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Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2244/2013*, **

Submitted by:	Roberto Isaías Dassum and William Isaías Dassum (represented by counsel, Xavier Castro Muñoz and Heidi Laniado Hollihan)
Alleged victims:	The authors
State party:	Ecuador
Date of communication:	12 March 2012 (initial submission)
Document references:	Decision adopted pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 5 June 2013 (not issued in document form)
Date of adoption of Views:	30 March 2016
Subject matter:	Criminal conviction and seizure of authors' assets
Procedural issues:	Lack of victim status; inadmissibility *ratione materiae*; *litis pendentia*; lack of jurisdiction; failure to exhaust domestic remedies; abuse of the right to submit communications

* Adopted by the Committee at its 116th session (7-31 March 2016).

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

The text of an individual opinion (partly dissenting) by Mr. Yuval Shany, member of the Committee, appears as an annex to the present document.

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Substantive issues:	Right to liberty; right to due process; retroactive application of less favourable criminal law; equality before the law and non-discrimination
Articles of the Covenant:	2 (1) and 3 (a), 9, 14 (1), (2) and (3) (c), 15 and 26
Articles of the Optional Protocol:	Articles 1, 3 and 5 (2) (a) and (b)

1. The authors of the communication are Roberto Isaías Dassum and William Isaías Dassum, both Ecuadorian citizens. They claim to be the victims of violations of the rights set forth in the following articles of the Covenant: article 9; article 14 (1) and (2), read separately and in conjunction with article 2 (1) and (3) (a); article 14 (3) (c); article 15; and article 26. The Optional Protocol to the Covenant entered into force for Ecuador on 23 March 1976.

The facts as submitted by the authors

2.1 The authors are businessmen and were shareholders and directors of companies that were part of a corporate unit known as "Grupo Isaías", whose best known member was the Filanbanco bank. The authors were, respectively, president and vice-president of this bank. At the end of the 1990s, Ecuador experienced internal and external difficulties that seriously affected its economy. The slump in the production sector overall had a severe impact on the financial system, as a creditor of the sector. Ecuadorian banks suffered a serious crisis after 1998, when virtually all of them applied for liquidity loans from the Ecuadorian Central Bank (BCE). These loans were granted by BCE in 1998 and were based on the solvency of the technical assets of the financial group in question, which were submitted for review to the Office of the Superintendent of Banks. The Office of the Superintendent certified that Filanbanco was solvent and approved its access to stabilization loans.

2.2 After receiving several liquidity loans, private Filanbanco shareholders asked the Banking Board of Ecuador to subject the bank to a restructuring and consolidation programme, which the Board agreed to in its decision of 2 December 1998. This programme was exclusively for solvent banks with liquidity problems, which proves that Filanbanco was a solvent bank whose liquidity problems were cyclical. Otherwise, it would have been subjected to a pre-liquidation rationalization procedure.

2.3 Under the restructuring programme, the bank was handed over to a State agency, the Deposit Guarantee Agency (AGD). An audit carried out by the Arthur Andersen company in March 1999, just three months after the bank had been handed over to the Agency and while it was being administered by the State, showed that the bank was solvent and that the crisis when it was in private hands was due to liquidity problems. However, on 30 July 2002, while Filanbanco was still under State administration, the Banking Board decided on its compulsory liquidation, though not before the bank had been forced to absorb an insolvent bank (Banco La Previsora) and to make loans to other banks with problems. In view of the declaration of compulsory liquidation, Filanbanco closed its doors to the public on 30 July 2002. On 8 April 2010, the Office of the Superintendent of Banks declared that Filanbanco's assets were to be transferred to BCE and that it would cease to exist as a company.

2.4 Against this background, there began an intense campaign against the authors as former shareholders and directors of Filanbanco, including threats and defamatory statements from officials in the Office of the President and other government officials, and criminal proceedings were opened against them. The proceedings began with a request addressed by the Attorney General to the President of the Supreme Court on 16 June 2000,

asking him to conduct a preliminary investigation into the authors and other former officials of Filanbanco for bank embezzlement (article 257 of the Criminal Code in force at the time of the offence, i.e. 1998[1]) and fraud (article 363 of the same code), as well as various financial offences under the General Act on Financial Institutions. On 22 June 2000, the President of the Court ordered a preliminary investigation into the offences listed by the prosecutor and ordered the pretrial detention of the authors. On 26 June 2000, the President of the Court addressed an arrest warrant to National Police Headquarters; the authors contested the warrant on 27 June 2000.

2.5 On 20 November 2002, at the end of the investigation, the Attorney General submitted his report, amending his request of 16 June 2000 in the light of the investigation. His report contains the accusation against the authors for financial offences (false statements and authorization of illegal operations) but says there was no abuse of public funds belonging to BCE (embezzlement) or bank embezzlement, since it was only after the acts under investigation had taken place that the granting of associated, related or inter-company loans was classed as (bank) embezzlement.

2.6 On 19 March 2003, the President of the Court, distancing himself from the charges set out by the Attorney General, issued a decision to convene a trial for the offence of bank embezzlement.[2] The authors lodged an appeal against this decision with the Office of the President of the Court and filed an application for the procedure to be ruled null and void.

2.7 On 12 May 2009, the First Criminal Division of the National Court of Justice upheld the decision to convene a trial. The authors requested extensions, clarifications, amendments, declarations of nullity and recusal of the judges. On 28 October 2009, the judges on the panel decided to recuse themselves from the case, alleging that attempts had been made to bribe them. Three associate judges were appointed in their place; it was these judges who, on 15 January 2010, ruled on the authors' objections. They also amended the 12 May 2009 trial order, on the grounds that it violated the principles of legality and congruence between the indictment and the court decision. Therefore, the authors should not be tried for embezzlement but for the offences imputed to them in the indictment (balance sheet and document forgery).

[1] Article 257 states that: "Any person in the service of a public organization or entity or any person responsible for a public service who misuses public or private monies or securities, documents, deeds of title, bearer bonds or securities in their possession by virtue or reason of their office, whether the misuse takes the form of embezzlement, arbitrary disposal or any other similar form ... shall be punished with 4 to 8 years' imprisonment …

"This provision covers employees managing funds of the Ecuadorian Social Security Institute or of State-owned or private banks …"

Act No. 99-26, of 13 May 1999 introduced an amendment that added the following paragraph:

> "The provisions of this article also cover civil servants, administrators, executives or employees of private Ecuadorian financial institutions, as well as members of those bodies' boards of directors, who assist in the commission of these unlawful acts."

The same Act introduced the criminal offence of "special bank embezzlement":

> Article 257 A: "Any of the persons listed in the previous article who abuse their position to fraudulently obtain or grant associated, related or inter-company loans, in violation of the express legal provisions in respect of this kind of operation … shall be punished with 4 to 8 years' imprisonment …"

[2] The decision notes that some commentators were arguing that bank embezzlement could be considered an offence only if committed after article 257 A had been introduced in the Criminal Code. However, this assertion is unfounded, as the offence of bank embezzlement was already defined in paragraph 3 of article 257, which was in force at the time when the acts were committed. The decision cites a 1984 Supreme Court judgment that applied this provision of criminal law in convicting the directors of Banco La Previsora.

2.8 On 19 January 2010, the President of the National Council of the Judiciary suspended of his own motion the three associate judges for "alleged irregularities that have alarmed the general public and harmed the image of the judiciary", and started disciplinary proceedings against them for changing the criminal offence imputed to the authors. The President of Ecuador asked the Council to investigate the associate judges' bank accounts and publicly stated that the Council should dismiss them. On 26 January 2010, the National Assembly issued a resolution rejecting the decision of the associate judges and urged the Council to investigate their conduct and decide on appropriate sanctions. The associate judges ended up being reported to the Council by the Attorney General, dismissed and prosecuted for malfeasance. However, the proceedings against them were dismissed by the Second Criminal Division of the National Court of Justice on 8 December 2010, for lack of evidence.

2.9 The vacancy left by the dismissal of the associate judges was filled through the appointment of a "panel of temporary associate judges for criminal cases at the National Court of Justice", created specifically for these proceedings. The Constitution establishes a single category of associate judges at the National Court: they are selected under the same procedures and assigned the same duties as regular judges; they are appointed by the Council following a competitive recruitment process, not directly by the President of the National Court; and their job is not to try just one given case.[3]

2.10 On 17 May 2010, this panel declared the decision of 15 January 2010 to be null and void and reinstated the charge of embezzlement. This was the only decision taken by the panel. After issuing it, the panel members returned to private practice as lawyers.

2.11 The acts that were the subject of the proceedings took place before 1998, when the 1979 Constitution and the 1983 Code of Criminal Procedure were in force. According to articles 254 and 255 of the Code, proceedings are to be suspended until the accused surrender or are captured for trial. On 11 August 1998, a new constitution entered into force, article 121 of which allowed the trial in absentia of public officials and public servants in general who had been indicted on charges of embezzlement, bribery, extortion and illicit enrichment. The 2008 Constitution contains a similar rule. The authors were not public officials; nor were they being investigated for the aforementioned crimes. Moreover, the acts of which they were accused had occurred before the 1998 Constitution was adopted, and yet the proceedings against them went ahead.

2.12 On 3 August 2010, the Second Criminal Division of the National Court ordered the trial to begin. It also confirmed the detention order against the authors and the order notifying the police authorities and the International Criminal Police Organization (INTERPOL) that the authors were to be located and apprehended. On 11 August 2010, the

[3] According to the associate judges' decision of 17 May 2010, which is included in the file sent to the Committee, the State Counsel General appealed the decision of the panel of permanent associate judges, asking for it to be reversed and for the regular judges' decision to be upheld. The appeal was heard by the panel of temporary associate judges in accordance with the rules of procedure of the National Court, notably the Court's decision of 21 January 2009, which gives the President of the Court the authority to appoint temporary associate judges when neither the regular judges nor the permanent associate judges can act. Once their jurisdiction had been established, the temporary associate judges found that the permanent associate judges had amended, of their own motion, the decision of the regular judges to try the authors for embezzlement without having the authority to do so, since, regardless of the composition of the panel, it was still the same judicial body and therefore could not revoke its own decision. Its competence was limited to dealing with the requests for clarification and extensions submitted by the accused. Consequently, the panel of temporary associate judges declared the decision of the permanent associate judges to be null and void, and the decision of the regular judges to be applicable. As for the requests for clarification and extension requested by the accused, the panel rejected these as unrelated to flaws in the language or to clarification.

authors' objections were rejected and the order was given to begin proceedings in absentia. At the same time, the Government requested and obtained from INTERPOL international arrest warrants for the authors, who were living in the United States of America. In addition, the Government requested their extradition from the United States.

2.13 On 10 April 2012, a judge of the Special Criminal Division of the National Court sentenced the authors to 8 years' imprisonment for the crime of embezzlement. An appeal against the decision and appeals for annulment and in cassation were rejected on 12 March, 24 April and 29 October 2014, respectively, by the Special Criminal Division. The Constitutional Court rejected an application for a special protective remedy on 17 September 2015.

2.14 The National Court overturned of its own motion the appeal court ruling that the authors were guilty of embezzlement — by misappropriation of funds — as defined in article 257 of the Criminal Code, on the grounds that the ruling was a misinterpretation of this article and that the authors had actually been convicted of the offence of bank embezzlement, as defined in the same article. The penalty imposed was imprisonment for eight years, with no mitigating circumstances as the commission of the offence as part of a gang was an aggravating circumstance.

2.15 According to the authors, the cassation judgment aggravated the violations of the Covenant in that it violated: (a) the principle of legality, by retroactively assimilating the "misappropriation of funds" to the offence of embezzlement, even though the former had been decriminalized; it applied retroactively the less favourable criminal law, by considering them to be perpetrators of the offence of bank embezzlement, which at the time the charge was laid applied to much more limited cases; it applied the aggravating circumstance of "committed as part of a gang", which has been repealed in the current Comprehensive Organic Criminal Code; and it applied the criminal offence of embezzlement, which is indeterminate and an impediment to the defence of the accused; (b) the right to equality before the law, by applying more onerous sanctions than those imposed in identical cases; (c) the principle of *non reformatio in peius*, by imposing more onerous sanctions for offences other than those set out in the appeal court ruling, thereby also violating the right to a defence; (d) the right to be tried by independent judges, since the judges who ruled on the appeal had already participated in previous decisions in the same case or had publicly demonstrated bias in that connection.

2.16 In parallel with the criminal trial, a civil suit was brought by the Deposit Guarantee Agency against former shareholders and directors of Filanbanco to have their assets seized, allegedly in order to guarantee payment of the amounts owed to the bank's depositors at the time the Agency was called in. The proceedings were initiated by decision AGD-UIO-GG-2008-12 of 8 July 2008, which ordered the seizure of all assets belonging to individuals who had been directors and shareholders of Filanbanco up to 2 December 1998. On this basis, without any prior administrative or judicial proceedings and with the assistance of the police, the seizure of over 200 companies and other assets owned by the authors and other members of the Isaías group was set in motion.[4] In addition, on 9 July 2008, the Constituent Assembly, which had been elected under the political process led by the President of Ecuador, issued its Legislative Decree No. 13, according it constitutional rank. This decree confirmed the legal validity of the above-mentioned decision; declared that the decision was not subject to any constitutional remedy or other special protection; and ordered that applications for a remedy that had already been submitted should be shelved, without suspending or impeding implementation of the decision. Any judge who took over a case involving an application for any kind of constitutional remedy in connection with the decision or any future application to enforce the decision must reject them or face dismissal,

[4] The file contains a list of the companies and other assets seized.

without prejudice to any possible criminal liability incurred. The decree also established that the decision was not "subject to complaint, challenge, application for *amparo*, action-at-law, claim, judgment or any administrative or judicial decision".

2.17 Legislative Decree No. 13 of the Constituent Assembly has an antecedent in its Legislative Decree No. 1 of 9 November 2007, pursuant to which the decisions of the Constituent Assembly are not open to checks or challenges. This decree establishes that judges and courts processing any action that is contrary to these decisions shall be dismissed and prosecuted. On 10 June 2010, Roberto Isaías Dassum filed a motion with the Constitutional Court to have Legislative Decree No. 13 declared unconstitutional; the motion was dismissed on 21 June 2012 on the grounds that the decree was immune to such challenges.

2.18 The appeals submitted by the authors against this and subsequent decisions on the seizure of assets proved fruitless. The decision stipulates that all the authors' assets, including those that were not intended for the operations of Filanbanco or any other company in the same group, i.e. those allocated for the personal use of the authors, were liable to seizure. In addition, the seizure encompassed property believed by some to belong to the authors, regardless of the ownership shown on the respective property titles.

The complaint

3.1 The authors allege that irregularities in the criminal proceedings and asset seizure proceedings gave rise to violations of their right to the judicial guarantees of due process under article 14 (1), (2) and (3) (c) of the Covenant, read separately and in conjunction with article 2 (1) and (3) (a); the right to equality before the law and non-discrimination under article 26; the right not to be subjected to the retroactive application of less favourable criminal law under article 15; and the right to liberty of person under article 9.

3.2 The case is not pending before another international procedure, and domestic remedies with regard to the criminal proceedings have been exhausted. Regarding the asset seizure proceedings, there is no appropriate legal remedy, since Legislative Decree No. 13 of the Constituent Assembly excludes any judicial action or remedy.

Complaints relating to articles 14 and 26

3.3 In the criminal proceedings, Ecuador violated the rights of the authors (a) to be tried by a competent, independent and impartial tribunal established by law, (b) to be presumed innocent until proved guilty, and (c) to be tried without undue delay.

3.4 The decision of the three permanent associate judges of the First Criminal Division of the National Court not to prosecute the authors for bank embezzlement led to the dismissal and prosecution of the judges. Such arbitrariness violates the independence of the judiciary provided for in article 14 (1) of the Covenant.

3.5 The panel of temporary associate judges created specifically for this trial reinstated the charge of "bank embezzlement". This decision was taken just 10 days after the associate judges had been sworn in, despite the complexity of the case, the size of the file and the 10 years the case had lasted. This was the only ruling made by this panel. It was, therefore, a special court created in violation of the law for the sole purpose of handing down a judgment against the authors. Whatever the basis in domestic legislation for the establishment of this "temporary" court, it is illegitimate to use it solely to supplant three associate judges who were arbitrarily suspended and dismissed. Consequently, the appointment of this panel violated the principle of a "competent … tribunal established by law".

3.6 On 10 May 2010, Roberto Isaías Dassum appealed to have the appointment of the temporary associate judges revoked. On 11 May 2010 he requested that these associate judges recuse themselves from the case and on 20 May 2010 he challenged the decision to reinstate the charge of bank embezzlement, claiming a violation of the right to be tried by a competent, independent and impartial tribunal.

3.7 The right to be heard by the duly appointed (natural) judge had also been violated; as the authors were domiciled in Guayaquil, they should have been tried by an ordinary court in the district of Guayas. However, the case against the authors was added to those of other people being tried under special jurisdiction, so as to bring the case before the National Court.

3.8 To prohibit the authors from challenging the judges' appointment was also a violation of the right to be tried by an impartial court. This prohibition was the result of an amendment introduced in 2009 to the Code of Criminal Procedure, which established an absolute ban on the recusal of judges in cases initiated and processed under the 1983 Code, which was applicable in the case against the authors.

3.9 The authors' right under article 14 (2) of the Covenant to the presumption of innocence was violated by: (a) the repeated statements by the most senior officials in the executive branch affirming their guilt; and (b) the treatment of the authors as guilty during the proceedings, even before the full trial phase had begun. In the decision to start the trial, the President of the Supreme Court stated that "it had been determined in the preliminary investigation" that the authors "had committed" acts constituting "offences that were a means of committing the offence of bank embezzlement". This and similar statements implied that the responsibility of the authors was proven before the oral proceedings began and placed the burden of proof on them to prove during the rest of the trial that they were not guilty.

3.10 The authors' right to be tried without undue delay was violated by the unreasonable duration of the proceedings: (a) four years after the acts of which they had been accused had taken place, and two years after the start of proceedings, to issue the indictment (20 November 2002); and (b) more than six years to rule on the appeal against the order to start the trial, even though the law requires this to be decided in 15 days plus one day for every 100 pages in the case file. More than seven years passed between the formal opening of the full trial and its ratification by the panel of temporary associate judges.

3.11 The authors' absence from the country cannot be invoked as a cause of the delay in the criminal proceedings for two reasons: (a) the State chose to try them in absentia, even though its own Constitution forbade this; and (b) in leaving Ecuador, the authors were exercising their legitimate right to protect their freedom, integrity and security from the abuse of power of which they were victims.

3.12 The right to due process was also violated in the asset seizure proceedings. The Deposit Guarantee Agency is an administrative body that is not outside the scope of article 14 of the Covenant when it takes action to determine rights and obligations of a civil nature. In view of this, the absence of an administrative review procedure within the Agency, which would have allowed the authors to exercise their right to a defence before the Agency decided to seize their assets, violated due process guarantees (Covenant, art. 14 (1) and (2)). The State hid the legal weakness of decision AGD-UIOGG-2008-12 by giving it jurisdictional immunity under Legislative Decree No. 13. This immunity entails a violation of the right of access to justice, due process and equality before the law and the courts in respect of the authors' efforts to assert their rights under civil law, in particular their property rights as former Filanbanco owners and shareholders. Legislative Decree No. 13 also violates the right to due process in relation to article 2 (1) and (3) (a), of the Covenant, by not respecting the right to an effective remedy and the authors' right to equality before

the courts. For the same reasons, the decision and Legislative Decree No. 13, taken together, violate the right to equality before the law and non-discrimination provided for in article 26 of the Covenant, by denying access to justice to specific individuals seeking to assert their rights.[5]

Complaints relating to article 15

3.13 The authors are victims of a violation of this article in that: (a) they were subject to the application ex post facto of a newly defined criminal offence; and (b) they were accused of an offence that had been repealed by the time the full trial phase of the criminal proceedings began.

3.14 By Act No. 99-26 of 13 May 1999, i.e. after the incriminated acts had taken place, the Criminal Code was amended to include the criminal offence of "special bank embezzlement" (art. 257-A), which until then did not exist, and which involves loan operations with related companies. This amendment shows that, prior to its adoption, the conduct that constitutes this offence was not punishable. Until that date, both criminal law and banking legislation explicitly permitted such operations, within certain limits. Now, the National Court applied to the authors a criminal offence that had been repealed (art. 257), but reinterpreted it to cover related and inter-company operations. The prohibition of retroactive application of a law under article 15 (1) of the Covenant cannot be circumvented by a broader or improper interpretation of the old law designed to give retroactive effect to the new law.

3.15 Moreover, the authors are alleged to have authorized the use of the liquidity loans granted by the BCE to Filanbanco for unlawful purposes. Such conduct matches the legal definition of misappropriation of funds. However, Act No. 2001-47 "decriminalized" the misappropriation of public or private funds as a form of embezzlement, before the trial order was issued against the authors in 2003. This amounts to a violation of the last sentence of article 15 (1) of the Covenant, which protects the right to the retroactive application of the more favourable criminal law. This took place despite the fact that the Supreme Court avoided using the term "misappropriation", using instead the terms "arbitrary disposal of public funds" and "fraud" by means of the "authorization of illegal financial operations".

3.16 Retroactivity in contravention of article 15 (1) was also evident in the asset seizure proceedings started on 8 July 2008, since the legal basis cited by the Deposit Guarantee Agency was article 29 of the Act on Economic Restructuring in the Area of Tax and Finance, which was introduced in that Act in 2002.

Complaints relating to article 9

3.17 The judicial decision to place the authors in pretrial detention, though not executed, is an arbitrary measure taken by the State in violation of article 9 of the Covenant. To violate the right to liberty of person does not necessarily require the actual execution of a detention order or the incarceration of the person for whom an arbitrary arrest warrant has been issued. The very issuance of the detention order on 22 June 2000 and of an international arrest warrant, as well as the other measures taken to secure the authors' arrest and the extradition formalities, in the context of irregular and arbitrary criminal proceedings devoid of the minimum judicial guarantees, violates the right to liberty of person.

[5] The authors point out that a challenge against the decision, which was filed on 28 June 2010, was rejected by the Provincial Court of Justice of Guayaquil in application of Legislative Decree No. 13.

State party's observations on admissibility

4.1 In its observations of 4 December 2013 and 10 December 2015, the State party explains the differences between the criminal proceedings (started in 2000) and the asset seizure proceedings (started in 2008). In the first, the necessary judicial guarantees were assured, as the criminal case was brought against natural persons who had allegedly engaged in criminal activities regulated by the Criminal Code. By contrast, the acts linked to the seizure of assets stemmed from business activities and actions related to corporate assets. Given that in the proceedings before the Committee the only complainants are the authors, no internal action other than that taken against them can be brought up in those proceedings. Only natural persons are entitled to international protection of human rights. As a result, proceedings in which the plaintiffs are legal persons, and where the subject is their rights and obligations under national legislation, must be outside the scope of the communication. Moreover, it would be inappropriate to discuss lawsuits filed by persons other than the authors, be they natural or legal persons.

4.2 While the communication refers to an alleged violation of Covenant rights, this concerns the alleged use of the assets of different companies or groups of companies, which are legal persons. The authors are trying to use Covenant rights to defend the rights of legal persons. For this reason, the Committee should declare itself incompetent with regard to all administrative, legal or jurisdictional acts that involve companies or business groups. In addition, the allegations related to the property rights of shareholders, directors, businesses and corporations like the Isaías group are made in an effort to secure the protection of an alleged property right, and so the allegations related to the asset seizure proceedings should be declared inadmissible by the Committee *ratione materiae*.

4.3 The authors filed a petition with the Inter-American Commission on Human Rights. The outcome was a decision not to open the case on the grounds that the requirements for consideration had not been met and domestic remedies had not been exhausted. The Commission conducted a lengthy analysis of the petition and adopted a final decision that was duly notified to the complainants. Consequently, in accordance with article 5 (2) (a) of the Optional Protocol, the Committee should not consider the communication.

4.4 The communication is unsubstantiated as regards the obligations of the State party under the Covenant, as the authors are not in Ecuadorian territory and, therefore, such obligations are not enforceable by the State party. For the same reason, the authors are not subject to the power of the State party.

4.5 The Optional Protocol makes an exception to the requirement for the exhaustion of domestic remedies when the application of the remedies is unreasonably prolonged. In the present case, the complexity of the proceedings should be taken into account, as it was necessary first to request and then analyse extensive technical reports (external audits) from various public supervisory bodies, such as the Central Bank, the Anti-Corruption Commission and the Central and Regional Offices of the Superintendent of Banks. Moreover, the proceedings can be said to have been completed within a reasonable time, in view of the exhaustive procedures initiated by the authors, who in the course of the proceedings filed applications for every possible remedy available under domestic law.[6]

4.6 The authors have turned to the Committee without taking account of the purpose of the Covenant and the Optional Protocol, thereby hindering it in its task of considering the individual complaints submitted to it. This is a clear example of an abuse of the right to submit a communication.

[6] The State party provides a chronological list of the procedural motions filed in the years leading up to the trial.

State party's observations on the merits

4.7 In the State party's view, all the authors' arguments questioning the independence of the judges and courts are simply the result of their disagreement with court decisions and do not derive from the obligations that are the subject of article 14 of the Covenant. Article 182 of the Ecuadorian Constitution establishes the position of associate judge within the structure of the judiciary, giving such judges the same status, under the same regime of responsibilities and prohibited conduct in the exercise of their duties, as regular judges. On the basis of the standard-setting authority of the National Court in plenary session, as established by the Constitutional Court in its decision regarding the transition period — which, as a matter of constitutional jurisprudence, is binding on all public servants and individuals — article 11 of the Superseding Decision on the Organization of the National Court of 22 December 2008 sets out the legitimate, legal and constitutional activity of the associate judges of the National Court. This provision states that "in the absence of permanent associate judges … temporary associate judges [may be called on] to try a specific case … they shall be appointed by the regular judges of the Division hearing the case or, in their absence, by the President of the relevant Division." Accordingly, no one's right to be tried by a competent court has been violated. On the other hand, the recusal of judges as a procedural guarantee mechanism is practised in Ecuador.

4.8 There was no violation of the principle of presumption of innocence in the statements of the President of Ecuador, which were delivered in a setting designed to inform the public about his activities and the Government's policies. Such a setting reflects the freedom of expression of all citizens, including the President, whose personal opinions on a particular subject do not imply any influence on judges and courts.

4.9 As regards the complaints relating to article 15 of the Covenant, embezzlement was defined as an offence in the 1938 Criminal Code, as amended in 1971 (art. 257). This provision was amended again in 1977. Pursuant to the new provision, "officials of State-run or private banks," including shareholders, directors and employees, were listed among the perpetrators of the offence.[7] This made it possible to prosecute the authors and other bankers of the time. The judge considered that the authors were private banking officials, in their roles as president and vice president of Filanbanco, and that, according to the appellate ruling, "they misused public funds, that is, the liquidity loans granted by the Central Bank ... considering their conduct as the offence of embezzlement, as defined and sanctioned in the first and second paragraphs of article 257." Later, the Act of 13 May 1999 added a third paragraph to this article to include "civil servants, directors, executives or employees of private national financial institutions, as well as members of the boards of directors of such entities". The amendment clarified the earlier provision as regards the perpetrators of the offence. The legislature, in view of the widespread alarm created by the serious economic, social and political consequences of the banking crisis of 1998, was seeking in this amendment to expressly identify perpetrators of the offence, but this does not imply that the earlier provision had overlooked them.

4.10 As regards the asset seizure proceedings, the Deposit Guarantee Agency and the Banking Board of Ecuador observed the principle of legality. In particular, the Agency's decision No. 153 of 31 July 2008 contains instructions for the seizure of assets and guarantees a procedure that respects the rules of due process. There was therefore no violation of article 14 (1) of the Covenant as regards equality before the courts. In addition, the seizure process includes procedures to establish the lawful origin and real ownership of the seized assets. In the event of an abuse of authority, the Deposit Guarantee Agency could have been subjected to one of the administrative remedies set out in the Administrative Disputes Act.

[7] Conclusion of the National Court in its judgment in cassation.

4.11 As regards Legislative Decree No. 13 of the Constituent Assembly, Ecuador rejects the authors' argument that it is unconstitutional and illegitimate. The Constituent Assembly was not a State but a supra-State body, whose mandate derived directly from the will of the people. As a matter of democratic principle, the people's will is distinct from and clearly superior to the State. According to article 2.2 of its rules of procedure, "the National Constituent Assembly shall adopt legislative decrees that are binding on its decisions and regulations in the exercise of its full powers. Legislative decrees shall have immediate effect without prejudice to their publication in the relevant organ." The Assembly considered the complex financial and administrative situation of Filanbanco and stressed the importance of the work of those institutions of State, such as the Deposit Guarantee Agency, which are considered an expression of the authorities' desire to eradicate all forms of impunity. It was in this context that the asset seizure proceedings were authorized. In line with Legislative Decree No. 13, the Assembly, in a decision of 8 July 2008, set out measures to protect the rights of the workers of the companies involved. The decision and Legislative Decree No. 13 are not acts of the State containing *ad hominem* legal rules, as they are not related to natural persons, as claimed by the authors.

4.12 As the authors are not under its jurisdiction or within its territory, Ecuador cannot be held accountable for acts relating to an alleged violation of article 9 of the Covenant. As regards the extradition proceedings, in June 2013 the United States Department of State informed Ecuador that the request to extradite the authors had been rejected, indicating that Ecuador must provide sufficient evidence to determine probable cause for the offence of which they were accused, and that the Departments of State and Justice would then reconsider the extradition request.

4.13 The State party recalls the Committee's jurisprudence in the case of *González del Río v. Peru* (communication No. 263/1987), according to which the issuance or existence of a detention order does not in itself constitute a form of deprivation of liberty. This jurisprudence confirms that the scope of protection of the right concerned is physical freedom, and that its violation requires not only that the person concerned is detained, but also that their detention is illegal or arbitrary. Insofar as the competent judge hands down a pretrial detention order in accordance with the law and verifies the existence of evidence that an offence was committed and that the defendants participated in committing it, as was done in the case against the authors according to the order to initiate criminal proceedings, the precautionary measure of pretrial detention is justified. The decision of 22 June 2000 justified the issuance of the detention order for breach of the law by Filanbanco, since, during the term of the loans granted by the Central Bank, these were not used to preserve the stability of the financial system but to invest in prohibited operations. Throughout the criminal process, the detention order was scrutinized periodically by the judges in the case in order to verify its content and ensure that the defendants appeared in court. Each renewal of the order complied with the legal requirements and was justified by the evidence that offences had been committed. Moreover, no figure can be placed on the period of validity of detention orders against a person who is still at large, because the order alone does not constitute a limitation on their physical freedom, and cannot be or become illegal or arbitrary.

Authors' comments on the State party's observations

5.1 The authors submitted comments on the State party's observations on 6 February 2014.

5.2 The smear campaign and the constant statements against them have continued. In February 2014, for example, on the programme "Enlace Ciudadano" (Citizen Liaison), broadcast by several radio and television stations, the President of the country called them

"scoundrels" and "criminals" and accused them once again of driving the country's largest bank into bankruptcy and attacking the national Government in the print media.

5.3 Ecuador asserts that in the criminal proceedings, the rights to due process and the protection of the court were respected. However, it offers no evidence of this assertion, it does not deny the facts that are the subject of the communication and it does not rebut their characterization as a violation of rights guaranteed by the Covenant.

5.4 As regards the asset seizure proceedings, the authors state that behind the rights of legal persons may be found the rights of their shareholders, natural persons, who, according to the State itself, were the authors or members of their families. The Act on Economic Restructuring in the Area of Tax and Finance provides explicitly for a measure to be taken against "the shareholders", who would be held personally liable, as individuals or natural persons, for the debts contracted by the banks, namely the legal entities that the shareholders, as individuals, are partners in. All the actions of the State denounced in this communication explicitly targeted the authors as natural rather than legal persons.

5.5 The authors submitted their complaint to the Inter-American Commission on Human Rights in 2005, but in 2008 the Commission decided not to proceed with it, on the grounds that domestic remedies had not been exhausted. The authors petitioned for a review but later desisted and formally withdrew their petition. This happened before they submitted their communication to the Committee.

5.6 The authors reject the State's argument about lack of jurisdiction *ratione loci*. All the acts reported in this communication were carried out by agents of the State in the exercise of Ecuadorian jurisdiction. The authors' absence from the territory does not absolve the State party of responsibility for the breach of its obligations under the Covenant or remove the victims from the protection that it affords them. Trying a person means exercising jurisdiction and using the power of the State over him or her.

5.7 Ecuador does not submit evidence of abuse of rights or explain how such abuse might have occurred. The delay in the criminal proceedings can be attributed to the lack of diligence of the judicial authorities and the arbitrariness of their conduct, which have forced the authors to seek remedies in defence of their right to a fair hearing.

5.8 Ecuador identifies deregulation and the removal of controls on financial activity, which lessened the State's control over the financial sector, as one of the causes of the 1999/2000 financial crisis. This assertion shows that the activities and behaviour for which the authors were tried were not prohibited by the legislation in force at the time. On the contrary, they were in compliance with the General Act on Financial Institutions.

5.9 Regarding the length of the proceedings, the authors state that the victims of procedural violations cannot be expected to abstain from seeking remedies or mounting a defence. The six years that it took for the criminal proceedings to begin following the decision to convene a trial cannot be blamed on the authors. That a trial to determine liability for banking offences should have been delayed for more than 13 years cannot be justified, either.

5.10 The Code of the Judiciary of 9 March 2009 does not grant the National Court of Justice the authority to appoint temporary associate judges and, moreover, it abrogates the decision of the Supreme Court of 19 May 2008 permitting the appointment of temporary associate judges.

5.11 Regarding Legislative Decree No. 13, the authors recall that the objective of a Constituent Assembly is to write a new constitution. In some cases, these bodies have taken on other functions, such as appointing civil servants or enacting transitional rules between one constitutional regime and the next. Nonetheless, the fact that such an assembly should

rule on and have an impact on private cases involving specific persons, depriving them of their fundamental rights, constitutes an unlawful and discriminatory situation.

5.12 As regards the characterization ex post facto of an action as a criminal offence or the application of an offence that has been repealed, Ecuador did not provide a specific reply to the authors' allegations or counter their arguments about the violation of the last sentence of article 15 (1) of the Covenant. As for the complaint relating to article 9, the authors reiterate their initial arguments. The order for their detention is still in force, and Ecuador is still trying to deprive them physically of their liberty.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the 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.

6.2 The Committee takes note of the objection raised by the State party that the obligations set out in the Covenant are not enforceable by it since the authors are not in Ecuadorian territory. The Committee considers that the authors' complaints are related to the judicial proceedings brought against them in the State party, regardless of their residence abroad, and that in this regard the State party has exercised its jurisdiction. Therefore, absence from the territory does not constitute an obstacle to the admissibility of the communication.

6.3 The Committee considers that the authors' allegations do not, of their nature, imply an abuse of the right to submit communications, and that there are no obstacles to the admissibility of the communication under article 3 of the Optional Protocol.

6.4 The Committee takes note of the State party's observation that the communication is inadmissible under article 5 (2) (a) of the Optional Protocol because the authors submitted a complaint to the Inter-American Commission on Human Rights. The authors responded to this argument by pointing out that the Commission decided in 2008 not to proceed with the complaint; and that the authors asked for a review but subsequently withdrew this request before submitting their communication to the Committee. The Committee refers to its jurisprudence on this matter[8] and considers that the same matter is not being examined under another procedure of international investigation or settlement. Therefore, the Committee is not precluded under article 5 (2) (a) of the Optional Protocol from considering the present communication.

6.5 The authors claim that the detention order violates their rights under article 9 of the Covenant. The Committee notes, however, that the order was issued within the framework of criminal proceedings, that it has not been executed, since the authors are not in the territory of the State party, and that the authors are not deprived of their liberty. Therefore, the Committee considers that this claim is unsubstantiated and therefore inadmissible under article 2 of the Optional Protocol.

6.6 As regards the complaints concerning article 14 (1) and (2) of the Covenant, read separately and in conjunction with article 2 (1) and (3) (a), and article 26, with regard to the asset seizure proceedings, and articles 14 (1), (2) and (3) (c) and 15, with regard to the criminal proceedings, the Committee considers that these claims have been sufficiently substantiated for purposes of admissibility, declares them admissible and proceeds to their examination on the merits.

[8] Communication No. 2202/2012, *Rodríguez Castañeda v. Mexico*, Views adopted on 18 July 2013, para. 6.3.

Consideration of the merits

7.1 The Committee has considered the present 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 authors claim that the asset seizure proceedings violated their right of access to justice, to equality before the courts and to due process under article 14 (1) and (2) of the Covenant, asserting their civil rights to challenge the seizure of their personal assets; that there was no administrative review procedure that would have allowed them to exercise their right to a defence before the Deposit Guarantee Agency ordered the seizure; that Legislative Decree No. 13 prohibited the institution of any legal challenge to the Agency's decision to order the seizures, and expressly established that any judge who took over a case involving an application for any kind of constitutional remedy in connection with the decision or any future application to enforce the decision must reject them or face dismissal, without prejudice to any possible criminal liability incurred; and that these actions would also violate their right to due process in relation to article 2 (1) and (3) (a), and the right to equality before the law and non-discrimination under article 26. The State party points out that the acts linked to the seizure of assets stemmed from business activities and actions related to corporate assets. Given that only natural persons are entitled to international protection of human rights, the authors' complaints about the asset seizure proceedings would be outside the scope of the communication; also *ratione materiae*, as the complaints are aimed at a purported right to property.

7.3 The Committee recalls its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, paragraph 9 of which states that "the fact that the competence of the Committee to receive and consider communications is restricted to those submitted by or on behalf of individuals (article 1 of the Optional Protocol) does not prevent such individuals from claiming that actions or omissions that concern legal persons and similar entities amount to a violation of their own rights".

7.4 In the present case, the Committee considers that the issuance of Legislative Decree No. 13, which expressly prohibited the filing of any applications for constitutional remedy or other special protection in respect of the decisions of the Deposit Guarantee Agency and included the instruction to dismiss, without prejudice to any possible criminal liability incurred, any judges who took cognizance of such applications, violates the authors' right, under article 14 (1) of the Covenant, to a fair hearing in the determination of their rights and obligations in a suit at law.

7.5 Having reached that conclusion, the Committee will not consider the complaint relating to the violation of article 26 of the Covenant for the same acts.

7.6 The authors claim that in the criminal proceedings the following rights under article 14 were violated: the right to be tried by a competent, independent and impartial tribunal established by law; the right to be presumed innocent until proven guilty; and the right to be tried without undue delay. In this respect, the Committee notes that the National Court was designated as the competent court because of the privileges enjoyed by some of the co-defendants and on the basis of internal procedural rules whose interpretation is not for the Committee to question.

7.7 The Committee also notes that in the prosecutor's report of 20 November 2002, the authors are accused of financial crimes but not embezzlement, and it is pointed out, among other things, that bank embezzlement was categorized as an offence after the incriminated acts had taken place. However, the President of the Court ordered a trial for the offence of bank embezzlement, stating that such conduct was covered by article 257 of the Criminal Code in force at the time of the acts and that there was jurisprudence in this area. The trial

order for this offence was confirmed on 12 May 2009 by the Criminal Division of the Court, although the judges on the panel subsequently recused themselves from hearing the case. This led to their replacement by three associate judges from the same division, whose job was to rule on the authors' appeal against the trial order. The resultant panel handed down a decision amending the trial order of 12 May 2009 and determined that the authors should not be tried for embezzlement but for the offences set out in the indictment. The President of the Court, of his own motion, suspended the associate judges for misconduct and the State appealed their decision. To hear the appeal, three temporary associate judges were appointed to the Criminal Division, on the basis of the Court's decision of 21 January 2009 allowing the President of the Court to appoint temporary associate judges when neither the regular judges nor the permanent associate judges can act. This new panel revoked the decision of the permanent associate judges on the definition of the offence, on the grounds that they had amended of their own motion the decision of the regular judges without having the authority to do so, since, regardless of the composition of the panel, it was the same judicial body and therefore could not revoke its own decision.

7.8 The Committee notes that the competence of the Criminal Division to rule on issues relating to the trial order is not in dispute. The fact that its composition was altered twice on the basis of the procedural rules in force at the time does not affect the principle of the natural judge in the circumstances of the case, as the composition was determined in accordance with the law in force, including the rules governing the functioning of the Court, according to the State party. As the Committee is not a fourth level of jurisdiction (or a "court of fourth instance"), it is not its role to consider the merits of the decisions taken by the judges involved.

7.9 The Committee notes that the President of Ecuador made statements calling for the associate judges to be dismissed; that on 26 January 2010 the National Assembly issued a resolution rejecting the decision of the associate judges and calling for an investigation into their conduct; and that the associate judges were dismissed and prosecuted for malfeasance by the National Court of Justice, although the case was ultimately dismissed.

7.10 The Committee notes that the events that led to the authors' prosecution had a big impact on the economic and financial situation of the country, the consequences of which lasted for some time. The Committee also notes that in this context, the highest authorities in the land expressed their views publicly and made statements urging criminal sanctions for those responsible for the events, who had been, after all, people at the top of the country's most representative banking institutions. However, this does not mean that the manner in which the criminal proceedings against the authors were conducted or the final outcome of the investigation were determined by or were the result of the public utterances of representatives of the executive and the legislature, or that those utterances violated any article of the Covenant.

7.11 In the light of the above, the Committee considers that the information before it does not allow it to conclude that there has been a violation of article 14 (1) and (2) of the Covenant.

7.12 As regards the authors' complaint in connection with the delay in the criminal proceedings, the Committee notes, and agrees with the State party, that the acts that were the subject of the judicial investigation were very complex from a substantive standpoint, and also by virtue of the number of people involved. Moreover, the Court had to deal with a large number of procedural motions and appeals. In view of these factors, the Committee does not have sufficient evidence before it to enable it to conclude, under article 14 (3) (c) of the Covenant, that the National Court was responsible for any undue delays.

7.13 The authors claim to have been the victims of a violation of article 15 of the Covenant, as they were convicted of a criminal offence, bank embezzlement, provided for in article 257 of the Criminal Code, which did not cover the acts they were alleged to have committed, and that, in so doing, the courts made a wrongful interpretation of this article of the Criminal Code. In addition, the authors were accused of conduct that matched the legal definition of "misappropriation of funds", even though the misappropriation of public or private funds as a form of embezzlement was decriminalized in 2001. The Committee notes that the issues related to the criminal offence applicable to the authors and the interpretation of article 257 of the Criminal Code were the subject of many procedural motions and rulings by various bodies of the National Court from the beginning of the proceedings up to the ruling on the appeal in cassation, which analysed the changes in the criminal offences applied in the case, including the classification of bank embezzlement. Prior to the conviction in first instance, three different panels (regular judges, permanent associate judges and temporary associate judges) of the Criminal Division of the National Court ruled on the classification of the alleged acts as embezzlement. Moreover, the legal controversy surrounding the classification of the alleged acts as embezzlement was what led to the recusal of the regular judges of the Division, the dismissal of the permanent associate judges and the appointment of a panel of temporary associate judges. The same issue was also considered at appeal and in cassation. The authors' complaints to the Committee under article 14 (1) and (2) of the Covenant are also based on the controversy over whether the alleged acts were or were not covered by the definition of embezzlement contained in article 257 of the Criminal Code. Their complaints under article 14 (1) and (2) and those relating to article 15 of the Covenant are therefore closely linked. However, the Committee is not competent to elucidate the debate on *ius puniendi*, nor on different criminal classifications and their content, as it is not a fourth level of jurisdiction.

7.14 The Committee recalls its jurisprudence to the effect that it is for the courts of States parties to evaluate the facts and the evidence in each particular case, or the application of domestic legislation, unless it can be proven that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice. The Committee notes that, according to the ruling in cassation, the conduct imputed to the authors was already defined as a criminal offence in article 257 of the Criminal Code in force at the time of the events (bank embezzlement) and that the 1999 amendment, which post-dated them, simply clarified the established offence as regards the perpetrators of the criminal offence. The Committee considers that there is not sufficient evidence to affirm that the interpretation of article 257 of the Criminal Code by the domestic courts was manifestly wrong or arbitrary. Accordingly, the acts as described do not allow the Committee to conclude that there was a violation of article 15 of the Covenant.

8. The Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party violated the authors' right, under article 14 (1) of the Covenant, to a fair hearing in the determination of their rights and obligations in a suit at law.

9. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. In implementation of this obligation, the State party should make full reparation to the persons whose rights under the Covenant have been violated. Consequently, the State party should ensure that due process is followed in the relevant suits at law, in accordance with article 14 (1) of the Covenant and the present Views.

10. By becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant. Pursuant to article 2 of the Covenant, the State party has undertaken to guarantee to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy where it has been determined that a violation has occurred. The Committee therefore requests the State party to provide, within 180 days, information about the measures taken to give effect to the present Views. The State party is also requested to publish the present Views and have them widely disseminated in the State party.

Annex

Individual opinion (partly dissenting) of Mr. Yuval Shany, member of the Committee

1. I agree with the Committee that the combination of decision AGD-UIO-GG-2008-12, adopted by the Deposit Guarantee Agency on 8 July 2008, and Legislative Decree No. 13, adopted by the Constituent Assembly on the following day, violated the authors' right under article 14 (1) of the Covenant to a fair and public hearing by a competent tribunal to determine their legal rights and obligations — in the present case, their rights and obligations as individuals subject to seizure of assets as directors and shareholders in the Filanbanco bank. The Committee was also correct in rejecting the State party's objection *ratione personae* alluding to the aim of the impugned measures to seize corporate assets, since the authors' private property was encompassed by the said measures, and the authors were deprived, as individuals, of the ability to challenge the legality of the measures.

2. I am less persuaded, however, by the Committee's treatment of the statement of the President of Ecuador, in which the President called on the associate judges to be dismissed and investigated, and of the treatment of the authors' claims pertaining to the retroactive application of Act No. 99-26 of 13 May 1999. With respect to the President's statement, I do not agree with the Committee's position that the key question is whether it has been demonstrated that the manner in which the criminal proceedings against the authors were conducted or the final outcome of the investigation were determined by or were the result of the public utterances of representatives of the executive branch and the legislature (para. 7.10). A call by a senior member of the executive branch to investigate judges and remove them from office because of an interim decision they rendered in the course of complex criminal proceedings constitutes a serious and direct act of interference in the independence of those proceedings. It should be recalled in this connection that the right to be tried before an independent tribunal is an absolute right,[a] not only in the sense that it is not subject to exceptions, but also in the sense that the right does not depend on the eventual outcome of the tainted proceedings. In other words, the right to be tried before an independent tribunal may be violated even if it is not shown that the outcome of the case was affected by the lack of independence. I am therefore of the view that the President's statement violated the authors' right to be tried before a tribunal that is actually independent and that reasonably appears to be independent.[b]

3. With regard to the issue of retroactivity, the Committee is correct in observing that it is generally for the domestic courts of the States parties to evaluate the manner of application of domestic law. However, in the circumstances of the present case, in which both the Attorney General and the associate judges were of the view that the indictment should not contain the new bank embezzlement offence because of the non-retroactive application of its new definitions, and given the aforementioned interference in the criminal proceedings by the executive branch, I remain doubtful as to whether the ultimate position of domestic courts on the matter could attract full deference from the Committee.

[a] See the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 19.

[b] See European Court of Human Rights, Application No. 22107/93, *Findlay v. the United Kingdom*, judgment of 25 February 1997, para. 73.