijan and prevented citizens from exercising democratic rights in a meaningful and informed manner.

3.3 The failure to publish lists of available frequencies and hold free, open and fair licence competitions for such frequencies constitutes an unlawful interference with the authors' right to freedom of expression under article 19.¹² Although competitions for two frequencies were held in September 2008 and November 2010, they were not free, open or

⁸ The authors cite a report by the OSCE Representative on Freedom of the Media after her visit to Azerbaijan in 2011. Available from www.osce.org/fom/78951?download=true.

⁹ In a resolution passed on 12 May 2012, the European Parliament "urge[d] the authorities to safeguard all necessary conditions to allow the media, including opposition media, to operate, so that journalists [could] work and report freely without any pressure, and to pay special attention to the safety of journalists". Available from www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0243+0+DOC+XML+V0//EN.

¹⁰ See CCPR/C/AZE/CO/3, para. 15.

¹¹ Report available from <https://freedomhouse.org/sites/default/files/Free%20Expression%20Under%20Attack%20-%20Azerbaijans%20Deteriorating%20Media%20Environment.pdf>.

¹² See also general comment No. 34 (2011) on the freedoms of opinion and expression, paras. 39-40.

reasoned. That interference was unlawful and unnecessary in a democratic society and therefore did not meet the requirements established by article 19 (3).

3.4 The failure by the Council to publish a list of available frequencies at least once a year and hold tenders for available frequencies breached the requirements set by the national broadcasting law, and as such cannot be “prescribed by law”. This requirement refers not only to the need for any interference with the rights under article 19 to have some basis in domestic law but also refers to the quality of the law in question. Such laws must not only be accessible and have foreseeable consequences, but must afford a measure of legal protection against arbitrary interferences by public authorities in accordance with the rights guaranteed by the Covenant.¹³ The absence of any provision in the Law on Television and Radio Broadcasting that (a) specifies the frequency in which competitions should be held for radio broadcasting licences, (b) requires the Council to give consideration to the need for diversity and media plurality in relation to such competitions, or (c) requires the Council to give adequate reasons for its decisions and any refusal of a licence, means that the law does not provide sufficient protection from arbitrary interference with the authors’ rights under article 19. In addition, such failure cannot be justified with the argument put forward by the Council that there is no need for new television and radio stations. Even if media pluralism did exist in Azerbaijan, regular tenders would still need to be held regularly for new broadcasters to enter the market.

3.5 The authors contend that the interference with their rights was not proportional or necessary in a democratic society. No justification has been provided by the Council or domestic courts for the interference with their right to freedom of expression other than that the Council’s refusal had been in accordance with the law. This interference cannot be justified on the basis that there is no need for new television and radio stations. On the contrary, as Azerbaijan has failed to ensure that the public has access through television and radio to impartial and accurate information and a range of opinions and comments, there is a pressing need for new television and radio stations. Even if there were already a varied and pluralistic audiovisual media, that would not, on its own, justify the failure to hold regular tenders for new or different broadcasters to obtain licences since such restriction is not necessary in a democratic society and would not strike a fair balance between the rights of the individual broadcasters and the legitimate aims in article 19 (3) of the Covenant.

3.6 The authors further submit that the failure by the Council and national courts to provide sufficient reasons for their decisions constitutes a violation of their right under article 14 (1) of the Covenant to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of their rights. The right to sufficient reasoning in a judgment stems from the obligation under article 14 that the legal reasoning of judgments must be made public. Without a reasoned judgment, the review of any findings by a court would be made impossible and the right to appeal becomes meaningless. The Courts did not address the authors’ claims related to the Council’s failure to hold public tenders for radio broadcasting licences and the Council’s awarding of licences to other companies without a tender. The three Courts failed to assess how this failure would have constituted an unlawful restriction of media pluralism and a violation of the authors’ rights to freedom of expression, and rejected the authors’ complaints solely on the basis of the argument that the Council had acted according to the law in their response to the authors.

3.7 As a remedy, the authors request that the Committee call on the State party: (a) to hold a licence tender and to conduct it fairly; (b) to review its regulations on the allocation of frequencies, including the rules governing licencing tenders, so that these meet the standards of transparency and fairness; and (c) provide the authors with just compensation for the violations of their rights.

State party’s observations on admissibility and merits

4.1 In its observations of 23 January 2013 and 23 April 2014, the State party argues that the authors’ complaints are manifestly ill-founded because the National Television and

¹³ Ibid., paras. 22-25.

Radio Council announced tenders in accordance with existing legislation and the authors were able to participate in them. On 23 November 2010, the Council called for a tender for a new radio station in Baku and the Absheron Peninsula, which was open from 25 November to 25 December 2010. Three candidates participated in that tender and were invited to a meeting with the Council on 18 January 2011, where their editorial, technical and creative capacities to broadcast were assessed. As a result of that assessment, the Council decided to grant the broadcasting licence to the company “Golden Prince LLC”. The other applicants filed a judicial complaint against that decision and lost. The tender was carried out in a lawful¹⁴ and objective manner. Given that the authors were able to participate in the tender with the same opportunities as those available to other participants, their rights were not violated. In addition, information relating to the tender and available radio frequency was shared with the authors and announced publicly. Finally, existing legislation does not prevent the authors from competing again in the future. The interference in the authors’ freedom of expression was therefore lawful and it fell within the State’s margin of appreciation in the protection of public order. It pursued two aims recognized under article 19 (3), namely, the prevention of disorder in telecommunications and the protection of the rights of others, as it was designed to ensure pluralism of information by allowing a fair allocation of frequencies.¹⁵

4.2 The State party notes that, while the authors disputed the Council’s failure to announce a tender in their complaint before the District Court, their appeals were related only to their loss in the November 2010 tender. The applicants requested the first instance court to order the relevant authorities to assign to their company a broadcasting frequency without having the relevant licence for broadcasting. The court rightly noted that the authors had to participate in tenders in order to receive the licence. Therefore, the authors’ claims under article 14 are manifestly ill-founded.

4.3 The State party further contends that the authors cannot claim to be victims of the rights enshrined in the Covenant because they concealed from the Committee the fact that they had participated in the November 2010 tender for a radio broadcasting licence. Therefore, their claim constitutes an abuse of their right to submit communications and should be declared inadmissible under article 3 of the Optional Protocol.

4.4 With regard to the authors’ claims relating to article 14.1 of the Covenant, the State party notes that national courts did not consider the Council’s response to the authors as a rejection of a licence application and concluded that their rights had not been violated.

Authors’ comments on the State party’s observations

5.1 In their comments dated 1 March 2013 and 30 June 2014, the authors submit that the State party has failed to address their claims. The State party refers to a tender held in November 2010 whereas the authors’ claim refers to their application for a licence for radio broadcasting of 19 May 2010, which was refused by the National Television and Radio Council by letter dated 25 May 2010, and to the Council’s failure to hold regular and fair tenders for radio broadcasting.

5.2 The authors challenge the State party’s statement that the Council acted according to the law and reiterate that, under the Law on Television and Radio Broadcasting, the Council was obliged to publish a list of available frequencies at least once a year and hold tenders. In November 2010, the Council published a tender for a single frequency, but a list of all available frequencies has never been published despite the legal requirement.

5.3 The authors note that, since their communication was filed with the Committee, the Council has only held one tender for a radio frequency covering the territory outside of

¹⁴ The State party cites article 15.5 of the Television and Broadcasting Act, which states that “[t]he following should be taken into consideration when conducting the tender for a special agreement (license): 1) The correspondence of the applicants’ indicators with the provisions of the tender, 2) the creative and technical capacities of the applicants for the conduction of the television/radio broadcasting, and 3) the results of the open hearing and other tender procedures”.

¹⁵ The State party invokes the European Court of Human Rights’ decision in the case *Groppera Radio AG v. Switzerland* (application No. 10890/84), of 28 March 1990.

Baku and Nakchivan, which was criticized by civil society because the licence was granted to a pro-Government candidate. In addition, licences have been granted since then without competition to a State-affiliated television channel in 2011 and to a State-affiliated radio station in 2012. The authors add that the deterioration in the media situation has raised concern among national and international organizations.¹⁶

5.4 The authors further note that the State party merely states that a tender was held in November 2010 without providing information on whether any other tenders were held or demonstrating that these tenders were fair and open and provided a genuine opportunity for independent broadcasters to obtain a licence. With that, the State party failed to dispute the authors' assertion that the Council's refusal to hold such tenders violates article 19. In addition, the State party has not justified how the refusal to grant them a licence would be aimed at "protecting public order in telecommunications". The authors accept that licences may be required for broadcasting. However, it does not follow from the judgment invoked by the State party in *Groppera Radio AG v. Switzerland* that licence measures shall not be otherwise subject to the requirements for permissible restrictions to the right to freedom of expression, namely, prescribed by law and necessary in a democratic society. The State party has failed to demonstrate that it meets these requirements.

5.5 The authors note that the November 2010 tender was not concealed from the Committee but actually explained in their initial communication. They add that only Mr. Jafarov took part in that tender and was unsuccessful at obtaining a licence, which only reinforces the argument that there are no fair and genuine opportunities for non-Government aligned broadcasters to obtain a licence. The argument before the Committee is, however, that the State party has failed to hold regular, open and fair tenders for licences for available radio frequencies and that it has rejected the authors' application for a frequency in May 2010.

5.6 Finally, the authors challenge the State party's assessment in the sense that the scope of their national claims changed from the first instance to the appeals and cassation instances and submit that their arguments before the three courts were the same, as reflected in the decisions.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether it is admissible under the Optional Protocol.

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

6.3 The Committee notes that the authors' claims before the Committee were brought at the domestic level all the way to the Supreme Court. It also notes the State party's argument that the appeals related only to the loss in the November 2010 tender and not the failure to issue a tender. However, the Committee observes that the authors raised all of their claims before all judicial instances in the State party and that the judicial decisions issued reflect those claims. The Committee therefore considers that all domestic remedies have been exhausted as required by article 5 (2) (b) of the Optional Protocol.

6.4 The Committee notes the State party's argument that the complaint constitutes an abuse of the right to submit communications because the authors concealed the fact that they had participated in the November 2010 tender. The Committee observes, however, that

¹⁶ The authors cite, inter alia, the Action Plan for Azerbaijan 2014-2016 of the Committee of Ministers of the Council of Europe (available from <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016802ed088>); the 2014 World Report by Human Rights Watch (available from www.hrw.org/world-report/2014/country-chapters/azerbaijan); and the 2013 Freedom of Press report by Freedom House (available from <https://freedomhouse.org/report/freedom-press/2013/azerbaijan>).

the authors included that information in their submissions to the Committee and does not consider, as a result, the complaint to constitute an abuse of the right to submit communications.

6.5 The Committee also notes the State party's argument that the complaint regarding the rejection of the authors' application for a broadcasting license in May 2010 is manifestly ill-founded because a tender for a broadcasting licence was announced in November 2010 in Baku and the Absheron peninsula and the authors were able to participate in it on an equal basis. The Committee notes, in this regard, the authors' allegation that all the tenders issued by the State party have been questioned by civil society for their lack of fairness and openness. However, it notes the State party's response that the tender held in November 2010 was carried out in a manner that was lawful and objective, and that the local courts have reviewed and rejected challenges to the tender's outcome. The Committee considers that the authors have failed to refute the argument by the State party that their request to obtain a radio frequency in May 2010 was rejected with good reason, because the State party intended to publish a tender, and indeed published one shortly thereafter. Furthermore, the authors have not identified specific procedural or substantive flaws in the tender process held in November 2010 that rendered it unfair or lacking in transparency. The Committee recalls in this regard that it is generally for the national courts and not for the Committee to evaluate the facts and evidence in a particular case, or to review the interpretation of domestic legislation, unless it is apparent that the courts' decisions are manifestly arbitrary or amount to a denial of justice.¹⁷ Since the domestic courts of the State party have reviewed legal challenges to the November 2010 tender and rejected them, and since the Committee does not have before it information that would call into doubt the contents of these judicial decisions or the procedure in which they were obtained, the Committee considers this part of the communication as inadmissible under article 2 of the Optional Protocol.

6.6. The Committee considers, however, that the authors have sufficiently substantiated their other claims related to the alleged violation of their right to freedom of expression under article 19 of the Covenant, involving the lack of regular public tenders for the allocation of available broadcasting frequencies and the allocation of certain frequencies without a public tender. While noting the arguments raised by the State party in this connection, the Committee considers such arguments to be intimately linked to the merits of the case. The Committee therefore declares the authors' claims under article 19 admissible.

6.7 With regard to the authors' claim related to an alleged violation of their rights under article 14 (1) on the basis of the failure of the national courts to address all of their claims and to motivate their decisions, the Committee considers that these claims too are intimately linked to the claims submitted under article 19 of the Covenant.

6.8 In the light of the above, the Committee declares the communication admissible insofar as it appears to raise issues under article 19 and 14 (1) of the Covenant, and proceeds to its examination on the merits.

Consideration of the merits

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

7.2 The Committee notes the authors' claims that, by failing to hold regular, open and fair tenders to award radio broadcasting licences, the State party violated their right to freedom of expression under article 19 of the Covenant. It further notes the authors' statements that, since its establishment in 2003, the National Television and Radio Council has never published a list of available radio frequencies, despite being required to do so by law at least once a year, and that during this period of 13 years only three tenders for a radio broadcasting license have been held despite the existence of at least 11 available frequencies. Finally, it notes the author's statement that radio broadcasting licences have

¹⁷ See communication No. 1128/2002, *Rafael Marques de Morais v. Angola*, Views adopted on 29 March 2005, para. 5.5.

been directly awarded by the Council without competition on several occasions to entities affiliated to the Government of the State party. The Committee notes that the State party has neither contested any of these allegations nor explained the reasons for not holding regular and open tenders to grant broadcasting licenses despite the availability of frequencies over the years.

7.3 Under these circumstances, the Committee considers that the State party's failure to publish pursuant to its domestic law the list of available broadcasting frequencies and organize on a regular basis multiple open tenders prevented de facto the authors from obtaining radio broadcasting licences, thus falling short of its duty to ensure the right to freedom of expression under article 19 (2), including the right to seek, receive and impart information and ideas of all kinds. In this respect the Committee recalls its general comment No. 34 (2011) on the freedoms of opinion and expression, which states that "a free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society"; and that "as a means to protect the rights of media users ... to receive a wide range of information and ideas, States parties should take particular care to encourage an independent and diverse media".¹⁸

7.4 The Committee must now determine whether the limitation of the authors' right to freedom of expression was justified by article 19 (3) of the Covenant. The Committee recalls that that article allows for certain restrictions to the exercise of the right to freedom of expression, only as provided by law and necessary (a) for the respect of the rights and reputation of others, or (b) for the protection of national security or public order (*ordre public*) or public health or morals. The Committee recalls that any restriction on the exercise of those freedoms must conform to the strict tests of necessity and proportionality. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.¹⁹ The Committee further recalls that it is for the State party to demonstrate in specific fashion the precise nature of the threat to any of [the grounds listed] that caused it to restrict freedom of expression.²⁰ State parties must avoid, in particular, imposing onerous licensing conditions and fees on the broadcast media and the criteria for the imposition of these should be reasonable and objective, clear, transparent, non-discriminatory and otherwise in compliance with the Covenant.²¹ The penalization of a media outlet or journalist solely for being critical of the Government or the political social system espoused by the Government can never be considered to be a necessary restriction of freedom of expression.²²

7.5 In the present case, the State party has argued that the interference in the author's right to freedom of expression was lawful and necessary for the prevention of disorder in telecommunications and for the protection of the rights of others, as it was designed to ensure pluralism of information. While acknowledging the State party's arguments referring to the need to regulate licensing conditions, the Committee also notes that the State party has not adequately explained why it has not published a list of available radio frequencies despite being required to do so under domestic law, and how the goal of ensuring pluralism in the imparting of information through radio broadcasts has been attained without the regular organization of new tenders to allocate frequencies. Nor has it explained how the attainment of the goals of pluralism and diversity can be reconciled with the practice of allocating broadcasting frequencies without a tender to entities who appear to have ties with the Government of the State party.

7.6 Consequently, the Committee concludes that the State party has failed to justify that the limitation of the authors' right to freedom of expression resulting from the lack of organization of periodic tenders and the lack of transparency in the allocation of licenses without public tenders was legitimate under the exceptions contained in article 19 (3) of the Covenant. Therefore, the Committee concludes that the limitations imposed on the authors

¹⁸ See general comment No. 34 (2011), paras. 13-14.

¹⁹ *Ibid.*, para. 22.

²⁰ *Ibid.*, para. 36.

²¹ *Ibid.*, para. 39.

²² *Ibid.*, para. 42.

to have access to a radio frequency were arbitrary in nature and amounted to a violation of their rights under article 19 (2) of the Covenant.

7.7 Having found a violation of article 19 of the Covenant, the Committee decides not to separately examine the alleged violation of article 14 (1).

8. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that facts before it reveal of violation of article 19 (2) of the Covenant.

9. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. The State party is also under an obligation to prevent similar violations in the future and to review its laws on television and radio broadcasting with a view to ensuring that radio broadcasting licenses appertaining to available broadcast frequencies are actually allocated on the basis of clear and transparent procedures guaranteeing regular and open competitions by which candidates are assessed on the basis of non-discriminatory criteria, and with the aim of promoting media pluralism in the State party.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant 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 a violation is found to have occurred, the Committee wishes to receive information from the State party, within 180 days, about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views, to have them translated in to the official language of the State party and widely distributed.

Annex

[Original: Spanish]

Individual opinion of Committee member Fabián Omar Salvioli (concurring)

1. I concur with the Committee's Views in *Agazade v. Azerbaijan* (communication No. 2205/2012), according to which the facts in the case disclose a violation of article 19 (2) of the International Covenant on Civil and Political Rights in respect of Mr. Yashar Agazade and Mr. Rasul Jafarov.

2. Likewise, I approve of the reparation awarded and, in particular, of the fact that the Committee spells out in detail the guarantees of non-repetition to be provided by the State party, which, in this case, entail reviewing its laws on television and radio broadcasting with a view to ensuring that radio broadcasting licences are actually allocated on the basis of clear and transparent procedures guaranteeing regular and open competitions by which candidates are assessed on the basis of non-discriminatory criteria and with the aim of promoting media pluralism in the State party. This precise identification of measures of non-repetition helps the State to know exactly how to comply with the Committee's Views and provides the Committee itself with clearer criteria for evaluating compliance by means of the follow-up procedure carried out by the Special Rapporteur.

3. Nevertheless, I believe that the Committee ought to have expressly included, in the reparation to be granted to the victims, fair compensation for the violation of their rights. This financial compensation would mainly serve to cover the litigation costs incurred by the authors throughout the course of the proceedings before the domestic courts.
