



**United Nations**

# **Report of the Human Rights Committee**

## **Volume II**

**Ninety-seventh session  
(12–30 October 2009)**

**Ninety-eighth session  
(8–26 March 2010)**

**Ninety-ninth session  
(12–30 July 2010)**

**General Assembly  
Official Records  
Sixty-fifth session  
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*Note*

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## Annex V

### Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights

#### A. Communication No. 1206/2003, *R.M. and S.I. v. Uzbekistan* (Views adopted on 10 March 2010, ninety-eighth session)\*

<i>Submitted by:</i>	T.M. and Z.I. (not represented by counsel)
<i>Alleged victims:</i>	R.M. and S.I., the authors' sons
<i>State party:</i>	Uzbekistan
<i>Date of communication:</i>	13 October 2003 (initial submission)
<i>Decision on admissibility</i>	6 July 2006
<i>Subject matter:</i>	Imposition of death penalty after unfair trial
<i>Procedural issue:</i>	Non-substantiation of claims
<i>Substantive issues:</i>	Right to life; fair hearing; right to be presumed innocent
<i>Articles of the Covenant:</i>	6, paragraphs 1 and 4; 7; 9; 10; 14, paragraphs 1–3; 16
<i>Article of the Optional Protocol:</i>	2

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

*Meeting* on 10 March 2003,

*Having concluded* its consideration of communication No. 1206/2003, submitted to the Human Rights Committee on behalf of R.M. and S.I. under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the authors of the communication, and the State party,

*Adopts* the following:

#### Views under article 5, paragraph 4, of the Optional Protocol

1.1 The authors of the communication are T.M. and Z.I., both citizens of Uzbekistan. They submit the communication on behalf of their sons, respectively, R.M. and S.I., also

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Mahjoub El Haiba, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

Uzbek citizens, both born in 1979, who at the time of submission of the communication were detained on death row in Tashkent. They claim that their sons are victims of violations by Uzbekistan of article 6, paragraphs 1 and 4; article 7; article 9; article 10; article 14, paragraphs 1, 2 and 3; and article 16 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 28 September 1995. The authors are unrepresented.

1.2 Under rule 92 of its Rules of Procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, requested the State party, on 13 October 2003, not to carry out the executions of the authors' sons, so as to enable the Committee to examine their complaint. By note of 30 October 2003, the State party informed the Committee that it would accede to the request for interim measures. On 1 May 2009, following the Committee's request for an update on the status of the death sentences of R.M. and S.I. after the abolition of the death penalty in Uzbekistan as of 1 January 2008, the State party forwarded information to the effect that on 29 January 2008, the Supreme Court of Uzbekistan had commuted their respective death sentences to 25 years' imprisonment.

#### **The facts as presented by the authors**

2.1 On 30 June 2003, the authors' sons were convicted by the Tashkent City Court of the premeditated murder under aggravated circumstances and robbery of two individuals, and were sentenced to death. R.M. and S.I. confessed to having killed the victims in the course of a fight, provoked by the victims' aggressive actions. They claimed, however, that they had not intended to kill them, did not steal from them and that they had duly reported the crime to the police. During the course of the investigation, both men were psychologically and physically coerced into confessing guilt on all of the charges. The Court refused to take any mitigating factors into account and sentenced them to death. The authors submit that during the trial, the court did not act objectively and took the side of the prosecution.

2.2 On 1 August 2003, an Appeal Chamber of the Tashkent City Court revised the sentence by withdrawing certain charges which it considered were unfounded, but upheld the death sentence. On 25 September 2003, the Judicial Chamber for Criminal Cases of the Supreme Court further revised the sentence by withdrawing a number of other charges but also upheld the death sentence.

#### **The complaint**

3. The authors claim that their sons' trial and ill-treatment in custody give rise to violations of articles 6, paragraphs 1 and 4; article 7; article 9; article 10; article 14, paragraphs 1, 2 and 3; and article 16 of the Covenant.

#### **The State party's observations on admissibility and merits**

4.1 In a note verbale dated 30 October 2003, the State party stated that R.M. and S.I. were found guilty of having committed a robbery, combined with the premeditated murder of a married couple in their apartment and attempted premeditated murder of two other persons, including a minor, in the evening of 22 December 2002. The Tashkent City Court found that, having armed themselves with knives, their intent was to murder the couple. Following the murders, the authors' sons tried to cover their tracks by turning on a gas stove and leaving a burning cigarette in the apartment.

4.2 The State party submitted that the guilt of R.M. and S.I. was proven beyond doubt by the case evidence and that the death sentences were justified and proportionate to the crime committed.

### Authors' comments on the State party's observations

5.1 In their comments on the State party's observations dated 19 March 2004 (for T.M.) and 7 December 2005 (for Z.I.), the authors contended that their sons' death sentences were cruel and unfounded. They added that they had not received a fair trial because the Tashkent City Court and the appeal instances committed serious violations of domestic criminal and criminal procedure law.

5.2 The authors claimed that a number of charges against their sons should have been withdrawn, including murder with the intent to profit and to rob, concealing a crime and murder with particular cruelty. The authors stated, inter alia, that under article 97 of the Criminal Code, aggravating circumstances "with particular cruelty" could only be found where the accused had subjected the victim to torture or committed a wantonly cruel act; there was no allegation that this was so in the present case.

5.3 The authors submitted that under the Resolution of the Supreme Court No. 40 on judicial practices related to the cases of premeditated murder (20 December 1996), where several persons are charged with a crime, the court must examine the character and degree of participation of each of the accused. In the present case, the courts did not establish who actually committed the murder. According to the authors, the investigation materials and the court proceedings demonstrate that neither R.M. nor S.I. had premeditated the murders. Moreover, according to the Resolution of Plenum of the Supreme Court "On court judgment", where a crime is committed by a group of people or with prior agreement between them, the court must establish precisely the role played by each of the accomplices. In the present case, this was not done.

5.4 According to the authors, the courts have not taken into account the fact that the deaths occurred in the context of an argument over a debt. Allegedly, the victims had refused to pay back an overdue debt to R.M., as a result of which the victims themselves provoked a fight.

5.5 The authors added that their sons' presumption of innocence was violated because their guilt was not proven according to law. Moreover, contrary to article 56 the Criminal Code,<sup>1</sup> aggravating circumstances were taken into account twice – as elements of the crime and in determining the punishment, while mitigating circumstances were altogether ignored by the courts.

5.6 Lastly, the authors submitted that according to Resolution No. 40 of the Supreme Court, a death sentence is the exceptional punishment for premeditated murder under aggravated circumstances. Article 97 of the Criminal Code envisaged imprisonment for 15 to 20 years as an alternative to the death penalty, while article 7 stipulated that a stricter sentence shall be imposed only if the purposes of punishment could not be achieved through imposition of a lesser punishment envisaged for a crime. Therefore, in the authors' view the law allows, rather than mandates, the imposition of the death penalty.

5.7 Appeals for Presidential pardon were submitted by T.M. on behalf of R.M. on 28 October 2003 and by Z.I. on behalf of S.I. on an unspecified date. Negative replies to the requests for reconsideration of the death sentence for S.I. were received from the Supreme Court on 27 December 2003, 16 January, 31 March and 2 August 2004 and on 30 June 2005. No further information on the outcome of the appeal on behalf of R.M. has been provided by T.M.

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<sup>1</sup> Article 56 of the Criminal Code (Aggravated Circumstances): [...] Aggravated circumstance stipulated in a relevant article of the Special Part of the Criminal Code as an element of that crime cannot be taken into account in determining the punishment.

### **Decision on admissibility**

6.1 During its eighty-seventh session, on 6 July 2006, the Committee considered the admissibility of the communication. It noted that in their initial submission of 13 October 2003, the authors alleged that their sons had been psychologically and physically coerced, during the investigation, into confessing their guilt on all of the charges against them. However, no information in substantiation of this claim had been adduced. In the circumstances, the Committee considered that the authors had failed to substantiate the claim sufficiently under article 7, for purposes of admissibility, and found this claim inadmissible under article 2 of the Optional Protocol.

6.2 The Committee further observed that the authors' claims under article 9 and article 10 had not been properly substantiated, as there was no information on file which suggested that the authors' sons had been subjected to arbitrary arrest or detention or that they had been treated inhumanly or without respect for their inherent dignity in detention. The Committee also noted that nothing was available in the file to suggest that the authors' sons had been denied recognition as persons before the law within the meaning of article 16. Accordingly, the Committee found the authors' claims under article 9, article 10 and article 16 insufficiently substantiated, and thus inadmissible under article 2 of the Optional Protocol.

6.3 The Committee considered that the facts as submitted by the authors appeared to raise issues under article 14, paragraphs 1, 2 and 3, of the Covenant, and that the authors' claims in respect of these provisions should be examined by the Committee on their merits. Since the authors' claim under article 14 that their sons were sentenced to death after an unfair trial was declared admissible, so was the claim of a violation of article 6.

6.4 To enable the Committee to make an informed decision on the merits of the communication, the Committee also decided that the State party should be reminded of its obligation under article 4, paragraph 2, of the Optional Protocol, to examine in good faith all allegations brought against it and to provide the Committee with all relevant information at its disposal. In particular, the State party was requested to provide copies of the trial transcripts of the Tashkent City Court that convicted the authors' sons on 30 June 2003 and of the Appeal Chamber of the Tashkent City Court that upheld this conviction on 1 August 2003, as well as a copy of the ruling of the Appeal Chamber of the Tashkent City Court of 1 August 2003. In turn, the authors were requested to provide copies of their sons' complaints on appeal and of any other petition submitted to the State party's authorities, pertinent to their claims under article 14 and article 6 of the Covenant.

### **State party's observations on the merits**

7.1 On 12 October 2006, the State party submitted its observations on the merits, without however providing any of the court documents requested of it in the Committee's decision on admissibility. The State party stated that the Committee's decision on admissibility was examined by the Supreme Court of Uzbekistan, which concluded that no violations of the criminal or criminal procedure law had taken place during the investigation and court examination of the criminal case of R.M. and S.I.

7.2 The allegations about the "use of unlawful methods" to extract confessions on all charges from R.M. and S.I., and information from witnesses in the course of pretrial investigation and trial were not confirmed by the Supreme Court. Both alleged victims were "provided with a right to defence from the outset of their detention", all interrogations, legal proceedings and court hearings were conducted in the presence of their lawyers.

7.3 According to the State party, under article 509 of the Criminal Procedure Code, the original decision of the second instance's court shall be signed by all of the judges who take part in the examination of the case and shall be added to a defendant's criminal case file. A

convict and the other parties to the proceedings shall be provided with a certified copy of the decision, which may omit the signatures of the judges involved.

7.4 Finally, the State party reiterated that the domestic courts correctly assessed the legal qualification of the crimes committed by R.M. and S.I., and that the punishment was proportionate to the crime committed.

7.5 By notes verbales of 17 October 2006 and 16 February 2009, the State party was reminded of the Committee's request to provide court documents indicated in its decision on admissibility. On 1 May 2009, the State party notified the Committee that, according to article 475 of the Criminal Procedure Code, copies of the judgment and of other court documents are made available only to the parties to criminal proceedings. For this reason, copies of the court documents requested by the Committee could not be made available to it.

#### **Absence of the authors' comments on the merits**

8. By letters of 17 October 2006, 16 February 2009, 5 May 2009 and 19 October 2009, the authors were requested to submit their comments on the State party's observations on the merits and reminded of the Committee's request to provide court documents indicated in its decision on admissibility. The Committee notes that this information has not been received.

#### *Consideration of the merits*

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee notes the authors' allegations, raising issues under article 14, paragraphs 1, 2 and 3, of the Covenant, that their sons' trial was unfair, their right to be presumed innocent was violated and that the court failed to establish the character and degree of participation of each of the accused in the murders. It observes that these allegations relate primarily to the evaluation of facts and evidence by the State party's courts. It recalls<sup>2</sup> that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice. The Committee further notes the State party's contention that article 475 of its Criminal Procedure Code prevents it from supplying court documents as requested in the Committee's admissibility decision. While the Committee regrets the State party's failure to provide this information and reiterates its obligation under article 4, paragraph 2, of the Optional Protocol, to provide the Committee with all relevant information at its disposal, it notes, at the same time, that the authors themselves have not provided the information requested from them despite four reminders sent in 2006 and 2009. Indeed, the authors have provided no response at all to the Committee's admissibility decision or to the State party's observations. Accordingly, and in absence of any further pertinent information which would enable it to verify whether the trial in fact suffered from the defects alleged, the Committee can find no basis for a conclusion of a violation of article 14, paragraphs 1, 2 and 3, of the Covenant.

9.3 Finally, as to the authors' claim under article 6 of the Covenant, the Committee notes that on 29 January 2008, the Supreme Court of Uzbekistan commuted the death sentences of both R.M. and S. I. to 25 years' imprisonment. In light of this, and absent any

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<sup>2</sup> See, inter alia, communication No. 541/1993, *Simms v. Jamaica*, decision on inadmissibility adopted on 3 April 1995, para. 6.2.

findings of violations of article 14 in the present case, the Committee concludes that the facts before it do not reveal a violation of article 6, of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of any of the provisions of the International Covenant on Civil and Political Rights.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]



**B. Communication No. 1225/2003, *Eshonov v. Uzbekistan*  
(Views adopted on 22 July 2010, ninety-ninth session)\***

<i>Submitted by:</i>	Olimzhon Eshonov (not represented by counsel)
<i>Alleged victims:</i>	The author and his deceased son, Orif Eshonov
<i>State party:</i>	Uzbekistan
<i>Date of communication:</i>	8 September 2003 (initial submission)
<i>Subject matter:</i>	Suspicious death in custody allegedly resulting from torture
<i>Procedural issues:</i>	Non-substantiation of claims
<i>Substantive issues:</i>	Right to life; torture, cruel, inhuman or degrading treatment or punishment; effective remedy
<i>Articles of the Covenant:</i>	6, paragraph 1, alone and read in conjunction with 2; 7, alone and read in conjunction with 2
<i>Article of the Optional Protocol:</i>	2

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

*Meeting on 22 July 2010,*

*Having concluded* its consideration of communication No. 1225/2003, submitted to the Human Rights Committee by Mr. Olimzhon Eshonov in his own name and on behalf of Mr. Orif Eshonov under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication, and the State party,

*Adopts* the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1.1 The author of the communication, Mr. Olimzhon Eshonov, an Uzbek national born in 1932, is the father of Mr. Orif Eshonov, also an Uzbek national, born in 1965, who died in custody presumably on 15 May 2003. The author acts on his own behalf and on behalf of his son, and claims a violation by Uzbekistan of his son's rights and of his own rights under article 2 and article 7 of the International Covenant on Civil and Political Rights. The communication also appears to raise issues under article 6, paragraph 1, alone and read in

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Mr. Mahjoub El Haiba, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

conjunction with article 2, of the Covenant, with regard to the author's son. The author is unrepresented. The Optional Protocol entered into force for the State party on 28 December 1995.

1.2 On 22 January 2004, the State party requested the Committee to examine the admissibility of the communication separately from its merits, in accordance with rule 97, paragraph 3, of the Committee's rules of procedure. On 11 February 2004, the Special Rapporteur on new communications and interim measures decided, on behalf of the Committee, to examine the admissibility of the communication together with the merits.

#### **The facts as presented by the author**

2.1 On 6 May 2003, the author's son was arrested by officers of the National Security Service, allegedly while distributing Hizb ut-Tahrir leaflets, and detained in the Department of Internal Affairs of Karshi City. On the same day, the Department of the National Security Service of the Kashkadarya Region instituted criminal proceedings against the author's son and seven other individuals under article 159, part 1, of the Criminal Code (attempt to overthrow the constitutional order of the Republic of Uzbekistan). Contrary to the requirements of article 217 of the Criminal Procedure Code, the author was not informed about his son's arrest within 24 hours.<sup>1</sup> On 16 May 2003, the author was advised that his son had died and his body was returned to the family for burial. On 17 May 2003, the author's son was buried in his hometown of Yangiyul in the presence of approximately 30 law-enforcement officers.

2.2 According to the results of the expert examination conducted by the Forensic Medical Bureau of the Ministry of Health in the Kashkadarya Region, the author's son had died on 15 May 2003 in the resuscitation department of the Kashkadarya Regional Medical Centre. The author alleges, however, that according to the information available to him, his son had died on 10 May 2003 and his body was kept in the Medical Centre's morgue for four days.

2.3 The author submits to the Committee several post-mortem photographs of his son's body, taken by him after the body was returned to the family. He states that, as corroborated by the photographs, his son's body showed in addition to *livores mortis* extensive haematomas, large red spots, coagulated blood around his middle fingers on both hands, apparent swelling of both hands, numerous scratches and skin injuries. In addition, according to the official forensic medical report No. 45 of 30 May 2003 issued by the Forensic Medical Bureau of the Ministry of Health in the Kashkadarya Region, a total of 7 his ribs were broken: ribs Nos. 8 and 9 on the right side and ribs Nos. 6 to 11 on the left side of the body. He notes that neither the report of the post-mortem examination of 15 May 2003 nor the official forensic medical report No. 45 of 30 May 2003 document all visible injuries on his son's body.

2.4 On 20 May 2003, the author petitioned the Presidential Administration to conduct an investigation into his son's death. This petition was first transmitted to the General Prosecutor's Office and then to the Prosecutor's Office of the Kashkadarya Region. By a letter from the Prosecutor's Office of the Kashkadarya Region of 18 June 2003, the author was informed that the Prosecutor's Office of Karshi City conducted an investigation into his son's death and, on 31 May 2003, decided not to institute criminal proceeding on the

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<sup>1</sup> On 27 May 2003 the author received a letter of 6 May 2003 with a postal stamp of 19 May 2003, in which he was informed by the Head of the Investigation Department of the National Security Service of the Kashkadarya Region that his son was arrested on suspicion of having committed a crime. The author submits that the letter in question was back-dated and written after his petition to the Presidential Administration.

basis of article 83, part 2, of the Criminal Procedure Code, for lack of *corpus delicti* in anyone's actions.

2.5 On 29 May 2003, the author petitioned the General Prosecutor to conduct an investigation into his son's death. By a letter from the General Prosecutor's Office of 30 June 2003, the author was informed that due to the deterioration of his son's health, he was transferred on 13 May 2003 from the Department of Internal Affairs of Karshi City to the Kashkadarya Regional Medical Centre and died in the resuscitation department of the said Medical Centre on 15 May 2003, despite having been rendered medical assistance. According to the investigation conducted by the Prosecutor's Office of Karshi City and official forensic medical report, the death of the author's son was caused by hypertension, which resulted in brain haemorrhage. Internal rib fractures also detected on his son's body occurred ante-mortem due to a cardiac massage and are unrelated to his son's death. According to the doctors in charge of the case, rib fractures occurred as a result of a massage that also caused an outflow of blood into his soft tissues. A complex forensic examination was put in place in order to verify the doctors' arguments and to ascertain the cause of his son's death and the investigation into his case has been resumed.

2.6 On 23 June 2003, the author submitted yet another petition to the General Prosecutor with the request to initiate an investigation without further delay. By a letter from the Prosecutor's Office of the Kashkadarya Region of 15 August 2003, the author was informed that on 11 June 2003, the Prosecutor's Office of the Kashkadarya Region revoked the decision of the Prosecutor's Office of Karshi City of 31 May 2003 not to institute criminal proceeding and referred the case back to the Prosecutor's Office of Karshi City for a supplementary investigation. The investigation established on the basis of the report of the complex forensic examination that the author's son suffered from hypertension of the third degree, chronic pyelonephritis, chronic lung inflammation and chronic anaemia. These illnesses were detected in the Kashkadarya Regional Medical Centre in a timely manner and appropriate and sufficient medical assistance was rendered to the author's son. A brain haemorrhage and an acute infection of the blood in the deceased's brain resulted in a cerebral swelling and coma, aggravated by his other chronic illnesses. Therefore, his life could not be saved, despite the rendering of professional medical assistance. On 4 August 2008, the Prosecutor's Office of Karshi City again decided not to institute criminal proceedings on the basis of article 83, part 2, of the Criminal Procedure Code. On the same day, this decision was confirmed by the Prosecutor's Office of the Kashkadarya Region.

2.7 The author submits that according to the official forensic medical report No. 45 of 30 May 2003, prior to being transferred from the Department of Internal Affairs of Karshi City to the Kashkadarya Regional Medical Centre on 13 May 2003, medical assistance was rendered to his son on several occasions between 10 and 13 May 2003. In particular, on 10 May 2003, urgent medical assistance was given to his son in the premises of the Department of Internal Affairs of Karshi City, and on 11 May 2003, urgent medical assistance was also provided in the premises of the Department of Internal Affairs of Karshi City and then in the Kashkadarya Regional Medical Centre. On 12 May 2003, the author's son was transported back to the Department of Internal Affairs of Karshi City. On 13 May 2003, urgent medical assistance was again given in the premises of the Department of Internal Affairs of Karshi City and then in the Kashkadarya Regional Medical Centre. The author submits that given his son's grave medical condition which was clear to medical personnel, the way in which medical assistance was provided to his son in itself constituted a form of torture. The author draws the Committee's attention to the fact that already on 11 May 2003, his son had undergone an X-ray examination of his chest, with a note in the X-ray report that "no rib fractures have been detected". On 13 May 2003, he had undergone a further X-ray examination of the skull, with a note in the X-ray report that "no signs of a skull fracture have been detected". He claims that these notes in the above X-ray reports

were an attempt by the State party's authorities to conceal the fractures that had already existed at that time.

2.8 The author submits that prior to being arrested by officers of the National Security Service on 6 May 2003, his son had not suffered from any chronic illnesses. In support of this claim he provides a copy of the medical certificate (undated) issued by the Yangiyul City Adult Outpatient Department in response to the request of 18 June 2003 sent on the author's behalf by the Legal Aid Society. The medical certificate states that the author's son had not consulted the Yangiyul City Adult Outpatient Department for treatment and had not been registered for any regular medical check-ups.

2.9 The author provides a copy of the Human Rights Watch Briefing Paper of 4 April 2003 "Death in custody in Uzbekistan" describing six suspicious deaths in custody allegedly resulting from torture. He submits that his son's death is part of the State party's practice of total impunity for law-enforcement officers implicated in torture, which also shows a tendency aimed at spreading fear among individuals practising Islam outside of government control.

### **The complaint**

3.1 The author submits that his son's death resulted from torture to which he was subjected by law-enforcement officers in the course of interrogations and the inadequate investigation conducted by the State party's authorities is an attempt to conceal the crimes committed by its agents. He claims, therefore, that the State party violated his and his son's rights under article 7 of the Covenant.

3.2 The author claims that according to article 329 of the Criminal Procedure Code, a decision on whether or not to institute criminal proceedings should be taken within no later than 10 days. In his case, these procedural deadlines have not been complied with by law-enforcement officers, which in turn, resulted in a violation of his right under article 2 of the Covenant to have an effective and enforceable remedy.

3.3 Although the author does not specifically invoke this article, his claim in relation to his son's death as a result of torture appears to also raise issues under article 6, paragraph 1, alone and read in conjunction with article 2, of the Covenant, in his son's respect.

### **State party's observations on admissibility and merits**

4.1 On 15 December 2003, the State party submitted that the author's son was arrested on 6 May 2003 on suspicion of having committed a crime under article 159, part 1, of the Criminal Code, and was placed in custody on 9 May 2003. While being interrogated in the presence of a lawyer, the author's son did not deny that he was distributing leaflets and, when explicitly asked by the Deputy Prosecutor of the Kashkadarya Region on 9 May 2003, explained that he had not been subjected to unlawful methods after his arrest. According to the State party, this testimony of the author's son was duly documented in the interrogation report.

4.2 On 10, 11 and 13 May 2003, the author's son, who was detained at that time in a temporary confinement ward (IVS) of the Department of Internal Affairs of Karshi City, suffered from a sharp increase in blood pressure and had to be hospitalized in the Kashkadarya Regional Medical Centre. He was diagnosed with hypertension of the second degree, hypertonic crisis of the first degree, a severe form of pulmonary asthma, chronic renal insufficiency, a severe form of anaemia, chronic bronchitis and pneumonia. The author's son died in the said medical institution on 15 May 2003, despite having been rendered medical assistance.

4.3 According to the forensic medical report, mandated by the Prosecutor's Office of Karshi City, the death of the author's son was caused by hypertension, which resulted in the abnormal cerebral blood circulation and a brain haemorrhage. No signs of bodily injury were detected. The conclusions of the forensic medical examination have been confirmed by doctors who treated the author's son and by other materials. Officers of the Department of the National Security Service of the Kashkadarya Region and of the Department of Internal Affairs of Karshi City were subjected to investigation, respectively, by the National Security Service and the Department of Internal Affairs of the Kashkadarya Region, with the conclusion that no illegal acts had been committed by any of the law-enforcement officers. For this reason, on 31 May 2003, the Prosecutor's Office of Karshi City decided not to institute criminal proceedings in this case. On 11 June 2003, this decision was revoked by the Prosecutor's Office of the Kashkadarya Region and the investigation is currently ongoing.

4.4 On 22 January 2004, the State party challenged the admissibility of the communication, arguing that the author failed to substantiate his claims under article 2 and article 7 of the Covenant. It submitted that on the basis of the author's petition, the General Prosecutor's Office had revoked the decision of the Prosecutor's Office of the Kashkadarya Region and, on 9 September 2003, ordered a new investigation and a complex forensic examination. In his petition to the General Prosecutor's Office, the author had primarily requested the exhumation of his son's body to carry out additional medical examinations. A special forensic medical commission consisting of "distinguished and experienced experts" conducted a thorough examination of the medical materials and concluded that there was no need to exhume the body of the author's son. Therefore, on 30 September 2003, the Prosecutor's Office of the Kashkadarya Region again decided not to institute a criminal proceeding in this case. On an unspecified date, this decision was confirmed by the General Prosecutor's Office.

4.5 The State party also submits that the author provided misleading information as to the context of article 329 of the Criminal Procedure Code (see paragraph 3.2 above) and argues that, according to the above-mentioned article, criminal proceedings are instituted only if there are sufficient grounds for that. The State party further claims that the revocation of the decision of the Prosecutor's Office of the Kashkadarya Region by the General Prosecutor's Office is an example of effective application of article 329 of the Criminal Procedure Code, which per se was put in place to ensure legal protection of individuals.

4.6 As to the author's claims under article 7 of the Covenant, the State party refers to the forensic medical report, testimony of the author's son and those of his cellmates, in support of its argument that the author's son had never been subjected to torture and other inhuman treatment by law-enforcement officers and medical personnel. The State party also argues that the author's allegation with regard to the impunity of law-enforcement officials as a violation of article 7 of the Covenant is incorrect, as well as his reference to the death of other individuals in custody, since the Committee's complaint procedure does not cover the alleged cases of mass violation of human rights. It adds that in 2001–2002, several law-enforcement officers were found guilty of subjecting detainees to inhuman treatment which resulted in their death, and sentenced to long terms of imprisonment. In August 2003, article 235 of the Criminal Code was amended with the aim of explicitly prohibiting torture and inhuman treatment and making it punishable by severe penalties; these amendments came into effect in September 2003.

4.7 On the facts, the State party reiterates the conclusions of the forensic medical report that internal fractures of seven ribs detected on the deceased's body were a result of a life-saving cardiac massage and were unrelated to his death. The State party adds that according to the testimony of an officer who was on duty in the IVS of the Department of Internal

Affairs of Karshi City on 6 May 2003 (name is available on file), the author's son, who had initially introduced himself as Mr. Akmal Khakimov, was detained in the same cell with two other individuals. This officer has further testified that no force was used against the author's son and that, on 11 May 2003, he was taken to the hospital "as he got hydrophobia". This testimony was confirmed by the other four officers of the IVS of the Department of Internal Affairs of Karshi City (names are available on file). Six individuals who were detained in the same cell with the author's son have either written explanatory letters or given testimonies, attesting to the fact that the author's son had not complained to them about his health or about being subjected to torture and that he had no signs of bodily injuries.

#### **Author's comments on the State party's observations**

5.1 On 5 and 20 April 2004, the author commented on the State party's observations. He submits that the State party's claims with regard to his son's numerous illnesses have not been corroborated by any evidence. He refers to the medical certificate issued by the Yangiyul City Adult Outpatient Department (see paragraph 2.8 above) and explains that in Uzbekistan, all individuals suffering from hypertension and asthma, especially severe forms, are registered and subjected to regular medical check-ups. Therefore, if his son had indeed suffered from these illnesses, there would have been ample medical documentation for the State party to submit in support of its claims.

5.2 The author reiterates his initial claim that, as corroborated by photographs submitted to the Committee, numerous injuries on his son's body are inconsistent with the explanations advanced by the State party's authorities. In particular, he submits that typically a cardiac massage is performed in the heart area (ribs Nos. 3 and 4), whereas all seven broken ribs in his son's body were situated much lower than the heart area and could have been inflicted by blows. Swelling of the hands could have been a result of forcing hard objects, presumably steel needles, under his nails. The author claims that prior to the burial, he noticed that bodily tissues under his son's nails were damaged. Furthermore, the author suspects that some of his son's organs, in particular his brain, might have been removed from his body in order to conceal traces of being hit in the head. The author insists on the exhumation of his son's body in order to have an objective confirmation of his allegations.

5.3 The author states that he does not trust the conclusions of those doctors who rendered the so-called medical assistance to his son nor of the "distinguished and experienced experts". He claims that it would have been simply impossible for an independent doctor or expert not to notice all the injuries on his son's body and concludes, therefore, that either the doctors and experts in question have not been independent from law-enforcement entities or pressure was exerted on them. He further adds that, according to the forensic medical report, his son was rendered urgent medical assistance on several occasions within just a few days and should not have been allowed by an independent doctor to be subjected to interrogations with such health conditions.

5.4 The author submits that his claim in relation to article 329 of the Criminal Procedure Code is based on the non-compliance by law-enforcement officers with the procedural deadlines for taking a decision on whether or not to institute criminal proceedings in relation to his son's death.

5.5 The author submits that written explanatory letters and testimonies of his son's cellmates referred to by the State party could have been obtained from them by law-enforcement officers either under pressure or in exchange for a decrease in the term of imprisonment or other privileges.

### Supplementary submissions

6. On 19 December 2007, in addition to reiterating its earlier arguments, the State party submits that the deceased's illnesses were corroborated by the forensic medical report and that one cannot exclude that his son knew that he suffered from the illnesses in question and either had not registered for any regular medical check-ups or had registered in a medical institution other than the Yangiyul City Adult Outpatient Department. With regard to the author's claim that numerous injuries on his son's body were inconsistent with the explanations advanced by the State party, it submits that the conclusions of the initial forensic medical examination have been confirmed by the report of the complex forensic examination No. 17-Com of 1 July 2003.

7. On 15 January 2008, the State party's submission of 19 December 2007 was forwarded to the author for comments. Reminders for comments were sent on 16 February 2009 and 29 September 2009. No response has been received.

### Issues and proceedings before the Committee

#### *Consideration of admissibility*

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement. In the absence of any objection by the State party, the Committee considers that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have been met.

8.3 The State party contested the admissibility of the communication, arguing that the author has failed to substantiate his claims under article 2 and article 7 of the Covenant. The Committee considers, however, that the arguments advanced by the State party are closely linked to the merits of the communication and should be taken up when the merits of the communication are examined. The Committee considers that the author has sufficiently substantiated his claims, for purposes of admissibility, in that they appear to raise issues under article 2; article 6, paragraph 1; and article 7 of the Covenant, and declares them admissible.

#### *Consideration of the merits*

9.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5, paragraph 1, of the Optional Protocol.

9.2 As to the author's claim in relation to the arbitrary deprivation of his son's life, the Committee recalls its general comment No. 6 (1982) on the right to life, which states that the right enshrined in this article is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation.<sup>2</sup> In this regard, the Committee considers that a death in any type of custody should be regarded as *prima facie* a summary or arbitrary execution, and there should be thorough, prompt and impartial

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<sup>2</sup> *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40), annex V, para. 1.*

investigation to confirm or rebut the presumption, especially when complaints by relatives or other reliable reports suggest unnatural death.<sup>3</sup>

9.3 The Committee notes that, in the present case, the author's son was arrested on 6 May 2003 by officers of the National Security Service and, as confirmed by the State party (see paragraph 4.7 above), he had not complained about his health that day. The author argues that his son was in good health prior to his detention and that he was not aware that he was suffering from an illness of any kind. Nine days later, that is, on 15 May 2003, he died in the Kashkadarya Regional Medical Centre. According to the official forensic medical report No. 45 of 30 May 2003, the author's son suffered from several chronic and life-threatening illnesses, inter alia, hypertension, a severe form of pulmonary asthma, a chronic renal insufficiency, a severe form of anaemia, chronic bronchitis and pneumonia, and died from hypertension, which resulted in the abnormality of cerebral blood circulation and a brain haemorrhage. The Committee further notes that the State party refers to the testimony of an officer of the IVS of the Department of Internal Affairs of Karshi City (see paragraph 4.7 above), according to which the author's son had to be hospitalized "as he got hydrophobia". The State party, however, has not provided any explanation as to what could have triggered a bout of hydrophobia in custody.

9.4 The Committee notes that a medical certificate provided by the author to the Committee attests to the claim that his son was not registered by the medical institution at his habitual place of residence for any regular medical check-ups in relation to any illness. Although the State party argued that a lack of such registration at the deceased's habitual place of residence is inconclusive, it has not provided any evidence that would suggest that he had indeed suffered from any of the above-mentioned illnesses prior to being taken into custody. In addition, the State party has not explained why the author was repeatedly returned to his place of detention from the Kashkadarya Regional Medical Centre, having, according to the State party's own medical reports, required urgent medical attention on several occasions within the space of only a few days. Given that the author's son ultimately died in the same Medical Centre, the Committee would have expected an investigation or at the very least an explanation from the State party of the reasons why he was continually released back into detention and why the author was not notified about his son's grave medical condition in time before his death.

9.5 The Committee notes that the author complained about a lack of impartiality and other inadequacies in the State party's investigation into his son's death and that he provided a detailed description of injuries on his son's body, suggesting that he had died from an unnatural death (see paragraphs 2.3 and 5.2 above). The Committee notes that the author's description of the injuries is corroborated either by photographic evidence submitted to the Committee or by the State party's own forensic medical reports. In particular, the reports attest to the fact that seven of the deceased's ribs were broken. The official investigations conducted by the Prosecutor's Office on three occasions resulted in a conclusion that there were no grounds to institute criminal proceedings in relation to the death of the author's son for lack of *corpus delicti* in anyone's actions.

9.6 In this regard, the Committee recalls that the burden of proof cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to evidence and that frequently the State party alone has

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<sup>3</sup> See Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Economic and Social Council resolution 1989/65, annex, para. 9.



access to relevant information.<sup>4</sup> It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, and to furnish to the Committee the information available to it. The Committee observes that in cases in which the established investigative procedures are inadequate and in cases where there are complaints from the family of the victim about these inadequacies or other substantial reasons, States parties should pursue investigations through an independent commission of inquiry or similar procedure.<sup>5</sup> If the body of the deceased person has been buried and it later appears that an investigation is required, the body should be promptly and competently exhumed for an autopsy. The autopsy report must describe any and all injuries to the deceased including any evidence of torture. Families of the deceased and their legal representatives should have access to all information relevant to the investigation, and should be entitled to present other evidence.<sup>6</sup>

9.7 The Committee observes that in the present case the arguments provided by the author point towards the State party's direct responsibility for his son's death by torture and, inter alia, necessitated at the very minimum a separate independent investigation of the potential involvement of the State party's law-enforcement officers in the torture and death of the author's son. The Committee considers, therefore, that the State party's failure to, inter alia, exhume the body of the author's son and to properly address any of the author's claims raised at the domestic level and in the context of the present communication about inconsistencies between injuries on his son's body and the explanations advanced by the State party's authorities, warrant the finding that there has been a violation<sup>7</sup> of article 6, paragraph 1, and article 7, of the Covenant, with regard to the author's son.

9.8 The author also claimed that his son's death resulted from torture to which he was subjected by law-enforcement officers in the course of interrogations and the inadequate investigation conducted by the State party's authorities is an attempt to conceal the crimes committed by its agents. These allegations were presented both to the State party's authorities and in the context of the present communication. The Committee recalls that a State party is responsible for the security of any person under detention and, when an individual is injured while in detention, it is incumbent on the State party to produce evidence refuting the author's allegations.<sup>8</sup> Moreover, once a complaint about ill-treatment contrary to article 7 has been filed, a State party must investigate it promptly and impartially.<sup>9</sup> Where investigations reveal violations of certain Covenant rights, States parties must ensure that those responsible are brought to justice.<sup>10</sup>

<sup>4</sup> Communications No. 30/1978, *Bleier v. Uruguay*, Views adopted on 24 March 1980, para. 13.3; No. 84/1981, *Dermit Berbatol. v. Uruguay*, Views adopted on 21 October 1982, para. 9.6.

<sup>5</sup> See Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (note 3 above), para. 11.

<sup>6</sup> *Ibid.*, paras. 12–13 and 16.

<sup>7</sup> See Communication No. 962/2001, *Mulezi v. Democratic Republic of the Congo*, Views adopted on 8 July 2004, para. 5.4.

<sup>8</sup> Communications No. 907/2000, *Siragev v. Uzbekistan*, Views adopted on 1 November 2005, para. 6.2; and No. 889/1999, *Zheikov v. Russian Federation*, Views adopted on 17 March 2006, para. 7.2.

<sup>9</sup> Human Rights Committee, general comment No. 20 (1992) on the prohibition of torture and cruel treatment or punishment, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A, para. 14.

<sup>10</sup> Human Rights Committee, general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40, vol. I (A/59/40 (Vol. I))*, annex III, para. 18.

9.9 The Committee notes that, in addition to the above-mentioned official forensic medical report, the State party referred to the testimony of the author's son and those of his cellmates, in support of its argument that the author's son had never been subjected to torture and other inhuman treatment by law-enforcement officers and medical personnel. The State party, however, did not provide any information as to whether any inquiry was undertaken by the authorities both in the context of the criminal investigations or in the context of the present communication to address the detailed and specific allegations advanced by the author in a substantiated way. In these circumstances, due weight must be given to the author's allegations. The Committee considers, therefore, that the above factors, taken together, lead it to conclude that the State party's investigations into the highly suspicious circumstances of the death of the author's son in the State party's custody just nine days after his arrest by officers of the National Security Service, were inadequate, in the light of the State party's obligations under article 6, paragraph 1, and article 7, read in conjunction with article 2, of the Covenant. In the Committee's view, therefore, there has been a violation of article 6, paragraph 1, and article 7, read in conjunction with article 2, of the Covenant, with regard to the author's son.

9.10 The Committee further observes that although over seven years have elapsed since the death of the author's son, the author still does not know the exact circumstances surrounding it and the State party's authorities have not indicted, prosecuted or brought to justice anyone in connection with this custodial death in the highly suspicious circumstances. The Committee understands the continued anguish and mental stress caused to the author, as the father of a deceased detainee, by this persisting uncertainty amplified by the condition in which his son's body was returned to the family for burial, and considers that it amounts to inhuman treatment of the author, in violation of article 7 of the Covenant.

9.11 The Committee further finds that the persistent failure of the State party's authorities properly to investigate the circumstances of his son's death effectively denied the author a remedy.<sup>11</sup> The Committee considers that, taken together, the circumstances require the Committee to conclude that the author's rights under article 2, read in conjunction with article 7, of the Covenant, have also been violated.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation by Uzbekistan of Mr. Orif Eshonov's rights under article 6, paragraph 1, and article 7, alone and read in conjunction with article 2, and of the author's rights under article 7; and under article 2, read in conjunction with article 7, of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy in the form, inter alia, of an impartial investigation into the circumstances of his son's death, prosecution of those responsible and adequate compensation. The State party is also under an obligation to prevent similar violations in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not 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

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<sup>11</sup> Communication No. 1275/2004, *Umetaliev v. Kyrgyzstan*, Views adopted on 30 October 2008, para. 9.6.

enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**C. Communication No. 1232/2003, *Pustovalov v. Russian Federation*  
(Views adopted on 23 March 2010, ninety-eighth session)\***

<i>Submitted by:</i>	Oleg Pustovalov (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Russian Federation
<i>Date of communication:</i>	5 November 2003 (initial submission)
<i>Subject matter:</i>	Criminal procedural violations and prison conditions
<i>Procedural issues:</i>	Non-substantiation of claims; exhaustion of domestic remedies.
<i>Substantive issues:</i>	Allegations of ill-treatment; right to fair trial; right to legal assistance; right to obtain examination of witnesses; right to be treated with humanity and respect to one's dignity
<i>Articles of the Covenant:</i>	2, paragraph 3; 7; 9, paragraphs 1 and 3; 10; 14, paragraphs 1, 2 and 3 (b), (d), (e) and (g)
<i>Articles of the Optional Protocol:</i>	2 and 5, paragraph 2 (b)

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

*Meeting on 23 March 2010,*

*Having concluded* its consideration of communication No. 1232/2003, submitted to the Human Rights Committee by Mr. Oleg Pustovalov under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication, and the State party,

*Adopts* the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication is Oleg Pustovalov, born in 1963, currently serving a prison sentence in the Russian Federation. The author claims violations by the Russian Federation of articles 2, paragraph 3; 7; 9, paragraphs 1 and 3; 10; 14, paragraphs 1, 2 and 3 (b), (d), (e) and (g), of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 1 January 1992. The author is unrepresented.

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

### **Factual background**

2.1 On 23 December 2000, the Moscow City Court sentenced the author to 24 years and 3 months' imprisonment for attempted murder, rape, robbery and other crimes that took place between November 1999 and February 2000. On 27 March 2001, the Judicial Collegium of the Supreme Court, as a cassation instance, upheld the sentence of the Moscow City Court.

2.2 The author claims that several procedural violations took place during his arrest (on 5 February 2000) and his pretrial detention. He claims that his arrest was illegal and based solely on the "grave nature of the charges and the danger he represented". He was not told how to appeal the decisions governing his arrest and detention. He was allegedly severely beaten and tortured by police officers at Petrovka 38 police department in order to make him confess his guilt. Police officers allegedly put plastic bags over his head and forced him to take psychotropic drugs. He claims he fainted and almost died. His head and entire body were bloodied. He was thus forced to testify against himself. The nature of the beatings was allegedly confirmed by a medical note issued by a doctor at the pretrial detention center (SIZO) No. 1. The author claims that his torture was taped on video, which was later destroyed. Due to his bad physical condition as a result of torture, he was not brought before the prosecutor who had authorized his detention. Allegedly, he was not provided with a lawyer for three days after his arrest. In all his appeals to higher courts the author allegedly insisted that he had not participated in the crimes he was convicted for and that he had confessed guilt as a result of torture.

2.3 The author claims that the result of the identification parade was forged and that he was not allowed to have access to a lawyer during the process. The physical characteristics of the perpetrator pointed out by victims and witnesses did not allegedly match his. He claims that he was not able to meet his lawyer and thus did not have legal assistance during the identification parade.

2.4 The author claims that a number of irregularities took place during his trial. His requests to invite additional experts and witnesses were all denied. During the time the crimes took place in Moscow, he was in fact in Ulyanovsk. To prove his alibi, he requested to call a witness from Ulyanovsk, but his request was denied. There were also alleged contradictions in the conclusions of experts. For example, one expert concluded that the crime weapon was a firearm, while the other concluded that it was not. The author was allegedly removed from the court room at the request of a witness, despite his objections, and his intervention was suspended by a judge. He allegedly requested a medical expertise to prove that he was unable for medical reasons to father children, as one of the rape victims had become pregnant. This request was also rejected. He also complained to the court about the torture during his interrogation, which is allegedly reflected in the records of the proceedings. However, his allegations were not considered by the court.

2.5 At the beginning of the court proceedings, the author requested the court to change his lawyer, who was supposed to act on a pro bono basis but had asked him for US\$ 5,000 to handle the case. The court rejected this request. The author submits that under section 51, paragraph 7, of the Criminal Procedure Code, a court cannot deny a request to change counsel, if the accused does not agree with counsel's opinion. Later, he requested to be represented by his sister, pursuant to section 47, paragraph 6 (a), of the Criminal Procedure Code; this request was also rejected.

2.6 The author claims that some newspapers published personal information about him, such as his name, age and address as well as the charges against him even before his trial began. He claims that the information about him was intentionally distorted: it stated that he had previously been convicted of rape, that he was a sexual maniac and a former police officer.

### **The complaint**

3. The author claims that the facts as described reveal violations by the Russian Federation of articles 2, paragraph 3; 7; 9, paragraphs 1 and 3; 10; 14, paragraphs 1, 2 and 3 (b), (d), (e) and (g), of the Covenant.

### **State party's observations on admissibility**

4. On 24 March 2004, the State party submitted that the communication should be declared inadmissible, as the author had not exhausted all available domestic remedies. It submits that the Supreme Court received a complaint under the supervisory review procedure from the author, with the same arguments as those in the present communication. The Supreme Court is considering initiating a supervisory review process and transmitting the complaint to the Presidium of the Supreme Court under section 48 of the Criminal Procedure Code.

### **Author's comments on the State party's observations**

5. On 17 May 2004, the author submits that his complaint was sent to the Supreme Court under supervisory review after he had received a notification from the Committee informing about the registration of his case. He requested the Supreme Court to give him a response in order to transmit it to the Committee. On 21 April 2004, the Presidium of the Supreme Court issued a decision rejecting his complaint under supervisory review, but at the same time reducing his sentence to 22 years and 3 months' imprisonment, following the entry into force of the new Criminal Code.

### **Additional submissions by the parties**

6.1 Additional submissions from the parties to the case have been summarized and divided thematically as follows:

#### **Allegations of ill-treatment during the interrogation phase**

6.2 The author submits that the decision of the Presidium of the Supreme Court of 21 April 2004 allegedly conceded his bodily injuries, but stated that they were caused during his capture. He insists that his injuries were the result of torture by police officers during his interrogation. His complaints of torture addressed to the court and the prosecutor's office were allegedly ignored. He does not have copies of their responses, as he claims they were not given to him. He was only requested to sign the copies of their responses. Initially he was not given a copy of the letter that he had addressed to the administration of SIZO No. 1, where he stayed for 10 days after his beatings by police officers at Petrovka 38. In that letter, he had explained that he had been ill-treated by the police. However, in a later submission, the author provided the Committee with a copy of the letter. The author also claims that he was not given a copy of the medical report confirming his torture allegations.

6.3 The State party contended on this issue that under the Internal Rule No. 205 issued by the Ministry of Justice on 3 November 2005, convicts cannot request from the administration of correctional institutions copies of documents from their personal files. Only suspects and accused persons have this right, under Rule No. 189 issued by the Ministry of Justice on 14 October 2005. However, in a later submission, the State party acknowledged that it was against the law not to provide the author with a copy of his letter and that the prosecutor of the Ulyanovsk had been ordered to take action in this regard. The State party also provided a copy of the medical note which confirms that the author had bodily injuries on 12 February 2000, the day of his arrival at the detention centre. It contends that the author has never requested a copy of this medical note.

### **Allegations of procedural violations**

6.4 The author submits that the decision of the Presidium of the Supreme Court acknowledged his claim that at the beginning of the trial, he had requested to change his lawyer, but that his request was denied as unjustified. He argues that he requested this change as his lawyer had asked for a retainer his family could not afford. The author claims that the decision also acknowledged that he was not provided with a lawyer during the identification parade, but it stated that he had not asked for one. He notes that, in fact, he had asked for a lawyer throughout the process, ever since his arrest. No lawyer was present during the initial medical test on his ability to have sexual relations. His complaints to the office of the President were forwarded to the General Prosecutor's office, which merely returned a standard letter. He notes that during the trial, he was asked to leave the courtroom during the testimony of one of the victims. When he returned, he was not informed about the content of the testimony and he was not able to question the victim.

6.5 The author adds that the decision of the Presidium of the Supreme Court did not address the issue of his inability to procreate; neither did the other court decisions. It also omitted to mention the refusal of his numerous requests to invite a witness who could confirm that he was not in Moscow at the time of the crimes. The decision also ignored his statements that he was forced to confess his guilt and that he did request the court for legal assistance. He adds that he did not confess his guilt on the rape charge, that there was no material evidence to prove his guilt, and that no crime weapon was found on him. One of the rape victims allegedly stated that her attacker was shorter than her, while the author himself is 8 cm taller than the victim. He gives details of physical characteristics and circumstances of each assault indicated by victims and witnesses. He argues that the identification parade was unfair, as the witnesses and victims were shown his photo in advance.

6.6 The State party merely submits that the author's claims about criminal procedural violations during his trial and appeal, including the violation of his right to a lawyer, are without substance.

### **Allegations of inhumane treatment in prison**

#### *Right to receive food*

6.7 The author claims that food parcels and money sent by his family on 24 August 2004 were never delivered to him in prison, while the food parcel sent by his family on 18 January 2005 for his birthday was delivered to him only on 27 January 2005. He claims that this was done by the prison administration intentionally and caused moral damage to him and material damage to his family. He provides the names and positions of officials who were allegedly involved in delaying delivery of his parcels.

6.8 The State party contests the author's claim and submits that the food parcel sent in August 2004 was received while he was in a penitentiary institution in the Irkutsk region. Thus, the parcel was returned to the sender. Concerning the delayed delivery of his parcel in January 2005, the State party submits that it was due to the large number of parcels received during Christmas. The State party acknowledges that money transferred to the author's account was illegally transferred to an account of the prison administration. The Deputy Prosecutor of Vladimir region took necessary actions in this regard.

#### *Right to adequate recreation and clothing*

6.9 The author submits that his health deteriorated due to his inability to walk, and his continued confinement to his cell, as the administration of the prison refused to give him winter shoes or to allow him to use his own shoes when the ones he had been given were

worn out. The administration allegedly gave him shoes only five months after he requested them. He contracted pneumonia and sinusitis. He claims that his numerous requests for medical assistance were simply ignored by the prison administration, which pretended that it had not received the requests. He allegedly did not get any medical assistance from 2004 to 2005.

6.10 The State party notes that the author was provided with new shoes in March 2005. According to the prison rules shoes are provided once a year. It also notes that the author did not ask for medical assistance during the period of 2004–2005. It argues that during his time in prison T-2 in Vladimir, the author received adequate medical treatment. His health did not deteriorate and he did not complain of pneumonia and sinusitis.

*Right to adequate food*

6.11 The author complains of the bad quality of prison food, which he claims does not have any taste or colour. The meat is allegedly spoiled, bread is half baked. Decent food is served only when there is a visit by a commission of the Ministry of Justice.

6.12 The State party rejects the author's allegations and states that the menu is prepared in accordance with the requirements established by order of the Ministry of Justice No. 136 of 4 May 2001. The menu was further improved by another order of the Ministry of Justice No. 125 of 2 August 2005. The medical unit within the institution regularly controls the menu. It checks the quality of meals, conditions of their storage as well as their expiration dates.<sup>1</sup> In addition, inmates have a right to buy food items at the shop of the prison T-2 or to receive them in parcels or other types of transfers. The State party adds that the author purchased food items at the prison shop, as shown on his personal account statements.

*Right to adequate prison accommodation*

6.13 The author claims that he was transferred to cell No. 12 on the 1st floor of the prison reserved for convicts with psychiatric problems. His cell allegedly was in bad condition, cold and full of insects and rats. His numerous requests for a transfer to a different cell were ignored. As a result, he became ill. He treated himself with medication sent by his family. He adds that he had never requested the help of a psychiatrist, and doctors could confirm this from his medical records.

6.14 The State party argues that according to the records of the psychiatric unit, the author was not listed at all in the unit between 2001 and 2005. The author contacted the psychiatrist, who established that he was having difficulties with psychological adaptation to his environment and concluded that he did not need psychiatric monitoring. It submits that the official documents as well as statements from officials show that the cell No. 12 on the 1st floor, where the author was held, does not belong to the psychiatric unit. In fact, he was transferred there in order to improve his conditions. The cell complies with the requirements of section 80 of the Criminal Executive Code.<sup>2</sup> It adds that the cell is equipped

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<sup>1</sup> The State party has submitted a document from the Federal Office for Execution of Punishment which provides a list of food items in grams per person per day. For example, it states that meat is provided five times a week; the rest is canned meat. It submits that the daily portion of meat is 80 grams, after cooking it amounts to 45 grams. Fish is also provided systematically. The daily portion is 100 grams. After cooking it amounts to 70 grams.

<sup>2</sup> The State party attached a letter from the Federal Office for Execution of Punishment stating that cell No. 12, where the author was transferred, was not part of the psychiatric unit and there were no persons with psychiatric problems.



in accordance with the order of the Ministry of Justice No. 161 of 28 May 2001,<sup>3</sup> and complies with sanitary epidemiological requirements.<sup>4</sup> It submits that in compliance with the Federal Law No. 52 of 30 March 1999 “On sanitary epidemiological conditions of population” as well as with sanitary rules issued by the Head Doctor of the Ministry of Health and Social Development No. 24 of 18 July 2002, rat disinfection measures were taken in order to prevent insects and rats in cells. No insects or rats were found in prison T-2 of Vladimir.<sup>5</sup>

*Right to send and receive correspondence*

6.15 The author also complains about delays up to 40–45 days in sending and receiving correspondence, as well as not being able to use a phone. He argues that he could not send the letter dated 29 September 2005 on 31 October 2005, more than a month later, as stated by the State party. His complaints to the Prosecutor of Ulyanovsk region that the prison administration obstructed his correspondence with the Committee was not replied to. The author points out that most of the documents produced by the State party do not bear his signature.

6.16 The State party in turn argues that the author’s correspondence was delivered and dispatched on time, and this was verified by testimonies of prison staff. It provides a list of incoming and outgoing correspondence of the author, including registration numbers and the dates for each correspondence. It notes that from 2002 to 25 August 2005 the author submitted 19 complaints to various institutions. The letter of the author dated 29 September 2005 addressed to the Committee was received on 31 October 2005 and sent to the addressee on 1 November 2005. No complaint or letters addressed to the Committee were received prior to this date. The State party contests the author’s claim that his right to use a telephone was violated. It submits that the author was unable to telephone since he used all the money on his account to buy food products at the local shop and had no money left for phone calls. Still, he exercised his right to use a telephone under article 92 of the Criminal Executive Code. The State party submits extracts from the book with records of telephone use by inmates.<sup>6</sup>

*Right to employment*

6.17 The author claims that his right to employment was violated. He argues that his requests and applications for jobs were not registered.

6.18 The State party responds that he was offered jobs at production units of the prison numerous times, however he refused the offers stating that he did not want to work.

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<sup>3</sup> The State party attached a letter from the Federal Office for Execution of Punishment which provides list of items in the author’s cell, such as radio, shelves for food, hangers for clothes, table, chairs, water tank, garbage bin, toilet facilities, mirror, ventilator, etc.

<sup>4</sup> The State party submitted a letter from the head sanitary doctor of prison T-2 in Vladimir, which provides a detailed description of the microclimate in the cells. For example, it states that during the warm seasons the temperature in the cell is between 18.3° C and 18.5° C. Humidity is about 46.3 per cent. During the winter the temperature is between 19.5° C and 19.7° C. The humidity is 38.7 per cent.

<sup>5</sup> The State party submitted a letter from the Federal Office for Execution of Punishment, which confirms its statement.

<sup>6</sup> The record book states that the author used the prison telephone on 30 April 2003, 6 November 2003 and 14 May 2004.

## Issues and proceedings before the Committee

### *Consideration of admissibility*

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee notes, as required by article 5, paragraph 2 (a) and (b), of the Optional Protocol, that the same matter is not being examined under any other international procedure of investigation or settlement.

7.3 The Committee has taken note of the State party's arguments that the author had not exhausted domestic remedies at the time the case was submitted to the Committee, and that he subsequently continued to make use of domestic remedies. The Committee recalls its jurisprudence that the issue of exhaustion of domestic remedies is to be decided at the time of its consideration of the case, save in exceptional circumstances,<sup>7</sup> which does not appear to be the case in the present communication.<sup>8</sup>

7.4 The Committee notes the author's claim that, due to his bad physical condition as a result of torture, he was not brought before the judge or the prosecutor who authorized his detention, which might raise issues under article 9, paragraphs 1 and 3. It considers, however, that the author has not provided sufficient information to substantiate his claim, including information on whether his claim was brought before the judicial authorities. Accordingly, the Committee considers this claim inadmissible under article 2 of the Optional Protocol, for lack of substantiation.

7.5 The Committee considers that the author's remaining allegations, which appear to raise issues under article 7; article 10; and article 14, paragraph 3 (b),(d),(e) and (g), of the Covenant, have been sufficiently substantiated, for purposes of admissibility, and declares them admissible.

### *Consideration of merits*

8.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee notes the author's claim that he was beaten and subjected to ill-treatment by the police during the interrogation, thus forcing him to confess guilt. He provides details on the methods of ill-treatment used and contends that these allegations were raised in the court, but were ignored. The Committee also notes the medical note issued by SIZO No. 1 and the letter addressed to the administration of SIZO No. 1 by the author, a copy of which was provided by the State party. Both confirm the author's allegations. The Committee recalls its jurisprudence that it is essential that complaints about ill-treatment must be investigated promptly and impartially by competent authorities.<sup>9</sup> In the absence of any other substantive refutation by the State party, the Committee concludes that the treatment to which the author was subjected, as described by him and supported by

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<sup>7</sup> See communication No. 925/2000, *Kuok Koi v. Portugal*, decision on inadmissibility adopted on 22 October 2003, para. 6.4.

<sup>8</sup> See communication No. 1085/2002, *Taright et al. v. Algeria*, Views adopted on 15 March 2006, para. 7.3.

<sup>9</sup> General comment No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A, para. 14.

the medical note and letter, amounts to a violation of article 7 and article 14, paragraph 3 (g), of the Covenant.<sup>10</sup>

8.3 As to the allegations of bad quality of food, bad conditions in his cell, his transfer to psychiatric unit of the prison as well as complaints about not being able to receive parcels, to send and receive correspondence, to use the phone, to walk outdoors, to receive adequate clothing and be provided with medical assistance, the Committee notes that the State party has submitted detailed information to refute each allegation. In such circumstances the Committee cannot conclude that there was a violation of article 10 of the Covenant.

8.4 The Committee notes the author's claim that he was not allowed to have his lawyer present during the identification process and that the trial court denied his request to change his lawyer as well as his requests to invite additional experts and witnesses. The Committee also notes that the State party merely stated that the author's claims concerning procedural violations and violation of his right to fair trial are groundless and did not provide any arguments refuting these allegations. In these circumstances the Committee concludes that the author's allegations must be given due weight and that the author's rights under article 14, paragraph 3 (b, d and e), were violated.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 7 and article 14, paragraph 3 (g), and article 14, paragraph 3 (b), (d), and (e), of the International Covenant on Civil and Political Rights.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy including the payment of adequate compensation, initiation and pursuit of criminal proceedings to establish responsibility for Mr. Pustovalov's ill-treatment, and a retrial with the guarantees enshrined in the Covenant. The State party is also under an obligation to prevent similar violations in the future.

11. 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 or not, 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 in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

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<sup>10</sup> See communication No. 1057/2002, *Kornetov v. Uzbekistan*, Views adopted on 20 October 2006, para. 7.1.

**D. Communication No. 1246/2004, *Gonzalez Muñoz v. Guyana*  
(Views adopted on 25 March 2010, ninety-eighth session)\***

<i>Submitted by:</i>	Patricia Angela Gonzalez (not represented by counsel)
<i>Alleged victims:</i>	The author and her husband, Lazaro Osmin Gonzalez Muñoz
<i>State party:</i>	Guyana
<i>Date of communication:</i>	14 December 2003 (initial submission)
<i>Subject matter:</i>	Denial of citizenship of a Cuban doctor married to a Guyanese national
<i>Procedural issues:</i>	Author's substantiation of claims; exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to a fair hearing; right not to be subjected to arbitrary interference with family life
<i>Articles of the Covenant:</i>	14, paragraph 1; 17, paragraph 1
<i>Article of the Optional Protocol:</i>	2; 5, paragraph 2 (b)

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

*Meeting on 25 March 2010,*

*Having concluded* its consideration of communication No. 1246/2004, submitted to the Human Rights Committee by Patricia Angela Gonzalez under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication, and the State party,

*Adopts* the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication is Patricia Angela Gonzalez (maiden name Sherett), a Guyanese citizen born in 1953. Although she does not invoke any specific provisions of the International Covenant on Civil and Political Rights,<sup>1</sup> her communication

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

The text on an individual opinion signed by Committee member Ms. Ruth Wedgwood is appended to the present Views.

<sup>1</sup> The Covenant and the Optional Protocol entered into force for the State party respectively on 15 May 1977 and 10 August 1993. On 5 January 1999, the State party notified the Secretary-General that it

appears to raise issues under articles 7; 14, paragraph 1; and 17 of the Covenant. The author is not represented by counsel.

### **The facts as submitted by the author**

2.1 On 18 May 2000, Mr. Lazaro Osmin Gonzalez Muñoz, a Cuban doctor, entered Guyana under a medical cooperation agreement between Cuba and Guyana to render medical services for a period of two years. His contract of 15 May 2000 with the Cuban Central Unit for Medical Cooperation (UCCM) provided, *inter alia*, that he must comply with the legal provisions in force for citizens of Cuba if he decides to marry during the period of his contractual obligations. This would nevertheless not exempt him from completing his contractual obligations with the UCCM. He was also required to obtain prior authorization from the UCCM before entering into contracts with third parties. As for his marital status, the contract stated that he was married.

2.2 From May 2000 to July 2001, Mr. Gonzalez worked at a regional hospital, until he was sent back to Cuba for one-month vacation. After his return to Guyana, he was assigned to another hospital. On 6 November 2001, he underwent surgery for appendicitis. Meanwhile, the Cuban Embassy learned about his engagement with Ms. Sherett. When Mr. Gonzalez was declared fit for work, the Cuban Embassy informed him that he had to return to Cuba for full recuperation. He decided not to return to Cuba, fearing that otherwise he would not be allowed to return to Guyana.

2.3 On 13 December 2001, the author and Mr. Gonzalez married in Georgetown and, on 20 December 2001, Mr. Gonzalez applied to the Immigration Department, Ministry of Home Affairs for Guyanese citizenship, under article 45<sup>2</sup> of the Constitution of Guyana (1980).

2.4 On 19 March 2002, an agent of the Ministry of Home Affairs told the author and her husband that the Cuban Embassy had warned the Guyanese authorities of the possible consequences of granting Mr. Gonzalez citizenship or a work permit. Setting such a precedent could jeopardize the medical cooperation between both countries, e.g. the further deployment of the Cuban Medical Brigade to Guyana and the granting of scholarships to Guyanese students. They were also advised that the Guyana courts had no jurisdiction over the immigration department.

2.5 By letter of 27 March 2002, the Ministry of Home Affairs advised Mr. Gonzalez that “[i]t is not now convenient to consider any application for work permit outside of the Government of Guyana” and that his application for permanent residence and citizenship “cannot be processed at this time”.

2.6 On 23 April 2002, Mr. Gonzalez filed a writ of certiorari in the High Court, challenging the refusal of the Minister of Home Affairs to register him as a Guyanese citizen. In an exchange of affidavits submitted to the Court, Mr. Gonzalez claimed, and the

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had decided to denounce the Optional Protocol with effect from 5 April 1999. On the same date, the State party re-acceded to the Optional Protocol with a reservation concerning the Committee’s competence to consider communications from persons “under sentence of death for the offences of murder and treason in respect of any matter relating to his prosecution, detention, trial, conviction, sentence or execution of the death sentence and any matter connected therewith”.

<sup>2</sup> Art. 45 of the Constitution of Guyana (1980) provides: “Any person who, after the commencement of this Constitution, marries a person who is or becomes a citizen of Guyana shall be entitled, upon making an application in such manner and taking such oath of allegiance as may be prescribed, to be registered as a citizen of Guyana: Provided that the right to be registered as a citizen of Guyana under this article shall be subject to such exceptions or qualifications as may be prescribed in the interest of national security or public policy.”

State party denied: (a) that he had not breached his contract with the UCCM by seeking employment in private hospitals; (b) that his current marriage was not bigamous, since his first marriage with a Cuban national had been dissolved by judgment of 29 January 2001 of the Tribunal of La Lisa (Cuba);<sup>3</sup> (c) that he was entitled under article 45 of the Constitution to be registered as citizen of Guyana; (d) that section 7<sup>4</sup> of the Guyana Citizenship Act, on which the Minister's refusal to register him as citizen was based, was incompatible with the Constitution; (e) that the Minister's decision violated principles of natural justice; and (f) that it was subject to appeal to the courts.

2.7 In his reply, the Attorney-General stated that it had been established by Cuban authorities that Mr. Gonzalez's divorce certificate was not recorded in the books of the Tribunal of La Lisa; that it did not carry a folio number; and that it had no legal validity outside Cuba, since it was not authenticated by the Foreign Ministry of Cuba. Even if Mr. Gonzalez was lawfully married to a Guyanese citizen, he did not have an absolute right to be registered as a citizen of Guyana under article 45 of the Constitution. The Minister had lawfully exercised his discretion under section 7 of the Citizenship Act and article 42, paragraph 1 and article 45 of the Constitution to refuse citizenship on grounds of national security and public policy, when he considered that the relations between Guyana and Cuba would be affected in the event that Mr. Gonzalez breached his obligation to return to Cuba at the end of his contract; that by granting citizenship to Mr. Gonzalez, Guyana would "open the floodgates" for other Cuban doctors working in Guyana on Government contract; and that other cooperation agreements and foreign policy matters would also be jeopardized. Public policy grounds were a matter to be decided by the executive branch rather than the judiciary.<sup>5</sup>

2.8 Invoking judicial precedent,<sup>6</sup> Mr. Gonzalez replied that the Minister of Home Affairs was required to exercise his discretion reasonably and to give reasons for refusing an application for citizenship in order to enable the applicant to rebut such reasons or to challenge the justification for the refusal before the courts. In *Attorney General v. Ryan*,<sup>7</sup> the Privy Council had declared section 7 of the Bahamas Nationality Act (1973), which was similar to section 7 of the Guyana Citizenship Act, unconstitutional and void, because it made the right to be registered as a citizen of the Bahamas subject to the sole discretion of the executive branch of Government.

2.9 On 9 May 2002, the High Court of the Supreme Court of the Judicature granted Mr. Gonzalez *certiorari*, and on 12 November 2003, it quashed the decision of the Minister of Home Affairs to refuse to register Mr. Gonzalez as a citizen, which it considered to be unreasonable, arbitrary, in breach of principles of natural justice, and based on irrelevant considerations. It ordered the Minister to review the application for citizenship and to provide Mr. Gonzalez with an opportunity to present evidence in support, as well as to

<sup>3</sup> A certified translation of a divorce certificate, as well as a copy of the original, dated 9 February 2001 is enclosed with the communication.

<sup>4</sup> Section 7 of the Guyana Citizenship Act (1966) reads: "(1) The Minister may, if he is satisfied that the interests of national security or public policy so require, refuse to register as a citizen of Guyana any person to whom the proviso to article 42 (1) or 45 of the Constitution or section 4 (2) of this Act applies. (2) The Minister shall not be required to assign any reason for the exercise of any discretionary power conferred on him as to the registering as a citizen, the naturalizing, or certifying the citizenship, of any person and no exercise of any such power shall be subject to appeal or review in any court."

<sup>5</sup> Reference is made to House of Lords, *Secretary of State for the Home Department v. Rehman*, 3 WIR (2001) 877, 893–895.

<sup>6</sup> *R. v. Secretary of State for the Home Department Ex Parte Fayed et al.* (1997), 1 All E.R. 274.

<sup>7</sup> 1 WLR (1980) 143.

refute any evidence that may be presented for the refusal, of his application within one month of the date of the Court's decision.

2.10 On 28 November 2003, the Minister of Home Affairs met with the author, her husband and their lawyer to review Mr. Gonzalez's application for citizenship. No decision on review had been taken at the end of the Court's deadline (12 December 2003).

### **The complaint**

3.1 The author claims that the Minister's refusal to register Mr. Gonzalez as a citizen of Guyana, as well as the failure to comply with the Court order to review his case within the one-month deadline, violates his constitutional rights as the spouse of a Guyanese citizen and amounts to "miscarriage of justice". She also claims that, as a dissident, he would face long-term imprisonment or execution if returned to Cuba. The fact that he had challenged not only the decision of the Minister of Home Affairs of Guyana but, indirectly, also the Cuban Embassy's request to deny him citizenship would be considered a "counterrevolutionary action" by Cuban authorities.

3.2 For the author, the Minister's failure to comply with the order of the High Court is a clear indication that he will be denied citizenship. At a press conference, the Minister had publicly announced that the author and her husband would be deported to Cuba once court proceedings were over. There were good reasons to believe that his case was determined at a political level during the visit of a high-level diplomatic delegation from Cuba.

3.3 Although the author does not invoke any specific provisions of the Covenant, her communication appears to raise issues under articles 7; 14, paragraph 1; and 17, paragraph 1.

### **State party's observations on admissibility**

4.1 On 26 April 2004, the State party challenged the admissibility of the author's claims, arguing that she had not substantiated how the non-registration of her husband as a Guyanese citizen would violate his rights under the Covenant. The communication is therefore considered inadmissible *ratione materiae* and also is said to constitute an abuse of the right of submission.

4.2 The State party reiterates that the right for spouses of Guyanese citizens to be registered as citizens of Guyana is subject to such exceptions and qualifications as may be prescribed in the interests of national security or public policy (art. 45 of the Constitution and section 7 of the Guyana Citizenship Act). The Minister was not required to justify his decision, nor was the decision subject to appeal or review in any court. Judicial precedent confirmed the absence of an absolute right to registration as a citizen.<sup>8</sup>

4.3 The State party submits that, pursuant to the High Court's order of 12 November 2003, the Minister of Home Affairs decided on the review of Mr. Gonzalez's citizenship application on 14 April 2004. The Minister determined that Mr. Gonzalez had breached his contract with the UCCM, because he left Guyana for an unknown destination between 1 and 31 July 2001 and because he thereafter withdrew his services from the Government of Guyana to seek employment with private hospitals. Without determining whether or not his marriage in Cuba was still valid, the Minister refused to register him as a Guyana citizen or to grant him a work permit, arguing that the breach of his contractual obligations towards UCCM could not be condoned, as it could adversely affect the good relations between the

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<sup>8</sup> The State party quotes from a judgment of the Court of Appeals of Guyana, *Nielsen v. Barker* (1982), 32 West Indian Reports 254.

Governments of Guyana and Cuba and could “lead to a cessation of further assistance to Guyana, particularly in the area of health provision to Guyanese”.

**Author’s comments on the State party’s observations**

5.1 On 23 June 2004, the author commented on the Minister’s decision on review dated 14 April 2004, arguing (a) that in July 2001, her husband had been on home leave; (b) that rather than withdrawing his services from the Government of Guyana after his return to Guyana, he had been assigned by the Minister of Health to another hospital as a resident doctor; and (c) that he had never breached his contract with the UCCM, but had been told by the Cuban Embassy to return to Cuba for “full recuperation”.

5.2 The author submits that, on 31 May 2004, she appealed the Minister’s decision of 14 April 2004 to the High Court of the Supreme Court of Judicature, seeking a declaration (a) that the refusal to grant her husband citizenship amounts to torture or inhuman or degrading treatment and violates her constitutional right to freedom of movement, as it would compel her to reside outside Guyana to maintain her marital relationship; (b) that the Minister of Home Affairs “is a tribunal charged to determine civil rights and obligations but does not satisfy the requirements of Article 144 (8)<sup>9</sup> of the Constitution of the Republic of Guyana”; and (c) that the Minister’s exercise of discretion under Section 7 of the Guyana Citizenship Act “is unconstitutional, unreasonable, *ultra vires* and null and void,” as the national security and public policy exceptions are not sufficiently defined in an Act of Parliament or in subordinate legislation.<sup>10</sup> By reference to article 17 of the Covenant, she applied for interim orders compelling the Minister to grant the author residence and work permits.

5.3 In his reply, the Minister stated: (a) that Mr. Gonzalez had breached the terms of his contract with the UCCM by seeking private employment before the end of the contract; (b) that he had not provided proof of the divorce of his first marriage; (c) that the right of a person who marries a Guyanese citizen to apply under article 45 of the Constitution for registration as a citizen is a qualified right and does not incorporate by implication any right of abode in the country; (d) that his decision to refuse to register Mr. Gonzalez as a citizen of Guyana complied with principles of natural justice and was not subject to appeal or review in any court; and (e) that the decision did not contravene the author’s constitutional right to freedom of movement.

5.4 Lastly, the author informed the Committee that her husband had temporarily left Guyana for his personal safety and in order to find work abroad.

**State party’s additional observations on admissibility and author’s comments**

6. On 30 November 2004, the State party submitted that the author failed to exhaust all available domestic remedies, as the hearing for the motion she filed with the High Court in May 2004 only began on 28 October 2004.

7.1 In a submission dated 9 February 2005, the author criticized the State party’s additional admissibility submission as “another maneuver and excuse to escape

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<sup>9</sup> Art. 144, para. 8, of the Constitution of Guyana (1980) reads: “Any court or other tribunal prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial: and where proceedings for such a determination are instituted by any person before such a court or other tribunal, the case shall be given a fair hearing within a reasonable time.”

<sup>10</sup> Exceptions to the right in art. 45 of the Constitution to be registered as a citizen of Guyana must be “prescribed” in the interests of national security or public policy. Art. 49, para. 1, of the Constitution of Guyana defines “prescribed” as follows: “In this Chapter ‘prescribed’ means prescribed by or under any Act of Parliament.”



responsibility". She argues that the communication had been registered by the Committee on the basis that the author had exhausted all available domestic remedies.

7.2 The author submits that, rather than reviewing the application for citizenship, the Minister had based his decision of 14 April 2004 on the same grounds as his first decision denying Mr. Gonzalez citizenship, which the High Court had considered to be unreasonable, arbitrary, in breach of principles of natural justice and based on irrelevant considerations. The Minister took this decision four months after the deadline set by the Court (12 December 2003). The reason for her new motion in the High Court seeking constitutional relief was to challenge the Minister's miscarriage of justice.

7.3 The author submits that 15 months after the High Court's ruling, the State party was still hiding behind unduly prolonged legal proceedings, while she and her husband were forced to live in separate countries to ensure his safety and subsistence.

8. On 9 June 2005, the State party again challenged the admissibility of the communication on grounds of non-exhaustion of available domestic remedies, as the case regarding the granting of citizenship was still pending at the High Court. The author's motion in the High Court had been scheduled for hearing on 10 June 2005, and any decision of the High Court would be subject to appeal to the Court of Appeal of Guyana, as well as to further appeal to the Eastern Caribbean Court of Justice.

9. On 3 August 2005, the author informed the Committee that she and her lawyers were awaiting clarification as to whether Justice P. [*sic.*] would continue presiding over her case in the High Court after his reassignment to other courts. It was unknown to her and her lawyers when the hearing of her case would continue in the High Court.

10.1 On 3 October 2005, the author submitted that she had still not been informed when her case in the High Court would be resumed. At the most crucial point of the case, when both parties were about to make their summations for the Judge's consideration and decision, the presiding judge was removed from the courts in the County of Demerara and sent to preside in the courts of the County of Berbice. This was yet another maneuver on the part of the State party to frustrate justice. She invokes the principle that justice delayed is justice denied.

10.2 The author reiterates that at the time of registration of the communication, all available domestic remedies had been exhausted, that the Minister of Home Affairs had failed to comply with the order of the High Court within the prescribed time limit, and that his decision on review, dated 14 April 2004, fell short of constituting a review, as it was based on the same grounds as the first decision refusing to register her husband as a citizen of Guyana. There was no reason to believe that the State party would respect the rule of law in the second set of proceedings, after it had already exhibited contempt for the ruling of the High Court in the first set of proceedings.

10.3 The author claims that the State party denies her the basic human right to live and work peacefully with her husband in Guyana, although she is a citizen of Guyana and married her husband according to the laws of the State party. It was obvious that the State party's intention was to force her into exile, if she wanted her marriage and her family to survive. This was in violation of her Covenant rights.

#### **Additional information from the author**

11.1 On 12 May 2006, the author informed the Committee that the hearing in her case resumed on 2 December 2005 and concluded on 27 January 2006. However, no judgment had been handed down so far. She submitted several submissions to the High Court in relation to her constitutional motion:

(a) In the written submissions on behalf of the applicant, the author's lawyer sought declarations by the Court that the decision of the Minister of Home Affairs infringed her constitutional rights to freedom of movement and to reside in the State party on the ground that she would be compelled to reside outside Guyana in order to maintain her marital relationship; that her husband was permitted to lawfully enter and re-enter and depart from Guyana; and that the exercise of discretion by the Minister was unconstitutional as no matters constituting interests of national security or public policy were set out in any Act of Parliament or subordinate legislation. Moreover, the Minister had failed to identify any cabinet document or document tabled in the National Assembly indicating that there was a special regime in respect of Cuban doctors married to Guyanese obtaining citizenship. There was no evidence that Mr. Gonzalez had breached his contract, which was a private contract and could not be used in the circumstances to form a basis for public policy. The lawyer also sought orders compelling the Minister to grant Mr. Gonzalez the necessary permits enabling him to remain and to engage in lawful employment in Guyana, as well as interim orders to protect his rights until a final decision on motion. By reference to article 17 of the Covenant and judicial precedent,<sup>11</sup> the lawyer also invoked the author's and her husband's right to family life;

(b) In the submission on behalf of the respondents, the Attorney General reiterated that Mr. Gonzalez "does not have an absolute right to reside in Guyana by virtue of his alleged marriage to a Guyanese citizen". Rather, the right of a person who marries a Guyanese citizen to apply under article 45 of the Constitution of 1890 for registration as a citizen of Guyana was a qualified right and did not imply any right of abode in the country. The decision of the Minister to refuse him citizenship was valid, since the Minister was vested with a discretionary power under section 7 of the Guyana Citizenship Act (chap. 14:01) and article 45 of the Constitution, which he had exercised on public policy grounds. The author was precluded from basing her constitutional motion on article 17 of the Covenant because the right to protection against interference with family life was not a fundamental right under the Constitution (article 154 (a) (2) of the Constitution). Moreover, she was not entitled to a legitimate expectation upon marriage to a Cuban doctor that he would remain in Guyana. The Minister had acted fairly when denying citizenship to Mr. Gonzalez, who had been provided with a hearing and with reasons for the refusal of citizenship;

(c) In the submissions in reply, the author's lawyer reiterated that the "purported" exercise of discretion by the Minister of Home Affairs was flawed, in the absence in legislation of a clear definition of what constitutes public policy. The Minister had failed to produce any evidence of public policy and to consider the author's constitutional rights. Although article 17 of the Covenant was not a fundamental right under the Constitution, the Covenant was nevertheless binding on the Executive, and the Court was bound to interpret the fundamental rights provisions of the Constitution in the light of "international law, international conventions, covenants and charters bearing on human rights" (article 39, paragraph 2, of the Constitution).

11.2 On 5 January 2008, the author informed the Committee that the acting High Court judge, Justice P., had dismissed her constitutional motion on 1 October 2006, ordering her to pay costs of 25,000 Guyana dollars. From the bench, he had suggested that she could take the matter to the Court of Appeal. Her lawyer had filed a notice of appeal in the Court of Appeal. However, her case could not be scheduled before the Court of Appeal because the judgment of the High Court had still not been issued in writing, although her lawyer had

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<sup>11</sup> *Rattigan v. Chief Immigration Officer* [1994] 1 LRC 343, at 351-352, making reference to the Committee's decision in communication No. 35/1978, *Aumeeruddy-Cziffra et al. v. Mauritius*, Views adopted on 9 April 1981.

on several occasions consulted with the Chief Justice on the unwarranted delay on the part of the High Court judge to submit his ruling in writing.

11.3 On 15 September 2008, the author informed the Committee that Justice P. had still not issued his judgment of 1 October 2006 in writing, thus effectively preventing her notice of appeal from being entertained by the Court of Appeal. She argues that the unjustified two-year delay in issuing a written judgment amounts to a denial of justice.

#### **State party's non-response on the merits**

12.1 On 26 April 2004, the State party requested the Committee, under rule 97, paragraph 3, of the Committee's rules of procedure, to reject the communication as inadmissible. On 13 May 2004, the Committee, through its Special Rapporteur on new communications and interim measures, informed the State party of its decision not to examine the admissibility of the communication separately from the merits and reminded the State party to provide its observations on the merits by 18 August 2004. This time limit was extended until 4 October 2004 at the State party's request. On 30 November 2004, the State party again challenged the admissibility of the communication. Following reminders dated 10 November 2004, 10 December 2004 and 8 March and 6 April 2005, the State party informed the Committee on 9 June 2005 that it was in the process of preparing its observations on the admissibility and merits of the communication. On 15 June 2005, the State party was requested to keep the Committee informed about the state of the proceedings before the High Court and the Court of Appeal of Guyana. On 24 December 2007 and 24 January 2008, the Committee reminded the State party to provide updated information on the judicial proceedings concerning Mr. Gonzalez's citizenship. A final reminder was sent on 26 February 2008, together with a final reminder for the State party to submit its observations on the merits of the communication. On 8 July 2008, the State party, without commenting on the merits, submitted that the author's notice of appeal was still pending before the Court of Appeal.

12.2 The Committee recalls that the State party has an obligation under article 4, paragraph 2, of the Optional Protocol to cooperate with the Committee and to submit to it, within six months, written explanations or statements clarifying the matter and the remedy, if any, that may have been granted. The Committee regrets the State party's failure to provide any observations with regard to the merits of the author's claims. In the absence of any such information from the State party, due weight must be given to the author's claims, to the extent that they have been substantiated.

#### **Issues and proceedings before the Committee**

##### *Consideration of admissibility*

13.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

13.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

13.3 Insofar as the author claims that Mr. Gonzalez would face imprisonment or even execution if returned to Cuba, raising issues under article 7, the Committee considers that the matter is moot, since Mr. Gonzalez is not physically within the jurisdiction of the State party and accordingly she has not sufficiently substantiated the claim for the purposes of admissibility. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

13.4 As to the claims that the proceedings before the High Court were unduly prolonged and that the delay on the part of the High Court judge to issue a written ruling was

unwarranted, the Committee notes that these claims relate to judicial proceedings concerning Mr. Gonzalez's attempts to contest a negative decision about his citizenship application. It recalls that the concept of a "suit at law" under article 14, paragraph 1, of the Covenant is based on the nature of the right in question rather than on the status of one of the parties or the particular forum provided by domestic legal systems for the determination of particular rights.<sup>12</sup> Article 45 of the Constitution of Guyana provides that any person who marries a Guyana citizen is entitled to registration as a Guyana citizen, even if this right may be limited by such exceptions or qualifications as may be prescribed in the interest of national security or public policy. Although section 7, paragraph 2, of the Guyana Citizenship Act provides that the Minister's exercise of his discretionary power to refuse to register as a Guyana citizen any person to whom the exceptions or qualifications to article 45 of the Constitution apply is not subject to appeal or judicial review, the Committee notes that this did not prevent the High Court from reviewing the Minister's decisions of 27 March 2002 and 14 April 2004 on Mr. Gonzalez's citizenship application and from quashing the Minister's refusal of citizenship registration in the first decision. While decisions on citizenship applications do not necessarily need to be determined by a court of law, the Committee considers that whenever, as in the present case, a judicial body is entrusted with the review of an administrative decision on such an application, it must respect the guarantees of a fair hearing as enshrined in article 14, paragraph 1.<sup>13</sup> The Committee thus concludes that, in the circumstances of the case, article 14, paragraph 1, second sentence, applies to Mr. Gonzalez's citizenship proceedings.

13.5 The Committee notes that the author made repeated efforts to bring the procedural delays to the attention of the competent judicial authorities. In this regard, it recalls the author's uncontested statement that she and her lawyers sought clarification as to when the hearing of her case would continue and as to whether Justice P. would continue to preside over her case in the High Court, after his reassignment to another jurisdiction, and that her lawyers raised the delay by Justice P. in issuing a written decision during consultations with the Chief Justice. It also notes that the delay on the part of the High Court judge to issue his ruling in writing was unexplained. The Committee refers to its case law to the effect that, for the purposes of article 5, paragraph 2 (b), of the Optional Protocol, domestic remedies must both be effective and available and must not be unduly prolonged. The Committee considers that, in the present case, domestic remedies have been unreasonably prolonged and that article 5, paragraph 2 (b), does not preclude it from examining the communication.

13.6 Regarding the author's claims raising issues under article 17, paragraph 1, of the Covenant, the Committee considers that such claims have been sufficiently substantiated for purposes of admissibility. Not finding any other obstacle to it, the Committee considers this part of the communication admissible.

#### *Consideration of the merits*

14.1 The issue before the Committee is whether the length of the judicial proceedings before the High Court of the Supreme Court of Judicature and the presiding Judge's delay in submitting his decision in writing violated the author's and her husband's rights under the Covenant.

14.2 The Committee recalls that the concept of a fair hearing, as enshrined in article 14, paragraph 1, of the Covenant, necessarily entails that justice be rendered without undue

<sup>12</sup> Communication No. 112/1981, *Y.L. v. Canada*, decision adopted on 8 April 1986, paras. 9.1 and 9.2.

<sup>13</sup> Communication No. 1015/2001, *Perterer v. Austria*, Views adopted on 20 July 2004, para. 9.2.

delay.<sup>14</sup> It notes that the author appealed the Minister's decision of 14 April 2004 to the High Court on 31 May 2004, and that it took the presiding Judge until 1 October 2006 to decide on her motion, although the hearing of the case had been concluded on 27 January 2006. The Committee considers that the State party has not explained why the Court's review of the constitutionality of the ministerial decision in question took 28 months. Even if the fact that the presiding High Court judge was temporarily assigned to other courts may to a certain extent explain the postponement of the hearing of the case during 2005, it cannot justify a lapse of time of more than eight months between the conclusion of the hearing (27 January 2006) and the final decision (1 October 2006), during which no written judgment was prepared. Moreover, the subsequent delay on the part of the High Court judge to issue his ruling in writing had further delayed the proceedings for more than two years, as the author's appeal to the Court of Appeal could not be scheduled for hearing. The Committee observes that the combined effect of the delays in the judicial proceedings, following the Minister's failure to review the author's husband's application for citizenship within one month, as ordered in the decision of the High Court of 12 November 2003, was detrimental to the author's and her husband's legitimate interest to clarify his status in Guyana. Furthermore, it does not appear from the file before the Committee that the appeal against the decision of 14 April 2004 of the Minister of Home Affairs had suspensive effect or that the High Court issued any interim orders to protect the author's and her husband's rights pending the final determination of the case. Against this background, the Committee concludes that the above indicated delays were unreasonable and that article 14, paragraph 1, of the Covenant has been violated.

14.3 As to the author's claims raising issues under article 17, paragraph 1, of the Covenant the Committee notes that Mr. Gonzalez is not allowed to reside legally in Guyana and that, as a result, he had to leave the country and cannot live with his wife. It is also evident that they cannot live in Cuba. The State party has not indicated where else they might live as a couple. The Committee considers that this fact constitutes an interference with both spouses' family. The question is whether such interference is arbitrary or unlawful. The Committee recalls its jurisprudence that interference authorized by States can only take place on the basis of law. As for the concept of arbitrariness, it is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.<sup>15</sup>

14.4 In the present case, the Committee notes the State party's submission that the Minister refused to register Mr. Gonzalez as a Guyana citizen or to grant him a work permit arguing that the breach of his contractual obligations towards UCCM could adversely affect the good relations between the Governments of Guyana and Cuba. It also notes the decision of the High Court dated 12 November 2003 which quashed the Minister's decision. In view of the delays regarding the subsequent proceedings, the Committee is not in a position to conclude that the interference referred to was unlawful. However, the Committee does conclude that the manner in which the State party's authorities have dealt with Mr. Gonzalez's request for citizenship is unreasonable and amounts to arbitrary interference with the author and her husband's family. It thus constitutes a breach of their right under article 17, paragraph 1, of the Covenant.

15. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the

<sup>14</sup> Communication No. 203/1986, *Muñoz Hermoza v. Peru*, decision adopted on 7 November 1988, para. 11.3.

<sup>15</sup> General comment No. 16 (1988) on the right to privacy, *Official Records of the General Assembly, Forty-third Session, Supplement No. 40 (A/43/40)*, annex VI, paras. 3 and 4.

facts before it reveal a violation of article 14, paragraph 1, and article 17, paragraph 1, of the Covenant.

16. In accordance with article 2, paragraph 3, of the Covenant, the author and her husband are entitled to an effective remedy, including compensation and appropriate action to facilitate the family reunification of the author and her husband. The State party is also under an obligation to ensure that similar violations do not occur in the future.

17. 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 or not and that, pursuant to article 2 of the Covenant, the State party has undertaken an obligation 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 in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

## Appendix

### **Individual opinion of Committee member Ms. Ruth Wedgwood**

The Human Rights Committee finds that the State party violated articles 14 and 17 of the Covenant in its extensive and unreasonable delays in the judicial appeals from the administrative refusal to grant either a residence permit, work permit or citizenship to the author's husband, so that they might reside together within the territory of the State party of which she is a citizen. I join in that conclusion, and doubt that the desire to qualify for future economic assistance from a foreign State such as Cuba could constitute a permissible reason to deny a right of residence. But in this case the Committee has not had occasion to address the broader substantive question whether the Covenant creates an unvarying obligation, as such, for a State party to allow residence and naturalization to any recognized spouse of a citizen, when there is no other apparent place where they may reside together.

Article 17 should be read with a generous spirit in its protection of the family. But before addressing this issue, the Committee may also wish to examine the negotiating history of the Covenant and the record of general State practice, in regard to the concerns that States may have professed in the discharge of their obligations in the protection of all citizens.

*(Signed)* Ms. Ruth **Wedgwood**

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**E. Communication No. 1284/2004, *Kodirov v. Uzbekistan*  
(Views adopted on 20 October 2009, ninety-seventh session)\***

<i>Submitted by:</i>	Kholida Turaeva (not represented by counsel)
<i>Alleged victim:</i>	The author's son, Sodik Kodirov
<i>State party:</i>	Uzbekistan
<i>Date of communication:</i>	11 May 2004 (initial submission)
<i>Subject matter:</i>	Imposition of death penalty after unfair trial and on the basis of confession obtained under torture
<i>Procedural issue:</i>	Non-exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to life; torture, cruel, inhuman or degrading treatment or punishment; right not to be compelled to testify against oneself or to confess guilt; effective remedy
<i>Articles of the Covenant:</i>	6; 7 read together with 2; 7 read together with 14, paragraph 3 (g); and 14, paragraph 1
<i>Article of the Optional Protocol:</i>	5, paragraph 2 (b)

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

*Meeting on 20 October 2009,*

*Having concluded* its consideration of communication No. 1284/2004, submitted to the Human Rights Committee on behalf of Mr. Sodik Kodirov under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication and the State party,

*Adopts* the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1.1 The author of the communication is Mrs. Kholida Turaeva, an Uzbek national, date of birth unspecified. She submits the communication on behalf of her son, Mr. Sodik Kodirov, an Uzbek national born in 1974, who at the time of submission of the communication was detained on death row in Tashkent, after being sentenced to death by the Tashkent City Court on 17 December 2003. Although the author does not claim a violation by Uzbekistan of any specific provisions of the International Covenant on Civil

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

The text on an individual opinion co-signed by Committee members Mr. Fabián Omar Salvioli, Ms. Christine Chanet and Ms. Zonke Zanele Majodina is appended to the present Views.



and Political Rights, the communication appears to raise issues under article 6; article 7, read together with article 2; article 7, read together with article 14, paragraph 3 (g); and article 14, paragraph 1, of the Covenant. The author is unrepresented. The Optional Protocol entered into force for the State party on 28 December 1995.

1.2 Under rule 92 of its rules of procedure, the Committee, acting through its Special Rapporteur for new communications and interim measures, requested the State party, on 12 May 2004, not to carry out the execution of the author's son, pending the consideration of the case. This request was reiterated by the Committee on 18 October 2004. By letter of 11 November 2004, the State party informed the Committee that it acceded to the request for interim measures. On 1 May 2009, following the Committee's request for an update on the status of Mr. Kodirov's death sentence after the abolition of the death penalty in Uzbekistan as of 1 January 2008, the State party forwarded information that on 29 January 2008, the Supreme Court of Uzbekistan had commuted Mr. Kodirov's death sentence to life imprisonment.

### **Factual background**

2.1 The author claims that when her son was arrested on 9 June 2003, he was subjected to torture by police officers for the purpose of extracting a confession. In particular, she states that her son was raped while in detention, and so severely mistreated that he had to be taken to a prison hospital and operated on. Allegedly, when she visited her son in detention on 10 June 2003, he did not recognize her and, as a result of the beatings, he could not walk unaided. The author submits that investigators must have used a sharp object to injure her son, because he had cuts all over his body.

2.2 On 17 December 2003, the Tashkent City Court handed down a death sentence, convicting the author's son on multiple counts of attempted premeditated murder under aggravating circumstances (arts. 25 and 97, part 2, of the Criminal Code); premeditated murder under aggravating circumstances (art. 97, part 2); robbery committed by a recidivist with infliction of serious bodily harm (art. 164, part 3); illegal acquisition and dealing in currency values (art. 177, part 3); and acquisition, destruction, damage or concealment of documents, stamps, seals, forms (art. 227, part 2). The author's son was also recognized as a particularly dangerous recidivist. On 6 February 2004, the case was heard by the Appeal Chamber of the Tashkent City Court, which reclassified the author's offences from part 3 of article 177, to the lesser part 2 thereof and dismissed one count of attempted premeditated murder under aggravating circumstances (arts. 25 and 97, part 2). The death sentence, however, was upheld. On 10 and 31 March 2004, the First Deputy Chairperson of the Supreme Court requested a dismissal of a number of counts of attempted premeditated murder under aggravating circumstances (arts. 25 and 97, part 2) and premeditated murder under aggravating circumstances (art. 97, part 2) through the supervisory review procedure. These requests were granted on 23 March and 16 April 2004, respectively. The author's son's death sentence, however, was retained. On an unspecified date, the author's son filed a request for a presidential pardon but no response was received.

2.3 According to the author, her son claimed in court that he was beaten and tortured during the pretrial investigation to force him to plead guilty and showed marks of torture on his body. The court, however, considered her son's statements as an attempt to avoid responsibility and punishment for the crimes committed. The author further submits that at the start of her son's trial, she was told by the judge that if she were to come to the court hearings, he would inform the victims and they would take the law into their own hands and kill her together with her son in the court building. The judge allegedly added that "death was awaiting her son in any event". The author concludes, therefore, that her son's trial was not fair and that the court was partial.

### **The complaint**

3. Although the author does not specifically invoke any provisions of the Covenant, the communication appears to raise issues under article 6; article 7 read together with article 2; article 7 read together with article 14, paragraph 3 (g); and article 14, paragraph 1, of the Covenant.

### **State party's observations on admissibility**

4.1 On 11 November 2004, the State party submits that, on 17 December 2003, the author's son was found guilty of premeditated murder of five persons with particular cruelty and under aggravating circumstances, as well as of robbery, and sentenced to death. Between 10 May and 7 June 2003, the author's son assaulted, battered and robbed 16 women, including one minor, who were walking unaccompanied late in the evening, took possession of their valuables and subsequently sold them to third persons. As a result of serious bodily injuries inflicted by the author's son and despite medical intervention, five of the victims died. The State party provides a short description of the 16 incidents on the basis of which the author's son was subsequently charged and found guilty.

4.2 The State party submits that the guilt of the author's son was proven by his own confession, the verification of his confession at the crime scenes, witnesses' and victims' testimonies, case file materials, conclusions of forensic experts, fingerprints and psychiatric examinations.

4.3 The State party submits that all of the author's claims about a violation of her son's rights presented in her communication to the Committee, that is, allegations of torture, rape and intimidation of her son, as well as of other violations of criminal procedure law, are unsubstantiated. There is no evidence in the author's son's criminal case file that he was subjected to physical or mental pressure during a pretrial investigation and subsequent proceedings. Equally, there is no information about medical treatment that the author's son had to undergo as a result of the alleged ill-treatment.

4.4 The State party further submits that, starting from the first interrogation of the author's son on 9 June 2003, he was represented by a lawyer. Upon the completion of the pretrial investigation, the author's son and his lawyer were given access to the case file from 5 to 11 September 2003. In addition, upon the lawyer's request, the trial was postponed from 2 to 3 October 2003, in order to give her the opportunity to further study the case file materials. Neither at this stage, nor in court, did the author's son or his lawyer complain about ill-treatment during the pretrial investigation. The issue of alleged violation of the author's son's rights in criminal proceedings has not been raised by his lawyer either orally or in writing before the Appeal Chamber of the Tashkent City Court on 6 February 2004.

4.5 The State party submits that there is neither evidence nor information in the case file materials about the alleged pressure exercised against the author by the judge of the Tashkent City Court. In fact, the author was present at the court hearings and has not made any oral or written statements about the alleged violation of criminal procedure law.

4.6 The State party concludes that the pretrial investigation and court proceedings were conducted in full compliance with the Criminal Procedure Code. All charges and evidence were thoroughly examined and evaluated, and his guilt was duly proven. While imposing the punishment, the court took into account the author's son's three previous convictions, the fact that he presented a public danger and the severe nature of the crimes committed.

### **Author's comments on the State party's observations**

5.1 On 18 January 2005, the author adds on the facts that her son was arrested in the absence of witnesses and without the arrest protocol being drawn up. The private belongings attributable to him were in fact seized on 8 June 2003 in the apartment of a third person. The author challenges her son's role and/or degree of participation in each of the 16 incidents referred to by the State party (see paragraph 4.1 above). She concludes that the charges against her son were unsubstantiated and/or excessive.

5.2 The author refers to the Resolution of the Plenum of the Supreme Court of 20 November 1996, according to which evidence obtained through the use of unlawful methods, such as physical force (torture, beatings) and psychological and moral pressure is void. She submits that the confession "beaten out" of her son under torture during the pretrial investigation was used by the court in determining his role in the crimes. The author submits a copy of the medical certificate signed by the head of the detention facility UYA 64/IZ-I and dated 21 May 2004, according to which "while in detention in the facility, Mr. Sodik Kodirov underwent an in-patient treatment from 13 to 23 June 2003, in connection with self-inflicted injury. Diagnosis: Avulsed wound of the lower third of the right forearm. Posthaemorrhagic anaemia. Was examined by the psychiatrist in connection with the complaints about insomnia. Diagnosis: Asthenoneurotic syndrome without active pathology. Out-patient treatment prescribed." The author adds that the medical certificate fails to document that at the time in question, her son's arm was broken, there was a wound in his head and a stab wound to his chest.

5.3 The author concludes that the pretrial investigation and court proceedings in her son's case were superficial and were carried out "in a particularly accusatory manner". Therefore, the trial was not fair and the court was partial.

### **Supplementary submissions**

6. On 20 February 2009, the Committee reiterated its earlier request to the State party of 12 May 2004 to provide a full trial transcript of Mr. Kodirov's court hearing in the Tashkent City Court. On 1 May 2009, the State party notified the Committee that, according to article 475 of the Criminal Procedure Code, copies of the judgment and of other court documents are made available only to the parties to criminal proceedings. For this reason, a copy of the trial transcript of Mr. Kodirov's court hearing in the Tashkent City Court could not be made available to the Committee.

7. On 5 May 2009, the State party's note verbale of 1 May 2009 was forwarded to the author with the request for comments and a copy of the full trial transcript of Mr. Kodirov's court hearing in the Tashkent City Court. No response has been received.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

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

8.3 The State party has argued that the author's claims about a violation of her son's rights presented in her communication to the Committee, that is, allegations of torture, rape and intimidation of her son, were never raised before the domestic authorities or courts,

which renders this part of the communication inadmissible under article 5, paragraph 2 (b), of the Optional Protocol, for failure to exhaust all available domestic remedies. The author, in turn, argued that her son claimed in court that he had been beaten and tortured during the pretrial investigation to force him to plead guilty and showed marks of torture on his body; his statements, however, were not taken into account and his initial confession was used by the court in determining his role in the crimes. In the light of these conflicting arguments, the State party and the author were requested by the Committee to provide a copy of the full trial transcript of Mr. Kodirov's court hearing in the Tashkent City Court, in order to enable the Committee to make an informed decision on the issue of exhaustion of domestic remedies. This critical document, however, has not been received. Notwithstanding the fact that the author is unrepresented, the State party merely referred to the provision in its domestic criminal procedure law, i.e. that court documents are made available only to the parties, as an obstacle for compliance with the Committee's request and implied that the trial transcript in question could be obtained through the author, instead of fulfilling its duty to provide the document itself.

8.4 In this regard, the Committee reaffirms its jurisprudence that the burden of proof cannot rest on the author of the communication alone, especially considering that the author and the State party do not always have equal access to the evidence and frequently the State party alone has the relevant information.<sup>1</sup> It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to furnish to the Committee the information available to it. In cases where the allegations are corroborated by credible evidence submitted by the author and where further clarification depends on information exclusively in the hands of the State party, the Committee may consider the author's allegations substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party. In the present communication, the Committee takes into account that the State party did not provide any corroborating documentation to refute the author's claim that her son's rape and torture allegation were raised before the domestic courts, although the State party had the opportunity to do so, and which the author has sufficiently substantiated. Therefore, the Committee considers that it is not precluded by article 5, paragraph 2 (b), of the Optional Protocol from examining the communication.

8.5 The Committee notes that, although the author in her submissions does not specifically invoke any provisions of the Covenant, her allegations and the facts as submitted to the Committee appear to raise issues under article 6; article 7 read together with article 2; and article 7 read together with article 14, paragraph 3 (g), of the Covenant. The Committee considers that the author has sufficiently substantiated these claims, for purposes of admissibility, and declares them admissible.

8.6 The author's claim that her son's trial court was unfair and not impartial seems to raise issues also under article 14, paragraph 1, of the Covenant. The Committee, however, does not consider this claim to be sufficiently substantiated and, therefore, finds this part of the communication inadmissible under article 2 of the Optional Protocol.

#### *Consideration of the merits*

9.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5, paragraph 1, of the Optional Protocol.

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<sup>1</sup> See, Communications No. 30/1978, *Bleier v. Uruguay*, Views adopted on 24 March 1980, para. 13.3; No. 139/1983, *Conteris v. Uruguay*, Views adopted on 17 July 1985, para. 7.2; and No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.3.

9.2 The author has claimed that her son was raped and subjected to torture while in police custody for the purpose of extracting a confession, to the extent that he had to be hospitalized. In support of her allegations, the author submitted a copy of the medical certificate issued by the head of the detention facility and dated 21 May 2004, according to which Mr. Kodirov was hospitalized from 13 to 23 June 2003, in connection with self-inflicted injury. She also claimed that the medical certificate failed to document other serious injuries on her son's body. The State party merely affirmed that the author's allegations are unsubstantiated and that there was no information about medical treatment that her son had to undergo as a result of the alleged ill-treatment. The Committee notes, however, that the State party did not explain whether, in the light of the author's rape and torture allegations, any investigation took place in relation to Mr. Kodirov's documented injury which required hospitalization and appeared while he was in the State party's custody. The Committee must, in the circumstances, give due weight to the author's allegations. The Committee recalls that a State party is responsible for the security of any person under detention and, when an individual is injured while in detention, it is incumbent on the State party to produce evidence refuting the author's allegations. In the light of the information provided by the author, the Committee concludes that the lack of adequate investigation into the allegations of ill-treatment in custody of her son amounted to a violation of article 7, read together with article 2, of the Covenant.

9.3 Furthermore, as regards the author's claim of a violation of her son's rights, in that he was forced to sign a confession under torture, the Committee recalls its jurisprudence that the wording of article 14, paragraph 3 (g), must be understood in terms of the absence of any direct or indirect physical or psychological coercion by the investigating authorities on the accused with a view to obtaining a confession of guilt. The Committee also recalls that the burden is on the State to prove that statements made by the accused have been given of their own free will. In these circumstances, the Committee concludes that the facts before it disclose a violation of article 7, read together with article 14, paragraph 3 (g), of the Covenant.

9.4 The Committee recalls its jurisprudence to the effect that the imposition of a death sentence after a trial that did not meet the requirements for a fair trial amounts also to a violation of article 6 of the Covenant. In the present case, however, the death sentence imposed on 17 December 2003 was commuted to life imprisonment on 29 January 2008. In these circumstances, the Committee considers it unnecessary to examine separately the author's claims falling under article 6 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of Mr. Kodirov's rights under article 7, read together with article 2; and article 7, read together with article 14, paragraph 3 (g), of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Kodirov with an effective remedy. The remedy should include a new trial that would comply with fair trial guarantees of article 14 of the Covenant, impartial investigation of the author's claims falling under article 7, prosecution of those responsible, and full reparation, including adequate compensation. The State party is also under an obligation to prevent similar violations in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not 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 in case a violation has been established, the Committee wishes to

receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

## Appendix

### **Individual opinion of Committee members Ms. Christine Chanet, Ms. Zonke Zanele Majodina and Mr. Fabián Omar Salvioli (partly dissenting)**

1. In general we concur with the deliberations and conclusions reached by the Human Rights Committee in communication No. 1284/2004, "*Kodirov v. Uzbekistan*", but regret that we cannot agree with the findings in the final part of paragraph 9.4, in which, although the Committee correctly recalls that "the imposition of a death sentence after a trial that did not meet the requirements for a fair trial amounts also to a violation of article 6 of the Covenant", then concludes there has not been a violation of article 6 in the case in question because "the death sentence imposed on 17 December 2003 was commuted to life imprisonment on 29 January 2008".

2. Uzbekistan has made significant advances in its domestic legislation in terms of respect for and guarantees of the right to life, as shown by the fact that, on 23 December 2008, the State ratified the second Optional Protocol to the International Covenant on Civil and Political Rights, thus demonstrating its commitment to the abolition of capital punishment. Moreover, in the Kodirov case, the Committee had requested interim measures, and the State responded positively on 11 November 2004. This demonstrates the State's fulfilment in good faith of the international obligation undertaken on ratification of the International Covenant on Civil and Political Rights to take the necessary measures to give full effect to the Committee's decisions.

3. The above does not excuse the Committee from giving an opinion on the facts of a specific case, as considered under this individual communication. In our view, it is inappropriate — most pertinently for the purposes of proper reparation — for a body such as the Committee to fail to give an explicit opinion on a violation of a human right recognized in one or more articles of the International Covenant on Civil and Political Rights.

4. In its general comment No. 6 (1982) on the right to life, the Human Rights Committee states that "the expression 'most serious crimes' must be read restrictively to mean that the death penalty should be a quite exceptional measure. It also follows from the express terms of article 6 that it can only be imposed in accordance with the law in force at the time of the commission of the crime and not contrary to the Covenant. The procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence ...".<sup>a</sup>

5. A violation of article 6, paragraph 2, exists regardless of whether the death penalty was actually carried out. As the Committee itself has stated before, "the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant".<sup>b</sup> This case law was based on earlier decisions in which the Committee stated that a preliminary hearing that failed to observe the guarantees of article 14 violates article 6, paragraph 2, of the

<sup>a</sup> *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40), annex V, para. 7.*

<sup>b</sup> *Communication No. 1096/2002, Kurbanova v. Tajikistan, Views adopted on 6 November 2003, para. 7.7.*

Covenant.<sup>c</sup> Unfortunately, this criterion was not maintained in recent cases and this, in our view, represents a step backwards in the Committee's jurisprudence.

6. In the interpretation of human rights law, and in the name of progress, an international body may amend a view it previously held and replace it with an interpretation that provides greater protection for the rights contained in an international instrument: this constitutes appropriate and necessary development of international human rights law.

7. The reverse procedure is not acceptable, however: it is not appropriate to interpret human rights provisions more restrictively than before. The victim of a violation of the Covenant deserves at least the same approach to protection as that provided in cases considered previously by the same body.

8. Consequently, and without wishing to minimize the steps taken by Uzbekistan in respect of the abolition of the death penalty, we are of the opinion that, in the Kodirov case, the Committee should also have found a violation of the right contained in article 6, paragraph 2, of the International Covenant on Civil and Political Rights.

(Signed) Ms. Christine **Chanet**

(Signed) Ms. Zonke Zanele **Majodina**

(Signed) Mr. Fabián Omar **Salvioli**

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

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<sup>c</sup> Communications No. 719/1996, *Levy v. Jamaica*, Views adopted on 3 November 1998, para. 7.3, and No. 730/1996, *Marshall v. Jamaica*, Views adopted on 3 November 1998, para. 6.6.



**F. Communication No. 1312/2004, *Latifulin v. Kyrgyzstan*  
(Views adopted on 10 March 2010, ninety-eighth session)\***

<i>Submitted by:</i>	Rustam Latifulin (represented by counsel, Yuriy Shentsov)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Kyrgyzstan
<i>Date of communication:</i>	28 June 2004 (initial submission)
<i>Subject matter:</i>	Unfair trial; unlawful detention
<i>Procedural issues:</i>	Non-substantiation; inadmissibility <i>ratione materiae</i> ; evaluation of facts and evidence
<i>Substantive issues:</i>	Right to a fair trial; right to immediate access to a lawyer; unlawful constraint measure; right to be promptly informed of the charges; conviction for failing to fulfil contractual obligations
<i>Articles of the Covenant:</i>	2; 9, paragraphs 1 and 2; 11; 14, paragraphs 1 and 3 (c) and (d); and 26
<i>Articles of the Optional Protocol:</i>	2 and 3

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

*Meeting* on 10 March 2010,

*Having concluded* its consideration of communication No. 1312/2004, submitted to the Human Rights Committee by Mr. Rustam Latifulin under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication, and the State party,

*Adopts* the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication is Mr. Rustam Latifulin, a citizen of Kyrgyzstan, whose claims allege him to be the victim of violations by the State party of articles 2; 9, paragraphs 1 and 2; 11; 14, paragraphs 1 and 3 (c and d); and 26 of the Covenant. He is represented by counsel, Yuriy Shentsov.

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Mahjoub El Haiba, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

### **The facts as presented by the author**

2.1 From 1999 to 2001 the author worked as the director of the “People’s Friendship Foundation”, which provided assistance to Kyrgyz citizens wishing to work or study abroad. The Foundation had a license issued by the Ministry of Labour to carry out such activities and offered no guarantees, but assistance and support in finding a job or studying abroad.

2.2 In 7 June 2002, the author was detained as a suspect of assault under section 112 of the Criminal Code. He appealed the decision regarding his detention up to the Supreme Court with no avail. On 19 June 2002, the author was charged with fraud in connection with his activities in the Foundation under section 166 of the Criminal Code, and on 20 March 2003, he was convicted by the Pervomaisk District Court of fraud (sect. 166, para. 3 (2 and 4)), theft of property (sect. 169), and assault (sect. 112, para. 1). He was sentenced to a total of 12 years of imprisonment with confiscation of property at a colony of strict regime. On 17 April 2003, the author filed an appeal with the Bishkek City Court, which upheld the sentence on 22 August 2003. An application for supervisory review was filed with the Supreme Court, however not by the author or his representatives, but by one of the victims who believed that the real perpetrators had escaped justice. This application was dismissed on 2 March 2004. According to the author, the Supreme Court examined the case four and a half months late, in his absence and the absence of his lawyer, despite the fact that under the Criminal Procedure Code, it has to examine within one month.

2.3 The author did not commit fraud as he had warned his clients that he could not guarantee their visas. The court failed to assess the role of one Bazarbaev, a former head of the foundation, who allegedly determined the fees to be charged to clients. The court also ignored the fact that many clients were successfully sent abroad to work or to study and it did not question the legality of the Foundation’s activities.

2.4 The court made mistakes in establishing the fees that the victims had been charged and claims that all payments were sent to the Foundation’s account. The author refers to the court’s finding that the deputy head of the Foundation, Mr. Gladilin had withdrawn a large sum of money from the Foundation’s account under the author’s instruction and submits that he knew nothing about this withdrawal and that the court failed to investigate how the money had been spent. Allegedly, Mr. Gladilin had used blank papers that the author had signed while he was in hospital so that Mr. Gladilin could send letters on the author’s behalf to partner organizations. No inquiries were conducted in this regard. The author had no role in the financial aspects of the Foundation and that, at worst, he was in breach of contract. He states that several of those allegedly defrauded testified in his defence.

2.5 The author was not given access to a lawyer for a period of three days after his arrest. He states that his detention per se was unlawful, as the offence in question at the time, assault, was not one for which a constraint measure was prescribed by law. The charge of fraud under section 166 of the Criminal Code was added only after he had appealed his detention. He was not charged with any offence for a period of 10 days, and he was not advised of his right to challenge his detention. He claims that under section 102 of the Criminal Procedure Code the constraint measure is applied if there is a ground to assume that the accused or defendant will hide from the investigation or court proceedings or will obstruct objective investigation or court proceedings. There is no evidence in his file that he hid from the investigation and, furthermore, the investigator was aware of his address. The author challenged the lawfulness of his detention in the District Court on 19 June 2002. The court justified the constraint measure stating that the investigation could not locate the author at the place of his residence and that he had failed to notify the court about his new address and change in his employment status. He appealed twice in the Supreme Court on 4 July 2002 and 22 October 2002. The appeals were dismissed in his absence and in the absence of his lawyer on 7 October 2002 and 13 November 2002 respectively.

2.6 The trial court failed to examine documentary evidence by the defence and relied on the testimonies of the victim Kushueva, who testified only during the pretrial investigation and not during the trial. The author's lawyer's request that the court hear witnesses who could testify in his favour was dismissed.

2.7 The appeal court also failed to examine either documentary evidence or witness testimonies, and thus upheld his sentence.

### **The complaint**

3.1 The author claims a violation of article 9, paragraph 2, of the Covenant, as he was not charged with any offence for a period of 10 days, and he was not advised of his right to challenge his detention.

3.2 As to the author's claim that his arrest was unlawful, as the offence in question at the time, assault, was not one for which a constraint measure was prescribed by law and his claim that the charge of fraud was added when he had appealed his detention, the Committee notes that these allegations may raise issues also under article 9, paragraph 1, of the Covenant.

3.3 The author claims that his rights under article 11 were violated, as he was imprisoned for failure to fulfil a contractual obligation.

3.4 The author claims that the Court showed bias towards him generally, as it did not take into account that other persons were responsible for the financial matters of the foundation. Furthermore the court refused his lawyer's requests to examine certain witnesses, including persons whom the organization had successfully sent abroad to work. The author claims that these facts constitute a violation of article 14, paragraph 1, of the Covenant.

3.5 The author claims to be a victim of violation of article 14, paragraph 3 (d), as the hearing in the Supreme Court was held in his absence and the absence of his lawyer. He claims violation of article 14, paragraph 3 (c) as there was a delay in review of his case by the Supreme Court. He also claims violation of articles 2, and 26.

### **State party's observations**

4.1 On 22 November 2004, the State party submits that the author was convicted of assault under section 112 and theft of property under section 169 of the Criminal Code and sentenced to 12 years imprisonment with confiscation of property.

4.2 It submits that the author's guilt was proven by the statements of victims Sadarbek G., Korchueva J., Kerimkulova A., Kushueva Ch., Bekulova D. and other documentary evidence. The sentence was upheld by higher courts. The General Prosecutor's Office did not find any procedural violations in the author's case.

### **Author's comments on the State party's observations**

5.1 On 2 March 2005, the author contested the submission by the State party, stating that it did not provide any counter arguments to his claims regarding violations of the Covenant and that its conclusions were unsubstantiated.

5.2 The author claims that the State party's reference to the General Prosecutor's Office is incorrect, as the case was examined by the judicial bodies and the General Prosecutor's Office has no mandate to comment on judicial decisions.

### Additional comments by the parties

6.1 On 7 June 2005, the State party submits that the General Prosecutor's Office examined the case and confirmed that the author's guilt under sections 112, 166 and 169 was proven by the statements of victims Nusupova D., Sardarbek. G., Jenaliev M., Alkan R., Kamchibek G., Bekulova J., Korchueva J. and statements by witnesses Jenaliev M., Osmonaliev A., Cheremisina A., and others. It was also supported by the results of a judicial expertise, an audit of the Foundation and other materials of the case. The sentence was reviewed by the Supreme Court of Kyrgyzstan.

6.2 On 29 June 2005, the author submits that the State party's observations of 7 June 2005 do not contain any new information which is worth commenting on. He stated that the State party is unwilling to investigate his case further and tries to delay the Committee's decision. The author asks the Committee to accelerate the examination of his case as his health is deteriorating due to depression. He claims that he has been under psychological pressure to withdraw his complaints to international bodies.

6.3 On 19 December 2005, the State party submits that the remaining term of 8 years, 11 months and 15 days of the author's sentence term was reduced by one fourth under the Law on amnesty of 10 April 2004. Under section 61 of the Criminal Code his term in pretrial detention – 1 year, 2 months, 15 days was deducted in the calculation of his sentence term. Thus, the period of his imprisonment is counted from 7 June 2002 to 30 December 2010. His early release is possible after 14 March 2008.

### Issues and proceedings before the Committee

#### *Consideration of admissibility*

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant. The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the matter is not being examined under another procedure of international investigation or settlement.

7.2 The Committee notes the author claims that his rights under article 11 were violated, as, in his view, he was imprisoned for failure to fulfil a contractual obligation. The Committee notes that the facts for which the author was tried did not concern the failure to meet a contractual obligation, but rather fell under the scope of the criminal law. Accordingly, the Committee considers that this part of the communication is incompatible *ratione materiae* with the provisions of the Covenant, and that it is therefore inadmissible under article 3 of the Optional Protocol.

7.3 The Committee notes that the author's allegations in paragraph 3.4, regarding claims under article 14, paragraph 1, largely relate to the evaluation of facts and evidence by the State party's courts. The Committee refers to its jurisprudence<sup>1</sup> and reiterates that it is

<sup>1</sup> See for example: Communications No. 541/1993, *Errol Simms v. Jamaica*, decision on inadmissibility adopted on 3 April 1995 and No. 1234/2003, *P.K. v. Canada*, decision on inadmissibility adopted on 20 March 2007. Communications No. 1188/2003, *Riedl-Riedenstein et al. v. Germany* decision adopted on 2 November 2004; No. 886/1999, *Schedko and Bondarenko v. Belarus*, Views adopted on 3 April 2003; No. 1138/2002, *Arenz et al. v. Germany*, decision on admissibility adopted on 24 March 2004. General comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 Vol. I), annex VI.

generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that it was clearly arbitrary or amounted to a denial of justice. The material before the Committee does not reveal that the conduct of the trial suffered from any such defects. Accordingly, the Committee considers that the author has not substantiated these allegations for purposes of admissibility and the claims are thus considered inadmissible pursuant to article 2 of the Optional Protocol.

7.4 The Committee notes the author's claims that the hearing in the Supreme Court was delayed and held in his absence and in the absence of his lawyer in violation of article 14, paragraph 3 (c and d). The Committee notes that the author did not provide sufficient information to illustrate his claims in this regard. It notes, in particular that the proceedings in question relate to a supervisory review of a court decision that was already into force, and were the result of a claim filed not by the author or his representatives but by another individual. In the circumstances, the Committee declares this part of the communication inadmissible, for lack of substantiation, pursuant to article 2 of the Optional Protocol.

7.5 As to the alleged violation of articles 2 and 26, the author does not provide information to illustrate his claims in this respect. Accordingly, this part of the communication is deemed inadmissible, as insufficiently substantiated, under article 2 of the Optional Protocol.

7.6 The Committee finds that the claims relating to articles 9, paragraphs 1 and 2, of the Covenant, which the State Party has not factually disputed, have been substantiated for the purposes of admissibility.

#### *Consideration of the merits*

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee notes the author's claim that his detention was unlawful, as the offence in question at the time, assault, was not one for which a constraint measure was prescribed by law. It also notes his claim that the charge of fraud was put forward only after he appealed his detention. The materials before the Committee reveal that the court justified the detention with his failure to notify the court regarding the change of his residence and employment status. The Committee notes, however, that the State party has failed to address this matter in the context of the present communication. In the absence of any other information, the Committee concludes that there has been a violation of article 9, paragraph 1.

8.3 The Committee notes the author's claims that during the first 10 days in detention he was not informed of the charges against him. The Committee notes that in its reply to the present communication, the State party has not factually disputed the claim but merely, as a general matter, stated that no procedural violations have been observed in the author's case. In the absence of any further information, the Committee finds that the facts reveal a violation of articles 9, paragraph 2, of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has violated articles 9, paragraphs 1 and 2, of the International Covenant on Civil and Political Rights.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, in the form of appropriate compensation. The State party is also under an obligation to prevent similar violations in the future.

11. Bearing in mind that, by becoming a State 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 or not and that, pursuant to article 2, of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**G. Communication No. 1338/2005, *Kaldarov v. Kyrgyzstan*  
(Views adopted on 18 March 2010, ninety-eighth session)\***

<i>Submitted by:</i>	Soyuzbek Kaldarov (represented by counsel, Amageldy Moldobaev and Salizhan Maitov)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Kyrgyzstan
<i>Date of communication:</i>	27 December 2004 (initial submission)
<i>Subject matter:</i>	Failure to bring a detained person before a judge and imposition of death penalty after unfair trial
<i>Procedural issue:</i>	Non-substantiation of claims
<i>Substantive issues:</i>	Right to life; torture, cruel, inhuman or degrading treatment or punishment; arbitrary detention; right to be brought promptly before a judge; right to take proceedings before a court; right to humane treatment and respect for dignity; presumption of innocence; right to be tried without undue delay; right to legal assistance; right not to be compelled to testify against oneself or to confess guilt
<i>Articles of the Covenant:</i>	6, paragraph 1; 7; 9, paragraphs 1, 3 and 4; 10, paragraph 1; 14, paragraphs 2, 3 (c), (d) and (g)
<i>Article of the Optional Protocol:</i>	2

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

*Meeting on 18 March 2010,*

*Having concluded* its consideration of communication No. 1338/2005, submitted to the Human Rights Committee by Mr. Soyuzbek Kaldarov under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication, and the State party,

*Adopts* the following:

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\* The following members of the Working Group participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Mahjoub El Haiba, Mr. Ahmed Amin Fathalla, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

## Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Mr. Soyuzbek Kaldarov, a Kyrgyz national born in 1976, who at the time of submission of the communication was detained on death row in Osh, Kyrgyzstan. He claims violations by Kyrgyzstan of his rights under article 6, paragraph 1; article 7; article 9, paragraphs 1, 3 and 4; article 10, paragraph 1; article 14, paragraphs 2 and 3 (c), (d) and (g), of the International Covenant on Civil and Political Rights. The author is represented by counsel. The Optional Protocol entered into force for the State party on 7 January 1995.

1.2 Under rule 92 of its rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, requested the State party, on 10 January 2005, not to carry out the author's execution, pending the consideration of his case.

1.3 A moratorium on the execution of the death penalty was initially introduced in Kyrgyzstan by a Presidential Decree, which entered into force on 8 December 1998. Since then, it has been extended on an annual basis. Presidential Decree of 30 December 2003, on prolongation of the term of moratorium on execution of the death penalty in the Kyrgyz Republic, extended the moratorium until 31 December 2004. On 9 November 2006, Kyrgyzstan adopted a new Constitution, which abolished the death penalty. On 30 July 2009, the State party informed the Committee that on 17 December 2007, the Judicial Chamber for Criminal Cases of the Supreme Court of Kyrgyzstan had commuted Mr. Kaldarov's death sentence to life imprisonment.

### The facts as presented by the author

2.1 On 7 March 1999, at approximately 2 a.m., the author was driving a third person's car with four acquaintances in the outskirts of Bishkek, when he was stopped by two traffic policemen. One of the passengers, K.A. ordered the author to ignore the policemen and to drive away at high speed. After a short pursuit, the car was blocked by the police vehicle. A fight ensued between the policemen, the author and three of the passengers who were in the car. In the course of the fight, one of the policemen fired a warning shot which prompted the author and the three passengers to return to the car and drive away. Shortly thereafter, K.A. ordered the author to turn around and to drive back to the policemen to take their pistol. Upon arrival, K.A. opened the car's boot and took out a sawn-off rifle. He shot one of the policemen dead at short range, seized that policeman's pistol and fired with it at the second policeman.

2.2 On 9 March 1999, the author and the other two passengers, A.M. and K.K., were arrested by law-enforcement officers. Upon arrest, they confessed to having committed a crime and testified about the role played by each of the participants in the incident in question. In particular, they unanimously identified K.A. as the murderer of both policemen and repeated this statement during verification of the testimony at the crime scene, which was videotaped. Subsequently, however, investigating officers conducted "a new investigation with the use of physical pressure", as a result of which a murder of one of the policemen was attributed to the author. The initial testimony given by A.M. and K.K. after arrest disappeared from the criminal case file and, on an unspecified date, the author was charged with the murder of one of the policemen.

2.3 On 2 March 2000, the Pervomai District Court of Bishkek convicted the author on counts of banditry (art. 230, parts 1 and 2, of the Criminal Code); illegal acquisition of a vehicle or another motor transport (art. 172, part 3); illegal acquisition, transfer, dealing in, storage, transport or carrying of firearms, ammunition, explosive materials and explosive devices (art. 241, part 3); illegal production or repair of firearms (art. 242, part 1, clause 1); theft (art. 164, part 3, clause 1); fraud (art. 166, part 3, clause 3); use of force against a public agent (art. 341, part 2); premeditated infliction of grave damage to health (art. 104,



part 3, clauses 1, 2 and 3); attempt on the life of a law-enforcement officer (art. 340) and murder (art. 97, part 2, clauses 1, 3–6, 10, 13–17). He was sentenced to death, with the seizure of his property.

2.4 On 13 June 2000, the author's cassation appeal against his conviction was dismissed by the Judicial Chamber for Criminal Cases of the Bishkek City Court. On 19 December 2000, the Supreme Court upheld the ruling of the Bishkek City Court through the supervisory review procedure. The author's request for a presidential pardon was rejected on 13 October 2001.

2.5 On 6 October 2004, A.M. filed a request with the Chairperson of the Supreme Court to have the author's conviction reviewed, in which he identified K.A. as the murderer of the two policemen on the date in question. He stated that he had been forced to change his initial testimony and to accuse the author of murder under pressure from law-enforcement officers.

### **The complaint**

3.1 The author claims that his rights under article 9, paragraphs 3 and 4, were violated, because the first and second investigations were conducted in the absence of a court decision on the lawfulness of his detention. He further claims that, contrary to article 9, paragraph 3, the State party's law does not require that anyone detained on a criminal charge is brought promptly before a judge. Furthermore, he claims that if a person arrested or detained is brought before an officer other than a judge, this officer should be authorized by law to exercise judicial power and be independent in relation to the issues dealt with. The author's placement in custody was authorized by a prosecutor, who cannot be considered independent. The author also refers to the Committee's jurisprudence<sup>1</sup> that a delay of one week between the time of arrest and the time when the arrested person was brought before a judge in a capital case cannot be deemed compatible with article 9, paragraph 3, and that pretrial detention of over 16 months in a capital case constitutes, in the absence of satisfactory explanations from the State party or other justification discernible from the file, a violation of the right, under article 9, paragraph 3, to be tried "within reasonable time" or to be released. The author submits that it would be ineffective to raise his claims under article 9, paragraph 3, before the domestic courts, because in the absence of relevant domestic law, the courts would be unable to enforce his rights guaranteed under article 9, paragraph 3, of the Covenant. Thus, there are no domestic remedies to exhaust for the claims under this provision of the Covenant.

3.2 The author claims that he is a victim of violations of article 9, paragraph 1, and article 14, paragraph 3 (d), because he was assigned a lawyer on 16 March 1999, that is, seven days after his arrest. Under article 100, part 1, of the Criminal Procedure Code, anyone arrested on suspicion of having committed a crime shall be interrogated in the presence of a lawyer. Under article 216, part 1, of the Criminal Procedure Code, charges shall be presented in the presence of a lawyer. Under article 46 of the Criminal Procedure Code, participation of a lawyer in criminal proceedings is mandatory if (1) it was requested by the suspect, accused or defendant and [...] (5) a person is suspected or accused of having committed a particularly serious crime. According to article 13 of the Criminal Code, particularly serious crimes are premeditated crimes punishable by more than 10 years' imprisonment or the death penalty. The author claims that from the moment of his arrest, he was suspected of having committed a crime punishable by death and, therefore, he should have been provided with a lawyer from the moment of his arrest. Contrary to this

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<sup>1</sup> Communication No. 702/1996, *McLawrence v. Jamaica*, Views adopted on 18 July 1997, para. 5.6.

requirement, in the absence of a lawyer he was arrested, interrogated and charged with having committed a particularly serious crime.

3.3 The author maintains that he is a victim of violations of article 14, paragraph 2, and article 14, paragraph 3 (g), arguing that in finding him guilty of the crimes charged, the State party's courts relied primarily on his accomplices' testimony obtained under pressure from law-enforcement officers. He submits that he testified in court about the existence of an earlier testimony by his accomplices, exonerating him from responsibility for murdering the policemen. The court, however, interpreted all discrepancies in favour of the prosecution, thus shifting the burden of proof to the accused. The author submits that he raised these issues before the domestic courts but "as they were not reflected in the respective trial transcripts, all available domestic remedies have been exhausted".

3.4 The author also claims a violation of his rights under article 7 and article 10, paragraph 1, because while he was detained in a temporary detention facility (IVS) he was beaten up on a few occasions by law-enforcement officers to force him to "start testifying against himself". He submits that although both he and A.M. made complaints on this issue during the trial, they were not taken into account. Furthermore, the author submits that while on death row, he has contracted numerous diseases, including tuberculosis, and that one of his accomplices, K.A. died of tuberculosis in the same prison cell. Contrary to the State party's obligation to guarantee equal access to medical services without any discrimination based on the inmates' legal status, the author was not provided with proper medical assistance. He also refers to the Committee's jurisprudence,<sup>2</sup> establishing that the wording of article 14, paragraph 3 (g), must be understood in terms of the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt. Therefore, it is unacceptable to treat an accused person in a manner contrary to article 7 of the Covenant in order to extract a confession.

3.5 The author further claims that article 14, paragraph 3 (c), was violated, because he was arrested on 9 March 1999 but court proceedings started only in March 2000 and finished in December 2000. Therefore, he was waiting for judicial examination of his case for more than one and a half years, in clear violation of this provision of the Covenant. He refers to the Committee's jurisprudence,<sup>3</sup> establishing that a substantial delay between indictment and trial cannot be explained exclusively by a complex factual situation and protracted investigations. The author also refers to the Committee's general comment No. 13 (1984) on the administration of justice,<sup>4</sup> according to which a guarantee of article 14, paragraph 3 (c), relates not only to the time by which a trial should commence, but also the time by which it should end and judgement be rendered; all stages must take place "without undue delay". To make this right effective, a procedure must be available in order to ensure that the trial will proceed "without undue delay", both in first instance and on appeal.

3.6 Finally, the author invokes a violation of article 6, paragraph 1, because he was sentenced to death upon the conclusion of a trial in which the provisions of the Covenant have not been respected. He refers to the Committee's jurisprudence,<sup>5</sup> confirming that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant, including the right to a fair hearing by an independent tribunal,

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<sup>2</sup> Communication No. 253/1987, *Kelly v. Jamaica*, Views adopted on 8 April 1991, para. 5.5.

<sup>3</sup> Communication No. 473/1991, *Del Cid Gómez v. Panama*, Views adopted on 19 July 1995, para. 8.5.

<sup>4</sup> *Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 40 (A/39/40)*, annex VI, para. 10.

<sup>5</sup> *Kelly v. Jamaica* (note above), para. 5.14.

the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal.

#### **State party's observations on admissibility and merits**

4.1 On 4 March 2005, the State party submits that the author's guilt was proven by case file materials, including the testimony of his accomplices A.M., K.K. and K.A, witnesses' testimonies, the author's own letter addressed to K.A., in which Kaldarov was asking his accomplice K.A. to take responsibility for the murder of the two policemen, crime scene reports, reports on the seizure of the sawn-off rifle and pistol, reports on examination of the author's clothes, conclusions of forensic experts, ballistic and biological examinations.

4.2 The State party submits that there were no violations of the criminal procedure during the investigation of the author's case and his trial. The court objectively evaluated the evidence and legally qualified the author's actions correctly. When imposing the punishment, the court took into account public danger and the severe consequences of the crime committed by the author.

4.3 As to the alleged violations of criminal procedure law, which, according to the author took place during the investigation, the prosecution authorities promptly conducted a procedural inquiry and, in the absence of any violations, the Pervomai District Court of Bishkek handed down its judgment. This judgment was subsequently upheld by the Bishkek City Court and the Supreme Court.

4.4 Finally, the State party submits that the moratorium on execution of the death penalty was extended by the Presidential Decree of 10 January 2005 until 31 December 2005.

#### **Author's comments on the State party's observations**

5.1 On 17 February 2009, the author submits that in its observations on admissibility and merits, the State party failed to address any of the claims advanced in his initial complaint. The State party merely stated that the prosecution authorities promptly conducted a procedural inquiry without giving answers to such questions as when he was arrested and brought before a judge, when he was assigned a lawyer, what happened to his accomplices' initial testimony and why his accomplice K.A. died of tuberculosis in custody. In the author's opinion, a failure by the State party to provide concrete information in reply to his allegations proves that the violations in question indeed took place.

5.2 The author submits that the only positive development in the State party of relevance to his case is an adoption of Law No. 91 of 25 June 2007, introducing changes and amendments to the Criminal and Criminal Procedure Codes, according to which the death penalty was substituted by life imprisonment.

#### **Additional submissions by the State party**

6.1 On 30 July 2009, the State party submits that the author, together with the three other accomplices, was arrested on 9 March 1999 on the basis of article 426 of the 1960 Criminal Procedure Code, on the suspicion of having committed a murder of two persons on 7 March 1999. His arrest is documented by the report available in the case file materials. The same day, the author was assigned a lawyer, Mr. S. Sharsheev, by a senior investigator of the Bishkek City Prosecutor's Office, and all subsequent legal proceedings in the author's case were carried out in the presence of his lawyer.

6.2 On 12 March 1999, the author was charged with murder (article 97, part 2, of the Criminal Code); concealing a crime (article 339, part 2) and illegal acquisition, transfer, dealing in, storage, transport or carrying of firearms, ammunition, explosive materials and explosive devices (article 241, part 2). The same day, his placement in custody was authorized by the Bishkek City Prosecutor. On 3 May 1999, the pretrial investigation was extended until 7 June 1999 on the basis of the investigator's request. On 31 May 1999, the pretrial investigation and the author's detention were extended until 7 July 1999. On 28 June 1999, the pretrial investigation and the author's detention were extended until 7 August 1999.

6.3 On 14 August 1999, the author's case was transmitted to the Bishkek City Prosecutor for approval and subsequent transfer to the court. On 18 August 1999, the case was transferred to the Pervomai District Court of Bishkek for examination. On 9 September 1999, a judge of the Pervomai District Court of Bishkek remitted the case back to the Bishkek City Prosecutor for clarifications on the investigation. On 15 September 1999, the author's detention was extended until 24 September 1999 with the authorization of the Bishkek City Prosecutor.

6.4 On 20 September 1999, the author's case was transmitted to the Bishkek City Prosecutor for approval and subsequent transfer to the court. On 23 September 1999, the case was transferred to the Pervomai District Court of Bishkek for examination but the court proceedings were postponed on numerous occasions due to the victims and witnesses' failure to appear before court and due to the defendants' requests for the replacement of their lawyers.

6.5 The State party reiterates that the author was assigned a lawyer from the day of his arrest and that the lawyer took part in all legal proceedings in his case. Extension of the author's detention and pretrial investigation, as well as the presentation of charges against him were carried out in full compliance with the State party's criminal and criminal procedure law. Finally, the State party draws the Committee's attention to article 382 of the Criminal procedure Code, according to which decisions of the Supreme Court are final and not subject to appeal.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement and notes that the State party has not contested that domestic remedies have been exhausted.

7.3 The Committee notes the author's allegations under article 7 and article 14, paragraph 3 (g), concerning beatings to force him to "start testifying against himself". It also notes that the State party has not submitted any specific observations on this matter. The Committee observes, however, that the author's allegations are very broadly worded. He does not provide any information on when and where these beatings are supposed to have taken place, how often and for what duration. He provides no specific description of either the methods of the beatings, or of the identity or description or number of officers allegedly responsible, nor indeed of any consequences, medical or otherwise, resulting from the alleged treatment. No corroborating medical certificate attesting to ill-treatment of any kind has been submitted. The Committee also notes that despite the author's claim that his

treatment contrary to article 7 and article 14, paragraph 3 (g), was raised by him before the domestic courts, no mention of this issue appears in the copies of any court documents provided by the author to the Committee. In these circumstances, the Committee considers that the author has not substantiated this allegation sufficiently for purposes of admissibility, and finds this part of the communication inadmissible under article 2 of the Optional Protocol.

7.4 The Committee notes the author's claim that his rights under article 9, paragraph 1, and article 14, paragraph 3 (d), were violated, because he was assigned a lawyer only seven days after being arrested and, as a result, he was arrested, interrogated and charged with having committed a particularly serious crime in the absence of a lawyer. In light of the State party's counterclaim, which remains uncontested by the author, that he was represented by a lawyer from the day of his arrest on 9 March 1999, the Committee considers that this part of the communication is inadmissible as insufficiently substantiated for purposes of admissibility under article 2 of the Optional Protocol.

7.5 The Committee notes that the author claims, without providing further details, that he was deprived of his right under article 9, paragraph 4. In the absence of any other pertinent information in this respect, it considers that this part of the communication is inadmissible under article 2 of the Optional Protocol, as insufficiently substantiated.

7.6 The author claims that while on death row, he contracted numerous diseases, including tuberculosis, and that contrary to the State party's obligation under article 10, paragraph 1, he has not been provided with proper medical assistance. The Committee notes, however, that the material before it does not allow it to establish the state of the author's health before and during his detention on death row. It further remains unclear whether these allegations were raised at any time before the domestic courts. In these circumstances, the Committee considers that this part of the communication is insufficiently substantiated, for purposes of admissibility, and is therefore inadmissible under article 2 of the Optional Protocol.

7.7 The Committee notes the author's allegations under article 14, paragraph 2, concerning the manner in which the courts handled his case. It observes, however, that these allegations relate primarily to the evaluation of facts and evidence by the State party's courts. It recalls<sup>6</sup> that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice. In the present case, the Committee considers that given the absence in the case file of a trial transcript of the first instance court, the author's cassation and supervisory review appeals, or other similar information which would have enabled the Committee to verify whether the trial in fact suffered from such defects, this part of the communication is insufficiently substantiated, for purposes of admissibility, and is therefore inadmissible under article 2 of the Optional Protocol.

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<sup>6</sup> See, inter alia, communications No. 541/1993, *Simms v. Jamaica*, decision on inadmissibility adopted on 3 April 1995, para. 6.2; No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, decision on inadmissibility adopted on 2 November 2004, para. 7.3; No. 886/1999, *Schedko and Bondarenko v. Belarus*, Views adopted on 3 April 2003, para. 9.3; No. 1138/2002, *Arenz et al. v. Germany*, decision on inadmissibility adopted on 24 March 2004, para. 8.6. See also Human Rights Committee general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI, para. 26.

7.8 As to the author's claim under article 14, paragraph 3 (c), concerning the alleged unreasonable delay of one year and nine months between his arrest on 9 March 1999 and the Supreme Court's decision on his supervisory review appeal on 19 December 2000, the Committee notes that official charges were brought against the author on 12 March 1999 and that he was convicted on 2 March 2000. The Committee observes that the author has not presented sufficient information to indicate why he considers this delay excessive. In the light of the information before the Committee, it finds that this claim is insufficiently substantiated and therefore declares it inadmissible under article 2 of the Optional Protocol.

7.9 Concerning the author's allegations under article 6, paragraph 1, the Committee notes that on 17 December 2007, the Judicial Chamber for Criminal Cases of the Supreme Court commuted his death sentence to life imprisonment. In the light of the above and given that the author's allegations under article 6 are based exclusively on his claims under article 14, none of which the Committee considers sufficiently substantiated for the purposes of admissibility, this part of the communication is therefore also inadmissible under article 2 of the Optional Protocol.

7.10 The Committee considers that the author's remaining claim under article 9, paragraph 3, of the Covenant, has been sufficiently substantiated, for purposes of admissibility, and proceeds to its examination on the merits.

#### *Consideration of the merits*

8.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee notes the author's claim, which is factually supported by what the State Party has submitted from the case file (see paragraphs 6.2.–6.3) that, as his placement in custody was authorized by a prosecutor, who cannot be considered independent, his rights under article 9, paragraph 3, of the Covenant, have been violated. In this respect, the Committee recalls its jurisprudence<sup>7</sup> that paragraph 3 of article 9 entitles a detained person charged with a criminal offence to judicial control of his/her detention. It is generally admitted in the proper exercise of judicial power that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with. In the circumstances of the case, the Committee is not satisfied that the public prosecutor can be characterized as having the institutional objectivity and impartiality necessary to be considered an "officer authorized to exercise judicial power" within the meaning of article 9, paragraph 3, and concludes that there has been a violation of this provision.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is therefore of the view that the facts before it disclose a violation of the author's right under article 9, paragraph 3, of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, in the form of appropriate compensation, and to make such legislative changes as are necessary to avoid similar violations in the future.

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<sup>7</sup> See, inter alia, communications No. 1348/2005, *Ashurov v. Tajikistan*, Views adopted on 20 March 2007, para. 6.5; No. 521/1992, *Kulomin v. Hungary*, Views adopted on 22 March 1996, para. 11.3; No. 1218/2003, *Platonov v. Russian Federation*, Views adopted on 1 November 2005, para. 7.2.

11. 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 or not 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 in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**H. Communication No. 1363/2005, *Gayoso Martínez v. Spain*  
(Views adopted on 19 October 2009, ninety-seventh session)\***

<i>Submitted by:</i>	Gerardo Gayoso Martínez (represented by counsel, Joaquín Ruiz-Giménez Aguilar)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	29 May 2003 (initial submission)
<i>Subject matter:</i>	Evaluation of evidence and scope of the review of criminal cases on appeal by Spanish courts
<i>Decision on admissibility</i>	30 June 2008
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; failure to substantiate claims
<i>Substantive issue:</i>	Right to have the conviction and sentence reviewed by a higher tribunal according to law
<i>Article of the Covenant:</i>	14, paragraph 5
<i>Articles of the Optional Protocol:</i>	3; 5, paragraph 2 (b)

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

*Meeting on 19 October 2009,*

*Having concluded* its consideration of communication No. 1363/2005, submitted to the Human Rights Committee by Mr. Gerardo Gayoso Martínez under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication, and the State party,

*Adopts* the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1.1 The author of the communication, dated 29 May 2003, is Gerardo Gayoso Martínez, a Spanish lawyer, born in 1967. The author claims to be a victim of a violation by Spain of

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvio, Mr. Krister Thelin and Ms. Ruth Wedgwood.

The text on an individual opinion signed by Committee member Mr. Krister Thelin is appended to the present document.



article 14, paragraph 5, of the Covenant. The Optional Protocol entered into force for Spain on 25 April 1985. The author is represented by counsel, Joaquín Ruiz-Giménez Aguilar.

1.2 On 11 May 2005, the Special Rapporteur on new communications and interim measures decided that the admissibility of the communication should be considered separately from the merits.

### **Factual background**

2.1 On 28 February 1997, Investigating Court No. 4, Arenys de Mar, opened an investigation into three persons suspected of drug trafficking. The three suspects were arrested on 21 June 1997 and several kilos of hashish were found in the truck they were travelling in and impounded, along with their mobile phones. None of those arrested implicated the author, nor did the police mention him in their first report on the investigation. The judicial investigation went on for several months and culminated in a court decision dated 16 December 1997, which does not mention the author in connection with the case.

2.2 On 16 January 1998, police officers from Barcelona's second narcotics unit presented a report to the investigating court, accusing the author of involvement in the drug-trafficking operation. According to the report, the author had been seen by two police officers on 20 June 1997 talking to a Mr. C., one of the persons arrested on 21 June 1997, in Galicia, in one of the locations where the drugs were transported. As a consequence of this new report, the judge opened a separate confidential sub-file within the case and ordered the tapping of the telephones the author used in his capacity as a lawyer. Three months later, the police decided to stop the telephone taps, as the conversations were of no police interest.

2.3 On 29 April 1998, the author was called to a police station in Chamartín, Madrid, supposedly to act as defence counsel for a detainee. When he arrived, a police officer from Barcelona asked him several questions in relation to an alleged offence against public health, in which he denied any involvement, but the police did not tell him that there was a specific accusation against him. According to the author, these acts were unlawful as they had not been authorized by a court.

2.4 On 18 May 1998, Investigating Court No. 4, Arenys de Mar, rendered an order relinquishing jurisdiction over the investigation. The order makes no mention of the author as involved in the offences. The investigation was transferred to Central Investigating Court No. 6 of the National High Court, which took a statement from the author for the first time on 27 November 1998 and informed him of the charge against him.

2.5 The court ordered an investigation to establish whether the author had made telephone calls to his client, one Laureano Oubiña, who was under investigation for drug trafficking, between 10 and 25 June 1997, when the operation in question took place. It was found, however, that the author had not made or received any telephone calls from Mr. Oubiña on 19, 20 or 21 June 1997. On 9 December 1998, the author was picked out of a line-up by two police officers as the person they had seen in conversation with Mr. C. in Galicia on 20 June 1997. The author maintains that one of the police officers was the one who had called him to the police station in Chamartín (Madrid) in April 1998 and that the purpose of that meeting had been to meet the author so as to be able to accuse him later of having been seen in the company of those involved in the drug-trafficking operation. He adds that on 20 June 1997 he had been in Madrid and had had lunch at a restaurant along with the rest of his client Mr. Oubiña's legal team.

2.6 The court terminated the investigation into the case on 16 December 1998. According to the author, the police had no conclusive evidence of his involvement in drug

trafficking and what they were trying to do was to find a way of obtaining evidence against Laureano Oubiña.

2.7 Hearings were held between May and July 1999 in the fourth section of the Criminal Division of the National High Court. Statements were made by the police officers who claimed to have seen the author on 20 June 1997 in the company of the accused, Mr. C. The author points out that the testimony of these police officers, who are members of Barcelona's second narcotics unit, contrasts with that of the police officers at the Mataró police station, who were involved in the arrest of the detainees and did not claim to have seen the author. Furthermore, eight persons stated that they had seen the author on 20 June 1997 in a restaurant in Madrid having lunch with the rest of Mr. Oubiña's lawyers. The police officers who had identified the author said they had done so from a photograph, which they had requested from the general archive of the National Identity Card Office. The author obtained a document from that office stating that no request had been made to the archive in respect of the author on the dates indicated by the police. To prove that he had been in Madrid on 20 June 1997, the author also submitted to the hearing an expert's report showing that he had signed his company's bookkeeping journal on that date.

2.8 The National High Court did not admit the defence evidence presented by the author's counsel. The Court considered that his involvement in the crime was proven by the statements of the police officers who saw him on 20 June 1997 and the telephone calls between the author and his client Mr. Oubiña between 2 and 26 June 1997.

2.9 In a ruling of 4 October 1999, the National High Court convicted Mr. Oubiña of an offence against public health. The ruling also sentenced the author for the same crime to four years' imprisonment and a fine of 1.4 billion pesetas.

2.10 On 1 February 2000, the author lodged an appeal in cassation before the second chamber of the Supreme Court, requesting a full review of the conviction and sentence. He alleged irregularities and errors of fact and of law in 13 separate grounds for appeal. The Supreme Court upheld the contested verdict in a ruling dated 5 July 2001. The Court rejected the request for a review of the prosecution evidence, arguing that that was not a matter for the remedy of cassation since technically it was a question of fact that the Supreme Court could not deal with owing to the "very procedure of the appeal". Specifically, the Court stated the following:

"... The National High Court thoroughly considered the arguments made by the appellant in his defence and reached the conclusion that the grounds for the conviction were the statements made during the hearing by the police officers involved in the case and the telephone conversations with the accused Oubiña. The ruling on the evaluation of the evidence is therefore based on the credibility of the witnesses who claimed to have seen the appellant engaged in activities directly linked to the transport of drugs, driving one of the vehicles, etc. It is clear, therefore, that the High Court's (...) arguments are based on the direct apprehension of the evidence, i.e., it was the judges' own perception that formed the basis of their evaluation and their determination of credibility. Consequently, this is not a matter for the remedy of cassation, since technically it is merely a question of fact that this Chamber cannot deal with owing to the very procedure of the appeal."

2.11 On 31 July 2001, the author submitted an application for *amparo* to the Constitutional Court alleging, inter alia, violations of his rights to a fair trial, to the presumption of innocence and to a second hearing under article 14, paragraph 5, of the Covenant. In a decision of 30 September 2002 the Constitutional Court decided not to admit his appeal, finding, inter alia, that the Supreme Court had reviewed the conviction and sentence in accordance with the requirements of article 14, paragraph 5, of the Covenant.

### **The complaint**

3.1 The author argues that the appeal in cassation is an extraordinary remedy that is limited in scope and does not allow for a re-evaluation of the evidence or a review of the facts deemed to have been proven in the lower court. The aim of cassation is to check the application of the law by the courts and to harmonize legal precedents, but it does not provide for a review of the facts, the classification of the offence, the determination of guilt or the sentence.

3.2 The author argues that article 5, paragraph 4, of the Judiciary Organization Act attempts to mitigate the limitations of cassation by allowing, at least in theory, allegations of violations of constitutional rights and the presumption of innocence in the cassation hearing, and obliging the Supreme Court to ascertain that the conviction is based on authentic evidence and that the grounds for the conviction are in keeping with that evidence. However, in practice, the Supreme Court continues to describe itself as an extraordinary instance where no review of the evidence admitted in the lower court is possible.

3.3 The author argues that the factual elements of the lower court's conviction were not reviewed, in violation of the right set out in article 26 of the Covenant, according to which all persons are equal before the law and are entitled without discrimination to the equal protection of the law. The Supreme Court did not review the lower court's evaluation of the evidence and, therefore, did not review the facts deemed to have been proven by that court or the grounds for conviction.

3.4 The author further argues that in the appeal in cassation he challenged the veracity of the police statements against him and the incorrect evaluation of the documentary evidence concerning the telephone calls. In relation to the first point, the Supreme Court indicated: "It is clear that the High Court's arguments ... are based on its direct apprehension of the evidence, i.e., it was the judges' own perception that formed the basis of their evaluation and their determination of credibility. Consequently, it is not a matter for the remedy of cassation since it is a question of fact that this Chamber cannot deal with owing to the very procedure of the appeal."

3.5 The author claimed that there was an error in the evaluation of the telephone calls, since the High Court had concluded that the content of the conversations between the author and his client Oubiña showed criminal intent, despite the fact that there were no transcripts of the telephone calls. In that respect, the Supreme Court indicated that: "It is true that the defence strenuously challenged this evidence, but as we have already stated, such challenges are not admissible in the context of an appeal in cassation." In light of the foregoing, the author concludes that he was denied the right to have his conviction and sentence reviewed by a higher court, in accordance with article 14, paragraph 5, of the Covenant.

3.6 The author notes that he filed a complaint before the European Court of Human Rights claiming a violation of articles 5, 6 and 8 of the European Convention on Human Rights. However, that complaint did not claim a violation of the right to a second hearing, since Spain has not ratified Protocol 7 to the European Convention. The complaint concerning a violation of that right was submitted only to the Committee.

### **The State party's observations on admissibility**

4.1 In its observations dated 27 April 2005, the State party argues that the communication should be considered inadmissible due to non-exhaustion of domestic remedies. In the appeal in cassation the author did not raise the issue that he has now brought before the Committee, and therefore the requirements of articles 2 and 5, paragraph 2 (b), of the Optional Protocol have not been met.

4.2 The State party also argues that the communication is unfounded. The author had the right to three hearings, since the decision of the National High Court was appealed before the Supreme Court, and that judgement was subsequently reviewed by the Constitutional Court. The system for effective review of convictions is well established in Spain. It is not true that the appeal in cassation is restricted to an analysis of legal and formal issues and that it does not allow for a review of evidence. Currently, in accordance with article 852 of the Criminal Procedures Act, an appeal in cassation may be lodged on the grounds of a violation of a constitutional provision. Furthermore, by invoking the right to a fair trial and the presumption of innocence under article 24, paragraph 2, of the Constitution, it is possible for the Supreme Court to check not only that the legal and constitutional conditions governing the evidence on which the conviction is based have been fulfilled, but also that the evidence is sufficient to attribute guilt. Therefore, the appellant had a remedy available to him that allowed the Supreme Court to carry out a “thorough review”, i.e., to consider not only the legal issues, but also the factual elements on which the evaluation of evidence was based.

4.3 In examining the alleged violation of the appellant’s right to be presumed innocent, the Supreme Court referred to previous evaluations of the prosecution evidence (the statements of the police officers who testified against him) and, finding that that evidence had been obtained in compliance with due process and “thoroughly and rationally” evaluated by the trial court, concluded that there was sufficient prosecution evidence to set aside the presumption of innocence. In combination with the rest of the legal argumentation in the judgement, in which the Supreme Court responds to the many issues raised in the appeal, this makes it possible to state that, in this case, the requirements of a second hearing have been met, since not only the legal and formal aspects, but also the factual elements, have been reviewed.

4.4 In light of the foregoing, the State party argues that the communication is clearly unfounded and constitutes an abuse of the purpose of the Covenant and should therefore be declared inadmissible in accordance with article 3 of the Optional Protocol.

#### **Author’s comments on the State party’s observations**

5. On 6 July 2005, the author responded to the State party’s observations. He stated that through the appeal in cassation he had requested the sole competent higher authority (the Supreme Court) to thoroughly review the judgement handed down by the National High Court. However, the Supreme Court did not review either the factual elements of the ruling or their evaluation by the National High Court, arguing that the scope of the remedy in cassation prevented the Court from evaluating or re-evaluating the inconsistencies between the police statements for the prosecution and the testimony for the defence presented by the author, nor could it nor would it scrutinize the incorrect evaluation of evidence in relation to the telephone calls, of which there were none during the period in question. Furthermore, the author went to the Constitutional Court claiming a violation of his right to a second hearing. Not only did that Court not review the evidence or the grounds for the conviction, but it did not consider the complaint concerning the violation of article 14, paragraph 5, of the Covenant, since it confined itself to declaring the case inadmissible without examining the grounds. In the light of the foregoing, the author denies that his claims are abusive or unfounded.

#### **Decision of the Committee on admissibility**

6.1 At its ninety-third session, on 30 June 2008, the Committee considered the admissibility of the communication.

6.2 In accordance with article 5, paragraph 2 (a), of the Optional Protocol, the Committee ascertained that the same matter was not being examined under another procedure of international investigation or settlement.

6.3 With regard to the State party's contention that domestic remedies were not exhausted, the Committee noted that the author brought his complaint of a violation of the right to a second hearing before the Constitutional Court, and that that Court gave a ruling on the complaint. The State party did not say what other effective remedy the author could have invoked. Accordingly, the Committee found that domestic remedies had been exhausted.

6.4 The Committee concluded that the author's complaint raised significant issues with respect to article 14, paragraph 5, of the Covenant and that it was sufficiently substantiated for the purposes of admissibility. The Committee therefore declared the communication admissible.

### **State party's observations on the merits and author's comments**

7.1 In its observations on the merits, dated 21 January 2009, the State party referred to its submission of 25 July 2005 stating that the communication was clearly unfounded. It reiterates that in this case it is only necessary to read the judgement in cassation to see that the Supreme Court carried out a full review, not only of the legal points but also of the facts and the evidence.

7.2 The State party refers to the Committee's case law to the effect that the remedy of cassation meets the requirements of article 14, paragraph 5, of the Covenant.<sup>1</sup>

8.1 In his reply of 12 March 2009, the author summarizes the development over time of Spanish case law in respect of the compatibility between the remedy of cassation and the right to a second hearing in criminal cases under article 14, paragraph 5, of the Covenant. In that respect he points out that he submitted his appeal in cassation in February 2000, i.e., five months before the Committee's decision in *Gómez Vázquez*.<sup>2</sup> He also draws attention to apparent inconsistencies in the Supreme Court's case law: despite having stated that it would interpret the remedy of cassation broadly as a result of the *Gómez Vázquez* case, in its judgement of 5 July 2001 in the author's case it does not review the evidence, on the grounds that evidence is a matter of fact that lies outside the scope of that remedy.

8.2 The author reiterates that his conviction was based on telephone calls made to and from his office phone in the course of the preparation and execution of the offence. Yet, he contends, this is obviously incorrect since the documentary evidence itself shows that there were no calls between him and Mr. Oubiña between 18 and 22 June 1997 (paras. 2.5 and 5, above). Moreover, despite the existence of copious evidence contradicting the testimony of the police officers who maintained they had seen him at the place of the events, the Supreme Court failed to review the National High Court's examination of the evidence (para. 2.8, above).

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<sup>1</sup> See, inter alia, communications No. 1389/2005, *Bertelli Gálvez v. Spain*, decision adopted on 25 July 2005; No. 1399/2005, *Cuartero Casado v. Spain*, decision adopted on 25 July 2005; No. 1323/2004, *Lozano Aráez et al. v. Spain*, decision adopted on 28 October 2005.

<sup>2</sup> Communication No. 701/1996, *Gómez Vázquez v. Spain*, Views adopted on 20 July 2000.

## Issues and proceedings before the Committee

### *Consideration on the merits*

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

9.2 With regard to article 14, paragraph 5, of the Covenant, the author maintains that his conviction, and in particular the evidence for the prosecution, was not subjected to a full review in accordance with the provisions of article 14, paragraph 5. In this regard the Committee notes that the Supreme Court found that a review of the evidence is a matter of fact that falls outside the scope of the remedy of cassation and may not be undertaken in that context.<sup>3</sup>

9.3 The Committee recalls that, while article 14, paragraph 5, does not require a retrial or a fresh hearing,<sup>4</sup> the court conducting the review should be able to examine the facts of the case,<sup>5</sup> including the evidence brought by the prosecution. As mentioned above, the Supreme Court stated that it was unable to reassess the evidence examined by the trial court because the remedy of cassation was “confined to questions of law”.<sup>6</sup> The Committee concludes that the review conducted by the Supreme Court was limited to verifying the validity of the evidence, as assessed by the trial court, without reconsidering whether it was sufficient to justify the conviction and sentence based on the facts. Consequently, the review did not constitute a review of the conviction and sentence within the meaning of article 14, paragraph 5, of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses a violation by the State party of article 14, paragraph 5, of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy that will permit his conviction and sentence to be reviewed by a higher court. The State party is also under an obligation to prevent similar violations in the future and to ensure the strict fulfilment of its obligations under article 14, paragraph 5, of the Covenant.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not 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 where a violation is established, the Committee wishes to receive from

<sup>3</sup> See para. 2.10 above.

<sup>4</sup> Communications No. 1110/2002, *Rolando v. Philippines*, Views adopted on 3 November 2004, para. 4.5; No. 984/2001, *Juma v. Australia*, decision adopted on 28 July 2003, para. 7.5; No. 536/1993, *Perera v. Australia*, decision adopted on 28 March 1995, para. 6.4.

<sup>5</sup> See general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI, para. 48.

<sup>6</sup> Supreme Court judgement No. 573/2001, eighth legal ground, last paragraph.

the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

## Appendix

### **Individual opinion of Committee member Mr. Krister Thelin (dissenting)**

The majority has found a violation of article 14, paragraph 5, of the Covenant.

I respectfully disagree.

Article 14, paragraph 5, does not require a retrial or a new hearing, but at a minimum that the court conducting the review itself sufficiently examines the facts presented at the lower court. A review that is limited to the formal and legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient under the Covenant.<sup>a</sup>

In this case it is clear from the reading of the Supreme Court's judgement that it did, indeed, take into account the credibility of the witnesses heard at the lower court in deciding on the appeal. This, in my view, is a sufficient examination of the facts by the reviewing court to satisfy the requirements of article 14, paragraph 5.

For this reason, no violation of article 14, paragraph 5, of the Covenant has been disclosed.

*(Signed)* Mr. Krister **Thelin**

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

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<sup>a</sup> General comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI, para. 48, footnote 100, and *Gómez Vázquez v. Spain*, para. 11.1.



**I. Communication No. 1369/2005, *Kulov v. Kyrgyzstan*  
(Views adopted on 26 July 2010, ninety-ninth session)\***

<i>Submitted by:</i>	Felix Kulov (represented by counsel, Lyubov Ivanova)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Kyrgyzstan
<i>Date of communication:</i>	11 November 2004 (initial submission)
<i>Subject matter:</i>	Conviction of an opposition leader after an unfair trial, unlawful detention
<i>Procedural issue:</i>	Non-substantiation
<i>Substantive issues:</i>	Right to fair trial, right to immediate access to a lawyer, unlawful constraint measure, presumption of innocence, right to examine witnesses, freedom of expression
<i>Articles of the Covenant:</i>	2; 7; 9, paragraphs 1, 3 and 4; 14, paragraphs 1, 2, 3 (a)-(e), and 5; 15; 19; and 25 (a)
<i>Article of the Optional Protocol:</i>	2

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

*Meeting on 26 July 2010,*

*Having concluded* its consideration of communication No. 1369/2005, submitted to the Human Rights Committee on behalf of Mr. Felix Kulov under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication, and the State party,

*Adopts* the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication is Mr. Felix Kulov, a Kyrgyz national born in 1948, who at the time of submission was serving a prison sentence in Kyrgyzstan. The author claims to be the victim of violations by Kyrgyzstan of his rights under articles 2; 7; 9, paragraphs 1, 3 and 4; 14, paragraphs 1, 2, 3 (a)-(e), and 5; 15; 19; and 25 (a), of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Kyrgyzstan on 7 January 1995. He is represented by counsel, Lyubov Ivanova.

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Mahjoub El Haiba, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada and Mr. Krister Thelin.

**The facts as presented by the author**

2.1 The author submits that he is a member and one of the leaders of the political opposition in Kyrgyzstan. Since 1990, he has been Minister of Interior, Vice-President, Minister of National Security, Governor of the Chuysk region and Mayor of the capital Bishkek. In March 1999, he resigned as Mayor of Bishkek and founded the "Ar-Namis" political party (Party of Dignity). The party openly criticized the presidential policy and proposed different measures to reform the country. As a result he was subjected to persecution.

2.2 In February 2000, the population of the Kara-Buurinsk electoral district proposed his candidature for the Parliamentary elections. The author affirms that on the first turn of the elections he was in fact elected, but due to fraud, he was defeated by a pro-governmental candidate. On 12 March 2000, the author announced his decision to stand for President at the October 2000 elections. On 22 March 2000, he was arrested by the security services. Allegedly, the arrest provoked protest demonstrations in the Kara-Buure region and in Bishkek. In the night of 4 April 2000, some 500 policeman dispersed the "hunger strikers" by force and arrested nine persons, who received administrative fines.

2.3 The author was allegedly arrested by the Chief of the Second Investigation Department of the then Ministry of National Security (now National Security Service, NSS) and was charged with malpractice in office while he acted in an official capacity in 1997–1998. He was placed in pretrial detention, upon authorization of the Deputy Prosecutor General. He was not brought before the prosecutor when he approved the placement on pretrial detention, nor was he brought before a judge or other official empowered to exercise judicial power.

2.4 The author appealed against the pretrial detention decision with the Ministry of the National Security and the Office of the Prosecutor General, but his appeals were rejected. He then appealed to the Pervomaisk District Court in Bishkek. On 30 March 2000, the Court allegedly examined the appeal in the absence of the author and his lawyer, and confirmed the decision to keep him in detention. The author requested a supervisory (*nadzor*) review of his detention by the Supreme Court. The Supreme Court rejected the request on 5 April 2000. Furthermore, his lawyers requested his release several times in the Bishkek Military Court, to no avail.

2.5 On 7 August 2000, the Bishkek Military Court acquitted the author. On 11 September 2000, the Military Court of Kyrgyzstan annulled this judgment and sent the case back for re-examination. On 16 September 2000, the author's lawyer appealed under the supervisory procedure with the Supreme Court against the decision of the Military Court of Kyrgyzstan. On 20 September 2000, a three-judge panel of the Supreme Court rejected the request for review.

2.6 On 22 January 2001, the Bishkek Military Court, in closed session, found the author guilty of malpractice in office while he acted in an official capacity and sentenced him to seven years of imprisonment in the colony of strict regime with confiscation of property. The author was also deprived of his military grade of "major-general". No new evidence was produced in the retrial and the second judgment was based on exactly the same facts and evidence as the judgment that acquitted him.

2.7 The author and his lawyers appealed against this judgment to the Military Court of Kyrgyzstan. The appeals were rejected by the Court on 9 March 2001. On 19 July 2001, the Supreme Court rejected the author's and his lawyer's claims filed under the supervisory procedure. The author then filed a complaint to the Constitutional Court with a request to declare the court's decisions in his regard unconstitutional. On 11 June 2002, the Constitutional Court rejected the request for a constitutional review.

2.8 According to the author, in all the above appeals, he claimed violations of his right to a fair and public trial by a competent, independent and impartial tribunal and his right to be presumed innocent, and of his rights as a defendant, including the right to call witnesses on his behalf. He also claimed that he was discriminated against on political grounds.

2.9 On 26 July 2001, after the examination of his appeal by the Supreme Court on 19 July 2001, he was charged again for malpractice in office, for the period 1993–1999. Notwithstanding the fact that he was already detained, a new decision for pretrial detention was issued against him on 26 July 2001, upon authorization of the Deputy Prosecutor General. Once again, the author was not brought before the Prosecutor nor before a judge or a person authorized to exercise judicial power. He decided not to appeal against this decision of pretrial detention, because of the ineffectiveness of any legal avenue.

2.10 On 8 May 2002, the Pervomaisk District Court (Bishkek) found the author guilty of malpractice in office and sentenced him to 10 years of imprisonment (taking into account the not yet fully served prison term under the previous judgment), with confiscation of property and a prohibition to hold any position within the State or local administration for a period of three years after serving the sentence.

2.11 The author appealed the judgment to the Bishkek City Court and on 11 October 2002, the court rejected the appeal. The author then complained to the Supreme Court. On 15 August 2003, the Supreme Court rejected his request for supervisory judicial review.

2.12 In his complaints to the Bishkek City Court and to the Supreme Court, he claimed that his rights to a fair and public trial by a competent, independent and impartial tribunal, his right to be presumed innocent, and his rights as a defendant, were violated.

2.13 Finally, a third criminal case was opened against him on 6 February 2001, for malfeasance in office concerning the period 1994–1995.

2.14 On 6 February 2001, while he was in detention, he was presented with new charges and again a constraint measure in the form of detention was selected, despite the fact that he was already in detention, which was still in force at the time of the submission of the present communication. From 2001 to 2003, his detention was constantly prolonged by the Investigation Department of the National Security Service, with the General Prosecutor's Office approval. The author repeatedly appealed with the General Prosecutor's Office against the decisions to prolong his preventive detention, claiming a violation of article 9 of the Covenant, but all his appeals were rejected. The appeal to courts was not necessary because of their ineffectiveness.

### **The complaint**

3.1 The author claims that he is a victim of violation of article 7 of the Covenant, because he was kept in the buildings of NSS from 22 March to 7 August 2000, and again from 22 January 2001 to April 2003 (when he was transferred to a penitentiary colony). During the time of his detention, he was not allowed any correspondence and communication, i.e. he was kept without any contact with the outside world and thus virtually held incommunicado. His wife and relatives tried to visit him several times, but were systematically denied access to him. The author quotes resolution 1997/38 of the Commission for Human Rights, paragraph 20, where the Commission stated that the prolonged preventive detention without a right of correspondence and communication may contribute to the commission of acts of torture and may, by itself, constitute a form of cruel, inhuman and degrading treatment. He also refers to the Committee jurisprudence in Communication No. 458/1991, *Mukong v. Cameroon*, on incommunicado detention.

3.2 Article 9, paragraph 1, is said to have been violated as the author was arrested on 22 March 2000 while he was under treatment in hospital, as it was suspected he would obstruct

the investigation or escape. The author affirms that the decision to detain him was unlawful, as the investigators had absolutely no evidence that he wanted to escape or to obstruct the inquiries. He affirms that his preliminary detention in 2000 and in 2001–2002 was unreasonable and unnecessary in his case.

3.3 The author claims that his rights under articles 9, paragraph 3, read together with article 2, paragraphs 1 and 2, were also violated, because the investigators' decision to place him in pretrial detention was confirmed by a procurator – i.e. a representative of the executive branch on 22 March 2000, in his absence, and because he was not brought before a judge or other officer authorized by law to exercise judicial power. On 30 March 2000, the District Court rejected the appeal against the prosecutor's decision also in the author's absence. Furthermore, the Supreme Court refused to examine his claims regarding his detention, arguing that the criminal investigation was still pending.

3.4 The author claims that article 9, paragraph 1, was also violated as he was sentenced to 10 years of imprisonment because the tribunals miscalculated his sentence. According to him, the courts amalgamated the sentences wrongly and did not take into consideration the time he spent in pretrial detention. Because of this, his anticipated release would only be possible after 12 November 2005, i.e. after the date of the Presidential elections.

3.5 It is claimed that in violation of article 9, paragraph 4, the author was kept in an investigation detention centre since 6 February 2001, due to the opening of a third case against him. His detention was prolonged on several occasions between 2001 and 2003 by the investigators, and with the prosecutor's authorization, but in absence of any judicial control.

3.6 The author also claims that he is a victim of violation of article 14, paragraph 1, as his case was examined by a military court in closed meetings, in violation of the provisions of the Covenant and applicable national legislation. Neither international monitors nor journalists, nor members of his political party were allowed in the courtroom. According to the court, this was due to the limited space available. However, the author claims that hearings took place in the military hall which could accommodate hundreds of people. According to him, the investigation classified his case file as secret without giving any grounds. He adds that the judges were partial and that the judge issued a 63-page judgement within just three hours. His requests for additional expertise, additional investigation and recusal of judges were ignored. His case was examined by a military court although the crimes in question were concerning malpractice in office. He adds that military courts do not meet the standards of independence.

3.7 The author claims that his right to be presumed innocent (article 14, paragraph 2) was violated, as immediately after his resignation as Mayor of Bishkek, the authorities began to persecute him and to use national media to portray him as a criminal. Allegedly, the documentary "Corruption" was produced and financed by the presidential administration, in which the Deputy Chairman of the NSS explained the charges against the author and showed alleged inculpatory evidence before the investigation ended. The film was broadcast several times on national television and on the Russian NTV Channel. A group of Russian journalists was allowed to study the criminal case file and they allegedly used the information afterwards to prepare critical articles against the author.

3.8 The author also alleges that article 14, paragraph 3 (b), was violated because his lawyers were given limited time to study the evidence against him. The lawyers requested to be given additional time for the preparation of the defence but their requests were allegedly ignored by the prosecution and the courts. The lawyers were not allowed to excerpt or copy the case file and could work on the file only in the NSS and in court. While in detention, the author was unable to consult his lawyer privately, but only through

interphone. The premises where his conversations with the lawyer took place were equipped with listening devices and were cold in winter.

3.9 The author claims that article 14, paragraph 3 (c), was violated because he was judged twice for malpractice in office and a third set of criminal proceedings was still pending at the time of submission of the present communication, on the same grounds. Despite the fact that his lawyers requested to join the three cases and to examine them together on several occasions, the courts refused to link them in order to make him appear as a dangerous recidivist. The author's right to be judged promptly was thus violated.

3.10 The author states that during the investigation and in court he requested to be represented by a lawyer from Russia. However this request was refused because he was a foreign national, notwithstanding that the provisions of the Law on advocacy and the agreement between the Russian Federation and Kyrgyzstan authorized this. In order to participate in the author's case and study the case file the lawyers had to get permission from the NSS by presenting their full CVs and filling out a special form. During the proceedings, a criminal case for dissemination of State secrets was opened against one of his lawyers, allegedly to enfeeble the author's defence. He further submits that the lawyer, who participated from the beginning of the proceedings, was sick during the hearing at the Bishkek city court and requested to postpone the hearing. However, the court ignored the request arguing that the author had another lawyer. This one, however, was not well familiarized with his case file. The above constitutes, in the author's view, a violation of articles 14 and in particular 14, paragraph 3 (d), of the Covenant.

3.11 The author claims that in violation of article 14, paragraph 3 (e), the author was not allowed to examine witnesses against him in court, as the courts refused to call them without justifying their refusal. He claims that he was not allowed to make a copy of protocols of court hearings which could prove his requests.

3.12 The examination of the author's case under the supervisory (*nadzor*) procedure by the Supreme Court took place in his and in his lawyers' absence, although with the participation of a prosecutor. He claims that under section 88 of the Constitution and section 42 of the Criminal Procedure Code, the author had a right to participate in court hearings. His appeals to this effect were ignored, in violation of article 14, paragraph 5, of the Covenant.

3.13 According to the author, article 15 was violated because he was found guilty without reason for "abuse of power" during his tenure as military chief – a crime for which he wasn't charged during the investigation. While he had been charged under section 177, part 2, of the Criminal Code, the judgement of 22 January 2001 found him guilty under section 266, part 1, of the Criminal Code. Such requalification was illegal under section 264 of the Criminal Procedure Code. He adds that at the time of the judgement, the acts under section 266, part 1, no longer constituted a crime, in violation of article 15 of the Covenant. He also adds that one of the crimes he was charged for under section 169 of the Criminal Code does not foresee an element of the crime which existed in the previous edition of the Criminal Code of 1960. Therefore, the author argues that he was convicted for a crime which did not exist in the Criminal Code in force at the time of conviction.

3.14 Finally, the author claims a violation of article 19, paragraphs 1 and 2, and article 25 (a), stating that he was arrested, charged and sentenced exclusively on political grounds, because of his criticism of the regime in place and in order to prevent his participation in the presidential elections. He adds that this was confirmed by the International League for Human Rights and other organizations. He was a nominee for the Sakharov award for "freedom of opinion" as a prisoner of conscience.

### **State party's observations**

4.1 On 20 June 2005, the State party submitted that the decision of the Supreme Court of 6 April 2005 confirmed the acquittal of the author by the Military Court of the Bishkek of 7 August 2000. It also submitted that the decision of the Military Court of 11 September 2000 as well as those of the Military Court of Bishkek of 22 January 2001, the Judicial Collegiums of Military Court of 9 March 2001 and of the Supreme Court of 19 July 2001 were annulled.

4.2 Furthermore, the decision of the Supreme Court of 11 April 2005 annulled the sentence of the Pervomaisk District Court of 8 May 2002, the decision of the Bishkek City Court of 11 October 2002 and the decision of the Supreme Court of 15 August 2003 for the absence of criminal elements in his actions.

### **Author's comments on the State party's observations**

5. On 6 August 2005, the author acknowledged that under the decisions of the Supreme Court of 6 and 11 April 2005, he was acquitted. However he maintains that such decisions do not affect the violations of his rights under the Covenant. The violations of his rights and the shortcomings in the legal system in Kyrgyzstan were not examined by the Supreme Court on the merits and no measures were taken to provide him with effective means of protection.

### **State party's further comments**

6.1 On 23 March 2010, the State party reiterates its previous submission that the author was acquitted and the sentence against him as well as all subsequent judicial decisions confirming the sentence were annulled.

6.2 The State party adds that under section 316, part 2, and section 225, part 2, of the Criminal Procedure Code acquittal or cancellation of the sentence due to absence of criminal elements means that the convicted person is innocent and leads to full rehabilitation including compensation. Under section 422 of the Criminal Procedure Code the lawsuit for compensation for moral damage can be initiated under civil proceedings.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

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

7.3 In the absence of information on the grounds for the author's acquittal, the Committee is not in a position to conclude that there was a failure on his part to exhaust domestic remedies. Moreover, it observes that the State party raised no concerns in this regard.

7.4 The Committee notes that the author claimed violation of articles 19, paragraphs 1 and 2, and 25 (a), as he was arrested, charged and sentenced exclusively on political grounds, because of his criticism of the regime in place and in order to prevent his participation in the presidential elections. The Committee considers that the author did not provide sufficient details to illustrate his claims, thus it considers the claims as

insufficiently substantiated for purposes of admissibility under article 2 of the Optional Protocol.

7.5 The Committee notes the author's allegations that article 15 was violated because he was found guilty of a crime for which he wasn't charged during the investigation. The legal qualification of his action that fell under section 177, part 2 (abuse of authority), of the Criminal Code were changed to section 266, part 1 (abuse of authority), by a military personnel, of the Criminal Code. He argues that such a change in legal qualification contradicts section 264 of the Criminal Procedure Code. He also claimed that at the time when his sentence was issued, the acts under section 266, part 1, no longer constituted a crime. He adds that he was also charged under section 169 of the Criminal Code, which does not foresee the element of the crime which existed under section 87 of the 1960 Criminal Code. Therefore, the author argues that he was convicted for a crime which did not exist in the Criminal Code in force at the time of conviction. The Committee notes however that the author did not provide sufficient details on the relevance of section 87 of the old Criminal Code to his case and failed to substantiate his claim that section 266, part 1, of the old Criminal Code was applied illegally. In the absence of any further information, the Committee considers that the allegations under article 15 are insufficiently substantiated for purposes of admissibility under article 2 of the Optional Protocol.

7.6 As to the alleged violation of article 14, paragraph 3 (a), the Committee considers that the author did not explain the reasons why he considers that this provision has been violated. The Committee therefore declares this allegation inadmissible for lack of substantiation under article 2 of the Optional Protocol.

7.7 In connection with the claims related to articles 2; 7; 9, paragraphs 1, 3, and 4, in conjunction with article 2, paragraphs 1 and 2; and 14, paragraphs 1, 2, 3 (b)-(e), and 5, of the Covenant, the Committee considers that they have been sufficiently substantiated for the purposes of admissibility. The Committee, therefore, declares them admissible.

#### *Consideration of the merits*

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee notes the author's claim under article 7 that during the time of his detention in the buildings of the State NSS from 22 March to 7 August 2000, and again from 22 January 2001 to April 2003, he was not allowed any correspondence and communication, and was kept without any contact with the outside world. The State party did not comment on this allegation. The Committee recalls its general comment 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment, which recommends that States parties should make provision against incommunicado detention<sup>1</sup> and notes that total isolation of a detained or imprisoned person may amount to acts prohibited by article 7. In view of the above, the Committee finds that the author has been subjected to cruel, inhuman and degrading treatment, in violation of article 7 of the Covenant.

8.3 The Committee notes the author's allegations under article 9, paragraph 1, that the decision to detain him was unlawful, as the investigators had no evidence that he wanted to escape or to obstruct the inquiries. He adds that while calculating his prison term, the courts amalgamated the sentences wrongly and did not include his term in pretrial detention. The

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<sup>1</sup> *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40), annex VI, sect. A, para. 11.*

Committee recalls its jurisprudence that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime. The State party has not shown that these factors were present in the instant case.<sup>2</sup> In the absence of any further information, the Committee concludes that there has been a violation of article 9, paragraph 1, of the Covenant.

8.4 As for the author's claims under articles 9, paragraph 3, read together with article 2, paragraphs 1 and 2, that the decision to place him in pretrial detention was made by a prosecutor, i.e. a representative of the executive branch, under the national legislation, in his absence, and that he was not brought before a judge or other officer authorized by law to exercise judicial power. The Committee notes that the State party has not provided any information, showing that the prosecutor had the institutional objectivity and impartiality necessary to be considered an "officer authorized to exercise judicial power" within the meaning of article 9, paragraph 3, of the Covenant. In these circumstances, the Committee concludes that the facts as submitted reveal a violation of the author's rights under article 9, paragraph 3, of the Covenant.

8.5 The author also claimed violation of article 9, paragraph 4, as he was allegedly kept in an investigation detention centre since 6 February 2001, due to the opening of a third case against him. His detention was allegedly prolonged on several occasions between 2001 and 2003 by the investigators, and with the prosecutor's authorization, but in absence of any judicial control. The author allegedly appealed with the General Prosecutor's Office, but all his appeals were rejected. According to him, the appeal to courts was not necessary because of their ineffectiveness. The State party did not comment on these allegations. In the absence of any further information, the Committee concludes that there has been a violation of article 9, paragraph 4, of the Covenant.

8.6 The author also claims that he is a victim of violation of article 14, paragraph 1, as his case was examined by a military court in closed meeting; the investigation classified his case file as secret without giving any grounds and the 63-page judgement was prepared within three hours, putting into question the partiality of the judges. He adds that military courts do not meet the standards of independence. The Committee recalls its jurisprudence that the court must provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, for example, potential public interest in the case, duration of the oral hearing and the time the formal request for publicity has been made.<sup>3</sup> The State party did not provide any comments on these allegations. In such circumstances, the Committee considers that the trial of the author did not meet the requirements of article 14, paragraph 1.

8.7 The Committee notes the author's allegations of violation of presumption of innocence, as the authorities allegedly used national media to portray him as a criminal; his lawyers were given only limited time to study the evidence, and "obstacles" were added to examine the additional evidence presented by the prosecution; he had been judged already two times for malpractice in office but a third set of criminal proceedings was still pending at the time of submission of the present communication, on the same grounds; his request to be represented by a lawyer from Russia was ignored, though allowed under the legislation; NSS created additional obstacles for lawyers' participation in the author's case; and finally he was not allowed to examine witnesses against him in court, as the courts refused to call them without justifying their refusal. The Committee notes that the State party did not provide any comments on any of these allegations. In the absence of any information from

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<sup>2</sup> Communication No. 305/1988, *Alphen v. The Netherlands*, Views adopted on 23 July 1990.

<sup>3</sup> Communication No. 215/1986, *van Meurs v. The Netherlands*, Views adopted on 13 July 1990.



the State party, the Committee considers that due weight must be given to the author's allegations and concludes that there has been a violation of article 14, paragraphs 2, 3 (b), (c), (d) and (e), of the Covenant.

8.8 Regarding the claims that the examination of the author's case under the supervisory (*nadzor*) procedure by the Supreme Court took place in his and in his lawyers' absence, although with the participation of a prosecutor, the Committee notes that despite the fact that under the Criminal Procedure Code of the State party, the participation of the accused at the hearing of the supervisory review procedure is decided by the court itself, the State party failed to explain the reasons why it did not allow the participation of the author and his lawyers at the proceedings at the Supreme Court. In the absence of any other information, the Committee considers that there has been a violation of article 14, paragraph 5, of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has violated articles 7; 9, paragraphs 1, 3, and 4; and 14, paragraphs 1, 2, 3 (b), (c), (d), (e), and 5, of the International Covenant on Civil and Political Rights.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy including the payment of adequate compensation and initiation of criminal proceedings to establish responsibility for the author's ill-treatment under article 7 of the Covenant. The State party is also under an obligation to prevent similar violations in the future.

11. Bearing in mind that, by becoming a State 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 or not and that, pursuant to article 2, of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**J. Communication No. 1377/2005, *Katsora v. Belarus*  
(Views adopted on 19 July 2010, ninety-ninth session)\***

<i>Submitted by:</i>	Vladimir Katsora (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	7 February 2005 (initial submission)
<i>Subject matter:</i>	Seizure and destruction of leaflets belonging to an electoral block
<i>Procedural issue:</i>	Non-substantiation of claims
<i>Substantive issues:</i>	Equality before the law; prohibited discrimination; right to impart information; permissible restrictions; right to a fair hearing by a competent, independent and impartial tribunal
<i>Articles of the Covenant:</i>	14, paragraph 1; 19, paragraphs 1 and 2; 26
<i>Article of the Optional Protocol:</i>	2

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

*Meeting on 19 July 2010,*

*Having concluded* its consideration of communication No. 1337/2005, submitted to the Human Rights Committee by Mr. Vladimir Katsora under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication, and the State party,

*Adopts* the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication is Mr. Vladimir Katsora, a Belarusian national born in 1957, residing in Gomel, Belarus. He claims to be a victim of a violation by Belarus of his rights under article 14, paragraph 1; article 19, paragraphs 1 and 2; and article 26 of the International Covenant on Civil and Political Rights. The author is unrepresented. The Optional Protocol entered into force for the State party on 30 December 1992.

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada and Mr. Fabián Omar Salvioli.

### The facts as presented by the author

2.1 The author is a member of the National Committee of a political party, the United Civil Party, registered by the Ministry of Justice on 28 November 1995 and re-registered on 30 July 1999. The party carries out its activities in accordance with the national law of Belarus and its own statutes, also registered by the Ministry of Justice on the same dates as the party itself. One of the statutory objectives of the party is to take part in the elections, according to procedures established by national law. The elections of deputies to the House of Representatives of the National Assembly (Parliament) were scheduled for 17 October 2004, together with a republican referendum, initiated by the President of Belarus, on amending the Constitution. On the eve of the elections to the National Assembly and the referendum, the United Civil Party, together with the other political parties, formed an electoral block known as “V-Plus” (Five Plus) to challenge the Government proposals for amending the Constitution.

2.2 The author submits that the formation of electoral blocks with the other parties as a method of work of political parties is not prohibited in Belarus and is governed by articles 7 and 23 of the Law on Political Parties of 5 October 1994 (as amended on 26 June 2003).<sup>1</sup> He further submits that the Electoral Code of 11 February 2000 (as amended on 4 January 2003)<sup>2</sup> which governs legal status of the participants of electoral process, does not establish a mandatory procedure for the state registration of electoral blocks of political parties and that, therefore, activities of such electoral blocks cannot be considered as illegal. Under article 45, first paragraph, of the Electoral Code, political parties that carry out campaigns for the election of candidates, shall have a right of free and comprehensive discussion of electoral programmes of candidates, their political, professional and personal qualities, as well as of campaigning for or against a candidate at meetings, rallies, in mass media and during meetings with voters. Under the fourth paragraph of the same article, political parties shall have a right of free campaigning for the proposal to hold a referendum, for the adoption of a decision put to referendum, as well as against the proposal to hold a referendum or against the decision put to referendum.

2.3 As part of their campaign for the election of deputies to the House of Representatives and for the referendum, political parties that formed the electoral block in question published several leaflets under the V-Plus logo. These leaflets described a consolidated programme of action of these parties in addressing the key issues in Belarus. Moreover, the leaflets explicitly indicated that this programme of action would serve as a platform for further activities, should the candidates from the parties forming the block win the election.

2.4 On 12 August 2004, acting on behalf of the electoral block V-Plus, the author was transporting from Minsk to Gomel in his private vehicle some 14,000 copies of leaflets,

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<sup>1</sup> The Law on Political Parties of Belarus:

(Source: [www.legislationline.org/documents/action/popup/id/6428](http://www.legislationline.org/documents/action/popup/id/6428))

Article 7 (Methods of Work of Political Parties) – The political parties are to implement their objectives and goals through: [...] the nomination of candidates for elections, participation in electoral campaigns, including by means of formation of electoral blocks with the other parties, as well as the control over the conduct and results of elections [...]

Article 23 (Rights of Political Parties) – From the moment of registration the political parties are entitled to: [...] take part in the preparation for and conduct of elections, nominate candidates and carry out election campaign; form electoral blocks to take part in the election campaign and elections [...]

<sup>2</sup> The Electoral Code of Belarus (Source: website of the Central Electoral Commission of the Republic of Belarus: [www.rec.gov.by/english/Electoral\\_Code.html](http://www.rec.gov.by/english/Electoral_Code.html)).

marked with a V-Plus logo, entitled “Five steps to a better life”,<sup>3</sup> and an unspecified number of copies of the newspapers “*Time*” and “*New Newspaper*”. In the Zhlobin District of the Gomel Region his vehicle was stopped by traffic police and escorted to the traffic police station where the vehicle was thoroughly searched by officers of the Ministry of Internal Affairs. Then the author was taken to the Zhlobin District Department of Internal Affairs, at which point the leaflets and newspapers were seized from him.

2.5 On an unspecified date, officers of the Zhlobin District Department of Internal Affairs drew up an administrative report, stating that the author had committed an administrative offence under article 167-10, part 1 (engaging in activities on behalf of unregistered or non re-registered political parties, trade unions or the other public associations), of the 1984 Belarus Code on Administrative Offences.<sup>4</sup> On 31 August 2004, the Zhlobin District Court of the Gomel Region found the author guilty of having committed an administrative offence under article 167-10, part 1, of the Code on Administrative Offences for engaging in activities of an unregistered public association and ordered him to pay a fine of 570,000 roubles (30 base amounts). The court also ordered the destruction of the 14,000 “Five steps to a better life” leaflets. The court concluded that, by transporting leaflets with a logo of a public association — V-Plus — which was not duly registered in the Integrated State Register of the Ministry of Justice, the author had engaged in activities on behalf of an unregistered public association. This decision is final and executory.<sup>5</sup>

2.6 Subsequently, the author requested the Chair of the Gomel Regional Court to have the Zhlobin District Court’s decision reviewed under the supervisory procedure. The author claimed, inter alia, that the seizure of leaflets ordered by the Zhlobin District Court as a secondary administrative penalty could not be applied under article 167-10, part 1, of the Code on Administrative Offences.<sup>6</sup> On 18 October 2004, the Chair of the Gomel Regional Court rejected the author’s request by affirming that the prior decision was lawful and well-founded. He specifically addressed the author’s claims in relation to the seizure of leaflets and concluded that the decision of the Zhlobin District Court had no reference to the seizure of leaflets. The Chair of the Gomel Regional Court stated that the Zhlobin District Court took note of the author’s statement to the effect that he was not the leaflets’ owner and since nobody else claimed an ownership over them in the course of the proceedings, the court decided to order the destruction of leaflets.

2.7 On an unspecified date, the author applied, also under a supervisory procedure, to the Chair of the Supreme Court. On 31 December 2004, the Deputy Chair of the Supreme Court confirmed the lawfulness of the previous decision and rejected the author’s request.

2.8 On 1 October 2004, the author sent an open letter to the Chair of the Constitutional Court, General Prosecutor, Chair of the State Security Committee, Minister of Internal Affairs, Head of State Traffic Police, Chair of the Customs Committee and Head of the Main Department of Frontier Troops, complaining that his unlawful detention on 12 August 2004 and subsequent seizure of leaflets, which had been filmed by unknown individuals in

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<sup>3</sup> A copy of the leaflet is available on file with the Secretariat.

<sup>4</sup> The 1984 Belarus Code on Administrative Offences was replaced by the new Code on Administrative Offences as of 1 March 2007.

<sup>5</sup> Under article 266 of the Code on Administrative Offences, the court’s decision in administrative cases is final and it cannot be appealed through administrative proceedings. This decision, however, can be revoked by the chair of a court of superior jurisdiction through the supervisory procedure.

<sup>6</sup> The sanction envisaged under article 167-10, part 1, of the Code on Administrative Offences is a warning or a fine of between 10 and 50 minimum (monthly) salaries.

civilian clothes, was broadcasted by two state-owned television channels, “BT” and “STV”, on 25 and 26 September 2004, respectively.

2.9 On 17 October 2004, the Prosecutor of the Gomel Region replied to the author that the officers of the Ministry of Internal Affairs had not breached any law in detaining him and that his actions had been correctly defined by court as falling under article 167-10 of the Code on Administrative Offences. On 20 October 2004, the Head of the Traffic Police Department of the Gomel Executive Committee sent a written reply to the author’s open letter, stating that his vehicle was stopped for exceeding a speed limit. On 5 November 2004, the General Prosecutor’s Office informed the author that he could appeal the actions of officers of the Ministry of Internal Affairs and those of the television channels through the procedure established by law. On 7 November 2004, the Head of the Gomel Regional Department of the State Security Committee replied to the author that the object of his complaint fell outside the competence of the State Security Committee.

### **The complaint**

3.1 The author claims that the State party’s courts ignored his argument that he was not engaging in activities on behalf of an unregistered public association, but on behalf of a properly registered party which was a member of the so-called “V-Plus” electoral block. He further claims that there is no requirement under national law for an electoral block of political parties to be registered. He states that the courts made no effort to establish whether V-Plus was a public association within the meaning of article 1 of the Law on Public Associations and dealt with the proceedings in a summary and incompetent manner. The courts also ignored the author’s arguments that his right to impart information was guaranteed under article 34, part 1, of the Constitution and article 19 of the Covenant, and failed to explain why the restriction of his freedom to impart information was justified under article 19, paragraph 3, of the Covenant. The author submits, therefore, that he was not afforded the benefit of a fair hearing by a competent, independent and impartial tribunal, as required by article 14, paragraph 1, of the Covenant.

3.2 The author also claims that, in breach of article 26 of the Covenant, the State party’s authorities failed to guarantee his right to equal protection of the law against discrimination, on the ground of his political opinions.

3.3 The author further claims a violation of his right to hold opinions under article 19, paragraphs 1 and 2, because of the arbitrary seizure and destruction of 14,000 “Five steps to a better life” leaflets, in particular in violation of his right to impart information and ideas of all kinds. He states that the State party failed to justify the necessity of restricting his right under article 19, paragraph 3, of the Covenant.

### **State party’s observations on admissibility and merits**

4. On 9 June 2005, the State party submitted information provided by the Supreme Court, according to which, on 31 August 2004, the Zhlobin District Court of the Gomel Region found the author guilty of having committed an administrative offence under article 167-10, part 1, of the Code on Administrative Offences and ordered him to pay 57,000 roubles (30 base amounts) as a fine. The State party added that it equalled approximately US\$ 25. The State party claimed that this decision was based on national law in force at that time. It referred to the case materials, according to which the author was transporting, on 12 August 2004, 14,000 “Five steps to a better life” leaflets that belonged to the unregistered association V-Plus. These facts, as corroborated by a witness statement, had not been contested by the author. The leaflets seized from the author had a logo of the V-Plus coalition that, according to the information received from the Ministry of Justice, had not been duly registered as a public association in the Integrated State Register.

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

5.1 On 17 July 2005, the author commented on the State party's observations. He submitted that, contrary to what was claimed by the State party, he was ordered to pay 570,000 roubles and not 57,000 roubles, as a fine. He added that it equalled US\$ 265. Moreover, as transpires from the decision of the Zhlobin District Court of the Gomel Region, the court ordered the seizure and destruction of the 14,000 "Five steps to a better life" leaflets as a secondary penalty.

5.2 The author challenged the State party's argument that the decision of the Zhlobin District Court of the Gomel Region was based on national law in force at that time. He conceded that 14,000 "Five steps to a better life" leaflets indeed had the V-Plus logo, but argued that the Supreme Court's claim to the effect that this logo belonged to an unregistered public association was unsubstantiated and not based on any evidence. He reiterates his claim that the Electoral Code did not establish a mandatory procedure for the state registration of electoral blocks of political parties and that, therefore, such activities on the eve of the electoral campaign could not be considered as illegal in Belarus. The author concludes that the Supreme Court and the State party have failed to explain why the restriction of his right to impart information was justified under article 19, paragraph 3, of the Covenant.

**Issues and proceedings before the Committee***Consideration of admissibility*

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement. In the absence of any objection by the State party, the Committee considers that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have been met.

6.3 The author claims that his right to equal protection of the law under article 26 of the Covenant was violated, as he was discriminated against on the ground of his political opinions. The Committee notes, however, that the author has failed to provide any details or any supporting evidence in substantiation of this claim. In addition, it remains unclear whether these allegations were ever raised in the domestic courts. In these circumstances, the Committee considers that this part of the communications is unsubstantiated, for purposes of admissibility, and must therefore be held to be inadmissible under article 2 of the Optional Protocol.

6.4 As to the author's claim under article 14, paragraph 1, the Committee notes that it relates primarily to issues directly linked to those falling under article 19, of the Covenant, that is, the author's right to impart information. It also notes that there are no obstacles to the admissibility of the claims under article 19, paragraph 2, of the Covenant, and declares them admissible. Having come to this conclusion, the Committee decides that it is not necessary to separately consider the claims arising under article 14, paragraph 1; and article 19, paragraph 1, of the Covenant.

*Consideration of the merits*

7.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5, paragraph 1, of the Optional Protocol.

7.2 The first issue before the Committee is whether or not the application of article 167-10, part 1, of the Code on Administrative Offences to the author's case, resulting in the confiscation of the 14,000 "Five steps to a better life" leaflets with the logo of the V-Plus electoral block and the subsequent fine constituted a restriction within the meaning of article 19, paragraph 3, on the author's right to impart information. The Committee notes that article 167-10, part 1, of the Code on Administrative Offences establishes administrative liability for engaging in activities on behalf of unregistered or non-registered political parties, trade unions or the other public associations. It also notes that if the State party were to impose a requirement of a state registration of political parties (including electoral blocks of registered political parties), trade unions and the other public associations, it would effectively establish obstacles regarding the exercise of the freedom to impart information, guaranteed by article 19, paragraph 2, of the Covenant.<sup>7</sup>

7.3 The second issue is, therefore, whether in the present case such obstacles are justified under article 19, paragraph 3, of the Covenant, which allows certain restrictions but only as provided by law and necessary: (a) for respect of the rights or reputations of others; and (b) for the protection of national security or of public order (*ordre public*), or of public health or morals. The right to freedom of expression is of paramount importance, and any restrictions to the exercise of this right must meet a strict test of justification.<sup>8</sup>

7.4 The Committee notes that the author has argued that article 167-10, part 1, of the Code on Administrative Offences does not apply to him, as he was not engaging in activities of any unregistered public association, and that the sanctions thus were unlawful and constituted a violation of article 19 of the Covenant. In this regard, the Committee notes, firstly, that the author and the State party disagree on whether or not the V-Plus electoral block was a public association that required a separate registration by the Ministry of Justice. Secondly, it notes that there is nothing in the material before the Committee which suggests that the findings of the State party's courts were based on anything other than the absence of registration of the V-Plus electoral block by the Ministry of Justice. The Committee is, however, not in a position to re-evaluate the findings of the State party's courts with regard to the legal status of the electoral block in question in Belarus.

7.5 Nonetheless, even if the sanctions imposed on the author were permitted under national law, the State party has not advanced any argument as to why they were necessary for one of the legitimate purposes set out in article 19, paragraph 3, of the Covenant, and why the breach of the requirement to register the V-Plus electoral block in the Ministry of Justice involved not only pecuniary sanctions, but also the seizure and destruction of the leaflets. The Committee concludes that in the absence of any pertinent explanations from the State party, the restrictions to the exercise of the author's right to impart information cannot be deemed necessary for the protection of national security or of public order (*ordre public*) or for respect of the rights or reputations of others. The Committee therefore finds that the author's rights under article 19, paragraph 2, of the Covenant have been violated in the present case.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation by Belarus of article 19, paragraph 2, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including full reparation

<sup>7</sup> Communication No. 780/1997, *Laptsevich v. Belarus*, Views adopted on 20 March 2000, para. 8.1.

<sup>8</sup> See, inter alia, communication No. 628/1995, *Park v. Republic of Korea*, Views adopted on 20 October 1998, para. 10.3.

and appropriate compensation. The State party is also under an obligation to prevent similar violations in the future.

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 or not 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 in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]



**K. Communication No. 1392/2005, *Lukyanchik v. Belarus*  
(Views adopted on 21 October 2009, ninety-seventh session)\***

<i>Submitted by:</i>	Valery Lukyanchik (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	7 April 2005 (initial submission)
<i>Subject matter:</i>	Denial of possibility of candidacy for lower chamber of the Belarus Parliament.
<i>Procedural issues:</i>	Non-substantiation of claims; non-exhaustion of domestic remedies.
<i>Substantive issues:</i>	Right to be elected without unreasonable restrictions and without distinction; access to court; right to have one's rights and obligations in a suit at law determined by a competent, independent and impartial tribunal established by law
<i>Articles of the Covenant:</i>	2; 14, paragraph 1; 25 (b)
<i>Article of the Optional Protocol:</i>	None

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

*Meeting on 21 October 2009,*

*Having concluded* its consideration of communication No. 1392/2005, submitted to the Human Rights Committee by Mr. Valery Lukyanchik under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication, and the State party,

*Adopts* the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication is Mr. Valery Lukyanchik, a Belarusian national born in 1960, residing in Kokhanovo urban settlement, Belarus. He claims to be a victim of violations by Belarus of article 14, paragraph 1, and article 25 (b) of the International

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

The text of an individual opinion signed by Committee member Ms. Ruth Wedgwood is appended to the present Views.

Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 30 December 1992. The author is not represented.

**The facts as submitted by the author**

2.1 The author is an opponent of the current regime in Belarus. After the incumbent President, Mr. Lukashenko, came to power in 1994, the author resigned from his duties with the Public Prosecutor's Office on his own accord. After the resignation, the author has actively participated in the electoral process as a candidate for the 1995 elections to the Supreme Council of the Republic of Belarus, an election monitor, and a member of an initiative group created in support of a candidate challenging the incumbent President during the 2001 presidential elections in Belarus. As a human rights defender, he participated in trial monitoring and in the activities of several public associations.

2.2 On 11 August 2004, the author filed an application in the District Electoral Commission of the Tolochin electoral constituency No. 31 for the registration of an initiative group, consisting of 64 people, who had agreed to collect signatures of voters in support of his candidature as a Deputy of the House of Representatives. The application was submitted in conformity with the requirements of article 65, part 1, of the Electoral Code, according to which the registration of such an initiative group is a precondition for collecting signatures required for the nomination of a candidate to the House of Representatives.

2.3 At 12.30 p.m. on 13 August 2004, the Chairperson of the District Electoral Commission handed the author a report dated 12 August 2004, stating that his application for the registration of the initiative group had been denied. The reason cited in the report was the author's alleged non-compliance with article 65 of the Belarus Constitution and article 5 of the Electoral Code. Specifically, it was alleged that 2 out of 64 people indicated in the initiative group's list had been included in it without their consent, and had filed written notifications about this with the District Electoral Commission. The author asked the Chairperson to have access to these notifications, but his request was refused.

2.4 The author submits that the two individuals in question did give their consent to be included in the initiative group. He contends that, in any event, the provisions cited by the District Electoral Commission have nothing to do with the procedure for nominating candidates; rather they guarantee that everyone is free to choose whether, and for whom, to vote in parliamentary and presidential elections. However, the fact that a person has become a member of an initiative group has no effect on the person's right to choose who to vote for; further, a person is free to cease being a member of the initiative group at any time. The author states that the controversy over whether the two individuals had consented for their names to be on the relevant list was not a reason to deny registration of his initiative group as such, and that there was no legal justification for this. The author also notes that the Electoral Code only requires an initiative group to consist of 10 members, while his had over 60.

2.5 On 16 August 2004, 43 members from the list of the author's initiative group sent by post an appeal against the denial of registration to the Central Electoral Commission on Elections and Conduct of Republican Referendums. On 20 August 2004, the Central Electoral Commission declined to review the appeal on the grounds that the three-day deadline for doing so, established by article 65, part 2, of the Electoral Code, was missed. The ruling states that the report was handed to the author in person on 13 August 2004 and the appeal to the Central Electoral Commission was sent on 16 August 2004, that is, after the expiry of the deadline. The author, in turn, refers to article 192 of the Civil Code, according to which, for the purposes of deadlines established by law, the count starts on the day following the calendar date on which the initiating event took place. He submits that in the present case the count started on Saturday, 14 August 2004, with the deadline expiring

at midnight on 16 August 2004. According to article 195 of the Civil Code, the deadline expires at midnight on the last day of the deadline; written documents handed in at the post office before midnight on the last day of the deadline are considered to be submitted in time. The author contends, therefore, that the appeal signed by the majority of members of his initiative group was submitted within the three-day deadline.

2.6 The author further notes that, even if the Central Electoral Commission contrary to article 192 of Civil Code starts its count from 13 August 2004, the three-day deadline was not missed, because its expiry then fell on a non-working day, Sunday, 15 August 2004. In this situation, according to article 194 of the Civil Code, if the last day of the deadline falls on a non-working day, the deadline expires on the first working day following it. Since the post office in Tolochin is closed on Sundays, the appeal to the Central Electoral Commission was sent by post on Monday, 16 August 2004.

2.7 On 20 August 2004, the author appealed the ruling of the Central Electoral Commission to the Supreme Court. On 24 August 2004, the appeal was dismissed; this decision is final and could not be appealed on cassation. The Court referred to article 65, part 2, of the Electoral Code, according to which the decision of the higher electoral commission may be appealed within three days of its issuance to the Supreme Court of the Republic of Belarus. In the author's case, however, the Central Electoral Commission had not taken a decision, but had declined to review the appeal of the members of the author's initiative group for procedural reasons. The Court added that it lacked jurisdiction to examine the author's appeal, as the law did not envisage any procedure of challenging in the Supreme Court rulings of such a nature by the Central Electoral Commission. The Court also noted that the appeal of 20 August 2004 was signed by the author himself, rather than by the members of his initiative group.

2.8 The author submits that the arguments advanced by the Supreme Court are unfounded and unlawful. He refers to the same article 65, part 2, of the Electoral Code that had been cited by the Supreme Court, but contends that it does not require the appeal to the Supreme Court to be submitted by members of the initiative group. He refers to article 6 of the Civil Procedure Code and article 60, part 1, of the Belarus Constitution. The first provision guarantees judicial protection of one's violated or challenged rights and interests; the second guarantees to everyone the protection of his rights and liberties by a competent, independent and impartial court of law within the time limits specified in law. The author asserts that his constitutional right to be elected to the House of Representatives was violated and, therefore, the Supreme Court's argument about the lack of jurisdiction to examine his appeal is unlawful. The author believes that he, like many other members of the opposition in Belarus, was deprived of the opportunity of putting his views before the voters and of the judicial protection of his rights and interests.

2.9 The author submits that it would have been pointless for him to appeal the decision of the Supreme Court through the supervisory review procedure, since the registration of the initiative groups for the elections to the House of Representatives would have been over by then in any case.

### **The complaint**

3.1 The author claims that the District Electoral Commission's decision not to register the initiative group that sought to nominate him as a candidate for office violated his right, guaranteed under article 25 (b) of the Covenant, to run for the office of Deputy of the House of Representatives.

3.2 He maintains that, in breach of article 14, paragraph 1, the State party's courts have denied him judicial protection of the right to run for office.

**State party's observations on admissibility and merits**

4.1 On 4 September 2007, the State party recalls the chronology of the case and submits that both claims by the author — the violation of his right to take part in the conduct of public affairs and his right to an independent and impartial court hearing — are unfounded.

4.2 The State party submits that the denial of registration of the author's initiative group by the District Electoral Commission was based on article 5 of the Electoral Code, according to which every citizen is free to decide whether to participate in the elections. Accordingly, every citizen is free to decide not only whether to participate in voting, but also whether to become a member of an initiative group to collect signatures of voters in support of a candidate's nomination. In violation of this requirement, the author included the persons Mashkovich and Kuntsevich in the initiative group without their consent. The State party provides a copy of their written notifications on the matter addressed to the District Electoral Commission.

4.3 According to article 65, part 2, of the Electoral Code, registration of the initiative group may be denied in case of violation of the requirements of the present Code. Since the requirements of article 5 of the Electoral Code were violated by the author in the process of formation of his initiative group, the District Electoral Commission had the authority to deny the registration of such a group. The author's argument that the provisions of article 5 of the Electoral Code and article 65 of the Belarus Constitution, establishing the principle of free participation in elections, apply only to the voting procedure, rather than throughout the entire elections process, is unfounded.

4.4 The State party further submits that the report of the District Electoral Commission was handed to the author in person on 13 August 2004 and, therefore, an appeal to the Central Electoral Commission should have been submitted on 15 August 2004 at the latest. It argues that the author's reference to the provisions of the Civil Code on the counting of deadlines is erroneous. The deadline in the author's case should be counted from the day of the receipt of the decision of the District Electoral Commission on the denial of registration. According to clause 30 of the Regulations of the Central Electoral Commission, appeals by citizens are dealt with under the Law on Appeals of Citizens. According to articles 8 and 10 of this Law, the counting of a deadline for appealing an alleged violation, as well as for the consideration of an appeal, starts on the day when the alleged violation took place or when the appeal against the decision that allegedly violates one's rights was registered. The State party notes that, unlike the Civil Code, the Electoral Code does not envisage a procedure for the extension of a deadline for appealing the decisions of the electoral commissions. It concludes that the Central Electoral Commission strictly complied with the provisions of electoral law in considering the author's case, and that the author's communication to the Committee, which is primarily about the interpretation of domestic legislation, should be declared inadmissible.

4.5 The State party submits that, under article 436 of the Civil Procedure Code, court rulings that already had become executory, except for the rulings of the Presidium of the Supreme Court, could be reviewed through the supervisory review procedure on the basis of an objection lodged by the public officials listed in article 439 of the same Code. The State party notes that the author did not appeal the decision of the Supreme Court of 24 August 2004 through the supervisory review procedure either to the Supreme Court or to the Public Prosecutor's Office, and that, therefore, all available domestic remedies have not been exhausted.

4.6 The State party submits that, under article 341 of the Civil Procedure Code, a person wishing to challenge the decision of the electoral commission related to discrepancies in the lists of signatures and other matters provided by law, can file a complaint in court situated in the same locality as the relevant electoral commission not later than seven days before

the elections (referendum). The electoral law does not envisage any procedure for challenging in the Supreme Court rulings of the Central Electoral Commission not to consider an appeal against the denial of registration of an initiative group. Moreover, under article 65 of the Electoral Code, the appeal of a denial of registration of an initiative group should be signed by the majority of its members. The State party recalls that the appeal submitted to the Supreme Court was signed by the author himself, who was not a member of the initiative group and, therefore, did not have a right to submit such an appeal.

#### **Author's comments on the State party's observations**

5.1 On 2 January 2008, the author reiterated his initial claims and added that, in its observations of the admissibility and merits, the State party has arbitrarily interpreted the provisions governing electoral rights of citizens in nominating candidates for the House of Representatives.

5.2 The author submits that the Chairperson of the District Electoral Commission, who was at the same time the Deputy Chairperson of the Tolochin Executive Committee in charge of commerce and education in the Tolochin District, was well aware that the author was an opponent of the current regime in Belarus and a human rights defender. The author claims that the Chairperson of the District Electoral Commission pressured Mashkovich and Kuntsevich, who were professionally dependent on him, into submitting written notifications to the District Electoral Commission, claiming that they had been included in the author's initiative group without their consent. The author asserts that the Chairperson of the District Electoral Commission personally visited Mashkovich at his home and Kuntsevich at his workplace in order to obtain the written notifications in question.

5.3 The author reaffirms his position that every member of the initiative group is free not to participate in the collection of signatures but it should not be a ground for denying the registration of the initiative group as a whole. He also reiterates that the counting of deadlines is governed exclusively by chapter 11 of the Civil Code, and that the State party's arguments on this matter are legally wrong. Under article 10 of the Law on Legal Normative Acts, the Civil Code is of a higher legal standing than any other code and laws containing the provisions of civil law. The author adds that the other acts do not contain provision on the counting of deadlines but if they do and the counting is regulated differently, then they contradict the Civil Code and are therefore invalid.

5.4 The author challenges the State party's interpretation of article 65 of the Electoral Code with regard to the requirement that the appeal of the denial of registration submitted to the Supreme Court should be signed by the majority of members of the initiative group in question. He asserts that this requirement applies only to an appeal submitted to the higher electoral commission.

5.5 As to the State party's argument that all available domestic remedies have not been exhausted, the author reiterates his initial argument that an appeal to the Supreme Court through the supervisory review procedure would have been pointless. A consideration of such an appeal takes one month and even a decision in the author's favour would not be an effective remedy, since he would not be able to take part in the ongoing electoral campaign. The author also recalls that the decision of the Supreme Court of 24 August 2004 became executory on the same day it was taken and that, in these circumstances, all available domestic remedies have been exhausted.

#### **Supplementary submissions by the State party**

6. On 2 May 2008, the State party reiterated its arguments that the author did not appeal the decision of the Supreme Court of 24 August 2004 through the supervisory review procedure and that the appeal submitted to the Supreme Court was signed by the

author himself, who was not a member of the initiative group and, therefore, did not have a right to submit such an appeal.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

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

7.3 The State party has argued that the author did not appeal the decision of the Supreme Court of 24 August 2004 through the supervisory review procedure, which renders the communication inadmissible under article 5, paragraph 2 (b), of the Optional Protocol, for failure to exhaust all available domestic remedies. The author, in turn, argued that the decision of the Supreme Court of 24 August 2004 became executory on the same day it was taken and an appeal through the supervisory procedure would have been pointless, because even a decision in the author's favour would not be an effective remedy, since he would not be able to take part in the ongoing electoral campaign.

7.4 The Committee recalls that, for the purpose of article 5, paragraph 2 (b), of the Optional Protocol, the author must make use of all judicial or administrative avenues that offer him a reasonable prospect of redress. If certain legal remedies are not available to him or are, in the author's opinion, ineffective or futile or would be unreasonably long, then he must offer prima facie evidence for this. In this respect, the Committee observes that the author's claim on the ineffectiveness of the supervisory review procedure in his case is primarily based on the time-bound nature of the electoral process. It further notes that the State party had merely stated in abstracto that, contrary to the requirements of article 5, paragraph 2 (b), of the Optional Protocol, the author did not appeal the decision of the Supreme Court of 24 August 2004 through the supervisory review procedure, without addressing the author's claim on the time-bound nature of the electoral process and without showing how this remedy might provide effective redress in his case. In these circumstances and in the absence of further information from the State party, the Committee accepts the author's argument that, for him, the supervisory review procedure is ineffective and considers that it is not precluded by article 5, paragraph 2 (b), of the Optional Protocol from examining the communication.

7.5 As to the author's claim under article 14, paragraph 1, the Committee has noted that it relates to issues similar to those falling under article 25 (b), read together with article 2 of the Covenant, namely, the right to an effective remedy involving an independent and impartial determination of the author's claim that his right to run for office was violated. The Committee decides that the communication is admissible under article 25 (b) of the Covenant, read in conjunction with article 2, and that, therefore, it is not necessary to separately consider the claims arising under article 14, paragraph 1.

#### *Consideration of the merits*

8.1 The Human Rights Committee has considered the communication in light of all the information made available to it by the parties, as provided under article 5, paragraph 1, of the Optional Protocol.

8.2 In reaching its decision, the Committee has taken into account the State party's own admission that the right of citizens to become a member of an initiative group to collect

signatures of voters in support of a candidate's nomination is a right that is protected by article 5 of the Electoral Code and article 65 of the Belarus Constitution. It follows, therefore, that if this part of the electoral process is encompassed within the right to free participation in elections, then it is equally protected by the guarantees of article 25 of the Covenant, which recognizes and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service. The Committee refers to its general comment No. 25 (1996) on the right to participate in public affairs, voting rights and the right of equal access to public service, according to which the exercise of the rights protected by article 25 may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable, and if a candidate is required to have a minimum number of supporters for nomination, this requirement should be reasonable and not act as a barrier to candidacy.<sup>1</sup>

8.3 The Committee recalls that, in the present case, the registration of the author's initiative group as a whole was denied on the grounds that 2 out of 64 people indicated in the initiative group's list had been included in it without their consent. It also notes the State party's argument that the non-consent of these two individuals meant that the District Electoral Commission possessed the discretion to deny registration of the initiative group and the State party's conclusion that this discretion gave the District Electoral Commission "the authority to deny the registration of such a group". In this regard, the Committee reiterates its position that, within the framework of each State's electoral system, the vote of one elector should be equal to the vote of another, and notes that the State party did not explain how the decision of the District Electoral Commission to deny the registration of the author's initiative group complied with the requirements of equal suffrage, objectivity and reasonableness.

8.4 The Committee takes note of the author's counterclaim that the controversy over whether the two individuals had consented that their names be on the initiative group's list could not be used as a ground to deny registration of his initiative group as a whole for two reasons. First, every member of the initiative group is free to cease being a member at any time, and, second, the Electoral Code only requires an initiative group to consist of 10 members, while his had over 60. In this regard, the Committee recalls its jurisprudence that it is generally not for itself, but for the courts of States parties, to review or to evaluate facts and evidence, or to examine the interpretation of domestic legislation, unless it can be ascertained that the conduct of the trial or the evaluation of facts and evidence or interpretation of legislation was manifestly arbitrary or amounted to a denial of justice.

8.5 In light of the information before the Committee, however, it concludes that, in the present case, the State party has failed to explain how the decision on the denial of registration of the author's initiative group complied with the requirements of article 25 of the Covenant, given that well over the requisite number of members (10) was submitted in order to register the group and that the rights of the two non-consenting individuals were restored once they were removed from the list. No suggestion was made that the author behaved in a fraudulent manner. As well, no assessment of proportionality or reasonableness was provided to justify the denial of the author's right to run for the office of Deputy of the House of Representatives by exclusive reliance on the lack of consent of two individuals, as opposed to the consent of 62 people for their names to be included in the list of the author's initiative group. In these circumstances, the Committee concludes that the author's rights under article 25 (b) of the Covenant, read in conjunction with article 2, have been violated.

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<sup>1</sup> *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40, vol. I (A/51/40 (Vol. I)), annex V, paras. 4 and 17.*

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information at its disposal discloses a violation by the State party of article 25 (b) of the Covenant, read in conjunction with article 2.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. It is also under an obligation to take steps to prevent similar violations occurring in the future.

11. 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 or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. In addition, it requests the State party to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]



## Appendix

### **Individual opinion of Committee member Ms. Ruth Wedgwood (concurring)**

The Human Rights Committee finds that Belarus has violated articles 25 (b) and 2 of the International Covenant on Civil and Political Rights – by refusing to register an electoral “initiative group” supporting the political candidacy of former public prosecutor Valery Lukyanchik for the House of Representatives in Belarus.

I concur in the Committee’s conclusion that article 25 (b) of the Covenant was violated, though I would reach this result on somewhat different grounds.

The case concerns the right of citizens to nominate a candidate for office, and to take part in government. As a long-time critic of the current Belarus president, Mr. Lukyanchik tried to register an “initiative group” as a first step to qualify as a parliamentary candidate. The registration of an initiative group must then be followed by gathering signatures from yet other voters in order to stand as a nominee for election to the House of Representatives.

Nonetheless, the local electoral commission denied the registration of the initiative group. The State party says that 2 of the 64 people named in the application sent written disavowals of support to the district electoral commission, and this sufficed to disqualify the whole group, even though only 10 supporters were needed to meet the statutory minimum.

The author replies that the chairperson of the district electoral commission — who also served as a local government executive in charge of commerce and education — exerted direct pressure on these two supporters to make the disavowals. The State party has not countered the specifics of this aspect of his claim. These facts would seem sufficient to establish a prima facie violation of the requirements of article 25 (b), since an election official should maintain neutrality between candidates.

The Committee thus does not need to reach the more complicated question of whether it is ever permissible to void or disqualify an election petition, in the event that one or more signatures on it are found to be questionable, even where the signatures are unnecessary to meet a statutory minimum. Before reaching such a broad result, it would seem wise to survey the election laws of the many operating democracies, to see whether this type of rule has been found necessary as a matter of prudence and as an incentive to assure the integrity of petition drives in open democracies.

The facts of this case, as pleaded, seem to show a rather more blatant attempt by a local election official to interfere with the workings of the democratic process.

*(Signed)* Ms. Ruth **Wedgwood**

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**L. Communication No. 1398/2005, *Possemiers v. Spain*  
(Views adopted on 20 October 2009, ninety-seventh session)\***

<i>Submitted by:</i>	Mark Possemiers (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	26 November 2003 (initial submission)
<i>Decision on admissibility:</i>	5 March 2007
<i>Subject matter:</i>	Alleged irregularities in criminal proceedings for fraud and forgery
<i>Procedural issues:</i>	Victimhood; substantiation of allegations; exhaustion of domestic remedies
<i>Substantive issues:</i>	Compulsory labour; right of anyone who is arrested to be tried within a reasonable time; right of accused persons to be segregated from convicted persons; liberty of movement; right to a fair hearing by an independent and impartial tribunal; right not to be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence at the time when it was committed; right not to be subjected to arbitrary interference with one's privacy or family
<i>Articles of the Covenant:</i>	8, paragraph 3; 9, paragraph 3; 10, paragraph 2 (a); 12; 14, paragraphs 1 and 2; 14, paragraph 3 (a), (b), (c), (d), (f) and (g); 15, paragraph 1; and 17, paragraph 1
<i>Articles of the Optional Protocol:</i>	1, 2 and 5, paragraph 2 (b)

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

*Meeting on 20 October 2009,*

*Having concluded* its consideration of communication No. 1398/2005, submitted to the Human Rights Committee by Mr. Mark Possemiers under the Optional Protocol to the International Covenant on Civil and Political Rights,

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvio, Mr. Krister Thelin and Ms. Ruth Wedgwood.

*Having taken into account* all written information made available to it by the author of the communication, and the State party,

*Adopts* the following:

### **Views under article 5, paragraph 4, of the Optional Protocol**

1.1 The author of the communication, dated 26 November 2003, is Mr. Mark Possemiers, a Belgian national born on 10 September 1953, who claims to be the victim of violations by Spain of articles 8, 9, 10, 12, 14, 15 and 17 of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The author is not represented by counsel.

1.2 On 2 February 2006, the Special Rapporteur on new communications and interim measures decided that the admissibility of the communication should be considered separately from the merits.

#### **The facts as submitted by the author**

2.1 The author claims that his home was searched in 1995 under a court order for the seizure of a rubber stamp in connection with proceedings brought by an insurance company. The police carrying out the order seized data from a company belonging to him. He alleges that he was arrested and held incommunicado for three days, until a judge granted his release on bail. He claims he was not informed of the reason for his arrest.

2.2 In August 1997, the author answered a summons to appear in court in connection with the documentation seized from his home. He claims that he was assigned a lawyer with whom he was unable to speak before the hearing and that the judge had assumed that he did not need an interpreter. The judge, at the request of the public prosecutor, ordered his pretrial detention. The author maintains that he was not informed of the offence(s) for which he was detained.

2.3 The author states that he remained in pretrial detention until 15 September 1999 and was not informed of the reasons for his detention until one and one-half years after the fact. He alleges that he was forced to work while in prison and was kept in a cell with convicted offenders.

2.4 The author maintains that he was defended by an inexperienced court-appointed lawyer who did not defend him effectively. Furthermore, contact with his lawyer was restricted while he was in prison, since he was allowed a limited number of telephone calls (only one or two per week) and since personal contact was not permitted during visits. He maintains that the lawyer visited him only once.

2.5 The author states that the Madrid Provincial High Court in charge of his case rescinded the order to commence the oral proceedings and that he was never notified of the charges against him. He did not learn what the charges were until he was notified of the judgement handed down in his case.

2.6 On 12 February 2001, when he was in the Canary Islands, he received a telephone call in which he was told that he was to appear in court to attend oral proceedings on 14 February. In mid-May 2001, he was arrested on a warrant issued by the Provincial High Court and was held in Tenerife, Canary Islands, for one and one-half months. He was subsequently transferred to Madrid two days before the start of his trial. He was not able to speak with his lawyer until five minutes before the trial. The Provincial High Court would not allow him to defend himself, even though he had made a request in writing to that effect. Nor did he have an interpreter at the trial.

2.7 On 25 June 2001, he was sentenced to 42 months in prison by the Madrid Provincial High Court for fraud and for forgery of a public commercial document of an official nature.<sup>1</sup> The author was informed of his conviction on 13 July 2001. He claims that he lodged an appeal on 18 July 2001, within the legal deadline, but that the Court failed to rule on this appeal, and his conviction stood. In April 2002, he was released on parole (under supervision). He requested a copy of the appeal from the prison authorities but his requests were ignored.

2.8 The author maintains that he was found guilty on the basis of a 1996 amended version of the Criminal Code that was not in force at the time the acts of which he was accused were committed.

2.9 The author asserts that, even though he had been released on parole, the State party would not allow him to visit his children or his mother.

### **The complaint**

3.1 The author alleges a violation of article 8, paragraph 3, of the Covenant on the grounds that he was forced to work while in pretrial detention.

3.2 The author also alleges a violation of article 9, paragraph 3, of the Covenant on the grounds that his pretrial detention was unduly extended beyond the time limit for such detention (i.e., one year, renewable for a further year) as provided for in articles 503 and 504 of the Criminal Procedures Act. According to the author, the Provincial High Court refused to release him on bail in July 1999, by which date the author had spent almost two years in pretrial detention, in order to justify the extension of his period of detention to the maximum permissible extent, as there was no other reason to prolong it. He also argues that the fact that he was held incommunicado for three consecutive days when his house was searched in 1995 was “without just cause”.

3.3 The author also states that he was the victim of a violation of article 10, paragraph 2 (a), of the Covenant because he was held with convicted prisoners during his pretrial detention. Also, he was not allowed to see his children or mother, even though he had been released on parole, which constitutes a violation of article 12, paragraph 2, of the Covenant.

3.4 The author claims to have been the subject of violations of the following paragraphs of article 14:

(a) Paragraph 1, on the grounds that the judges took into account his previous police and criminal record, even though he had been acquitted;

(b) Paragraph 2, on the grounds that he was continually denied the possibility of release on bail, the court having decided in July 1999 that his deprivation of liberty was not excessive and that two years was the maximum period of pretrial detention established by law for offences carrying a sentence of less than six years;

(c) Paragraph 3 (a), on the grounds that he was not informed of the charges against him. The first notification, 14 months after he was imprisoned, was rescinded, and the first time he learned of the charges was when he was informed that he had been found guilty;

(d) Paragraph 3 (a), taken in conjunction with article 9, paragraph 2, of the Covenant, as he was not informed in detail of the charges against him at the time of his detention;

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<sup>1</sup> According to the judgement, the offences were committed against the Public Treasury, the National Social Security Institute and the National Employment Institute.

(e) Paragraph 3 (b), on the grounds that he was not informed in advance of the date of his trial. He was notified of the summons on 12 February 2001, two days before the start of his trial. He was held in prison in Tenerife, Canary Islands, in 2001 for six weeks and was transferred to Madrid two days before the trial; he was not able to speak with his lawyer until five minutes before the trial began;

(f) Paragraph 3 (c), on the grounds that his trial lasted from 1995 to 2001;

(g) Paragraph 3 (d), on the grounds that the court-appointed lawyer visited him only once and did not defend him properly. He alleges that the State pays €12 to court-appointed lawyers for each prison visit, does not oversee the lawyers in any way and assigns cases to inexperienced lawyers. In addition, he considers that this provision of the Covenant was also violated when the Provincial High Court refused to allow him to defend himself, even though he requested to be allowed to do so on several occasions;

(h) Paragraph 3 (f), on the grounds that he did not have the assistance of an interpreter during the trial, even though he had requested such assistance in writing. In addition, the notification of his conviction was in Spanish, which seriously hampered his ability to appeal;

(i) Paragraph 3 (g), on the grounds that he was pressured into declaring himself guilty by being promised that he would be released after three months if he confessed and threatened with a delay in the opening of his trial if he did not. In addition, he considers this provision to have been violated because a mortgage was cancelled without the beneficiary of the mortgage — an Irish company — being subpoenaed;

(j) Paragraph 5, on the grounds that, although he lodged an appeal within the legal deadline of five days, the court failed to deal with his application and proceeded to enforce the judgement against him. In addition, the prison authorities denied him a copy of the appeal.

3.5 The author alleges a violation of article 15, paragraph 1, of the Covenant, as he was convicted on the basis of the new Criminal Code in respect of events which occurred before it entered into force. He points out that the new Criminal Code did away with a prison privilege established in the previous code, under which a prisoner needed to serve only half his sentence to be eligible for parole.

3.6 Finally, the author alleges a violation of article 17, paragraph 1, of the Covenant, on the grounds that the search of his home was illegal, as it was not confined to the terms set out in the search warrant.

#### **State party's observations on admissibility and the merits**

4.1 By notes verbales dated 2 August 2005 and 18 January 2006, the State party submitted its observations on the admissibility of the communication. It contends that the communication is inadmissible under articles 2 and 3 of the Optional Protocol because the author has not exhausted domestic remedies and because the communication constitutes an abuse of the right to submit communications. It maintains that the author should have submitted an appeal in cassation, in accordance with the procedure indicated in the judgement against him, and that he should also have submitted the corresponding application for *amparo*.

4.2 The State party adds that the guilty verdict handed down by the Madrid Provincial High Court gives a sufficiently clear picture of the general behaviour of the author, who makes a string of unjustified and unfounded allegations without providing any solid evidence or documentation in support of his complaints.

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

5.1 In his comments of 7 August 2006, the author indicates that he did lodge an appeal against his sentence and that he has still not been informed of the outcome of that appeal. He adds that an appeal in cassation can be submitted only once a decision has been taken on that appeal. He states that, in Spain, when an appeal is filed, both a lawyer and a solicitor (*procurador*) have to be appointed, which makes a mockery of the right to defend oneself. In addition, in a number of cases, the Spanish courts have refused to grant any form of compensation, and there is very little chance that an appeal will be allowed.

5.2 With regard to the exhaustion of domestic remedies, he argues that there was an excessive delay, since the proceedings started in 1995 and ended in 2001. He cites a ruling by the European Court of Human Rights in which it acknowledged that a five-year delay was excessive.<sup>2</sup> In his case he has waited for 12 years and is not in a position to pay €12,000 for a lawyer and solicitor simply to see his case continue for another 10 or 12 years. The high cost of hiring a lawyer and solicitor makes the exhaustion of remedies impossible.

### The Committee's decision on admissibility

6.1 The Committee examined the admissibility of the communication during its eighty-ninth session, held in March 2007. With regard to the complaints relating to article 14, paragraph 1, and article 15, paragraph 1, the Committee considered that the author had not explained how the events to which the complaints referred had affected him personally or had caused him specific harm. The Committee consequently decided that, under those circumstances and in accordance with its settled jurisprudence,<sup>3</sup> the author could not be considered a victim within the meaning of article 1 of the Optional Protocol in respect of the aforementioned complaints. It therefore found that this part of the communication was inadmissible under article 1 of the Optional Protocol.

6.2 With regard to the complaints relating to articles 8; 9; 10; 12; 14, paragraph 2; 14, paragraph 3 (a), (b), (d), (f) and (g); and 17 of the Covenant, the Committee noted that the author had provided no proof whatsoever to back up those allegations and considered that he had not substantiated his claims sufficiently for the purposes of admissibility. In conclusion, that part of the communication was inadmissible under article 2 of the Optional Protocol.

6.3 In relation to the author's complaint of an excessive delay in the criminal proceedings, which allegedly lasted from 1995 to 2001, in violation of article 14, paragraph 3 (c), the Committee took note of the State party's general argument concerning the non-exhaustion of domestic remedies. The Committee also observed that the author had provided no information about the appeals he claims to have attempted to lodge with the domestic courts in connection with his allegation. The Committee therefore considered that this part of the communication was inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.4 With respect to the claim relating to article 14, paragraph 5, the Committee also took note of the State party's argument that the author had not exhausted domestic remedies and that he should have submitted an appeal in cassation, which would have been the proper procedure for appealing the judgement of the Provincial High Court. The Committee also noted, however, that the State party had not contradicted the author's claim that he had

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<sup>2</sup> European Court of Human Rights, *Soto Sanchez v. Spain*, application No. 66990/01.

<sup>3</sup> See communications Nos. 1329/2004 and 1330/2004, *Pérez Munuera and Hernández Mateo v. Spain*, decision adopted on 25 July 2005, para. 6.3.

lodged an appeal and that it had furnished no information on the existence of any second hearing in this case or on the legislation providing the basis for the procedure followed in respect of the author on this point. The Committee recalled its decisions in which it had found that a review in cassation was not a substitute for an appeal before a court of second instance,<sup>4</sup> although, in certain particular cases, an appeal in cassation might include a reconsideration of the trial court's decisions that was sufficient to meet the requirements of the Covenant. The Committee therefore found that this part of the communication was admissible and should be examined on the merits.

#### **State party's observations on the merits**

7.1 On 17 October 2007 the State party submitted observations on the merits and declared that the Covenant had not been violated. It reiterated that the author had not exhausted domestic remedies, since he had not filed an appeal in cassation, which was the procedure indicated in the judgement against him,<sup>5</sup> or an application for *amparo*. The judgement of the Provincial High Court provided telling indications of the nature of the general behaviour of the author, who had made a string of unfounded allegations without providing any solid, documented evidence concerning the action he had taken to address the alleged violations of his rights.

7.2 The author offers the State party no proof that he filed any appeal against the judgement of the Provincial High Court. The fact that, in its observations on admissibility, the State party stated that none of the proper appeals available for exhausting domestic remedies had been used does not imply that the author had lodged inadmissible appeals. The author does not sufficiently substantiate his complaint, has not submitted any evidence to support his allegations and has not supplied any information about the remedies he allegedly sought in the domestic courts.

7.3 According to the State party, it is a clear abuse of the system of individual communications to use it for alleging violations which, by their very nature, leave a paper trail, without providing the slightest proof, thus placing on the State party the burden of challenging allegations concerning imaginary facts, documents or procedures. The State party cannot base its actions on speculation about the possible content of a review undertaken pursuant to an appeal of which there is no evidence and which, had it been brought, would necessarily have been rejected as inadmissible. Nor can it do so on the basis of suppositions about the scope of the review in an appeal in cassation when the author himself admits that he has sought no such remedy.

#### **Author's comments on the State party's observations**

8. On 14 September and 23 December 2008 the author informed the Committee that he had requested a copy of the appeals application that had been sent from Valdemoro Prison from the Directorate General of Prisons, the Ministry of Justice, the Ministry of the Interior and Valdemoro Prison, but had received no reply. On telephoning the Directorate General, he had been tersely informed that instructions had been given not to provide him with any

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<sup>4</sup> See the Committee's decisions in communications No. 701/1996, *Gómez Vázquez v. Spain*, Views adopted on 20 July 2000; No. 986/2001, *Semey v. Spain*, Views adopted on 30 July 2003; No. 1007/2001, *Sineiro Fernández v. Spain*, Views adopted on 7 August 2003; No. 1101/2002, *Alba Cabriada v. Spain*, Views adopted on 1 November 2004; and No. 1104/2002, *Martínez Fernández v. Spain*, Views adopted on 29 March 2005.

<sup>5</sup> The conviction, a copy of which is to be found in the file, notes that the appropriate procedure for appealing it is an appeal in cassation.

information/copy. He adds that it would be very easy for the State to check the Valdemoro Prison records in order to determine that he did indeed send an appeals application.

*Consideration of the merits*

9.1 The Committee has considered the merits of the present communication in the light of all the information made available to it by the parties.

9.2 The author claims to have been the victim of a violation of article 14, paragraph 5, of the Covenant. He alleges that, although he lodged an appeal against the conviction handed down by the trial court, the court did not pursue it but instead proceeded to enforce the judgement. In its observations regarding the question of admissibility, the State party asserts that the author did not file an application for cassation or for amparo, but it makes no mention of a possible appeal. In its observations concerning the merits of the case, the State party contends that the author did not file an application for cassation and maintains that there is no proof that he did so. The author does not provide any details about the remedy which he claims to have sought or any evidence that it was actually submitted. The author's contention that the prison authorities did not respond to his requests for a copy of his written appeals application does not exempt him from his obligation to provide the Committee with the means of substantiating his claims. The Committee therefore lacks sufficient evidence to find that article 14, paragraph 5, of the Covenant was violated.

10. In the light of the above, the Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal any violation of article 14, paragraph 5, of the Covenant.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]



**M. Communication No. 1401/2005, *Kirpo v. Tajikistan*  
(Views adopted on 27 October 2009, ninety-seventh session)\***

<i>Submitted by:</i>	Nadezhda Kirpo (not represented by counsel)
<i>Alleged victim:</i>	The author's son, Pavel Kirpo
<i>State party:</i>	Tajikistan
<i>Date of communication:</i>	26 May 2005 (initial submission)
<i>Subject matter:</i>	Unlawful arrest; forced confessions obtained with use of beatings and torture, in the absence of a lawyer
<i>Procedural issue:</i>	Level of substantiation of claims
<i>Substantive issues:</i>	Torture; forced confessions; habeas corpus; right to defence
<i>Articles of the Covenant:</i>	7; 9; 14, paragraph 3 (d) and (g)
<i>Articles of the Optional Protocol:</i>	2

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

*Meeting on 27 October 2009,*

*Having concluded* its consideration of communication No. 1401/2005, submitted to the Human Rights Committee on behalf of Mr. Pavel Kirpo under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication, and the State party,

*Adopts* the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication is Ms. Nadezhda Kirpo, a Tajik resident of Russian origin born in 1956, who claims that her son, Mr. Pavel Kirpo, also a Tajik resident of Russian origin, born in 1977, is a victim of violations of his rights under article 7; article 9, paragraphs 1 and 3; and article 14, paragraph 3 (d), of the Covenant. Although the author does not invoke it specifically, the communication appears also to raise issues under article 14, paragraph 3 (g), of the Covenant. The author is unrepresented by counsel. The Optional Protocol entered into force for the State party on 4 April 1999.

\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Ms. Christine Chanet, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

The text of an individual opinion signed by Committee member Ms. Ruth Wedgwood is appended to the present Views.

**The facts as presented by the author**

2.1 The author contends that in 2000, her son was employed by the United Nations as an assistant to the head of the unit in charge of the project services in Tajikistan.<sup>1</sup> On 7 May 2000, he was arrested by officials of the Ministry of Security, allegedly while trying to commit a robbery of US\$ 100,000 from the United Nations premises in Dushanbe. On 17 January 2001, the Dushanbe City Court convicted him to a 15-year prison term, with confiscation of his belongings. On 23 May 2001, the Supreme Court confirmed the sentence.

2.2 The author explains that according to the Dushanbe City Court, her son planned to commit the robbery together with three other individuals (K., S., and B., whose whereabouts could not be established), and he had entered in a secret agreement with them, thus creating a criminal organized group. On 6 May 2000, he obtained illegally a revolver with a silencer and ammunition for it from K. On 7 May 2000, the author's son entered into the United Nations premises armed with the revolver, and as agreed with K., spoke to two security guards in an attempt to obtain their promise that they would not prevent him from committing the intended theft in exchange for US\$ 20,000 to be shared by them. The guards apparently agreed but in the meantime they secretly contacted the Ministry of Security. An intervention group from this Ministry arrived shortly after and Mr. Kirpo was detained.

2.3 The author claims that on 7 May 2000, her son was brought to the premises of the Ministry of Security and was kept there until 20 May 2000. On 7 May 2000, the authorities detained also Mr. Kirpo's wife and kept her in the Ministry of Security until 9 May 2000. It was Mr. Kirpo's wife who informed the author of the communication, in a phone conversation of 8 May 2000, about their arrests and whereabouts. The author explains that her son was kept isolated and could not meet with his relatives. She could meet with him only on 19 May 2000, in the building of the Ministry of Security; he had lost a lot of weight and was all black and blue. Later on 19 May 2000, she spoke with a representative of the United Nations in Dushanbe about her son's arrest. The representative met with her son in presence of an investigator of the Ministry of Security, I.R. According to the author, the representative later explained to her that her son was unable to speak, had broken ribs, and could move only with great difficulties.

2.4 According to the author, during his detention at the Ministry of Security, her son was severely beaten and tortured with use of electricity on different parts of his body in order to force him to give depositions. He was also hit with police batons and metal sticks to the point that he had ribs broken and had difficulties in talking and moving. In court, the lawyers of the author's son invoked this issue on a number of occasions, but their complaints were simply ignored.

2.5 The author also claims that her son was detained unlawfully as after his apprehension on 7 May 2000, he was kept in the Ministry of Security until 20 May 2000. The author contends that during this period, her son was not represented by a lawyer nor was he officially informed of his procedural rights. Notwithstanding, he personally requested several times that the investigators be allowed to be represented by a lawyer but with no result. His arrest as a suspect of a crime was recorded on 20 May 2000 only, i.e. 13 days after his actual apprehension. The same day, he was interrogated as a suspect, again in the absence of a lawyer,<sup>2</sup> and was officially charged with robbery. Following this, the

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<sup>1</sup> The author provides neither the exact title of her son nor the exact name of the department in which he was employed.

<sup>2</sup> The author explains that on 20 May 2000, she did hire a lawyer to represent her son, but the lawyer was allowed to participate in the proceedings on 23 May 2000 only.

author's son was detained for two days in the Ministry of Internal Affairs, and was placed in custody in an investigation detention centre (SIZO) on 23 May 2000.

2.6 The author contends that her son's lawyer complained during the court trial about the unlawful detention of her son for 13 days, but the court, instead of pronouncing itself on the nature of the detention, simply ruled out that the period of time between 7 and 19 May 2000<sup>3</sup> is to be taken into account when calculating her son's prison term.

2.7 The author further claims that her son's official arrest — on 20 May 2000 — was sanctioned by a prosecutor on 23 May 2000 and not by a court. She contends that the prosecutor is not an organ which can exercise judicial authority.

### **The complaint**

3.1 The author claims that her son is a victim of violation of his rights under article 7, as he was beaten and tortured by officials of the Ministry of Security, and forced to confess guilt. Although the author does not invoke it specifically, this claim appear also to raise issues under article 14, paragraph 3 (g), of the Covenant.

3.2 The author also claims a violation of the rights of her son under article 9, paragraphs 1 and 3, as he was detained unlawfully for 13 days, and as once it was decided to place him officially in pretrial detention, the legality of this decision was not controlled by a court but by a prosecutor.

3.3 The author further invokes a violation of her son's right to defence as protected by article 14, paragraph 3 (d), given that he was not represented by a lawyer at the early stages of the investigation.

### **The State party's failure to cooperate**

4. The State party was invited to present its observations on the admissibility or/and the merits of the communication in June 2005, and reminders were sent in this respect in October 2006, March 2008 and February 2009. The Committee notes that this information has not been received. The Committee regrets the State party's failure to provide any information with regard to admissibility or the substance of the author's claims. It recalls that under the Optional Protocol, the State party concerned is required to submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that it may have taken. In the absence of a reply from the State party, due weight must be given to the author's allegations, to the extent that these have been properly substantiated.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

5.2 The Committee notes, as required by article 5, paragraph 2 (a) and (b) of the Optional Protocol, that the same matter is not being examined under any other international procedure of investigation or settlement and that it is uncontested that domestic remedies have been exhausted.

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<sup>3</sup> The author explains that her son remained in the Ministry of Security until 20 May, but the Court has affirmed that it was until 19 May 2000.

5.3 The Committee has noted the author's claim that she had hired a lawyer to defend her son on 20 May 2000 (date of the official indictment of her son), but the attorney was only allowed to participate in the proceedings as of 23 May 2000. The Committee observes that these allegations may raise issues under article 14, paragraph 3 (d), of the Covenant. In the absence of any other explanations in this respect by the parties, however, and in the absence of any pertinent information on file, the Committee considers that this part of the communication is inadmissible under article 2 of the Optional Protocol as insufficiently substantiated for purposes of admissibility.

5.4 The Committee has noted the author's detailed allegations that, contrary to article 7 of the Covenant, her son was beaten and tortured and forced to confess guilt. It considers that although the author has not invoked it specifically, this part of the communication also raise issues under article 14, paragraph 3 (g), of the Covenant. In the absence of any observations by the State party, the Committee considers that these allegations are sufficiently substantiated, for purposes of admissibility, and therefore the communication is admissible under article 7 and 14, paragraph 3 (g), of the Covenant.

5.5 The Committee has further noted the remaining part of the author's allegations under article 9 of the Covenant, as her son was kept for 13 days in the Ministry of Security, with no legal counsel, and as the subsequent decision to have him placed in custody officially was not controlled by a court but by a prosecutor. The Committee considers that these allegations are sufficiently substantiated for purposes of admissibility, and declares them admissible.

#### *Consideration on the merits*

6.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties as provided for under article 5, paragraph 1, of the Optional Protocol.

6.2 The Committee notes the author's claims that her son was detained unlawfully for 13 days, in the Ministry of Security, with no access to lawyer and no possibility, for 12 days, to contact his relatives. During this period, he was beaten and tortured by investigators and forced to confess guilt in a robbery. The Committee notes that the author provides a fairly detailed description of the manner in which her son was beaten and on the method of torture used (electroshocks). The author also explains that the courts have failed in their duty to order a prompt inquiry on the alleged torture and ill-treatment of her son, and that they have disregarded the claims of the lawyers of her son in this respect. In the absence of any reply by the State party, the Committee considers that due weight must be given to the author's allegations.

6.3 The Committee recalls that once a complaint about ill-treatment contrary to article 7 has been filed, a State party must investigate it promptly and impartially.<sup>4</sup> It considers that in the circumstances of the present case, the facts as presented by the author and which are uncontested by the State party reveal a violation, by the State party, of the rights of the author's son under article 7 and article 14, paragraph 3 (g), of the Covenant.

6.4 The Committee notes that the author has claimed that her son was apprehended by officials of the Ministry of Security on 7 May 2000 and detained isolated, without being informed officially of the reasons of detention and without being provided with legal representation in spite of his numerous requests to that effect, in the premises of the

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<sup>4</sup> Human Rights Committee, general comment No. 20 (1992) on the prohibition of torture, or other cruel, inhuman or degrading treatment or punishment, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A, para. 14.

Ministry of Security until 20 May 2000, when he was officially charged. The author further claims that when the issue was raised by her son's lawyer during the trial, the court failed to give a legal qualification on the nature of the detention of her son during the 13 initial days of detention. In the absence of any explanations by the State party in this respect, the Committee decides that due weight must be given to these allegations. The Committee recalls that article 9, paragraph 1, of the Covenant requires that no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. Article 9, paragraph 2, requires that anyone arrested shall be informed at the time of arrest of the reasons of arrest and of any charges against him. Even if in the present case the facts as presented demonstrate that the authorities had sufficient grounds to apprehend the author's son as a suspect, the Committee considers that the fact that he was kept in detention for 13 days before his actual arrest to be documented formally and without informing him officially of the reasons of his arrest, constitutes a violation of Mr. Kirpo's rights under article 9, paragraphs 1 and 2, of the Covenant.

6.5 The author has also claimed that her son was officially placed in pretrial detention on 20 May 2000, but he was never brought before a court to verify the lawfulness of his detention and his detention was sanctioned by a prosecutor, in violation of article 9, paragraph 3, of the Covenant. The Committee recalls that paragraph 3 of article 9 entitles a detained person charged with a criminal offence to judicial control of his/her detention.<sup>5</sup> It is inherent in the proper exercise of judicial power that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with. In the circumstances of the case, the Committee is not satisfied that the public prosecutor can be characterized as having the institutional objectivity and impartiality necessary to be considered an "officer authorized to exercise judicial power" within the meaning of article 9, paragraph 3, and concludes that there has been a violation of this provision.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 7; article 9, paragraphs 1–3; and article 14, paragraphs 3 (g), of the Covenant.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author's son with an effective remedy, including initiation and pursuit of criminal proceedings to establish responsibility for ill-treatment of the author's son, an appropriate reparation including compensation, and to consider his retrial in conformity with all the guarantees enshrined in the Covenant or his release. The State party is also under an obligation to prevent similar violations in the future.

9. 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 or not, 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 in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

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<sup>5</sup> See, inter alia, communications No. 1348/2005, *Ashurov v. Tajikistan*, Views adopted on 20 March 2007, para. 6.5; No. 521/1992, *Kulomin v. Hungary*, Views adopted on 22 March 1996, para. 11.3; and No. 1218/2003, *Platonov v. Russian Federation*, Views adopted on 1 November 2005, para. 7.2.

## Appendix

### **Individual opinion of Committee member Ms. Ruth Wedgwood**

In this case, Tajikistan has not responded to four successive invitations sent to the State party, over the course of almost four years, to answer the allegation that Tajik State security agents carried out the torture of a former United Nations employee suspected of an attempted robbery and that Tajik courts have refused to investigate the matter. The complaint was brought to this Committee from the mother of the alleged victim. I join my colleagues in the conclusion that the author's allegations, in the absence of an answer by the State party, suffice to find a breach by the State party of articles 7 and 14, paragraph 3(g) of the International Covenant on Civil and Political Rights.

The allegations in this case are a bit unusual. Mr. Pavel Kirpo was employed as an assistant in the United Nations office in Dushanbe. On 6 May 2000, he allegedly brought a revolver to the United Nations facility, intending to steal US\$ 100,000 in cash from his employer. The United Nations security guards summoned the Tajik authorities, rejecting an attempt by Mr. Kirpo to corrupt them into permitting the robbery to go forward.

An "intervention group" of State agents responded to the scene and arrested Mr. Kirpo, holding him incommunicado for 13 days at the Ministry of Security, where he was allegedly beaten and tortured with electricity, batons and metal sticks. His wife was also arrested and held for two days. Mr. Kirpo was not allowed to see a lawyer in this period and was charged with a crime only after his interrogation was complete. The local judiciary apparently refused to investigate the claim that he was abused, in abdication of its responsibility to assure that the prisoners brought before them on criminal charges are treated with physical decency. These uncontested facts suffice to find violations of articles 7, 9 and 14 of the Covenant on Civil and Political Rights, and I join the Committee's conclusions.

But there is another delicate aspect of this matter which strikes closer to home and, in the discharge of conscience, demands remark. Namely, it is not clear whether United Nations authorities made any attempt to monitor the whereabouts or condition of their employee for a period of 12 days following his arrest at the United Nations office. The Committee has not called for any amicus comment by the United Nations on this set of facts.

A United Nations representative apparently did visit the former employee (who by then had been fired) on 19 May 2000, after Mr. Kirpo's mother sought his intervention. This visit unfortunately came too late, after the severe beatings had occurred. Mr. Kirpo's mother states that the United Nations representative reported that the ribs of her son had been broken, that he could move only with difficulty, and that he was unable to speak.<sup>a</sup> It is not known whether the United Nations official filed any official report about the visit, although he is to be congratulated for taking even these steps to prevent further harm.

The Covenant does not, as such, have international organizations as parties and the complaint mechanism of the Optional Protocol only extends to States parties. One also hesitates insofar as the United Nations office in Dushanbe and its former employees have not had an opportunity to comment on this matter.

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<sup>a</sup> See Views of the Committee, para. 2.3.

Nonetheless, given the seriousness of the events alleged in this case, it seems necessary to recall that the United Nations in its activities around the world must seek to assure the observance of human rights. Under the Covenant, the Committee has consistently demanded of State parties that affirmative and effective steps must be taken, when a prisoner is transferred to another State, to assure that he is treated humanely. While the United Nations has no independent police authority in most of the States in which it operates, one may hope that the organization would take the same precautions in assuring the well-being of individuals whose arrest the organization itself has requested, not least, its own employees. This would include checking promptly and periodically upon the status of the individuals and their condition, and assuring that they have representation by an attorney during the course of their detention and trial. The right to be free from torture is not subject to derogation or suspension, and does not depend upon a treaty text.

Without assuming the truth of the author's allegations, the set of circumstances alleged here would seem to warrant reflection and study by the United Nations. This may focus on the elaboration of precautionary standards for preventing any recurrence of such alleged facts in the future.

*(Signed)* Ms. Ruth **Wedgwood**

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**N. Communication No. 1425/2005, *Marz v. Russian Federation*  
(Views adopted on 21 October 2009, ninety-seventh session)\***

<i>Submitted by:</i>	Anton Marz (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Russian Federation
<i>Date of communication:</i>	14 March 2005 (initial submission)
<i>Subject matter:</i>	Retroactive application of the law with lighter penalty
<i>Procedural issue:</i>	Incompatible <i>ratione materiae</i>
<i>Substantive issues:</i>	Right to be equal before the courts; right to be heard by a competent tribunal; retroactive application of the law with lighter penalty; discrimination on the grounds of sex and social status
<i>Articles of the Covenant:</i>	9, paragraphs 1 and 5; 14, paragraphs 1 and 3 (d); 15, paragraph 1; 26
<i>Article of the Optional Protocol:</i>	3

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

*Meeting* on 21 October 2009,

*Having concluded* its consideration of communication No. 1425/2005, submitted to the Human Rights Committee by Mr. Anton Marz under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication, and the State party,

*Adopts* the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication is Anton Marz, a citizen of the Russian Federation born in 1962, currently serving a life sentence in the Russian Federation. He claims to be a victim of violations by the Russian Federation of his rights under article 9, paragraphs 1 and 5; article 14, paragraphs 1 and 3 (b and d); article 15, paragraph 1; and article 26, of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 1 January 1992.

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.



### **Factual background**

2.1 On 17 November 1994, the Krasnoyarsk Regional Court found the author guilty of multiple rape, murder, attempted murder, illegal handling and storing of firearms, and sentenced him to death. On 5 April 1995, the Supreme Court upheld the decision of the Regional Court.

2.2 The Decree of the President of the Russian Federation of 2 April 1999 on pardon, commuted the author's death sentence to life imprisonment, under section 59, paragraph 3, of the Criminal Code of 1 January 1997.

### **The complaint**

3.1 The author claims that commutation of his death sentence to life imprisonment constitutes a violation of article 15, paragraph 1, of the Covenant. In substantiation of his claim, he explains that between 1992 and 1993, when the incriminated facts took place, the Criminal Code of the Russian Soviet Federative Socialist Republic (RSFSR) of 27 October 1960, then in force, did not include life imprisonment as a penalty. He claims that section 24 of the Criminal Code of the RSFSR of 27 October 1960 provided that in case of pardon the death penalty is commuted to 15 years of imprisonment. Therefore, he argues that commutation of his sentence to life imprisonment under section 59, paragraph 3, of the Criminal Code of 1 January 1997 is a heavier penalty than the penalty proscribed by the law that was applicable when the criminal offences he was convicted of were committed.

3.2 The author claims that he has exhausted all available domestic remedies.

### **Submissions by the parties**

4.1 As there have been many submissions from the parties, with inevitable repetitions, an attempt has been made to group and cluster the arguments.

#### *Retroactive application of the law with lighter penalty*

4.2 The author argues that the President's decree of 2 April 1999 on pardon contradicts the Decree of the Constitutional Court No. 3 P of 2 February 1999, which states that the death penalty is illegal and violates sections 19; 20, paragraph 2; and 46 of the Constitution. He claims that under this decree of the Constitutional Court his death sentence should have been annulled and the sentence be brought in accordance with the legislation in force under section 10, paragraph 1, of the Criminal Code and section 54, paragraph 2, of the Constitution. The Russian President issued his decree of 2 April 1999 on pardon when the death penalty was already abolished by decree of the Constitutional Court No. 3 P of 2 February 1999. He adds that under the former Criminal Code of the RSFSR, there were "crimes" and "serious crimes", while the Russian Criminal Code of 1 January 1997 introduced a new category entitled "particularly serious crimes". Under the old code, he was convicted for committing "serious crimes", while under the new code, the crimes he committed fall under the category of "particularly serious crimes", which involve harsher sentences. Under section 10 of the Criminal Code, this law should not have been applied to him.

4.3 On 23 November 2005, the State party submits that the author's claim that the President's Decree of 2 April 1999 on pardon made his condition worse in comparison to the legislation that was in force when the crimes were committed, is unfounded. Under section 102 of the Criminal Code of the RSFSR, the maximum penalty for the crimes committed by the author was death. Under section 24, paragraph 1, of the Criminal Code of the RSFSR (the version of 17 December 1992, in force when the crimes took place), the death penalty could be commuted to life imprisonment. The decree of the Constitutional Court of 11 January 2002 declares that "pardon as an act of mercy cannot lead to

consequences that are heavier for the convict than those that were established for by the criminal law and decided by a court on a specific case". The State party argues that the commutation of a death sentence to a lighter sentence under the criminal law cannot be considered as worsening the convict's situation. Neither constitutional rights nor the provisions of section 10 of the Criminal Code, nor norms of international law were violated. The State party challenges the author's claim regarding the decree of the Constitutional Court and submits that this decree establishes a date (2 February 1999), after which no accused could be sentenced to death independently of whether his/her case was examined by a jury or by a panel of three professional judges or by one professional judge and two lay judges. The sentence of the author was handed down on 17 November 1994 and became executory on 11 April 1995.

*Allegations of procedural violations in relation to the Decree on Pardon*

4.4 On 27 September 2006, the author submits that under the "Order for consideration of petitions for pardon in the Russian Federation" endorsed by the President's decree of 28 December 2001, a request for pardon should come from the convict in the form of a written petition to the President of the Russian Federation indicating the reasons for his request. However, in his case, the President issued the Decree on Pardon without his consent and without any written petition from him. He argues that he had requested that his case be sent for additional investigation in his cassation appeal to the Supreme Court, and that he had not addressed any petition to the President. These are two different legal documents and procedural actions. The President's Decree of 2 April 1999 on pardon allegedly was not published, which the author claims contradicts section 15, paragraph 3, of the Constitution of the Russian Federation. It allegedly also contradicts the President's Decree No. 763 of 23 May 1996 on the order of publication and enforcement of acts issued by the President of the Russian Federation, the Government of the Russian Federation and normative acts of the federal executive bodies". He adds that he was not able to familiarize himself with the President's pardon decree, as he did not get a copy of it, in violation of section 24, paragraph 2, of the Constitution and the Decree of the President of 4 August 1983 on the order of issuing and certifying documents on the rights of citizens by companies, organizations and other establishments. Thus, the President's pardon decree of 2 April 1999 is not in his case file. He claims that his case file contains only extracts of the pardon, and is not signed by the President, therefore being void. In his appeal to the office of the General Prosecutor, he attached a copy of the "extracts" of the decree, not the full text. Under section 85 of the Criminal Code and section 89, paragraph b, of the Constitution, the President may pardon individuals, but from February to June 1999 the President issued 12 pardon decrees, by which he pardoned more than six hundred persons, which means that he did not pardon each individually. Section 15, paragraph 3, of the Constitution and the President's decree No. 763 of 23 May 1996 on the order of publication and enforcement of acts issued by the President of the Russian Federation, the Government of the Russian Federation and normative acts of the federal executive bodies allegedly do not establish exceptions or restrictions on the publication of any decrees and legal acts concerning human rights and freedoms in the press.

4.5 The State party contests the claims that the President's pardon decree was issued without his petition and that he was not given a copy thereof. The author's case file contains information that he did submit a petition requesting his pardon, in which he requested "to send his case for additional investigation". It states that the author's reference to the "Order for consideration of petitions for pardon in the Russian Federation" of 28 December 2001, is unfounded as this order was endorsed by the President after his pardon decree of 2 April 1999. The case file contains extracts of the Presidential pardon decree. The author was given a copy of the decree on 9 June 1999. In his appeal to the General Prosecutor's office, he did attach a copy.

*Allegations of unlawful deprivation of liberty*

4.6 The author claims that under section 90 of the Constitution of the Russian Federation “decrees, formal and non-formal orders issued by the President should be applied by the courts if they comply with the Constitution and federal laws”. He claims that his case file contains no decision by a court which endorsed the commutation of death penalty to life imprisonment. He claims that he is serving his life imprisonment illegally solely on the basis of “extracts” from the decree with no signature of the President and with no incoming and outgoing registration numbers. The stamp on the document is very simple with no state emblem, thus the “extracts” allegedly do not meet the requirements of the State standards No. p-6 30-97, and therefore are legally void. The format of the “extracts” shows that the pardon was issued by the President, who established the sentence, which contradicts section 118 of the Constitution and section 8 of the Criminal Procedure Code, which state that determining a sentence is the exclusive prerogative of the courts. Commentary to section 8 of the Criminal Procedure Code states that “despite the position or the rank of the official, he or she does not have a right to appoint, establish or select punishment”. He argues, if there is no court decision sentencing him to life imprisonment, it means that he is serving his life imprisonment term illegally. The President can only issue a pardon decree and request another penalty, but it should be the court which enforces the decree and determines the type of penalty under the Criminal Code of the RSFSR, which was in force when the crimes were committed. The sentence of 17 November 1994 did not indicate the prison term would start, nor did it indicate the type and regime of the penitentiary institution, thus violating section 302, paragraph 7, of the Criminal Procedure Code and section 308, paragraph 6 (1), of the Criminal Code. As there was no decision by a court replacing the death penalty by life imprisonment, no changes were introduced to his sentence. Therefore, he claims his detention in colony No. 6 is illegal. He claims he was deprived of his right under chapter 47 of the Criminal Procedure Code and sections 78–140 of the Criminal Executive Code to address issues related to the enforcement of his sentence. He thus claims a violation of his rights under article 9, paragraphs 1 and 5, of the Covenant.

4.7 The State party in turn contests the author’s claim and submits that the commutation of the author’s death sentence to life imprisonment was decided by the President not as part of the criminal proceedings determining a sentence, but in exercise of the constitutional right of the President to pardon. There was thus no need for an additional court decision to approve the pardon.

*Right to be heard by a competent tribunal established by law*

4.8 The author claims that the sentence of the Krasnoyarsk Regional Court on his case was illegal. He argues that criminal cases carrying the death penalty should have been examined by a panel of three professional judges or by a jury under section 15, paragraph 2, of the Criminal Procedure Code of the RSFSR. But the death sentence against the author was handed down by a panel of one professional judge and two lay judges under section 15, paragraph 1, of the Criminal Procedure Code of the RSFSR. He argues that under section 381, paragraph 2, of the Criminal Procedure Code, the sentence issued by an unlawfully constituted panel of judges also violates article 14 of the Covenant. He claims that he had insisted on being tried by a panel of three professional judges. He adds that the decision of the Supreme Court of 5 April 1995 is also illegal as there were significant violations of criminal procedure law. He claims the decision was signed by one judge, who was not even the President of the Panel, contrary to section 381, paragraph 3, part 10, of the Criminal Procedure Code. Thus, his sentence of 17 November 1994 has not been “confirmed” and therefore has not yet become executory. Under section 48 of the Criminal Code of the RSFSR, the statute of limitations for criminal liability for serious crimes is 10 years. As the author has already served 13 years in prison, he claims he should now be released. He

argues since the court decisions in the case are void, the pardon decree of the President of 2 April 1999 is also unlawful.

4.9 The State party in turn admits that the author requested that his case be examined by three professional judges. Under section 15 of the Criminal Procedure Code, then in force, criminal cases could be examined either by a collegium of judges or individually. Examination of a case by collegium of judges means examination by a professional judge and two lay judges. In all courts except for district (town) courts cases could be examined by three professional judges by decision of the court concerned and with the consent of the accused. As such, the choice of the composition of the panel was a prerogative of the court itself. The State party submits that the author did not challenge the composition of the court, nor did he present any petitions in this regard. For cases with sentences higher than 15 years' imprisonment, life imprisonment or death penalty, a court must be composed by three professional judges, but this rule was only set out in Federal Law No. 160 of 21 December 1996, after the author's sentence had been handed down.

4.10 The State party argues that the cassation decision was signed by all judges. A copy of the decision was verified by one judge of the Supreme Court as per applicable. The author's complaint under the supervisory review was rejected by the decision of the Supreme Court on 11 April 2005. The Deputy Chair of the Supreme Court upheld the decision.

*Allegations of violation of the principle of equality before the courts*

4.11 The author claims that the fact that his case was not examined by a jury contradicts section 20, paragraph 2, and section 123, paragraphs 3 and 4, of the Constitution of the Russian Federation. When his sentence was handed down, the jury panel had not yet been established in Krasnoyarsk region; as such, he claims the principle of equality was violated, contrary to article 14, paragraph 1, of the Covenant.

4.12 The State party submits that the author's claim that he was deprived of his right to a jury is unfounded and contradicts laws in force when the case was examined. Under chapter 2, part 6 on "concluding and transitional provisions" of the Constitution of the Russian Federation, until the adoption of a federal law setting out the procedure for the examination of cases by jury, the previous procedure of examination of that category of cases by courts was preserved. Chapter 10 of the Criminal Procedure Code of the RSFSR on proceedings in the court of jury, in particular section 421 read together with section 36, establishes that crimes carrying the death penalty are examined by juries in the regional, district and city courts on the basis of a petition by the accused. At the same time, under section 420 of the Criminal Procedure Code of the RSFSR, the regions in which the jury trials were established were determined by the Supreme Court. Section 30, paragraph 2, part 2 of the Criminal Procedure Code, which sets up a jury trial, has been enforced in the Krasnoyarsk region only since 1 January 2003 under section 8, paragraph 2, of the Federal Law on entry into force of the Criminal Procedure Code of the Russian Federation No. 177 of 18 December 2001.

*Allegations of discrimination on the ground of sex and social status*

4.13 The author claims that he is a victim of discrimination on the grounds of "social status" and sex, in violation of article 26, of the Covenant as under sections 57 and 59 of the Criminal Code neither death penalty nor life imprisonment can be issued against women. The author argues that the State party did not explain why this exception in law cannot be regarded as discrimination as it violates the Constitution, which guarantees that men and women have equal rights and freedoms. He also claims that he was deprived of his right to have his sentence reconsidered on the basis of new circumstances, namely the

resolution of the Constitutional Court No. 3-p of 2 February 1999, due to his social status. His appeal to the Supreme Court on this matter was rejected as repetitive.

4.14 The State party submits that the fact that women, minors as well as men above 65 are exempted from the death penalty under section 23, paragraph 2, of the Criminal Code cannot be considered as discrimination on any ground.

#### *Alleged criminal procedure violations*

4.15 The author claims that procedural violations during the pretrial investigation, the trial and the cassation court hearing should have led to the annulment of his sentence, as they violated his rights under article 14, paragraph 1, of the Covenant. He claims that most investigation acts were carried out without a lawyer; he was familiarized with the materials of his case again in the absence of his lawyer; his case was examined by an unlawfully constituted panel of judges; he was not given the protocol of the trial and did not sign it, as a result of which he could not comment on the protocol; neither he nor his lawyer participated in the hearing before the Supreme court; and he did not see the cassation appeal prepared by his lawyer. He stresses that participation of a lawyer in death penalty cases is mandatory even if the accused refuses legal assistance. He claims that the cassation court did not correct these mistakes, as it did not examine his case fully and did not admit that his right for legal assistance was violated under section 332 of the Criminal Procedure Code of the RSFSR. Therefore, he claims a violation of articles 14, paragraph 1, of the Covenant. The Committee notes that allegations may also raise issues under article 14, paragraph 3 (b and d), of the Covenant.

4.16 The State party in turn submits that the author's claim that most investigation processes were conducted in the absence of his lawyer contradict the case materials. It submits that in delivering the sentence the court relied only on those testimonies which had been given in the presence of his lawyer. The interrogations of the author as an accused person were also conducted in the presence of a lawyer. Only three initial interrogations of the author, as a suspect, and one interrogation, as an accused person, were conducted without a lawyer, as the author had refused the services of a lawyer himself stating he did not need legal assistance. Under section 50 of the Criminal Procedure Code of the RSFSR, which was in force when these investigation acts took place, the accused has a right to refuse the services of a lawyer at any stage of the process. It also contests the author's argument that he was forced to familiarize himself with the case materials in the absence of a lawyer. The State party submits that the author wanted to familiarize himself with his case file separately from his lawyer, in accordance with applicable rules. His request was granted. Therefore, his argument that he was not provided with a lawyer while familiarizing himself with his case materials is unfounded. The State party submits that a copy of the cassation appeal filed by the author's lawyer, who was representing him during the court proceeding, was sent to the author by the court on 16 January 1995. Under Section 335, paragraph 2, of the Criminal Procedure Code of the RSFSR, cassation court proceedings can only be attended by a lawyer. Participation of the accused during the process is decided by the respective court. In the present case, neither the author nor his lawyer requested the author's participation during the cassation court hearings.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

5.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol. It also notes that the author has exhausted domestic remedies, as has been conceded by the State party.

5.3 The Committee notes the author's allegations with respect to unlawful deprivation of his liberty as he claims there were several procedural irregularities in violation of article 9, paragraphs 1 and 5, of the Covenant. It notes the author's claim that his sentence does not indicate the beginning of his sentence term, or the type and regime of the penitentiary institution in violation of the Criminal Procedure Code. The Committee observes that the author's sentence was based on a court decision, i.e. on legal grounds, while the requirements of domestic legislation on the type of information a sentence should contain are outside the scope of the Covenant. Therefore, the Committee considers that this part of the complaint is incompatible *ratione materiae* with the provisions of the Covenant, and thus inadmissible under article 3 of the Optional Protocol.

5.4 The Committee notes the author's claim concerning discrimination under article 26 in respect of the capital punishment and a life sentence, on grounds of social status and sex. As regards the claim in respect of social status, the author has not sufficiently substantiated the claim for the purposes of admissibility.

5.5 With regard to his claim of discrimination on the ground of sex in respect of life imprisonment, the claim is inseparable from the claim in respect of the death penalty, as the punishment is the result of commutation of the death penalty. As to the argument that the death penalty did not apply to women and thus constituted discrimination against men, the Committee recalls its jurisprudence that not all differentiations in treatment can be deemed to be discriminatory under article 26.<sup>1</sup> In the light of the fact that under article 6 of the Covenant all measures of abolition should be considered as progress in the enjoyment of the right to life,<sup>2</sup> the Committee considers that this exemption from the death penalty cannot constitute differential treatment contrary to article 26. Accordingly the claim is insufficiently substantiated for the purposes of admissibility.

5.6 The Committee considers that the author's other allegations, under article 14, paragraphs 1 and 3 (b and d), and article 15, paragraph 1, of the Covenant, have been sufficiently substantiated, for purposes of admissibility, and declares them admissible.

#### *Consideration of the merits*

6.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

6.2 The Committee notes the author's claim that his sentence was issued by an illegal panel of judges; the cassation decision was not signed by all judges; and that he was not given the protocol of the court trial and he did not sign it, in violation of article 14, paragraph 1, of the Covenant. The Committee notes the State party's submission that under section 15 of the Criminal Procedure Code of the RSFSR, the choice about the composition of the court panel was a prerogative of the court itself. The mandatory nature of examination of cases carrying over 15 years imprisonment, life imprisonment or the death penalty by a panel of three professional judges was set out only in Federal Law No. 160 of

<sup>1</sup> See communication No. 182/1984, *Zwaan-de Vries v. The Netherlands*, Views adopted on 9 April 1987, para. 13.

<sup>2</sup> General comment No. 6 (1982) on the right to life, *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40*, vol. I (A/37/40 (Vol. I)), annex VI, para. 6.

21 December 1996, which entered into force after the author's sentence was handed down on 17 November 1994. The Committee notes the State party's argument that the original of the court decision was signed by all judges of the penal, that only the copy was verified by one judge under applicable rules. The State party argues that the author did not request a copy of the protocol of the court proceedings. The Committee notes that the author has not refuted these claims. In the absence of any other pertinent information the Committee concludes that the facts of the case do not disclose a violation of article 14, paragraph 1, of the Covenant.

6.3 The Committee takes note of the author's argument that the President's pardon decree contradicts the Decree of the Constitutional Court dated 2 February 1999. The latter states that the death penalty is not legal and violates articles 19; 20, paragraph 2; and 46 of the Constitution of the Russian Federation, as not every citizen had an opportunity to be heard by the court of jury. The author claims that the President issued his pardon decree of 2 April 1999 when the death penalty had already been abolished by the Constitutional Court decree No. 3 P. In 1994, when the sentence of the author was handed down, the jury panel had not yet been established in Krasnoyarsk region and he claims this violates the principle of equality before the courts. The Committee notes the State party's argument that the decree of the Constitutional Court No. 3 P establishes a date, 2 February 1999, from which no accused could be sentenced to death. It also notes the State party's argument that chapter 2, part 6 (on concluding and transitional provisions), of the Constitution established that until the adoption of the federal law setting out the procedure for the examination of cases by a jury, the previous procedure of examination of that category of cases by courts should be preserved. The Committee recalls its jurisprudence to the effect that while the Covenant contains no provision establishing a right to a jury trial in criminal cases, if such a right is provided under domestic law, and is granted to some persons charged with crimes, it must be granted to others similarly situated on an equal basis.<sup>3</sup> If distinctions are made, they must be based on objective and reasonable grounds. The Committee notes that under the Constitution of the State party, the availability of a jury trial is governed by federal law, but that there was no federal law on the subject. The fact that a State party that is a federal union permits differences among the federal units in respect of jury trial does not in itself constitute a violation of article 14, paragraph 1, of the Covenant.

6.4 The Committee notes the author's claim that most investigative acts were carried out in the absence of a lawyer; that he familiarized himself with the materials of his case again in the absence of a lawyer and that neither he nor his lawyer participated in the hearing before the cassation court, even though the participation of a lawyer in death penalty cases is mandatory even if the accused refuses legal assistance. The State party refutes these allegations by stating that all proceedings were conducted in the presence of a lawyer, except the initial three interrogations as a suspect and one as an accused, because the author had refused the services of a lawyer himself at that stage of the proceedings. While familiarizing himself with his case, the author wished to study his case file separately from his lawyer, and neither the author nor his lawyer requested for participation during the cassation court hearing. The author has not refuted these arguments of the State party. In the absence of any other pertinent information, the Committee concludes there has been no violation of article 14, paragraph 3 (b) and (d), of the Covenant.

6.5 With regard to the author's claim under article 15, paragraph 1, of the Covenant that commutation of his death sentence to life imprisonment is a heavier penalty than the one proscribed by the law that was applicable when the criminal offences were committed, the

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<sup>3</sup> See, in relation to article 26, communication No. 790/1997, *Cheban et al. v. Russian Federation*, Views adopted on 24 July 2001, paras. 7.2 and 7.4.

Committee notes the author's argument that the law did not include life imprisonment as a penalty and that consequently the death sentence should not have been commuted to life imprisonment, but should have been commuted only to 15 years imprisonment. The Committee, however, points out as argued by the State party that under section 24, paragraph 1, of the Criminal Code of the RSFSR, which was in force during the author's conviction, the death penalty could be commuted to life imprisonment.

6.6 The Committee notes that the author also submitted additional arguments, namely that the Decree on pardon was issued without his consent and without his written petition; it was not published in press; it was not issued for each convict individually; he is serving life imprisonment illegally on the basis of "extracts" from the decree with no signature of the President, no registration number and no official State emblem on the stamp; he was not familiarized with the Decree of the President on pardon fully as he did not get a copy of the decree; pardon issued by the President while establishing penalty is the prerogative of courts only; and finally the crimes he committed fall under the category of "particularly serious crimes" of the new Criminal Code, which entail harsher punishments, thus cannot be applied to him. The Committee observes that article 15, paragraph 1, entails the nature and the purpose of the penalty, its characterization under national law and the procedures involved in making and implementation of the penalty as part of criminal proceedings. The Committee notes that pardon is in essence humanitarian or discretionary in nature, or motivated by considerations of equity, not implying that there has been a miscarriage of justice. The Committee considers that even if the author's sentence was deterred as part of the criminal proceedings, it was well within the limits provided by both the old Code and the new Code. Therefore the Committee concludes that there has been no violation of article 15, paragraph 1, of the Covenant.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a breach of any of the provisions of the Covenant invoked by the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]



**O. Communication No. 1442/2005, *Kwok v. Australia*  
(Views adopted on 23 October 2009, ninety-seventh session)\***

<i>Submitted by:</i>	Yin Fong, Kwok (represented by counsel, Nicholas Poynder and Leonard Karp)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Australia
<i>Date of communication:</i>	25 November 2005 (initial submission)
<i>Subject matter:</i>	Deportation to China, possible application of the death penalty
<i>Procedural issues:</i>	None
<i>Substantive issues:</i>	Right to life; unlawful and arbitrary detention
<i>Articles of the Covenant:</i>	6, paragraphs 1 and 2; 7; 9, paragraphs 1 and 4; and 14
<i>Article of the Optional Protocol:</i>	None

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

*Meeting on 23 October 2009,*

*Having concluded* its consideration of communication No. 1442/2005, submitted to the Human Rights Committee on behalf of Yin Fong, Kwok under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication, and the State party,

*Adopts* the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1.1 The author of the communication is Ms. Yin Fong, Kwok a Chinese citizen, currently in community detention in Australia, awaiting deportation to China. She claims to be a victim of violations by Australia of article 6 paragraphs 1 and 2; article 7; article 9, paragraphs 1 and 4; and article 14 of the International Covenant on Civil and Political Rights. She is represented by counsel: Mr. Nicholas Poynder and Mr. Leonard Karp.

1.2 On 6 December 2005, the Special Rapporteur on new communications and interim measures requested the State party not to deport the author while her case is under consideration by the Committee, in accordance with rule 92 of the Committee's rules of procedures. On 11 September 2006, the State party acceded to this request.

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\* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

**Factual background**

2.1 In 1994, the author's husband, Mr. Linsheng, Zhang, became the Deputy Director of the Roads and Traffic Management Centre in Guangzhou, in China. In the same year, the author became a Hong Kong resident and started a business called Everwell Gain Enterprises. The author and Mr. Zhang lived apart but visited each other regularly. In September or October 1999, Mr. Zhang became the head of the Guangzhou City Public Security Bureau Traffic Police Branch. In his new position, it is claimed that he attempted to improve efficiency and eradicate corruption. On 5 March 2000, he was called to a meeting at the Roads and Traffic Management Centre in Guangzhou from which he did not return. The author later discovered that he had been detained and was being held without charge by the Chinese authorities, ostensibly on suspicion of bribery and corruption.

2.2 On 10 March 2000, the author left Hong Kong, China for Australia. She wanted to visit her sister and niece who resided there. She also stated to State party authorities that her husband had disappeared four days previously under unusual circumstances and she was "unsure about [her] own future". The author entered the State party legally on a temporary visitor's visa, which was extended until 31 January 2001. On 4 January 2001, she left the State party to visit her son, who was studying in Canada. Her flight to Canada included a stopover in Honolulu, where she was refused entry by immigration officials of the United States of America, and was put back on a plane to the State party. On 5 January 2001, she arrived in the State party and was interviewed by an officer from the Department of Immigration (the Department). Unknown to her at the time, the reason for the interview was that a "person alert" had been issued in relation to her. This "person alert" indicated that the Federal Police had been advised by "Beijing post" that the author was wanted in China for diverting over 1 million yuan of company funds and was suspected of bribery. Although the alert contained a note indicating that relevant papers were held in the Investigations Policy & Coordination Section of the State party's authorities, the only information given to the author at the time was that a warrant had been issued for her arrest by Chinese authorities. Following the interview, the immigration officer cancelled the author's visa on the basis that she was not intending to stay temporarily as a tourist. On 5 January 2001, she was taken into detention.

2.3 On 8 January 2001, the author lodged an application for a protection visa, on the grounds that the charges against her and Mr. Zhang were politically motivated. On 25 January 2001, she made similar claims in an interview with an officer from the Department. On 8 March 2001, a delegate of the Minister for Immigration refused her application for a protection visa, on the grounds that her claims were implausible and fabricated. On 12 March 2001, she lodged an application for review of the delegate's decision with the Refugee Review Tribunal (RRT). In her application form, she stated that to support her case, she would need information in the possession of the State party Government about the accusations made against her in China. Over the next four and a half years she pursued proceedings before the RRT and in the Federal Court, in which she sought access to information relating to the charges forwarded by Chinese authorities to the State party. The State party resisted release of this information, on the grounds that the information had been provided in confidence by the Government of China. On 7 June 2001, the RRT refused the application for a protection visa for the first time. The author sought judicial review of the RRT decision by the Federal Court.

2.4 On 7 September 2001, the Administrative Appeals Tribunal (AAT) refused an application for review of an earlier decision of the Department to refuse access to the requisite information under the Freedom of Information Act 1982 (Cth). On 16 October 2001, the Federal Court dismissed the author's request for judicial review of the AAT decision. The author appealed against this decision to the Full Bench of the Federal Court. On 20 March 2002, the Full Bench allowed the appeal and directed the Department to

produce to the author documents in its possession but “limited to those which reveal the name of the agency from which the document originated and any request for confidentiality by the Chinese authorities”.

2.5 On 1 November 2001, the Federal Court dismissed the application for judicial review of the first RRT decision. The author appealed against this decision to the Full Bench of the Federal Court. On 18 May 2002, the Minister for Immigration conceded the appeal against the RRT decision on the grounds of “breach of procedure” by the RRT. The application for a protection visa was remitted to a differently constituted RRT for re-determination. On 6 December 2002, a re-constituted RRT refused the application for a protection visa for a second time. On this occasion, the RRT again refused to give the author access to the information requested. The author sought judicial review of this RRT decision by the Federal Court. On 16 May 2003, the Federal Court granted the application for judicial review of the RRT decision, on the grounds that the RRT had failed to give the author a copy of the advice given by the Secretary of the Department regarding the significance of the information given by the Government of China. The application for a protection visa was remitted to a differently constituted RRT for re-determination.

2.6 On 30 August 2003, a re-constituted RRT refused the application for a protection visa for a third time. The author went through the usual appeal procedures culminating in the Full Bench of the Federal Court granting the appeal on 17 June 2004, on the grounds that the RRT had failed to consider whether the author could be told the “gist” of the information withheld even if the information could not be released in its entirety. The application for a protection visa was remitted to a differently constituted RRT for re-determination. On 4 November 2004, the RRT refused the application for a protection visa for a fourth time. On this occasion, the RRT again refused to give the author access to the information, although it *did* explain the “gist” of the information. This information consisted inter alia of the charges which she may face if returned, including charges of corruption, which carry the death penalty but is not mandatory. The author sought judicial review of the RRT decision by the Federal Court and availed herself of the appeal procedures available, culminating in the High Court’s refusal to grant special leave to appeal on 7 October 2005.

2.7 The author subsequently made a request to the Minister for Immigration to remain in Australia, according to section 417 of the Migration Act 1958, under which the Minister has a non-enforceable discretion to substitute a more favourable decision for a decision of the RRT if “it is in the public interest to do so”, including where there are circumstances that provide a sound basis for a significant threat to that person’s security, human rights or human dignity on return to their country of origin, where there are circumstances that may bring Australia’s obligations under the Covenant into consideration, or where there are unintended but particularly unfair or unreasonable consequences of legislation. The author has not yet received any decision from the Minister in relation to her request. Should the Minister decline to exercise the discretion under section 417, the author must, pursuant to section 198 of the Migration Act, be removed from Australia “as soon as reasonably practicable”. According to the author, she is unaware of the precise nature of the offence she is alleged to have committed. While she has been given the “gist” of the factual allegations, she has not been provided with a copy of the arrest warrant or the charge sheets. The following information is known to her: newspaper reports provided by the RRT suggested that, by June 2000, it was public knowledge that Mr. Zhang was under investigation for large-scale corruption. He had been accused of using his position as head of the Traffic Police in Guangzhou to solicit and accept bribes, and he had received unlawful benefits from the Guangdong Paili Driving Service Company, in which he was given a 20 per cent stake, and his wife 40 per cent. He had paid money into a bank account held by his wife in Hong Kong, China.

2.8 According to an article in the *Singtao Daily* newspaper, dated 5 August 2004, which was provided by the author to the RRT, Mr. Zhang had been sentenced to death by the Chinese authorities for accepting bribes in October 2003. The article also made reference to the author's application for a protection visa, her fear of being persecuted by Chinese authorities, and the litigation over access to the information provided by Chinese authorities. The author denied the allegations made by Chinese authorities maintaining that the prosecution of her husband is politically motivated, and that she will suffer the same prosecution if she is returned to China. She also claims that she faces further punishment if returned, as she has been publicly identified in newspaper articles as an applicant for refugee status in the State party and a critic of the Chinese authorities. The RRT, on 4 November 2004, made no finding as to the truth or otherwise of the allegations against her but rejected her contention that the charges are contrived or politically motivated. It further rejected the author's argument that she faces mistreatment in China on the basis of her request for refugee status as, according to the Department of Foreign Affairs and Trade in 1995, it was unaware of any substantiated claims of mistreatment of failed refugee claimants who had returned to China.

### **The complaint**

3.1 The author claims a violation of article 6 of the Covenant by the State party, if she is returned to China, as there is a "real and foreseeable risk" that she will be convicted and sentenced to death. Although she has not been provided with any information on the legal provisions on which she may be charged, nor whether the death penalty is a mandatory sentence should she be found guilty, she has been the subject of substantially the same allegations as her husband and would thus face similar charges. Moreover, given the conviction of her husband, and the imposition of the death penalty upon him, it can be inferred that she will similarly be found guilty and face a similar penalty. China applies the death penalty to "white collar" crimes such as corruption. She also claims that corruption, which is the nature of the charge against her, involves no loss of life, or physical harm and thus does not meet the threshold of a "most serious" crime, within the meaning of article 6, paragraph 2.

3.2 The author claims a violation of article 7 of the Covenant if returned to China, as there is a "real and foreseeable risk", that she will be subjected to torture or cruel, inhuman or degrading treatment or punishment. She also claims a violation of article 14 if returned, as it is unlikely that she will be afforded due process, including the right to a fair hearing by an independent and impartial tribunal, the right to review by a higher tribunal, the right to adequate time and facilities for preparation of her defence, and the right to counsel.<sup>1</sup> She also claims that as she will not be protected by the legal system in the People's Republic of China, the necessary and foreseeable consequence of her deportation is that she will be exposed to a risk of her rights under article 7.

3.3 The author claims a violation of article 9, paragraphs 1 and 4, of the Covenant with respect to her prolonged detention for over four years. The effect of section 189 of the Migration Act under which the author was detained is that the author could not be released from detention under any circumstances. There is no provision which would allow her to be released from detention, either administratively or by a court.

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<sup>1</sup> To support her claim she provides a report of 22 March 2004, from Amnesty International, entitled "People's Republic of China: executed "according to law"? The death penalty in China" (AI Index: ASA 17/003/2004), as well as United States Department of State, "China (includes Tibet, Hong Kong, and Macau)", Country Reports on Human Rights Practices: 2006 (Bureau of Democracy, Human Rights, and Labor, 2007), available from [www.state.gov/g/drl/rls/hrrpt/2006/78771.htm](http://www.state.gov/g/drl/rls/hrrpt/2006/78771.htm).

### The State party's admissibility and merits submission

4.1 On 11 July 2007, the State party commented on admissibility and merits. It argues that all of the author's claims are inadmissible for lack of substantiation and that the claim in relation to article 7 is inadmissible as incompatible with the provisions of the Covenant. As to article 6, the State party submits that the author failed to make out a prima facie case that she will be subjected to arbitrary deprivation of life if returned to China, in that the application of the death penalty does not prima facie constitute *an arbitrary* deprivation of life. It refers to the Committee's jurisprudence that, if a person is subjected to the death penalty contrary to the provisions of article 6, paragraph 2, the removing State may be found in violation of article 6, paragraph 2, read in accordance with article 6, paragraph 1, if the application of the death penalty would amount to an arbitrary deprivation of life.<sup>2</sup> She has not provided details as to whether the individual circumstances of her case would constitute a serious crime or whether the death penalty, if it were imposed for the crimes with which she may be charged, would not be imposed by a properly constituted court.<sup>3</sup>

4.2 The State party submits that even if the death penalty in this instance can be interpreted to be an arbitrary deprivation of life, the author has not sufficiently substantiated her claim that she faces a real risk of being subjected to the death penalty if returned to the People's Republic of China. The State party acknowledges its obligations pursuant to the Committee's jurisprudence in *Judge v. Canada*,<sup>4</sup> that it should not return the author to China if there is a real risk that she will face the death penalty. However, it submits that the author has not substantiated that "she will be convicted of any crimes in particular as she has not yet been charged, and has not demonstrated that the People's Republic of China will impose the death penalty on her if she is convicted".

4.3 The State party rejects the author's argument that she has not been provided with "any of the legal provisions under which she has been charged, nor whether the death penalty is a mandatory requirement should she be found guilty". She has not been charged and was provided with a summary of possible charges against her by the Refugee Review Tribunal. While the copy of the Tribunal decision submitted to the Committee has some pages blacked out, the author received a complete copy of the decision and the relevant sections dealing with potential charges against her were clear. The State party admits that the charges which she may face, including charges of corruption, carry the death penalty in China, but note that it is not mandatory, and it is not certain that she will be found guilty of these offences even if charged. As to the documents provided by the author to support her claims, the State party refers to the Committee's jurisprudence to support its argument that it is impossible to determine the intent of another country in an individual case by reference to documents of a general nature.<sup>5</sup> The author has not demonstrated that there is a pattern of conduct in similar cases to her own and has therefore not sufficiently substantiated her

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<sup>2</sup> Communication No. 692/1996, *A.R.J. v. Australia*, Views adopted on 28 July 1997, para. 6.13.

<sup>3</sup> According to the State party, it is beyond the scope of the Committee and the Government of Australia to determine whether China (which has not ratified the Covenant or the Second Optional Protocol) imposes the death penalty for other than the most serious crimes and without due process at law as this would mean making a judgment on China's internal domestic regulation. Communication No. 470/1991, *Kindler v. Canada*, Views adopted on 30 July 1993, para. 8.6.

<sup>4</sup> Communication No. 829/1998, *Judge v. Canada*, Views adopted on 5 August 2003.

<sup>5</sup> Communication No. 445/1991, *Champagnie, Palmer and Chisholm v. Jamaica*, Views adopted on 18 July 1994, para. 5.3.

claim.<sup>6</sup> She herself doubts that the Chinese authorities will be able to make out a case against her and if it is unable to do so, she will not face any punishment.<sup>7</sup>

4.4 On the article 7 claim, the State party notes that the author does not elaborate on what treatment she may receive in China or how such treatment would constitute torture or cruel, inhuman or degrading treatment or punishment. It is aware of the findings of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment who stated that, while the Government of China is ready to take steps to “combat torture and ill-treatment”, he acknowledges that torture is often practiced in the criminal justice system.<sup>8</sup> For this reason, the State party submits that it would not return the author if it were satisfied that there is a real risk of torture or cruel, inhuman or degrading treatment or punishment. On the claim under article 14, apart from the provision of a report from the United States State Department, the author makes no attempt to demonstrate why or how she will be personally subjected to treatment contrary to article 7 if returned to China.<sup>9</sup> In the State party’s view, it is particularly incumbent on the author to provide information which demonstrates her claims, given that the allegations concern a State which is not the State party.

4.5 The State party also submits that the claim under article 7 is incompatible *ratione materiae* with the provision of the Covenant, as the author attempts to make a non-refoulement claim in relation to the right to a fair trial, which is not encompassed by article 7. The author appears to argue that not having a fair trial in accordance with article 14 will constitute a breach of article 7 of the Covenant. She argues that authorities in China “consistently disregard due procedure” for white collar crimes, such as bribery and corruption, but in the State party’s view, a breach of article 14 by another State does not constitute conduct that would breach its non-refoulement obligation under the Covenant. It submits that the non-refoulement obligation is implied under article 2, which obliges States parties to ensure that all individuals within their territory and subject to their jurisdiction have their rights recognized in accordance with the Covenant. According to the Committee’s jurisprudence, the responsibility of a State party for the actions of another State only applies with respect to very serious violations of the Covenant, namely under articles 6 and 7, but does not extend to other Covenant articles such as article 14.<sup>10</sup> Specifically, the Committee has previously noted that due process guarantees under article 14 do not fall within the ambit of the prohibition on non-refoulement.<sup>11</sup>

<sup>6</sup> See communication No. 236/1987, *V.M.R.B. v. Canada*, decision on inadmissibility adopted on 18 July 1988, para. 6.3. Communication No. 706/1996, *G.T. v. Australia*, Views adopted on 4 November 1997, para. 8.4.

<sup>7</sup> It refers to the author’s initial submission in which she states: “It is manifest in these circumstances that such conduct cannot amount to a ‘most serious’ crime. As such, even if the Chinese authorities are able to prove the case against the alleged victim there is no grounds for justifying the imposition of the death penalty under article 6.”

<sup>8</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (E/CN.4/2006/6/Add.6), para. 71.

<sup>9</sup> In this regard, she refers to communication No. 445/1991 (note 5 above), where the Committee considered that the authors, by merely referring to a report outlining the conditions of detention in Jamaican prisons, had failed to substantiate the allegation that they were the victims of a violation of article 10 of the Covenant for purposes of admissibility.

<sup>10</sup> See Communications No. 470/1991, *Kindler v. Canada* (note 3 above); No. 539/1993, *Cox v. Canada*, Views adopted on 31 October 1994; general comment 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III, para. 12.

<sup>11</sup> *A.R.J. v. Australia* (note 2 above).

4.6 As to the claims under article 9, paragraphs 1 and 4, the State party submits that the author has failed to outline any attempts she has made to seek review of her detention or challenge its lawfulness (art. 9, para. 4) and has not demonstrated that it was in any way arbitrary or unlawful (art. 9, para. 1). She has thus failed to substantiate these claims. She was released from Villawood Immigration Detention Centre in 2005 and is now in community detention, which means that she is able to live in the community subject to certain conditions.<sup>12</sup> The State party submits that the author's detention occurred and continues to occur in accordance with procedures established by the Migration Act and is therefore lawful. As an unlawful non-citizen,<sup>13</sup> the author was detained pursuant to section 189 of the Migration Act.<sup>14</sup> Her detention continued while she pursued four years of appeals, and continues while the State party considers possibilities for her safe removal.

4.7 The State party denies that the author's detention was arbitrary. The provisions of the Migration Act under which she is detained, and the individual facts of her case, justify her detention. She has since been released into community detention and has not been granted a visa to remain in the State party. Her release into community detention demonstrates that her case has been under review and that all attempts were made to ensure that the policy was applied appropriately and proportionately. Mandatory immigration detention is a measure for, among others, people who arrive in the State party without a valid visa.<sup>15</sup> The detention of such persons is necessary to ensure that they are available for the processing of any protection claims, to enable essential identity, security, character and health checks to be carried out, and to ensure that they are available for removal if found not to have a basis to lawfully remain in the State party. This approach is consistent with the fundamental principle of sovereignty in international law, which includes the right of a State to control the entry of non-citizens into its territory. Various versions of these immigration detention provisions have been considered by the High Court and were found to be constitutional.<sup>16</sup>

4.8 According to the State party, a person can be released from immigration detention for a number of reasons, including when there is no longer a reasonable suspicion that the person is an unlawful non-citizen, that the person becomes a lawful non-citizen or citizen, or if a court finds that detention was not lawful under the Migration Act. The author could

<sup>12</sup> The State party explains that community detention is a policy which was introduced in June 2005 following amendments to the Migration Act 1958. These amendments provide the Minister with a non-compellable, non-delegable public interest power to specify alternative detention arrangements for a person's detention and conditions to apply to that person. Placement in community detention enables people to move about in the community without needing to be accompanied or restrained by an immigration officer, or designated person. It is a form of immigration detention and does not give her any lawful status or the rights or entitlements of a person living in the community who is the holder of a valid visa. Efforts to arrange her removal from Australia continue while she is living in community detention.

<sup>13</sup> Migration Act 1958 (Cth), section 14.

<sup>14</sup> *Ibid.*, sections 196 and 198. Section 189, para. 1, provides relevantly: "If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person." Section 196 of the Migration Act provides for the duration of detention: "An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is: (a) removed from Australia under section 198 or 199; or (b) deported under section 200; or (c) granted a visa."

<sup>15</sup> The State party refers to its response to communication No. 560/1993, *A. v. Australia*, Views adopted on 3 April 1997, para. 5.

<sup>16</sup> *Chu Kheng Lim v. Minister for Immigration and Ethnic Affairs* (1992) 176 CLR 1, 46 (Toohey J). *Minister for Immigration and Multicultural and Indigenous Affairs v. Al Khafaji* [2004] HCA 38. *Al-Kateb v. Godwin, Keenan & Minister for Immigration and Indigenous and Multicultural Affairs* (2004) 219 CLR 555.

have brought a writ of habeas corpus in the Federal Court or the High Court, to determine the legality of the detention and the court could have ordered her release if it found that she had been detained unlawfully under section 189 of the Migration Act.<sup>17</sup> A range of administrative mechanisms are also available for persons to be released from detention, including the grant of a bridging visa in appropriate circumstances and the Minister's personal power to grant a visa to a detainee in the public interest. In relation to the cancellation of her visa on 5 January 2001, the author could also have sought judicial review of this decision.

4.9 As to the author's reference to *A. v. Australia*, the State party observes that it did not accept the Committee's Views. In any event, it considers that the facts of this case are different, as the author had her visa cancelled in 2001, and had pursued four years of litigation relating to her protection visa application, which prolonged her detention. The State party could not have commenced the removal process until these proceedings had been concluded. Moreover, the author was detained in Villawood Immigration Detention Centre at all times until released into community detention and has always had access to her legal representatives, who have remained the same throughout her detention. Now that she is in community detention, she is still free to access her legal representatives at any time and to interact with the community, in accordance with the terms and conditions of her release. In the event that the Committee finds the communication admissible, the State party provides the same arguments on the merits as it does in seeking to establish that the author has failed to substantiate her claims.

#### **Author's comments on the State party's observations**

5.1 On 19 December 2007, the author argued that she is at a distinct disadvantage compared to the State party, which has all the documentation in relation to this case, in seeking to substantiate her claims because she has only had access to limited information. However, based on this limited information, it is beyond doubt that her husband was convicted and sentenced to death for corruption, and that a warrant for her arrest was issued by the Chinese authorities.<sup>18</sup> None of this has been challenged by the State party. The author submits that there is nothing more she can do other than to provide independent information about the pattern of conduct in similar cases in China. She argues that the test is whether there is a *real risk* that her rights under the Covenant will be violated in China,<sup>19</sup> and that she is not obliged, as suggested by the State party, to substantiate "that she *will* [emphasis added] be convicted of any crimes" or "that China *will* [emphasis added] impose the death penalty on her if she is convicted".

5.2 As to the State party's argument that the allegations under article 7 are incompatible *ratione materiae* with the provisions of the Covenant, as to her non-refoulement claim in relation to the right to a fair trial, the author refers to the Committee's Views in *Larrañaga v. The Philippines*,<sup>20</sup> where it was held that the imposition of the death penalty on a person after an unfair trial wrongly subjected that person to the fear that he will be executed and, in the circumstances where there is a real possibility that the sentence will be enforced, that fear must give rise to such anguish as to amount to a violation of article 7. She also refers to

<sup>17</sup> *Al-Kateb v. Godwin & Ors* (2004) 219 CLR 555, 573 (McHugh J).

<sup>18</sup> In this regard, she refers to the RRT decision of 4 November 2004, pp. 67–68, 72–73 annex, and 84–85 annex.

<sup>19</sup> *A.R.J. v. Australia* (note 2 above).

<sup>20</sup> Communication No. 1421/2005, Views adopted on 24 July 2006.



*Alzery v. Sweden*, where the Committee accepted that removal to a country which may have exposed the author to a manifestly unfair trial could give rise to a claim under article 14.<sup>21</sup>

5.3 As to the State party's arguments on article 9, the author submits that the State party has been attempting for many years, without success, to justify its policy of mandatory detention for all unauthorized arrivals and refers to the Committee's jurisprudence in this regard, including *A. v. Australia*.<sup>22</sup> The fact that the author had her visa cancelled upon arrival in the State party does not distinguish her case so as to make her detention justifiable. In her view, the fact that she had lawfully obtained her visa prior to entering the State party should have given the authorities less reason to detain her. The State party's justification for mandatory detention has been to ensure availability for processing protection claims, to enable essential identity, security, character and health checks to be carried out and to ensure availability for removal if protection claims are denied. The author argues that there could have been no doubt as to her identity and there is no reason why the State party could not have released her into community detention sooner. As to the argument that she could have challenged the legality of her detention by writ of habeas corpus, the Committee has already made it clear that a person is not required to pursue futile remedies, and since the High Court has upheld the validity of the State party's mandatory detention system, there would be no prospect of success with such a claim.

#### **Supplementary submissions from the author and the State party**

6. On 18 June 2008, the author submitted a copy of a report from the Commonwealth and Immigration Ombudsman to the Minister for Immigration and Citizenship, dated 28 March 2008, as well as other documentation, which indicates that the State party has sought diplomatic assurances from China that the author will not be subjected to any violation of her rights under the Covenant if she is returned there. The same report also indicated that the author's request that the Minister exercise his non-reviewable discretion under section 417 of the Migration Act 1958 to allow her to remain in Australia may be determined by the outcome of Australia's request for diplomatic assurances from China. The fact that the State party has sought diplomatic assurances from China was not previously disclosed to the author. The author requests the Committee to "caution" the State party against the proposed use of diplomatic assurances in the present case.

7.1 On 3 October 2008, the State party responded to the author's supplementary submission. It admits that the Ombudsman's report contains errors and that the statements that the Government is seeking assurances from China either with respect to the imposition of the death penalty or relating to torture are incorrect. The State party submits that it has no plans to remove the author from Australia and that it has not sought assurances from China in relation to the author. The actions described in the Ombudsman's report are at a very early stage and have not progressed to a Government decision to seek assurances at this stage. It submits that the author still has an outstanding Ministerial intervention request before the Department of Immigration and Citizenship and that this request has not yet been finalized given the complexity of the case. The author remains in community detention.

7.2 The State party submits that it has provided all relevant information to both the Committee and the author on this case.<sup>23</sup> The author was provided with a summary of possible charges against her if she is returned to China when her case was before the Refugee Review Tribunal. She also received a copy of the RRT decision, including the relevant sections dealing with potential charges against her. And she has subsequently been

<sup>21</sup> Communication No. 1416/2005, Views adopted on 25 October 2006.

<sup>22</sup> Note 15 above.

<sup>23</sup> It refers to communication No. 30/1978, *Bleier v. Uruguay*, Views adopted on 29 March 1982.

the subject of four Ombudsman investigations and reports, which have been provided in full to her.

7.3 The State party submits that even if it were to seek assurances from China, while the negotiations for such assurances are continuing, it would be inappropriate, nor the practice of the State party, to disclose to the subject of those negotiations the existence of same. Such diplomatic negotiations are sensitive and confidential. However, the State party submits that it would disclose the final outcome of such negotiations to the person to be removed. It submits that it is entitled to undertake procedures to assess the viability of removing the author, including assessing whether it can remove the author to China without the risk of breaching its non-refoulement obligations. These assessments are still ongoing, but there has been no information received in the course of these assessments that is not known to the author.

7.4 The State party submits that seeking assurances would be a permissible option in this case. There is no prohibition on an abolitionist State removing a person to a State that maintains the death penalty where there is no real risk of it being applied. The seeking of diplomatic assurances is common international practice and necessary in cases of extraction or removal where the State assesses that there is a risk that the death penalty might be imposed. The State party refers to the principle that if there is a real risk that the death penalty may be applied in a given case, a State cannot remove the person “unless the Government, which has requested the extradition, provides a legally binding assurance not to execute the person”.<sup>24</sup> The State party is of the view that the same principle applies to removals and refers to the Committee’s jurisprudence.<sup>25</sup> The State party submits that a legally binding assurance is one given by the part of the Government or the judiciary that would usually have the responsibility of carrying out the act or enforcing the assurance. The State party does not consider that there is a real risk that the author will face the death penalty if returned to China. However, if it should form the view that the death penalty would be imposed upon her, the Government would seek assurances that she not face the death penalty were it to remove her to China.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

8. Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol. The Committee does not accept the State party’s argument that the author’s claims are inadmissible on grounds of non-substantiation, as the author has made reasonable efforts to substantiate her claims of violations of the Covenant for the purposes of admissibility. Similarly, it considers all the claims of the author compatible *ratione materiae* with the Covenant. The Committee also finds that given that no issue arises with respect to the exhaustion of domestic remedies, article 5, paragraph 2 (b), of the Optional Protocol does not prohibit it from considering this case on the merits.

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<sup>24</sup> Manfred Nowak, *UN Covenant on Civil and Political Rights. CCPR Commentary* (2nd rev. ed.) (Kehl am Rhein, Engel, 2005), p. 150.

<sup>25</sup> Communication No. 706/1996, *G.T. v. Australia*, Views adopted on 4 November 1997.

*Consideration of the merits*

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee notes that the author makes no claim per se under the Covenant with respect to the decision of the State party to provide her with only limited information on the alleged charges against her, including only “the gist” of the information, submitted to it by the Chinese authorities. It also notes that the State party has denied the claim that diplomatic assurances have been requested in this case, a denial to which the author has not responded. For this reason, the Committee does not intend to consider these issues.

9.3 With respect to the claim that the author was arbitrarily detained, in terms of article 9, paragraph 1, prior to her release into community detention, the Committee recalls its jurisprudence that, in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification.<sup>26</sup> In the present case, the author’s detention as an unlawful non-citizen continued, in mandatory terms, for four years until she was released into community detention. While the State party has advanced general reasons to justify the author’s detention, the Committee observes that it has not advanced grounds particular to her case which would justify her continued detention for such a prolonged period. In particular, the State party has not demonstrated that, in the light of the author’s particular circumstances, there were no less invasive means of achieving the same ends. While welcoming her eventual release into community detention, the Committee notes that this solution was only made possible after she had already spent four years in secure detention. For these reasons, the Committee concludes that the author’s detention for a period in excess of four years without any chance of substantive judicial review, was arbitrary within the meaning of article 9, paragraph 1.

9.4 With respect to the remaining claims relating to the author’s possible deportation, what is at issue in the case is whether by deporting the author to China, there are substantial grounds for considering that the State party would be exposing her to a real risk of irreparable harm,<sup>27</sup> in violation of article 2, read together with article 6 and/or article 7 of the Covenant. In this regard, the Committee recalls that, a State party, which has itself abolished the death penalty, would violate an individual’s right to life under article 6, paragraph 1, if it were to remove a person to a country where they are under a sentence of death.<sup>28</sup> The question in this case is whether there are substantial grounds for considering that there is a real risk that the author’s deportation would result in the imposition on her of such a sentence, i.e., a real risk of irreparable harm. The Committee also recalls its jurisprudence that the imposition of a death sentence on a person after an unfair trial is to

<sup>26</sup> *A. v. Australia* (note 15 above); communication No. 900/1999, *C. v. Australia*, Views adopted on 28 October 2002.

<sup>27</sup> Human Rights Committee, general comment No. 31 (2001) on the nature of the general legal obligation imposed on States parties to the Covenant, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III. According to para. 12, “... the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed”.

<sup>28</sup> *Judge v. Canada* (note 4 above).

subject that person wrongfully to the fear that he/she will be executed in violation of article 7 of the Covenant.<sup>29</sup>

9.5 As to the facts, it would appear that the author has not yet been charged, but that at least one warrant for her arrest was issued by the Chinese authorities. The State party concedes that the likely charges, including charges of corruption, carry the death penalty in China, but argues that it is not mandatory, and that it is not certain that she will be found guilty of these offences if charged (para. 4.3 above). The State party does not pronounce itself on the likelihood of the Chinese authorities approaching it with a warrant for the author's arrest if they do not intend to charge her if she returns to its jurisdiction. While recognizing that neither the Committee nor the State party are in a position to assess the guilt or otherwise of the author or to assess the likelihood of the imposition of a non-mandatory sentence in the event that she is convicted, the Committee notes that the risk to the author's life would only be definitively established when it is too late for the State party to protect her right to life under article 6 of the Covenant.

9.6 The Committee observes that the State party does not contest the assertion that the author's husband has been convicted and sentenced to death for corruption, and that the warrant issued by the Chinese authorities for the author's arrest relates to her involvement in the same set of circumstances. The RRT itself, on 4 November 2004, while making no finding on the author's guilt or innocence, rejected the contention that the charges against her are contrived. The Committee reiterates that it is not necessary to prove, as suggested by the State party, that the author "will" be sentenced to death (para. 4.2 above) but that there is a "real risk" that the death penalty will be imposed on her. It does not accept the State party's apparent assumption that a person would have to be sentenced to death to prove a "real risk" of a violation of the right to life. It also notes that it is not made out from a review of the judgements available to the Committee, albeit incomplete, of the judicial and immigration instances seized of the case that arguments were heard as to whether the author's deportation to China would expose her to a real risk of a violation of article 6 of the Covenant.

9.7 The Committee notes that the State party does not contest the author's claims that she is at risk of having an unfair trial if she were to be returned to China but merely argues that its non-refoulement obligations do not extend to article 14 violations (para. 4.5 above). However, the Committee is obliged to give due weight to her argument of such a risk, as well as the fact that the author's spouse has apparently been sentenced to death for "accepting bribes" (para. 2.8) and that a warrant has been issued for her own arrest for similar offences (paras. 2.2 and 2.6). The Committee is also cognizant of the anxiety and distress that would be caused by her being exposed to such a risk. For all of the above reasons and while recognizing the State party's assertion (para. 7.1) that it currently has no plans to remove her from Australia, the Committee considers that an enforced return of the author to China, without adequate assurances, would constitute violations by Australia, as a State party which has abolished the death penalty, of the author's rights under article 6 and article 7 of the Covenant.

9.8 Having found a violation of article 9, paragraph 1, with respect to the author's detention, and potential violations of articles 6 and 7, in the event that the State party forcibly removes the author to the Peoples' Republic of China without adequate assurances, the Committee does not consider it necessary to address whether the same facts amount to a violation of article 6, paragraph 2, article 9, paragraph 4, or article 14 of the Covenant.

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<sup>29</sup> Communication No. 1421/2005, *Larrañaga v. the Philippines*, Views adopted on 24 July 2006.

10. The Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal a violation by Australia of article 9, paragraph 1, and that the enforced removal of the author to the Peoples' Republic of China without adequate assurances would amount to violations of articles 6 and 7, of the Covenant.

11. Pursuant to article 2, paragraph 3 (a) of the Covenant, the Committee concludes that the author is entitled to an appropriate remedy to include protection from removal to the People's Republic of China without adequate assurances as well as adequate compensation for the length of the detention to which the author was subjected.

12. Bearing in mind that, by becoming a State 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 or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to its Views. The Committee is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**P. Communication No. 1465/2006, *Kaba v. Canada*  
(Views adopted on 25 March 2010, ninety-eighth session)\***

<i>Submitted by:</i>	Diene Kaba (represented by counsel, Johanne Doyon, later Valérie Jolicoeur)
<i>Alleged victim:</i>	Diene Kaba and Fatoumata Kaba, her minor daughter
<i>State party:</i>	Canada
<i>Date of communication:</i>	7 April 2006 (initial submission)
<i>Decision on admissibility</i>	1 April 2008
<i>Subject matter:</i>	Removal of the author and her daughter to Guinea
<i>Procedural issues:</i>	Failure to exhaust domestic remedies; failure to substantiate allegations
<i>Substantive issues:</i>	Risk of the author's daughter being subjected to excision if removed to Guinea
<i>Articles of the Covenant:</i>	7; 9, paragraph 1; 13; 14; 18, paragraph 1; 24, paragraph 1
<i>Articles of the Optional Protocol:</i>	2; 5, paragraph 2 (b)

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

*Meeting on 25 March 2010,*

*Having concluded* its consideration of communication No. 1465/2006 submitted to the Human Rights Committee by Ms. Diene Kaba under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication, and the State party,

*Adopts* the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1.1 The author of the communication is Ms. Diene Kaba, born on 27 March 1976 in Monrovia, Liberia, a national of Guinea, who has submitted the communication on her behalf and on that of her daughter, Fatoumata Kaba, born on 2 December 1994 in Guinea. She states that her removal to Guinea with her daughter would violate their rights under articles 7; 9, paragraph 1; 13; 14; 18, paragraph 1; and 24, paragraph 1, of the Covenant.

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\* The following members of the Committee participated in the consideration of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sánchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

They are represented by counsel, Ms. Johanne Doyon and later Ms. Valérie Jolicoeur. The Optional Protocol entered into force for the State party on 19 May 1976.

1.2 On 27 July 2007, the Committee, pursuant to rule 92 of its rules of procedure, acting through its Special Rapporteur on new communications and interim measures, requested the State party not to remove the author and her daughter to Guinea while the communication was under consideration by the Committee.

#### **The facts as submitted by the author**

2.1 On 20 February 2001, when Fatoumata was 6 years old, Mr. Karou Kaba, the author's husband, sent for two *exciseuses* (excision practitioners) without her knowledge to abduct Fatoumata after school in order to excise her.<sup>1</sup> When the author came to pick up her daughter, she was informed that two old ladies had come to take Fatoumata away, and she hurried home. She was able to prevent the excision just as her husband returned and, when he saw her, he beat her. Fatoumata sustained a scalp wound in the commotion. Mother and daughter managed to escape, and left Guinea on 25 May 2001. They went to Canada and claimed refugee status on grounds of membership of a particular social group as single women and victims of domestic violence, and in view of the serious risk of Fatoumata's excision.

2.2 On 17 September 2002, the Immigration and Refugee Board of Canada (IRB) refused to grant refugee status to the author and her daughter on grounds of lack of credibility. On or around 3 March 2003, the author applied for an exemption to the permanent resident visa requirement on the basis of humanitarian and compassionate considerations (H&C), and on or around 22 November 2005, she applied for a pre-removal risk assessment (PRRA). The evidence submitted in support of these applications includes several documents confirming the risk of excision in Guinea, a medical certificate attesting to the fact that Fatoumata had not been excised and abundant evidence of the practice of excision in Guinea. A letter from the author's uncle, Mr. Kabine, confirmed that her husband was still angry and threatened to harm her if he saw her again. The author's uncle also confirmed that Mr. Kaba had beaten her in the past. The author also submitted a letter from her husband in which he threatened her and insisted that Fatoumata should become a "true Muslim", i.e., undergo excision. The author's husband accused her of behaving like a white person and threatened to kill her if she did not return his daughter to him.

2.3 Alongside her problems with her husband, the author has expressed fear of persecution in relation to subsequent events experienced by her family in Guinea. These include the arrest of several members of the Kaba family following a failed coup against the President in January 2005. Since then, the family has been under heightened surveillance and subjected to unannounced raids on their homes, and five family members have been arrested. Another uncle was abducted one night in April 2005 and is currently detained; the conditions in which he is being held are unknown. According to testimony, when a family member was being questioned in April 2005, the authorities accused the author and one of her brothers, who is also currently outside the country, of financing a coup to overthrow the President of Guinea. All of this is new evidence that was not considered during the application for refugee status in 2002.

2.4 The PRRA and H&C applications were rejected on 16 December 2005 and the date of removal was set. The author filed an application for leave and judicial review of the PRRA and H&C decisions with the Federal Court. She also filed an appeal for a stay of removal with the Federal Court, which was denied on 27 February 2006.

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<sup>1</sup> The Committee considers that the term "excision" refers to a form of female genital mutilation.

2.5 On 19 May 2006, counsel stated that the author had obtained a divorce on 12 January 2006 following proceedings instituted in July 2005.<sup>2</sup> She was represented at the hearing by her brother, Al Hassane Kaba, who had been authorized to consent to the divorce and ask for sole custody of Fatoumata. The divorce decree contains no reference to custody of the child; according to counsel, section 359 of the Civil Code of Guinea applies in this instance: custody of a child aged over 7 years is automatically granted to the father.<sup>3</sup> The author's brother states that Mr. Kaba has obtained a court ruling ordering him and his mother to do everything possible to bring Fatoumata back to her father, on pain of severe penalties. In his affidavit, the author's brother further warns that Mr. Kaba is still determined to have Fatoumata undergo excision and has announced his intention to give her in marriage to his nephew. On her return to Guinea, Fatoumata would thus face certain excision and a forced marriage by her father, who would have complete parental authority over her. No protection would thus be provided by the State of Guinea to the authors. The author has also submitted testimony from her uncle, Mr. Bangaly Kaba, dated 13 March 2006, reiterating the serious threats faced by the author and her daughter.

### The complaint

3.1 The author asserts that articles 7; 9, paragraph 1; 13; 14; 18, paragraph 1; and 24, paragraph 1, of the Covenant have been violated by Canada. However, she does not link each of these articles with specific allegations.

3.2 Several substantial errors are claimed to have been committed in the decisions rendered, concerning in particular: (a) the risk of excision and failure to assess the best interests of the child; (b) disregard of the evidence and failure to assess the author's fear in regard to her particular situation as a single woman and a victim of spousal abuse; (c) violation of the principles of natural justice, the right to a hearing, adverse finding of credibility and arbitrary rejection of new evidence; and (d) failure to consider a new aspect of the fear of return, i.e., fear as a member of the Kaba family.

3.3 First, concerning the failure to assess Fatoumata's best interests, the main problem is said to have occurred during the PRRA and H&C procedures. The file contained medical evidence showing that Fatoumata had not undergone excision and letters and sworn statements by the author confirming the risks of excision in Guinea. The documentary evidence provided showed that around 99 per cent of girls in Guinea are affected by excision.<sup>4</sup> Although Guinea has enacted legislation addressing the issue, it is not applied in practice and hence protection by the State is non-existent. The PRRA officer admitted that the existence of excision in Guinea is not at issue in the present case. The Federal Court decision refers neither to the issue of excision nor to that of the best interests of the child – yet the stay of removal was based on these considerations. This error points to violation of the articles of the Covenant and places Fatoumata's physical integrity, mental health, security, development and education at risk. Fatoumata's removal also runs counter to the Convention on the Rights of the Child.<sup>5</sup> It is in Fatoumata's best interests not to return to an unhealthy environment in which her polygamous father would continue to assault and

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<sup>2</sup> A copy of the decision of the Court of Appeal of Conakry was submitted. The decision states that Mr. and Ms. Kaba "divorced by mutual consent on 12 January 2006".

<sup>3</sup> Counsel also refers to the report presented by Guinea to the Committee on the Rights of the Child (CRC/C/3/Add.48, para. 77).

<sup>4</sup> Counsel refers to a 2005 report by the United Nations Children's Fund (UNICEF) (entitled *Changing a Harmful Social Convention: Female Genital Mutilation/Cutting*) which does not indicate any change in the prevalence rate over the last decade.

<sup>5</sup> Counsel also refers to Canadian case law, the Youth Protection Act and the Immigration and Refugee Protection Act.



attack her mother as in the past. In this case, however, the PRRA officer and the Federal Court failed to display the necessary attentiveness and sensitivity to the child's interests in remaining in Canada, where she is integrated and safe from excision. Counsel also refers to several decisions by Canadian bodies in which applications for refugee status were accepted solely on the basis of the risk of excision in Guinea, which is equivalent to persecution, and in which women were recognized as a particular social group.

3.4 Second, the PRRA and H&C decisions neglected to consider the author's particularly vulnerable situation as a female victim of spousal abuse and a single woman. It is the combined effect of being a female victim of spousal abuse, the absence of protection by the State of Guinea and the lack of family support in Guinea because of her refusal to allow her daughter to be excised that has led to her well-founded fear of persecution. The author refused to bow to tradition and took a stand against her husband and in-laws concerning Fatoumata's excision. The IRB decision did not challenge the fact that she was a victim of spousal abuse. In fact, the court had questioned the validity of a medical certificate referring to Fatoumata,<sup>6</sup> but did not explicitly challenge the medical certificates or photographs of the author confirming her injuries and medical examinations carried out after her beating by her husband.

3.5 Moreover, neither the PRRA officer nor the Federal Court considered the application from the standpoint of women as a particular social group. It is alleged that both the PRRA officer and the IRB member who denied the refugee status application erred at law when they concluded that the author needed to prove that she and her daughter were personally targeted, disregarding the well-founded nature of their fear in view of the risks faced by members of a particular social group, i.e. women.

3.6 Third, concerning violation of the principles of natural justice, the H&C and PRRA decisions cannot be held valid given that these principles have been infringed. During the PRRA and H&C procedures, the officer cast doubt on the author's credibility and rejected the new evidence, questioning her behaviour in delaying, as he saw it, her departure from Guinea with her daughter. Yet the new documents were crucial in that they corroborated several of the allegations: the author's husband's demand that her daughter undergo excision and confirmation that the author faced serious and even fatal reprisals if he saw her again; and her uncle's confirmation that her husband had threatened and beaten her and was determined to have his daughter excised. The author was given no opportunity to be heard, and the officer did not attribute any evidentiary value to key evidence, to the detriment of the right to a hearing. Furthermore, the officer questioned the credibility of the author's entire account without interviewing her so as to clear up alleged contradictions or inconsistencies. Moreover, the Federal Court decision makes no mention of the new evidence. The authors therefore allege that the PRRA and H&C decisions are fundamentally flawed insofar as no interview or hearing was conducted to resolve issues of fact and credibility.<sup>7</sup>

3.7 Fourth, concerning the arbitrary rejection of new evidence and failure to consider a new aspect of the fear of return, another crucial error was committed in the PRRA and H&C decisions. The letter from the author's sister provided new evidence of risk, i.e., fear

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<sup>6</sup> See para. 4.5 above. Counsel refers to the correction made by the physician Bernard Moulonda on 25 January 2006, which is said to dispel any doubt in this regard. Counsel points out that this evidence was available to the Federal Court, but was not taken into consideration in its decision to deny the author's application for a stay of removal.

<sup>7</sup> Counsel refers to article 7 of the Canadian Charter of Rights and Freedoms, section 167 of the Immigration and Refugee Protection Regulations and section 113 (b) of the Immigration and Refugee Protection Act.

of persecution as a member of the Kaba family and as a person accused by the authorities of having financed a coup against the President. This evidence was not available at the time of the IRB hearing, and the PRRA officer rejected it. Counsel reiterates that it is not fair that the officer should reject that evidence of risk without even giving the author an opportunity to argue her case in an interview.

3.8 Enforcement of the order to remove the author and her daughter to Guinea would cause them irreparable harm, adversely affecting the security, health, physical integrity and life of the author, who faces reprisals by her husband, without any possibility of protection by the State in Guinea. Enforcement of the removal order would endanger Fatoumata's security, health, development, physical and mental integrity, life and best interests.

### **State party's observations**

4.1 On 24 January 2007, the State party submitted that the communication is inadmissible on grounds of both failure to exhaust domestic remedies and lack of sufficient substantiation of the author's allegations.

4.2 The State party submits that the communication is inadmissible for failure to exhaust domestic remedies. The "new" evidence should have been submitted under a new PRRA application by the author,<sup>8</sup> a remedy which is still available to her. The author could also apply to the Federal Court for a stay of the enforcement of the removal order pending the result of the PRRA.

4.3 Concerning the minimum justification for the communication, the author's allegations are manifestly not credible, given the numerous contradictions and implausibilities surrounding key aspects of her testimony. The evidence submitted fails to corroborate her allegations and is not credible. The complaint reveals no substantial grounds for believing that the author and her daughter risk being subjected to any treatment prohibited by article 7 of the Covenant on their return to Guinea. The allegations of violation of the other articles of the Covenant are inadmissible *ratione materiae* or are not sufficiently substantiated for the purposes of admissibility.

4.4 Alternatively, and for the same reasons, the communication should be rejected on its merits, according to the State party. The author's allegations have already been carefully examined by the Canadian authorities under the refugee determination procedure, the PRRA and H&C applications and the application for the stay of a removal order before the Federal Court. The allegations and evidence submitted under these procedures are essentially the same as those currently before the Committee. Having examined those allegations and the evidence and having heard the author's oral submissions, the Canadian authorities concluded that she lacked credibility and that she and her daughter did not risk persecution or unlawful treatment on their return to Guinea. In particular, the Canadian authorities concluded that there was no credible evidence giving reason to conclude that Fatoumata faced a personal risk of forced excision in Guinea.

4.5 The State party refers to the main inconsistencies and contradictions noted by the Canadian authorities. Firstly, it notes the absence of credible evidence of the alleged attempt at forced excision on 20 February 2001. The IRB observed that the medical certificate dated 20 February 2001 completely contradicts the author's account, as it states that Fatoumata received her injuries three weeks before the alleged attempt at forced excision.<sup>9</sup> When she was confronted with this major contradiction during the IRB hearing,

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<sup>8</sup> The State party refers to communication No. 1302/2004, *Khan v. Canada*, decision on inadmissibility adopted on 25 July 2006, para. 5.5.

<sup>9</sup> The medical certificate reads in part as follows: "I, the undersigned, certify that I examined today

the author did not offer any reply or explanation. Nor did she attempt to explain this contradiction in her PRRA application in November 2005. She now claims before the Committee that the physician had been mistaken in stating that Fatoumata had suffered her injuries three weeks before the medical examination. She submits as evidence a further medical certificate dated 25 January 2006 and signed by the same Gabonese doctor. It reads in part as follows: "In fact it was an injury sustained on the same day, i.e., 20 February 2001, the date of the medical examination, and not three weeks earlier. The mistake in the date was due to confusion with another young girl I had seen in my practice some time before, with the same cranial injury." The State party submits that this new evidence is not credible and that the doctor's explanation is implausible. Firstly, it is not merely a matter of the wrong date, as the diagnosis of 20 February 2001 reports a condition in remission and does not describe clearly a patient who has just been injured.<sup>10</sup> Secondly, it is unlikely that the author of the medical certificate would remember his mistake and the reason for it nearly five years later. The correction fails to explain why the author's prescription is dated 11 February 2001, whereas she claims she received her injuries at the same time as her daughter, i.e., on 20 February 2001.

4.6 The State party further points out that the author went to France without her daughter on 22 February 2001. She was in possession of a passport and a Schengen visa valid until 10 March 2001. Instead of escaping immediately with her daughter, the author made a one-week trip to France without her from 22 February to 1 March 2001, the date of her return to Gabon. It was not until three months later that she left Gabon with her daughter. In her refugee status application the author stated that the purpose of her trip to France was to obtain a visa for Canada. In fact, however, her Canadian visa was obtained in Libreville, Gabon, and there is no indication of any application for a Canadian visa in Paris in February 2001. When the IRB questioned her on the subject, the author argued that the trip to France was an opportunity to seek refuge there, without claiming to have availed herself of this option. She also testified that she did not want to leave France to return to Gabon, but that her daughter was still in Gabon. Notwithstanding the conclusions of the IRB, the author did not attempt to explain her trip to France in her PRRA application, or in her H&C application, or in her communication to the Committee. As for the delay between her return from France and the date on which she left Gabon with her daughter, 25 May 2001, the author said this was due to lack of money and her husband's temporary absence. Yet the trip to France suggests that her financial resources did not play a major role in that delay. Furthermore, by her own admission, the author was not a *pagne* (cotton wrap) vendor as stated in her refugee status application, but a receptionist at the Embassy of Guinea in Libreville, Gabon, during the period in question. When she applied for a visa to Canada in 2001, the author included a letter from the Embassy and her diplomatic identity card, which confirmed her employment there.

4.7 The Canadian authorities examined all the evidence and found that it did not corroborate her allegations. As to the medical certificate confirming that Fatoumata had not undergone excision, the PRRA officer did not consider it sufficient to prove the existence of the alleged risks. The PRRA officer also examined the three letters from the author's sister, uncle and husband and observed that the first letter made no mention of the risks of excision or of the alleged harassment of the author by her husband. The PRRA officer noted that the author had made no mention of political persecution or of her family's political activities in Guinea in her PRRA and H&C applications. The officer did not

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Fatoumata Kaba, a child aged 6 years, who sustained a cranial injury during a fall, with loss of consciousness and scalp injuries three weeks ago."

<sup>10</sup> The medical certificate reads in part as follows: "She has now recovered consciousness but the scalp still shows after-effects calling for specialist dermatological treatment of persistent alopecia ...."

consider the other two letters very convincing either. The uncle's letter provided little new information, and Mr. Kaba's letter did not provide a satisfactory explanation of the considerable implausibilities in her allegations. Moreover, the State party argues that the letter comes from Guinea, whereas Mr. Kaba and the author have lived in Gabon since 1992.

4.8 Concerning the new evidence submitted to the Committee on 19 May 2006, the State party maintains that the affidavit from Mr. Al Hassane A. Kaba is not credible for two main reasons. First, the source is not credible since the author of the affidavit is not who he claims to be. The author gave the names of her brothers and sisters in the H&C application and in the personal information form she submitted to support the asylum application. Neither the name nor the date of birth of Mr. Al Hassane A. Kaba appears on this list. Second, the contents of the affidavit are not credible. Sole custody was allegedly granted to Mr. Kaba on 12 January 2006, in other words on the same day the divorce decree was issued. It is unlikely that the Conakry court would have granted Mr. Kaba sole custody without mentioning it in the divorce decree, or in another written judgement of which the author would probably have received a copy. In the absence of credible evidence supporting her allegations, the State party maintains that the author did not establish that the father had been granted custody of Fatoumata. The State party also argues that she did not notify her divorce to the Canadian authorities, or to the Committee in her initial submission, and that she did not explain why she had not done so earlier.

4.9 Mr. Bangaly Kaba's letter does not come from a reliable and independent source and does not explain the major implausibilities and contradictions. Furthermore, it is dated 13 March 2006 but did not appear in the initial submission. Neither the affidavit nor the letter mentions the Kaba family's alleged political persecution in Guinea. The State party maintains that this "new" evidence should not be taken into consideration by the Committee, since it was never submitted to the Canadian authorities.

4.10 The incidence of excision has declined in recent years in Guinea, following various governmental and non-governmental initiatives to raise public awareness of the risks of excision and to retrain women who perform it.<sup>11</sup> The State party also maintains that whatever the incidence of excision in Guinea, it could not be concluded that Fatoumata risks being forced by her father to undergo excision upon her return to Guinea. In fact, the report of the United Nations Children's Fund (UNICEF) and the Demographic Health Survey<sup>12</sup> confirms that it is women, and more particularly mothers, who decide to have girls excised. Despite the fact that more than 7,000 Guinean women took part in the Survey, no case of excision carried out against the will of the mother or at the request of the father was reported. The same applies to the UNICEF report. Nor is there any mention of reprisals or threats such as those alleged in this case against mothers who refuse to subject their daughters to excision. According to the UNICEF report, shame, stigmatization and loss of social status are the consequences of refusing to follow this tradition. Thus, reportedly, mothers are sometimes subject to family pressure to have their daughters excised, but are not forced to do it by their husbands. The State party therefore maintains that the author would not be obliged to have her daughter excised, just as her mother did not have her excised. The author stated in her personal information form that she was "spared excision during my childhood, thanks to my mother, who opposed it". There is no evidence that Fatoumata might be forced to undergo excision despite her mother's opposition to this practice. The State party also argues that excision is prohibited in Guinea and perpetrators

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<sup>11</sup> The State party refers to the report of the Special Rapporteur on violence against women, its causes and consequences (E/CN.4/2003/75/Add.1), para. 300. It also refers to a United States Department of State report published in 2006.

<sup>12</sup> Demographic and Health Survey, Guinea 2005, prepared by the National Statistics Office.

are liable to severe punishment, under Act No. L/2000/010/AN adopted on 10 July 2000.<sup>13</sup> The author did not establish that she would be unable to obtain State protection if Mr. Kaba sought to have Fatoumata excised.

4.11 As far as the alleged violation of article 13 of the Covenant is concerned, the State party maintains that article 13 is not applicable in the present case because the author is not in Canada legally. In addition, there was no violation of article 13 since she presented oral testimony before the IRB, an independent and impartial administrative tribunal, in keeping with the law and the right to a fair hearing. The PRRA and H&C officer is not obliged to grant her a second hearing. The author had the chance to explain all the contradictions in her statement during the IRB hearing, and under article 13 of the Covenant there is no requirement that she be granted a second chance to explain the contradictions. Given that the PRRA officer took account of the contradictions noted by the IRB, and that the author failed to provide a satisfactory explanation of them, there is clearly no need for a further hearing.

4.12 Concerning the alleged violation of article 14, the latter does not apply to the determination of immigration status or the protection that may be granted by a State.<sup>14</sup>

4.13 With regard to article 7 of the Covenant, the State party maintains that the author has not sufficiently substantiated her allegations for the purposes of admissibility. The allegations are patently unfounded on account of the implausibilities and contradictions noted above. The allegations are not credible and show that the authors do not risk being subjected to treatment prohibited by the Covenant on their return to Guinea. The State party also maintains that the communication is inadmissible insofar as the allegations based on article 9, paragraph 1 and article 18, paragraph 1, of the Covenant are concerned, since those allegations have not been substantiated by any evidence. As to the allegation made with regard to article 24, paragraph 1, of the Covenant, it does not add to the allegations made under article 7 of the Covenant.

4.14 The State party emphasizes that the allegations have been examined by independent and impartial national bodies in keeping with the law and the right to a fair hearing. In the absence of proof of any clear error, abuse of procedure, bad faith, clear bias or serious procedural irregularities, the Committee should not substitute its findings of fact for those of the Canadian authorities. It is for the courts of States parties to review facts, the evidence and above all the issue of credibility in particular cases. The author has not shown that there was any irregularity in the decisions of the Canadian authorities that would justify action by the Committee with regard to their findings on the facts and credibility. In such circumstances, the Committee has repeatedly stated that it is not for the Committee to question the evaluation of facts and evidence by national authorities.

#### **Author's comments on the State party's observations**

5.1 On 26 July 2007, the author asserted that she had exhausted all effective remedies. She had already applied for a PRRA and had subsequently filed an application for leave and judicial review of the PRRA decision with the Federal Court, which had refused the application on 25 September 2006. Consequently, the PRRA remedy is no longer available. Moreover, the administrative stay granted is no longer applicable, given the adverse decision of the Federal Court.<sup>15</sup> It is further argued that subsequent PRRA applications do

<sup>13</sup> The State party refers to the report submitted by Guinea to the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW/C/GIN/4-6).

<sup>14</sup> The State party refers to the jurisprudence of the European Court of Human Rights in relation to article 6 of the European Convention on Human Rights.

<sup>15</sup> Counsel refers to a decision of the Committee against Torture stating that "this procedure would not

not have the effect of staying the removal order.<sup>16</sup> Thus, the subsequent PRRA application can on no account be considered an effective remedy, since removal of the authors remains enforceable while the application is being assessed. Furthermore, the PRRA officer may take into consideration only “new” evidence meeting the requirements of section 113 of the Immigration and Refugee Protection Act,<sup>17</sup> which, in this case, would mean new evidence not relating to excision or to the earlier problems. Accordingly, the risks already invoked by the author would not be re-evaluated in the light of the new evidence. This remedy, which does not allow for a full and fair analysis of the facts of the case and the evidence of the risks faced, cannot be considered effective.

5.2 In addition, contrary to the State party’s arguments, the author cannot apply to the Federal Court for a stay of enforcement of the removal order, pending the result of the PRRA, on the grounds of the risks faced. The Court may only intervene on certain grounds,<sup>18</sup> and the author has already filed an application for a stay of removal with the Federal Court, which was denied on 27 February 2006.

5.3 As to the risk of excision faced by Fatoumata, the incidence of excision in Guinea has declined very little, as demonstrated by the Demographic Health Survey, Guinea 2005, prepared by the National Statistics Office: the proportion of women excised fell from 99 per cent in 1999 to 96 per cent in 2005. Moreover, according to the report, there is little hope of a drop in the rate in the future. Lastly, again according to the report, the incidence of excision among women of the Malinke ethnic group, to which the authors belong, is 97 per cent. According to the 2005 report by UNICEF,<sup>19</sup> the incidence of excision among women aged 15–49 is 96 per cent. The 2001 report by the United States Department of

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afford the complainant an effective remedy” (communication No. 133/1999, *Falcon Ríos v. Canada*, Views adopted on 23 November 2004, para. 7.5).

<sup>16</sup> See part 8, section 165 of the Immigration and Refugee Protection Regulations on subsequent application:

165. A person whose application for protection was rejected and who has remained in Canada since being given notification under section 160 may make another application. [...] It is understood that the application does not result in a stay of the removal order.”

<sup>17</sup> “Consideration of an application for protection shall be as follows:

(a) An applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.”

<sup>18</sup> Section 18.1 of the Federal Courts Act states that:

“(1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought. [...]

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal:

(a) Acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(b) Failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

(c) Erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(d) Based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(e) Acted, or failed to act, by reason of fraud or perjured evidence; or

(f) Acted in any other way that was contrary to law.”

<sup>19</sup> UNICEF, *At a Glance: Guinea – Statistics*, 2005.

State cites a rate of 99 per cent. Consequently, and given Mr. Kaba's very serious threats in that regard, the risk of excision faced by Fatoumata is very real. Furthermore, the author would not be in a position to prevent her daughter's excision and protect her in the event that they returned to Guinea. The report by the United States Department of State<sup>20</sup> indicates that excision is often practised without parental consent, when girls are visiting relatives. Lastly, the documentation refers to the lack of protection by the State in Guinea, notwithstanding the fact that excision is illegal.

5.4 A recent case similar to the author's, involving a mother whose two-and-a-half-year-old daughter risked being excised in the event of her return to Guinea, has just been accepted on humanitarian and compassionate grounds. The Government of Canada, in approving the H&C application, recognized the real risks that excision entails and the need to refrain from removing a little girl who could be exposed to those risks.

5.5 With regard to the State party's other arguments, the author's allegations have not been given meaningful and thorough consideration. Concerning the IRB decision, the risks invoked were not properly analysed. The IRB did not consider the allegations of risk from the correct standpoint, since it failed to evaluate the author's application for refugee status on the basis of her social group, i.e., a single woman and victim of domestic violence who is opposing her daughter's excision and thereby challenging Guinean social customs. The IRB demanded evidence of personal risk, whereas Canadian case law clearly states that membership of a particular social group is sufficient for an application for refugee status to be approved. Moreover, the IRB made its finding that the author lacked credibility on the basis of minor elements, which constitutes a substantial error of law: the author's claim was subjected to a microscopic and painstaking analysis, contrary to judicial precedent.

5.6 In addition, not only are the PRRA and the H&C application not effective remedies,<sup>21</sup> the decisions in question are based on identical errors to those committed by the IRB. The author's allegations of risk were not properly analysed, owing in particular to the disregard and arbitrary rejection of the new evidence and to the failure to allow the author to give oral testimony. Lastly, the risks of return should be evaluated in the light of the facts and evidence currently available, particularly the new evidence.

5.7 Regarding the minor discrepancies, the new medical certificate addresses the contradictions raised by the IRB. The document demonstrates that it was the attending physician, not the author, who was responsible for these contradictions. It cannot be argued, on the basis of the errors committed by the physician, that return poses no risks. On the contrary, the new evidence proves that Fatoumata has not undergone excision; that the father is determined to have his daughter excised; that excision is a common practice; and that there is a lack of protection by the State. The author consulted her attending physician on several occasions in the past. Her ex-husband regularly assaulted her, and she sought treatment from her doctor on 11 February 2001 for injuries inflicted by her husband. The prescription dated 11 February 2001 does not therefore contradict the author's allegation that she went to her doctor, yet again, on 20 February 2001; rather, it demonstrates the repeated violence to which she was subjected.

5.8 Concerning her trip to France without her daughter, the author has submitted an affidavit stating the reasons for the trip, filed with the immigration authorities on 15 November 2006. She explains that, in Guinea, excision is normally practised on girls aged over 6 or 7 years and that, when she learned of her husband's intentions, she opposed them.

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<sup>20</sup> United States Department of State, Guinea: report on female genital mutilation (FGM) or female genital cutting (FGC) (2001).

<sup>21</sup> Committee against Torture, communication No. 133/1999, *Falcon Ríos v. Canada*, decision adopted on 23 November 2004.

Her fears were increased by the attempted excision in February 2001. The author also explains that, during her absence, her cousin was to take care of her daughter and ensure that the father did not have her excised. The author mentions that a friend had advised her to travel to France to facilitate her subsequent trip to Canada but, owing to difficulties with her travel documents, her daughter was unable to accompany the author to France as originally intended. The author further explains that her friend was to ensure that her daughter obtained the necessary documents so that she could join her as soon as possible. When the author learned that her daughter would be unable to join her, she immediately decided to return. She explains the reason for the delay between the issuance of the Canadian visa and her departure for Canada: she had to gather together the money needed for the journey and wait until her husband left the area on business before she could escape. Thus, it cannot be argued, on the basis of the trip to France, that return to Guinea poses no risk.

5.9 As to the trip to Gabon, this element is not relevant to the current evaluation of the risks of return for the authors. It was the author's friend who helped her complete her personal information form and who misstated a date, thus creating confusion at the IRB hearing. Lastly, regarding the financial resources for the trip to France, she received financial assistance from friends, which enabled her to travel at that time.

5.10 Regarding the political persecution of her family, the author explains that the persecution only began in April 2005 with the arrest of her uncle. She was informed of the arrest a few months before receiving the PRRA decision in December 2005. She had thus not succeeded, prior to the PRRA decision, in obtaining all the information and documentation necessary to substantiate these allegations, and accordingly she had not yet informed the immigration authorities of the persecution.

5.11 All of the evidence, taken together and properly evaluated, corroborates the allegations of risk. The affidavit by Mr. Al Hassane A. Kaba is credible: he describes himself as the author's brother but is in fact her cousin, that is, the son of her father's older brother. It is customary for Guineans to refer to their male cousins as brothers. The author did not include her cousin in the list of family members abroad because the list covered only brothers and sisters having the same father and/or the same mother. Concerning the lack of specific provisions on custody in the divorce decree, custody of minor children aged over 7 years is automatically granted to the father. Consequently, it is not unlikely that the decree would be silent on the matter. As to the author's alleged delay in informing the authorities of her divorce, she was waiting to receive official divorce papers before doing so. Lastly, the fact that some documents do not corroborate the risks invoked by the author can on no account be regarded as contradicting the author's allegations, which moreover are corroborated by other documents.

5.12 Regarding article 13 of the Covenant, it cannot be claimed that the author's status precludes her from submitting the reasons against her expulsion. Furthermore, every person has the right to a hearing by a competent, independent and impartial tribunal. The errors committed, and the evidence presented, confirm the risk of cruel, inhuman or degrading treatment or punishment. The right to protection set out in articles 7 and 9 of the Covenant is applicable. Concerning article 18 of the Covenant, the right to freedom of thought, conscience and religion cannot but include the right to refuse to subject one's minor daughter to any degrading and dangerous religious practice such as excision. Lastly, the right of the child to such measures of protection as are required by her status as a minor, provided for in article 24 of the Covenant, is applicable in this case.

#### **Decision of the Committee on admissibility**

6.1 On 1 April 2008, at its ninety-second session, the Committee considered the admissibility of the communication.



6.2 With regard to the complaint of a violation of articles 9 and 18 of the Covenant, the Committee considered that they were not sufficiently substantiated, and concluded that they were inadmissible under article 2 of the Optional Protocol.

6.3 With respect to the author's contention that she was not afforded an effective remedy to contest her and her daughter's expulsion, the Committee observed that the author did not substantiate how the Canadian authorities' decisions failed thoroughly and fairly to consider their claim that they would be at risk of violation of article 7 if returned to Guinea. In these circumstances, the Committee did not need to determine whether the proceedings relating to the authors' expulsion fell within the scope of application of article 13 (as a decision upon which an alien lawfully present is expelled) or article 14 (as a decision relating to civic rights and duties). This part of the communication was accordingly inadmissible under article 2 of the Optional Protocol.<sup>22</sup>

6.4 The Committee recalled that States parties are under an obligation not to expose individuals to a real risk of being killed or subjected to cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.<sup>23</sup> The Committee therefore needed to decide whether there were substantial grounds for believing that, as a necessary and foreseeable consequence of the removal of the author and her daughter to Guinea, there was a real risk that they would be subjected to treatment prohibited by article 7 of the Covenant.<sup>24</sup> In the present case, the Committee noted that the author's allegations had already been carefully examined by the Canadian authorities in connection with the application for refugee status, the PRRA and H&C applications and the application for the stay of a removal order before the Federal Court. Having examined those allegations and the evidence and having heard the author's oral submissions, the Canadian authorities had concluded that she lacked credibility and was not at risk of being persecuted or subjected to unlawful treatment on her return to Guinea. The Committee considered that Ms. Kaba had not shown sufficiently why these decisions were contrary to the standard set out above. Nor had she adduced sufficient evidence in support of a claim that she would be exposed to a real and imminent risk of violation of article 7 of the Covenant if she was returned to Guinea. The Committee therefore considered that the author's claim was inadmissible under article 2 of the Optional Protocol as insufficiently substantiated for the purposes of admissibility.

6.5 As far as Fatoumata and the alleged violation of articles 7 and 24 of the Covenant are concerned, the Committee observed that the "new" documents submitted by counsel to the Committee on 19 May 2006, including the divorce decree and Guinean legislation which is said to give custody of children automatically to the father, had not been provided to the Canadian authorities. The Committee noted the State party's argument that domestic remedies had not been exhausted and that it was not too late to submit a further application for a pre-removal risk assessment and an application for a stay of the expulsion order on the basis of the "new" documents. However, the Committee noted that the State party had rejected this evidence on the grounds that it was not credible. Without embarking on a detailed examination of counsel's arguments on the effectiveness of the pre-removal risk assessment, the Committee, in the light of the State party's position, considered that a further application for a pre-removal risk assessment would not constitute an effective

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<sup>22</sup> See communications No. 1315/2004, *Singh v. Canada*, decision on inadmissibility adopted on 30 March 2006, para. 6.2, and No. 1302/2004, *Khan v. Canada*, decision on inadmissibility adopted on 25 July 2006, para. 5.3.

<sup>23</sup> General comment No. 31 (2004) *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III, para. 12.

<sup>24</sup> See communications No. 706/1996, *G.T. v. Australia*, Views adopted on 4 November 1997, paras. 8.1 and 8.2, and No. 692/1996, *A.R.J. v. Australia*, Views adopted on 28 July 1997, para. 6.9.

remedy for Fatoumata under article 5, paragraph 2 (b), of the Optional Protocol. The Committee also noted that the evidence in the file indicated that up to 90 per cent of girls undergo excision in Guinea and finds that the claims presented on Fatoumata's behalf, under articles 7 and 24 of the Covenant, read together were sufficiently substantiated for the purposes of admissibility.

6.6 The Committee therefore decided that the communication was admissible insofar as it raised issues under article 7 and article 24, paragraph 1, of the Covenant in respect of Fatoumata Kaba. The Committee requested the State party to provide its views on the information relating to current Guinean legislation and practice relating to the custody of children after divorce, and the incidence of excision in Guinea.

#### **Additional observations of the State party regarding the admissibility and merits of the communication**

7.1 On 13 January 2009, the State party submitted additional observations on admissibility and merits and requested the Committee to reconsider its admissibility decision and to declare the communication inadmissible as a whole on grounds of abuse of process or, if an abuse of process were not acknowledged by the Committee, to declare it inadmissible on grounds of failing to substantiate the claim. If the Committee decided nevertheless to uphold the admissibility of the communication concerning Ms. Fatoumata Kaba, the State party would request the claims under articles 7 and 24, paragraph 1, of the Covenant to be rejected as unsubstantiated.

7.2 The State party engaged a lawyer practising in Guinea to collect the information requested by the Committee in its admissibility decision of 1 April 2008. As far as child custody in cases of divorce is concerned, the lawyer confirmed that article 359 of the Civil Code of Guinea is still in force, as the bill amending the article is pending adoption. Under article 359, children are entrusted to the care of their father once they reach the age of 7, unless a special agreement between the parents specifies otherwise. However, the State party notes that, according to the inquiry carried out by the lawyer, the divorce decree submitted by the author is forged. The senior registrar of the Court of First Instance in Kaloum/Conakry, which allegedly rendered the decree in question, confirmed that, as there was no record of the divorce in the register, the decree was not authentic. Furthermore, the decree could not have been granted on 12 January 2006 bearing the number 26, as the court had rendered only 9 civil judgements on that date. The registrar also provided a copy of the seal of the registrar of the court, confirming that the seal affixed to the copy of the decree submitted by the author was not authentic. The State party maintains that this new evidence shows beyond a reasonable doubt that the author's allegations are not credible and thereby undermine the credibility of the letters of Mr. Al Hassane A. Kaba, the author's so-called brother, and the letter of Mr. Bangaly Kaba, her so-called uncle, which both mentioned the divorce. In view of this blatant falsification of evidence, the State party requests the Committee to declare the communication inadmissible as a whole on grounds of abuse of process, in accordance with article 96 (c) of its rules of procedure.

7.3 The State party further considers that the evidence pertaining to the alleged divorce settlement giving custody of Fatoumata Kaba to her father should be rejected and declared inadmissible on grounds of failure to substantiate the claim. The allegation that the custody of the child would be granted to the father is based exclusively on article 359 of the Civil Code of Guinea, which would have been enforced following the alleged divorce. There is no evidence or allegation that the child's father could have any authority over the child without a divorce decree or against the mother's wishes. The State party recalls that the child's father does not appear to live in Guinea, since, according to the author, she and her husband had lived in Gabon since 1992 and her husband was still there in 2001 when the author and her daughter left the country for Canada. The only evidence linking Mr. Kaba to

Guinea since 2001 is a letter that he allegedly wrote to the author in December 2002 threatening to kill her. Given that the decree was forged, the State party doubts that this letter is authentic. The author has not shown in any case that she had contacted the Guinean authorities or requested protection for herself and her daughter. The State party therefore doubts the couple's intention to divorce and the supposed ill will of the author's husband.

7.4 Concerning the incidence of excision in Guinea, the State party has relied on expert reports that show the prevalence of excision in Guinea among girls between 10 and 14 years old to be below 89.3 per cent. The State party maintains, however, that this figure is not a reliable measure of the risk of excision that Fatoumata Kaba personally faces, since it is women, particularly mothers, who decide on their daughters' excision. No cases of excision carried out against the mother's wishes have been reported. The State party adds that the author has not undergone excision, as her mother had made a stand against it, and that, likewise, the author could stand in the way of her daughter's excision on their return to Guinea. According to a survey carried out in 2005, only 15.2 per cent of Guinean mothers who had not undergone excision had at least one daughter who had been excised. The author's daughter was already beyond the age when girls run the highest risk of excision.<sup>25</sup> Statistics confirm that the daughters of women who have not undergone excision are much less exposed to the risk of excision. Based on these statistics, the State party concludes, given that it is the mother who has the power to decide on matters involving excision, that the author's allegations are not sufficiently substantiated for the purposes of admissibility and excision is not a necessary and foreseeable consequence of Fatoumata Kaba's expulsion to Guinea.

7.5 If the Committee decided nevertheless to uphold the admissibility of the communication from the viewpoint of Fatoumata Kaba, the State party would ask it to reject the allegation on the merits.

#### **Author's comments on the State party's observations**

8.1 On 19 May 2009, the author, represented by a new counsel, reiterated the arguments previously advanced and added that the general literature on excision shows that several members of the family have a say in whether excision is performed and that it is extremely rare for the decision to be perceived as concerning only the parents given that excision affects the social status of the excised person and her family. These reports also state that excision is sometimes performed without the consent of the child and/or her mother.<sup>26</sup> In this case, as the threat of excision came not only from the father but also from the father's family, the threat did not hinge solely on the divorce decree or the father's wishes.

8.2 The author refers to the Civil Code of Guinea, which stipulates that the father has authority over the child until the age of majority, including the right to inflict corporal punishment, even in the event of divorce. Given that Fatoumata Kaba's father has never been stripped of parental authority, his ties with his daughter still exist. The author adds that the Guinean authorities do not intervene in family disputes. Despite the fact that excision is illegal in Guinea, no excision practitioner was prosecuted in 2008 for performing an excision. The author could not, therefore, turn to the State for protection in the event of a dispute with her husband over the issue. Furthermore, Mr. Kaba lives in Guinea, as the divorce decree attests. In support of this claim, the author provides a letter from relatives

<sup>25</sup> According to the third demographic and health survey of Guinea (EDSG-III) of 2005, only 27 per cent of girls aged between 10 and 14 and only 3 per cent of girls over the age of 14 have undergone excision.

<sup>26</sup> The Country of Origin Information Centre (Landinfo), "Female genital mutilation of women in West Africa", (Oslo, 12 January 2009), p. 23.

testifying that they have encountered Mr. Kaba in Guinea. On the basis of certain governmental reports and reports from NGOs, she insists that the risk of excision concerns minors between the ages of 4 and 17 and that excision may also be performed on adult women.

8.3 The author also reiterates in her comments the risks that she faces if she is expelled to Guinea.

8.4 Lastly, as far as the authenticity of the divorce decree is concerned, the author engaged a Guinean lawyer to clarify the State party's allegation that the decree is a forgery and, if necessary, to institute new divorce proceedings. She insists nevertheless that she was not present during the proceedings and that she was represented by family members who confirm that they participated in them. Her lawyer contacted a bailiff in Conakry, who informed the lawyer that the registrar who allegedly signed the divorce decree did not recognize the signature or the seal, whereas another registrar did recognize his signature, which attests to the corruption among registrars in this case. The lawyer provided evidence of the use of several different seals by the registrar's office in Conakry, including the seal affixed to the divorce decree. The author thus concludes that the allegations of the State party challenging her credibility or blaming her for errors, fraud or breaches are unfounded. Lastly, the author informs the Committee that new divorce proceedings have been instituted resulting in her being awarded custody of Fatoumata Kaba in a judgement rendered on 15 April 2009.

8.5 The author sent a copy of the new divorce decree in a letter dated 8 June 2009 and noted that even though she had obtained custody of the child, the child still had a justifiable fear of undergoing excision, since her father maintained authority over her. The author maintains that Mr. Kaba is only using the divorce granted in her favour as a scheme to obtain the child's repatriation. She adds that there is no doubt as to Mr. Kaba's residence in Guinea, as evidenced by the record of the new divorce decree.

### **Review of admissibility**

9.1 The Human Rights Committee has examined the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee takes note of the State party's request for reconsideration of the admissibility decision and to declare the communication inadmissible as a whole on the ground of abuse of process, as the request was based on new evidence that questioned the credibility of the author's statements and the communication as a whole. Although the Committee wishes to give the State party's allegations their full weight, it considers, nevertheless, that the risk mentioned by the author on behalf of her daughter Fatoumata Kaba is sufficiently serious for the Committee to take it up in connection with the merits of the case, on the ground of reasonable doubt.

9.3 The Committee therefore proceeds with the consideration of the merits of the communication in view of the issues raised on the basis of articles 7 and 24, paragraph 1, of the Covenant concerning Fatoumata Kaba, the author's daughter.

### *Consideration of the merits*

10.1 As to the author's claim that expelling her daughter Fatoumata Kaba would entail a risk of her being subjected to excision by her father and/or members of the family, the Committee recalls that States parties are under an obligation not to expose individuals to a

real risk of being killed or subjected to torture or cruel, inhuman or degrading treatment or punishment upon entering another country by way of their extradition, expulsion or refoulement.<sup>27</sup> In this connection, there is no question that subjecting a woman to genital mutilation amounts to treatment prohibited under article 7 of the Covenant. Nor is there any question that women in Guinea traditionally have been subjected to genital mutilation and to a certain extent are still subjected to it. At issue is whether the author's daughter runs a real and personal risk of being subjected to such treatment if she returns to Guinea.

10.2 The Committee notes that in Guinea female genital mutilation is prohibited by law. However, this legal prohibition is not complied with. The following points should be noted: (a) genital mutilation is a common and widespread practice in the country, particularly among women of the Malinke ethnic group; (b) those who practise female genital mutilation do so with impunity; (c) in the case of Fatoumata Kaba, her mother appears to be the only person opposed to this practice being carried out, unlike the family of Fatoumata's father, given the context of a strictly patriarchal society; (d) the documentation presented by the author, which has not been disputed by the State party, reveals a high incidence of female genital mutilation in Guinea; (e) the girl is only 15 years old at the time the Committee is making its decision. Although the risk of excision decreases with age, the Committee is of the view that the context and particular circumstances of the case at hand demonstrate a real risk of Fatoumata Kaba being subjected to genital mutilation if she was returned to Guinea.

10.3 Consequently, in accordance with article 5, paragraph 4, of the Optional Protocol, the Committee is of the view that Fatoumata Kaba's deportation to Guinea would constitute a violation of article 7 and article 24, paragraph 1, of the Covenant, read in conjunction.

10.4 In accordance with article 2, paragraph 3 (a), of the Covenant, the State must refrain from removing Fatoumata Kaba to a country where she runs a real risk of being excised.

10.5 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 or not 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, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the present Views. The State party is also invited to publish the present Views.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

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<sup>27</sup> See communication No. 1302/2004, *Khan v. Canada*, decision on inadmissibility adopted on 25 July 2006, para. 5.4; communication No. 1429/2005, *A. et al. v. Australia*, decision on inadmissibility adopted on 1 April 2008, para. 6.3.

## Appendix

### **Dissenting opinion by Mr. Abdelfattah Amor**

1. In the present case, the Committee did not agree to grant the State party's request to reconsider its previous admissibility decision and to declare the communication inadmissible as a whole on grounds of abuse of process. In its decision on the merits, it found a violation of article 7 and article 24, paragraph 1, read in conjunction. I respectfully disagree with both the rejection of the request to reconsider the admissibility and the decision on the merits.

2. Regarding the reconsideration of admissibility, I believe that the Committee should have used greater caution with regard to the credibility of the information provided by the author and the degree to which that information was substantiated. Even though a legitimate doubt justifying the addition of the issue of admissibility to the consideration of the merits could be invoked, and even though the daughter cannot be held accountable for her mother's claims, what is at issue in terms of the admissibility is the credibility of the information provided by the author and its effects on the proceedings before the Committee.

3. The author initially claimed to have obtained a divorce by mutual consent on 12 January 2006 by Decree No. 26, as the result of proceedings that were begun in July 2005 and throughout which she had been represented by her brother. She stated that the decree contained no reference to custody of the child and that section 359 of the Civil Code of Guinea therefore applied, by which custody of a child aged over 7 years was automatically granted to the father.

4. Considering it unlikely that the custody of the child would not have been mentioned in the divorce decree, the State party is of the view that the author has not established that custody of the child was granted to the father.

5. Following the admissibility decision adopted on 1 April 2008, the State party engaged a Guinean lawyer in Conakry to verify the information presented. The lawyer then determined that the decree submitted by the author was a forgery. The State party has shown ample proof of this (see paragraph 7.2) and the author does not deny it, although she refuses to take responsibility for what, in her opinion, attests to the "corruption among registrars" (see paragraph 8.4).

6. On 15 April 2009, the author obtained another — this time authentic — divorce decree that granted her custody of the child. The author maintains, however, that the divorce granted in her favour was only a scheme used by her ex-husband to secure the child's repatriation.

7. What is certain is that the divorce decree of 12 January 2006, initially submitted by the author, is a forgery. The State party's investigation revealed that the seal of the registrar affixed to the decree was not authentic and that the court of Kaloum/Conakry had rendered only nine judgements on 12 January 2006 (the date on which the divorce decree was supposedly rendered) and that therefore the decree in question could not have borne the number 26.

8. The most important consideration is that the author was unable to prove that she or the persons acting on her behalf or representing her were not aware of the fraud from which she had intended to benefit by concluding that she had been denied custody of her daughter and, given that the custody issue was not mentioned in the decree and in accordance with section 359 of the Civil Code of Guinea, that custody had been granted to her daughter's

father. It is obvious that the author intended deliberately to mislead the Committee, because a person cannot claim to be divorced while knowing that he/she is not.

9. This conclusion is also corroborated by the discrepancies, contradictions and imprecise information provided by the author, which the State party had pointed out to the Committee from the beginning (see paragraphs 4.3 to 4.14). For example, there is the doctor who “corrects” a medical certificate five years after having written a different one in which the facts were untenable, while also juggling the dates (see especially paragraph 4.5 and the author’s reaction in that respect in paragraph 5.7). The pagne (cotton wrap) vendor turns out to be a receptionist at the Embassy of Guinea in Gabon (see paragraph 4.6). The brother is no longer a brother but a cousin (see paragraph 4.8). The Canadian entrance visa that was applied for in Paris is obtained in Libreville, Gabon and “there is no indication of any application for a Canadian visa in Paris in February 2001” (see also paragraph 4.6). Letters of testimony from family members suddenly appear just at the right moment. And even when the court grants custody of the child to the author, she finds a way to argue that it is merely a scheme concocted by the father.

10. It seems obvious to me that the author made use of practices that are incompatible with the functions entrusted to the Committee, both before the Committee pronounced its admissibility decision on 8 April 2008 and after Canada asked the Committee to reconsider the admissibility. I am convinced that she abused the process offered by the Optional Protocol. The State party invoked this abuse of process, covered by article 3 of the Optional Protocol and by rule 96 (c) of the rules of procedure of the Committee, to request that the Committee reconsider its admissibility decision and to declare the communication inadmissible as a whole.

11. In light of the new elements adduced by the State party, and especially the use of a forged decree, the Committee would not have been contradicting itself if, on the basis of the additional data provided, it had rejected the communication as a whole on the ground of abuse of process. Instead, it considered that “the risk mentioned by the author on behalf of her daughter ... is sufficiently serious for the Committee to take it up in connection with the merits of the case, on the ground of reasonable doubt”. I believe that the seriousness of the risk does not justify granting recourse to a process that the author has deliberately tainted.

12. As for reasonable doubt, it is true that it is impossible to consider the issue using completely objective criteria and that it is bound to involve a degree of subjectivity, but in any event information that is deliberately incomplete cannot be the object of reasonable doubt. In other words, the Committee is faced with here reasonable doubt of error. I believe that the Committee should have asserted its own credibility by specifying that it cannot allow itself to be manipulated by illegal procedures for any reason. I therefore regret the Committee’s attitude and do not find its admissibility decision relevant on the basis of either the legal assessment or the evaluation of the facts, even though I have always condemned female genital mutilation and will continue to do so, as it constitutes a violation of the Covenant and of human rights. The legitimacy of a cause cannot help but be damaged when it is defended by illegitimate means. In other words, the end cannot justify all the means for any of the parties concerned. That path will result in even greater difficulties for the Committee when it comes to implementation of its Views.

13. With regard to the merits, several observations are worth making.

14. In response to the request that it reconsider the admissibility, the Committee noted that the request was based “on new evidence that questioned the credibility of the author’s statements and the communication as a whole. Although the Committee wishes to give the State party’s allegations their full weight, it considers, nevertheless, that the risk mentioned by the author on behalf of her daughter Fatoumata Kaba is sufficiently serious for the

Committee to take it up in connection with the merits of the case, on the ground of reasonable doubt”.

15. In its consideration of the merits, the Committee completely lost sight of the issue of credibility, ignoring article 5, paragraph 1, of the Optional Protocol, which requires the Committee to consider “all written information made available to it by the individual and by the State Party concerned”. Why did it refuse to answer a question raised by the State party, which the Committee itself had already answered during the consideration of the merits?

16. Is the assessment of the degree of the risk reason enough to ignore the issue of credibility, when such assessment depends precisely on credibility itself? Have feelings of compassion and generosity stifled the fundamental issue of knowing whether the State party is legally required by the Covenant, despite the procedures and guarantees invoked and despite the lack of credibility of the information provided by the author, to refrain from removing the author and/or her daughter from the State party?

17. I believe that international law must have the last word, because it allows States, while offering guarantees, to enact legislation regulating the entry and stay of foreigners in their territory. The choices the Committee has made regarding this communication are unfathomable. This is truly surprising, given the Committee’s usual meticulousness and its care not to let compassion and legally questionable considerations interfere with its work.

18. In this case, one has the impression that everything was handled as if the issue under consideration were the process of female genital mutilation in general rather than an individual complaint. While points (a), (b) and (d) of paragraph 10.2 might appear to be stages in an argument, they creep into the individual complaint, using it as more of a pretext. It is to the Committee’s credit that it is vigilant regarding female genital mutilation in general, and it is able to question States about the issue during the consideration of their reports.

19. It is, however, still important for the Committee to limit itself to the case at hand, using the context to clarify the situation rather than as a general justification. The essential question is whether, taking into consideration all the information provided, the particular circumstances of the case could constitute a real and personal risk for the author’s daughter, who is 15 years old and whose mother is not excised, thanks to her own mother who opposed excision, recalling once again that a mother’s opposition to excision is a determining factor in most cases.

20. According to the State party, “no cases of excision carried out against the mother’s wishes have been reported”. In point (c) of paragraph 10.2, the Committee says only that “in the case of Fatoumata Kaba, her mother appears to be the only person opposed to this practice being carried out, unlike the family of Fatoumata’s father, given the context of a strictly patriarchal society”. Legal certainty has thus given way to human supposition. Furthermore, to say that only the mother is opposed to the situation is not corroborated by the case file, which includes several indications of the solidarity of the mother’s family.

21. It also seems curious that Fatoumata’s mother’s fear of the father’s family “in the context of a strictly patriarchal society” did not stop her from leaving for France, without her daughter, from 22 February to 1 March 2001, two days after the attempt to excise Fatoumata (see paragraph 4.6). A cousin was entrusted with the daughter’s care and with ensuring “that the father did not have her excised” (see paragraph 5.8). The least that can be said in this regard is that the mother’s fear was exaggerated to the Committee, which should have been more circumspect, especially since more than three months passed before the mother left Guinea with her daughter. I believe that the Committee accepted this exaggeration without bothering to analyse the information provided by the author. In sum, while there may be a risk, it is unsafe to define that risk as real or personal.



22. In its analysis of the case, the Committee gives the impression that it is better able than the State to assess the risk, as if the Committee had more information than the State or as if the State had assessed the risk in an arbitrary or ill-founded manner. I believe that the information in the case file makes it clear that the relevant State authorities gave due consideration to the issue of risk, invoking procedural and substantive safeguards, and it is unseemly to doubt that or to consider that it is for the Committee to replace inefficient State authorities in order to establish the facts and evidence.

23. It has consistently been held that it is within the jurisdiction of the States parties to examine the facts and evidence, unless it can be established that the assessment of the evidence was arbitrary or amounted to a manifest error or denial of justice, which is clearly not the case. The State party was right to recall that “in the absence of proof of any clear error, abuse of procedure, bad faith, clear bias or serious procedural irregularities, the Committee should not substitute its findings of fact for those of the Canadian authorities. It is for the courts of States parties to review facts, the evidence and above all the issue of credibility in particular cases. The author has not shown that there was any irregularity in the decisions of the Canadian authorities that would justify action by the Committee with regard to their findings on the facts and credibility” (para. 4.14).

24. The Committee has concluded that the removal of the author’s daughter “to Guinea would constitute a violation of article 7 and article 24, paragraph 1, of the Covenant, read in conjunction”. This conclusion implies two things. The first and most obvious is that the case concerns only the daughter, not her mother. There can be no ambiguity in that regard. The complaint was only declared admissible with regard to the daughter, and the merits concern only the daughter’s condition.

25. It follows from this that the daughter might stay in Canada while the mother could be removed. This is a curious solution that the Committee cannot make use of, given the (strongly criticized) position that it adopted in communication No. 930/2000, *Winata and Li v. Australia*. The second inference is that Canada could remove the daughter to a country other than Guinea where there is no real risk of excision. What the author requested, however, was to stay with her daughter in Canada. This means that the procedures before the Canadian authorities could only be tainted by irregularities if the issue at stake was the removal to Guinea, which is not at all obvious.

26. What the author requested from the Canadian authorities was, firstly, refugee status and, secondly, the issuance of a permanent residence visa on humanitarian grounds. It would have been more thorough to make the obvious distinctions and to specify that the evaluation made by Canada justified the refusal of both refugee status and the issuance of a permanent residence visa and could only raise questions if Canada wished to remove the author’s daughter to Guinea.

(Signed) Mr. Abdelfattah Amor

[Done in English, French and Spanish, the French text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the present report.]

## Dissenting opinion by Mr. Krister Thelin

A majority of the Committee has found a violation in this case. I respectfully disagree. The Committee's reasoning and conclusion should, in my view, read as follows:

"10.1 As to the author's claim that expelling her daughter Fatoumata Kaba would entail a risk of her being subjected to excision by her father and/or members of the family, the Committee recalls that States parties are under an obligation not to expose individuals to a real risk of being killed or subjected to torture or cruel, inhuman or degrading treatment or punishment upon entering another country by way of their extradition, expulsion or refoulement.<sup>a</sup> Nor is there any question that women in Guinea have traditionally been subjected to genital mutilation and to a certain extent are still subjected to it. The point at issue is whether the author's daughter runs a real and personal risk of being subjected to such treatment if she returns to Guinea.

"10.2 On the basis of the information submitted by the author throughout the proceedings — even leaving aside the issue of her credibility, raised in some respects by her assertions — read together with other material in the case file, the Committee is unable to conclude that the author has refuted the State party's claim that her removal and that of her daughter would not entail a real risk of a violation of the author's rights under articles 7 and 24, paragraph 1, read in conjunction.

"11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a violation by Canada of the articles of the Covenant referred to by the author."

(Signed) Mr. Krister **Thelin**

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

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<sup>a</sup> See communication No. 1302/2004, *Khan v. Canada*, decision on inadmissibility adopted on 25 July 2006, para. 5.4; communication No. 1429/2005, *A. et al. v. Australia*, decision on inadmissibility adopted on 1 April 2008, para. 6.3.

**Q. Communication No. 1467/2006, *Dumont v. Canada*  
(Views adopted on 16 March 2010, ninety-eighth session)\***

<i>Submitted by:</i>	Michel Dumont (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Canada
<i>Date of communication:</i>	17 March 2006 (initial submission)
<i>Decision on admissibility</i>	13 July 2007
<i>Subject matter:</i>	The right to be compensated after the reversal of a conviction
<i>Procedural issue:</i>	Failure to exhaust domestic remedies
<i>Substantive issue:</i>	Compensation for a miscarriage of justice
<i>Article of the Covenant:</i>	14, paragraph 6
<i>Article of the Optional Protocol:</i>	5, paragraph 2 (b)

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

*Meeting* on 16 March 2010,

*Having concluded* its consideration of communication No. 1467/2006, submitted by Mr. Michel Dumont (not represented by counsel) under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication, and the State party,

*Adopts* the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1.1 The author of the communication, dated 17 March 2006, is Michel Dumont, a Canadian national. He claims to be the victim of a violation by Canada of article 14, paragraph 6, of the International Covenant on Civil and Political Rights. He is not represented by counsel.

1.2 On 28 July 2006, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, decided that the admissibility of the communication should be considered separately from the merits.

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

The text of an individual opinion by Mr. Fabián Omar Salvioli is appended to these Views.

**The facts as submitted by the author**

2.1 On 25 June 1991, the Court of Quebec found the author guilty of having committed rape in the city of Boisbriand and sentenced him to 52 months' imprisonment. He appealed against that decision before the Appeal Court of Quebec, which upheld the conviction on 14 February 1994 on the grounds that the author had not invoked any error of law. On 23 June 1992, even before his appeal was heard, the victim of the rape signed a formal attestation stating that she had been mistaken about the identity of her aggressor, but this attestation was not mentioned during the appeal proceedings. The author remained in prison until May 1997, when he was granted parole. He therefore spent 34 months in prison. The Government commissioned a board of inquiry to report on the grounds for the author's request for review under article 690 of the Criminal Code. The report, which was issued on 15 July 1998, concluded that the victim's statement gave rise to reasonable doubt as to the author's guilt. The case was therefore referred back to the Appeal Court of Quebec. On 22 February 2001, the Appeal Court of Quebec quashed the conviction handed down by the Court of Quebec and acquitted the author of all charges against him.

2.2 On 21 August 2001, the author initiated a civil action in the Superior Court of Quebec against, inter alia, the Attorney General of Quebec, in which he sought financial compensation for the harm suffered by him and his family. Quebec filed its response to the author's claims on 13 August 2002. The author's initial statement was made more specific and amended to produce his final written argument, which is contained in his amended statement of 17 February 2004. On 15 June 2006 the case was inscribed for proof and hearing by the Court. The author also wrote numerous letters to various authorities seeking compensation for the miscarriage of justice he had suffered.

**The complaint**

3.1 The author claims to be the victim of a violation of article 14, paragraph 6, of the Covenant. Despite the fact that his conviction was reversed because a new or newly discovered fact showed that there had been a miscarriage of justice, he was not compensated in accordance with the Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons. Under the Guidelines, which were adopted in 1988 by the federal and provincial justice ministries and prosecutors, in order to be eligible for compensation, the claimant must have been imprisoned, a new fact must have come to light that shows that a miscarriage of justice has taken place, and a decision must have been taken under article 690 of the Criminal Code. Compensation is to be paid by the relevant provincial authorities. If a person is entitled to compensation, a judicial or administrative inquiry is to be opened in order to make a recommendation on the amount of compensation.

3.2 The author considers that he meets the three criteria set forth in the Guidelines on Compensation. As there is no official form, he has simply written numerous letters to the relevant authorities to seek compensation. All his requests have been rejected. The Ministry of Justice of Quebec suggested that he should apply to the civil courts. The author points out that the Guidelines do not mention any need to bring an action in the civil courts to obtain compensation, and he argues that he does not have the financial means to do so. He indicates that only one person, Mr. R.P., has received compensation from Quebec since the programme was set up in 1988. That person had been acquitted in 1986 and did not receive compensation until 2001, after a 15-year wait. According to the author, Mr. R.P. managed to obtain compensation only because the Ombudsman had put pressure on the then Minister of Justice.

**State party's observations on admissibility**

4.1 On 7 July 2006, the State party challenged the admissibility of the communication. It states that the author initiated a civil action against, inter alia, the Government of Quebec

seeking financial compensation in the Superior Court of Quebec on 21 August 2001, i.e. six months after his acquittal. On 15 June 2006, the case was inscribed for proof and hearing by the Court. The State party says the author could have filed his case as early as 13 August 2002, after Quebec had filed its response, but did not do so. The State party therefore argues that the author has not exhausted domestic remedies. It also says that his case should be heard shortly. If the claim is rejected, the State party notes that the author can appeal to the Appeal Court of Quebec and, ultimately, if given leave to do so, to the Supreme Court of Canada.

4.2 The State party notes that the author also lodged a complaint with the Quebec Ombudsman on 22 March 2006 and that this procedure is ongoing as well. Although the author maintains that he does not have the financial means to pursue these remedies, the State party observes that recourse to the Ombudsman does not involve any financial payment and that, in any case, simply pleading penury is not enough to absolve the author of his obligation to exhaust domestic remedies.

#### **Author's comments on the State party's observations**

5.1 On 17 October 2006, the author noted that the State party argues, on the one hand, that his communication is inadmissible because he has initiated legal action against, among others, the Attorney General of Quebec, but on the other hand that this legal action is not admissible either. In any case, the author maintains that his legal action has no bearing on his right to compensation as a victim of a miscarriage of justice under article 14, paragraph 6, of the Covenant. His action is intended to prove that the police and the Crown were at fault.

5.2 The author contends that the State party is not honouring its commitments under the Covenant, as the only measure it has taken to implement article 14, paragraph 6, is to adopt the Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons. He recalls that the State party itself admits in the Guidelines that "a compensation mechanism based solely on these Guidelines might go only part of the way towards enabling Canada to meet its obligations under the International Covenant, as the right to compensation would not be established in law as article 14, paragraph 6, of the International Covenant requires". The Guidelines also state that victims of a miscarriage of justice in Canada, even if their conviction has been reversed as provided for under article 14, paragraph 6, of the Covenant, must *prove* their innocence beyond a shadow of a doubt in order to be compensated. In that respect, the author refers to the reply from the Associate Deputy Minister of Justice of Quebec, dated 24 February 2006, to the effect that his examination of the case did not convince him of the author's factual innocence and that such a conviction was required in order for the Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons to be applicable. The author recalls that the Appeal Court acquitted him on 22 February 2001 and that the principle of the presumption of innocence should be fully applicable.

#### **Additional comments by the parties on admissibility**

6.1 On 6 February 2007, the State party noted that, in his civil liability suit before the Superior Court of Quebec, the author claims that the Attorney General of Canada committed specific errors during the author's term of detention in the federal prison system. Those allegations are not taken up before the Committee. It is in respect of those allegations that the Government of Canada has raised objections to admissibility. As part of his claim

in the Superior Court of Quebec, the author also requests compensation for the harm he and his family allegedly suffered as a result of his conviction and imprisonment.<sup>1</sup>

6.2 Although the author asserts that his action “has no bearing on his right to compensation as a victim of a miscarriage of justice under article 14, paragraph 6, of the Covenant”, the State party notes that the author amended his initial statement, adding a separate chapter specifically on his right to compensation under the Canadian Charter of Rights and Freedoms and the Charter of Human Rights and Freedoms within the overall context of the Covenant. Thus, contrary to what the author seems to be suggesting to the Committee, the State party is of the view that his action could result in compensation for the miscarriage of justice that he claims to have suffered. The State party therefore argues that the action could provide the remedy which he seeks before the Committee, i.e., compensation for the miscarriage of justice that he claims to have suffered, regardless of the fact that the burden of proof lies with the author in that suit, since the burden of proof is an integral part of any civil action. The State party further recalls that the author must, in any event, show that he meets the conditions for the application of article 14, paragraph 6, in particular by proving that there has been a miscarriage of justice.<sup>2</sup>

6.3 The State party considers that the author’s arguments with regard to the Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons are not relevant.

6.4 With regard to the complaint lodged with the Quebec Ombudsman on 22 March 2006, the State party notes that the Ombudsman had declared it inadmissible in June 2006 on the grounds that the Public Protector Act bars the Ombudsman from intervening when a judicial remedy is being sought by the complainant.

7.1 On 22 May 2007, the State party noted that the author’s action in the Superior Court of Quebec has not yet been heard and a hearing date has not yet been set. Since it was inscribed for proof and hearing on 15 June 2006, the case has followed the usual course. Inscription for proof and hearing means a case is ready and a date for the hearing can be set. The parties to the action met in court in March 2007 to fix a hearing date, but the Court postponed the setting of a date until 29 June 2007 so that certain steps could be taken to facilitate the proceedings, given that several parties are involved and the proceedings will be lengthy. It should be noted that the delays that have arisen since the case was inscribed for proof and hearing in June 2006 are normal under the circumstances.

7.2 The State party also notes that the author waited 18 months after Quebec had filed a response, i.e., until 17 February 2004, to file a further amended statement with the Court. He then waited 28 months, i.e., until 15 June 2006, before inscribing the case for proof and hearing, and then only after Quebec had obliged him to do so by procedural means. Consequently, nearly four years elapsed between the time that Quebec filed its response with the Court and the author’s inscription of the case for proof and hearing.

8. On 29 May 2007, the author noted that, in the State party’s response to the action which he had initiated in the ordinary courts, the State party itself said that, since articles 2, paragraph 3, and 14, paragraph 6, of the Covenant have not been specifically incorporated into Canadian law, those obligations could not constitute a valid basis for action. In addition, in response to the State party’s argument that the author must prove that a miscarriage of justice has occurred, the author points out that his file was transmitted to the

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<sup>1</sup> The State party has attached a copy of the response of the Attorney General of Canada to the suit initiated by the claimants dated 8 June 2006.

<sup>2</sup> See, for example, communications No. 89/1981, *Muhonen v. Finland*, Views adopted on 8 April 1985 and No. 408/1990, *W.J.H. v. the Netherlands*, decision on inadmissibility adopted on 22 July 1992.

Court of Appeal of Quebec and that this led to his acquittal, precisely because there had been a miscarriage of justice.

9. On 11 June 2007, the author explained that all the procedural delays in the Superior Court of Quebec were occasioned by the Attorney General of Quebec. He says that, between 2004 and 2006, his lawyer repeatedly requested meetings with the Ministry of Justice lawyers, with a view to reaching an amicable settlement with them. The author himself was invited to meet with the Associate Deputy Minister of Justice of Quebec on 30 November 2005 to discuss the issue of compensation for persons wrongly convicted and imprisoned. On 24 February 2006, the Deputy Minister told him that there would be no amicable settlement. It is for these reasons that the author postponed procedures with the Court, so as not to incur pointless expenditures if an amicable settlement could be reached.

10.1 On 19 June 2007, the State party reiterated that it was not claiming that the entire action initiated by the author in the Superior Court is inadmissible. The Government of Canada has raised certain pleas as to inadmissibility and responses relating to specific errors for which it is allegedly responsible regarding the author's detention conditions in the federal prison system. On the merits, it maintains there was no error. As for the author's request for compensation for the harm allegedly suffered by him and his family in consequence of his conviction and imprisonment, the Government of Canada maintains that it is not responsible for this harm. It is up to the Superior Court to determine if the Government of Canada is responsible and, if so, to what extent.

10.2 In addition, the State party explains that the author's claim for damages is based first and foremost on the applicable rules in Quebec relating to civil liability and not on the Covenant. The author has amended his initial statement in order to add a separate chapter, in which he bases his right to compensation on the Canadian Charter of Rights and Freedoms and the Charter of Human Rights and Freedoms, within the overall context of the Covenant. Accordingly, the argument made by the Government of Canada that articles 2, paragraph 3, and 14, paragraph 6, of the Covenant do not constitute a valid basis for action because the Covenant has not been explicitly incorporated into Canadian law has no relevance for the determination of whether or not the actions undertaken before the Superior Court with a view to obtaining monetary compensation are or are not well founded or for the Court's determination of the level of responsibility of each of the respondents in the action. The Superior Court has the requisite jurisdiction to deal with the action brought before it and the pleas entered by the respondents.

10.3 With regard to the author's assertion that "the Government of Canada argues that it has not incorporated the Covenant in Canadian law (in 31 years) and that, as a result, its international commitments do not give rise to rights for persons subject to Canadian jurisdiction", the State party recalls that article 2 of the Covenant does not specify precisely how the commitments under the Covenant are to be fulfilled, but rather stipulates that States parties must undertake to implement the Covenant through the adoption of legislative or other measures. The implementation of the Covenant in Canada is effected through a range of measures, which may be either legislative or regulatory, as well as through programmes and policies.

11. On 1 July 2007, the author stated that the dates had been set for a 15-day hearing, which was to take place from 5 to 25 February 2009. He noted that the Superior Court of Quebec "strongly recommends that the parties take part in a settlement conference, to be held before completion of their joint case management statement".

12. On 9 July 2007, the State party explained that the time elapsed before the trial was normal, given the large number of cases waiting to be heard in the district of Montreal, the relative urgency of these cases, the anticipated duration of the hearing in the author's case and the number of parties involved. The dates that had been set were the first available

dates for proceedings of the length required in the author's case and had been accepted by the author.

#### **Decision of the Committee on admissibility**

13.1 On 13 July 2007, at its ninetieth session, the Committee considered the admissibility of the communication.

13.2 The Committee observed that the author's conviction by the Court of Quebec on 25 June 1991 was upheld by the Court of Appeal of Quebec on 14 February 1994. The author did not appeal to the Supreme Court of Canada but wrote to the Minister of Justice of Canada under article 690 of the Criminal Code. On the basis of that request, the Minister of Justice ordered the case to be referred back to the Court of Appeal because certain information had been brought to the Minister's attention which could be relevant in determining the innocence or guilt of the author. On 22 February 2001, the Court of Appeal of Quebec acquitted the author of all the charges against him. The Committee therefore considered that article 14, paragraph 6, applied in the present case.

13.3 On the question of exhaustion of domestic remedies, the Committee took note of the State party's argument that the author could obtain compensation for the miscarriage of justice he claims to have suffered through the legal action he had brought before the Superior Court of Quebec. It also noted, however, that the author had approached numerous authorities to obtain compensation, to that point without success. According to the Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons, a legal or administrative board of inquiry should have been set up by the provincial or federal minister responsible for criminal justice in order to look into the matter of compensation for the author. No such board of inquiry was ever established. In any event, the Committee noted that the State party itself admits in the Guidelines that "a compensation mechanism based solely on these Guidelines might go only part of the way towards enabling Canada to meet its obligations under the International Covenant, as the right to compensation would not be established in law as article 14, paragraph 6, of the International Covenant requires".

13.4 The Committee noted that, on 21 August 2001, the author brought a civil liability action against the Attorney General of Quebec to obtain compensation. This action has lasted for some six years and has still not been concluded. The Committee noted that, even though the author amended his initial statement on 17 February 2004, the case could not have been inscribed for proof and hearing in the Superior Court of Quebec before 15 June 2006 because the Attorney General of Canada did not file its response until 8 June 2006. Furthermore, it also noted that the author hoped to achieve an amicable settlement of the case up until 24 February 2006, the date on which the Deputy Minister finally informed him that there would be no such settlement (see paragraph 9 above). The Committee was therefore of the view that the author could not alone be held responsible for the delay. Under the circumstances, the Committee considered that the State party had not demonstrated that the judicial process was effective and found that the communication was admissible insofar as it raised issues with respect to article 14, paragraph 6.

#### **State party's observations on admissibility and on the merits**

14.1 On 29 April 2008, the State party submitted its observations concerning the admissibility and the merits of this communication and asked the Committee to reconsider its decision regarding admissibility under rule 99, paragraph 4, of its rules of procedure and to find the communication inadmissible on the grounds of failure to exhaust domestic remedies. Alternatively, the State party requests that the Committee declare the communication inadmissible *ratione materiae* on the grounds that the author has not established that he meets the requirements set forth in article 14, paragraph 6, of the



Covenant or that it reject the communication on the merits on the grounds that there has been no violation of article 14, paragraph 6.

14.2 The State party recalls the facts of the case and notes that, on 23 June 1992, the victim of the acts which the author was accused of committing, who mistakenly believed that he was still in prison,<sup>3</sup> stated that in late March 1992 she had thought she had seen someone who looked very much like the author in a video rental shop. This statement was reportedly transmitted to the author's counsel in a letter dated 3 July 1992. Between 1994 and 1997, the victim had reportedly said on several occasions that she was uncertain as to the identity of her assailant, but had never retracted her statement. In its judgement of 22 February 2001, the Court of Appeal of Quebec concluded that the victim's statements gave rise to a reasonable doubt as to the author's guilt. The Court did not, however, rule on the author's innocence.

14.3 The State party maintains that the civil suit brought by the author before the Superior Court of Quebec can provide a full remedy for the harm which the author claims to have suffered. Since that suit is currently under way, it submits that the author has not exhausted all the effective domestic remedies available to him. It contends that, if the Court finds in favour of the author, this civil action can provide a full remedy for the harm that he claims to have suffered.

14.4 The State party disputes the statements made by the Committee in paragraph 13.4 above and observes that the Attorney General of Canada was impleaded<sup>4</sup> in the suit on or around 24 July 2002 by the Attorney General of Quebec and was made a respondent in the case on 17 February 2004 on the basis of the author's amended statement. It asserts moreover that the delays that have arisen in the civil case being heard by the Superior Court of Quebec are entirely attributable to the author, since, under the Code of Civil Procedure of Quebec, the plaintiff is responsible for moving the proceedings along. The author could have had his claim inscribed for proof and hearing as early as March 2004, at which time the Attorney General of Canada would have had to present its response.<sup>5</sup> The State party adds that the author inscribed his complaint (on 15 June 2006) only after the Attorney General of Quebec had forced him to do so.<sup>6</sup> It also maintains that the author's attempt to arrive at an amicable settlement did not delay the proceedings in the Superior Court of Quebec because the case could have been inscribed for hearing at any time and that this therefore cannot be used as a justification for his inaction.

14.5 The State party emphasizes that the amount of time that passed between the date on which the author inscribed the action for proof and hearing (June 2006) and the date set for the hearing (February 2009) is unexceptional, given the large number of cases waiting to be heard, the relative urgency of these cases and the anticipated duration of the hearing in the author's case (see paragraph 12).

14.6 With regard to the establishment of a judicial or administrative board of inquiry pursuant to the Guidelines on Compensation for Wrongfully Convicted and Imprisoned

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<sup>3</sup> On 27 January 1992, the Court of Appeal of Quebec released the author conditionally while he waited for the Court to hear his appeal; he had been given leave to appeal on 31 July 1991.

<sup>4</sup> "Impleading" is a procedure by which a respondent in an action may have a third party named to the suit on the grounds that the third party's presence is required in order for the case to be fully resolved.

<sup>5</sup> Under articles 218 and 222 of the Code of Civil Procedure of Quebec, the plaintiff in the principal action (in this case, the author) has an interest to make any useful application to ensure that an action in warranty does not cause undue delay in the principal action. The Attorney General of Canada did not present its defence until 8 June 2006 (see paragraph 13.4 of the decision on admissibility).

<sup>6</sup> On 16 May 2006, the Attorney General of Quebec petitioned that the action be dismissed for want of prosecution under article 265 of the Code of Civil Procedure of Quebec.

Persons, the State party also disputes the comments made by the Committee in paragraph 13.3, noting that such a board is to be set up only if the person in question meets certain eligibility criteria. One of those requirements is that it must have been proven that the person did not commit the crime for which he or she was convicted; this is not the same thing as a person having been found not guilty. In this particular case, the author was acquitted in view of the fact that the new evidence, i.e., the victim's statement, would not permit a prudent jury to conclude beyond all reasonable doubt that the author was guilty. The Court of Appeal did not state that the author did not commit the crimes for which he was convicted and, in the absence of such a statement, the question of eligibility under the Guidelines was examined by means of an administrative inquiry. The findings of that inquiry were that it had not been proven that the author did not commit the offence for which he had been convicted. There was thus no reason to name a board of inquiry to determine the amount of compensation.

14.7 The State party also submits that the meaning of the expression "according to law", as it appears in article 14, paragraph 6, of the Covenant, has no practical or specific implication in terms of this communication, since the question of whether the Guidelines are applied by means of administrative measures or by law does not alter the requirement of factual innocence that must be met in order for a person to be eligible for compensation. The State party contends that, in the light of article 2, paragraph 2, of the Covenant,<sup>7</sup> the Guidelines give effect to the rights set forth in article 14, paragraph 6, of the Covenant because they are public and sufficiently detailed to enable an individual to ascertain the nature of the criteria that will be used in dealing with his or her request.

14.8 As an alternative, if the Committee lets its Views of 13 July 2007 stand, the State party submits that the communication should be found to be inadmissible *ratione materiae* under article 3 of the Optional Protocol, since the author has not established that he meets all the conditions required for the application of article 14, paragraph 6, of the Covenant. Moreover, the author has not established that his conviction was reversed because of a new or newly discovered fact, since the victim's statement expressing uncertainty about her identification of the author was conveyed to the author's counsel in 1992, i.e., between the time of the original trial and the appeal. The State party also asserts that, even if the statement made by the victim in 1992 were to be regarded as a new or newly discovered fact, which it denies, its non-disclosure in time is wholly or partially attributable to the author, who failed to submit it during his hearing of 14 February 1994 before the Court of Appeal of Quebec. It reminds the Committee that, according to its own jurisprudence, the State party should not be held responsible for the actions or omissions of author's counsel.

14.9 Lastly, the State party submits that the author has not demonstrated that he has been the victim of a miscarriage of justice within the meaning of article 14, paragraph 6. It observes that, according to the preparatory work, some States interpret the objective of article 14, paragraph 6, to be the compensation of people who are innocent of the crimes for which they have been convicted.<sup>8</sup> The State party also observes that, according to the Committee's jurisprudence, the principle of the presumption of innocence, as invoked by the author, is not applicable to compensation proceedings. It contends that the author has not proved on the balance of probabilities that he did not commit the crime in question and

<sup>7</sup> See para. 13 of general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III.

<sup>8</sup> General Assembly of the United Nations, fourteenth session, 1959, report of the Third Committee, vol. 4, p. 273, para. 24, and p. 285, para. 11; Commission on Human Rights, summary records, sixth session (E/CN.4/365, pp. 39–40 and E/CN.4/SR.158, p. 7, para. 27, and p. 12, para. 61); Commission on Human Rights, summary records, eighth session (E/CN.4/SR.323, p. 7).

has therefore not proven his factual innocence. The victim's uncertainty as to her assailant's identity led to the author's acquittal, but does not prove his factual innocence. Furthermore, the victim did not retract her statement or have any doubts during the preliminary inquiry or the trial that the author was her attacker. The State party goes on to note that the Court of Appeal that reviewed the judgement did not find that there had been any irregularity, negligence, abuse of rights or denial of justice during the police investigation or the proceedings.

#### **Author's comments on the State party's observations**

15.1 On 29 June and 9 July 2008, the author repeated that he meets all the requirements for compensation under the Guidelines and under article 14, paragraph 6, of the Covenant, since the final decision by which he had been convicted was reversed on the basis of new evidence (i.e., the victim's statement regarding her mistake regarding the identity of her assailant), and he had been acquitted of all charges against him.

15.2 The author affirms that the delays arising in the course of the civil proceedings are wholly attributable to the Attorney General of Quebec and the Attorney General of Canada. He submitted a request for inscription for proof and hearing on 21 May 2002, which led to the impleading of the Attorney General of Canada on 23 July 2002. The author emphasizes that this procedural step placed the Government of Quebec in opposition to the Government of Canada and that this was the main cause of the delay of the civil proceedings.

15.3 The author disputes the State party's arguments concerning the alignment of the Guidelines with article 14, paragraph 6, and notes that, in the Guidelines themselves, the State party affirms that, in the absence of a law, the Guidelines do not fully meet the obligations assumed under the Covenant. He adds that — unlike the Guidelines — article 14, paragraph 6, does not require victims of a miscarriage of justice to prove their factual innocence.<sup>9</sup>

15.4 The author further maintains that, upon remitting his case to the Court of Appeal, the Minister of Justice had acknowledged the author's innocence by stating that "this remedy is an extraordinary measure which is used only when the Minister is assured that there has probably been a miscarriage of justice". The author contends that the Court of Appeal acknowledged, in effect, his innocence by reversing his conviction and acquitting him of the charges. If there had been any doubt as to his innocence, the Court of Appeal could have ordered a retrial. Since the police investigation did not turn up any fingerprints and no DNA analysis was conducted, the author's conviction rested entirely on the victim's statements, and the victim had stated that he was innocent on repeated occasions, in some instances publicly. The author also challenges the description of the assailant that was submitted by the State and points to several differences between it and the description contained in the police report that was prepared at the time that the victim pressed charges.

15.5 The author also emphasizes that the Court of Appeal admitted the six statements made by the victim after the original trial as new evidence, stating that this evidence had been submitted with due diligence and that it was relevant, credible and could influence the verdict. The introduction of the victim's statements led to the reversal of the judgement rendered on 25 June 1991. He states that the Court of Appeal had established that the non-disclosure of this new fact was not attributable to him. The author also disputes the contention that the State party forwarded the victim's statement of 23 June 1992 to his counsel and observes that the State party has not produced an acknowledgement of receipt

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<sup>9</sup> The author refers to the case of Mr. S.T., who is said to have been acquitted in 2007 without being declared innocent and who reportedly received compensation in 2008.

for a letter dated 3 July 1992. In addition, he contends that it was the State party's duty to make this new information known during the appeal proceedings.

**Additional observations of the parties on admissibility and on the merits**

16.1 On 19 December 2008, the State party repeated that "proof of factual innocence is required for the application of article 14, paragraph 6, and the Guidelines (see paragraph 3.1 above)<sup>10</sup> and that it is an essential component of a miscarriage of justice". The concept of a miscarriage of justice applied by the Minister of Justice in referring the case back to the Court involves the determination of whether or not, in the light of additional evidence, a conviction is sustainable beyond all reasonable doubt, whereas compensation for a miscarriage of justice is based on factual innocence. The State party emphasizes that the author's acquittal was founded upon the victim's uncertainty as to her identification of her assailant; the author was acquitted because there was a reasonable doubt, but this cannot be interpreted as proof of his factual innocence.

16.2 With regard to the author's allegations concerning receipt of the statement made by the victim in 1992, the State party reaffirms the comments it made on 29 April 2008 and states that these allegations will be considered by the Superior Court of Quebec in the course of the civil action. It asserts that the judgement handed down by the Court of Appeal in 2001 did not establish that the non-disclosure in time of the victim's 1992 statement was not attributable to the author, in whole or in part.

16.3 The State party argues that the victim's statement does not prove that the author is innocent, since she said that the man whom she saw in the store "could have been Dumont". Her subsequent statements do not prove the author's factual innocence on the balance of probabilities either.

16.4 The State party reiterates that the delays occurring in the civil action are attributable to the author. It notes that the author's request for inscription of his claim for proof and hearing was rejected in June 2002 and that the author did not move his case along thereafter. The State party repeats that, contrary to what the author has stated, domestic remedies have not been exhausted, and the grounds for the civil proceedings do not differ in substance from those cited in the communication that he has submitted to the Committee, given the fact that he has invoked article 14, paragraph 6, in his civil suit.

16.5 The State party also rejects the author's challenge to the description which the victim gave of her assailant; it emphasizes that the author did not call into question, either in 1994 or in 2001, the description given in the court of first instance.

17. On 10 February 2009, the author repeated his comments of 29 June 2008 and highlighted the fact that the victim has publicly stated that he was not guilty of the crime.

18. On 27 February 2009, the State party reported that an amicable settlement had been reached between the author and the City of Boisbriand and its insurers (two of the four respondents in the civil proceedings brought by the author before the Superior Court of Quebec) and asserted that this demonstrates that domestic remedies are useful and effective. The author had sued the City of Boisbriand in connection with the harm caused by alleged misconduct on the part of the police handling the investigation.<sup>11</sup> The exact terms of the settlement, including the sum to be paid, are, however, confidential. The State party

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<sup>10</sup> The Guidelines state that "compensation should only be granted to those persons who did not commit the crime for which they were convicted".

<sup>11</sup> The matter on which an amicable settlement was reached differs from the case submitted to the Committee because it did not concern a miscarriage of justice.

reiterates that the communication should therefore be found to be inadmissible on the grounds that domestic remedies have not been exhausted.

19. On 23 July 2009, the State party indicated that the Superior Court of Quebec had dismissed the action brought by the author against the Attorney General of Quebec and the Attorney General of Canada on 17 July 2009. It repeats that the communication remains inadmissible on the grounds that domestic remedies have not been exhausted, since the Court's decision can be appealed to the Court of Appeal of Quebec.

20. On 23 August 2009, the author stated that, the day after the alleged encounter in the video club in March 1992, the investigator was apprised of the doubts raised by the victim as to her assailant's identity, but that neither he nor his counsel was so informed. He also contends that the judgement of 17 July 2009 contains obvious errors, such as the fact that the judge relied on a statement regarding the identification of the assailant by the victim, in which she said that, in addition to seeing a photograph of the author, she also wanted to see his hands because her assailant had tattoos. The author claims, however, that the victim never saw his hands. He also states that there was no crime scene, as the victim did not report the attack until two days after it had occurred. It would have been surprising, he says, if the victim had informed the prison service of her doubt about her assailant as early as September 1994, and it is even less understandable why the authorities did not take action on their own initiative to reopen the case. Lastly, the author maintains that the State party and the Government of Quebec refuse to acknowledge their responsibility for this miscarriage of justice and that he has received only a portion of the compensation which he sought from the City of Boisbriand and its insurers.

21.1 On 25 September 2009, the State party informed the Committee that the author was appealing the judgement of 17 July 2009 to the Superior Court of Quebec and that the Appeal Court's decision was not expected for several more months. The State party reiterates that the object of the civil action brought by the author is essentially the same as that of the communication submitted to the Committee and that the civil action is an effective remedy which has not yet been exhausted.

21.2 The State party explains that the judge of the Superior Court of Quebec rejected the author's claim based on an absence of fault on the part of the Attorney General of Quebec and the Attorney General of Canada. The Court found that, at the time that the Attorney General of Quebec brought charges against the author in 1990, he had reasonable and probable grounds for believing that the author was guilty of the crime in question and that there was no evidence of malice, abuse or bad faith on the Attorney General's part. The conclusions reached by the Court support the State party's contention that it committed no fault in the proceedings against the author. The Court reportedly concluded, in addition, that it had not been established that neither the author nor his counsel had received the report on the investigation containing the victim's statements concerning her doubts about her assailant and that the Attorney General of Quebec was not at fault for having failed to introduce the victim's statement at the appeal stage, since he had fulfilled his disclosure obligation, and it was not for him to become involved in the defence's case. The State party maintains that the Superior Court's conclusion that there were indications that the person whom the victim saw at the video club in March 1992 could have been the author supports its contention that the author has not established his factual innocence for purposes of the application of article 14, paragraph 6, of the Covenant.

#### **Review of the decision on admissibility**

22.1 The Committee takes note of the State party's request that it reconsider its decision of 13 July 2007 regarding admissibility under article 99, paragraph 4, of its rules of procedure and find the communication inadmissible on the grounds of failure to exhaust domestic remedies.

22.2 The Committee takes note that the State party recognizes that it did not set up a legal or administrative board of inquiry under the Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons to consider the author's case because he did not meet the eligibility criteria requiring proof of his innocence. His request was therefore denied. It also notes that on 17 July 2009 the Superior Court of Quebec dismissed, in the first instance, the civil liability suit brought by the author on 21 August 2001 against the Attorney General of Quebec and the Attorney General of Canada to seek compensation for a miscarriage of justice, and that these proceedings have still not been completed, nine years after the acquittal of the author of the communication. In the light of the explanations of the parties regarding the delay in the civil proceedings, the author cannot be held solely responsible, given that he was informed only on 24 February 2006 that he would not receive an amicable settlement.

22.3 The Committee takes note that the State party has not provided any new information that would lead to reconsideration of its decision regarding admissibility. Accordingly, it reiterates that the communication is admissible and proceeds to consider the merits of the case.

*Consideration of the merits*

23.1 The Committee has considered the present communication in the light of all written information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

23.2 The Committee recalls that, under the conditions set out for the application of article 14, paragraph 6, of the Covenant, compensation according to law shall be paid to persons who have been convicted of a criminal offence by a final decision and have suffered punishment as a consequence of that conviction, if their conviction has been reversed or they have been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice.<sup>12</sup>

23.3 In this case, the author was convicted of a criminal offence by a final decision and was sentenced to a term of imprisonment of 52 months. He was held in prison for a total of 34 months. On 22 February 2001, the Court of Appeal of Quebec acquitted the author of all the charges against him "in view of the fact that the new evidence which has come to light would not permit a reasonable jury acting on correct instructions to find the appellant [the author] guilty beyond all reasonable doubt".

23.4 The Committee notes the State party's argument that it had not been established that the author did not commit the crime in question and that his factual innocence had therefore not been proven. The State party submits that it is of the view that a miscarriage of justice within the meaning of article 14 (6) of the Covenant occurs only when the convicted person is in fact innocent (factual innocence) of the offence with which he is charged. It also

<sup>12</sup> See general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI, para. 52; communications No. 89/1981, *Muhonen v. Finland*, Views adopted on 8 April 1985; No. 408/1990, *W.J.H. v. the Netherlands*, decision on inadmissibility adopted on 12 August 1992, para. 6.3; No. 868/1999, *Wilson v. the Philippines*, decision on inadmissibility adopted on 30 October 2003; No. 880/1999, *Irving v. Australia*, decision on inadmissibility adopted on 1 April 2002; No. 963/2001, *Uebergang v. Australia*, decision on inadmissibility adopted on 27 March 2001, para. 4.2; No. 980/2001, *Hussain v. Mauritius*, decision on inadmissibility adopted on 18 March 2002; No. 1001/2001, *Strik v. the Netherlands*, decision on inadmissibility adopted on 1 November 2002; No. 1367/2005, *Anderson v. Australia*, decision on inadmissibility adopted on 31 October 2006.

explains that in the Canadian penal system, with its common-law tradition, the subsequent acquittal of a convicted person does not imply innocence, unless expressly stated by the court due to evidence to that effect.

23.5 In this case, without prejudice to the Committee's position on the accuracy of the State party's interpretation of article 14, paragraph 6, of the Covenant and its implications for the presumption of innocence, it observes that the author's conviction was primarily based on the victim's statements and that the doubts expressed by the victim after March 1992 concerning her assailant led to the reversal of the author's conviction on 22 February 2001. It further notes that, in the event of acquittal of the person prosecuted, the State party has no procedure for launching a new investigation in order to review the case and to possibly identify the real perpetrator. The Committee therefore considers that the author should not be held responsible for this situation.

23.6 Consequently, owing to this gap, and to delays in the civil proceedings, which have been pending for nine years, the author has been deprived of an effective remedy to enable him to establish his innocence, as required by the State party in order to obtain the compensation provided for in article 14, paragraph 6. The Committee therefore notes a violation of article 2, paragraph 3, read in conjunction with article 14, paragraph 6, of the Covenant.

24. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation of article 2, paragraph 3, read in conjunction with article 14, paragraph 6, of the Covenant.

25. Pursuant to article 2, paragraph 3 (a), of the Covenant, the State party is obliged to provide the author with an effective remedy in the form of adequate compensation. The State party is also required to ensure that similar violations do not occur in the future.

26. 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 or not 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, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

## Appendix

### **Partially dissenting individual opinion by Mr. Fabián Omar Salvioli**

1. I agree with the decision of the Human Rights Committee, in which it found a violation of article 2, paragraph 3, read in conjunction with article 14, paragraph 6, of the International Covenant on Civil and Political Rights in the *Dumont v. Canada* case.
2. However, for the reasons given below, I believe that the Committee should have concluded that in this case the State was also guilty of a separate violation of article 14, paragraph 6, of the International Covenant on Civil and Political Rights.
3. Article 14, paragraph 6, states as follows: “When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.”
4. Clearly, article 14, paragraph 6, does not require the convicted person to prove his or her innocence; it establishes the right to compensation for a miscarriage of justice if an error is revealed by a new or newly discovered fact.
5. It may also be noted that paragraph 6 does not require the wrongly convicted person to prove that a miscarriage of justice has taken place; such proof may be provided by any means, irrespective of the action undertaken by the convicted person.
6. In the context of article 14, paragraph 6, the expression “according to law” does not allow States to restrict a right which has been established by legislation, but only the possibility of regulating the way it is exercised in order to ensure compensation. This is how the Committee understood it when it stated in paragraph 52 of its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial that “it is necessary that States parties enact legislation ensuring that compensation as required by this provision can in fact be paid and that the payment is made within a reasonable period of time”.<sup>a</sup>
7. In its observations, the State notes that according to the preparatory work, some States interpret the objective of article 14, paragraph 6, to be the compensation of people who are innocent of the crimes for which they have been convicted and that proof of factual innocence is a requirement that must be met for article 14, paragraph 6, to be applicable.
8. The Committee should have established clearly that such an interpretation is incompatible with both the letter and the spirit of article 14, paragraph 6, of the Covenant. A treaty must be interpreted in good faith, according to its literal meaning and in the light of its aim and objective. It may be useful to refer to the preparatory work as an additional means of interpretation or in the event that the outcome of interpretation, purposive or otherwise, turns out to be ambiguous or confused.

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<sup>a</sup> *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40, vol. I (A/62/40 (Vol. I)), annex VI.*



9. The wording of article 14, paragraph 6, of the International Covenant on Civil and Political Rights is clear: nowhere does it contain a requirement of the proof of innocence, and even less of “factual innocence”.

10. In the light of the above arguments, since Canadian legislation requires that it is the wrongly convicted person who must show proof of innocence in order to be entitled to compensation for miscarriage of justice, it cannot be considered compatible with article 14, paragraph 6, of the International Covenant on Civil and Political Rights.

11. According to a rule of both customary and conventional international law, a party may not invoke the provisions of its own domestic law as justification for not applying a provision of international law; this rule entails a general obligation not only to align domestic law with the provisions of the international instrument concerned, but also not to enact legislation which is incompatible with that instrument.

12. I therefore consider that in the Dumont case the Committee should have concluded that, in order to ensure that no similar violation occurs in future, the Canadian State must abolish the obligation for the convicted person to give proof of innocence in order to receive compensation for a miscarriage of justice.

*(Signed)* Fabián Omar **Salvioli**

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**R. Communication No. 1491/2006, *Blücher von Wahlstatt v. The Czech Republic* (Views adopted on 2 July 2010, ninety-ninth session)\***

<i>Submitted by:</i>	Nikolaus Fürst Blücher von Wahlstatt (represented by counsel, Lovells Solicitors)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Czech Republic
<i>Date of communication:</i>	7 July 2006 (initial submission)
<i>Subject matter:</i>	Discrimination on the basis of citizenship with respect to restitution of property
<i>Procedural issue:</i>	Abuse of the right of submission
<i>Substantive issues:</i>	Equality before the law and equal protection of the law
<i>Article of the Covenant:</i>	26
<i>Article of the Optional Protocol:</i>	3

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

*Meeting on 27 July 2010,*

*Having concluded* its consideration of communication No. 1491/2006, submitted to the Human Rights Committee on behalf of Nikolaus Fürst Blücher von Wahlstatt under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication, and the State party,

*Adopts* the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication is Nikolaus Fürst Blücher von Wahlstatt, a British and Czech citizen. He claims to be a victim of violations by the Czech Republic of his rights under article 2, paragraph 1; article 2, paragraph 3; article 14; and article 26 of the International Covenant on Civil and Political Rights.<sup>1</sup> He is represented by counsel, Lovells Solicitors.

\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Mahjoub El Haiba, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

<sup>1</sup> The Covenant was ratified by Czechoslovakia in December 1975 and the Optional Protocol in March 1991. The Czech and Slovak Federal Republic ceased to exist on 31 December 1992. On 22 February 1993, the Czech Republic notified its succession to the Covenant and Optional Protocol.

### The facts as presented by the author

2.1 The author is the cousin and claims to be the lawful heir of the last rightful owner of certain real (agricultural) properties situated in what is now the Czech Republic. The author submitted documents to Czech courts apparently establishing that these properties had belonged to the von Wahlstatt family since 1832.<sup>2</sup> They belonged to Hugo Blücher von Wahlstatt (a British and allegedly Czech citizen) in 1948 when he died, and the property was inherited by Alexander Blücher von Wahlstatt (also a British and allegedly Czech citizen), Hugo's brother. Between 1948 and 1949, after Hugo's death, the property was nationalized by the Czech Republic pursuant to Acts Nos. 142/1947 and 46/1948.<sup>3</sup>

2.2 After his death in 1974, Alexander Blücher von Wahlstatt, through his will and testament, bequeathed, inter alia, all of his properties in Czechoslovakia to the author, his first cousin. According to the author, the will was drawn up and executed pursuant to the laws of Guernsey, where the author and his father then resided.

2.3 After the revolution in 1989, the author moved to Czechoslovakia. In 1991, the Government of the Czech Republic passed the Land Law No. 229/1991<sup>4</sup> to redress former land confiscations that had occurred with regard to agricultural properties in the period between 1948 and 1989. The operative paragraphs of this Act are article 4, paragraph 1, which specifies that, the "beneficiary" shall be a citizen of the Czech and Slovak Federal Republic who has his permanent residence on its territory and whose land, buildings and structures belonging to the original farmstead passed over to the State between the period of 25 Feb 1948 and 1 January 1990. In terms of inheritances of such properties, article 4, paragraph 2, specifies the "authorized" recipients of compensation as the natural citizens of the Czech and Slovak Federal Republic permanently resident on its territory, in the following order: (a) an heir who by virtue of a testament acquires the entire inheritance; (b) an heir who by virtue of a testament has acquired part of the property corresponding to his or her inheritance entitlement. The author alleges, and provides expert testimony to support his view, that the law does not require Czech citizenship of the original owner in cases where the original owner is deceased and the claim is made by his/her inheritors (para. 4(2)). In fact, he alleges that pursuant to Law No. 93/1992 Coll., article 4, para. 2 of Land Law No. 229/1991, was amended to remove the citizenship requirement in relation to the original owner.

2.4 The original property was situated in the jurisdiction of three separate districts, and the author initiated administrative restitution proceedings in the land offices of Ostrava,

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<sup>2</sup> In the proceedings at issue, the State party contested whether the will allowed the author to rely on the law of restitution of property, but did not contest the ownership of the property itself.

<sup>3</sup> According to information from communication No. 757/1997, *Pezoldova v. Czech Republic*, a general confiscation law No. 142/1947 was enacted on 13 August 1947, allowing the Government to nationalize, in return for compensation, agricultural land over 50 hectares and industrial enterprises employing more than 200 workers.

<sup>4</sup> According to information from the *Pezoldova* case, Act No. 229/1991 was enacted by the Federal Assembly of the Czech and Slovak Federal Republic and came into force on 24 June 1991. The purpose of the Act was "to alleviate the consequences of some property injuries suffered by the owners of agrarian and forest property in the period from 1948 to 1989". According to the Act, persons who are citizens of the Czech and Slovak Federal Republic who reside permanently on its territory and whose land and buildings and structures belonging to their original farmstead devolved to the State or other legal entities between 25 February 1948 and 1 January 1990 are entitled to restitution of this former property inter alia if it devolved to the State by dispossession without compensation under Act No. 142/1947, and in general by expropriation without compensation. By judgment of 13 December 1995, the Constitutional Court held that the requirement of permanent residence in Act No. 229/1991 was unconstitutional.

Nový Jičín, and Opava on or around 14 December 1992. These proceedings, and their appeals, lasted for more than ten years, and resulted in 23 decisions. All tribunals and courts rejected the applications for restitution, but applied varying and often conflicting reasons, requiring from the author diverse and in his view often unreasonable burden of proof. By way of example, before the land registry of Opava, the administrative court required that the author prove that his cousin had been a Czech citizen, knowing that the land registry had been destroyed, and not accepting as dispositive the numerous pieces of evidence that he provided to the court. The Ostrava Municipal Courts, in its second examination of the issue, held that the will was not sufficient to meet the wording of the Land Act, because an inheritance must be quantified as a percentage of assets (which was not the case in this instance<sup>5</sup>): "... inheritance share is an ideal share in the testator's assets specified in the testament but it has to be specified in numbers, e.g. by fractions or percentage, or verbally, e.g. equal shares." This standard was upheld in four decisions of the Prague Municipal Court of 23 June 1999. Grounds for rejection of restitution were often different and sometimes contradictory with each level of appeal.

2.5 The author also applied to the Constitutional Court seven times. Final rejections<sup>6</sup> were based on the assertion that Alexander Blücher von Wahlstatt (the author's cousin), as the bearer of the inherited rights in question, did not have, or was not proven to have had, Czech citizenship.

2.6 Finally, the author filed complaints in the European Court of Human Rights (ECHR) on 6 June 2000 (App. No. 58580/00, regarding proceedings relating to the Land Office at Opava) and 1 December 2003 (App. No. 38751/03, regarding proceedings relating to the Land Office at Nový Jičín). No application was made in relation to the proceedings relating to the Land Office at Ostava. The basis of the complaints in the two applications was identical: the author relied on article 6 of the European Convention on Human Rights, article 1 of Protocol 1 of the Convention and article 1 of Protocol 1 of the Convention read together with article 14. Three main objections were raised: (a) that the imposition of a citizenship requirement by the Government of the Czech Republic was arbitrary; (b) that the allocation of the burden of proof with regard to proving the nationality was arbitrary; and (c) that the interpretation of the will of the author's cousin (by the Ostrava land office) was arbitrary. The author's first application was declared partly inadmissible (as to article 1 of Protocol 1 and article 14 of the Convention) on 24 August 2004. On 11 January 2005 (deemed definitive on 11 May 2005), the ECHR concluded that there had been no violation of article 6, para. 1 of the Convention, as the national jurisdictions had competently assessed the evidence presented by the author, that they were responsible for interpreting the legislation on restitution, and that their conclusions were not arbitrary. The author's second application was declared inadmissible on 17 May 2005, as it did not disclose any appearance of a violation of the rights in the Convention.

### The complaint

3.1 The author claims to be a victim of a violation of article 26 of the Covenant, in that the citizenship requirement in Land Law No. 229/1991 for the original owner of the confiscated property is discriminatory. He argues that the violation arises from the fact that

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<sup>5</sup> In his will Alexander bequeathed: (a) £500 and all his vehicles to his chauffeur; (b) £500 to his cleaning woman; (c) all his property situated in South Africa to his cousin Wolfgang von Schimonsky; and (d) to his cousin Nikolaus Blücher absolutely ... his papers, portraits and generally all his estate other than bequeathed under (a), (b) and (c) above.

<sup>6</sup> On 30 May 1997, for proceedings relating to the Land Office at Ostrava; on 3 February 2000, for proceedings relating to the Land Office at Nový Jičín; and on 3 June and 9 October 2003 for proceedings relating to the Land Office at Opava.

the courts read this citizenship requirement into the law. He invokes the jurisprudence of the Committee in similar previous cases.<sup>7</sup> He also argues that the discrimination is aimed at the entire family, who are considered not “Czech enough”, implying political motivations for this discrimination.

3.2 The author claims a violation of his right to a fair trial, guaranteed by article 14, by the arbitrary insertion of a citizenship requirement for the original owner of the confiscated property by the domestic courts. In the alternative, if the Committee considers that Land Law No. 229/1991 contains such a citizenship requirement, the author claims that the law itself is discriminatory and violates article 26. He further claims that the standard of proof, requiring that he prove the Czech citizenship of his cousin, amounts to a violation of article 14. He claims that the State party’s courts (Ostrava Regional Court and Prague Municipal Court) failed to respect his right to a fair trial under article 14 on account of the arbitrary interpretation of his cousin’s will.

3.3 The author claims that the State party failed to provide him with an effective remedy, within the meaning of article 2, paragraph 3 and article 2, paragraph 1, read in combination with articles 14 and 26, against the arbitrary interpretation of the will, since the Constitutional Court refused to address the author’s complaints about arbitrary interpretation and instead relied on the citizenship issue.

#### **State party’s submission on admissibility and merits**

4.1 On 7 March 2007, the State party commented on the admissibility and merits of the communication. It submits that the case is inadmissible for abuse of the right of submission, due to the following delays prior to addressing the Committee on 7 July 2006: over ten years from the decision of the Constitutional Court of 30 May 1997 (relating to the procedure before the office of Ostrava); over six years from the decision of the Constitutional Court of 3 February 2000 (relating to the procedure before the office of Nový Jicín); and nearly three years from the decision of the Constitutional Court of 9 October 2003 (relating to the procedure before the office of Opava).

4.2 The State party claims that, contrary to what was expressed by the author, the application submitted on 6 June 2000 (App. No. 58580/00) to the ECHR referred to proceedings relating to the Land Office at Nový Jicín, as well as proceedings relating to the Land Office at Opava.<sup>8</sup> Even if the author’s application to the ECHR is taken into account, this still leaves a delay of over one year after the ECHR decision of 11 January 2005 (deemed definitive on 11 April 2005), prior to addressing the Committee on 7 July 2006. The State party confirms that no proceedings were initiated before the ECHR with respect to the proceedings before the Land Office in Ostava. Thus, with respect to these proceedings, the State party highlights that the author waited for a period of over ten years, from the date of the Constitutional Court decision of 30 May 1997 until 7 July 2006, before he addressed the Committee. While acknowledging that there is no explicit time limit for the submission of communications to the Committee, the State party refers to the limitation period of other international instances, notably the International Convention on the

<sup>7</sup> Communications No. 586/1994, *Adam v. Czech Republic*, Views adopted on 23 July 1996; No. 857/1999, *Blazek v. Czech Republic*, Views adopted on 12 July 2001; No. 747/1997, *Des Fours Walderode v. Czech Republic*, Views adopted on 30 October 2001; and No. 945/2000, *Marik v. Czech Republic*, Views adopted on 26 July 2005.

<sup>8</sup> It would appear from the decision of the ECHR of 11 January 2005 (deemed definitive on 11 April 2005) that it only related to the proceedings before the Land Office at Nový Jicín, as expressed by the author. As to the proceedings before the Land Office of Opava, it states in the judgement (French only) “*La Cour observe que cette dernière procédure fait l’objet d’une autre requête introduite par l’intéressé, enregistrée sous le n° 38751/03.*”

Elimination of All Forms of Racial Discrimination (six months following exhaustion of domestic remedies) to demonstrate the unreasonable length of time the authors waited in this case without providing adequate reasons for the delay.

4.3 The State party also submits that, although it has not made a reservation to article 5, paragraph 2 (a), of the Optional Protocol, the Committee should observe that the issues raised in this case have already been considered by the ECHR, and that in the light of this the Committee should examine the communication more rigorously. The Committee should not become an appeal body from decisions of the ECHR.

4.4 On the merits, the State party contests the author's claim that the Constitutional Court created a new condition for restitution based on a citizenship requirement for the original owner as well as the heir. It submits that the Court relied on the principle of *nemo plus juris ad alium transferre potest quam ipse habet*: that a person who asserts a claim after the death of the original owner should not have more rights than the original owner himself and that this argument was accepted by the ECHR in its decision of 11 January 2005.

4.5 The State party denies that the proof required for the purpose of demonstrating the Czech nationality of the original owner was onerous. It lists the type of documents that would have sufficed for this purpose and submits that the author failed to provide any document directly attesting to the claim that his uncle (through which his cousin is alleged to have received Czech citizenship) was indeed a Czech citizen. The national courts examined this issue extensively, and the Land Office of Opava even requested an investigation by the Service of Internal Affairs, which confirmed that it could find no proof that the original owner of the property was indeed a Czech citizen. The State party submits that the author had many opportunities to comment on all the evidence put forward by the authorities during the domestic proceedings, and the author is not claiming to have had no access to such information. The State party argues that article 14 cannot be interpreted to mean that the national authorities should consider a condition to be fulfilled simply because it is too difficult to demonstrate. In its view, the fact that the author could not prove that his cousin was a Czech citizen is simply because he was not.

4.6 The State party denies that the will in question was interpreted arbitrarily and regards the court's interpretation of article 4, paragraph 2 of the Land Law as correct (see paragraph 2.4 above). Similarly, the domestic authorities correctly did not apply the law of Guernsey to the given case, contrary to the author's claim. The State party denies that the citizenship requirement is discriminatory and refers to its submissions in the earlier property restitution cases filed against it.<sup>9</sup> At the beginning of the 1990s, the legislature decided to remedy some of the wrongs caused by the communist regime, through restitution. The group of people who could receive restitution of property was large but obviously certain conditions had to be fulfilled of which the citizenship requirement was one. It points to the decisions of the Constitutional Court, which on several occasions has attested to the constitutionality of the requirement, and in the present case considered that it was not possible that the heir to the property would have more rights than the original owner.

4.7 The State party submits that the reasoning of the Constitutional Court, to the effect that the original owner must have been a Czech citizen for the purposes of the restitution laws, does not invalidate the decisions of the Land Offices to dismiss the author's claim for failure to fulfil other criteria. The reason the Constitutional Court did not consider the

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<sup>9</sup> *Adam v. Czech Republic*, para. 12.6, *Blazek v. Czech Republic*, para. 5.8, *Des Fours Walderode v. Czech Republic*, and *Marik v. Czech Republic* (see note 7 above).

author's other claims, including the alleged arbitrary interpretation of the original owner's will, was that this would not have changed the result – namely that the author was not entitled to restitution as the original owner was not a Czech citizen. The State party contends that the findings of the Land Offices as to the author's failure to fulfil the other conditions of the restitution law still stand and that the Constitutional Court was not obliged to examine whether the author satisfied these other conditions of the law once it found that the citizenship requirement had not been fulfilled.

4.8 The State party denies that the Blücher von Wahlstatt family was discriminated against by the Czech authorities, and submits that the only question under examination was whether the original owner was indeed a Czech citizen. If the authorities were discriminating against the family on the basis of their national origin, the Czech authorities would not have awarded the author Czech citizenship in 1992.

#### **Author's comments on the State party's observations**

5.1 On 4 February 2008, with respect to the arguments on abuse of submission, the author submits that he pursued his grievances before the Czech authorities and courts and the European Court of Human Rights for over twelve years. The last ECHR application was dismissed in May 2005 and the communication was submitted to the Committee in July 2006. He also refers to the State party's own observation that the Optional Protocol does not require a communication to be submitted within a certain deadline. Furthermore, he submits that the State party failed to produce any evidence to substantiate the alleged.

5.2 As to the argument that the Committee is not an appeal body of the ECHR, the author submits that it is irrational to suggest that the Committee should take a stricter stance towards his submission because the case has already been examined in another forum. The Committee is an independent expert body and there are different considerations which apply to its deliberations as compared with the ECHR. Moreover, the argument concerning his discrimination by the Czech authorities has not been (and could not have been) previously examined by the ECHR. Furthermore, the discrimination against the author on the basis of his national origin is an illegitimate distinction and warrants stricter scrutiny.

5.3 On the merits, the author reiterates his claim that the requirement of citizenship imposed by the Czech courts as a condition for restitution — be it in relation to the applicant, for the original owner or for both — is incompatible with the requirement of non-discrimination in article 26 of the Covenant. On the argument that the nationality requirement is justified by the approval given by the Constitutional Court, the author submits that this condition imposed upon the original owner also violated article 26, and that the State's obligation under the Covenant not only extends to the executive branch but to all three branches of State authority, including the legislature and the judiciary.

5.4 As to the principle of "*nemo plus juris ad alium transferre potest quam ipse habet*", the author submits that this principle has been wrongly portrayed and applied by the State party and does not apply to this case. It specifically cannot justify any differential treatment on the basis of nationality. Contrary to the State party's assertion, the principle of "*nemo plus*" cannot justify discrimination on the basis of nationality. The State party's reasoning is flawed. It does not apply to the facts of the case and simply states that the transferor cannot transfer more rights than he actually has. Therefore, the principle applies to cases in which the transferor tries to transfer rights, which do not belong to him, to the transferee. As a consequence, the principle is mainly concerned with third party protection.

5.5 The State party's translation of the principle "the transferee/successor cannot dispose of more rights than the transferor/original owner actually had" is misleading, as it does not concern the disposal of rights by the transferee, but is only concerned with the protection of third parties' rights during the transfer of rights by the transferor. While a

correct translation and application of the principle to the author's case would mean that "Alexander Blücher could not transfer more rights than he actually had" (which is not a problem in this case), the Government turns the meaning into "Nikolaus Blücher (successor) cannot dispose of more rights than Alexander Blücher (original owner) actually had". The State party's version of the principle refers to a comparison of the scope and the value of the right(s) before and after the actual transfer. In the author's view, rights do not have to remain unchanged forever after the actual transfer between transferor and transferee has taken place. Consequently, it is of course possible that the successor can dispose of more (or less) rights than the original owner actually had, simply because rights do not necessarily have to stay the same and are subject to possible changes.

5.6 The author submits that in his case, the rights in question did in fact change after the actual transfer: it was the Czech Republic itself that by virtue of the Land Law No. 229/1991 granted the author (successor) a claim to restitution which the original owner, who had died long before the Land Act has entered into force, did not have. The reason why the author disposes of more rights than the original owner had is to be found in the restitution legislation of the Czech Republic. When the author became the heir of Alexander Blücher in 1974 he entered into Alexander Blücher's position with regard to the estate in the Czech Republic. Therefore, Alexander Blücher never transferred more rights than he had and consequently Nikolaus Blücher never received more rights from Alexander Blücher than the latter had. In 1991, some 17 years after the death of Alexander Blücher, the Czech Republic by virtue of Land Law No. 229/1991 granted the heirs of wrongfully expropriated persons the right to restitution. As to the assumption that Alexander Blücher would not have been entitled to claim restitution under the Land Act because he was allegedly not a Czech citizen and therefore would not have fulfilled the criteria under the Land Act, the "logic" behind this reasoning is based on a hypothetical application of a discriminatory citizenship requirement to the original owner as if he were the applicant under the Act.

5.7 As to the argument that the Czech legislature was entitled to restrict restitution by the imposition of certain requirements, the author submits that it was the Czech courts and not the legislature that imposed such a requirement. The relevant and widely accepted principle of public international law is that the expropriation of property, even in the case of compensation, is illegal if it is based on discriminatory grounds. This principle must apply also to measures of restitution relating to expropriation. In the case of discrimination against non-nationals, such discrimination may be lawful only if the expropriation is in the public interest, but this is not the case here. The injustices which the Land Law seeks to redress occurred to owners of land, by virtue of their ownership, rather than to "nationals", by virtue of their nationality. Therefore, undoing these wrongs must not discriminate on grounds of nationality. Finally, he submits that the fact that he has acquired Czech citizenship in accordance with the law does not disprove the fact that the Czech authorities have a certain prejudice against the Blücher von Wahlstatt family. It merely proves that the Czech authorities in this respect have acted in accordance with the law.

#### **Author's supplementary submissions and the State party's comments thereon**

6.1 On 23 January 2009, the author provided responses to questions posed by the Secretariat on behalf of the Committee. According to the author, Hugo lived for most of his life in Czechoslovakia. Apart from completing his University education in the United Kingdom of Great Britain and Northern Ireland and fighting for the Allies in World War I as an officer of the British Royal Air Force, he was otherwise resident in Czechoslovakia. When his father died in 1928, Hugo took over the management of the family estate at Radun in Czechoslovakia. In 1947, he left the estate before Christmas for a trip to the United Kingdom and died unexpectedly of a heart attack on 8 January 1948 in Guernsey, the Channel Islands.



6.2 As to Alexander, the author submits that he was born in Guernsey in 1916 and went to Czechoslovakia after Hugo's death in February 1948 to take over the management of the estate. He remained there until it was nationalized, which "began in September/October 1948 and was completed by May 1949", i.e. after Hugo's death. During this period he lodged a legal complaint against the decisions of the Ministry of Agriculture with the Highest Court of Justice in Prague in July 1948. Alexander commuted between Czechoslovakia and Guernsey until he was denied re-entry on a return trip<sup>10</sup> "on account of the communist's opposition to his and his family's status within a class of prominent landowners". After being so refused re-entry he divided his time between South Africa and Guernsey until his death in Cape Town on 18 September 1974.

6.3 As to the author himself, he submits that he was born in Germany in 1932 but moved to Switzerland on account of his father's vehement opposition to the Nazi regime. In 1950 he returned to Germany to attend university. Throughout his childhood he made frequent visits to the families' estate in Czechoslovakia until its nationalization. At the end of the Velvet Revolution in the 1990s, he moved to the Czech Republic and was granted citizenship in 1992 and permanent residence in 1993. Subsequently, he began dividing his time between the Czech Republic and Switzerland.

7. On 3 June 2009, the State party indicated that it did not intend to comment on the author's submission.

8.1 On 5 February 2010, the author responded to further requests for clarification from the Committee. The Committee requested to know: under which provisions of the Acts Nos. 142/1947 and 46/1948, the property in question was nationalized; what the objective of Law 229/1991 was; why citizenship was made a condition for restitution in Law 229/1991. A copy of Acts Nos. 142/1947 and 46/1948 were also requested.

8.2 The author submitted a decision of the Ministry of Agriculture dated 15 April 1948 made under the authority of the Land Act 142/1947 in which it states that all of the land over 150 hectares with the exception of certain lands was confiscated pursuant to paragraph 1 of the same Act and that everything between 50 and 150 hectares was also confiscated under the same paragraph. The author could not find a similar document regarding Act 46/1948, but according to him given the relationship between the two Acts it is clear that the basis of confiscation of the remainder of the land in question under this latter Act was paragraph 1. The author did not provide a copy of either of these acts.<sup>11</sup>

## Issues and proceedings before the Committee

### *Consideration of admissibility*

9.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant. The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the matter is not being examined under another procedure of international investigation or settlement.

<sup>10</sup> No date provided.

<sup>11</sup> Upon a review of the decision of 15 April 1948, although there is no explanation of para. 1 of Law 142/1947, it would appear that the basis behind the nationalization related to the desire not to have large estates concentrated in the hands of individuals or joint owners as well as the urgent local need for agricultural land for the "public good" and in light of the expected return of Czech and Slav compatriots, who it is assumed were supposed to benefit from redistribution of the land.

9.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another international procedure of investigation or settlement. It notes that this case was already considered and decided by the European Court of Human Rights on 11 January and 17 May 2005, but that in accordance with its jurisprudence<sup>12</sup> previous examination by another body does not preclude it from considering the claims raised herein and the Czech Republic has not made a reservation under article 5, paragraph 2 (a) of the Optional Protocol.

9.3 As to the State party's argument that the submission of the communication to the Committee is an abuse of the right of submission under article 3 of the Optional Protocol, the Committee notes that the author diligently pursued his claims through the domestic courts until the judgments of the Constitutional Court of 30 May 1997, 3 February 2000, and 9 October 2003, whereupon he filed two claims with the European Court of Human Rights. It notes that this Court handed down judgments, relating to the proceedings before the Land Offices of Opava and Nový Jicín, on 11 January and 17 May 2005, respectively, and that the authors filed a complaint before the Committee on 7 July 2006. Thus, a period of just over one year expired prior to filing a complaint before the Committee.

9.4 While noting that no claim was filed before the ECHR with respect to the proceedings before the Land Office of Ostava, leaving a period of over ten years between the Constitutional Court decision and the complaint to the Committee, the Committee observes that the ECHR was seized of the author's remaining claims on 6 June 2000, in which the same citizenship issue was raised. The Committee considers it reasonable that the author waited for the outcome of the ECHR decision before addressing the Committee.

9.5 The Committee recalls that there are no fixed time limits for submission of communications under the Optional Protocol and that mere delay in submission does not of itself, except in exceptional circumstances, involve an abuse of the right to submit a communication.<sup>13</sup> The State party has not duly substantiated why it considers a delay of just over one year to be excessive in the circumstances of this case. Thus, in the circumstances, the Committee does not regard the delay to have been so unreasonable to amount to an abuse of the right of submission and considers the communication admissible.

#### *Consideration of the merits*

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

10.2 The main issue before the Committee is whether the application to the author of Land Law No. 229/1991 amounted to a violation of his right to equality before the law and to equal protection of the law, contrary to article 26 of the Covenant. It reiterates its jurisprudence that not all differentiations in treatment can be deemed to be discriminatory under article 26. A differentiation which is compatible with the provisions of the Covenant and is based on objective and reasonable grounds does not amount to prohibited discrimination within the meaning of article 26.<sup>14</sup>

<sup>12</sup> *Pezoldova v. Czech Republic* (see note 3 above).

<sup>13</sup> See communications No. 787/1997, *Gobin v. Mauritius*, decision on inadmissibility of 16 July 2001, para. 6.3, No. 1434/2005, *Claude Fillacier v. France*, decision on inadmissibility of 27 March 2006, para. 4.3; and No. 1101/2002, *Alba Cabriada v. Spain*, Views adopted on 1 November 2004, para. 6.3.

<sup>14</sup> See communication No. 182/1984, *Zwaan-de Vries v. The Netherlands*, Views adopted on 9 April 1987, para. 13.

10.3 The Committee recalls its Views in the cases of *Simunek, Adam, Blazek, Marik, Kriz, Gratzinger* and *Ondracka*<sup>15</sup> where it held that article 26 had been violated, and that it would be incompatible with the Covenant to require the authors to obtain Czech citizenship as a prerequisite for the restitution of their property or, alternatively, for the payment of appropriate compensation. Bearing in mind that the authors' original entitlement to their properties had not been predicated on citizenship, it found that the citizenship requirement was unreasonable. In the case *Des Fours Walderode*,<sup>16</sup> the Committee observed further that a requirement in the law for citizenship as a necessary condition for restitution of property previously confiscated by the authorities makes an arbitrary, and, consequently a discriminatory distinction between individuals who are equally victims of prior State confiscations, and constitutes a violation of article 26 of the Covenant. This is all the more so in the present case, where the author himself does in fact satisfy the citizenship criterion but is denied restitution on the basis of a reliance on the same requirement of the original owner.

10.4 While noting that, according to the State party, there are other reasons which would prevent the author from fulfilling the conditions of the law in question, the Committee notes that the only criteria considered by the Constitutional Court in dismissing the author's request for restitution was that the original owner did not satisfy the citizenship criteria. Thus, irrespective of whether the citizenship requirement was inherent in Land Law No. 229/1991 itself or whether it resulted from the application of the law by the courts of the State party, the Committee finds that the application of the requirement for citizenship violated the author's rights under article 26 of the Covenant.

10.5 In light of a finding of a violation of article 26, due to the fact that the citizenship criteria, as applied in this case, was discriminatory, the Committee need not pronounce itself on the author's other claims under articles 14 and 2, which relate to the national court's assessment of whether or not the original owner was in fact a Czech citizen, as well as their interpretation of the will in question.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 26 of the International Covenant on Civil and Political Rights.

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including appropriate compensation if the properties cannot be returned. The Committee reiterates that the State party should review its legislation to ensure that all persons enjoy both equality before the law and equal protection of the law.

13. 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 or not, 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 in case a violation has been established, the Committee wishes to

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<sup>15</sup> See communication No. 516/1992, *Simunek v. Czech Republic*, Views adopted on 19 July 1995, para. 11.6; *Adam v. Czech Republic*, para. 12.6, *Blazek v. Czech Republic*, para. 5.8, *Marik v. Czech Republic*, para. 6.5, *Des Fours Walderode v. Czech Republic* (see note 7 above); communications No. 1054/2002, *Kriz v. Czech Republic*, Views adopted on 1 November 2005, para. 7.3; No. 1463/2006, *Gratzinger v. Czech Republic*, Views adopted on 25 October 2007, para. 7.5; and No. 1533/2006, *Ondracka v. Czech Republic*, Views adopted on 2 November 2007, para. 7.3.

<sup>16</sup> *Des Fours Walderode v. Czech Republic* (note 7 above), paras. 8.3–8.4.

receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**S. Communication No. 1502/2006, *Marinich v. Belarus*  
(Views adopted on 16 July 2010, ninety-ninth session)\***

<i>Submitted by:</i>	Mikhail Marinich (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	15 May 2006 (initial submission)
<i>Subject matter:</i>	Conviction of an opposition leader accompanied with unfair trial, unlawful detention, inhuman conditions of detention and alleged violation of his right to privacy, freedom of expression and freedom of assembly
<i>Procedural issue:</i>	Non-substantiation
<i>Substantive issues:</i>	Right to fair trial, right to immediate access to a lawyer, unlawful constraint measure, right to be promptly informed of the charges, inhuman treatment and poor conditions of detention, presumption of innocence
<i>Articles of the Covenant:</i>	7; 9, paragraph 1; 10; 14, paragraphs 1, 2 and 3 (a) and (b); 15; 17; 19; and 22
<i>Article of the Optional Protocol:</i>	2

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

*Meeting* on 16 July 2010,

*Having concluded* its consideration of communication No. 1502/2006, submitted to the Human Rights Committee by Mr. Mikhail Marinich under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication, and the State party,

*Adopts* the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication is Mr. Mikhail Marinich, born in 1940, a citizen of Belarus and former presidential candidate, who claims to be the victim of violations by the

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

State party of articles 7, 9, 10, 14, 15, 17, 19 and 22 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 30 December 1992. The author is unrepresented.

### **The facts as presented by the author**

2.1 The author, formerly a high-level state official,<sup>1</sup> was a candidate to the presidential elections of Belarus in 2001. Following the unsuccessful elections, he became head of the Belarusian Association Business Initiative (BABI). He published several articles and made speeches at conferences on economic reform suggesting views different from those of the Government. This led to persecution of BABI members by the State.

2.2 The author submits that since 2002, he has been under tight surveillance. His phone was tapped, his car was followed, and he was not given permission to open branches of BABI in the regions. After the publication of one of his articles in a national newspaper, administrative charges were brought against him. Furthermore, the BABI offices were closed down several times, forcing them to change their location. At the beginning of 2004, the organization rented an apartment in Minsk city. While the author was on a business trip to the United States of America, the authorities forced the owner of the apartment to cancel the lease to the BABI. Thus, they had to move and the organization's equipment, part of which had been provided by the Embassy of the United States on the basis of an agreement, was moved to a garage until the new office could be rented.

### *Arrest*

2.3 On 24 April 2004, while driving, the author was stopped by the traffic police for exceeding the speed limit and driving in a drunken state, which he denied. Soon after, the KGB<sup>2</sup> officers arrived and searched his personal belongings without any search warrant. During the search, the KGB officers seized his case with US\$ 91,000. No protocol in relation to seizure was made. At around 8 p.m., the author was taken to the KGB office without a warrant issued by the prosecutor's office or any other agency. He claims that he was not allowed to call his relatives or to contact a lawyer.

2.4 The author was interrogated during the night without legal assistance. The interrogation was allegedly recorded with a hidden camera. Subsequently, some parts of the interrogation were shown on Belarusian TV, accompanied with false and degrading comments about the author. He submits that the Belarusian TV aired the distorted information even before the investigation ended.

2.5 Early on the morning of 25 April 2004 the author was released, but was ordered to return for a meeting with KGB officers on 26 April 2004 at 3 p.m. The author was not given any procedural documentation in relation to his detention. During the following interrogation, which also took place in the absence of a lawyer, the author was informed that part of the money (US\$ 41,900) seized from him was found to be counterfeit. He was not given the results of the expertise that came to such conclusion and was given no explanation of why such expertise was required in the first place. As such, the author became a witness in a crime of producing and distributing counterfeit foreign currency.

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<sup>1</sup> He was a former Mayor of Minsk city, former deputy of the Parliament, former Minister of Foreign Economic Relations and former Ambassador of Belarus to several European countries.

<sup>2</sup> The State Security Agency of the Republic of Belarus (Belarusian: Камітэт дзяржаўнай бяспекі, КДБ, Russian: Комитет государственной безопасности, КГБ) is the intelligence agency of Belarus. It is the only intelligence agency that kept the Russian name KGB after the dissolution of the Soviet Union.

2.6 On 26 April 2004, the investigators searched his summer house and seized a firearm and personal documents. His house was broken into as the windows were shattered and his belongings were scattered around. The firearm did not have his fingerprints. No video or photo was taken during the search. The search report did not take note of the broken window and other traces of burglary. His personal documents were seized in violation of the Criminal Procedure Code. The search of his house was unlawful as it was carried out in relation to the criminal case on counterfeit of foreign currency, under which he was only a witness.

#### *Opening of criminal proceedings*

2.7 On 27 April 2004, a criminal case was opened against the author under section 295, part 2 (illegal actions involving a firearm) and section 377, part 2 (theft of documents, stamps or seals). The same day, he managed to meet a lawyer.

2.8 On the same day, the apartment of his former daughter-in-law and grandson was searched. They also interrogated his former daughter-in-law on his health and financial situation. His own apartment was also searched in the absence of his lawyer. Personal documents, business cards, letters, articles, mobile phones and documents concerning the BABI were seized. The garage of his son was also searched.

#### *Pretrial constraint measure*

2.9 On 29 April 2004, having spent five days in the KGB remand prison, the author was provided with a warrant authorizing his incarceration. Sections 295, part 2, and 377, part 2, of the Criminal Code invoked in the warrant include other measures of pretrial constraint which do not involve incarceration. He claims that while choosing the constraint measure, KGB investigators did not take into account the circumstances of the case, the severity of the charge, the services he rendered to the society and the state, his health condition and the appeals of the public at large. The health report, which was provided to the KGB, stated that a week prior to the arrest he had sought medical advice for severe pains and fever. He was diagnosed as suffering from a heart and kidney condition and was recommended to undergo treatment at a cardiovascular hospital due to tachycardia. A petition filed by the author and his lawyer with the Minsk Regional Prosecutor to change the constraint measure on health grounds was rejected. The petition was accompanied with letters of support by public figures.

#### *Investigation*

2.10 The preliminary investigation lasted for eight months, which he spent in the KGB remand prison. During this time, he claims he was presented with trumped-up charges in order to prolong his incarceration. When evidence could not be found, other charges were brought against him. Thus, a criminal case which led to his conviction was launched on 23 September 2004, five months after his detention, and only on 4 November 2004 an accusation warrant was issued. He claims that his detention from 26 October 2004 onwards was based on the need to explore the possibility of launching another criminal case against him under section 377, paragraph 1, of the Criminal Code in connection with the theft of the seal of the organization that he headed. In May and June 2004, a total of six petitions were lodged with the Minsk Region Prosecutor's Office to protest against the illegal detention and charges against him. Two similar petitions were filed with the General-Prosecutor's Office of Belarus. On 29 June 2004 he wrote a letter to the head of the Belarusian KGB and the Belarusian Prosecutor-General to expose the illegal nature of his detention and the charges laid by the KGB. On 24 September 2004, the author's lawyer filed a complaint with the Minsk Regional Prosecutor demanding the dropping of all charges against the author. The complaint was dismissed.

2.11 The author adds that the investigation was carried out by the Department of the KGB for Minsk city and Minsk region, although under section 182 of the Criminal Procedure Code, it falls under the purview of the Ministry of Interior.

*Prison conditions*

2.12 The author submits that during the pretrial detention, he was held in inhuman and degrading conditions at the KGB remand prison, which had a negative effect on his health as shown in medical reports. He claims that recommendations made by a cardiologist were not observed. In August 2004, the United Nations Working Group on Arbitrary Detention was refused authorization to visit the author in his place of his detention.

2.13 He submits that during the incarceration he was held in five different cells, none of which was larger than 5 square metres. These cells were originally designed for one or two people, but in fact were populated by four or five people. The cells were not equipped with artificial ventilation and there was no source of fresh air from the outside. Thus, the air reeked of sweat, urine and excrement. In summer, the cells were excessively hot and the inmates had to be half naked. Their clothes were always damp due to high humidity. In autumn, the cells were cold and moist. There was no natural light and the cell was lit by a single bulb. Thus, the cell was always in semi-darkness. The light, which was not switched off at night, did not penetrate the lower bunks and it was impossible to either read or write, while people on the upper bunks found it difficult to sleep. The insufficient light strained his eyes and worsened his eyesight. This is allegedly documented in a medical report.

2.14 He claims that meals at the remand prison were very meagre. Oatmeal was served for breakfast, a soup and porridge for lunch and boiled unpeeled potatoes and herring for dinner. The ration never included vegetables, fruit or meat. Inmates were entitled to two monthly food packages sent by relatives. However, the packages were controlled tightly. He claims he lost 10 kilograms in six months. He adds that his inmates were heavy smokers and the prison administration did nothing to limit smoking or separate those who smoked from those who did not.

2.15 He claims that during his detention he developed several chronic cardio-vascular diseases. His kidney condition also deteriorated. While in jail, he underwent two medical examinations, which revealed several cardiovascular diseases, including arrhythmia, ischemic heart disease, and atherosclerosis. The medical examination report of 20 October 2004 said that he should undergo treatment at a specialized medical establishment. He claims that the members of the medical commission were pressured to conclude that there were no medical grounds for releasing him from the remand prison.

*Trial*

2.16 The author submits that the trial, which lasted from 23 to 30 December 2004, was neither independent nor unbiased. Although the hearings were declared open to the public, representatives of political parties and NGOs were effectively barred from the court room. The court building was allegedly surrounded by the police who prevented people from even approaching it. He adds that KGB officers were constantly present in the building. Two of them recorded the proceedings. The hearings were held in a small room which could seat only 12 people. He claims that during recesses, KGB officers and the judge held consultations without witnesses. Journalists allowed into the court room at the insistence of the defence and relatives were not permitted to record the hearings.

2.17 The author claims that during the hearings the judges took scant interest in the speeches made by lawyers and the defendant. The prosecutor was rude and tendentious. He repeatedly made scurrilous statements about the author. On 30 December 2004, the last day of the trial, the judge travelled to the Minsk Region Court to obtain guidance as to the



verdict and the punishment. The author was convicted for stealing computer and other office equipment donated by the United States Embassy to the BABI and sentenced to five years of imprisonment with confiscation of property and without a right to hold certain official positions for the duration of three years. He claims that his conviction under section 210, part 2, of the Criminal Code is illegal as there were no elements of the crimes in his actions. The United States Embassy and the State Department allegedly stated that they had no claims whatsoever against the author and the organization he headed. Not only did the court ignore the statement submitted by the United States Embassy regarding the absence of any claims, but also misrepresented the actual facts by claiming in its verdict that the property owner demanded that the equipment be returned. The court also disregarded the protocol of the BABI council meeting which stipulated that the organization had no property claims against the author.

2.18 The author adds that the court underestimated the fact that he was abroad when the equipment was moved out of the office and was not capable of contacting the organization members. This is proved by the documents which the prosecution obtained from the passport and visa service. They show that he left Belarus on 25 January 2003 and returned on 17 February 2003. This fact was also confirmed by the witnesses and the documents provided by the defence. The author adds that the court tendentiously granted the statements only partial acknowledgement. He claims that in the sentence the court twisted the logic and the meaning of these statements.

2.19 After the trial in January 2005, he was transferred to the KGB remand prison in Minsk and was kept there until 3 March 2005 when he was taken to the Orsha penal colony. The conditions remained the same (meagre ration, a 40-minute daily walk, and absence of medical assistance). At that time, his lawyers filed a cassation appeal to the Minsk Region Court which resulted in the reduction of his term from five to three and half years.

#### *Orsha penal colony*

2.20 The author claims that it took more than one day for him and other inmates to get to Orsha. During the trip in freezing railway cars, the handcuffed inmates were subjected to degrading searches and inspections. Once they reached Orsha, they were taken to the penal colony in specially equipped lorries. After they arrived at the colony, they were ordered out of the lorries, and were forced to squat, lower their heads and kneel. During the trip to Orsha, the guards confiscated all the medications he had to take twice a day and did not give them back.

2.21 After the arrival at the colony on 3 March, he approached the administration for medical assistance, but to no avail. He claims it was difficult to get admitted to a prison hospital: only five inmates could be put in hospital at one time. Before a transfer to the hospital an inmate had to stand in a lengthy queue to be examined by a doctor. Sometimes as many as 50 inmates from different units crowded in the corridor.

2.22 On 4 March, he accidentally dropped a kettle with boiling water and badly scalded the left side of his body. Two days later, he was paralysed and was taken to the prison hospital. He claims he suffered a stroke and the prison administration did not notify either his relatives or his lawyer. The administration and prison doctors did nothing to provide him with the needed assistance or to contact cardiovascular specialists.

2.23 On 10 March 2005, his wife managed to arrange a meeting with him while he was half paralysed. He got medications back, but they were not suitable for treating strokes. He spent a week without receiving any treatment.

2.24 On 11 March 2005, he complained to the General Prosecutor's Office demanding action regarding the refusal of medical assistance by the Orsha penal colony administration. The same day, the Orsha prosecutor finally visited the colony. However, a special medical commission came to the colony only on 14 March, i.e. one week after he had the stroke. On 15 March, he was taken to the central prison hospital at penal colony No. 1 in Minsk. A report of the head of the prison hospital at the penal colony of 22 March 2005 said that he suffered a stroke on 7 March 2005. The report added that he also developed a post-stroke cardiosclerosis, fibrillation, atherosclerosis of aorta, coronary, carotid H2A, arterial hypertension, urolithiasis, cataract, angiosclerosis of the retina of both eyes, and thermal burn of a middle and upper third of the left forearm. The report testifies that from November 2004 to February 2005, while he was in remand prison, he suffered from a heart attack. He adds that it was not certified by the medical centre of the remand prison and he did not get the required medical treatment at the prison hospital.

#### *Conditions at penal colony No. 1*

2.25 The author claims that the administration of penal colony No. 1 made no special arrangements despite his serious condition. The conditions and the rations at the colony were hardly sufficient for ensuring his recovery. He was entitled to two three-day and three 90-minute visits a year by relatives and only three food packages annually. His request for additional packages was allegedly denied.

2.26 He adds that in January 2006, the temperature did not exceed 10° C in the cells and 16° C in the hospital.

2.27 He claims that since 26 July 2005, he was entitled to release on parole in accordance with the Penal Code of Belarus as he was above the age of 60 years and had served half of his sentence. However, it was rejected due to the fact "that he had not entered on the path of correction".

2.28 In November 2005, he was declared a disabled person of the second group, and therefore entitled to release on health grounds. An application of 24 September 2005 in that regard seeking release on health grounds was turned down. As a pure formality, he was transferred to a less strict regime allowing two additional short and two lengthy visits a year. However, these regime changes remained largely on paper. Only in March 2006, he was allowed to be examined by a doctor from outside the prison. The author was released on parole on 14 April 2006 after the 19 March presidential elections in Belarus.

2.29 The author adds that after his detention a public campaign was launched to ensure his release. NGOs held mass protests against his incarceration and conviction. All protests were dispersed by the authorities and many activists were persecuted for taking part in them. The investigation and the trial were observed by representatives from the European Union, the United States and international organizations. In their numerous statements they condemned the actions of the Belarusian authorities and exposed the biased justice system. They also called for the author's immediate release and a halt to his political persecution.

#### **The complaint**

3.1 The author claims violations of articles 7 and 10, as he was held in inhumane, severe and degrading conditions at the KGB remand prison, during his transfer to colony No. 8 (Orsha) and in both colonies No. 8 and No. 1. He claims that such conditions had a negative effect on his health, which was documented in medical reports. He claims that he suffered a stroke in the penal colony after the administration refused to provide him with the required medications and that he did not receive treatment for one week after the stroke.

3.2 He claims violations of article 9 as the charges pressed, the pretrial constraint measure selected, and the continued extension of his incarceration were unlawful. He claims that the decision on the pretrial constraint measure did not take into account the circumstances of the case, the severity of the charge, the services he rendered to the society and the State, his health condition or the appeals of the public at large. He also claims that he was taken to the KGB without a warrant issued by the prosecutor's office or any other agency. No charges were laid for five days. The preliminary investigation lasted for eight months, which he spent in the KGB remand prison. During this time, he was presented with a variety of trumped-up charges in order to prolong his incarceration. A criminal case which led to his conviction was launched on 23 September 2004, five months after his detention and only on 4 November 2004 was an accusation warrant issued. He claims that his detention from 26 October 2004 onwards was based on the need to explore the possibility of launching another criminal case.

3.3 The author claims violation of article 14 as he was not provided with legal assistance during his initial interrogations. Furthermore, his right to the presumption of innocence has been violated. He claims that the interrogation was recorded with a hidden camera. Subsequently, some episodes of the interrogation were shown on Belarusian TV, accompanied with false and degrading comments about the author. He adds that during the court proceedings the judges were acting under instructions from the authorities. The hearings were not fully open to the public and were closely monitored by special services which taped the whole trial. The judges tendentiously interpreted the evidence gathered by the investigation, as well as the evidence given by the witnesses and the defendant.

3.4 The author claims violation of article 17 as he claims that despite his status of a witness initially, all searches of his flat and property confiscations were illegal.

3.5 He claims violation of articles 19 and 22, as his opposition to the political and economic course pursued by Belarusian President Aleksandr Lukashenko was behind his detention and sentencing. For two years prior to his arrest, he personally, as well as the organization he headed, had come under pressure and suffered from persecution by the authorities.

3.6 The author does not provide any details on his claim under article 15 of the Covenant.

#### **State party's observations**

4.1 On 7 June 2007, the State party submitted that the author was convicted under section 210, part 4 of the Criminal Code for theft of 40 pieces of equipment given for a temporary use by the United States Embassy. The author failed to register the equipment in proper order with the Department on Humanitarian Affairs under the Office of the President. The equipment was not registered in the financial records of the organization; instead it was kept at the rented apartment and then moved in his son's car to a garage.

4.2 It submits that the author was found not guilty on the charges of illegal storage of firearms under section 295, part 2, of the Criminal Code for lack of evidence.

4.3 The author's sentence was reduced to three years and six months. It submits that the court trial was open to the public and was conducted in accordance with the criminal procedure law. The author's claims of inappropriate behaviour of the prosecutor and the judge have not been confirmed.

4.4 The author's argument on the absence of claims from the United States Embassy in relation to the equipment contradicts the materials in the case file, in particular the statements by the employees of the United States Embassy. The court's decision is thus based on evidence that are examined and analysed in the judgment.

4.5 As to the author's claim with respect to unlawful expropriation of his money by the KGB officers, the State party submits that US\$ 49,000 out of US\$ 90,900 found in the author's car were found to be counterfeit. The author acknowledged that the money belonged to him but refused to comment on the results of the expertise. The investigation did not conclude the author's involvement in the crime and the investigation was suspended as no responsible person could be found.

4.6 Upon his arrival at Orsha, the author underwent a medical examination and was prescribed a treatment. Close relatives of the author submitted a petition against those held responsible for causing harm to his health. In this respect, the Prosecutor's office ordered an investigation into the cause of the brain stroke suffered by the author. The investigation did not reveal any breach of professional responsibilities by the medical personnel of colony No. 8. On 15 March 2005, he was transferred to the neurological department of the hospital at colony No. 1, for convicts with the diagnosis of brain stroke. The author underwent treatment prescribed by the consultant at the Scientific Research Institute on Neurology and Neurosurgery as well as by a cardiologist. He was examined by the Scientific Research Centre on Cardiology. The medications were provided by the colony hospital. Those medications that were not available at the hospital were provided by the author's relatives.

4.7 On 22 March 2005, the author stated that he did not have any claims against the administration of colony No. 1 on the conditions of his detention and that he was satisfied with his treatment. Due to his health condition the author was detained in the colony No. 1 until his release.

4.8 The author's sentence was reduced by one year under the amnesty for the sixtieth anniversary of the victory in World War II.

4.9 The State party refers to the author's claim of unfair trial, violations of the rights of the accused and violation of presumption of innocence and submits that the requirements of these articles are reflected in the national legislation. The author's sentence was reviewed at the cassation and supervisory review levels, including by the Supreme Court. The sentence was found to be lawful and justified. It submits that there were no violations of the right of the accused which could lead to annulment of the sentence. The court observed the presumption of innocence as required by section 16 of the Criminal Procedure Code.

#### **Author's comments on the State party's observations**

5.1 On 7 January 2008, the author submitted that the observations by the State party do not correspond to the facts and materials of his case. He reiterates his previous submissions and adds that the facts provided by the State party are arbitrary and distorted despite the documentary evidence. He claims that during the trial his lawyer and himself requested the judge to replace the prosecutor as well as noted the judge's communication with the KGB officers. However no action was taken to follow up these requests and notifications. He adds that none of his complaints and requests during his pretrial detention was addressed.

5.2 The author refutes the State party's observation finding the court's sentence justified. He states that the case materials do not contain any evidence to prove his intentions. He refers to the State party's observations that the United States Embassy had claimed the property, and argues that the case file contains a letter from the United States Embassy and the United States State Department confirming the absence of any claims towards him personally and towards his organization. The court ignored this evidence. He adds that the accusation invited a technical staff member of the United States Embassy as a witness, a Belarusian citizen who was under pressure by the KGB. The officials of the United States Embassy — United States citizens — were not invited to the court.

5.3 He adds that the State party's comment that he had passed a medical examination upon arrival at the colony is false. He reiterates that he was transferred to the medical unit only after he had had a stroke on 4 March 2005, not 7 March 2005 as stated by the State party. He claims that he was transferred to the prison hospital only on 15 March 2005, and that he could have avoided complications if he had been treated in time.

#### **Additional comments by the parties**

6.1 On 2 May 2008, the State party reiterates its previous submissions and adds that the author's claims of inadequate behaviour by the accusation as well as of communication between the judge and intelligence officers during the trial have not been confirmed. The evidence was assessed correctly according to section 105 of the Criminal Procedure Code.

6.2 The author's statement that there were no claims of the equipment from the United States Embassy contradicts the case materials, in particular the testimonies by witnesses.

6.3 The State party submits that under the law the equipment should have been reflected in the financial report of the organization as "rented". However the report for 2002–2003 to the tax office does not indicate that the BABI received the equipment. The author had been the president of the BABI since 9 October 2001. On 13 October 2003 he was excluded from its membership. This was confirmed by witnesses. The arguments of the author that the agreement with the United States Embassy was extended have not been confirmed.

6.4 The State party argues that the case file contains materials indicating that the United States Embassy demanded the return of the equipment. However, the author gave false information as if the equipment was installed in regional centres. In fact, the equipment was found at the residence of the author and in a garage where they were transferred under his instruction. Thus, the author's guilt was proven by the evidence examined during the proceedings and analysed in the sentence.

7.1 On 12 September 2008, the author reiterated his previous allegations and adds that during the trial, the witnesses did not testify that he had stolen the equipment; they had only confirmed that the equipment was installed in the BABI office. He adds that all the witnesses testified on the reasons why the equipment was not registered, mainly due to the obstacles created by the authorities to register the BABI regional offices, which forced the organization to leave its central office in Minsk. As such, he claims that the court distorted the logic and the meaning of the testimonies as well as cut and paraphrased them. In addition, he claims that the fact that the equipment was not registered under the law, should be considered under an administrative, not criminal, procedure.

7.2 As to the comment by the State party that the author was excluded from the BABI membership, the author submits that the court contradicted itself, by first punishing him as a head of the organization and at the same time excluding him from the membership in the organization. He states that he was not excluded from the organization despite the attempts by the Ministry of Justice, which blocked its activities. All these attempts were made six to eight months prior to his detention.

8.1 On 26 March 2009, the State party submitted that under section 287 of the Criminal Procedure Code those who are present at the public court hearings have a right to an audio or written record of the process. Photo and video recordings are allowed with the permission of the Chair and of the parties. Therefore, the author's statement about the prohibition of recording, if he meant audio or written recording, is false.

8.2 The author's allegations about the communication between the judge and intelligence officers have not been justified. Public order is the duty of the interior offices. Since the case has attracted the attention of mass media and the diplomatic community as confirmed by the author himself, the law enforcement officers took necessary measures to

maintain public order in the court. The restrictions on the number of persons willing to participate at the hearing were due to the limited space available in the court room.

8.3 With regard to the author's claim to return his money, the State party reiterates that US\$ 49,000 out of US\$ 91,000 were counterfeit. The rest was confiscated as part of the confiscation of property envisaged in his sentence.

8.4 With regard to the author's claim of violations during his transfer to the colony, the State party submits that the transfer took five hours, in accordance with the regulations of the Ministry of Interior. The transfer was carried out by train in special carriages which are equipped with cells with three row beds. The heating system of such carriages is operated under general rules. Taking into account these circumstances, a criminal investigation was denied for lack of criminal elements in the action of the staff who accompanied the author during his transfer.

8.5 Under the regulations of the Ministry of Interior, medications are not allowed during the transfer and the same regulations state that convicts being transferred from one prison to another are subject to personal search, including a search of their belongings.

8.6 Under the internal regulations of the colonies upon arrival at the colony all convicts are placed in isolated quarantine cells for 14 days where they undergo medical examination. The first week, they undergo a thorough examination by the doctor to reveal diseases as well as to assess their condition of health.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

9.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

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

9.3 The Committee notes that the State party has not raised any issues regarding exhaustion of domestic remedies.

9.4 The Committee notes the author's allegations under articles 19 and 22, that his opposition to the political and economic course pursued by Belarusian President Aleksandr Lukashenko was behind his detention and conviction. The Committee considers, however, that the author did not provide sufficient details to illustrate his claims. It, therefore, concludes that the claims are insufficiently substantiated for purposes of admissibility and declares them inadmissible under article 2 of the Optional Protocol.

9.5 As to the alleged violation of article 15, the Committee considers that the author did not explain the reasons why he considers that this provision has been violated. The Committee therefore declares this allegation inadmissible for lack of substantiation under article 2 of the Optional Protocol.

9.6 The Committee notes the author's allegations under article 17 regarding the search of his and his relatives' home as well as the search of his personal belongings, tapping of his phone, surveillance of his car, and confiscation of his money and documents. The Committee considers, however, that these allegations should be examined in connection with his allegations under article 14, as they relate to the criminal case initiated against him.

9.7 Regarding the claims related to articles 7, 9, 10, and 14 of the Covenant, the Committee considers that they have been sufficiently substantiated for the purposes of admissibility. The Committee, therefore, declares them admissible.

*Consideration of the merits*

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

10.2 The Committee notes the author's claim under articles 7 and 10 of the Covenant that during his detention he was held in inhuman, severe and degrading conditions at the KGB remand prison, and subsequently in colonies No. 8 in Orsha and No. 1 in Minsk, as well as subjected to inhuman treatment during his transfer from the remand prison to the colony in Orsha. He claimed that such conditions and treatment had a negative effect on his health, and led to a brain stroke while in the penal colony because the administration refused to provide him with the required medications; furthermore, he claims the administration did not provide treatment for one week after the stroke.

10.3 The State party contested part of these allegations stating that the author underwent a medical examination and was prescribed a treatment. It submitted that the investigation conducted following the author's complaint did not find any breaches of professional duties by the medical personnel of the colony No. 8 and that he was transferred to colony No 1 due to his health condition. However, the State party did not comment on the deterioration of the author's health while in detention and on the fact that he was not provided with required medication and immediate treatment after his stroke. The Committee notes that States parties are under an obligation to observe certain minimum standards of detention, which include provision of medical care and treatment for sick prisoners, in accordance with rule 22 of the Standard Minimum Rules for the Treatment of Prisoners. It is apparent from the author's account as well as from the medical reports provided that he was in pain, and that he was not able to obtain the necessary medication and to receive proper medical treatment from the prison authorities. As the author stayed in prison for more than a year after his stroke and had serious health problems, in the absence of any other information, the Committee finds that he was the victim of violation of article 7 and article 10, paragraph 1, of the Covenant.

10.4 The Committee notes the author's claim under article 9 that the charges pressed, the pretrial constraint measure selected and the continued extension of his incarceration were unlawful. The criminal case which led to his conviction was launched five months after his detention. The Committee also notes the author's claim that he was taken to the KGB without a warrant issued by a prosecutor's office or any other agency was not presented with charges for five days and was prevented from having legal assistance during his initial interrogations. The author also claimed that during the eight months of detention in the KGB remand prison, he was presented with a variety of trumped-up charges in order to prolong his incarceration. The State party merely stated that there were no violations of the rights of the accused which could lead to the annulment of the trial. The drafting history of article 9, paragraph 1, confirms that "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means inter alia that remand in custody pursuant to arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime. The State party has not shown that

these factors were present in the instant case.<sup>3</sup> In the absence of any further information, therefore, the Committee concludes that there has been a violation of article 9 of the Covenant.

10.5 The Committee notes the author's claims that the court was neither independent nor unbiased as the judges were acting under instructions from the authorities; the hearings were not fully open to the public and were closely monitored by special services which taped the whole trial; and the judges tendentiously interpreted the evidence gathered by the investigation, as well as the evidence given by the witnesses and the defendant. The State party limited itself to stating that the court trial was open to the public and conducted in accordance with the criminal procedure law, and that the author's claims of inappropriate behaviour of the accusation and the judge have not been confirmed. The Committee notes the prominent profile of the author and recalls its jurisprudence that the court must provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, e.g. potential public interest in the case, the duration of the oral hearing and the time the formal request for publicity has been made.<sup>4</sup> It also notes that the State party did not provide any arguments as to the measures taken to accommodate the interested public taking into account the role of the author as a public figure. The Committee further notes that the author's allegations related to the search of his and his relatives' home as well as the search of his personal belongings, tapping of his phone, surveillance of his car, and confiscation of his money and documents. In the absence of comments from the State party to counter the allegations by the author, the Committee concludes that the facts alleged constitute a violation of article 14, paragraph 1, of the Covenant.

10.6 With regard to the allegations of violations of article 14, paragraph 2, the Committee notes the author's claims that his right to the presumption of innocence has been violated, as some episodes of the interrogation were broadcasted on Belarusian TV accompanied with false and degrading comments about the author suggesting that he was guilty. He submitted that the State-controlled Belarusian TV aired the distorted information even before the investigation ended. The State party did not contest these allegations. The Committee recalls that the accused person's right to be presumed innocent until proved guilty by a competent court is guaranteed by the Covenant. The fact that, in the context of this case, the State media portrayed the author as guilty before trial is in itself a violation of article 14, paragraph 2, of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violations by the State party of articles 7, 9, 10, paragraph 1, and 14, paragraphs 1 and 2, of the International Covenant on Civil and Political Rights.

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy including the payment of adequate compensation and initiation of criminal proceedings to establish responsibility for Mr. Marinich's ill-treatment under article 7 of the Covenant. The State party is also under an obligation to prevent similar violations in the future.

13. Bearing in mind that, by becoming a State 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 or not and that, pursuant to article 2, of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its

<sup>3</sup> See communication No. 305/1988, *Alphen v. Netherlands*, Views adopted on 23 July 1990, para. 5.8.

<sup>4</sup> Communication No. 215/1986, *van Meurs v. The Netherlands*, Views adopted on 13 July 1990, para. 6.2.



jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**T. Communication No. 1519/2006, *Khostikoev v. Tajikistan*  
(Views adopted on 22 October 2009, ninety-seventh session)\***

<i>Submitted by:</i>	Valery Khostikoev (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Tajikistan
<i>Date of communication:</i>	18 August 2006 (initial submission)
<i>Subject matter:</i>	Unfair trial
<i>Procedural issue:</i>	None
<i>Substantive issue:</i>	Bias and partiality of courts
<i>Article of the Covenant:</i>	14, paragraphs 1 and 3
<i>Article of the Optional Protocol:</i>	2

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

*Meeting on 22 October 2009,*

*Having concluded* its consideration of communication No. 1519/2006, submitted to the Human Rights Committee by Mr. Valery Khostikoev under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication, and the State party,

*Adopts* the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication is Mr. Valery Khostikoev, a Tajik national born in 1963. He claims to be a victim of violations by Tajikistan of his rights under article 14, paragraphs 1 and 3 (b) and (d), of the International Covenant on Civil and Political Rights. The author is unrepresented. The Optional Protocol entered into force for the State party on 4 April 1999.

**The facts as submitted by the author**

2.1 In 1993, the author was appointed Director-General of the then State-owned sports complex Republican Swimming Pool, which, according to the author, was the only Olympic-size swimming pool in Dushanbe. According to him, when he took over his functions, the complex was completely devastated and was not subsidized by governmental funds. In order to save it, in 1997, the author and the employees of the complex negotiated

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\* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

with the Government Sports Committee and created a joint-stock company called Republican Swimming Pool AOOT. The company was registered in accordance with the provisions of the Law on stocks, and 40 per cent of the shares were owned by the employees. The other 60 per cent remained State property through a structure called the Committee on the administration of State property.

2.2 According to the terms of the agreement, the employees paid for 30 per cent of their shares immediately, and they had to pay the remaining part before 15 September 1998. Due to financial problems and to the unstable situation in the country at that moment, the employees managed to pay for the totality of their shares only in 2000.

2.3 The author affirms that later (exact date unspecified), the employees acquired the remaining 60 per cent of the company's shares, pursuant to an agreement with the Committee on the administration of State property. Shortly after, the employees of the firm started to receive threats of physical persecution and were put under constant pressure by the Chairman of the Sports Committee and President of the Tajik Olympic Committee, one Mr. Mirzoev, who was also the former chief of the Presidential Guard. Apparently, Mr. Mirzoev wanted to acquire 52 per cent of the company's shares. The author claims that he was beaten in this connection, on two occasions, in the premises of the Olympic Committee, after which he left the country for nine months.

2.4 On 22 June 2005, the Office of the Prosecutor-General initiated a procedure in the High Economic Court of Tajikistan, claiming that the sale of 42 per cent of the sport complex was unlawful and that it had caused important damage to the State. The author claims that his lawyers requested the court to allow him and the employees "to study the case file" before the case was decided, but the judge rejected their request, stating that they would be able to do so when they prepared an appeal against the judgment. The judge also had stated the following: "In which country do you [think you] live in? Bring me a letter from the President and we will decide in your favour".

2.5 On 17 August 2005, the High Economic Court decided that the acquisition of the totality of the company's shares was unlawful,<sup>1</sup> and asked the parties to be "returned to the initial situation". The author affirms that the court in fact "copied" the Prosecution's claim in its decision, and ignored all other evidence. He appealed against this decision to the Appeal Body of the Higher Economic Court. On an unspecified date, the Appeal Body rejected his appeal. The author then appealed to the Plenary of the Higher Economic Court, under a supervisory procedure, but his claim was rejected.

### **The complaint**

3.1 The author claims a violation of his rights under article 14, paragraph 1, as, according to him, his trial did not meet the basic requirements for a fair trial. In addition, although the Tajik Civil Code provides a three-year statutory limitation for similar disputes, the Prosecutor's Office initiated the procedure in relation to events that took place five years earlier. However, the court ignored this issue. The court similarly ignored the fact that after the full payment of the shares, the parties had no disputes against each other. Prior to the trial, the presiding judge affirmed that if the author brought him a letter from the President, he would decide in his favour. This shows, in the author's opinion, that the proceedings were biased and that the court thus also failed in its duty of impartiality and objectivity. During the trial, the author requested the judge to accept additional evidence in

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<sup>1</sup> The author points out in this respect that although the Prosecutor requested the court to declare unlawful the sale of only 42 per cent of the company's shares, the court declared void the sale of the totality of the shares.

relation to the acquisition of the firm's property, as well as financial documents about the firm's actual value at the moment of the transaction, but his requests were simply ignored.

3.2 The author also claims a violation of article 14, paragraph 3 (b), read together with article 14, paragraph 1, as his lawyers were not given the opportunity to study the case file prior to the beginning of the court trial. The court thus violated, according to the author, the principle of equality of arms.<sup>2</sup>

3.3 Finally, the author claims a violation of article 14, paragraph 3 (d), as his lawyer was not allowed to participate at the beginning of the court trial, because the court allegedly affirmed that his lawyer did not have the necessary documents to act. The author claims that this was only a pretext, and that his lawyer was in possession of all required documents. According to him, the court used formalistic arguments in order to obstruct the lawyer's work. The lawyer was only allowed to participate at the final stages of the trial.

### State party's observations

4.1 The State party presented its observations by note verbale of 20 March 2007.<sup>3</sup> It contends that, in the interest of the Government of Tajikistan, a case was opened by the General-Prosecutor's Office, on the privatization of the public entity Republican Swimming Pool, against the Tajik Committee on the management of State property, the State entity on the sale of State property, the company Republican Swimming Pool AOOT, the Ministry of Finance of Tajikistan, two enterprises (Badr, and Telecom Technology Ltd.), the Tajik Swimming Federation, and the author.<sup>4</sup> The case was examined by the High Economic Court of Tajikistan on 17 August 2005. The court satisfied the Prosecutor's Office request, the sale was declared void and the parties were placed in the initial situation.

4.2 According to the State party, the court found that pursuant to an agreement of 3 October 1997, 40 per cent of the shares of the entity State Swimming Pool were sold to the employees of the entity. Under paragraph 3.3 of the said agreement, the employees had until 15 September 1998 to pay for the totality of their shares. In case of non-respect of this obligation, as provided under paragraph 5.1 of the agreement, the sale was subject to annulment.

4.3 The court noted that, according to financial documents, the last payment of the shares in question was made on 14 July 2000, i.e. in breach of paragraph 5.1 of the agreement. Accordingly, the court concluded that the agreement of 3 October 1997 was void.

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<sup>2</sup> In this respect, the author refers to the decision of the European Court for Human Rights in the case of *Foucher v. France* (10/1996/629/812), where the Court has found a violation of the applicant's rights under article 6, para. 3, read together with article 6, para. 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>3</sup> The State party's observations are in fact a submission called "Information of the Higher Economic Court of Tajikistan".

<sup>4</sup> From the documents on file it appears that initially, in 1997, the employees of the sports complex acquired 40 per cent of the shares; the remaining 60 per cent remained State property. On an unspecified date, Mr. Khostikoev acquired the shares of the employees (and thus he owned 40 per cent of the complex). On 22 June 1998, the State sold another 12 per cent of the shares in a public auction. The shares were acquired by the firm Badr (4 per cent), another firm Telecom Technology Ltd (4 per cent), and the Tajik Swimming Federation (4 per cent). Subsequently (exact date not specified), the author acquired this 12 per cent of the shares from the new owners, and thus he owned 52 per cent of the complex. The remaining 48 per cent of the shares that belonged to the State were acquired by the author pursuant to an agreement of 10 September 2004.

4.4 The court found also that the subsequent sale of 12 per cent of the shares of the sport complex on 22 June 1998 was unlawful, as it was contrary to paragraphs 28 and 58 of the Regulations on the sale of objects of privatization by way of auctions and tenders. This provision requires that payments in relation to such contracts must be made during the 30 days following the conclusion of an agreement. In this case, the payment of the 12 per cent of the shares was not made within this time frame, but later. Accordingly, the court concluded that the auctions in relation to the 12 per cent of the shares were also void. The court further found that the sale of the remaining 48 per cent of the shares of the sport complex was made in violation of paragraphs 107 and 109 of the Regulations.<sup>5</sup>

4.5 According to the State party, the first instance court correctly concluded that the sale of the totality of the shares of the sport complex was void. This conclusion was made following a thorough and comprehensive examination of all evidence and was lawful. For these reasons, on 17 October 2005, the appeal instance of the High Economic Court confirmed the decision of the first instance court. The decision was further examined by the cassation instance of the High Economic Court, on 12 December 2005, and was once again confirmed.

4.6 The State party concludes by contending that all court decisions with respect to the present case were lawful and justified, and no violation of the author's rights occurred.

#### **Author's comments on the State party's observations**

5.1 The author presented his comments on 1 June 2007. He reiterates his claims under article 14, paragraph 1, of the Covenant, and recalls that the Prosecutor's Office and the courts did not respect the three-year statutory limitation rule established by the Tajik Civil Code. The Prosecutor's Office submitted its request five years after the contested events, without providing any justification for the non-respect of the statutory limitation. The author reiterates that the presiding judge made remarks before the start of the trial (see paragraph 2.4 above). This shows that the court was biased and the case pre-judged. The author also asked to be allowed to submit additional evidence during the trial — in particular copies of newspapers containing announcements on the auctions and sales and financial documents on the company's real value — but his requests were rejected.

5.2 The author adds that before the examination of the case in court, the entity on the sale of State property submitted comments regarding the Prosecutor's request to the court. The entity did not see any irregularity on the sale of the swimming pool shares. It also affirmed that it had no claims, and fully confirmed the validity of the auctions, and the receipt of the full payment of the value of the shares.

5.3 Finally, the author contends that in its request to the court, the General Prosecutor's Office did not challenge the acquisition of 100 per cent of the swimming pool shares, but only the acquisition of 48 per cent of the shares.

#### **Issues and proceedings before the Committee**

##### *Consideration of admissibility*

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

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<sup>5</sup> No further explanations are provided.

6.2 The Committee notes, as required by article 5, paragraph 2 (a) and (b), of the Optional Protocol, that the same matter is not being examined under any other international procedure of investigation or settlement, and it notes that it is uncontested that domestic remedies have been exhausted.

6.3 The Committee considers that the author's uncontested allegations of a violation of his right to fair trial under article 14, paragraph 1, of the Covenant (see paragraph 3.1 above) as his trial was biased and the court has failed to its duty of impartiality and objectivity; as the court did not respect the three-year statutory limitation for such cases; the absence of any disputes between the parties after the full payment of the shares of the sport complex; the remarks allegedly made to the author by the presiding judge prior to the trial; and the refusal of the court to accept additional evidence during the trial have been sufficiently substantiated, for purposes of admissibility, and declares these claims admissible.

6.4 The author further claims that his lawyer was not given the opportunity to study the case file prior to the beginning of the court trial. In addition, the lawyer was allowed to take part only at the final stages of the trial. The Committee notes that the State party has not addressed these issues specifically, but has merely contended that no procedural violations of the author's rights occurred in the present case. In the circumstances, the Committee, however considers that this part of the author's allegations have been sufficiently substantiated, for purposes of admissibility, and declares them admissible as far as they raise issues under article 14, paragraph 1, of the Covenant. In light of this conclusion, the Committee considers that the author's allegations under article 14, paragraph 3 (b) and (d) are inadmissible as such.

*Consideration on the merits*

7.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties as provided for under article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee notes that the author claims a violation of his rights under article 14, paragraph 1, of the Covenant, because the court acted in a biased manner in his case, as it did not allow his lawyer to study the case file prior to the beginning of the court trial (see paragraph 2.4 above). The court also allegedly prevented, without sufficient justification, the author's lawyer from taking part in the initial stage of the court trial. In addition, at the beginning of the trial, the presiding judge allegedly made oral remarks to the author to the effect that if he brought a letter from the President of the Republic, he would obtain gain in his case. The author also claims that neither the prosecutor nor the courts ever addressed the issue of the non-respect of the statutory limitation (time bar) in his case, and they simply ignored the author's lawyer's objections in this regard. The trial court allegedly further refused to allow the possibility for the author to adduce relevant evidence. The court, finally, declared void the totality of the sale of the sport complex, whereas the Prosecutor's Office only requested the annulment of the sale of 48 per cent of the complex's shares.

7.3 The Committee notes that the State party did not refute these specific allegations, but limited itself to contending that all court decisions in the case were substantiated and that no procedural violations had occurred. The Committee considers that in the circumstances, and in the absence of any other pertinent information on file, due weight must be given to the author's allegations. In the circumstances of the present case, the facts as presented, and not refuted by the State party, tend to reveal that the author's trial suffered from a number of irregularities, which, taken as a whole, in the Committee's opinion, amount to a breach of the basic guarantees of a fair trial, such as equality before the law and a fair hearing by an impartial tribunal. The Committee concludes that the author's rights under article 14, paragraph 1, have thus been violated.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 14, paragraph 1, of the International Covenant on Civil and Political Rights.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including the payment of appropriate compensation. The State party is also under an obligation to prevent similar violations in the future.

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 or not, 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 in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**U. Communication No. 1520/2006, *Mwamba v. Zambia*  
(Views adopted on 10 March 2010, ninety-eighth session)\***

<i>Submitted by:</i>	Munguwambuto Kabwe Peter Mwamba (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Zambia
<i>Date of communication:</i>	29 June 2005 (initial submission)
<i>Subject matter:</i>	Death penalty after unfair trial; undue delay for hearing of appeal
<i>Procedural issue:</i>	None
<i>Substantive issues:</i>	Right to life/mandatory nature of the death penalty; torture, cruel, inhuman or degrading treatment; poor conditions of detention; method of execution – hanging; due process; presumption of innocence; right to review without delay
<i>Articles of the Covenant:</i>	6; 7; 10; paragraph 1; 14, paragraph 2; 3(c); and 5

*Article of the Optional Protocol:* 2

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

*Meeting on 10 March 2010,*

*Having concluded* its consideration of communication No. 1520/2006, submitted to the Human Rights Committee by Mr. Munguwambuto Kabwe Peter Mwamba under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication, and the State party,

*Adopts* the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication is Mr. Munguwambuto Kabwe Peter Mwamba, a Zambian national, born in 1956, who is currently on death row waiting for his case to be reviewed on appeal by the Supreme Court of Zambia. He claims to be a victim of violations by the State party of the International Covenant on Civil and Political Rights. Although he does not invoke any articles of the Covenant, his communication appears to raise issues

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Mahjoub El Haiba, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.



under article 6; article 7; article 10, paragraph 1; and article 14 of the Covenant. He is not represented by counsel.

### **The facts as presented by the author**

2.1 On 24 March 1999, the author, who was a high-ranking police officer (superintendent) at the time, was arrested, and detained on suspicion of having murdered the driver of a van carrying 40 tons of copper cathodes and of having stolen the cathodes. He was charged with murder, attempted murder and aggravated robbery. He was taken to the Police Service Headquarters, where he was placed in handcuffs and shackles and subjected to torture and ill-treatment, including an assault by the victim's son with the acquiescence of police officers. He was then transferred to the Chongwe Police Station, where he was secretly detained, in handcuffs and shackles and without food and water for three days.

2.2 On 28 March 1999, he was sent to the Kabwata Police Station, where he was detained in a cell covered with urine and excrement. He remained in pretrial detention until his trial on 1 September 1999. He states that on this date the judge also determined the lawfulness of his detention. The police officers investigating the murder and robbery repeatedly asserted through the media that he was the offender. While the author was in detention police officers threatened to kill him, as a result of which the author gave a false confession. However, this confession was not relied upon by the prosecution. The author was also informed by his nephew, who was a paramilitary officer, that there were plans to kill him in the bush. With the help of his lawyer and the officer-in-charge of the prison in which he was detained, he managed to avoid being murdered. This issue was not brought up at trial by the author for fear that the officers in question might seek revenge on the author's nephew.

2.3 On 1 September 1999, the author's trial began. He was represented by counsel, who was hired privately. On 8 August 2001, he was convicted by the High Court of Zambia of murder and attempted murder and was sentenced to death by hanging, which is a mandatory sentence. He was acquitted on the aggravated robbery charge due to the negligence of the police officers involved, who failed to take any action against third parties who were found in possession of the stolen items. These third parties were neither charged nor summoned to testify during the author's trial, because they bribed the police officers in question to prevent their prosecution. As the three offences were committed at the same time, the judge should also have acquitted him on the two other charges (murder and attempted murder).

2.4 The author did not have a fair trial. The court was neither independent nor impartial, and the judge and the State prosecutor were bribed. There was no equality between the parties in the proceedings, as the comments and the submissions made by his lawyer were ignored by the judge. Defence witnesses, as well as his lawyer, were intimidated and beaten by police officers. A request by the State prosecution, which was granted by the judge, to exclude the third parties, who were found with the stolen goods, from testifying in Court is a miscarriage of justice. The author's lawyer did not have time to examine a report by the ballistic expert and prepare his defence, as the false report was only produced in Court during the trial. The police officers and the judges involved in his case are corrupt. The Inspector of Police orchestrated his conviction, as the author had previously attempted to have him removed for corruption.<sup>1</sup> In addition, some police officers were bribed to produce false evidence and testimonies, and the judges involved were strongly influenced by the repeated declarations made by the police in the media during the investigation.

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<sup>1</sup> The author provides the names of all of the officers involved.

2.5 On 22 August 2001, the author lodged an appeal before the Supreme Court. He is still awaiting review of his case. There are 170 convicts in the same prison all awaiting their appeal, which takes between 2 and 15 years. The conditions on death row are inhuman and amount to sleeping in a dirty public toilet: cells are 3 by 3 metres; they accommodate several prisoners and have no toilet facilities, so they must avail of small tins to relieve themselves; tuberculosis, malaria and HIV/AIDS are all prevalent in the prison.

2.6 The author wrote five times to the Chief Justice requesting information on the status of his appeal and asking him to consider a retrial before the High Court during which the third parties found in possession of the stolen goods could testify. In a response from the Chief Justice, he was informed that his appeal had been delayed due to missing transcripts from his hearing, which at that point had been found, and that his appeal would take place soon.<sup>2</sup> The author believes that the transcripts have been and/or will be altered, and informs the Committee that his wife was recently informed by public officials that his sentence would be confirmed due to the fact that he has lodged several complaints, including complaints of corruption on the part of the judge and the police officers who dealt with his case.

### **The complaint**

3.1 The author claims that the treatment which he was subjected to in pretrial detention amounts to physical and psychological torture, or to cruel, inhuman or degrading treatment or punishment (paras. 2.1 and 2.2 above). He also claims that the conditions of detention on death row, the stress and depression he has developed since his detention there, the fear that he might die from tuberculosis, malaria or HIV/AIDS, all of which he claims are prevalent in the prison, as well as the fact that he has been waiting for, by now, over eight years to have his case reviewed, amount to torture, or to cruel, inhuman or degrading treatment or punishment (para. 2.5 above). He also claims that the method of execution by hanging constitutes cruel, inhuman or degrading treatment. All of these claims appear to raise issues under article 10 and/or article 7 of the Covenant.

3.2 The author claims that he did not have a fair trial for the reasons set out in paragraph 2.4 above. In addition, he claims that his presumption of innocence (art. 14, para. 2) was not respected by the police authorities, demonstrated by their declaration through the media that he was guilty. According to the author, the articles in the newspapers, describing him as a criminal, influenced the Court in its decision to convict him.

3.3 The author complains that his rights were violated as a result of being compelled by the police to testify against himself under the threat of murder (art. 14, para. 3(g)).

3.4 The author claims that the death sentence imposed upon him is mandatory for the crime of murder, which appears to raise issues under article 6 of the Covenant.

3.5 Finally, the author claims that he was denied the right to have his conviction and sentence reviewed by a higher tribunal since his appeal has been deliberately delayed for five years (at the time of submission of his initial communication), which appears to raise issues under article 14, paragraphs 3(g) and 5, of the Covenant. In addition, until such time as it is heard, and in the event that it does not succeed, he is not in a position to seek pardon or commutation of his sentence (art. 6, para. 4).

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<sup>2</sup> See the reply by the State party.

### State party's observations

4. On 9 February 2007, the State party informed the Committee that this case had yet not been heard by the Supreme Court due to "technical reasons" and provided a copy of a letter from the Director of Public Prosecutions, dated 2 February 2007, indicating that the appeal had not been heard as "the record of proceedings has not been typed" but that "the Master of the Supreme Court had indicated (to the Director of Public Prosecutions) that the Court would advise on progress towards the case being heard "in the next few weeks". Despite reminders to the State party on 24 July 2007, 23 June 2008, and 2 March 2009, to provide its submission on admissibility and merits no further information has been received from the State party.

### Issues and proceedings before the Committee

#### *Consideration of admissibility*

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant. The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the matter is not being examined under another procedure of international investigation or settlement.

5.2 The Committee notes the State party's only submission on this case in 2007, more than five years since the appeal was filed, that the long delay has been merely due to the failure to have the record of proceedings typed. At the time of consideration of this communication, over eight years after the author's conviction, the author is still waiting for his appeal hearing and remains on death row. The State party has provided no further explanation for this delay. Thus, the Committee considers that the delay in the disposal of the author's appeal amounts to an unreasonably prolonged delay within the meaning of article 5, paragraph 2 (b), of the Optional Protocol and therefore declares the communication admissible.

5.3 The Committee notes that the author's allegations in paragraph 2.4 largely relate to the evaluation of facts and evidence by the State party's courts, which appear to raise issues under article 14 of the Covenant. The Committee refers to its jurisprudence<sup>3</sup> and reiterates that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that it was clearly arbitrary or amounted to a denial of justice. The material before the Committee does not sufficiently reveal that the conduct of the trial suffered from any such defects. Accordingly, the author has not substantiated these allegations for the purposes of admissibility and these claims are thus considered inadmissible pursuant to article 2 of the Optional Protocol.

5.4 As to the claim that the author was compelled to confess guilt, the Committee notes that the author himself states that this confession was not relied upon by the prosecution.

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<sup>3</sup> See for example: communications No. 541/1993, *Simms v. Jamaica*, decision on inadmissibility adopted on 3 April 1995 and No. 1234/2003, *P.K. v. Canada*, decision on inadmissibility adopted on 20 March 2007. Communications No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, decision on inadmissibility adopted on 2 November 2004; No. 886/1999, *Schedko and Bondarenko v. Belarus*, decision on admissibility adopted on 3 April 2003; No. 1138/2002, *Arenz et al. v. Germany*, decision on admissibility adopted on 24 March 2004. General comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI.

Thus, the Committee also considers this issue inadmissible for non-substantiation, pursuant to article 2 of the Optional Protocol.

5.5 The Committee finds that the other claims relating to: the imposition of the death penalty and associated issues; the author's conditions of detention; his right to be presumed innocent until proven guilty; and right to review without delay have all been substantiated for the purposes of admissibility.

*Consideration of the merits*

6.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

6.2 The Committee notes that the State party's only response to date to the author's allegations is that the appeal has not yet taken place "due to technical reasons" and it has provided no arguments on the substance of the author's claims. It reaffirms that the burden of proof cannot rest on the author of the communication alone, especially considering that the author and the State party do not always have equal access to the evidence and frequently the State party alone has the relevant information. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to furnish to the Committee the information available to it. In the light of the failure of the State party to cooperate with the Committee on the matter before it, due weight must be given to the author's allegations, to the extent that they have been substantiated.

6.3 The Committee notes that the author was convicted of murder and attempted murder, on the basis of which he received a mandatory death sentence. The State party does not contest that the death sentence is mandatory for the offences of which he was convicted. The Committee recalls its jurisprudence that the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of article 6, paragraph 1, of the Covenant, in circumstances where the death penalty is imposed without any possibility of taking into account the defendant's personal circumstances or the circumstances of the particular offence.<sup>4</sup> The Committee finds that the imposition of the death penalty itself, in the circumstances, violated the author's right under article 6, paragraph 1, of the Covenant. In light of the finding that the death penalty imposed on the author is in violation of article 6, the Committee considers that it is not necessary to examine issues regarding the method of execution.

6.4 The Committee notes that the State party has not contested the information provided by the author on his deplorable conditions of pretrial detention and current detention on death row, including the claims that he was initially detained secretly, assaulted, handcuffed and shackled, denied food and water for three days and is currently incarcerated in a small and filthy cell without adequate toilet facilities. The Committee recalls that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; they must be treated in accordance with, inter alia, the Standard Minimum Rules for the Treatment of Prisoners.<sup>5</sup> It considers, as it has

<sup>4</sup> See for example: communications No. 806/1998, *Thompson v. St. Vincent and the Grenadines*; Views adopted on 18 October 2000; No. 845/1998, *Kennedy v. Trinidad and Tobago*, Views adopted on 26 March 2002; and No. 1077/2002, *Carpo et al. v. The Philippines*, Views adopted on 28 March 2003.

<sup>5</sup> General comment No. 21 (1992) on humane treatment of persons deprived of their liberty, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. B, paras. 3 and 5; communication No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2.

repeatedly found in respect of similar substantiated claims,<sup>6</sup> that the author's conditions of detention, as described, violate his right to be treated with humanity and with respect for the inherent dignity of the human person, and are therefore contrary to article 10, paragraph 1. In the light of this finding in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary to separately consider any possible claims arising under article 7 in this regard.<sup>7</sup> For these reasons, the Committee finds that the State party has violated article 10, paragraph 1, of the Covenant.

6.5 As to the claim that the author's right to be presumed innocent until proven guilty was eroded by the police officers' announcements in the media that he was culpable, the Committee recalls its jurisprudence as reflected in its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, according to which "the presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle".<sup>8</sup> The same general comment, as well as the Committee's jurisprudence,<sup>9</sup> refers to the duty of all public authorities to refrain from prejudging the outcome of a trial, including by abstaining from making public statements affirming the guilt of the accused. The media should avoid news coverage undermining the presumption of innocence. Given the author's claims that such public statements were made against the author and the State party's failure to dispute these claims, the Committee considers that the State party has violated article 14, paragraph 2, of the Covenant in this regard.

6.6 The Committee recalls its jurisprudence<sup>10</sup> as reflected in its general comment No. 32<sup>11</sup> that the rights contained in article 14, paragraphs 3(c), and 5, read together, confer a right to review of a decision at trial without delay and that the right of appeal is of particular importance in death penalty cases. It notes that nearly six years after conviction, the only reply by the State party to the Committee is that the failure to hear the author's appeal was due to technical reasons, viz. the failure to have the record of proceedings typed. Given the fact that the author's appeal has still not been heard, now over eight years since his conviction, at the time of examination of the present communication, which remains uncontested by the State party, the Committee considers that the delay in the instant case violates the author's right to review without delay and consequently finds a violation of article 14, paragraphs 3(c) and 5, of the Covenant. In the light of the finding that the author's right to a review has been unduly delayed, the Committee considers that it is not necessary to address the author's claim relating to his inability to apply for a pardon or commutation of his sentence.

<sup>6</sup> See for example: communications No. 908/2000, *Evans v. Trinidad and Tobago*, Views adopted on 21 March 2003; and No. 1173/2003, *Benhadj v. Algeria*, Views adopted on 20 July 2007.

<sup>7</sup> Communication No. 818/1998, *Sextus v. Trinidad and Tobago*, Views adopted on 16 July 2001.

<sup>8</sup> *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI, para. 30.

<sup>9</sup> See for example communication No. 770/1997, *Gridin v. Russian Federation*, Views adopted on 20 July 2000.

<sup>10</sup> See for example: communications No. 390/1990, *Lubuto v. Zambia*, Views adopted on 31 October 1995; No. 523/1992, *Neptune v. Trinidad and Tobago*, Views Adopted on 16 July 1996; No. 614/1995, *Thomas v. Jamaica*, Views adopted on 31 March 1999; No. 702/1996, *McLawrence v. Jamaica*, Views adopted on 18 July 1997; and No. 588/1994, *Johnson v. Jamaica*, Views adopted on 22 March 1996.

<sup>11</sup> *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI.

6.7 The Committee recalls that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant.<sup>12</sup> In the present case, the author's death sentence was imposed, in violation of the right to a fair trial, as guaranteed by article 14 of the Covenant, and therefore also in violation of article 6 of the Covenant.

6.8 The Committee considers that the author's claim that his detention on death row, where he has been waiting for over eight years for the hearing of his appeal at the time of consideration of his communication, has affected his physical and mental health raises, issues under article 7. In this regard, it notes the author's description of the conditions of detention in paragraph 2.5 above. It reiterates its jurisprudence<sup>13</sup> that to impose a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed. In circumstances where there is a real possibility that the sentence will be enforced, that fear must give rise to considerable anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence. Indeed, as the Committee has previously observed,<sup>14</sup> the imposition of any death sentence that cannot be justified under article 6 would automatically entail a violation of article 7.<sup>15</sup> The Committee therefore concludes that the imposition of the death sentence on the author after the conclusion of proceedings which did not meet the requirements of article 14 of the Covenant amounts to inhuman treatment, in violation of article 7.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has violated article 6, paragraph 1, due to the mandatory nature of the death penalty; article 10, paragraph 1; article 14, paragraph 2; article 14, paragraph 3(c); article 14, paragraph 5; and article 6, as the death penalty was passed in violation of the right to a fair trial; and article 7 for the inhuman treatment caused by the failure to meet the fair trial guarantees of the International Covenant on Civil and Political Rights.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, which should include a review of his conviction with the guarantees enshrined in the Covenant, as well as adequate reparation, including compensation. The State party is under an obligation to avoid similar violations in the future.

9. Bearing in mind that, by becoming a State 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 or not and that, pursuant to article 2, of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

<sup>12</sup> See for example: communications No. 719/1996, *Levy v. Jamaica*, Views adopted on 3 November 1998; No. 730/1996, *Marshall v. Jamaica*, Views adopted on 3 November 1998; and No. 1096/2002, *Kurbanov v. Tajikistan*, Views adopted on 6 November 2003.

<sup>13</sup> See for example communication No. 1421/2005, *Larrañaga v. the Philippines*, Views adopted on 24 July 2006; European Court of Human Rights, *Ócalan v. Turkey*, application No. 46221/99, 12 May 2005, paras. 167–175.

<sup>14</sup> See for example communication No. 588/1994, *Johnson v. Jamaica*, Views adopted on 22 March 1996.

<sup>15</sup> See for example *Larrañaga v. the Philippines* (note 13 above).

**V. Communication No. 1544/2007, *Hamida v. Canada*  
(Views adopted on 18 March 2010, ninety-eighth session)\***

<i>Submitted by:</i>	Mehrez Ben Abde Hamida (represented by counsel, Stewart Istvanffy)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Canada
<i>Date of communication:</i>	22 January 2007 (initial submission)
<i>Subject matter:</i>	Expulsion to Tunisia after rejection of an asylum application
<i>Procedural issue:</i>	Inadmissibility
<i>Substantive issues:</i>	Effective remedy; torture and cruel, inhuman or degrading treatment or punishment; right to life; right to protection from unlawful interference with privacy and family; right to a family; equality before the law and equal protection of the law
<i>Articles of the Covenant:</i>	2, 6, 7, 17, 23 and 26
<i>Articles of the Optional Protocol:</i>	2 and 3

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

*Meeting* on 18 March 2010,

*Having concluded* its consideration of communication No. 1544/2007, submitted to the Human Rights Committee by Mehrez Ben Abde Hamida under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication, and the State party,

*Adopts* the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1.1 The author of the communication is Mehrez Ben Abde Hamida, a Tunisian national, born on 8 October 1967. When he submitted his communication, he was living in Canada where an expulsion order, effective as of 30 January 2007, had been issued against him. The author claims to be a victim of the violation, by Canada, of articles 2, 6, 7, 17, 23 and 26 of the International Covenant on Civil and Political Rights. He is represented by counsel, Mr. Stewart Istvanffy.

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\* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

1.2 On 26 January 2007, pursuant to rule 92 (previously rule 86) of its rules of procedure, the Committee acting through its Special Rapporteur on new communications and interim measures, asked the State party not to expel the author to Tunisia pending consideration of his case. On 14 March 2007 the State party granted this request, but asked the Special Rapporteur to lift the interim measures. On 29 March 2007 the Special Rapporteur, considering that the author's claim was a priori well founded, rejected the State party's request.

#### **The facts as submitted by the author**

2.1 The author arrived in Canada on 2 October 1999, where he claimed refugee status, alleging that he had a well-founded fear of persecution in his country on account of his political opinions. He says that, at the age of 18, he was taken on as an administrative assistant in the security service of the Tunisian Ministry of the Interior. In 1991 he was promoted to the rank of auxiliary police officer and transferred to the Political Security Directorate of the Ministry of the Interior. In the course of his duties, he realized that force was used in the conduct of police inquiries and decided to resort to subterfuge so as not to participate in such acts. After numerous requests he managed to be transferred to another directorate and often found excuses to be absent from work. In 1993 he was transferred to the Ministry's detention centre where he was instructed to guard detainees. In March 1996 he disobeyed a strict order from his superiors not to feed detainees by offering some of his meal to a hungry young detainee. For this act, he was disarmed, interrogated, accused of sympathizing with political prisoners and placed under arrest for five months before being dismissed. After his release in August 1996, the author attempted to leave Tunisia, but he was stopped at the airport because he had no exit visa from the Director of the Security Services. He was then placed in detention for one month. On leaving prison he was subjected to very strict administrative surveillance, which required him to present himself twice a day to the security service to sign a surveillance register.

2.2 The author managed to leave Tunisia three years later by bribing an employee of the Ministry of the Interior to issue him with a new passport. The author obtained a Canadian and an American visa on the strength of a forged employment certificate as an artistic director of a company, but he chose Canada. The author waited for three months after his arrival as a visitor in Canada on 2 October 1999 before claiming refugee status on 10 January 2000.

2.3 On 1 May 2003 the Immigration and Refugee Board ("the Board") rejected the author's asylum application for two main reasons: first, the Board found that the author had not discharged the burden of proving that he had a well-founded fear of persecution in Tunisia on account of his political opinions. In this connection, the Board noted inconsistencies in the author's allegations, namely that, contrary to his statement that, after dismissal from the police, he was unable to keep a job, the author's identity card described him as the technical director of a company in July 1998. The author had then stated that he had obtained that document with a bogus attestation of employment, but the Board was not convinced by that explanation. The Board noted that the author had not been able to adduce any evidence that he had suffered from reprisals after feeding a detainee and had been unable to explain how he managed to leave the country so easily on a new passport, since freedom of movement at the Tunisian border was strictly controlled. In the Board's opinion, that would suggest that the author was not being sought by the authorities. The fact that the author had waited for three months after his arrival in Canada before claiming refugee status was interpreted by the Board as being at odds with his alleged subjective fear of persecution and consequently as a factor that undermined his credibility.

2.4. Secondly, in the light of the evidence, the Board held that the provisions of the Convention relating to the Status of Refugees (hereinafter referred to as "the Convention")



should not be applied to the author by virtue of article 1(F) (a) and (c).<sup>1</sup> The Board took the view that, as a member of the Political Security Section of the Ministry of the Interior from 1991 to 1993, he had been aware that torture was a routine practice of that section, but he had not shown that he had made a serious effort to dissociate himself, or resign, from that section. The Board considered that that section had the characteristics of an organization “with a limited, brutal purpose” and, applying the pertinent Canadian case law,<sup>2</sup> it arrived at the conclusion that mere membership of this section was sufficient to infer that there were good reasons for thinking that the author had perhaps committed one of the crimes listed in article 1(F) (a) and/or (c) during his years in police service. The Board therefore held that the author was excluded from the application of the Convention. The author attempted to appeal against the Board’s decision, but the Federal Court of Canada rejected the application for judicial review on 17 October 2003, without a hearing.

2.5 On 6 December 2004 the author submitted a request for a Pre-Removal Risk Assessment (PRRA), which was rejected on 21 February 2005. An application for judicial review of that decision was lodged with the Federal Court on 23 June 2005, together with an application for stay of deportation. This stay was granted without a hearing and the PRRA decision of 21 February 2005 was set aside by the Federal Court on 16 September 2005. In its decision, the Federal Court ordered that a fresh PRRA decision should be reached by another immigration officer. The file was passed on, but on 30 June 2006 the immigration officer responsible for the new PRRA decision again rejected the request. The decision repeats the statement that the author may not claim refugee status because his application was rejected under article 1(F) of the Convention by the Board. In consequence thereof, the assessment was restricted to an analysis of the risk referred to in section 97 of the Immigration and Refugee Protection Act. Despite further evidence presented by the author, the new PRRA decision arrived at the same conclusions as that of 21 February 2005, namely that, in view of his profile and the manner in which he had left Tunisia, the author had been unable to show that there were substantial grounds for believing that he would be subjected to torture or to cruel treatment or punishment, or that his life would be in jeopardy if he was returned to Tunisia. His request for protection was therefore rejected. An application for judicial review of the PRRA decision was rejected by the Federal Court on 16 November 2006 without a hearing.

2.6. In 2004 the author submitted a sponsored application for residence on humanitarian grounds on the basis of his marriage since 2003 with a woman from Canada, with whom he had been living since 2001. This application was considered at the same time as the second PRRA request by the same officer and rejected on the same date, 30 June 2006. Although the decision acknowledged the author’s genuine marriage to a Canadian citizen, his financial and psychological support of his wife and her psychological problems due to the author’s long immigration procedures, greater importance was attached to the fact that the

<sup>1</sup> “Article 1 ...

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

...

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.”

Article 1F of the Convention has been incorporated into Canadian law by art. 2, para. 1, of the Immigration and Refugee Protection Act.

<sup>2</sup> *Ramirez v. Canada* (Minister of Employment and Immigration), (1992) 2 F.C. 306.

Convention relating to the Status of Refugees did not apply to the author on account of crimes to which he had probably been an accessory during his service in the Tunisian political police between 1991 and 1993. The decision gave very little weight to the author's arguments regarding the risk he would run if he returned to Tunisia, since it first found that his personal profile was no proof that he would be threatened by the Tunisian authorities if he returned. Since the author had not therefore demonstrated the existence of any exceptional circumstances, he should not be exempted from the normal procedure for applying for permanent residence, an application which he would therefore have to submit in Tunisia. A request for judicial review of this decision was rejected without a hearing by the Federal Court on 26 November 2006.

2.7 On 6 December 2006, the author submitted another request for a PRRA which is still pending.

2.8 The author was served with an expulsion order inviting him to present himself at Montreal airport on 30 January 2007 for final departure to Tunisia. A further application for a stay of execution of the removal order, which also challenged the PRRA decision of 30 June 2006, was lodged. The Federal Court rejected the application on 22 January 2007 pursuant to the principle of *res judicata*.

### **The complaint**

3.1 In his initial communication, the author states that Canada has violated or, if it expelled him, would violate articles 2, 6, 7, 17 and 26 of the Covenant. He holds that the legal and administrative procedures applied to him are inconsistent with the guarantees set forth in article 2 of the Covenant. In particular, he emphasizes that the PRRA remedy must be deemed illusory, because the staff processing these applications are trained to reject them. He draws attention to the fact that the members of staff in question are employees of the Ministry of Immigration who do not possess the institutional independence and impartiality required before courts.<sup>3</sup> The author likewise contends that the procedure of applying for residence on humanitarian grounds is a chancy remedy, because the immigration officers handling it are of a very low grade and are not independent of the Government either. In his opinion, these remedies are a matter of discretion. The author notes that, when his file was examined under this procedure, the decision was virtually automatic in that, since it had been ruled that he was not covered by the Convention relating to the Status of Refugees, his residence application was rejected *ipso facto*. His marriage and his wife's rights were not considered and no study of proportionality was made to determine whether he really constituted a risk to Canada. The author takes issue with the fact that the PRRA decision of 30 June 2006 ignored and failed to mention a number of items of evidence in the file, namely a wanted notice of the Tunisian police, letters of support from various human rights organizations and from Radhia Nasraoui, a Tunisian lawyer. Similarly the author takes issue with the fact that the latest decision of the Federal Court (22 January 2007) disregarded proof, which in his opinion, demonstrates the real danger that he would run if he were expelled to Tunisia. The author stresses that the remedies for challenging his deportation are ineffective and of no avail.

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<sup>3</sup> The author refers to the decision of the European Court of Human Rights in *Chahal v. the United Kingdom*, 1996, 23 E.H.R.R. 413, and the concluding observations of the Committee against Torture on the third periodic report of Canada, where the Committee, noting that "both the review of security risk and the review of the existence of humanitarian and compassionate grounds are carried out by the same governmental body" said that it was concerned by "the alleged lack of independence of decision-makers" (A/56/44, para. 58 (f)).

3.2 The author refers to systematic human rights violations in Tunisia, including the routine practice of torture. He further submits that his expulsion would jeopardize his life and physical inviolability, in violation of article 6 of the Covenant. He contends that he would be regarded as a political opponent by the Tunisian authorities owing to his former attitude in the police and his claim of refugee status in a democratic country. For this reason, return would certainly mean detention in inhuman conditions. The author could also disappear.

3.3. The author submits that his expulsion would expose him to a risk of torture, in violation of article 7 of the Covenant. He refers to the conclusions of the Committee against Torture and the Human Rights Committee. He notes that, although various Canadian authorities have acknowledged that he used to work as a policeman in Tunisia, they did not conclude that he would therefore be under threat if he were to return. The author emphasizes that a wanted notice has been issued against him by the Tunisian authorities and that his mother was summoned in September 2006, something which, in his opinion, shows that he would be in real danger if he were expelled to Tunisia.

3.4 As far as articles 17 and 23 are concerned, the author submits that his return would amount to illegal interference in his private life and would break up his family without any justification, because he does not constitute any danger to the public. He adds that he is the economic mainstay of his wife with whom he has lived for more than five years and to whom he has been married for three, a marriage entered into in good faith and recognized as such by the Canadian authorities.

3.5 Although the author also relies on a violation of article 26 of the Covenant, he does not substantiate this allegation in his complaint.

#### **The State party's observations on admissibility and merits**

4.1 In its observations of 11 December 2008, the State party refers to the Committee's general policy of not evaluating evidence or reviewing facts as established by the domestic courts, but of confining itself to ascertaining whether the latter have interpreted domestic law in good faith and in a manner that is not manifestly unreasonable. It disputes the admissibility and the merits of the communication and contends that the communication is inadmissible and unfounded. The State party notes that since the author's last PRRA request, which he presented on 6 December 2006, is still pending, he has not therefore exhausted domestic remedies. The State party asserts, however, that it will not yet object to the admissibility of the communication, without prejudice to its right, at a later stage, to plead that it is inadmissible because domestic remedies have not been exhausted. The State party notes that the facts of the communication are identical to those presented to various Canadian authorities which found that the author did not have serious grounds for believing that he was likely to be subjected to torture or ill-treatment, or that his life would be in danger, if he had to return to Tunisia. The Committee is not therefore competent to re-evaluate the evidence or the findings of fact or of law adopted by the Canadian courts.

4.2 As far as the violation of article 2 is concerned, the State party considers that his claim is incompatible with the provisions of the Covenant and therefore inadmissible. It refers to the Committee's earlier decisions<sup>4</sup> that this article confers an accessory rather than an autonomous right, which may be exercised only after another violation of the Covenant, has been found to have occurred. Consequently and insofar as the author has relied on article 2 in isolation, this allegation should be rejected by the Committee as inadmissible

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<sup>4</sup> Communications No. 1153/2003, *Huamán v. Peru*, Views adopted on 24 October 2005, para. 5.4; No. 275/1988, *S.E. v. Argentina*, decision on inadmissibility adopted on 26 March 1990; and No. 345/1988 *R.A.V.N. et al. v. Argentina*, decision on inadmissibility adopted on 26 March 1990.

under article 3 of the Optional Protocol. Subsidiarily, the State party considers that there has been no violation of article 2, because in Canada there are many remedies offering protection against return to a country where there might be a risk of torture or other prohibited treatment. These remedies are open to judicial review subject to the permission of the competent court. The Committee and the Committee against Torture have considered PRRA requests and requests for exemption from the application of the normal provisions of immigration law on humanitarian grounds to be effective remedies.<sup>5</sup> As for the author's allegations regarding the quality, independence and impartiality of PRRA remedies and appeals on humanitarian grounds, the State party submits that the Committee's role should be confined to examining the instant case, rather than assessing the Canadian system for determining refugee status.<sup>6</sup>

4.3 With regard to the claims that articles 6 and 7 would be violated if the author were returned to Tunisia, the State party argues that the conclusions adopted by various domestic courts in the light of the facts refute these allegations. The author has been unable to substantiate his allegations that, if he were returned to Tunisia, his life would be threatened and he would risk torture or ill-treatment. All the pertinent bodies have ruled that the author's arguments are not credible and that he has adduced no evidence in support of his assertions. The author has been unable to explain the delay in producing the wanted notice concerning him. Moreover the fact that he has been detained by the Tunisian authorities in the past does not signify that he risks persecution in the future. Numerous documentary sources consulted by the Canadian authorities have also revealed that only opponents of the Tunisian regime are at risk of persecution by the authorities. Since the author has not shown that he belongs to this category, he has therefore failed to establish that *prima facie* he would face a real, personal risk of a breach of his rights under articles 6 and 7. The communication must therefore be declared inadmissible in respect of these two provisions.

4.4 With regard to the contentions concerning articles 17 and 23, the State party emphasizes that the application of the Immigration and Refugee Protection Act does not entail a violation of these articles. As far as article 17 is concerned, the State party refers to general comment No. 16 (1988) of the Committee, which defines the notions of arbitrary or unlawful interference with privacy. As for article 23, the State party refers to Committee's general comment No. 19 (1990) on the protection of the family, the right to marriage and equality of the spouses and notes that the Covenant does not guarantee the right of a family to choose the country in which to settle and that Governments enjoy wide discretion when expelling aliens from their territory. In addition, when he married, the author could not ignore the fact that he was in a precarious situation, without any status in Canada. Articles 17 and 23 do not guarantee that a person will never be removed from the territory of a State party if that would affect that person's family life.<sup>7</sup> The return of an individual to a country where the rest of his family is living will violate article 17 only if immigration laws are arbitrarily applied or conflict with the Covenant's provisions.<sup>8</sup> In the present case, the author has not established a *prima facie* violation of articles 17 and 23. The communication must therefore be deemed inadmissible with respect to these articles.

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<sup>5</sup> Communication No. 1302/2004, *Khan v. Canada*, decision on inadmissibility adopted 25 July 2006, para. 5.5; and Committee against Torture, communication No. 273/2005, *T.A. v. Canada*, decision on inadmissibility adopted on 15 May 2006, para. 6.4.

<sup>6</sup> The State party refers to Committee against Torture, communication No. 15/1994, *Khan v. Canada*, Views adopted on 15 November 2004, para. 12.1.

<sup>7</sup> The State party refers to communication No. 538/1993, *Stewart v. Canada*, Views adopted on 1 November 1996.

<sup>8</sup> The State party refers to communication No. 35/1978, *Aumeeruddy-Cziffra et al. v. Mauritius*, Views adopted on 9 April 1981, para. 9.2.

4.5 In the opinion of the State party, the author has been unable to demonstrate a prima facie violation of article 26. The author's allegations that the process for determining refugee status, especially the PRRA procedure, is biased and lacks independence, are unrelated to any of the forms of discrimination prohibited by article 26 and are not substantiated by any pertinent facts.

4.6 Subsidiarily, if the Committee were to take the view that the author's communication is admissible the State party submits that it is ill-founded for the same reasons as those put forward in respect of the plea that it is inadmissible.

#### **Author's comments on the State party's observations**

5.1 In his submissions filed on 18 July 2008 the author maintains that his communication is well founded and supported by conclusive evidence which was not examined by the Canadian authorities after the first refusal of the asylum application by the Board. He explains that he did not present the wanted notice until four years after it was issued because it took him that long to obtain the document. The author likewise mentions other evidence which was not considered, such as his mother's summons, a letter from his family, letters of support from Amnesty International, the Association for Human Rights in the Maghreb, the Quebec League of Rights and Liberties, a member of Parliament and Radhia Nasraoui, a Tunisian lawyer. He notes that this evidence is not mentioned in the State party's submission either. The author holds that the large-scale abuse of human rights in Tunisia is unquestionable,<sup>9</sup> as is objective proof of known danger to his person if he were to return to Tunisia. He faces real, personal danger and several documents in support of his application, which were ignored in the Canadian decisions, demonstrate the Tunisian authorities' interest in detaining him. If he were to return, he might be tortured or executed extrajudicially.

5.2 With regard to his right to respect of his family life, the author argues that many Canadian decisions disregarded the existence of his wife and his family life. The breakup of his family, which would be a direct, unavoidable consequence of his removal, would clearly be arbitrary. His removal would violate the principle of proportionality, according to which the Canadian authorities ought to have taken account of the fact that he has been living in Canada for nine years,<sup>10</sup> and has been married to a Canadian woman for five years. The decision on his application for residence on humanitarian grounds, which found that he would not have excessive difficulty in applying for residence from Tunisia, is illogical and pays no heed to the human rights situation in Tunisia.

#### **Additional observations of the State party**

6.1 In its observations of 11 December 2008, the State party, referring to recent information on human rights violations in Tunisia, notes that, according to these sources, Tunisian State repression is particularly directed at political opponents, human rights defenders and terrorist suspects. The State party reiterates that the author has not shown that he would run a real personal risk of torture, and that he is not credible. It observes that his comments contain nothing which would permit the Canadian authorities to alter their conclusions.

6.2 The State party notes with regard to the evidence mentioned by the author that it was presented only with the most recent PRRA request submitted by the author on 6 December 2006. This request will not be examined as long as the author's return has been stayed. The

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<sup>9</sup> Reference is made to the Judgment of the Grand Chamber of the European Court of Human Rights in *Saadi v. Italy*, application No. 37201/06 of 28 February 2008.

<sup>10</sup> And therefore now for 11 years.

letters of support from various human rights organizations merely echo the author's allegations and are not corroborated by objective proof. The letter from his family does not constitute independent, objective evidence and is therefore of little probative value. The summons issued to his mother does not indicate its purpose and it would be mere speculation to infer that it was connected with the author. With regard to the letter from the lawyer Radhia Nasraoui,<sup>11</sup> the State party notes that removal to Tunisia does not necessarily entail any risks for the author.<sup>12</sup> The fact that a person who has been returned might be questioned on arrival by the Tunisian immigration services does not mean that that person would be detained or tortured. In the present case, the evidence adduced does not suggest that the author is likely to be tortured or to be subjected to ill-treatment. The State again asserts that it has been found that the wanted notice issued with respect to the author does not prove that he is wanted in Tunisia.

6.3 As for the author's right to respect for his family life, the State party contends that the principle of proportionality has not been violated. The author married when his status in Canada was extremely precarious, since his asylum application had been rejected only a few months before his marriage.<sup>13</sup> The fact that he is still in Canada nine years after his arrival and five years after his marriage is due to the proceedings brought by him and should not prevent Canada from returning him.<sup>14</sup> Moreover the court which considered his first asylum application established that, even if he did have a well-founded fear of persecution should he return to Tunisia, which he has been unable to prove in this particular case, the author would be excluded from the protection of the Convention relating to the Status of Refugees by virtue of article 1F (a) and (c). Only in exceptional circumstances will a State party have to provide reasons going beyond the application of its laws to justify the removal of an alien without status in its territory.<sup>15</sup> The author's marriage is an important factor which was duly taken into account by the competent courts. It is not, however, a circumstance making his return unreasonable, because his wife could follow him to Tunisia. The State party likewise argues that no child has been born of the marriage. Lastly, it is noted that since the author has presented his claim solely on his own behalf, the Committee must consider only his rights.<sup>16</sup>

### Issues and proceedings before the Committee

#### *Consideration of admissibility*

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

<sup>11</sup> The letter says that "any Tunisian who has requested asylum in a foreign country is deemed by the Tunisian authorities to have 'sullied the country's image'".

<sup>12</sup> The State party refers to two decisions of the Committee against Torture: communication No. 300/2006, *Tebourski v. France*, Views adopted on 1 May 2007 and, *a contrario*, communication No. 179/2001, *B.M. v. Sweden*, Views adopted on 30 April 2002.

<sup>13</sup> His application was rejected on 24 April 2003 and he married in October 2003.

<sup>14</sup> The State party relies on communications No. 820/1998, *Rajan v. New Zealand*, decision on inadmissibility adopted on 6 August 2003, para. 7.3; and No. 930/2000, *Winata and Lan v. Australia*, Views adopted on 26 July 2001, para. 7.3.

<sup>15</sup> The State party cites, in support of its argument, communications No. 893/1999, *Sahid v. New Zealand*, Views adopted on 28 March 2003, para. 8.2; *Winata v. Australia* (note 14 above), and No. 1011/2001, *Madafferi v. Australia*, Views adopted on 26 July 2004, para. 9.8.

<sup>16</sup> The State party relies on communication No. 1222/2003, *Byahuranga v. Denmark*, Views adopted on 1 November 2004, para. 11.8.

7.2 With regard to article 5, paragraph 2 (b), of the Optional Protocol, the Committee notes that the author's last PRRA request, which he presented on 6 December 2006, remains pending before the State party's authorities. It however notes that the State party has not objected to the admissibility of the communication, and therefore considers that, for purposes of admissibility, domestic remedies have been exhausted.

7.3 With regard to the alleged violation of article 2, the Committee takes note of the State party's argument that this claim is inadmissible because it is incompatible with the Covenant, since article 2 may not be invoked independently. The Committee is of the view that the alleged violations that relate solely to article 2 of the Covenant are inadmissible under article 2 of the Optional Protocol.

7.4 The Committee further notes that the author claims to be a victim of a violation of article 26, without substantiating this allegation. He has failed to show in what way the process applied to him to determine whether he was eligible for refugee status in Canada was discriminatory in that it was based on a ground prohibited by article 26. The Committee is therefore of the opinion that the allegation is inadmissible under article 2 of the Optional Protocol.

7.5 As far as articles 6, 7, 17 and 23 are concerned, the Committee has taken note of the State party's argument that these claims should be declared inadmissible because, in the light of the author's contentions and the findings of law adopted by various Canadian authorities, the author has been unable to demonstrate a prima facie violation of these provisions. The Committee is, however, of the opinion that, for the purposes of admissibility, the author has substantiated his allegations with plausible arguments in support thereof.

7.6 The Committee therefore concludes that the author's communication is admissible insofar as it raises issues under articles 6, 7, 17 and 23 of the Covenant.

#### *Consideration of the merits*

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

8.2 In respect of the author's allegations under articles 6 and 7 of the Covenant, it is necessary to bear in mind the State party's obligation under article 2, paragraph 1, of the Covenant to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, including in the application of its processes for expulsion of non-citizens.<sup>17</sup>

8.3 The Committee has taken note of the author's submission that his expulsion would expose him to certain detention and to a risk of torture or disappearance. The Committee observes that these allegations have been refuted by the Immigration and Refugee Board ("the Board") which found that the author had not shown that, if he were to return to Tunisia, his life would be in jeopardy and that he was likely to be tortured or subjected to ill-treatment on the grounds of his political opinions. In addition, the Committee observes that the Board rejected the author's asylum application on the grounds that the Convention relating to the Status of Refugees did not apply to him by virtue of article 1F (a) and (c), of that Convention.

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<sup>17</sup> Human Rights Committee, general comments No. 6 (1982) on the right to life and No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment.

8.4 The Committee recalls its jurisprudence that it is generally for the courts of the States parties to the Covenant to evaluate facts and evidence of a particular case, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice.<sup>18</sup>

8.5 In the present communication the Committee observes that the material before it shows that, when the author's claims were considered by the State party's authorities, much weight was given to the fact that the Convention relating to the Status of Refugees did not apply to him and it appears that inadequate consideration was given to the specific rights of the author under the Covenant and such other instruments as the Convention Against Torture.

8.6 As far as article 6 is concerned, the Committee notes that the information submitted to it does not suggest that the author's expulsion to Tunisia would expose him to a real risk of a violation of his right to life. The author's contentions in this respect are no more than general allegations mentioning the risk of detention in inhuman conditions and the fact that he would be deprived of access to justice and might disappear, but without reference to any particular circumstances suggesting that his life would be in danger. In these circumstances, the Committee considers that the facts before it do not show that his expulsion would result in a real risk of a violation of article 6.

8.7 As for article 7, the Committee observes that the State party, in its submissions, refers mainly to the decisions of various authorities which have rejected the author's applications essentially on the grounds that he lacks credibility, having noted inconsistencies in his statements and the lack of evidence in support of his allegations. The Committee observes that the standard of proof required of the author is that he establishes that there is a *real* risk of treatment contrary to article 7 as a necessary and foreseeable consequence of his expulsion to Tunisia.<sup>19</sup> The Committee notes that the State party itself, referring to a variety of sources, says that torture is known to be practised in Tunisia, but that the author does not belong to one of the categories at risk of such treatment. The Committee considers that the author has provided substantial evidence of a real and personal risk of his being subjected to treatment contrary to article 7 of the Covenant, on account of his dissent in the Tunisian police, his six-month police detention, the strict administrative surveillance to which he was subjected and the wanted notice issued against him by the Ministry of the Interior which mentions his "escape from administrative surveillance". These facts have not been disputed by the State party. The Committee gives due weight to the author's allegations regarding the pressure put on his family in Tunisia. Having been employed by the Ministry of the Interior, then disciplined, detained and subjected to strict surveillance on account of his dissent, the Committee considers that there is a real risk of the author being regarded as a political opponent and therefore subjected to torture. This risk is increased by the asylum application which he submitted in Canada, since this makes it all the more possible that the author will be seen as a regime opponent. The Committee therefore considers that the expulsion order issued against the author would constitute a violation of article 7 of the Covenant if it were enforced.

8.8 As for the alleged violation of the author's right to family life under articles 17 and 23, the Committee considers that, since it found that article 7, of the Covenant would be violated if the author were returned to Tunisia, it deems it not necessary to further examine these claims.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the

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<sup>18</sup> See for example communication No. 541/1993, *Simms v. Jamaica*, decision on inadmissibility adopted on 3 April 1995, para. 6.2.

<sup>19</sup> See communication No. 692/1996, *A.R.J. v. Australia*, Views adopted on 28 July 1997, para. 6.14.



author's expulsion to Tunisia would, if implemented, violate his rights under article 7 in conjunction with article 2, of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including a full reconsideration of his expulsion order, taking into account the State party's obligations under the Covenant. The State party is also under an obligation to avoid exposing others to similar risks of a violation.

11. Bearing in mind that, by becoming a State 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 or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**W. Communication No. 1552/2007, *Lyashkevich v. Uzbekistan*  
(Views adopted on 23 March 2010, ninety-eighth session)\***

<i>Submitted by:</i>	Tatiana Lyashkevich (not represented by counsel)
<i>Alleged victim:</i>	Mr. Andrei Lyashkevich, the author's son
<i>State party:</i>	Uzbekistan
<i>Date of communication:</i>	4 October 2005 (initial submission)
<i>Decision on admissibility:</i>	13 March 2008
<i>Subject matter:</i>	Unfair trial, use of torture during preliminary investigation, ill-treatment
<i>Procedural issue:</i>	Exhaustion of domestic remedies; level of substantiation of claim
<i>Substantive issues:</i>	Arbitrary detention; torture; unfair trial; conditions of detention; habeas corpus
<i>Articles of the Covenant:</i>	2, 7, 9, 10 and 14
<i>Article of the Optional Protocol:</i>	5, paragraph 2 (b)

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

*Meeting* on 23 March 2010,

*Having concluded* its consideration of communication No. 1552/2007, submitted to the Human Rights Committee on behalf of Mr. Andrei Lyashkevich under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication, and the State party,

*Adopts* the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication is Ms. Tatiana Lyashkevich, a Russian national born in 1948 and currently residing in Uzbekistan. She submits the communication on behalf of her son, Mr. Andrei Lyashkevich, a Russian national born in 1977 and also residing in Uzbekistan, who, at the time the communication was submitted, was serving a 20-year prison sentence following his conviction by the Tashkent City Court on 2 March 2004 in a case of murder and robbery. The author claims that her son is the victim of a

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

violation by Uzbekistan of his rights under articles 2, 7, 9, 10 and 14 of the Covenant. The author is unrepresented.

### **Factual background**

2.1 On 2 March 2004, the Tashkent City Court found the author's son guilty of murder with aggravating circumstances and robbery with violence, and sentenced him to 20 years' imprisonment. According to the court, the author's son killed Mr. A. Sayfutdinov in the author's apartment on 6 August 2003 in order to seize a sum of money belonging to the victim. To conceal the murder, the author's son took Mr. Sayfutdinov's body to the cellar of the building, cut it up into pieces and put it into bags. He threw the bags into the Salar canal in Tashkent during the night of 7 August 2003.

2.2 The case was heard on appeal on 13 April 2004 by the Appeal Division of the Tashkent City Court, which applied a presidential amnesty and reduced the sentence of the author's son by four years, while upholding his conviction. The case was also brought to the attention of the Supreme Court on various occasions through applications for judicial review. On an unspecified date, the Criminal Chamber of the Supreme Court examined the case and upheld Mr. Lyashkevich's conviction.<sup>1</sup>

2.3 The author claims that her son is innocent. She had authorized him to sell certain family valuables and this is how he came to know Mr. Sayfutdinov, who purchased some of these items. A meeting was held in the author's apartment on 6 August 2003, in her absence. Her son presented Mr. Sayfutdinov to another person, Sergei, who sold objects and who he had met by chance. After examining the items concerned, Mr. Sayfutdinov became suspicious about their quality and had an argument with Sergei on the matter. Sergei took out a knife and stabbed Mr. Sayfutdinov in the chest, killing him. Sergei dragged the body to the basement of the building and put it in a bag. He left the premises saying that he would be back. He told the author's son that he admitted his responsibility. Later on, the author's son borrowed a friend's car and drove to a canal, where he threw the bag into the canal.

2.4 On 7 August, on returning to work, the author found two policemen waiting for her who showed her a photograph. She recognized an individual who had been looking for her son a few days before; she was informed that it was Mr. Anvar Sayfutdinov. At the time, the author's son was at her sister's house.

2.5 On the morning of 8 August 2003, the author was asked to present herself at the Yakksarsky district police station. There, she states, she was questioned by several policemen between 10 a.m. and 1 p.m. and invited to give explanations on the events of 6 August. She was threatened by the deputy chief of the police station with being put in jail if she made a false statement. She was also accused of murdering Mr. Sayfutdinov together with her son. The author asserts that she knew nothing of the events of 6 August. When she asked to be treated more decently, she was struck on the hand.<sup>2</sup>

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<sup>1</sup> The author provides copies of 13 replies received from the Supreme Court. Two of them, dated 14 January 2005 and 8 November 2004, signed by Mr. Khasanov, Vice-President of the Court's Criminal Chamber, and Mr. Tursunbaev, President of the Criminal Chamber, informed the author and the lawyer that, following their complaints, the son's case had been examined under the judicial review procedures by the Criminal Chamber of the Supreme Court. The Court found that there was no reason to refer the case for additional investigation and upheld the sentence. Another letter, dated 30 December 2004, also refers to a judicial review of the case by the Criminal Chamber of the Supreme Court, again upholding the sentence. The other replies of the Supreme Court, signed by its President or Vice-Presidents, reject the author's complaints and refuse to initiate a judicial review by the Court.

<sup>2</sup> The author claims that she had bruises for a week.

2.6 Later the same day, Mr. Radjabov, chief of the investigating unit, asked the author to bring her son to the police station. He promised that her son would not be subjected to physical coercion and would be freed after giving explanations. After her son arrived at the police station, she was taken back to her apartment, which the police proceeded to search. According to the author, the police had no search warrant. She did not receive a report on the search, even though this is required by law.

2.7 The author states that she took her son to the police at 2 p.m. She was not released until about midnight, despite the fact that Uzbek law prohibits any investigative procedure between 10 p.m. and 6 a.m. She asserts that she was not informed of her rights and obligations as a witness and that she was compelled to testify against her son, without going into greater detail.

2.8 The author returned to the police station on 9 August in search of her son, but was sent to the procurator's office, where she was invited to go and look for him in the Tashkent Department of Internal Affairs. Failing to find him there, she returned to the police station, where she was threatened with being locked up.

2.9 On 10 August, the author received a further visit from the police and a procurator for an in situ investigation. Her son was also present. He was handcuffed and, according to the author, answered questions only by "yes" and "no", while the policemen explained to him how the crime had been committed. Her son confessed to murdering Mr. Sayfutdinov, without giving any details of the sequence of events. The police filmed everything. On this occasion too, according to the author, she was not shown either a warrant to search at her home or a report on the investigation acts conducted.

2.10 In view of her son's condition, the author tried to find a lawyer. On 11 August, accompanied by a lawyer, she went to the police station, and subsequently to the procurator's office, to look for her son. She met with the deputy district procurator and the inspector in charge of the investigation. The inspector informed them that no investigative acts in the case were scheduled for that day. The lawyer was invited to present himself the following day, in order to attend an interrogation. It later transpired that, on 11 August, the author's son had been interrogated and participated in confrontations, without a lawyer being present.

2.11 The author notes that the documents relating to the preliminary investigation refer to the presence of a court-appointed lawyer, Mr. Burkhanov. According to her, the investigator sent a letter on 10 August to the Tashkent Bar Association requesting that a lawyer be appointed for Mr. Lyashkevich; on the same day, the Bar Association sent Mr. Burkhanov to act as defence counsel for the author's son.

2.12 The author states that, on 12 August, she received a further visit from the investigators, accompanied by her son. The officers again searched the apartment. She was not shown any warrant and did not receive a copy of the report.

2.13 The author asserts that, following the proceedings in first and second instance, her son's new lawyer sought clarification from the Tashkent Bar Association on Mr. Burkhanov's authorization to represent Mr. Lyashkevich. The Bar Association replied that the authorizations log for the period August 2003 to August 2004 did not confirm that Mr. Burkhanov had received such an authorization. According to the author, this means that the copy of the authorization to act attached to her son's file by the investigators was a forgery.<sup>3</sup> She notes that Mr. Burkhanov's signature appears on three reports in the file: the

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<sup>3</sup> The author adds that subsequently, in 2004, Mr. Burkhanov was sentenced to 11 years' imprisonment for fraud.

report relating to her son's interrogation as a suspect, the report on his confrontation with a certain Mr. Kladov,<sup>4</sup> and the report concerning his indictment and interrogation as a defendant. All these procedures took place on 11 August 2003.

2.14 According to the author, the foregoing demonstrates the existence of numerous procedural irregularities and confirms her son's statements that, during his arrest and the preliminary inquiries, he was denied his rights of defence.<sup>5</sup> She says that, by judgement of 24 September 2004, the Supreme Court ruled that statements obtained from a suspect in the absence of a lawyer have no legal force and cannot serve as a basis for charges. Article 51 of the Code of Criminal Procedure stipulates that the presence of a lawyer is obligatory if the accused is liable to the death penalty.

2.15 With reference to article 7 of the Covenant, the author states that during the preliminary investigation and before the court, her son explained that he had been beaten and tortured during his interrogations on 8, 9 and 10 August 2003 and that he had confessed under duress to killing the victim. He reportedly told the court that he had been advised by the lawyer to so inform the investigator immediately, but had been unable to speak to the latter until 30 October 2003, during an interrogation. Mr. Lyashkevich stated to the court that, on 9 August 2003, on the third floor of the Yakksarsky district police station, he had been beaten by a policeman who had struck him on the head and told him to confess to the murder. He also stated that he had been beaten in turn by seven or eight other individuals in the same police station. When the court questioned the chief of the criminal investigation department of the Department of Internal Affairs of the Yakksarsky district, he denied these allegations. The author's son further stated that the chief had also struck him, on 8, 9 and 10 August 2003.

2.16 With reference to article 9 of the Covenant, the author states that she brought her son to the police on 8 August 2003, after having received guarantees that he would only be interrogated and then released. However, this was not the case, and she was informed only on 11 August 2003, that her son was arrested for murder. She affirms that during the preliminary investigation, Mr. Lyashkevich furnished written explanations on 8 August, confirming that he knew the victim and had met him on 6 August; this document was not dated. On 9 August he provided further written explanations. Neither document mentioned the murder. On 10 August, under duress, the author's son produced written explanations stating that he had killed Mr. Sayfutdinov. According to the author, the investigators detained her son illegally for three days, and only after the desired confessions were obtained was her son officially charged. The author therefore considers that her son's detention between 8 and 10 August 2003 was illegal. She adds that, while her son still had the status of witness, he was questioned as a suspect, with fewer procedural guarantees.

2.17 The author invokes article 10 of the Covenant, and claims that, after being convicted, her son was imprisoned at Andijan from May 2004 to February 2005. She sent her son various documents to enable him to prepare appeals to the Supreme Court and other institutions. She says that no appeal from her son was received by those institutions. In January 2005, the author requested the Penal Correction Department to transfer her son to the Tashkent region.<sup>6</sup> This request was rejected. In March 2005, her son was transferred to Karchi prison.

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<sup>4</sup> Mr. Kladov was also tried under the same case for failing to inform the authorities about the murder, despite knowing about it.

<sup>5</sup> On this point, the author refers to a Supreme Court decision, various provisions of which deal with the application of a number of legal guarantees in respect to the rights of suspects and accused persons.

<sup>6</sup> The author justified her request by the fact that she lives on her own, is handicapped and has only a

2.18 Mr. Lyashkevich also complained that, during an illness, he had received no medical assistance. The author says she requested the prison administration to provide her son with the necessary care. When she visited the prison on 5 July 2005, her son had a temperature of over 39 C. He had had a high temperature for several days and was coughing, without receiving any care. The author requested the chief of the prison administration to provide her son with care, and she supplied medicine.

2.19 On 8 July 2005, the prison administration contacted the author to inform her that her son had been transferred urgently to the Tashkent prison hospital. After one week, she was informed by doctors at the hospital that, on arrival, her son had had a temperature of 39 C - 40 C and had been in a very weakened state, and that medical analyses had established that he was suffering from tuberculosis.

2.20 The author further contends that in violation of article 14, paragraphs 1, 2, 3 (b) and (g), of the Covenant, her son's case was not examined objectively, in violation of the principles governing the administration of justice. The evidence adduced against him was based on forced confessions, mere suppositions by investigators, various conflicting testimony and expert findings lacking evidentiary value. According to the author, the court sided openly with the prosecution while ignoring all her son's explanations, and the judgement merely reproduced the indictment. The court ignored the discrepancies in the various written explanations provided by her son between 8 and 10 August 2003, and disregarded those explanations. The author argues that the court assessed the evidence incorrectly and makes a detailed rebuttal of various findings of the court based on its examination of the facts and the evidence.<sup>7</sup> She also rejects as unfounded the court's conclusion that her son acted out of self-interest, and that he was systematically taking drugs at the time.

### **The complaint**

3. The author therefore claims that the facts as presented demonstrate that her son was the victim of a violation by Uzbekistan of his rights under articles 2, 7, 9, 10 and 14 of the Covenant.

### **State party's observations on admissibility**

4. By notes verbales dated 6 June and 31 July 2007, the State party challenged the admissibility of the communication on the grounds that the author had not exhausted all available domestic remedies. It noted that, on 2 March 2004, Mr. Lyashkevich was sentenced by the Tashkent City Court to 20 years' imprisonment for murder and robbery. His case was examined by the Supreme Court (Criminal Chamber) on 29 June 2004. Nevertheless, the Uzbek Courts Act provided that, aside from the hearing of cases on judicial (supervisory) review by the Criminal Chamber of the Supreme Court, its Presidium and its Plenum also have the right to examine cases.

### **Decision on admissibility**

5.1 During its ninety-second session, on 13 March 2008, the Committee examined the admissibility of the communication. It noted the State party's challenge to admissibility on the grounds that the case had not been examined by the Plenum or Presidium of the Supreme Court of Uzbekistan under the supervisory review procedure. The Committee

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moderate income. She also pointed out that her son had suffered from hepatitis on two occasions prior to his conviction and thus had liver problems, that he had a heart condition, suffered from rheumatism, etc.

<sup>7</sup> Such as testimony, expert findings, various depositions, etc.

observed that the State party provided no explanation as to the effectiveness of these proceedings but limited itself to noting that they were provided for by law. The Committee considered that even if such remedies may be *effective* in certain situations, such reviews were possible only with the express consent of the President or Vice-Presidents of the Supreme Court, who therefore have discretionary power to refer or not to refer a case to the Court, whereas a convicted person claiming that his or her rights have been violated could not initiate such a review directly.

5.2 The Committee noted that, in the present case, the author provided copies of 11 rejections of her applications for a judicial review, signed by the President or the Vice-Presidents of the Supreme Court; thus, the fact that the case of the author's son had not been examined by the Plenum or the Presidium of the Supreme Court could in no way be attributed to the author. The Committee also noted that the State party's Courts Act indicated that, apart from reviews conducted by the Chambers of the Supreme Court, the Presidium or the Plenum of the Supreme Court *may* also examine such cases. In the Committee's view, this showed that the remedies concerned are not generally applicable but remain discretionary and exceptional. Accordingly, the Committee considered that it was not barred from examining the present communication by article 5, paragraph 2 (b), of the Optional Protocol.

5.3 The Committee further noted the author's claim that her son's rights under article 2 of the Covenant have been violated, without providing any information in support of the claim. It recalled that the provisions of article 2 of the Covenant, which lay down general obligations for State parties, could not, in isolation, give rise to a claim in a communication under the Optional Protocol.<sup>8</sup> The Committee considered that the author's contentions in this regard were inadmissible under article 2 of the Optional Protocol.

5.4 The Committee also noted the author's claim that her son's rights under article 9 of the Covenant had been violated (see paragraph 2.16 above). In the absence of any further detailed and documented information in support of these allegations, the Committee considered that this part of the communication was insufficiently substantiated, for purposes of admissibility, and was therefore inadmissible under article 2 of the Optional Protocol.

5.5 The author had also claimed that her son's right under article 10 of the Covenant have been violated (see paragraphs 2.17–2.20 above). In the absence of any other pertinent information, the Committee decided that this part of the communication was insufficiently substantiated, and thus inadmissible under article 2, of the Optional Protocol.

5.6 The Committee considered that the facts as submitted by the author appeared to raise issues under articles 7 and 14 of the Covenant, and that the authors' claims in respect of these provisions should be examined by the Committee on their merits.

#### **State party's observations on the merits**

6.1 The State party presented its observations on the merits by note verbale of 6 May 2009. It recalls the facts of the case: on 2 March 2004, the Tashkent City Court found Mr. Lyashkevich guilty of murder and robbery and sentenced him to a 20-year prison term. On 29 June 2004, this decision was confirmed, on appeal, by the Supreme Court. In virtue of a general amnesty act of 1 December 2003, Mr. Lyashkevich's sentence was reduced by one fifth (four years).

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<sup>8</sup> See, inter alia, communication No. 316/1988, *C.E.A. v. Finland*, decision adopted on 10 July 1991, para. 6.2.

6.2 According to the State party, Mr. Lyashkevich's guilt was established not only on the basis of his confession made during the preliminary investigation, but also on the basis of a multitude of corroborating evidence, such as witnesses testimonies, depositions of several individuals in court, records on the search of Mr. Lyashkevich's home, including its basement, records on the search and seizure of evidence found in the car used to transport the body, the records on the verification of Mr. Lyashkevich's confessions at the crime scene, etc.

6.3 According to the criminal case file, Mr. Lyashkevich was arrested and interrogated as a suspect, on 10 August 2003, in the presence of a lawyer, Mr. D. Bukhranov. The case file contained an official document, dated 10 August 2003, by which this lawyer is authorized to represent the alleged victim, and the lawyer's presence was confirmed by the latter's signatures on this date on the official documents regarding the interrogation. A cross-examination between Mr. Lyashkevich and Mr. Kladov, carried on 11 August 2003, also took place in the lawyer's presence.

6.4 Mr. Lyashkevich was placed in pretrial detention on 11 August 2003, and the same day he was appointed another lawyer, Mr. Agakhanians. On 12 August 2003, in the presence of the new lawyer, the investigators conducted a verification of Mr. Lyashkevich's confessions at the crime scene. According to the State party, Mr. Lyashkevich's interrogation as a suspect permitted to disclose the location of the body of the murdered Mr. Sayfutdinov, and to understand the exact circumstances of the crime.

6.5 According to the State party, all investigation acts in respect to Mr. Lyashkevich were conducted in the presence of a lawyer. During his interrogations, Mr. Lyashkevich confirmed that he had confessed guilt voluntarily, and he had not been subjected to unlawful methods of investigation. The court interrogated the investigator and other police officials, and all denied having used unlawful methods of investigation.

6.6 In addition, a verification was carried out at the pre-investigation stages, which did not reveal any use of psychological or physical pressure against the alleged victim or the author of the communication. During the pretrial investigation, a prosecutor also provided a legal qualification of the acts of the police officers who did apprehend Mr. Lyashkevich; according to the prosecutor, no unlawful acts were committed by the police officers.

6.7 The State party recalled the affirmation in court by the author's son that the murder was in fact committed by an individual named "Sergei". It affirmed that this was verified by the court and was found to be groundless, as it contradicted the rest of the evidence. Thus, Mr. Lyashkevich's guilt was duly established by the court, his acts were qualified correctly, and his penalty was proportionate to the crime committed.

#### **Author's comments on the State party's observations**

7.1 On 13 July 2009, the author reiterated her previous allegations and commented on the State party's observations. First, she contested the State party's affirmation that the lawyer Mr. Burkhanov was officially authorized to represent her son on 10 August 2003. She claimed that this lawyer was assigned ex officio by an investigator, without consulting her. In addition, her son had affirmed in court that this lawyer was not present during his initial interrogations.<sup>9</sup> In the morning of 11 August 2003 (a Monday), the author met with the investigator and presented him the lawyer (Mrs. Agakhyants) she had privately hired to

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<sup>9</sup> The author adds that at a later stage, in November 2004, the privately hired lawyer of Mr. Lyashkevich has requested the Tashkent College of Lawyers No. 2 about clarifications, and it was confirmed that Mr. Burkhanov was never issued an official authorisation to represent Mr. Lyashkevich between August 2003 and August 2004.



represent her son. The investigator explained that no investigation acts would be carried out on that day and invited the new lawyer to come the next day. As it turned out later however, on 11 August 2003, Mr. Lyashkevich was interrogated and investigation acts were carried, including a cross-examination with Mr. Kladov, in the absence of his privately hired lawyer. According to the author, at no point of time was her son informed of his right to be represented by a lawyer.

7.2 The author reiterated that her son had only confessed guilt on 10 August 2003, i.e. on the third day after his actual detention. In his interrogation as a witness on 8 and 9 August 2003, he only confirmed that he met with Mr. Sayfutdinov on 6 August 2003, without referring to the murder. This showed, according to the author, that her son confessed guilt under psychological and physical pressure, including through blackmail, threats, beatings and torture.

#### **Additional observations by the State party**

8.1 The State party presented additional information by note verbale of 25 September 2009. It recalled the facts of the case, and reiterated that the guilt of Mr. Lyashkevich was duly established, on the basis of a multitude of corroborating evidence. Mr. Lyashkevich was officially arrested on 10 August 2003, was assigned an ex officio lawyer, and was interrogated as a suspect. On 11 August 2003, he was cross-examined with Mr. Kladov, and was interrogated as an accused person, in the presence of the lawyer.

8.2 On 11 August 2003, Mr. Lyashkevich was officially placed in pretrial detention and his family hired a lawyer privately. On 12 August 2003, in presence of this lawyer, Mr. Lyashkevich's confessions were verified at the crime scene. During his interrogations as a suspect and accused, Mr. Lyashkevich explained in detail when and how he committed the murder, how he dismembered Mr. Sayfutdinov's body, and how and where he threw the parts of the body into the river. His confession permitted to locate these parts, which allowed their further identification by Mr. Sayfutdinov's relatives.

8.3 The State party contended that all investigation acts in respect to Mr. Lyashkevich were conducted in the presence of a lawyer. In addition, when Mr. Lyashkevich met with a prosecutor, he confirmed that he had confessed guilt freely and that he was not subjected to unlawful methods of investigation. The outcome of the verification on the use of unlawful methods against the alleged victim, as a result of Mrs. Lyashkevich's allegations, established that these allegations were groundless.

#### *Consideration of the merits*

9.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee notes the author's allegations that her son was subjected to psychological and physical pressure and torture to the point that he confessed guilt (see paragraph 2.15 above). In substantiation, the author affirms that her son was beaten at the early stages of the investigation, by several officials. However, the author provides no detailed information on the alleged beatings and, in particular, on the nature of the alleged torture, and fails to explain whether she, her son, or his privately hired lawyer have ever made any attempt to complain about these issues prior to the court trial. The Committee further notes the State party's contention that Mr. Lyashkevich did confess guilt voluntarily, which he confirmed to his privately hired lawyer and specifically to a prosecutor. It also notes that the State party did affirm that the courts have examined these allegations and have found them to be groundless. In the circumstances, and on the basis of the information before it, the Committee concludes that the facts before it do not reveal a

violation of the author son's rights under articles 7 and 14, paragraph 3 (g), of the Covenant.

9.3 The Committee further notes that the author has invoked a violation of her son's rights under article 14, paragraphs 1 and 2, of the Covenant (see paragraph 2.20 above), and notes that the State party has not refuted these allegations specifically. In the absence of any additional information by the parties, however, it considers that the facts as presented do not provide the basis for a finding of a violation of Mr. Lyashkevich's rights under these provisions of the Covenant.

9.4 The Committee further notes the author's allegation that her son's right to defence was violated, in particular because the lawyer she had hired privately on 11 August 2003 was prevented from defending her son on that day, notwithstanding the fact that important investigation acts were conducted at this moment precisely. The Committee notes that the State party has only affirmed that all investigation acts in Mr. Lyashkevich's respect were conducted in the presence of a lawyer, without specifically addressing the issue of Mr. Lyashkevich's access to his privately hired lawyer. In the circumstances, and in the absence of any other information by the parties, the Committee concludes that denying the author son's access to the legal counsel of his choice for one day and interrogating him and conducting other investigation acts with him during that time constitutes a violation of Mr. Lyashkevich's rights under article 14, paragraph 3 (b).<sup>10</sup>

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of Mr. Lyashkevich's rights under article 14, paragraph 3 (b), of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Lyashkevich with an effective remedy, in the form of an appropriate compensation. The State party is also under an obligation to prevent similar violations in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not 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 in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

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<sup>10</sup> See, for example, communication No. 537/1993, *Kelly v. Jamaica*, Views adopted on 17 July 1996, para. 9.2; and communication No. 770/1997, *Gridin v. the Russian Federation*, Views adopted on 20 July 2000, para. 8.5.

**X. Communication No. 1554/2007, *El-Hichou v. Denmark*  
(Views adopted on 22 July 2010, ninety-ninth session)\***

<i>Submitted by:</i>	Mohamed El-Hichou (represented by counsel, Finn Roger Nielsen)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Denmark
<i>Date of communication:</i>	18 April 2007 (initial submission)
<i>Subject matter:</i>	Arbitrary interference with family life, protection of the family, right of the child to protection, discrimination
<i>Procedural issue:</i>	Degree of substantiation of claims
<i>Substantive issue:</i>	Protection of family life, rights of the child
<i>Articles of the Covenant:</i>	23 and 24
<i>Articles of the Optional Protocol:</i>	2

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

*Meeting on 22 July 2010,*

*Having concluded* its consideration of communication No. 1554/2007, submitted to the Human Rights Committee on behalf of Mr. Mohamed El-Hichou under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication and the State party,

*Adopts* the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1.1 The author of the communication is Mr. Mohamed El-Hichou, a Moroccan national, born on 6 June 1990, currently residing in Denmark. He claims to be a victim of violations by Denmark of articles 23 and 24 of the International Covenant on Civil and Political Rights.<sup>1</sup> The author is represented by counsel, Mr. Finn Roger Nielsen.

1.2 On 18 April 2007, the author submitted his initial communication together with a request for interim measures following an order to leave the country by 3 January 2007. In accordance with rule 97 of its rules of procedure, the Committee brought the complaint to the State party's attention on 23 April 2007. At the same time, the Committee, pursuant to rule 92 of its rules of procedure, requested the State party not to execute the order for the author to leave the country while his complaint was being considered. On 1 May 2007, the

\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms Iulia Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada and Mr. Fabián Omar Salvioli.

<sup>1</sup> The Covenant and the Optional Protocol entered into force for the State party on 23 March 1976.

State party suspended the author's deadline to leave the country pending the outcome of the case before the Committee.

**The facts as presented by the author**

2.1 The parents of the author divorced before he was born. The author's mother obtained custody over him and he lived with his mother's parents in Morocco until their death in 2000. After the death of his maternal grandparents, the author's mother could not support him and he was placed with his paternal grandmother, who had difficulties taking care of him.

2.2 After the divorce, the author's father moved to Denmark, where he remarried and had two children. Since the birth of the author, his father supported him financially, regularly spent summer vacations with him and maintained regular contact through letters and phone calls. On 9 February 2002, the author applied to be reunited with his father in Denmark. On 27 February 2003, the Danish Immigration Service rejected his application, based on the fact that his father had no custody over him.

2.3 In 2003, the author's mother remarried and transferred the custody over the author to his father. On 2 March 2003, the author requested the State party to reopen his application for residence, a request which was refused on 10 March 2003. The transferral of the custody was approved by the Danish authorities on 10 June 2003, following a request from his father.

2.4 On 3 July 2003, the applicant again applied for a residence permit in order to be reunited with his father. On 17 November 2003, the Danish Immigration Service rejected the application of the author, stating that the applicant's father had not proved the ability to maintain him.

2.5 In September 2004, due to the difficult living conditions he was experiencing in the home of his elderly grandmother, the author left Morocco and joined his father in Denmark. Meanwhile, the author appealed the refusal of the Immigration Service to the Ministry of Refugees, Immigration and Integration, which by decision of 1 February 2005, rejected the appeal and upheld the refusal to grant him a residence permit. The decision of the Ministry was appealed to the Copenhagen City Court. In October 2005, the author's father admitted his son's illegal presence in the country and the author was requested to report to the Immigration Service. The author was allowed to remain temporarily in the country until the court proceedings were finalized.

2.6 On 18 May 2006, the City Court revoked the Immigration Service decision and obliged the Service to grant a residence permit to the author. The Immigration Service appealed the court decision to the Eastern Division of the High Court in Denmark. During the proceedings in that court, the author's father provided documentation evidencing that he was suffering from epilepsy and, as a result, he had been unemployed for a long time and was supporting his family on social benefits. On 29 November 2006, the High Court decided that the original refusal to issue residence permit of the Immigration Service should be upheld. On 12 December 2006, the Ministry for Refugees, Immigration and Integration issued a decision obliging the author to leave Denmark not later than 3 January 2007.

2.7 The author attempted to obtain a review of the Immigration Service's refusal on humanitarian grounds, presenting a medical certificate that his father was suffering from epilepsy and could not work. The Ministry rejected the application by a letter dated 19 January 2007. The author also attempted to apply for further review of his case by the Supreme Court, but his application was rejected by the Appeals Permission Board on 20 March 2007. On 19 and 20 April 2007, the author was visited by the police, who informed him that he should leave the country within a week.

### **The complaint**

3.1 The author contends that he has exhausted all available and effective domestic remedies. He claims that the refusal to grant him a residence permit in Denmark and the order to leave the country, if implemented, would constitute violations of his rights under articles 23 and 24 of the Covenant.

3.2 The author maintains that although the rights of the child, as specified in the Convention on the Rights of the Child, can not be considered as a direct legal instrument for a decision of the Human Rights Committee, nevertheless their content can contribute to the interpretation and understanding of what constitutes a violation under article 24 of the Covenant. According to article 5 of the Convention on the Rights of the Child, the ratifying states, which include the State party, should respect the rights and the duties a parent has. Despite the fact that the State party recognized in 2003 the transfer of custody concerning the author, it rejected the request for family reunification with his father, thus preventing the latter from supporting and raising him. The author alleges to have been discriminated, since any other child in the State party according to the law has the right to live with the parent who by judgement, agreement or administrative decision has been granted the custody.

3.3 The author maintains that according to article 9 of the Convention on the Rights of the Child, the State party must ensure that a child is not separated from his/her parents against their will, except when competent authorities, subject to judicial review, determine in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. The author alleges that the refusal of the State party to allow the author to remain with his father violates article 9 of the Convention on the Rights of the Child and, accordingly, article 24 of the Covenant, in particular since his mother is unable to look after him and her whereabouts are currently unknown.

3.4 The author maintains that, according to article 10 of the Convention on the Rights of the Child, applications by a child or his or her parents to enter or leave a State party for the purpose of family reunification shall be dealt with by States parties in a positive, humane and expeditious manner. The author claims that the State party violated this provision and accordingly article 24 of the Covenant, since his application for family reunification was pending for more than four years and was eventually rejected.

3.5 The author maintains that, according to article 18 of the Convention on the Rights of the Child, State parties must render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities. The author claims that the State party should support in particular the parent who has custody over the child, that in the instant case the State party failed to meet this obligation, despite recognizing the transfer of custody, and hence violated article 24 of the Covenant.

3.6 The author also alleges that the State party is not entitled to limit or obstruct his right to family life, since it can not be argued that separating him from his father and his half-siblings would serve his interests and well being. The author also alleges that ever since he was born and before he joined his father in Denmark, they maintained regular contact. Therefore, the State party can not argue that the contact between father and son has not been developed to such an extent that the author would not be in a position to refer to his rights under article 24 of the Covenant. The author submits that he has a family life in the State party and that the refusal to grant him residence constitutes a disproportionate limitation of his and his father's family life and a violation of articles 23 and 24 of the Covenant.

3.7 The author maintains that the State party is not entitled to set as a condition for the family reunification that the father of the author should work, since no such condition exists regarding parents or children who are nationals of the State party or foreign nationals with a

residence permit. The author notes that he had been living in the country since September 2004 and has been supported by his father, which proves that the latter is in a position to raise him despite his limited means.

#### **State party's observations**

4.1 On 25 June 2007, the State party submitted its observations contesting the admissibility of the author's communication.

4.2 The State party submits that on 14 July 2006, the Danish Immigration Service refused to grant the author asylum, declaring his application manifestly unfounded. On 18 May 2006, the Copenhagen City Court quashed the Ministry's decision of 1 February 2005 with the motivation that the case did not present such substantial considerations that the author's father had to prove his ability to maintain the author. By order of 29 November 2006, the High Court of Eastern Denmark reversed the order of the City Court, restating the argumentation of the Ministry and that further appeals were refused by the Appeals Permission Board. The Ministry of Refugees, Immigration and Integration ordered the author to leave the country by 3 January 2007. On 2 January 2007, the author filed an application for a reopening of the Ministry's decision, which the latter refused on 19 January 2007.

4.3 The State party notes that the author stayed illegally in the country from September 2004 until 12 October 2005; that he was granted a residence permit while his asylum claim was being processed between 12 October 2005 and 24 July 2006; that he resided again illegally from 24 July until 20 September 2006; that he was granted temporary permission until 3 January 2007, pending legal proceedings; and that he remained illegally in the country between 3 January 2007 and 1 May 2007, when he was granted procedural extension based on the Human Rights Committee's request for interim measures.

4.4 The State party states that according to the latest information submitted by the author on 18 April 2007, his mother's address was unknown. The State party further includes information about other family members residing in Morocco – the author's paternal grandmother, and three siblings of his father.

4.5 The State party quotes the relevant domestic legislation, namely, article 9 of the Aliens Act of 1 July 1998. According to paragraph 1 (ii) of that article, a residence permit may be issued, upon application, to a minor child of a person permanently residing in the State party, provided that the child lives with the person having custody of him or her. Pursuant to paragraph 10 of the same article, since 1 June 2002, if "essential considerations" make it appropriate, before issuing such residence permit, evidence that the resident can maintain the child may be required. The State party submits that the above provision is applied in accordance with the State party's international obligations, including in particular article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. According to the current practice, the immigration authorities consider the length of the period from the time the applicant first had the opportunity to apply for a residence permit until the time when an application is submitted as an "essential consideration". Whether a residence application is submitted after an applicant has spent a substantial part of his or her childhood in his/her country of origin would also be an "essential consideration". Other factors deemed as "essential considerations" are whether the parent living in the State party chose to exercise his/her family life through short stays in the country of origin, for example during annual holidays, and how often the parent and the child were in contact before the application. Finally, it is also assessed whether there seem to be any substantial bars to the continued exercise of the family life in the same manner in the country of origin. If there are such bars, the authorities would refrain from making maintenance conditions.

4.6 The State party further explains that if an application for asylum is declared manifestly unfounded, a consultation with the Danish Refugee Council (a private humanitarian organization) takes place. If the latter disagrees with the immigration authorities' assessment, the case is forwarded to the Refugee Appeals Board for a review and final decision.

4.7 The State party maintains that the author failed to advance any submission as to the alleged violation of article 23 of the Covenant. It objects to the author's complaint related to his expulsion/deportation since it maintains that no such proceedings were ever initiated, but rather that he was ordered on several occasions to leave the country before a fixed deadline. Had the author not voluntarily left the country by the fixed deadline, and had his deadline not been extended upon the request of the Committee, deportation proceedings ultimately would have been initiated by the authorities. Such proceedings would not be contrary to articles 23 and 24 of the Covenant, as the same principles apply in cases concerning family reunification and cases concerning deportation of aliens who have a close family member in the country. The State party maintains that the author's claims are insufficiently substantiated and therefore the communication should be declared inadmissible.<sup>2</sup>

4.8 The State party acknowledges that the relationship between the author and his father amounts to "family life" within the meaning of the Covenant, even though they had never lived permanently together prior to the author's illegal entry into the country in September 2004. However, the State party does not find that it is obliged under the Covenant to permit the author and his father to enjoy their family life in its territory.

4.9 The State party submits that "families" are given wide implicit and explicit recognition in its legal system, in accordance with article 23 of the Covenant. Furthermore, article 24 of the Covenant does not define what protective measures are required by a child's status as a minor; instead, the States are granted a broad discretion with regard to the manner in which they implement their positive obligation. The State party submits that its legal system allows family members of persons residing in the country to apply for family reunification and/or short term visits and that in all such cases the authorities examine whether the applications should be granted in light of, inter alia, its obligation pursuant to the international law. Articles 23 and 24 of the Covenant do not entail a general obligation for a State to respect immigrants' choice of the country of their residence or to authorize family reunification in its territory, as both provisions must be read in the light of the State party's right to control the entry, residence and expulsion of aliens.

4.10 The State party disputes the claim that the refusal to grant the author a residence permit constitutes an "interference" with the family life between the applicant and his father, given that their present family life has lasted short of three years, it was established and developed during the applicant's mainly illegal stay in the country and they had never lived permanently together prior to the author's arrival in Denmark. The present case should be considered as one concerning the extent of the State's potential positive obligation under articles 23 and 24 of the Covenant, i.e. whether or not the author should be allowed to reside with his father in the country.

4.11 The State party is aware that the Committee normally considers a State's refusal to allow one member of a family to remain in its territory as a potential interference in that person's family life, but draws attention to the fact that in the majority of the cases

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<sup>2</sup> The State party refers to: Communications No. 1451/2006, *Gangadin v. the Netherlands*, decision on inadmissibility adopted on 26 March 2007, paras. 4.1–4.3; No. 820/1998, *Rajan v. New Zealand*, decision on inadmissibility adopted on 6 August 2003, paras. 7.3–7.4; and No. 419/1990, *O.J. v. Finland*, decision on inadmissibility adopted on 6 November 1990, para. 3.2.

involving family reunification considered by the Committee, the authors had spent much longer periods of time in the territory of the State concerned than the author in the present case (11 years in *Sahid v. New Zealand*, 15 years in *Madafferi v. Australia* and 14 years in *Winata and Li v. Australia*).

4.12 The present case does not fall within the scope of articles 23 and 24 of the Covenant and therefore the State party must enjoy a wide margin of appreciation to decide whether to authorize a family reunification. It maintains that the margin of appreciation should be particularly wide in the present case, considering that it had been tried in debt in two instances of administrative proceedings and in two court instances, all of which have specifically considered the case in the light of Denmark's obligations according to the international law. The State party recalls that in *Winata and Li v. Australia* the Committee explicitly stated that "there is significant scope for State parties to enforce their immigration policy and to require departure of unlawfully present persons".

4.13 The State party deduces from the Committee's practice that, in order not to be contrary to the articles 23 and 24 of the Covenant, a refusal of family reunification must be lawful and non-arbitrary. In the instant case the refusal was lawful, since it was made in accordance with the Aliens Act and its lawfulness is not disputed by the author. As for the concept of arbitrariness, it implies that the impugned measure must be proportionate to the legitimate aim pursued and quotes paragraph 7.3 of *Winata and Li v. Australia* in support. Unlike in *Winata and Li v. Australia*, in the present case there are no exceptional circumstances that would deem the removal of the author arbitrary.

4.14 The most important factor in the present case is the fact that the separation of the author and his father from the author's birth until September 2004 was caused entirely by the choice of the father to live abroad together with his new family. Nothing prevented the author's father from applying for family reunification at a much earlier stage, but he did not do so until 9 February 2002, 11 and a half years after the birth of the author. No legitimate explanation exists as to why the author's father waited that long. At no time during their more than 14 years of separation did the author's father apply for a short-term visa for the applicant to visit him and his new family in Denmark.

4.15 The State party refers to the established case law of the European Court of Human Rights (ECHR) on article 8 of the European Convention on Human Rights and family reunification of children. In cases where the separation of the family is a result of the parents' conscious decision to settle in a Contracting State and leave their children behind in their country of origin, ECHR adopts a strict approach, which is even stricter if the parents do not display a clear intention to be united with their children, e.g. because they wait several years before filing an application.

4.16 The State party notes that, at the time of the submission, the author was 17 years old and capable of looking after himself; he did not have the same need for his parents as a small child; the author has lived his entire childhood and his first teenage years without his father; his mother and a number of close relatives live in his hometown and consequently he has strong family, cultural and linguistic ties with Morocco. He has not substantiated his claim that the whereabouts of his mother are unknown, and he had repeatedly provided contradictory statements as to whether he lived with her from the year 2000 onwards.

4.17 The State party notes that at no time during his stay in its territory has the author been given an assurance or a legitimate expectation that he will be granted a right of residence, that in fact he was refused a residence permit twice, and that both the author and his father were well aware that the family life they were developing would remain precarious until the latter complied with the minimum income requirement. The State party further refers to the case-law of ECHR, according to which not even a very long



illegal/precarious stay of an applicant child can improve the child's legal position in relation to article 8 of the European Convention on Human Rights.<sup>3</sup>

4.18 The State party's refusal to grant a residence permit to the author does not prevent him and his father from maintaining the degree of family life that they had prior to the applicant's illegal arrival in the country. The State party does not find it established that the author's mother or his other relatives would not be able to provide for his care, with financial assistance from his father. The fact that the author's father's wife and their two children live in Denmark cannot be considered decisive as the author's father waited 11 and a half years before he applied for reunification and during that time he did not demonstrate any intention or desire of including the applicant in his new family. Consequently the State party maintains that the degree of hardship the author and his father will encounter as a result of the refusal of family reunification can not be compared in any way with the hardship facing the families in the *Madafferi*<sup>4</sup> and *Winata and Li*<sup>5</sup> cases.

4.19 The State party agrees that the provisions of the Convention on the Rights of the Child can be taken into consideration for the interpretation of article 24 of the Covenant, but notes that the Covenant is the legal basis to be considered and that the Committee does not have competence to decide whether a State has violated the Convention on the Rights of the Child. Furthermore, there is no legal basis to assert that the Convention on the Rights of the Child provides the author with additional and/or more favourable protection than articles 23 and 24 of the Covenant in the area of family reunification. Only article 9 of the Convention directly concerns family reunification and the requirements of that article have been met in the present case.

4.20 In all cases in which application for family reunification is filed, the parties involved have to meet all the conditions set in the Aliens Act. The author has not been treated any differently and therefore he has not been subjected to discrimination by the authorities. The maintenance requirement is imposed in all cases, including on its citizens, where a long period of time has elapsed from when the parent was able to apply for family reunification until such application is actually submitted. The State party disagrees with the author that article 24 of the Covenant, read in the light of article 10 of the Convention on the Rights of the Child, imposes an obligation on it to facilitate family reunification between a parent residing legally in Denmark and his/her child in all cases where the parent holds custody.

4.21 The State party finds it entirely reasonable to require the person residing in the country to demonstrate that he/she can provide for the basic costs of subsistence of his/her family members with whom reunion is sought. The State party maintains that such condition is in line with the jurisprudence of ECHR and refers to two cases where no violation was found as it had not been substantiated that the applicants had made any serious attempts at complying with the minimum income requirement and/or sustained their inability to do so.<sup>6</sup>

4.22 The State party quotes the applicant's submission regarding his father's health (medical records establishing that the latter has been suffering from epilepsy since 1986 and has been hospitalized on two occasions in 2003 and in 2006) and notes that the above does

<sup>3</sup> The State party refers to: *Mensah v. the Netherlands*, admissibility decision of 9 October 2001; *I.M. v. the Netherlands*, admissibility decision of 25 March 2003; *Benamar v. the Netherlands*, admissibility decision of 5 April 2005; *Chandra v. the Netherlands*, admissibility decision of 13 May 2003.

<sup>4</sup> Communication No. 1011/2001, *Madafferi v. Australia*, Views of 26 August 2004.

<sup>5</sup> Communication No. 930/2000, *Winata and Li v. Australia*, Views of 26 July 2001.

<sup>6</sup> *Konstantinov v. the Netherlands*, Judgment of 26 April 2007, para. 50 and *Haydarie v. the Netherlands*, admissibility decision of 20 October 2005.

not prevent him from maintaining the same degree of family life as they had before the author's arrival in the country.

4.23 The State party finally notes that the applicant has not referred to article 17, para. 1, of the Covenant, which prohibits the States from interfering with family life in an arbitrary or unlawful manner. Should the author refer to this provision at a later time the State party submits that the interference with the author's family life is both non-arbitrary and proportionate to the pursued legitimate aim.

4.24 The State party concludes that the communication should be declared inadmissible for lack of substantiation and the interim measures request withdrawn.

#### **Author's comments on the State party's observations**

5.1 On 14 January 2008, the author reiterates his complaint. He notes that he has learned to speak, read and write in Danish, despite the fact that he was denied access to school by the authorities. Despite his illness, his father has been employed for varying periods of time and, contrary to the State party's submission, he did not sustain the family's needs only on social assistance since 2003. In that respect the author provides copies of short-term employment contracts of his father dated 12 December 2005, 23 May 2006 and 14 November 2006.

5.2 With regard to his mother, the author clarifies that after his maternal grandparents' death in 2000, his mother was forced to live with her siblings, she could no longer support him and for that reason the author was relocated to live with his paternal grandmother and was supported financially by his father. The last address he has for his mother is the one she put on the documents transferring his custody to his father; subsequently she moved with her new husband and he is currently unaware of her whereabouts. The author strongly rejects the attempts of the State party to indicate that the information he provided regarding the whereabouts of his mother is not reliable and refers to a report of the Immigration Police, dated 18 October 2005 and the Decision of the City Court of Copenhagen, dated 18 May 2006, which documents that he did not deliver contradictory statements on that subject. The author also states that, according to Moroccan law, only when a child reaches the age of 12 does his/her father have a reasonable possibility to claim custody, which is why his father did not attempt to claim custody earlier. He also states that according to Muslim tradition the children of women who remarry cannot live with the new family unless permitted by the new husband, and that in general men in Morocco do not accept the responsibility to support the children of their new wife's previous marriages.

5.3 The author resubmits that the State party's obligations under article 24 of the Covenant are determined by the content of articles 5, 9 and 10 of the Convention on the Rights of the Child. He submits that since the State party has ratified the Convention on the Rights of the Child, it has positive obligations and in particular the obligation to ensure that the well-being of the child is not jeopardized by decisions of its authorities.

5.4 The author notes that his case is different from the *Winata and Li* and *Sahid* cases, where the children had residence permits and their parent's right to remain in the country was at stake. When a strong relationship has been established between a child and a parent, it is incumbent of the State party to demonstrate additional factors beyond enforcement of immigration policy justifying the deportation of the child, in order to prevent its decision from being characterized as arbitrary.

5.5 The author also submits that the decision of the Ministry of Refugees, Immigration and Integration is not in accordance with section 9, paragraph 10, and section 9, paragraph 1(ii) of the Aliens Act and therefore it is not lawful, since those provision do not entitle the authorities to set as a condition for issuing a permit that the father of the author should have a regular employment. The author disputes the Ministry's interpretation of the *travaux*

*préparatoires* for the above provisions and submits that the latter lead to the conclusion that a parent can be required to prove that he/she can maintain the child only if there has been no contact between the parent and the child for a long period prior to the application for family reunification. The author stresses that his father has visited him for one month every year and that he has continuously, since his birth, maintained his alimony obligations and hence has proved that he can support him. The author also notes that according to the Copenhagen City Court the author's father did not have to prove his ability to maintain him.

5.6 The author also submits that the decision of the State party not to grant him a residence permit is not in accordance with article 8 of the European Convention on Human Rights or the jurisprudence of ECHR. The author recognizes that the jurisprudence the State party relies on refers to the fact that parents who decided to live abroad opted consciously for a family life under those circumstances and that State parties are allowed a wide margin of discretion to implement immigration policy. However the author points out that in the present case his father has two children who have spent their whole life in the State party and their interests in their country of residence must also be given consideration. The author draws the Committee's attention to the case *Sen v. the Netherlands*,<sup>7</sup> paras. 38–41, in which a violation of article 8 was found since a reasonable balance was not made between the Government's interests in maintaining its immigration policy and the interest of the children.

5.7 With regard to the author's age and connections with Morocco, the author restates that he was 11 years old when he applied for reunification with his father for the first time, 14 when he joined his father. The fact that the consideration of the case by the State party's authorities took several years should not affect the assessment of the facts. Furthermore, the fact that his father has three siblings in Morocco is less relevant in a case where he seeks reunification with the parent who has a legal custody over him.

## **Issues and proceedings before the Committee**

### *Consideration of admissibility*

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, in accordance with article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement. The Committee observes that all available and effective domestic remedies have been exhausted.

6.3 The Committee takes note of the author's claim that the State party's refusal to grant him a residence permit constitutes discrimination against him under article 24, read in conjunction with article 2 of the Covenant. However, the Committee finds that the author failed to substantiate this allegation and therefore declares the communication inadmissible in that part.

6.4 The Committee notes the State party's submission that the author did not substantiate his claims of violations of his rights under articles 23 and 24 of the Covenant. However, the Committee is of the opinion that the arguments before it raise substantive issues which should be dealt with at the merits stage. The Committee therefore declares the communication admissible and proceeds to the examination of the merits.

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<sup>7</sup> Application No. 31465/96, Judgment of 21 December 2001.

*Consideration of the merits*

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it, as provided under article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee must decide whether the refusal of the State party to grant a residence permit to the author for the purposes of family reunification with his father and the order to leave the country constitute a violation of his rights to family life protection under articles 23 and 24 of the Covenant.

7.3 In the present case, it is not disputed by the State party that the author and his father have a family life, both before he joined his father in the State party's territory and afterwards. The fact that the author has remained illegally in the territory of the State party does not influence the fact that he developed family ties not only with his father, but with his half-siblings and their mother. It is also undisputed that the author learned the local language and developed certain ties with the local culture and society. The Committee notes the State party's submission that if the author was returned to his country of origin there was nothing to prevent him and his father from maintaining the same degree of family life they had before the author came to the State party. The Committee observes, however, that two important circumstances have changed. Firstly, already in the year 2000, the author's maternal grandparents, who were his de facto caregivers during the first 10 years of his life, were deceased. Second, in 2003 the author's mother transferred his custody to his father, a transfer recognized by the State party's authorities, and the primary responsibility for his support and upbringing after that lie with his father. Considering the above circumstances, the Committee is not convinced that it would have been in the best interest of the author, when he originally requested to be allowed to reunite with his father, to continue to maintain a family life with his father limited to annual visits and financial support.

7.4 The Committee takes note of the State party's argument that the initial separation of the author and his father were caused entirely by the decision of the latter to move to the State party and leave his son in his country of origin and that he made no attempts to reunite the author with his new family until he was 11 and a half years old. The Committee observes that the author's parents were divorced, his mother obtained the custody of him after his birth and that for the first 10 years of his life the author was adequately cared for by his grandparents. The Committee also observes that when those circumstances changed, the author's father started to make attempts to reunite with him in order to assume the role of a primary caregiver. The Committee also observes that at stake in the present case are the author's rights as a minor to maintain a family life with his father and his half-siblings and to receive protection measures as required by his status as a minor. The Committee notes that the author cannot be held responsible for any decisions taken by his parents in relation to his custody, upbringing and residence.

7.5 In these very specific circumstances, the Committee considers that the decisions not to allow the reunification of the author and his father in the State party's territory and the order to leave the State party, if implemented, would constitute interference with the family contrary to article 23 and a violation of article 24, paragraph 1 of the Covenant, due to a failure to provide the author with the necessary measures of protection as a minor.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the decisions not to allow the reunification of the author and his father in the State party's territory and the order to leave the State party would, if implemented, entail a violation of articles 23 and 24 of the Covenant.

9. In accordance with the Covenant, the State party is under an obligation to take appropriate action to protect the right of the author to effective reunification with his father, and to avoid similar situations in the future.

10. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to its Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**Y. Communication No. 1559/2007, *Hernandez v. Philippines*  
(Views adopted on 26 July 2010, ninety-ninth session)\***

<i>Submitted by:</i>	Evangeline Hernandez (represented by Marie Hilao-Enriquez [Alliance for the Advancement of People's Rights-Karapatan])
<i>Alleged victim:</i>	Benjaline Hernandez
<i>State party:</i>	The Philippines
<i>Date of communication:</i>	9 March 2006 (initial submission)
<i>Subject matter:</i>	Arbitrary execution of a human rights defender
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies, procedure of international investigation, abuse of the right of submission, non-substantiation
<i>Substantive issues:</i>	Right to life; duty to investigate
<i>Articles of the Covenant:</i>	2, paragraphs 1 and 3; 6, paragraph 1; 7; 9, paragraph 1; 10, paragraph 1; 17; and 26
<i>Articles of the Optional Protocol:</i>	2 and 3

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

*Meeting* on 26 July 2010,

*Having concluded* its consideration of communication No. 1559/2007, submitted to the Human Rights Committee on behalf of Ms. Benjaline Hernandez under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication, and the State party,

*Adopts* the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication is Ms. Evangeline Hernandez, who submits the communication on behalf of her daughter, Ms. Benjaline Hernandez, who died on 22 April 2003. She claims that her daughter was a victim of violations by the Philippines of her rights under article 2, paragraphs 1 and 3; article 6, paragraph 1; article 7; article 9, paragraph 1; article 10, paragraph 1; article 17; and article 26 of the International Covenant

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Mahjoub El Haiba, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Motoc, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

on Civil and Political Rights.<sup>1</sup> She is represented by Ms. Marie Hilao-Enriquez, from the Alliance for the Advancement of People's Rights – KARAPATAN.

### **Facts as presented by the author**

2.1 Ms. Benjaline Hernandez was the Deputy Secretary-General of KARAPATAN-Southern Mindanao Region, a human rights advocacy group, and also the Vice-President of the College Editor's Guild of the Philippines (CEGP), an alliance of school publications. She was conducting research on the impact of the peace process on the local community in Arakan, a province in Mindanao, when the incident occurred. On 5 April 2002, Ms. Hernandez and three local people were about to take their lunch when six paramilitaries from the Citizens Armed Force Geographical Unit (CAFGU), led by 7th Battalion (Airborne) M/Sgt. T., strafed the hut they were in. Four members of the militia were named by the author. All four members of KARAPATAN were shot, despite pleading for mercy. The autopsy disclosed, inter alia, that two bullets had been fired at Ms. Hernandez from close range and that she had been lying on her back when she was shot. There was an eyewitness to the incident.

2.2 The author's representatives filed a complaint against the security forces for violations of the Comprehensive Agreement to Respect Human Rights and International Humanitarian Law (CARHRIHL). The CARHRIHL, which took effect on 7 August 1998, was signed by the Government of the Philippines and the National Democratic Front of the Philippines as part of the peace negotiations. This case has not yet been discussed by the Joint Monitoring Committee, formed under the CARHRIHL. Since August 2004, the peace talks have been suspended.

2.3 The author acknowledges that domestic remedies have not been exhausted. She submits that the Department of Justice, "after a long time", filed "criminal informations" for murder against M/Sgt. T. and three others, who are members of CAFGU, before the Regional Trial Court of Kidapawan City, South Cotabato. According to the author, a junior military officer, who was the principle suspect, was not included in the charge. Despite the fact that bail is not normally granted in murder cases, it was granted in this case. Subpoenas for the attendance of military witnesses, as hostile witnesses for the prosecution, were disobeyed or ignored. The author argues that, although the case is ongoing, remedies have been unreasonably prolonged and will prove to be ineffective. It is argued that political killings continue in the State party, and that between 2001 and 2005 23 human rights defenders from KARAPATAN were killed by State security forces or by others under their control, inducement, acquiescence or tolerance. It is also claimed that 33 more have already been summarily executed in a similar fashion at the time of filing the communication. The author refers to reports from this Committee, Amnesty International, and the Asian Human Rights Commission to demonstrate the continuing impunity in the State party.

### **The complaint**

3. The author claims a violation by the State party of article 2, paragraphs 1 and 3; article 6, paragraph 1; article 7; article 9, paragraph 1; article 10, paragraph 1; article 17; and article 26 of the Covenant.

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<sup>1</sup> The Covenant entered into force for the State party on 23 January 1986 and the Optional Protocol on 22 November 1989.

**State party's observations on admissibility and merits**

4.1 On 8 August and 3 September 2007, the State party filed its observations on the admissibility and merits of the communication. On admissibility, the State party claims that the author has not exhausted all available domestic remedies and thus the case is inadmissible. The complaints filed for murder before the Philippine Commission on Human Rights and criminal actions before the Regional Trial Court in Kidapawan City, South Cotabato, are still pending and the State party denies that they have been unreasonably prolonged. M/Sgt. T. and "his men" are undergoing trial before the Regional Trial Court for the murder and it is still at the stage of receiving the prosecution's evidence. It refers to domestic case law, to the effect that the right to a trial without delay is only deemed violated when the delay is "vexatious, capricious, and oppressive".<sup>2</sup> It submits that remedies remain to be exhausted, and that if the author believes that the Supreme Court judge unlawfully neglected to act, she may file a petition for mandamus or an administrative case against the judge before the Supreme Court for delay. In addition, administrative charges could be brought against the military officials involved in the case with the Office of the Ombudsman, which could result in the removal from office or immediate suspension of the officials even while the case is pending.

4.2 In view of the above, the State party argues that the author has chosen not to pursue available domestic remedies due to impatience. Therefore, despite an acknowledgement that "the judicial system in the Philippines may not be ideal", the State party contends that it is premature for the author to conclude that domestic remedies are ineffective.

4.3 As to the complaint for violations of the CARHRIHL, the State party submits that until guidelines are finalized between the Government security forces and the National Democratic Front, such complaints cannot be considered under its complaints procedure. Such complaints are however transmitted to the appropriate government agency. It submits that these guidelines have not been finalized due to the breakdown in negotiations and points out that it was the National Democratic Front which withdrew from the negotiations in 2004.

4.4 The State party argues that the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol, as the same matter is being examined by the Special Rapporteur on extrajudicial, summary or arbitrary executions, who visited the country from 12–21 February 2007. It challenges the admissibility of the communication on grounds of abuse of the right of submission, as the author's failure to wait until the end of ongoing domestic legal proceedings amounts to a refusal to recognize and respect the State party's authority to investigate, prosecute and resolve criminal acts within its territorial jurisdiction. In the State party's view, the author is trying to involve the international community in the handling of a case relating to the State party's domestic criminal laws, which constitutes an undue interference with the State party's domestic affairs. It also argues that the author has not sufficiently substantiated the alleged violations of the Covenant, and that as this case is pending before the Courts, discussion of it is sub judice.

4.5 On the merits, the State party submits that it actively pursues remedies concerning alleged extrajudicial killings, and refers to Administrative Order No. 157 of 21 August 2006 issued by President Macapagal-Arroyo, which creates an independent commission (the Melo Commission) to investigate the killings of media workers and activists. On 22 February 2007, the Melo Commission released its 86-page preliminary report, which is being studied by various branches of the Government. In addition, the Supreme Court of the Philippines has drafted guidelines for Special Courts, which will handle cases of alleged

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<sup>2</sup> *Gonzales v. Sandiganbayan*, 199 SCRA 298 (1991).



extrajudicial killings. The State party refers to the preliminary report by the Special Rapporteur on extrajudicial, summary or arbitrary executions on his mission to the Philippines, which recognizes that efforts have been made by the State party to fight extrajudicial killings (A/HRC/4/20/Add.3, para. 4).

4.6 The State party contends that the communication fails to establish how the State party has violated the Covenant. It submits that the killing of Ms. Hernandez is not attributable to its armed forces or to the State but to individuals acting in their own interest. Nevertheless, it is doing its best to ensure that the fundamental rights and liberties of its citizens are respected. It recalls that if a State fails to investigate, prosecute or redress, private non-State acts in violation of fundamental rights, it is in effect aiding the perpetrators of such violations for which it could be held responsible under international law. The establishment of the independent Melo Commission to investigate extrajudicial killings demonstrates the State party's resolve to respond to this problem.

4.7 The State party submits that it regrets the failure of human rights organizations to inform the Commission of the numbers of victims of extrajudicial killings and the reasons why they believe that the military is responsible for these killings. It regrets that these organizations refused to cooperate with investigations conducted by bodies created by the State party and instead invoked the Committee's authority.

#### **Author's comments on the State party's observations**

5.1 On 17 December 2007 and 2 February 2008, the author commented on the State party's submission. On the issue of exhaustion of domestic remedies, she reiterates that this requirement does not apply when remedies are unreasonably prolonged or ineffective. More than six years since the victim was murdered and two years since the communication was submitted to the Committee, the criminal case filed before the Regional Trial Court remains pending. According to the author, the defence only began to present its evidence in chief one month prior to this submission to the Committee, the proceedings to date have been delayed, despite the uncomplicated nature of this case, and judging by the events to date, the proceedings are likely to be even further delayed. As to the other remedies available against a judge acting unlawfully, the author considers this procedure another layer of bureaucracy which would prove ineffective.

5.2 The author submits that the circumstances of this case have been aggravated by other factors, including the transfer to different assignments and places of deployment of the alleged perpetrators of the crime. Thus, despite several attempts to summon the accused, they could not be found or produced in court in time. The author accuses the National Bureau of Investigation of being complicit in the failure of material witnesses to appear in court to give evidence despite their having been subpoenaed. As a result, only one of several accused military personnel (M/Sgt. T.) and a few paramilitary forces are standing trial and the military personnel are out on bail for a crime for which bail is not normally granted. Earlier in the proceedings, superior military officers allegedly involved in the victim's murder were exonerated for technical reasons, i.e. as they were not the immediate or direct superiors or in command of the low-ranking military and paramilitary forces who perpetrated the crime. Also the principal eyewitness to the killing has been "maligned and harassed"<sup>3</sup> and his evidence may not be given the appropriate weight by the court mainly due to his anxiety and unfamiliarity with legal proceedings.

5.3 As to the guidelines drafted by the Supreme Court for the Special Courts to handle extrajudicial killing cases, the author submits that it is too early to establish whether such a

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<sup>3</sup> No further information is provided on who was/is harassing this witness.

positive initiative will effectively address the cases of extrajudicial killings in practice. In her view, this step falls short of correcting the multifarious failings and obstacles which cause such lengthy delays. The author highlights the continual pattern of consistent human rights violations, including extrajudicial killings, in the State party, which makes domestic remedies ineffective and meaningless. She adds that, despite the claims to the contrary by the State party, not a single perpetrator has been convicted.<sup>4</sup>

5.4 With respect to the claim by the State party that the communication is inadmissible, as it is being examined by another procedure of international investigation or settlement, the author considers it to be inapplicable to the present case. Firstly, the Special Rapporteur on extrajudicial, summary or arbitrary executions has concluded his investigation and therefore the matter is no longer “being examined”. Secondly, the visit by a Special Rapporteur to the State party cannot be considered as an international procedure of investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

5.5 The author adds that the communication does not constitute an abuse of the right of submission. She states that the circumstances that give rise to such an abuse, like the deliberate submission of false information or excessive delay in filing a complaint, does not exist in this case. The author submits that she is not refusing to recognize the State party’s authority, but is claiming that domestic remedies are ineffective. With respect to the alleged lack of sufficient substantiation, the author refers to the extensive supporting documentation attached to her initial communication. On the argument that the case is sub judice, she submits that such an argument would preclude the taking of any acts, steps or procedures in the international arena and render them nugatory.

5.6 On the merits, the author questions what the State party has done to accelerate consideration of this case before the Regional Court. With respect to the Melo Commission, she notes that its preliminary report was released in February 2007, under much public pressure, but that the final report has still not been issued. The Melo Commission suffered from lack of credibility and had little power to conduct investigations. Furthermore, several months after the release of the preliminary report, the State party is still studying its recommendations. They invoke the final report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on his mission to the Philippines, which states that, “[t]he many measures that have been promulgated by the Government to respond to the problem of extrajudicial executions are encouraging. However, they have yet to succeed, and the extrajudicial executions continue” (A/HRC/8/3/Add.2: summary, p. 3).

5.7 The author alleges that it is clear from the presentation of the facts, as well as the supporting documents, that the perpetrators identified were members of the State party’s security forces i.e. CAGU and the 7th Battalion (Airborne)/12th Special Forces Company of its Armed Forces. According to the author, the involvement of the State party has been attested to by various NGOs and the Commission on Human Rights itself recommended the filing of charges against the security forces for this murder.<sup>5</sup> The author refers to the *Sarma* case,<sup>6</sup> where the Committee held Sri Lanka responsible for the disappearance perpetrated

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<sup>4</sup> The author provides numerous reports from human rights NGOs and the United Nations to support these arguments.

<sup>5</sup> The author provides the following to support her arguments: Reporters without Borders, in its address to the fifty-eighth session of the United Nations Commission on Human Rights in April 2002; Amnesty International 2003 Report, p. 200; Commission on Human Rights resolution dated 21 June 2002. This resolution was not provided and could not be found on the Commission website thus it is impossible to verify.

<sup>6</sup> Communication No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003.

by a corporal who abducted a victim, despite the State's contention that the corporal acted beyond authority and without the knowledge of his superior officers.

5.8 On the argument that the "activists/militant" groups refused to cooperate with the authorities, the author submits that the executive branch, including the police, military and intelligence agencies, does not inspire any credibility or confidence from the victims, their families and human rights defenders. The author denies the claim that she has failed to participate, cooperate and engage with government agencies and submits that she does so to the extent that they are at least organizationally and formally distinct from the executive branch, including the Commission on Human Rights, the pertinent committees of its Congress and the courts.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 First, the State party argues that, by refusing to recognize the State party's authority to investigate, prosecute and resolve criminal acts within its jurisdiction and by involving the international community in a case concerning the State party's domestic laws, the author has abused her right of submission. The Committee recalls its jurisprudence in relation to article 3 of the Optional Protocol.<sup>7</sup> In the absence of any valid reason offered as to why the present communication constitutes an abuse of right of submission, the Committee rejects the State party's argument, and finds that the case is not inadmissible on this ground.

6.3 Secondly, the Committee notes the State party's challenge to the admissibility of the communication on the ground of failure to exhaust domestic remedies. The author concedes that domestic remedies have not yet been exhausted but claims that these remedies have been ineffective and unreasonably prolonged. The Committee refers to its case law, to the effect that, for the purposes of article 5, paragraph 2 (b), of the Optional Protocol, domestic remedies must both be effective and available, and must not be unreasonably prolonged. The victim's body was found in April 2002 and over eight years later, at the time of examination of this communication, it would appear that criminal proceedings initiated against the accused have not yet been finalized. In addition, the State party has not provided any reasons why this case could not have been considered more expeditiously, nor has it claimed the existence of any elements of the case which should have complicated the investigations and judicial determination of the case preventing its determination for over eight years. The Committee considers that, in the circumstances of the present case, domestic remedies have been unreasonably prolonged. The Committee accordingly finds that article 5, paragraph 2 (b), does not preclude it from considering the complaint.

6.4 The Committee also notes the State party's contention that the case is inadmissible because the subject matter of the communication is being or was examined by the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, who visited the country in February 2007. However, the Committee recalls that fact-finding country visits by a Special Rapporteur do not constitute a "procedure of international investigation or settlement" within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.<sup>8</sup>

<sup>7</sup> Communication No. 1560/2007, *Marcellana and Gumanoy v. the Philippines*, Views adopted on 30 October 2008.

<sup>8</sup> Communications Nos. 146/1983 and 148/1983-154/1983, *Baboeram-Adhin et al. v. Suriname*, Views

The Committee further recalls that the study of human rights problems in a country by a Special Rapporteur, although it might refer to or draw on information concerning individuals, could not be regarded as being the same matter as the examination of individual cases within the meaning of article 5, paragraph 2 (a), of the Optional Protocol. Accordingly, the Committee considers that the 2007 country visit by the Special Rapporteur on extrajudicial, summary or arbitrary executions, does not render the communication inadmissible under article 5, paragraph 2 (a), of the Optional Protocol.

6.5 As regards the author's claims relating to article 2, paragraph 1; article 7; article 9, paragraph 1; article 10, paragraph 1; article 17; and article 26 of the Covenant, the Committee observes that the author does not provide any explanation on how the victim's rights under these provisions were violated. The Committee considers that the author has not substantiated these claims, for purposes of admissibility and thus finds them inadmissible under article 2 of the Optional Protocol.

6.6 The Committee considers that the facts of the case give rise to issues under article 6, paragraph 1, read alone and in conjunction with article 2, paragraph 3, of the Covenant. In the absence of any other obstacles to the admissibility of these claims, the Committee considers them to be sufficiently substantiated, for purposes of admissibility.

#### *Consideration of the merits*

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 With regard to the merits of the communication, the Committee notes that criminal proceedings, against several of the alleged perpetrators, have still not been finalized over eight years after the victim's death. It recalls its jurisprudence that criminal investigation and consequential prosecution are necessary remedies for violations of human rights such as those protected by article 6.<sup>9</sup>

7.3 The Committee notes that it is undisputed that the victim died as a consequence of her being shot by members of the paramilitaries from the Citizens Armed Force Geographical Unit (CAFGU), led by 7th Battalion (Airborne) M/Sgt T. The author referred to various incidents of political killings of human rights defenders, allegedly committed by the State party's security forces, or other groups under its control, inducement, or acquiescence (see paragraph 2.3 above). The State party denied that the killing of the author's daughter was attributable to its military organization, without advancing convincing evidence that M/Sgt T. from the 7th Battalion, against whom a criminal action is pending, was acting in his own interest. Nor did the State party submit convincing information on any effective measures it undertook, in compliance with its obligation to protect the right to life under article 6, paragraph 1, to prevent and refrain from arbitrary deprivation of life.<sup>10</sup> The Committee, based on the material before it, finds that the State party is responsible for the death of Ms. Benjaline Hernandez, and concludes that there has

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of 4 April 1985, para. 9.1; No. 540/1993, *Laureano v. Peru*, Views of 25 March 1996, para. 7.1; and *Marcellana and Gumanoy* (note 7 above):

<sup>9</sup> Communication No. 1436/2005, *Sathasivam v. Sri Lanka*, Views adopted on 8 July 2008, para. 6.4 and *Marcellana and Gumanoy v. the Philippines* (note 7 above):

<sup>10</sup> See, for example, communication No. 1275/2004, *Umetaliyev and Tashtanbekova v. Kyrgyzstan*, Views adopted on 30 October 2008, para. 9.4.

been a violation of article 6, paragraph 1, of the Covenant, with regard to Ms. Benjaline Hernandez.<sup>11</sup>

7.4 The Committee notes the State party's argument that the author is currently availing herself of domestic remedies. However, though over eight years have elapsed since the killing took place, the State party's authorities have, apart from the pending and overdue case against M/Sgt T. and a few others, neither prosecuted nor brought to justice anyone else in connection with these events. While the State party provides information on general initiatives in the State party, including the establishment of the Melo Commission and new guidelines for "Special Courts" designed to consider cases of alleged extrajudicial killings, it does not indicate how these initiatives will contribute to the efficient and effective finalization of this case. Nor does it explain the reasons for the lack of significant progress in this case before the courts. In fact, even basic information on the number of alleged perpetrators indicted has been omitted in the State party's submission. Under article 2, paragraph 3, of the Covenant, the State party has an obligation to ensure that remedies are effective. The Committee recalls that a State party may not avoid its responsibilities under the Covenant with the argument that the domestic courts are dealing with the matter, when the remedies relied upon by the State party have been unreasonably prolonged.<sup>12</sup> For all of these reasons, the Committee also finds that the State party has violated article 2, paragraph 3, read in connection with article 6 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before the Committee reveal a violation by the Philippines of article 6, as well as a violation of article 2, paragraph 3, read in connection with article 6 of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to take effective measures to ensure that the criminal proceedings are expeditiously completed, that all perpetrators are prosecuted, and that the author is granted full reparation, including adequate compensation. The State party should also take measures to ensure that such violations do not recur in the future.

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 or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure 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 in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

<sup>11</sup> See *ibid.*, para. 9.5, and communication No. 962/2001, *Mulezi v. Democratic Republic of the Congo*, Views adopted on 8 July 2004, para. 5.4.

<sup>12</sup> Communication No. 1250/2004, *Rajapakse v. Sri Lanka*, Views adopted on 14 July 2006.

**Z. Communication No. 1565/2007, *Gonçalves et al. v. Portugal*  
(Views adopted on 18 March 2010, ninety-eighth session)\***

<i>Submitted by:</i>	Aurélio Gonçalves et al. (represented by Rui Ottolini Castelo-Branco and Maria João Castelo-Branco)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Portugal
<i>Date of communication:</i>	31 January 2007 (initial submission)
<i>Subject matter:</i>	Discriminatory tax legislation against casino croupiers
<i>Procedural issue:</i>	None
<i>Substantive issue:</i>	Violation of the principle of equality before the law
<i>Articles of the Covenant:</i>	2, paragraphs 1 and 2; 26
<i>Article of the Optional Protocol:</i>	None

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

*Meeting* on 18 March 2010,

*Having concluded* its consideration of communication No. 1565/2007, submitted to the Human Rights Committee by Mr. Aurélio Gonçalves under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the authors of the communication and the State party,

*Adopts* the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1. The authors of the communication are Mr. Aurélio Chainho Gonçalves, born on 8 October 1967; Ms. Carla Filomena Soares Domingues Pereira, born on 6 October 1963; Ms. Maria de Lurdes Mendes Cleto, born on 31 July 1961; Mr. João Maurício Rosado, born on 16 February 1947; Mr. Ricardino Leandro de Sousa, born on 8 March 1965; Mr. Manuel Guerreiro Rosa, born on 8 August 1944; Mr. Ricardo Simão Guerreiro, born on 29 October 1966; Mr. José Francisco Grilo Bugalho, born on 19 September 1947; Mr. Hélder Gaspar Monteiro, born on 27 February 1940; Mr. José António Duarte Seixas, born on 23 October 1956; Mr. Mário Conceição do Carmo, born on 27 April 1942; Mr. Manuel Justiniano da Silva Nunes, born on 16 October 1951; Mr. José Manuel Fernandes de Carvalho, born on 16 April 1959; Ms. Idália Maria Vilhena Ataíde Pires Pontes, born on 22 April 1969; Mr.

\* The following members of the Committee participated in the consideration of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Mahjoub El-Haiba, Mr. Ahmad Amin Fathalla, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

Avelino Albano Cupido, born on 3 March 1962; Mr. Abraão Israel Marques da Mota, born on 28 June 1942; Mr. Carlos Manuel Presa de Figueiredo, born on 5 July 1950; Mr. Custódio Silva Faria, born on 26 April 1936; Mr. Alvaro António Reis Miranda, born on 2 December 1957; Mr. João Manuel da Silva Seguro, born on 14 May 1956; Mr. Francisco José Caldeira Valadares, born on 30 July 1952; and Mr. Rui Manuel Ferreira Areias Barbosa, born on 29 December 1952. The authors are all Portuguese nationals. They claim to be victims of a violation by Portugal of article 26, read in conjunction with article 2, paragraphs 1 and 2, of the Covenant. They are represented by Dr. Rui Ottolini Castelo-Branco and Dr. Maria João Castelo-Branco. The Optional Protocol entered into force for the State party on 3 August 1983.

### **The facts as submitted by the authors**

2.1 The authors are croupiers working in casinos in Portugal. When the tax authorities demanded payment of their income taxes for 1999 and 2000, the authors refused to declare the income resulting from tips received from their customers (casino players). They considered that the tips from their customers had been given purely out of generosity and could therefore be regarded as charitable donations. They were not, strictly speaking, pay and, as a result, were not taxable.

2.2 According to article 2, paragraphs 1 and 3 (h), of the Personal Income Tax Code (CIRS), earned income from employment comprises all payments from or made available by the employer under a contract of employment or any other legal equivalent. Gratuities received for or on account of services provided, when not distributed by the employer, must be considered as part of earned income from employment. In its ruling 497/97 of 7 July 1997, the Constitutional Court declared this article to be unconstitutional. However, the Budget Act for 1999, 87-B/98, of 31 December 1998, contradicts this ruling, stipulating in article 29 that sums of money received by casino bank staff from players, depending on their winnings, are considered as gratuities received for or on account of services provided. The authors fear that this provision may impugn the ruling of the Constitutional Court, which found the provision on the taxation of tips received by croupiers to be unconstitutional.

2.3 The authors consider that this has led to discriminatory practice against croupiers. They are the only staff who are taxed on their tips, whereas waiters working in the same casinos, who likewise tend to receive tips from customers, are not taxed. The discriminatory nature of such differentiation was recognized by the Court of Justice of the European Communities (CJEC).<sup>1</sup> In an opinion issued by the Centre for Financial Studies, the tax authorities themselves argued that the provision violated the principle of equality and justice. Their conclusion was not, however, followed by the courts hearing the case (see below).

2.4 The authors also note that sickness and unemployment benefits are not calculated on the basis of their total income, but only on the basis of the salary paid directly by the employer. They point out that they have nonetheless to deduct 12 per cent of their monthly tips for a special social security fund but derive no benefit from that contribution or, at any rate, no greater assistance in the event of illness or unemployment. On this count, tips are not considered as earned income from employment. Furthermore, according to the authors, the State's inability to monitor the tips received by other categories of employees, whereas

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<sup>1</sup> The authors cite in particular a CJEC judgement of 23 November 2000, which considered a gratuity to be a sum of money which a customer is willing to pay spontaneously for a service provided by one or more croupiers and which cannot be included in the taxable amount, since it is like a sum of money given to a street musician.

monitoring croupiers' tips is simpler, should not work to their disadvantage. If monitoring tips is not possible and this gives rise to inequality among the professions, the State must quite simply refrain from creating the tax.

2.5 The authors therefore brought individual proceedings before the administrative and tax tribunals in Loulé (13 of the authors), Sintra (5 of the authors) and Porto (4 of the authors),<sup>2</sup> which dismissed their complaints between 1 March 2004 and 23 October 2006. The first appeal against one of these decisions was dismissed by the Supreme Administrative Court (judgement of 16 November 2005) for one of the authors. The other appeals were all dismissed between 7 March 2006 and 13 March 2007, either by the Central Administrative Tribunal for the South (for Sintra and Loulé) or by the Central Administrative Tribunal for the North (for Porto). Finally, between 20 March 2006 and 26 June 2007, the Constitutional Court, ruling on each appeal separately, systematically rejected the assertion that the provisions in question are unconstitutional.

### **The complaint**

3. The authors consider that the State party has violated their right to equality before the law, guaranteed by article 26 when read in conjunction with article 2, paragraphs 1 and 2, of the Covenant. They argue that the adoption of Act 87-B/98 changed the scope of ruling 497/97 of the Constitutional Court, thereby placing croupiers at a disadvantage vis-à-vis other professions. The situation violates the principle of equal taxation. Furthermore, while croupiers pay additional contributions of 12 per cent of their tips into the special social security fund, they receive no additional assistance in the event of illness or unemployment.

### **State party's observations**

4.1 In its observations of 21 November 2007, the State party challenges the merits of the communication submitted by the authors. It refers to the legislative history of taxation on croupiers' tips and stresses that the original version of the Professional Tax Code (CIP) contained no provision on the taxation of tips. The tax authorities therefore attempted, based on the legal definition of earned income, to include as part of taxable income tips paid by third parties to staff working in casinos. This sparked strong opposition from croupiers. In order to clarify the situation, Decree-Law No. 138/78 of 12 June 1978 was amended to include article 1, paragraph 2, of the CIP, according to which sums received as gratuities or tips by employees in the course of the performance of their work would henceforth be considered as earned income, even when such sums were not distributed by the employer. This provision was declared unconstitutional because it had no basis in law (decree passed by the Government but not validated by Parliament).

4.2 The legislature again attempted to introduce the provision through Decree-Law No. 297/79 pursuant to article 18 of Act No. 21-A/79, which said that the regulations governing the scope of income tax should be revised so as to include all earned or work-related income. The expression "tips and gratuities" was no longer used: the new legislation merely referred to "sums received by employees in the course of the performance of their work,

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<sup>2</sup> Each of the authors brought separate proceedings before either the Loulé Administrative and Financial Tribunal or its counterpart in Porto. The judgements of the tribunals were not delivered on the same date, but they deal with exactly the same claims. The authors likewise lodged separate appeals either with the Central Administrative Tribunal for the South, for those who had brought proceedings before the Loulé Court, or before the Central Administrative Tribunal for the North, for those who brought proceedings before the Porto Court. The Constitutional Court subsequently handed down similar judgements for all the authors of the communication, but on different dates.



even those not distributed by the employer". This new text was also declared unconstitutional for want of the signature of the Prime Minister in office on the date of promulgation. Decree-Law No. 183-D/80 reinstated the provision, the substance of the text having been correctly adopted. In 1982, however, the legislature decided that the Decree-Law should be repealed and did not reintroduce the wording on tips and gratuities until 1988. The new provision of the CIP stipulated that half of any sums received by employees in the course of the performance of their work, irrespective of their nature, would be taxable when the sums were not distributed by the employer.

4.3 When the country moved from a system of two codes (Professional Tax Code and Supplementary Tax Code) to the more modern system, more in line with the European Community, of the Personal Income Tax Code (CIRS), Act No. 106/88 of 17 September 1988 provided, in article 4, paragraph 2 (a), that "all payments stemming from work done on behalf of third parties, whether performed by servants of the State and other public-law entities or in consequence of a contract of employment or other contract legally equivalent to a contract of employment" would be considered as earned income. Article 2 of the Personal Income Tax Code (CIRS) concerning the tax base of category A income, specifies in paragraph 3 (h), that "[...] gratuities received for or on account of services provided, when they are not distributed by the employer, are also earned income".

4.4 The constitutionality of this provision was called into question by the Mediator, who referred the matter to the Constitutional Court. Responding to the question of whether a gratuity was a donation that might be exempt from employment tax regulations, the Constitutional Court found the provision to be constitutional. The Court considered that the specific nature of the profession of croupier made for a special arrangement which could not be considered unconstitutional. A consequence of this unique framework was a differentiation in the pattern of remuneration. Since this Constitutional Court ruling, No. 497/97 of 9 July 1997, the legislature and Government have been in favour of making tips subject to tax. Article 29, paragraph 5, of Act No. 87-B/98 of 31 December 1998, containing the State budget for 1999, stipulates that article 8 of CIRS should make explicit reference to the income of casino croupiers that does not come from the employer. The croupiers are up in arms against this provision, since they consider it a new development, inasmuch as their profession is referred to directly.

4.5 Before expressing its views on the merits of the allegations made by the authors, the State party analyses the legislation governing croupiers' incomes and, more particularly, gratuities. Casinos are private entities subject to a strong tax regime. They are inspected by the Inspectorate-General of Gambling (IGJ). Regulatory Decree No. 82/85 of 28 August 1985 governs the system for distributing gratuities received by staff in gaming rooms. As can be seen, these gratuities are not given *intuitu personae* to a certain croupier to whom a player takes a liking. They are deposited into a fund for this purpose and distributed every two weeks to croupiers according to the category to which they belong (more senior croupiers receive more). Since the issuance of Decree No. 24/89 of 15 March 1989, a Commission for the Distribution of Gratuities (CDG) has been established. This fact attests to the size of the sums of money involved and their sensitive nature. The equitable, legal and transparent distribution of these gratuities must be ensured. The State party goes on to say that the social security system also has an interest in gratuities. Under the laws governing the system, gratuities are considered as earned income.

4.6 The State party insists that gratuities are income stemming from the employment relationship, contrary to the authors' claims that they are donations, and thus exempt from tax. Croupiers receive tips because of their contracts of employment. Tips are not income obtained *intuitu personae* and are subject to social security deductions. The State party cites a study by law professors which argues that the adoption of an overarching, comprehensive concept of income, including tips, is not only in keeping with social practice but is also a

natural consequence of the principle of capacity to pay. It notes that earned income comprises several elements, including basic pay, seniority bonuses, various gratuities such as holiday and Christmas allowances, extras such as payments for special duties and overtime, night work and shifts etc.; this complex set of types of income counts towards various uses of different kinds, all legitimate. For example, only basic pay and seniority bonuses count towards severance pay; for accidents at work, only regular monthly benefits apply. There is nothing to preclude the taxation of tips, which are gratuities awarded for the performance of work.

4.7 The State party notes that the authors invoke Court of Justice of the European Communities (CJEC) case law, according to which the performance of music in the street prompts voluntary donations of indeterminate amounts of money. In one case, it had been established that no legal relationship existed between the performer and the recipient. There was thus no need to tax the very variable income of street musicians, which consisted solely of such gratuities. The State party is in agreement with this case law, but considers that the authors invoke it wrongly because it is not relevant to this case.

4.8 The State party bases itself on the jurisprudence of the Constitutional Court, which has analysed the principle of equality from three angles. First, formal equality provides that all citizens are equal before tax legislation, which means that all taxpayers in the same situation as defined by tax legislation must be subject to the same tax regime. Second, substantive equality requires the law to ensure that all citizens with an equal income must bear an equal tax burden, thereby contributing equally to public expenses. Lastly, equality through the tax system aims to achieve a fair distribution of income and wealth besides satisfying the financial requirements of the State and other public entities, since one purpose of income tax is to reduce inequalities among citizens. Therefore, although croupiers receive considerable amounts in the form of gratuities, these gratuities are not donations but customary gifts, and it makes no sense to relieve croupiers of taxes on such gratuities if the tax burden on other people at work is not alleviated.

4.9 The State party notes that, according to the Human Rights Committee, not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant. It follows that the criteria adopted by the Portuguese courts are fully in accordance with those established by the Committee. For all these reasons, the State party considers that the sums of money in question are earned income which is legitimately subject to tax and that no provision of international law, including article 26 of the Covenant, has been violated.

#### **Authors' comments on the State party's submission**

5. In their comments dated 2 February 2009, the authors reiterate the arguments expounded in the initial communication and request the Committee to find a violation of articles 26 and 2 of the Covenant, read together, and sentence the State party to pay 50,000 euros in damages.<sup>3</sup>

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<sup>3</sup> The authors do not specify whether this sum is required of each or of all of them.

## Issues and proceedings before the Committee

### *Consideration of admissibility*

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

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

6.3 In the absence of objections by the State party to the admissibility of the communication or reasons indicating that the communication might be wholly or partly inadmissible, the Committee declares that the allegations under article 26 of the Covenant, regarding the right to equality before the law, are admissible.

### *Consideration of the merits*

7.1 As provided for under article 5, paragraph 1, of the Optional Protocol, the Human Rights Committee has considered the communication in the light of all the information made available to it by the parties.

7.2 The Committee notes the authors' arguments that they are discriminated against vis-à-vis the members of other professions because they alone pay taxes on their tips; that tips are given by customers purely out of generosity and that they can therefore be regarded as charitable donations; that such tips cannot, strictly speaking, be considered as pay and are therefore not taxable. The Committee notes that, according to the authors, in the event of unemployment or sickness they do not receive any additional benefits in consideration of the tax to which they are subject.

7.3 The Committee also notes the arguments of the State party that taxation on tips earned by croupiers is the result of a legislative development intended to re-establish equality between the professions; that tips earned by croupiers cannot be compared with those of other professions because of the large sums of money involved; that, for that reason, a Commission for the Distribution of Gratuities has been established to manage the large sums received in tips; and that those sums are placed in a common fund and redistributed among the croupiers according to their rank. The Committee notes that, according to the State party, gratuities are income stemming from the employment relationship, contrary to the authors' claims that they are donations, and thus exempt from tax. Furthermore, earned income comprises several elements, including basic pay, seniority bonuses and various gratuities, and this complex set of types of income counts towards various uses of different kinds, all legitimate. For example, only basic pay and seniority bonuses count towards severance pay. The Committee further notes that, according to the State party, laws governing gratuity-related matters consider such income as earned income for social security purposes. Finally, the Committee notes that, according to the State party, all taxpayers in the same situation as defined by tax legislation must be subject to the same tax regime; that all citizens with an equal income must bear an equal tax burden; and that the ultimate objective of tax legislation is to reduce social inequalities.

7.4 The Committee recalls its general comment No. 18 (1989) on non-discrimination, in which it established that the principle of equality before the law and equal protection of the law shall guarantee to all persons equal and effective protection against discrimination; that discrimination must be prohibited in law and in fact in any field regulated and protected by

public authorities; and that, when adopting legislation, the State party should ensure that its content is not discriminatory.<sup>4</sup> Still referring to its general comment and its long-standing case law,<sup>5</sup> the Committee recalls that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant. It is therefore for the Committee to determine whether the differentiation made by Act No. 87-B/98 of 31 December 1998, containing the State Budget for 1999, is discriminatory towards the authors or if it is based on reasonable and objective criteria and the purpose is legitimate under the Covenant.

7.5 The Committee observes that the tax regime for croupiers is of a unique and specific nature, a fact that is not disputed by the authors. Furthermore, the Committee is not in a position to conclude that this taxation regime is unreasonable in the light of such considerations as the size of tips, how they are distributed, the fact they are closely related to the employment contract and the fact that they are not granted on a personal basis. Accordingly, the Committee concludes that the information before it does not show that the authors have been victims of discrimination within the meaning of article 26 of the Covenant.

7.6 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation by Portugal of the provisions of the Covenant.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

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<sup>4</sup> *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40*, vol. I (A/45/40 (Vol. I)), annex VI, sect. A, paras. 1 and 12.

<sup>5</sup> See communications No. 172/1984, *Broeks v. the Netherlands*, Views adopted on 9 April 1987, para. 13; No. 180/1984, *Danning v. the Netherlands*, Views adopted on 9 April 1987, paras. 13 and 14; No. 182/1984, *Zwaan-de Vries v. the Netherlands*, Views adopted on 9 April 1987, para. 13; No. 218/1986, *Vos v. the Netherlands*, Views adopted on 29 March 1989, paras. 12 and 13.

**AA. Communication No. 1577/2007, *Usaev v. Russian Federation*  
(Views adopted on 16 July 2010, ninety-ninth session)\***

<i>Submitted by:</i>	Adrakhim Usaev (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	The Russian Federation
<i>Date of communication:</i>	25 April 2007 (initial submission)
<i>Subject matter:</i>	Pretrial detention resorting to torture; forced confession, in the absence of a lawyer; unfair trial; discrimination of an ethnic Chechen
<i>Procedural issue:</i>	Level of substantiation of claim
<i>Substantive issue:</i>	Allegations of ill-treatment and torture, forced confessions, right to fair trial, right to a legal defence, non-discrimination
<i>Articles of the Covenant:</i>	2; 5; 7; 9; 14, paragraph 3 (a), (g), and (f); 20; and 26
<i>Article of the Optional Protocol:</i>	2

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

*Meeting on 19 July 2010,*

*Having concluded* its consideration of communication No. 1577/2007, submitted to the Human Rights Committee on behalf of Mr. Adrakhim Usaev under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication, and the State party,

*Adopts* the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication is Mr. Adrakhim Usaev, a Russian national of Chechen origin, born in 1976, who at present is imprisoned in Norilsk (Russia). He claims to be a victim of violation, by the Russian Federation, of his rights under article 2; article 5; article 7; article 9; article 14, paragraph 3 (a), (f), and (g); article 20; and article 26, of the International Covenant on Civil and Political Rights. He is unrepresented.

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada and Mr. Fabián Omar Salvioli.

### **The facts as submitted by the author**

2.1 The author claims that he was arrested on 14 July 2001 allegedly for having taken part in an armed attack against a police station in Gudermes (Chechen Republic), on 14 March 2001. On 29 March 2002, the Krasnodar Regional Court sentenced him to 13 years of imprisonment. Mr. Usaev was found guilty of illegal acquisition of fire arms, participation in an illegal armed organization, terrorism, and attempt on the life of law-enforcement officials in the exercise of their duties. On 11 September 2002, the Supreme Court of the Russian Federation examined the author's appeal and confirmed the sentence. The author's subsequent requests to the Supreme Court to have his case examined under the supervisory proceedings were rejected in 2005 and 2006.

2.2 The author claims that he is innocent and that his guilt was not duly established. He affirms that on 14 March 2001, at 4.30 a.m., several armed individuals wearing masks broke into his house in Gudermes, and without identifying themselves or presenting any warrant, started beating him, his father and his brother. Then the police "discovered" a pistol which they had allegedly brought with them. Based on this the author was taken to the police station. According to the author, the pistol was a mere pretext for his arrest, and no mention of it appeared later in his criminal case.

2.3 While in detention, the author was beaten and threatened with his family being persecuted. He was tortured over three days: a nylon bag and a gas mask were placed on his head to prevent him from breathing, to the point that he lost consciousness on two occasions and had to be revived with cold water. He also received electroshocks. He was also prevented from sleeping. During the interrogations, it was explained to him that he was resisting in vain, and that it would be better if he signed a document according to which he voluntarily presented himself to the police in order to repent as a "Chechen fighter", and thus an amnesty act would apply to his case. The investigators allegedly explained to him that he would be released and not prosecuted, while at the same time the investigators would improve their statistical data on the number of crimes solved.<sup>1</sup>

2.4 The author claims that at the time of his arrest, he had difficulties understanding Russian. On 17 July 2001, unable to continue to withstand the torture anymore, he agreed to sign all the needed documents. The investigators called an interpreter, who explained to him in the Chechen language that it would be better for him if he signed and accepted everything he was asked, otherwise he would be killed before the beginning of the court trial. The interpreter allegedly assured him that the court would sort out everything and would release him. The author thus signed the various documents.

2.5 The investigators then presented the author to his "co-accused" Abdurakhmanov. It was explained to the author that they had both taken part in the attack on the "Bagira" police station. Allegedly, he was informed that given the fact that he had confessed his guilt, he was prosecuted only for an event in which no human losses occurred.

2.6 While in detention, the author started studying the Russian language. On 11 February 2002, at the beginning of the trial, the presiding judge asked him whether he understood Russian. He replied that he badly mastered the language, to which he was told that this did not matter as the court could understand him. According to him, the trial transcript, however, included a mention to the effect that he masters the Russian language and refuses to be assisted by an interpreter.

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<sup>1</sup> According to the author, in 2001 all fighters that repented for having taken part in the illegal armed groups had been granted an amnesty.

2.7 Mr. Usaev claims that during the preliminary investigation, he requested to be represented by a lawyer. Allegedly, he was told that he had probably seen too many movies. In court, however, the author discovered that several documents prepared during the preliminary investigation were co-signed by lawyers, who allegedly represented his interests throughout the preliminary investigation. He requested to have these lawyers questioned in court, but his request was rejected, and no record to this effect was entered in the trial transcript, according to the author.

2.8 The author further claims that no lawful evidence of his guilt existed in his criminal case file. In addition, no witnesses recognized him or Mr. Abdurakhmanov in the courtroom as one of the participants in the alleged events. No firearms were seized in the author's house, and his fingerprints were not found on the guns seized in Mr. Abdurakhmanov's home. The author claims that the court ignored various pieces of circumstantial evidence in his favour, and was biased because of his Chechen origins.

2.9 The author explains that he had submitted his case to the European Court of Human Rights, but his application was declared inadmissible *ratione temporis* as it was submitted over the six-month time-limit requirement.<sup>2</sup>

2.10 Finally, he complains that in 2003 and 2006, two Amnesty Acts were promulgated which covered the Chechen Republic and the Northern Caucasus, but their provisions were never applied to his particular case.

### **The claim**

3. The author claims that the facts as presented above amount to a violation, by the Russian Federation, of his rights under article 2; article 5; article 7; article 9; article 14, paragraph 3 (a), (f), and (g); article 20; and article 26, of the Covenant.

### **State party's observations on admissibility and merits**

4.1 The State party presented its observations on admissibility and merits by note verbale of 21 December 2007. It notes, in the first place, that Mr. Usaev's allegations that he had been subjected to torture and discriminated against on the basis of his ethnic origins by the Ministry of Internal Affairs and the Federal Security Service are groundless. The investigation proceedings in connection with Mr. Usaev and his co-accused, Mr. Abdurakhmanov, were carried out in the presence of their lawyers, official witnesses, specialists, and others. A number of investigation sessions were video-taped.

4.2 Throughout the conduct of the preliminary investigation, on several occasions, Mr. Usaev had his defence rights explained to him, and neither he nor his lawyers have ever complained to the effect that he was subjected to unlawful methods of investigation, including through threats or violence. Allegations on unlawful methods of investigation and cruel treatment were formulated by the author and his lawyers for the first time before the court of first instance. These allegations were duly examined by the court, who was unable to confirm them and declared them unfounded, as reflected in the sentence.

4.3 The State party further notes that the content of Mr. Usaev's criminal case file does not confirm the author's allegations that he did not sufficiently master the Russian language at the trial stage and should have been offered the services of an interpreter. The State party notes that throughout his criminal case, the author never complained that he had been discriminated against on the basis of his ethnic origins.

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<sup>2</sup> European Court of Human Rights, application No. 14995/05, inadmissibility decision of 28 June 2006.

4.4 The State party further contends that the author's allegation that the trial transcript did not correctly reflect his answer to the question as to his level of Russian language proficiency and the need for an interpreter to be appointed, and that it did not include his request to have questioned in court some of the lawyers who defended him at the early stages of the investigation were groundless. The trial transcript makes it clear that the presiding judge had informed the parties of their right to acquaint themselves with the trial transcripts' content and to make annotated comments thereon. Both Mr. Usaev and his co-sentenced Mr. Abdurakhmanov received a copy of the trial transcript, on 4 June 2002, but they raised no objections regarding its completeness or accuracy.

4.5 The State party explains that the author's allegations on cruel treatment and the use of unlawful methods of investigation have been investigated on a number of occasions, including by the Supreme Court of the Russian Federation (when examining the criminal case on appeal, Ruling of 11 September 2002), and, in the context of the examination of the case under the supervisory review proceedings, by judges of the Supreme Court of the Russian Federation (decision of 25 January 2005), including by the First Deputy Chairman of the Supreme Court (answer sent to the author on 16 March 2006), and were found not to be confirmed. In addition, on 6 July 2006, the General Prosecutor's Office conducted a new verification as to the author's allegations in respect of his innocence and in relation to the unlawful methods of investigation used against him which were found to be unfounded.

4.6 The State party points out that pursuant to information from the Federal Service on the Execution of Penalties, when, on 3 August 2001, the author was placed at the pretrial detention Centre SIZO No. 2 in the village of Chernokozovo (Chechen Republic), his body showed no injuries, and his medical history card contained a specific reference to that effect. The results of a verification carried out in the SIZO No. 2 Centre showed that Mr. Usaev mastered the Russian language.

4.7 The State party explains that Mr. Usaev never submitted a request for Presidential pardon. It adds that no violation of the author's rights and lawful interests was committed during the time he was deprived of his liberty. Therefore, according to the State party, the author's allegations against the law-enforcement authorities on the use of torture, discrimination, and his reference to articles 2, 5, 7, 9, 14, paragraph 3 (a), (f), and (g), article 20, and article 26, of the Covenant, are not confirmed by the material of his criminal case file.<sup>3</sup>

#### **Author's comments on the State party's observations**

5.1 On 26 December 2008, the author commented on the State party's observations. According to him, given the fact that there was a war in Chechen Republic in 2001, it was impossible to have a proper and lawful investigation on criminal cases there during that period. He repeats that he was not represented by a lawyer during the preliminary investigation and no lawyer was present when he had been interrogated. The fact that the investigation documents and records were countersigned by lawyers constitutes, according to the author, a falsification. The lawyers in question were, according to the author, "on duty" and acted in the interest of the prosecution; they were not hired by him or his relatives. Thus, according to him, these lawyers had no right to sign official records during the preliminary investigation.

5.2 The author explains that two privately retained lawyers, Mr. Kh. and Mr. K., represented him during the court trial. The author and these lawyers requested the court to

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<sup>3</sup> The State party supplied copies of several criminal procedure documents regarding the author's investigation and trial.



call the “lawyers” who had been assigned to follow the preliminary investigation in order to question them about the presence of their signatures on procedural documents, but this request was rejected and no record in this regard is to be found in the trial transcript. The author claims that this was due to the fact that he was an ethnic Chechen, which was sufficient reason for the court to declare him guilty. All this amounts, according to the author, to a discrimination and it shows that the court did not want to clarify the objective truth in his case.

5.3 The author further points out errors in dates of trial transcripts, which, according to him, shows that his trial was not conducted properly.

5.4 In addition, all medical certificates in relation to the author were issued by military medical personnel in Chernokozovo and in Gudermes. According to the author, all certificates issued by the medical personnel there normally stated that the detainees had no medical problems. The author contends that the only way a medical certificate would show injuries or results of beatings would be if one had a lawyer. Given that he had no lawyer during the preliminary investigation, however, no such records could be established in his case.

5.5 The author submits that when he requested to see a medical doctor, the Chief of the Temporary Detention Centre in Gudermes rejected his request without explanations.

5.6 The author explains that as a result of the treatment he was subjected to (after his arrest), his body, except on the face, showed marks of beatings. He explains that he was kicked and punched, he was beaten with batons, and was tortured with electricity. During the beatings and torture, he had a plastic bag placed over his head so as not be able to see who was beating him. He also had cartridges placed between his fingers and had them squashed together, and he had a door slammed on his fingers, which caused him severe pain. He was thus forced to sign all the papers the investigators asked him to sign, without even reading their content.

5.7 The author further explains that a record of 2 October 2001, on the fact that the author was given the opportunity to examine the content of his criminal case file, indicated that the record was established in Chernokozovo, in the presence of the lawyer, Mr. Vagapov. According to the author, however, no lawyer ever visited him in the Pretrial Detention Centre No. 2 in Chernokozovo. According to him, this could be confirmed by the visitors’ registry of the detention centre in question.

5.8 The author further contends that he did not master the Russian language sufficiently at the stage of preliminary investigation and during the court trial, and that he therefore should have been offered an interpreter. All statements in official documents were written by him, but dictated to him, without him understanding their content. As to the statements produced by co-prisoners on his Russian language skills, the author points out that he does not know two of the three individuals in question. The last one, S.P., had, according to the author, arrived at the detention centre only in 2003, i.e. when the author’s Russian skills had already improved since he had been in detention, for two years, with Russian speakers.

#### **Additional information by the State party**

6.1 On 17 June 2009, the State party submitted additional information. It reiterates its previous observations, and refutes the author’s allegations that the prisoners L.M. and S.M. could not testify about his proficiency in the Russian language as he had never met them. The State party points out that the individuals in question were held in the same detention facility as the author, and he had been in contact with them.

6.2 The State party rejects as groundless the author’s allegations that he had been subjected to unlawful methods of questioning during the preliminary investigation. The

State party contends that throughout the preliminary investigation, neither the author nor his co-accused ever complained about unlawful methods of questioning, including during their stay in pretrial detention facilities located outside the Chechen Republic.

6.3 The State party recalls that a number of investigation activities during the preliminary investigation were carried out in the presence of a defence lawyer, and other acts were conducted in the presence of official witnesses, experts, etc. Investigation acts were recorded on video tape which was duly studied by the court. In a number of investigation acts, the co-accused provided corroborating depositions which included details and information that could be known only by them and not by the investigation officials at that point in time.

6.4 On this basis, the trial court concluded that the author's allegations on the use of physical violence against him during the investigation were found to be groundless. These allegations were further examined by the Supreme Court and the General Prosecutor's Office, and were found to be unfounded.

6.5 The State party further addresses the complainant's allegations on the violation of his rights to defence, in particular his claim that due to the absence of a lawyer during the preliminary investigation, the marks of the beatings he sustained could not be recorded, and that the author had acquainted himself with the content of the criminal case file in the absence of a lawyer, allegedly on 2 October 2001. It notes that no record dated 2 October 2001 exists in the criminal case file. From the record at the end of the preliminary investigation and on the transmittal of the content of the criminal case file to the accused and his defender, dated 3 October 2001, it becomes clear that this investigation action was carried out in the presence of the lawyer M. Vagapov. The author, by his signature on this record, has expressed his agreement to have Mr. Vagapov participating in the investigation proceedings in question. There is also a hand-written text by the author himself, to the effect that he had no demands whatsoever.<sup>4</sup>

6.6 On the same day, 3 October 2001, again in the presence of the lawyer Mr. Vagapov, the right under the Criminal Procedure Code to request that his case be examined either by a court together with a jury, or by a court made up of three professional judges was explained to the author. An official record of this was established, which was signed by both the author and his lawyer.<sup>5</sup>

6.7 The author's allegations that the court should have questioned the lawyers who had represented him during the preliminary investigation in order to establish the exact circumstances of the crime are, according to the State party, not based on the provisions of the Criminal Procedure Code. Given that the lawyers in question were not witnesses of a crime, their depositions could have no evidentiary value for the criminal case.

6.8 As to the indications of incorrect dates contained in procedural documents, such as those of 26 January 2002 and 11 February 2002,<sup>6</sup> the State party affirms that these constitute obvious technical errors which, however, did not prevented the court from adopting a lawful and sound decision.

6.9 With reference to the author's allegations on the impossibility of obtaining a medical certificate of his beatings and torture marks, especially in the absence of a lawyer, the State party explains that the medical personnel in the Investigation Detention Centre in Chernokozovo are part of the system for the execution of criminal punishments, in accordance with Federal Law No. 103 of 15 July 1995 on the detention of suspects or

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<sup>4</sup> The State party submits a copy of the record in question.

<sup>5</sup> See note 4 above.

<sup>6</sup> Ibid.

accused of having committed a crime. Pursuant to article 24 of that law, when a suspect or an accused person suffers bodily harm, he or she is to be examined without delay by the medical workers of the facility where he or she is detained. The results of such examinations are duly recorded and are transmitted to the victim. The chief of the detention facility, the individual or the organ competent for the criminal case, or the victim may request to have a new medical examination to be conducted in a specialized medical institution. A refusal to order such an examination may be appealed to the prosecutor who supervises the case.

6.10 Thus, according to the State party, in his comments, the author does not supply additional information to substantiate his argument as to his innocence or provide any evidence on the use of unlawful methods of investigation in relation to him.

6.11 The State party finally notes that, in substance, the author does not comment on the information submitted (by the State party), but he repeats his initial allegations to the effect that he had been subjected to violence and torture and had not been assigned a lawyer or an interpreter. According to the State party, the author's allegations tend in fact to challenge the evidence of his guilt; this issue, however, falls outside of the jurisdiction of the Committee.

#### **Additional information by the author**

7.1 On 31 August 2009, the author reiterated that he does not know two of the prisoners who had testified that his level of knowledge of the Russian language had been satisfactory.

7.2 He further claims, in connection with the investigation actions carried out in his criminal case, that in 2001, the Constitution of the Russian Federation was de facto not operating in the Chechen Republic, as it was a theatre of military operations. According to the author, the investigation proceedings were unlawful, as in 2001, the federal troops were and are still committing crimes against humanity and genocide in the Chechen Republic, and this policy had indirect repercussions on his criminal case.

7.3 On the alleged torture, the author contends that the reply of the Russian Federation is unconvincing.

7.4 The author further submits a copy of two documents dated 2 October 2001 and claims that they were indeed part of his criminal case file. He affirms that he had signed these documents under instructions from the investigators, in the absence of a lawyer, contrary to what is said by the State party. The author repeats that in any event, the mere fact that he was a Chechen was sufficient for the courts to declare him guilty.

7.5 The author reiterates that he had no lawyer during the preliminary investigation. He admits that one lawyer, Mr. Bakhonoev, had visited him in the detention centre of Gudermes, and this lawyer had explained to him his rights in Chechen. The author reiterates that he did not meet with other lawyers during the preliminary investigation.

7.6 The author further claims that the first instance court had refused to assign him an interpreter, in spite of his request. The trial transcript, however, contained a record that he refused the services of an interpreter. The author adds that at that time, he could only write in Russian, following dictation, or copying existing text; he was unable to elaborate a text himself, and could not understand the language.

## Issues and proceedings before the Committee

### *Consideration of admissibility*

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee notes, as required by article 5, paragraph 2 (a) and (b), of the Optional Protocol, that the same matter is not being examined under any other international procedure of investigation or settlement and that it was uncontested that domestic remedies have been exhausted.

8.3 The Committee has noted, first, that the author has claimed a violation of his rights under article 2 of the Covenant. The Committee recalls<sup>7</sup> that the provisions of this article, which lay down general obligations for State parties, cannot by themselves and standing alone give rise to a claim in a communication under the Optional Protocol. It considers that the author's claim to this effect cannot be accepted, and that accordingly it is inadmissible under article 2 of the Optional Protocol.

8.4 The Committee has noted the author's allegations under article 5; article 9; article 20; and article 26, of the Covenant. It notes that the author has not presented sufficient and concrete information or explanations on the alleged violation of his rights under the above provisions of the Covenant. Therefore, and in the absence of any other relevant information on file, the Committee considers that the author has failed to sufficiently substantiate his claims, for purposes of admissibility, and that, accordingly, this part of the communication is inadmissible under article 2 of the Optional Protocol.

8.5 The Committee considers that the remaining claims of the author, under article 7; and article 14, paragraph 3 (a), (f), and (g), of the Covenant, have been sufficiently substantiated and declares them admissible.

### *Consideration of the merits*

9.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee notes the author's claim that he was beaten and subjected to ill-treatment by the police during the interrogation, in the absence of a lawyer, thus forcing him to confess guilt. It takes note of the detailed description by the author of the methods of ill-treatment used, and of his contention that these allegations were raised in court but were rejected. The Committee also notes the State party's observations that these allegations have been duly considered by its authorities, including by the Supreme Court, and were found to be unfounded.

9.3 The Committee recalls its jurisprudence that it is essential that complaints about ill-treatment must be investigated promptly and impartially by competent authorities.<sup>8</sup> In the present case, the Committee notes that the State party has adduced no specific explanation or substantive refutation of these allegations, such as, in particular, explanations on how

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<sup>7</sup> See, inter alia, communication No. 1551/2007, *Moses Solo Tarlue v. Canada*, Views adopted on 27 March 2009, para. 7.3.

<sup>8</sup> General comment No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A, para. 14.

and when, in practice, the author's allegations of torture and ill-treatment were investigated, including by which specific authority. Therefore, it considers that due weight must be given to the author's allegations. Accordingly, the Committee concludes that in the present case, the treatment to which the author was subjected as described above, amounts to a violation of article 7 and article 14, paragraph 3 (g), of the Covenant.<sup>9</sup>

9.4 The Committee has further noted the author's claim that he was not represented by a lawyer during the preliminary investigation and that procedural documents were signed only pro forma by lawyers on duty who never met him. It notes the State party's contention that the author and his co-accused were represented by lawyers throughout the investigation, and that even if particular investigation proceedings were carried out in the absence of counsel, they were conducted in the presence of witnesses or other individuals, and that, and this was not refuted by the author, a number of investigation activities were videotaped and the trial court studied the tape. The Committee has also noted the author's claim that he had requested in vain to have his so-called lawyers questioned in court, but his request was rejected without having this reflected in the trial transcript. On this particular point, the Committee takes note of the State party's explanation that even though the author and his privately retained lawyer were given the opportunity to study and make comments or objections on the trial transcript, they did not make any comment.

9.5 The Committee further observes that the author's appeal to the Supreme Court, dated 2 April 2002, contains no claim on non-representation by a lawyer throughout the preliminary investigation; the author complains that he was not represented by a lawyer only during his additional interrogations on 18 and 21 July 2001. It finally notes that in his comments dated 31 August 2008, the author admits that he had met with a lawyer in the Gudermes detention centre, during the preliminary investigation. In the circumstances and in absence of any other pertinent information on file in this regard, the Committee considers that the facts as submitted do not permit it to conclude that there has been a violation of Mr. Usaev's rights under article 14, paragraph 3 (a), of the Covenant.

9.6 The Committee has finally noted the author's claim that despite his requests in court, he was never offered the services of an interpreter, and no record on this was made on the trial transcript. It notes that the State party has objected that neither the author nor his lawyers have ever formulated requests in this connection, and that the author, personally, made handwritten annotations in Russian on a number of official procedural documents. In addition, according to the State party, at the beginning of the court trial, Mr. Usaev explained that he masters the Russian language and that he does not need the services of an interpreter. The State party has also pointed out that, and this remains unrefuted by the author, that neither he nor his defence lawyer objected about the content of the trial transcript. The Committee further notes that the appeal of the author to the Supreme Court, dated 2 April 2002, does not include any reference to the author's problems in relation to his comprehension of Russian during the preliminary investigation or in court. In the circumstances, and in the absence of any other pertinent information on file, the Committee considers that the facts before it do not permit it to conclude that the author's rights under article 14, paragraph 3 (f), of the Covenant, have been violated.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 7 and article 14, paragraph 3 (g), of the International Covenant on Civil and Political Rights.

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<sup>9</sup> See, inter alia, communication No. 1057/2002, *Tarasova v. Uzbekistan*, Views adopted on 20 October 2006, para. 7.1.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy including the payment of appropriate compensation, initiation and pursuit of criminal proceedings to establish responsibility for Mr. Usaev's ill-treatment, and to consider the author's immediate release. The State party is also under an obligation to prevent similar violations occurring in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not, 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 in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**BB. Communication No. 1588/2007, *Benaziza v. Algeria*  
(Views adopted on 26 July 2010, ninety-ninth session)\***

<i>Submitted by:</i>	Nedjma Benaziza (represented by counsel, Nassera Dutour of the Collectif des Familles de Disparus en Algérie)
<i>Alleged victim:</i>	Daouia Benaziza, her sons and the author (granddaughter of the victim)
<i>State party:</i>	Algeria
<i>Date of communication:</i>	13 March 2007 (initial submission)
<i>Subject matter:</i>	Enforced disappearance
<i>Procedural issue:</i>	Failure to exhaust domestic remedies
<i>Substantive issue:</i>	Prohibition of torture and cruel, inhuman or degrading treatment or punishment; right to liberty and security of person; arbitrary arrest and detention; right to recognition as a person before the law; right to an effective remedy
<i>Articles of the Covenant:</i>	7; 9; 16; and 2, paragraph 3
<i>Articles of the Optional Protocol:</i>	5, paragraph 2 (b)

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

*Meeting on 26 July 2010,*

*Having concluded* its consideration of communication No. 1588/2007, submitted by Nedjma Benaziza under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication and the State party,

*Adopts* the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1.1 The author of the communication is Ms. Nedjma Benaziza, an Algerian citizen born on 31 December 1976. She claims that her grandmother, Ms. Daouia Benaziza, born in Chemora, Algeria, in 1929 was the victim of violations by Algeria of articles 7, 9, 16 and 2, paragraph 3, of the Covenant. She claims that she herself, her father and her uncles are victims of a violation of article 7 and article 2, paragraph 3, of the Covenant. The Covenant

\* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Majoub El Haiba, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

The text of an individual opinion signed by Committee member Mr. Fabián Omar Salvioli is appended to the present Views.

and the Optional Protocol entered into force for Algeria on 12 December 1989. The author is represented by counsel, Ms. Nassera Dutour of the Collectif des Familles de Disparus en Algérie (CFDA) (Coalition of Families of the Disappeared in Algeria).

1.2 On 12 March 2009, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, rejected the State party's request, dated 3 March 2009, that the Committee consider the issue of admissibility separately from the merits.

#### **The facts as submitted by the author**

2.1 Daouia Benaziza was the grandmother of the author, Nedjma Benaziza. Born in 1929, Daouia Benaziza was arrested on 2 June 1996 by military security officers. Shortly before the arrest, which occurred at around 10 p.m., military security officers, most of whom were hooded and armed, some in uniform and some in plain clothes, entered the building where Daouia Benaziza lived, looking for her son, Ali, who lived at the same address. Finding no sign of Ali, the officers took Daouia aside into one of the rooms of the apartment for questioning. As the security officers were preparing to take her away, one of her sons, Slimane, came upstairs to the apartment and tried to dissuade them from doing so, citing as reasons her advanced age (68 at the time of the events) and poor health. The officers replied that they would not keep her for questioning for more than two hours, after which she could return home.<sup>1</sup> Before taking her away, the military security officers asked her to remove her jewellery and were careful to take the telephone with them. The arrest took place not only in front of her sons but also in front of her neighbours. Daouia Benaziza has not been seen again since that day. One month earlier, her home had been visited and searched on two occasions by officers from the same service. For reasons that remain unknown, the officers were looking for her son, Ali Benaziza.

2.2 The day following Daouia Benaziza's arrest, one of her sons went to the police station and was informed by the police officers that they had not arrested his mother. Later, her sons were informed that their mother had been taken to the barracks in the centre of Constantine, opposite the office of the *wali* (equivalent of the prefect). When Ali Benaziza returned to the city on 4 June 1996, he and two of his brothers, Abdelkader and Mohamed, paid a visit to the prosecutor of the military court in the fifth military region of Constantine. Ali Benaziza proposed that he should take his mother's place in order to allow her release. He was arrested by the soldiers but released following an identity check. The soldiers promised him that Daouia Benaziza would be released soon.

2.3 Still without news of their mother, the victim's four sons, Ali, Mohamed, Abdelkader and Slimane, filed a series of written petitions with the military, civil, judicial and administrative bodies concerned, in order to find out why their mother had been arrested and to obtain information or secure her release. In all 17 of the petitions they filed with these bodies, the victim's sons mentioned her advanced age, her poor health, the incongruity of the possible accusations against an elderly woman and their failure to understand why the authorities were unable to provide them with any information on their mother's fate. The first letter from the four sons is dated 14 July 1996, one month and a half after the arrest of Daouia Benaziza. It was addressed to the Secretary-General of the Ministry of Defence with copies to the Office of the President of the Republic, the head of Government, the Ministry of Justice, the then speaker of parliament, the head of the fifth military region, the presidents of the two human rights leagues and the Ombudsman.

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<sup>1</sup> Her son Slimane and his wife were present at the time of the events. It would appear that the author was not present.



2.4 In September 1996, the Benaziza family hired an attorney, who filed a complaint against a person or persons unknown for abduction with the Court of Constantine. On 16 August 1997, nearly a year after filing the complaint, the family was summoned to the police station in the 13th police district of the *wilaya* (prefecture) of Constantine, where they were handed a copy of a decision to discontinue proceedings indicating that the persons or services responsible for the victim's arrest had not been identified. Between 1996 and 1998, members of the Benaziza family met with the chief prosecutor of the fifth military region of Constantine on several occasions (4 June 1996, 5 June 1996 and 30 July 1996). During the first two meetings with the prosecutor, they tried to find out what had happened to their mother. After learning from unofficial sources that their mother had died, the brothers filed a formal petition with the prosecutor. In the absence of any news from his office, they subsequently returned on 30 July 1996 in order to submit complete documentation. The same petition was submitted to the regional director of military security and to the president of the Algerian League for the Defence of Human Rights, who forwarded it to the Ministry of Justice. This led to a series of meetings at the following offices: the Office of the Prime Minister, where the brothers had a meeting on 11 August 1996; the Office of the President, which opened an inquiry in October 1996; the Ministry of Justice, where meetings were held on 21 and 25 August 1996; the Constantine gendarmerie, where they had a meeting on 23 November 1996 in connection with the inquiry led by the Office of the President; the Directorate-General of National Security, where they had a meeting on 4 April 1997 in connection with an investigation led by the Constantine prosecution service; and the National Human Rights Monitoring Centre, where they had several meetings on 14 July 1996 and in October 1997. Some of these petitions were submitted several times to the same authorities every few months or so. Despite all these efforts and the opening of some investigations, none of the petitions has yielded any results.

2.5 In the course of its inquiries, the Benaziza family received — from sources that remain confidential — conflicting reports on the fate of Daouia Benaziza. According to some reports, Daouia Benaziza died as a result of a ruptured spleen caused by beatings. According to others, she died of a heart attack in the first few days of her detention. However, the family has had no definitive proof of her death and no news on her fate, as no investigation has been able to find her. The Benaziza family next contacted the association SOS Disparus (SOS Disappearances) and the Collectif des Familles de Disparus en Algérie, which, among other things, organized demonstrations to ensure that the cause of the disappeared was not forgotten. The family also contacted Simone Veil, a member of the Constitutional Council of France. On 12 December 1997, the Benaziza family brought the case concerning Daouia Benaziza's disappearance to the attention of the United Nations Working Group on Enforced or Involuntary Disappearances.

2.6 The adoption of the Charter for Peace and National Reconciliation on 29 September 2005, and the publication of its implementing legislation on 28 February 2006, ended all hope of the Benaziza family having access to effective and available domestic remedies that would enable them to discover the fate of the author's grandmother.

### **The complaint**

3.1 The author notes that the arrest of Daouia Benaziza was carried out without a warrant, that her detention was not entered in the police custody register, that there is no official record of her whereabouts or fate and that no judicial guarantees apply to her detention. The author therefore considers that the detention was arbitrary and violated the right to liberty and security of person guaranteed by article 9 of the Covenant.

3.2 The author also argues that the refusal to reveal the fate or whereabouts of Daouia Benaziza or to admit that she has been deprived of liberty removes her from the protection

of the law, thereby violating her right to recognition everywhere as a person before the law, as guaranteed by article 16 of the Covenant.

3.3 The author further argues that the circumstances surrounding the disappearance of Daouia Benaziza themselves constitute a form of inhuman or degrading treatment and that prolonged arbitrary detention increases the risk of torture. Furthermore, at the time of her disappearance, Daouia Benaziza was elderly and suffered from serious health problems that required medical care, which she probably did not receive during her detention. The treatment to which the victim was likely to have been subjected is thus contrary to article 7 of the Covenant. The author also contends that the uncertainty with which members of Daouia Benaziza's family have had to live, which prevents them from finding closure, constitutes inhuman or degrading treatment of them within the meaning of article 7 of the Covenant.

3.4 The author points out that there has been no acknowledgment of Daouia Benaziza's detention and that, consequently, she has been deprived of her right to an effective remedy, as guaranteed by the Covenant. The Benaziza family too has been deprived of an effective remedy since the numerous petitions it has filed have been met with silence and inaction on the part of the authorities. The author explains that the Charter for Peace and National Reconciliation states in section IV that the Algerian people reject all allegations that hold the State responsible for deliberate disappearances. According to article 45 of Ordinance No. 06-01 of 27 February 2006 implementing the Charter: "Legal proceedings may not be brought against individuals or groups who are members of any branch of the defence and security forces of the Republic for actions undertaken to protect persons and property, safeguard the nation and preserve the institutions of the Republic. Any allegation or complaint shall be declared inadmissible by the competent judicial authority." The Ordinance also renders the families of the disappeared liable to heavy fines and harsh prison sentences if they speak of or report these crimes. The Charter has therefore deprived the family of its right to institute proceedings. Ten years after Daouia Benaziza's disappearance, her family still does not know what happened to her. The author is therefore of the view that the State has failed to meet its obligations under article 2, paragraph 3, of the Covenant.

3.5 This lack of an effective remedy has made it impossible for the author and her family to exhaust domestic remedies within the meaning of article 5, paragraph 2 (b), of the Covenant. With regard to the fact that the victim's family has brought the matter before the Working Group on Enforced or Involuntary Disappearances, the author cites the jurisprudence of the Human Rights Committee, in particular the case of *Laureano Atachahua v. Peru*, according to which "extra-conventional procedures or mechanisms established by the Commission on Human Rights or the Economic and Social Council, and whose mandates are to examine and publicly report on human rights situations in specific countries or territories, or on major phenomena of human rights violations worldwide, do not, as the State party should be aware, constitute a procedure of international investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol".<sup>2</sup> The author therefore considers that the communication is admissible.

#### **State party's observations on admissibility**

4.1 On 3 March 2009, the State party contested the admissibility of the communication, as well as that of 10 other communications submitted to the Human Rights Committee. It did so in a "background memorandum on the inadmissibility of communications submitted

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<sup>2</sup> Communication No. 540/1993, *Laureano Atachahua v. Peru*, Views adopted on 25 March 1996, para. 7.1.

to the Human Rights Committee in the context of the implementation of the Charter for Peace and National Reconciliation". The State party considers that communications incriminating public officials, or persons acting on behalf of public authorities, in enforced disappearances during the period in question, that is, from 1993 to 1998, must be considered in the broader context of the domestic socio-political and security environment that prevailed during a period in which the Government was struggling to fight terrorism.

4.2 During that period, the Government had to fight against groups that were not organized among themselves. As a result, there was some confusion in the manner in which a number of operations were carried out among the civilian population, and it was difficult for civilians to distinguish between the actions of terrorist groups and those of the security forces, to whom civilians often attributed enforced disappearances. Hence, cases of enforced disappearance may be of numerous origins but cannot, according to the State party, be attributed to the Government. On the basis of data recorded by a variety of independent sources, including the press and human rights organizations, it can be concluded that the concept of disappearances in Algeria during the period in question covers six distinct scenarios, none of which can be attributed to the State. The first scenario cited by the State party concerns persons reported missing by their relatives but who in fact chose to return secretly in order to join an armed group and who asked their family to report that they had been arrested by the security services as a way of "covering their tracks" and avoiding being "harassed" by the police. The second scenario concerns persons who were reported missing after their arrest by the security services and who took advantage of the situation to go into hiding when they were released. The third scenario concerns persons abducted by armed groups which, because they were not identified or because they had stolen uniforms or identification documents from police officers or soldiers, were mistakenly thought to belong to the armed forces or security services. The fourth scenario concerns persons reported missing who abandoned their families, and sometimes even left the country, to escape personal problems or family disputes. The fifth scenario concerns persons reported missing by their family but who were in fact wanted terrorists who had been killed and buried in the maquis following factional infighting, doctrinal disputes or arguments over the spoils of war among rival armed groups. The sixth scenario mentioned by the State party concerns persons reported missing who were actually living in Algeria or abroad under a false identity provided by a vast network of document forgers.

4.3 The State party stresses that it was in view of the diversity and complexity of the situations covered by the concept of disappearance that the Algerian legislature, following the referendum on the Charter for Peace and National Reconciliation, recommended a comprehensive approach to the issue of the disappeared under which the cases of all persons who had disappeared in the context of the national tragedy would be dealt with, all victims would be offered support to overcome their ordeal and all victims of disappearance and their beneficiaries would be entitled to redress. According to statistics from the Ministry of the Interior, 8,023 cases of disappearance have been reported, 6,774 examined, 5,704 approved for compensation and 934 rejected, with 136 still pending. A total of 371,459,390 Algerian dinars (DA) has been paid out as compensation to all the victims concerned. In addition, a total of DA 1,320,824,683 has been paid out in monthly pensions.

4.4 The State party further argues that not all domestic remedies have been exhausted. It stresses the importance of distinguishing between the simple formalities involving the political or administrative authorities, non-judicial remedies pursued through advisory or mediation bodies, and judicial remedies pursued through the relevant courts of justice. The State party observes that, as may be seen from the authors' statements,<sup>3</sup> the complainants

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<sup>3</sup> In its memorandum, the State party refers to the "authors", as it has provided a common reply to 11

have written letters to political and administrative authorities, petitioned advisory or mediation bodies and petitioned representatives of the prosecution service (chief prosecutors and public prosecutors), but have not, strictly speaking, initiated legal proceedings and seen them through to their conclusion by availing themselves of all available remedies of appeal and judicial review. Of all these authorities, only the representatives of the prosecution service are authorized by law to open a preliminary inquiry and refer a case to the investigating judge. In the Algerian legal system, it is the public prosecutor who receives complaints and who, if warranted, institutes criminal proceedings. Nevertheless, in order to protect the rights of victims or their beneficiaries, the Code of Criminal Procedure authorizes the latter to sue for damages by filing a complaint with the investigating judge. In this case, it is the victim, not the prosecutor, who institutes criminal proceedings by bringing the matter before the investigating judge. This remedy, which is provided for in articles 72 and 73 of the Code of Criminal Procedure, was not utilized, despite the fact that it would have enabled the victims to institute criminal proceedings and compel the investigating judge to initiate an investigation, even if the prosecution service had decided otherwise.

4.5 The State party also notes the authors' contention that the adoption by referendum of the Charter and its implementing legislation — in particular, article 45 of Ordinance No. 06-01 — makes it impossible to consider that there exist in Algeria any effective and available domestic remedies to which the families of victims of disappearance can have recourse. On this basis, the authors believed they were under no obligation to bring the matter before the relevant courts, thereby prejudging the position and findings of the courts on the application of the Ordinance. However, the authors cannot invoke this Ordinance and its implementing legislation to absolve themselves of responsibility for failing to institute the legal proceedings available to them. The State party recalls the Committee's jurisprudence to the effect that a person's subjective belief in, or presumption of, the futility of a remedy does not exempt them from the requirement to exhaust all domestic remedies.<sup>4</sup>

4.6 The State party then turns its attention to the nature, principles and content of the Charter for Peace and National Reconciliation and its implementing legislation. It stresses that, in accordance with the principle of the inalienability of peace, which has become an international right to peace, the Committee should support and consolidate peace and encourage national reconciliation so that States affected by internal crises can rebuild. As part of this effort to achieve national reconciliation, the State party adopted the Charter. The Ordinance implementing the Charter prescribes legal measures for the discontinuance of criminal proceedings and the commutation or remission of sentences for any person who is found guilty of acts of terrorism or who benefits from the provisions of the legislation on civil dissent, except for persons who have committed, or been accomplices in mass killings, rapes or bombings in public places. The Ordinance also prescribes measures to help address the issue of disappearances by introducing a procedure for filing an official declaration of death, which entitles beneficiaries to receive compensation as victims of the national tragedy. Socio-economic measures have also been put in place, including the provision of assistance with finding a job or compensation for all persons considered victims of the national tragedy. Lastly, the Ordinance prescribes political measures: these include a ban on holding political office for any person who exploited religion in the past in a way that contributed to the national tragedy, and declaring inadmissible any proceedings brought against individuals or groups who are members of any branch of the defence and security

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different communications. This reference thus also includes the author of the present communication.

<sup>4</sup> The State party cites in particular communications Nos. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989.

forces of the Republic for actions undertaken to protect persons and property, safeguard the nation and preserve the institutions of the Republic.

4.7 In addition to the establishment of funds to compensate all victims of the national tragedy, the sovereign people of Algeria have, according to the State party, agreed to a process of national reconciliation, which is the only way to heal the wounds inflicted. The State party insists that the proclamation of the Charter reflects a desire to avoid confrontation in the courts, media outpourings and political score settling. The State party is therefore of the view that the authors' allegations are covered by the comprehensive internal settlement mechanism provided for in the Charter.

4.8 The State party asks the Committee to compare the facts and situations as described by the authors with the socio-political and security context at the time; to note that the authors failed to exhaust all domestic remedies; to note that the authorities of the State party have established a comprehensive domestic mechanism for processing and settling the cases referred to in the communications in question through measures aimed at peace and national reconciliation that are consistent with the principles of the Charter of the United Nations and subsequent covenants and conventions; to find the above-mentioned communications inadmissible; and to request the authors to avail themselves of the appropriate remedy.

#### **Additional observations by the State party on admissibility**

5.1 On 9 October 2009, the State party transmitted a further memorandum to the Committee in which it raises the question of whether the submission of a series of individual communications to the Committee might not actually be an abuse of procedure aimed at bringing before the Committee a broad historical issue involving causes and circumstances of which the Committee is unaware. The State party observes in this connection that these "individual" communications dwell on the general context in which the disappearances occurred, focusing solely on the actions of the security forces and never mentioning those of the various armed groups that used criminal concealment techniques to incriminate the armed forces.

5.2 The State party insists that it will not address the merits of these communications until the issue of their admissibility has been settled, since all judicial or quasi-judicial bodies have a duty to deal with preliminary questions before considering the merits. According to the State party, the decision in the cases in point to consider questions of admissibility and the merits jointly and simultaneously — aside from the fact that it was not arrived at on the basis of consultation — seriously prejudices the proper consideration of the communications submitted, in terms of both their general nature and their intrinsic particularities. Referring to the rules of procedure of the Human Rights Committee,<sup>5</sup> the State party notes that the sections relating to the Committee's procedure to determine the admissibility of communications are separate from those relating to the consideration of communications on the merits, and that therefore these questions could be considered separately. With regard, in particular, to the question of the exhaustion of domestic remedies, the State party stresses that none of the communications submitted by the authors was channelled through the domestic courts to be considered by the Algerian judicial authorities. Only a few of the communications that were submitted reached the Indictments Chamber, a high-level investigating court with jurisdiction to hear appeals.<sup>6</sup>

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<sup>5</sup> Rules 93–98 (Procedure to determine admissibility) and 99–101 (Procedure for the consideration of communications on the merits) of the rules of procedure of the Human Rights Committee.

<sup>6</sup> The State party does not cite the communications to which it refers.

5.3 Recalling the Committee's jurisprudence regarding the obligation to exhaust domestic remedies, the State party stresses that mere doubts about the prospect of success or worries about delays do not exempt the authors from the obligation to exhaust these remedies. As to the question of whether the promulgation of the Charter has made it impossible to avail oneself of any remedy in this area, the State party replies that the failure of the authors to take any steps to clarify the allegations has so far prevented the Algerian authorities from taking a position on the scope and limitations of the applicability of the Charter. Moreover, the Ordinance requires declaring as inadmissible only proceedings that are brought against "members of any branch of the defence and security forces of the Republic" for actions consistent with their core republican tasks, namely, to protect persons and property, safeguard the nation and preserve its institutions. On the other hand, any allegations concerning actions attributable to the defence or security forces that can be proved to have taken place in any other context are subject to investigation by the appropriate courts.

5.4 Lastly, the State party reiterates its position with regard to the pertinence of the settlement mechanism established by the Charter for Peace and National Reconciliation. It points out in this regard that it is surprising that some of the authors of the above-mentioned communications have benefited from the process of filing an official declaration of the death of a relative, which entitles them to receive compensation, while at the same time they condemn the system.

#### **Author's comments on the State party's observations**

6.1 On 29 April 2010, the author, through counsel, rejected the State party's arguments relating to admissibility. Before addressing the questions of the exhaustion of domestic remedies, the scope of article 45 of the Ordinance or the scope of the Charter for Peace and National Reconciliation, the author notes that, by formulating general observations on the admissibility of all 12 communications concerning Algeria that are currently before the Committee, the State party fails to satisfy the Committee's requirement that States parties must provide specific responses and pertinent evidence in reply to the author's contentions.<sup>7</sup>

6.2 The author explains that all the summonses received by Abdelkader Benaziza, son of the victim, were written summonses. Nonetheless, Mr. Benaziza was not able to keep all of them, since the services concerned retained them when he arrived for his appointments. It did not occur to Mr. Benaziza to keep a copy of these documents, which did not specify the purpose of the summons and indicated only the date and time of the appointment and the fact that the summons concerned the case of Daouia Benaziza. However, such copies as were in the author's possession are included in the dossier submitted to the Committee.

6.3 Regarding the State party's objection to admissibility on the grounds that the victim's family should have availed itself of the procedure set out in articles 72 and 73 of the Code of Criminal Procedure, the author maintains that the victim's son did not need to avail himself of that procedure, since the many petitions submitted and the complaint lodged against person or persons unknown with the public prosecutor at the Court of Constantine resulted in, respectively, an investigation by the judicial police and an order for dismissal issued by the investigating judge of the First Chamber of the Court of Constantine. In the present case, the petitions filed by Mr. Benaziza with the prosecutor of the military court of Constantine, the Office of the President and various ministries in June and July 1996 apparently led to the opening of an investigation by the judicial police at the request of the public prosecutor of the Court of Constantine, acting on instructions from the

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<sup>7</sup> Communication No. 8/1977, *Weismann de Lanza and Lanza Perdomo v. Uruguay*, Views adopted on 3 April 1980, para. 15.

Ministry of Justice. On 16 August 1997, Abdelkader Benaziza was summoned to the police station in the 13th police district of the *wilaya* of Constantine, where he was handed a document indicating that the inquiries made had proved fruitless and that it had not been possible to identify the persons responsible for the disappearance of Daouia Benaziza.

6.4 In September 1996, in parallel with the steps mentioned previously, Mr. Benaziza filed a complaint for abduction against a person or persons unknown with the public prosecutor at the Court of Constantine. It is clear that, as a result, a judicial investigation was opened at the request of the prosecutor, as attested by the order dated 4 April 2010 dismissing the case that was issued by the First Investigating Chamber of the Court of Constantine, which Mr. Benaziza collected on Monday, 26 April 2010 after being notified of the decision on 21 April 2010. The dismissal order of 4 April 2010 indicates that, pursuant to a request dated 17 February 1999 to open an investigation into the disappearance of Daouia Benaziza, several gendarmes went to the Court of Constantine on 11 April 1999. The conclusions of the gendarmerie's investigation were submitted to the public prosecutor at the Court of Constantine, who reportedly proceeded to open a supplementary investigation. On completion of the judicial investigation, the investigating judge of the First Chamber of the Court of Constantine concluded that the results of the investigation and an analysis of the case file showed that the perpetrators of the disappearance remained unknown and that, in the circumstances, it was pointless to pursue the investigation; hence the decision to terminate the proceedings. Thus, according to the facts set out above and as indicated in the dismissal order, a judicial inquiry was opened into the disappearance of Daouia Benaziza by the investigating judge at the request of the public prosecutor. In the circumstances, it was completely pointless for the Benaziza family to initiate the procedure set out in articles 72 and 73 of the Code of Criminal Procedure, which would merely have ensured that the investigation was conducted in the same way.

6.5 In the author's opinion, the State party failed to respect its obligation under article 2, paragraph 3, of the Covenant to provide the Benaziza family with an effective remedy by conducting a thorough and diligent investigation.<sup>8</sup> In the present case, there was a failure to respect reasonable time limits for the investigation and also to conduct an impartial, thorough and diligent investigation. The fact is that 10 years elapsed between the request for an investigation, which was dated 17 February 1999, and the dismissal order, which was dated 4 April 2010. Furthermore, Mr. Benaziza received notification of the decision by registered letter on 21 April 2010 – 17 days after the decision was handed down. As he was not notified of the court's decision and dismissal order, Mr. Benaziza could take no further steps, since the Code of Criminal Procedure provides for complainants to appeal only against court orders issued by an investigating judge (Code of Criminal Procedure, arts. 168, 172 and 173). In addition, apart from the complainants' hearings, the family was not informed of any aspect of the investigation. Ms. Benaziza's sons received no information about any examinations of suspects or other witnesses or about the outcome of the investigation. Lastly, during the hearings, Mr. Benaziza was repeatedly asked to prove that the security services were responsible for the disappearance of his mother, which raises serious doubts about the effectiveness and impartiality of the investigation.

6.6 With regard to actions that can be brought against State officials on behalf of the victims of disappearances, the author maintains that, contrary to the assertions of the State party, such remedies have not been available since the adoption of article 45 of Ordinance No. 06-01. The last line of this provision clearly establishes that any charge or complaint filed against State officials for actions undertaken to protect persons and property,

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<sup>8</sup> Communications No. 1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007, para. 9; and No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 11.

safeguard the nation and preserve the institutions of the People's Democratic Republic of Algeria are automatically deemed inadmissible. The author claims that the three situations described in article 45 of Ordinance No. 06-01 are formulated so broadly as to encompass all circumstances in which State officials have engaged in serious acts of violence against persons, such as disappearances, extrajudicial killings and even torture. Accordingly, many of the families of the disappeared who have lodged complaints through the courts against a person or persons unknown or who have requested an investigation into the fate of the disappeared person have been directed to the *wilaya* commission charged with implementing the Charter for Peace and National Reconciliation in order to carry out the necessary steps to obtain compensation. The author maintains that, since 2006, the Charter for Peace and National Reconciliation and the compensation procedure have been the only response of the authorities to all the demands for the truth addressed by the families to the relevant judicial and administrative bodies. Hence, on 21 April 2010, the very day that Abdelkader Benaziza received notification of the dismissal order, representatives of the national gendarmerie paid a visit to the former residence of Daouia Benaziza (maiden name Gat) at 17 rue Belaib Mohamed, Constantine. During this visit, the gendarmes asked the Benaziza family to pay a visit to the national gendarmerie headquarters in Sidi Mabrouk, Constantine, which Abdelkader Benaziza did the very next day. He then discovered that the purpose of the meeting was to convince the Benaziza family to initiate the procedure to request compensation for Daouia Benaziza. During this meeting, Abdelkader Benaziza reiterated his desire for the authorities to conduct a genuine investigation to ascertain the fate of his mother and refused to initiate the compensation procedure. Abdelkader Benaziza requested a copy of the minutes of the meeting, but his request was denied.

6.7 Lastly, the author notes that the legislation implementing the Charter requires the families of the disappeared to obtain a declaration of death in order to claim financial compensation. Moreover, this procedure does not include any provision for the police or judicial authorities to carry out an effective investigation to ascertain the fate of the disappeared person. In these circumstances, the legislation implementing the Charter constitutes, in the author's view, an additional violation of the rights of the families of the disappeared and is certainly not a satisfactory response to the problem of disappearances, which should be based on respect for the right to the truth, justice, full redress and the preservation of the memory of the events.

#### **Additional observations by the State party**

7. In additional observations submitted on 12 April 2010, the State party reiterated on a point-by-point basis the comments it had formulated previously regarding the admissibility of the communication.

#### **Issues and proceedings before the Committee**

##### *Consideration of admissibility*

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

8.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee must ascertain that the same matter is not being examined under another procedure of international investigation or settlement. The Committee notes that the disappearance of the author's grandmother was reported to the Working Group on Enforced or Involuntary Disappearances in 1997. However, it recalls that extra-conventional procedures or mechanisms established by the Commission on Human Rights or the Economic and Social Council, and whose mandates are to examine and report publicly on human rights situations



in specific countries or territories or on major phenomena of human rights violations worldwide, do not constitute a procedure of international investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.<sup>9</sup> Accordingly, the Committee considers that the examination of Daouia Benaziza's case by the Working Group on Enforced or Involuntary Disappearances does not make it inadmissible under this provision.<sup>10</sup>

8.3 The Committee notes that, according to the State party, the author has not exhausted domestic remedies, since the author and her family did not consider the possibility of bringing the matter before the investigating judge and suing for damages in criminal proceedings. The Committee notes the author's argument that the complaint filed with the public prosecutor in 1996 against a person or persons unknown led to the issuance of a dismissal order by the investigating judge of the First Chamber of the Court of Constantine on 4 April 2010; that, at the request of the public prosecutor, the investigating judge opened a judicial investigation into the disappearance of Ms. Benaziza; and that, in the circumstances, it was completely pointless for the Benaziza family to initiate the procedure set out in articles 72 and 73 of the Code of Criminal Procedure, which would merely have ensured that the investigation was conducted in the same way. The Committee recalls its jurisprudence to the effect that authors must avail themselves of all judicial remedies in order to fulfil the requirement of exhaustion of all available domestic remedies, insofar as such remedies appear to be effective in the given case and are de facto available to the author.<sup>11</sup> The Committee also recalls that the State party has a duty not only to carry out thorough investigations of alleged violations of human rights, particularly enforced disappearances or violations of the right to life, but also to prosecute, try and punish anyone held to be responsible for such violations. To sue for damages for offences as serious as those alleged in the present case cannot be considered a substitute for charges that should be brought by the public prosecutor. The 17 judicial and non-judicial petitions lodged by the family of the victim over a two-year period failed to result in a trial or thorough investigation, and the complaint lodged against a person or persons unknown resulted, after 10 years, in dismissal of the case, which leads the Committee to conclude that the application of available domestic remedies was unduly prolonged. The Committee therefore finds that the author and her family have exhausted all domestic remedies, in conformity with article 5, paragraph 2 (b), of the Optional Protocol.

8.4 The Committee finds that the author has sufficiently substantiated her allegations insofar as they raise issues under articles 7, 9, 16 and 2, paragraph 3, of the Covenant and therefore proceeds to consider the communication on the merits.

#### *Consideration of the merits*

9.1 The Human Rights Committee has considered the present communication in the light of all the written information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

9.2 Clearly, the State party prefers to maintain that communications incriminating public officials, or persons acting on behalf of public authorities, in enforced disappearances during the period in question, that is, from 1993 to 1998, must be considered in the broader context of the domestic socio-political and security environment that prevailed during a

<sup>9</sup> *Laureano Atachahua v. Peru* (note 2 above), para. 7.1.

<sup>10</sup> *Ibid.*

<sup>11</sup> Communication No. 1003/2001, *P.L. v. Germany*, decision on admissibility adopted on 22 October 2003, para. 6.5. See also communication No. 433/1990, *A.P.A. v. Spain*, decision on admissibility adopted on 25 March 1994, para. 6.2.

period in which the Government was struggling to fight terrorism and that, consequently, they cannot be considered by the Committee under the individual complaints mechanism. The Committee wishes to recall its concluding observations addressed to Algeria at its ninety-first session,<sup>12</sup> as well as its jurisprudence,<sup>13</sup> according to which the State party should not invoke the provisions of the Charter for Peace and National Reconciliation against persons who invoke provisions of the Covenant or who have submitted or might submit communications to the Committee. As emphasized in its concluding observations concerning Algeria,<sup>14</sup> the Committee considers that Ordinance No. 06-01, without the amendments recommended by the Committee, appears to promote impunity and therefore cannot, as it currently stands, be considered compatible with the Covenant. The Committee rejects, furthermore, the argument of the State party that the author's failure to take any steps to clarify the allegations has so far prevented the Algerian authorities from taking a position on the scope and limitations of the applicability of the Charter.

9.3 The Committee recalls the definition of enforced disappearance in article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance of 20 December 2006, which states that "'enforced disappearance' is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law".<sup>15</sup> Any such act of disappearance constitutes a violation of numerous rights enshrined in the Covenant, such as the right to recognition as a person before the law (art. 16), the right to liberty and security of person (art. 9), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art. 7) and the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (art. 10). It may also constitute a violation of the right to life (art. 6) or a serious threat to this right.<sup>16</sup>

9.4 The Committee recalls its settled jurisprudence according to which the burden of proof does not rest solely on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to the relevant information.<sup>17</sup> It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has a duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to provide the Committee with the information available to it. In cases where the author has submitted allegations to the State party that are supported by credible

<sup>12</sup> CCPR/C/DZA/CO/3, para. 7 (a).

<sup>13</sup> *Boucherf v. Algeria* (note 8 above), para. 11.

<sup>14</sup> CCPR/C/DZA/CO/3, para. 7.

<sup>15</sup> General Assembly resolution 61/177. See also the Rome Statute of the International Criminal Court, of 17 July 1998, art. 7, para. 2 (i), *United Nations Treaty Series*, vol. 2187, No. 38544, p. 3; Inter-American Convention on Forced Disappearance of Persons, of 9 June 1994, art. 2, Organization of American States (A-60); Declaration on the Protection of All Persons from Enforced Disappearance, of 18 December 1992 (see General Assembly resolution 47/133).

<sup>16</sup> Communications No. 1328/2004, *Kimouche v. Algeria*, Views adopted on 10 July 2007, para. 7.2; No. 1295/2004, *El Alwani v. Libyan Arab Jamahiriya*, Views adopted on 11 July 2006, para. 6.2; No. 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006, para. 9.2; and No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003, para. 9.3. See art. 1, para. 2, of the Declaration on the Protection of All Persons from Enforced Disappearance (note 15 above).

<sup>17</sup> Communications No. 139/1983, *Conteris v. Uruguay*, Views adopted on 17 July 1985, para. 7.2; *Bousroual v. Algeria* (note 16 above), para. 9.4; and No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.3.

evidence, such as the 17 petitions submitted to the administrative and judicial authorities, and where further clarification, such as the replies provided by these same authorities, depends on information exclusively in the hands of the State party, the Committee may consider these allegations substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party.<sup>18</sup>

9.5 In the present case, the Committee notes that the author's grandmother, who was 68 years old at the time of the events, was reportedly arrested on 2 June 1996 by what clearly appears to be military security officers, most of them hooded and armed, some wearing uniforms and others in plain clothes. The author, her father and her uncles, as well as the neighbours, witnessed the scene. Despite the fact that the following day the police security services officially denied having arrested the author's grandmother, the military officers at the office of the prosecutor of the military court in the fifth military region of Constantine, for their part, reportedly acknowledged having arrested her, adding that she would be released shortly thereafter. The Committee notes that the State party has not furnished any explanation of these allegations, thus making it impossible to shed the necessary light on the events of 2 June 1996 or subsequent events. The Committee recognizes the degree of suffering entailed in being detained indefinitely and deprived of all contact with the outside world. In this connection, the Committee recalls its general comment No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment, in which it recommends that States parties should make provisions against incommunicado detention.<sup>19</sup> In the absence of a satisfactory explanation from the State party concerning the disappearance of the author's grandmother, the Committee considers that this disappearance constitutes a violation of article 7 of the Covenant with regard to Daouia Benaziza.

9.6 The Committee also takes note of the anguish and distress caused by the disappearance of the author's grandmother to her close family, including her sons, since 2 June 1996. It therefore considers that the facts before it reveal a violation of article 7 of the Covenant with regard to them.<sup>20</sup>

9.7 With regard to the alleged violation of article 9, the information before the Committee shows that the author's grandmother was arrested by military security officers and that the office of the prosecutor of the military court in the fifth military region of Constantine confirmed that the author's grandmother was being held in a barracks located in the centre of Constantine. The Committee notes that the State party has not responded to this allegation but has merely stated that the concept of disappearances in Algeria during the period in question covers six distinct scenarios, none of which can be attributed to the State. The State party has offered no explanation, other than the scenarios referred to above, to absolve itself of responsibility for the disappearance of the author's grandmother or for finding the perpetrators of her disappearance. In the absence of adequate explanations from the State party concerning the author's allegations that her grandmother's apprehension and subsequent incommunicado detention were arbitrary or illegal, the Committee finds a violation of article 9 with regard to Daouia Benaziza.<sup>21</sup>

<sup>18</sup> Communication No. 1439/2005, *Aber v. Algeria*, Views adopted on 13 July 2007, para. 7.2.

<sup>19</sup> *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A, para. 11.

<sup>20</sup> Communication No. 107/1981, *Almeida de Quinteros v. Uruguay*, Views adopted on 21 July 1983, para. 14; *Sarma v. Sri Lanka* (note 16 above), para. 9.5; *Bousroual v. Algeria* (note 16 above), para. 9.8; *Grioua v. Algeria* (note 8 above), para. 7.7.

<sup>21</sup> *Medjnoune v. Algeria* (note 17 above), para. 8.5.

9.8 With regard to the alleged violation of article 16, the Committee reiterates its settled jurisprudence, according to which the intentional removal of a person from the protection of the law for a prolonged period of time may constitute a refusal to recognize that person as a person before the law if the victim was in the hands of the State authorities when last seen and if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (Covenant, art. 2, para. 3) have been systematically impeded.<sup>22</sup> In the present case, the author indicates that her grandmother was arrested on 2 June 1996 by State security officers, some of whom were in uniform. To date she has received no news of her grandmother's fate and the 17 petitions filed with the authorities have all proved fruitless. The Committee notes that the State party has not furnished adequate explanations concerning the author's allegations that she has had no news of her grandmother. It considers that when a person is arrested by the authorities, if there is subsequently no news on their fate and no investigation is carried out, this omission on the part of the authorities amounts to removing the disappeared person from the protection of the law. The Committee concludes from this that the facts before it in the present communication disclose a violation of article 16 of the Covenant with regard to Daouia Benaziza.

9.9 The author invokes article 2, paragraph 3, of the Covenant, which confers on States parties the obligation to ensure that all persons have accessible, effective and enforceable remedies in order to exercise these rights. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing claims of rights violations. It refers to its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, which provides, inter alia, that the failure by a State party to investigate allegations of violations could, in and of itself, give rise to a separate breach of the Covenant.<sup>23</sup> In the present case, the information before the Committee indicates that the author did not have access to an effective remedy. The Committee therefore concludes that the facts before it disclose a violation of the rights of the author's grandmother under article 2, paragraph 3, of the Covenant, read in conjunction with article 6, paragraph 1, and articles 7, 9 and 16; and a violation of the rights of the author and her family under article 2, paragraph 3, of the Covenant, read in conjunction with article 7.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of the rights of the author's grandmother under articles 7, 9 and 16, and article 2, paragraph 3, of the Covenant, read in conjunction with article 6, paragraph 1, and articles 7, 9 and 16; and a violation of the rights of the author, her father and her uncles under article 7 and article 2, paragraph 3, of the Covenant, read in conjunction with article 7.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, in particular by conducting a thorough and diligent investigation into her grandmother's disappearance, duly informing her of the outcome of the investigation and paying appropriate compensation to the author, her father and her uncles. The Committee considers the State party duty-bound not only to conduct thorough investigations into alleged violations of human rights, particularly enforced disappearances and acts of torture, but also to

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<sup>22</sup> *Grioua v. Algeria* (note 8 above), para. 7.8; and communication No. 1495/2006, *Zohra Madoui v. Algeria*, Views adopted on 28 October 2008, para. 7.7.

<sup>23</sup> *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III, para. 15.

prosecute, try and punish the culprits.<sup>24</sup> The State party is also under an obligation to prevent similar violations in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not 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 in case a violation has been established. The Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

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<sup>24</sup> *Boucherf v. Algeria* (note 8 above), para. 11; *Medjnoune v. Algeria* (note 17 above), para. 10; and *Madoui v. Algeria* (note 22 above), para. 9.

## Appendix

### Individual opinion of Committee member Mr. Fabián Salvioli (partially dissenting)

1. I have generally concurred with the Committee's decision on the case of *Benaziza v. Algeria* (communication No. 1588/2007); although I regret to say that I must dissent from some aspects regarding the admissibility, treatment and assessment of the possible violations of the International Covenant on Civil and Political Rights. In the paragraphs below, I will expound the reasons that have led me to issue this partially dissenting opinion.

#### I. The "victim" status of the family of Ms. Daouia Benaziza, in accordance with the Optional Protocol, and the accreditation of counsel

2. The Committee, correctly in my opinion, has stated that there has been a violation of the rights established in article 7 and in article 2, paragraph 3, read in conjunction with article 7, of not only the author of the communication, but also of her father and her uncles, who are the granddaughter and sons, respectively, of Ms. Daouia Benaziza, the victim of an enforced disappearance. According to the Committee's consistent and settled jurisprudence, the enforced disappearance of a person in itself constitutes a violation of the rights of that person's immediate family.<sup>a</sup> The concept of family within the context of human rights law does not necessarily need to coincide with that specified in national legal systems as this would result in different standards being applied according to domestic legislation. The notion of family in international human rights cases thus refers to the presence of an actual "emotional bond" between the victim of the enforced disappearance and the persons with whom the victim lived or family members with whom the victim had close emotional ties.

3. According to the Optional Protocol and the Committee's interpretation of that Protocol, those submitting an individual communication must have victim status or legally represent the victim. Article 2 of the Protocol must be analysed in light of the object and purpose of the Protocol and of the International Covenant on Civil and Political Rights itself, with a view to ensuring the "useful effect" of these instruments. The system for the submission of individual communications to the Human Rights Committee precludes, of course, the possibility of a "popular action"; it is also clear that the system aims to render inadmissible any petitions presented on behalf of persons who do not wish the matter to be submitted to international jurisdiction and have consequently not given their authorization for this to be done.

4. It should not be presumed that this is the situation, however, when the person submitting the communication is a direct relative, as in this case, in which the author is acting on behalf of her father and uncles, in response to the enforced disappearance of their mother, her grandmother. The evidence submitted by the author and subsequently highlighted in the Committee's decision includes descriptions of various actions taken by the Benaziza family in the desperate search for news about Ms. Daouia Benaziza. Reportedly, her sons presented themselves before the prosecutor of the military court in the

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<sup>a</sup> Communications No. 107/1981, *Almeida de Quinteros v. Uruguay*, Views adopted on 21 July 1983, para. 14; No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003, para. 9.5; No. 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006, para. 9.8; and No. 1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007, para. 7.7.

fifth military region of Constantine, whereupon one of them even offered to take his mother's place in captivity. It would be inconceivable for the Committee to deny these family members the status of victims merely on the basis of the absence of a power of attorney or similar written document authorizing the case to be pursued at the international level.

5. Fortunately, on this point, the Committee did not assume such a position, which, for the sake of fulfilling mere formalities and with a total disregard for the circumstances surrounding the case, would have ended up undermining the object and purpose of the Covenant and its Protocol. As long as the adversarial principle is respected, and each party thus has the possibility of responding fully to the facts argued by the other, and provided that the respondent State has access to a proper defence, the Committee cannot and should not undermine the administration of justice or the fulfilment of the Covenant's purposes. In the *Benaziza* case, the respondent State has never questioned the author's right to present her father and uncles as victims, and, under those circumstances, all that remains for the Committee to do is to verify whether they do indeed have the status of victims, in other words, whether in their case one or more of the rights contained in the Covenant has been violated.

6. The situation would be different if the complaint were being filed by someone outside the family or, in this case, if there were insufficient evidence to claim that the family was genuinely concerned and truly suffered on account of Ms. Daouia Benaziza's disappearance. An international body may exercise flexibility in its assessment of the evidence. Moreover, its workings should not resemble the handling of cases in national courts where the administration of formal justice often ends up contradicting material justice.

## II. The capacity of the Committee to establish violations under articles not referred to in the petition

7. As I have maintained since I joined the Committee,<sup>b</sup> the Committee should not, in the absence of a specific allegation by the author of a communication that one or more articles have been violated, restrict its own capacity to find other possible violations of the Covenant that are supported by the established facts. Under the Committee's rules of procedure,<sup>c</sup> a respondent State can submit statements relating to both the admissibility and the merits of the complaint set forth in the communication; if the adversarial principle in the procedure established by the first Optional Protocol for dealing with individual communications is fully respected, neither party should be left without a proper defence.

8. The principle of *iura novit curia*, universally and uncontroversially followed in international jurisprudence in general<sup>d</sup> and especially where human rights are concerned,<sup>e</sup> gives the Human Rights Committee scope not to restrict itself to the legal claims made in a complaint when the facts disclosed and established in adversarial proceedings clearly reveal

<sup>b</sup> See the case of *Weerawansa v. Sri Lanka*, communication No. 1406/2005, partially dissenting opinion of Mr. Fabián Salvioli.

<sup>c</sup> Rule 91.

<sup>d</sup> Permanent Court of International Justice, *The Case of the S.S. "Lotus"*, Judgment No. 9, *PCIJ*, Series A, 1927, No. 10, p. 31.

<sup>e</sup> European Court of Human Rights, *Handyside v. United Kingdom*, Judgement of 7 December 1976, Series A, No. 24, para. 41; Inter-American Court of Human Rights, *Godínez-Cruz v. Honduras*; Series C N, para. 172; Judgement of 20 January 1989.

the violation of a provision not cited by the complainant. Should this be the case, the Committee must set the proper legal frame of reference for the violation.

9. Likewise, to ensure that all the purposes of the Covenant are complied with, the Committee's protective powers authorize it to rule that the State party found to be at fault must put a stop to all the effects of the violation, guarantee that such a thing will not recur, and make reparation for the damage caused in the particular incident concerned.

10. It is in this sense that I dissent, without prejudice to the actual decision itself, from section 8.4 of the decision in this case, because it should specifically state that the complaint raises issues related to article 6 of the Covenant. I do not see how an enforced disappearance such as the one reported in this case, which occurred in 1996, fails to raise issues related to the right to life when no news has been received of the victim since her arbitrary detention 14 years ago.

11. Over the years, the Committee's actions have been contradictory in this regard, and this inconsistency is particularly apparent in the present case: on the one hand, the Committee has omitted any reference to a possible violation of article 6 of the Covenant because this violation was not alleged by the author; on the other, it concludes that there was a violation of the rights of Ms. Daouia Benaziza under article 2, paragraph 3, of the Covenant, read in conjunction with article 6, paragraph 1, and articles 7, 9 and 16; and a violation of the rights of the author and her family under article 2, paragraph 3, of the Covenant, read in conjunction with article 7 (para. 9.9).

12. The author did not argue many of these "related violations", identified by the Committee, of article 2, paragraph 3; instead the author alleged an autonomous violation of the paragraph. Up to what point, then, does the Committee have the power to "reinterpret" the legal arguments of the parties?

13. Another issue which must be clarified as regards the Committee's deliberations is the varying interpretation of its capacity to apply the Covenant as law in the absence of legal argument, according to whether the author of a communication is represented by counsel or not. All petitions should receive the same treatment from the Committee, and it is not up to the Committee to speculate on the extent of the legal knowledge of those who appear before it. If the facts disclosed constitute clear evidence of torture, for example, and this is proven to be the case in the proceedings even though it was not legally argued by the petitioner, regardless of whether the petitioner is represented by counsel or not, the Committee ought to take the matter up under article 7. This does not leave the State party without a proper defence: the State party can respond to the statements made and the evidence presented and make its observations about the legal argument; it is the Committee that has the non-transferable power to apply the law and, specifically, the Covenant.

14. Legal assistance in international human rights cases can take many different forms depending on the situation and the actual international expertise available. It is not for the Committee to speculate on this matter; each petition should be treated the same regardless of whether the author has legal assistance or not. What the Committee cannot overlook is the evidence submitted by the author of a communication. At the same time it must give due consideration to the State party's response to that same evidence. The non-transferable duty of the Committee is to decide whether the facts of the case have been proven and, if they have, whether they represent one or more violations of the Covenant.

15. As long as the Committee fails to apply this criterion, it will continue to act inconsistently: at times analysing rights violations that have not been presented, as has occurred recently; at times, as in this case, inexplicably limiting its powers merely on account of the absence of legal arguments, even though all the facts clearly point to possible violations of article 6 of the Covenant.



### **Enforced disappearances and article 6 of the International Covenant on Civil and Political Rights**

16. Having established that the Committee has the power to set the legal frame of reference for the matter before it, regardless of the legal claims made by the parties, I maintain that in the *Benaziza* case the Committee should have concluded that the State party was responsible for violating the rights of Ms. Daouia Benaziza under article 6 of the Covenant.

17. The Committee's general comment No. 6 (1982) on the right to life states that States parties should take specific and effective measures to prevent the disappearance of individuals and should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.<sup>f</sup> These specific measures ought to consist not only of applying effective legal remedies in response to arbitrary detentions, but also, in the light of the duty to guarantee the right to life, of preventing any action by State agents that could result in enforced disappearances.

18. In this case, the author claims that her grandmother was arrested by State security officers, some of whom were in uniform, on 2 June 1996; that she has not received any news about her grandmother's fate; and that none of the 17 petitions presented to the authorities have produced results. Given that the State party has not provided satisfactory explanations to the allegations made by the author, who asserts that she has still not received any news about her grandmother, the Committee should have found that the facts before it disclosed a violation of paragraph 1 of article 6, inasmuch as the State party failed to meet its obligation to guarantee the right to life of Ms. Daouia Benaziza.

19. The duty to guarantee the rights established in the Covenant is referred to in three ways: article 2, paragraph 1, establishes the duty to guarantee the rights of all persons without distinction of any kind, embodying (obviously) the principle of non-discrimination in the enjoyment of rights; article 2, paragraph 3, refers to the effective remedy that all persons are entitled to when any of the rights enshrined in the Covenant is violated; and thirdly, there is the duty to guarantee each right in itself.

20. There is no need for each right recognized in the Covenant to begin with a statement that it must be guaranteed by the State. Also it would be absurd to say that the duty to guarantee those rights only refers to the obligation to not discriminate or to the obligation to provide a remedy in the case of violation. The duty to guarantee in itself is not established in article 2, paragraph 2, of the Covenant either. That paragraph refers to legislative or other measures to give effect to the rights established in the Covenant and embodies the principles that human rights are self-executing and have useful effect, both of which are intrinsically related, but do not refer solely, to the general duty to guarantee those rights.

21. Logic dictates that there is a duty to guarantee all the rights established in the Covenant for each person under a State party's jurisdiction. This duty to guarantee in itself is legally enshrined in the specific provision on each right established in the Covenant.

22. Consequently, in the case at hand, article 6, paragraph 1, was violated because the State party did not guarantee the right to life of Ms. Daouia Benaziza; in no way does this imply that the victim has died, as there is no evidence of this in the file. The State party must restore the right and consequently take the necessary measures for the victim to recover her freedom alive. In the meantime, the family must be allowed to file the pertinent

<sup>f</sup> *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40), annex V, para. 4.*

civil action suits, including those regarding succession- and assets-related matters arising from the enforced disappearance of Ms. Daouia Benaziza and not from her presumed death.

23. In the course of its decisions, the Committee has found in several cases of enforced disappearance that the victims' rights under article 6 of the Covenant had been violated,<sup>g</sup> even though it was not entirely clear what had happened to those victims. Regrettably, however, in other cases, including this one of Ms. Benaziza, the Committee has not followed this line of reasoning.<sup>h</sup> The development of human rights law is progressive by nature, and this logically obliges the international bodies responsible for applying such law not to make legal interpretations that are regressive in relation to established standards of protection. It is to be hoped that the Committee will return to the application of more guarantee-oriented criteria and a hermeneutical implementation of the Covenant that is in accordance with its object and purpose, both in matters of procedure and in matters of substance. This would help the States parties, in good faith, to adopt the measures required to make adequate reparation for violations committed, in fulfilment of the commitments assumed with regard to the international community.

(Signed) Mr. Fabián Salvioli

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

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<sup>g</sup> *Bousroual v. Algeria* (note a above); communications No. 449/1991, *Barbarín Mojica v. Dominican Republic*; No. 181/1984, *Arévalo Pérez v. Colombia*; and No. 030/1978, *Bleier v. Uruguay*.

<sup>h</sup> Communications No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*; and No. 1469/2006, *Sharma v. Sri Lanka*.

**CC. Communication No. 1589/2007, *Gapirjanov v. Uzbekistan*  
(Views adopted on 18 March 2010, ninety-eighth session)\***

<i>Submitted by:</i>	Sanobar Gapirjanova (not represented by counsel)
<i>Alleged victim:</i>	Youzef Gapirjanov, the author's son
<i>State party:</i>	Uzbekistan
<i>Date of communication:</i>	15 November 2006 (initial submission)
<i>Decision on admissibility</i>	10 October 2008
<i>Subject matter:</i>	Unfair trial with resort to torture during preliminary investigation
<i>Procedural issues:</i>	Exhaustion of domestic remedies; level of substantiation of claim; evaluation of facts and evidence
<i>Substantive issues:</i>	Torture; habeas corpus; unfair trial
<i>Articles of the Covenant:</i>	7, 9, 10 and 14
<i>Articles of the Optional Protocol:</i>	5, paragraph 2 (b); 2

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

*Meeting* on 18 March 2010,

*Having concluded* its consideration of communication No. 1589/2007, submitted to the Human Rights Committee on behalf of Mr. Youzef Gapirjanov under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication, and the State party,

*Adopts* the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication is Ms. Sanobar Gapirjanova, an Uzbek national born in 1935. She submits the communication on behalf of her son, Mr. Youzef Gapirjanov, also an Uzbek national, born in 1963, currently serving a 10-year prison sentence handed down by the District Court of Hamza (Tashkent) on 10 February 2005 for drug trafficking. The author claims that her son is a victim of violations by Uzbekistan of his rights under article 7; article 9; article 10; 12; and article 14, paragraphs 1 and 3 (b), (d), and (e), of the International Covenant on Civil and Political Rights. The author is not represented by counsel.

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Ahmed Amin Fathalla, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

**The facts as submitted by the author**

2.1 On 10 February 2005, the District Court of Hamza (Tashkent) handed down a 10-year prison sentence, convicting the author's son for illicit traffic in drugs. The author's son was also recognized as a dangerous recidivist. On 19 April 2005, the case was heard on appeal by the Tashkent City Court and the sentence was upheld. Several petitions for supervisory judicial review (*nadzornaya zhaloba*) submitted on behalf of the author's son were subsequently dismissed by the Supreme Court of Uzbekistan.<sup>1</sup>

2.2 The author claims that when her son was arrested on 11 August 2004, he was beaten by police officers to force him to plead guilty. As a result he suffered damage to his left ear and had to be taken to hospital for care. The author contends that her son informed a prosecutor of this on an unspecified date, but that the prosecutor ignored his complaint. His file contained a medical certificate dated 13 August 2004 from a doctor in the traumatology service of Hospital No. 1 in Tashkent, stating that the son's injury was indeed the result of "mechanical damage". According to the author, the investigators later removed this certificate from the file.<sup>2</sup>

2.3 The author asserts that, in the light of her son's repeated complaints about the use of illegal investigation methods, the court should have ordered a new medical examination and verified the specific cause of his injury. However, the court did not order any additional examinations and declared itself satisfied with the testimony of a medical expert, according to whom Mr. Gapijjanov suffered from chronic otitis, but the examination had been conducted too late to determine whether he had been struck on the ear. It is also claimed that the court accepted statements from police officers, which affirmed that the investigation had been carried out according to the rules and without having to resort to force.<sup>3</sup>

2.4 According to the author, her son's trial was unfair and his sentence unfounded. Her son had been accused of having sold heroin on various occasions to three different individuals. The criminal responsibility of those three individuals had also been engaged in the context of the same case; they therefore had a personal interest in the matter and were all drug addicts. Those individuals, according to the author, had incriminated her son in order to limit their liability. The author's son had not been caught *in flagrante delictu*;

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<sup>1</sup> With regard to the petitions for supervisory review, the author has submitted copies of various petitions presented on behalf of her son. Such petitions were addressed to the President of the Supreme Court on 20 July and 12 September 2005. One petition was addressed to the Presidium of the Supreme Court on an unspecified date. On 11 November 2005, the First Deputy President of the Supreme Court dismissed the petitions. Another petition for judicial review was addressed to the President of the Supreme Court on 15 December 2006. On 1 February 2007, the President of the Supreme Court's Criminal Division informed the author that he had examined the case and had found no justification for requesting a review.

<sup>2</sup> The author provides a copy of a response from the senior medical officer of her son's place of residence, dated 26 January 2005, certifying that Mr. Gapijjanov had not suffered from any ear disorder in the past.

<sup>3</sup> In support of her allegations on her son's ill-treatment, the author contends that he was initially placed in custody at the UYa-64/IZ-1 detention centre in Tashkent. When it became clear that the detention centre would receive a visit from representatives of the International Committee of the Red Cross, the officials transferred him to another detention centre in Tashkent (in the Kibrai district), according to the author in order to prevent him from revealing that he had been beaten by the police. A fictitious document is alleged to have been drawn up for that purpose by the head of the Kibrai detention centre, stating that Mr. Gapijjanov had been arrested for drug possession on 28 October 2004 in the Kibrai district. The author notes that her son was already in custody on that date, and the alleged arrest was therefore impossible.

therefore, the accusation against him was based solely on false statements that those three individuals produced to avoid being held responsible. No other objective evidence of the son's guilt was produced, neither during the preliminary investigation nor in court.<sup>4</sup>

2.5 The right to defence of the author's son allegedly was violated because he was not represented by counsel after his arrest, in spite of his repeated requests. Investigation procedures involving the author's son were thus conducted in the absence of a lawyer. Several of the requests or petitions submitted by the author's son during the preliminary investigation or during the trial were not examined, which allegedly made it impossible to establish the objective truth.<sup>5</sup> Neither the investigators nor the courts questioned a certain Mr. Turdikhodjaev, who could have confirmed the son's alibi. In addition, her son did not attend the appeal hearing, despite his specific request to this effect.<sup>6</sup>

2.6 The author contends that her son's lawyers acted in a passive way. Thus, the lawyers failed to request certification of the level of drug dependency of the three other persons accused together with her son. They failed to submit to the court an expert evaluation of the damage to her son's left ear, and did not request a new examination of his injury.

2.7 According to the author, in violation of article 243 of the Uzbek Code of Criminal Procedure, her son was not questioned by a prosecutor in connection with his placement in custody; yet a record of an interrogation between her son and a prosecutor was prepared in advance by the investigator.

2.8 On 12 August 2004, police officers allegedly cut the pockets out of her son's trousers, before sealing them and sending them off for analysis. The author claims that no witnesses were present during this procedure, thus rendering it illegal. This was also disregarded by the court.

2.9 The investigators are said to have conducted a search of Mr. Gapiirjanov's apartment and to have found 0.11 grams of heroin there. The author claims that, according to her son, the drugs in question had been planted and were hidden in the apartment by the police officers themselves. When the drugs were found, the officers made all the witnesses leave the room. This, the author argues, explains why the investigator then refused to order an analysis to compare the drugs seized in her son's apartment with those seized at the apartment of one of the co-accused.

2.10 The author claims that, during the preliminary investigation, one of the police officers demanded US\$ 1,000 in exchange for a promise to close the case, an offer which her son refused.

2.11 The author finally contests the findings of a complementary expert examination of the seized heroin (conducted on 30 August 2004), arguing that such an examination could not have taken place since the drugs seized should already have been used in their entirety during the analyses conducted on 12 and 13 August 2004.

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<sup>4</sup> According to the author, her son was taken out of the courtroom and deprived of his right to make a closing statement at the end of the proceedings, but there is nothing in the case file to support this allegation.

<sup>5</sup> The author further contends that during the preliminary investigation and the trial proceedings, she and her son submitted 114 petitions to various institutions, but received only 16 official replies.

<sup>6</sup> The court allegedly rejected his request on the grounds that it had only been made on the day of the appeal hearing. According to documents presented by the author, on 5 April 2005, the court of appeal informed the author's son and his lawyer that the appeal would be heard on 19 April 2005, but before the hearing the court did not receive any request for it to question her son during the hearing.

### **The complaint**

3.1 The author claims that her son is a victim of a violation of his rights under articles 7 and 10, as he was beaten by police officers during his arrest. The prosecutor ignored her son's complaints in this regard, and the court did not order his medical examination to verify his contention.

3.2 The author claims that her son is a victim of violations of article 9, as, after his arrest, he was not brought before a judge or other officer authorized by law to exercise judicial power.

3.3 The author claims, without offering further information, that her son is a victim of violation of his rights under article 12, of the Covenant.

3.4 Ms. Gapiirjanova contends that her son's trial did not meet the requirements of fairness within the meaning of article 14, paragraph 1, of the Covenant, and his sentence was unfounded.

3.5 The author argues that her son's rights under article 14, paragraphs 3 (b) and (d), were violated, as he was unrepresented after his arrest in spite of his request to this effect, and that he was not allowed to attend the appeal hearing of his case.

3.6 The author finally claims that her son's rights under article 14, paragraph 3 (e), were violated, as different requests made on his behalf during the investigation and in court were ignored, and, in particular, neither the investigators nor the court had interrogated a witness who could have confirmed the author's son alibi defence.

### **State party's observations on admissibility**

4.1 On 15 October 2007, the State party recalled that on 10 February 2005, the Hamza District Court had found Mr. Gapiirjanov guilty of a violation of article 275 of the Uzbek Criminal Code (illegal production, purchase or possession of narcotic or psychotropic substances and other related activities, with a view to their sale) and sentenced him to a 10-year prison term, as a dangerous repeat offender. The judgement was upheld on appeal by the Tashkent City Court on 19 April 2005. The State party noted that Mr. Gapiirjanov had not exhausted all available domestic remedies, as his case had not been examined by the Supreme Court of Uzbekistan under the supervisory review procedure. The State party thus requests the Committee to declare the communication inadmissible.

4.2 The State party asserts, without submitting details, that none of the author's allegations related to the conduct of the investigation or the trial are founded.

### **Decision on admissibility**

5.1 During its ninety-fourth session, on 10 October 2008, the Committee considered the admissibility of the communication. It noted the State party's challenge to admissibility on the grounds that the case had not been examined by the Supreme Court of Uzbekistan under the supervisory review procedure. The Committee observed that the State party provided no explanation as to the effectiveness of these proceedings but limited itself to noting that they were provided for by law. The Committee considered that even if such remedies may be *effective* in certain situations, such reviews were possible only with the express consent of the President or Vice-Presidents of the Supreme Court, who therefore have discretionary power to refer or not to refer a case to the Court, whereas a convicted person claiming that his or her rights have been violated could not initiate such a review directly.

5.2 The Committee noted that, in the present case, the author provided copies of several letters rejecting her requests for a judicial supervisory review in her son's case. These rejections were signed by the President or the Vice-Presidents of the Supreme Court; thus,

the fact that the case of the author's son had not been examined by the Criminal Division, the Plenum or the Presidium of the Supreme Court could in no way be attributed to the author. The Committee also noted that the State party's Courts Act indicated that, apart from reviews conducted by the Chambers of the Supreme Court, the Presidium or the Plenum of the Supreme Court *may* also examine such cases. In the Committee's view, this showed that the remedies concerned are not generally applicable but remain discretionary and exceptional. Accordingly, the Committee considered that it was not barred from examining the present communication by article 5, paragraph 2 (b), of the Optional Protocol.

5.3 The Committee further noted the author's claim that her son's rights under article 12 of the Covenant have been violated, without providing any information in support of the claim. In the absence of any other pertinent information, it considered that the author's contentions in this regard were inadmissible under article 2 of the Optional Protocol.

5.4 The Committee considered that the author's allegations raising issues under article 7; article 9; article 10; and article 14, paragraphs 1 and 3 (b), (d) and (e), of the Covenant were sufficiently substantiated for purposes of admissibility, and that the authors' claims in respect of these provisions should be examined by the Committee on their merits.

#### **State party's observations on the merits**

6.1 The State party presented its observations on the merits by note verbale of 6 March 2009. It recalls the facts of the case: on 10 February 2005, the Khamzinsk district Court of Tashkent found Mr. Gapiirjanov guilty of illicit selling of narcotic substances in an important amount, and sentenced him to 10 years in prison. This decision was confirmed on appeal, on 19 April 2005, by the Tashkent City Court. Mr. Gapiirjanov was also found to be a particularly dangerous recidivist.

6.2 The State party points out that, given that the Tashkent City Court initially examined Mr. Gapiirjanov's appeal in the victim's absence, the Presidium of the Tashkent City Court annulled, on 30 January 2008, the appeal decision of 19 April 2005. Following a new appeal examination, on 11 March 2008, the Tashkent City Court confirmed Mr. Gapiirjanov's sentence of 10 February 2005.

6.3 The State party contends that the author's allegations in the present communication are groundless. Mr. Gapiirjanov was arrested on 11 August 2004. After his arrest, police officers seized his trousers' pockets, in the presence of official witnesses. This investigation act was duly recorded and signed by those present. A chemical-forensic examination of 30 August 2004 established that the seized pockets disclosed traces of heroin.

6.4 The State party contends that in the light of the urgency, the search in Mr. Gapiirjanov's home on 13 August 2004 was carried out without prior agreement of a prosecutor. However, the prosecutor was duly informed, in accordance with the law in force (article 161 of the Criminal Procedure Code), about the search in question. The official witnesses present did not report any irregularities and confirmed the content of the official records made in respect of the outcome of the search. During the search, police officers discovered a small package that later appeared to contain 0.11 grams of heroin.

6.5 According to the State party, from the moment of arrest, Mr. Gapiirjanov's Constitutional rights were fully respected, he was assigned an ex officio lawyer, and his relatives were informed about his arrest.

6.6 On 12 August 2004, Mr. Gapiirjanov was interrogated as a suspect in the presence of a lawyer, Mr. Sadirislomov. Mr. Gapiirjanov had not complained about unlawful acts by the investigators. Throughout the preliminary investigation, Mr. Gapiirjanov had requested on a

number of occasions to have his lawyers replaced. For this reason, his lawyers had changed several times. In any event, his procedural rights were always protected, as required by law.

6.7 The State party recalls that according to a conclusion of a forensic-medical examination of 7 October 2004, Mr. Gapirjanov had sought medical help about his left ear on 13 August 2004. On this occasion, it was found out that he suffered from chronic otitis, what was not due to any coercive acts. His body did not disclose any injuries at that time. When interrogated in court on the matter, an expert of the Medical-Forensic Office explained that Mr. Gapirjanov had complained about his ear on 13 August 2004 and his otitis was then discovered. According to the expert, the incubation period before the manifestation of such diseases was around one month, i.e. the alleged victim's disease had started prior to the victim's arrest.

6.8 As to the author's allegations that a police officer had offered to close the criminal case against Mr. Gapirjanov in exchange for US\$ 1,000, the State party affirms that these were examined by an investigator at the time, and were found to be groundless (by official decision of 6 November 2004).

6.9 The State party finally contends that the allegations that Mr. Gapirjanov's guilt had been established only on the basis of testimonies of three individuals to whom he had sold drugs are unfounded. The State party points out that in addition to the depositions of the three individuals in question, Mr. Gapirjanov's guilt was also established on the basis of the depositions of other witnesses, such as Ms. Starikova, Ms. Radsulova, and Ms. Umarova. These witnesses had confirmed their depositions in a cross-examination together with Mr. Gapirjanov. His guilt was also established on the basis of forensic-chemical experts' conclusions, material, and other objective and corroborating evidence that were declared admissible by the courts.

#### **Author's comments on the State party's observations**

7.1 The author presented her comments on 3 April 2009. She reiterates her previous allegations. In particular, she contends that the State party's affirmation that her son was involved in drug trafficking was unfounded. In her opinion, the accusation against her son was based on the testimonies of individuals who were former or current drug addicts. These individuals had an interest in incriminating her son, in order to avoid the engagement of their own liability. All complaints in this respect were, according to the author, ignored by the authorities and her son's sentence was upheld.

7.2 The author further recalls that when her son was arrested on 11 August 2004, in Mr. Batskikh's home, there were three other individuals present, including a woman. These individuals were never interrogated during the preliminary investigation; this was due to the fact, according to the author, that Mr. Batskikh had in fact organized a brothel in his house, and in order to avoid charges, had designated Mr. Gapirjanov as a drug seller. Even though the author's son had had an alibi, the investigators interrogated a witness who could confirm this only two and a half months later.

7.3 The author reiterates that the search and the cutting out of her son's pockets were carried out in the absence of official witnesses. The author also recalls her allegations that during the discovery of the 0.11 grams of heroin in her son's home, the official witnesses had not been present as they were asked to leave.

7.4 The author also repeats her claim that no lawyer was present at the initial stages of the investigation, in spite of her son's repeated requests to this effect. She reiterates that later, her son's lawyers had to be changed, because they were put under pressure by the investigation and could not fully comply with their duties.



7.5 The author concludes by reiterating that the criminal case contained no direct evidence of her son's guilt, and that the appeal examination of her son's case by the Tashkent City Court on 11 March 2008 was conducted in a formalistic way, her son had not been interrogated, and Mr. Batskikh and other witnesses were not present in court.

### **Issues and proceedings before the Committee**

#### *Consideration of the merits*

8.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee notes the author's allegations that her son was subjected to beatings by the police officers in an attempt to force him to confess guilt (see paragraphs 2.2 and 2.3 above). In substantiation, the author affirms, in particular, that shortly after his arrest, her son had been kicked on the head to the point that his left ear was damaged and he had to be taken to emergency ward at a hospital. The author also claimed that an official record confirming this was subsequently removed from her son's criminal file by the investigators. According to her, the authorities have failed to properly address her son's numerous complaints on the matter, both during the preliminary investigation and in court. The Committee further notes the State party's contention that Mr. Gapirjanov had in fact suffered from health issues and his ear problems were unrelated to physical coercion and had in fact started before his arrest, as confirmed in court by a medical expert. It also notes the State party's affirmation that these allegations had been examined by the courts and were found to be groundless.

8.3 The Committee recalls that once a complaint about ill-treatment contrary to article 7 has been filed, a State party must investigate it promptly and impartially.<sup>7</sup> The Committee considers that the facts as presented do not demonstrate that the State party's competent authorities have given due and adequate consideration to the alleged victim's complaints of ill-treatment made both during the preliminary investigation and in court. In these circumstances, and in the absence of a sufficient response by the State party on the author's specific allegations, the Committee concludes that the facts before it amount to a violation of the rights of the author's son under article 7, of the Covenant. In the light of this conclusion, the Committee does not consider it necessary to deal separately with the author's claim under article 10 of the Covenant.

8.4 The author had further claimed that after her son's arrest on 11 August 2004, the latter was never brought before a court or other officer authorized by law to exercise judicial power to verify the lawfulness of his detention and placement in custody, in violation of article 9, paragraph 3, of the Covenant. The Committee notes that this specific allegation was not refuted by the State party. It further notes that, from the documents on file, it appears that the decision to place Mr. Gapirjanov in custody was endorsed by a prosecutor, even though no exact date is specified. The Committee recalls,<sup>8</sup> however, that paragraph 3 of article 9 entitles a detained person charged with a criminal offence to judicial control of his/her detention. It is inherent in the proper exercise of judicial power that it be exercised by an authority which is independent, objective and impartial in relation

<sup>7</sup> Human Rights Committee, general comment No. 20, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A, para. 14.

<sup>8</sup> See, inter alia, communications No. 1348/2005, *Ashurov v. Tajikistan*, Views adopted on 20 March 2007, para. 6.5; No. 521/1992, *Kulomin v. Hungary*, Views adopted on 22 March 1996, para. 11.3; No. 1218/2003, *Platonov v. Russian Federation*, Views adopted on 1 November 2005, para. 7.2.

to the issues dealt with. In the circumstances of the present case, the Committee is not satisfied that the public prosecutor can be characterized as having the institutional objectivity and impartiality necessary to be considered an “officer authorized to exercise judicial power” within the meaning of article 9, paragraph 3, and concludes, therefore, that there has been a violation of this provision.

8.5 The Committee further notes the author’s various allegations of violations of her son’s rights under article 14, paragraph 1, of the Covenant, that his trial was biased and his sentence unfounded. It also notes that the State party has not specifically refuted these allegations, but affirms, in general terms, that the alleged victim’s guilt was duly established, on the basis of a multitude of corroborating testimonies and other evidence, and that at all stages, the alleged victim’s procedural rights were respected. In the absence of any further information of relevance on file, the Committee considers that the facts as presented do not provide the basis for a finding of a violation of Mr. Gaporjanov’s rights under this provision of the Covenant.

8.6 The author has also claimed a violation of her son’s rights under article 14, paragraph 3 (b) and (d) of the Covenant. The State party has contended that Mr. Gaporjanov was assigned an ex-officio lawyer from the moment of arrest, and that, subsequently, he had to have his lawyer changed on a number of occasions, at his own request. The author has not refuted these contentions specifically but has replied without providing further details, that her son’s lawyers had changed because they were placed under pressure by the investigation. In the circumstances, and in light of the contradictions in the parties’ submissions, and in absence of other pertinent information on file, the Committee concludes that the facts as submitted do not provide the basis for a finding of a violation of Mr. Gaporjanov’s rights under these provisions of the Covenant.

8.7 The author has finally invoked, in general terms, a violation of her son’s rights under article 14, paragraph 3 (e), of the Covenant, as a witness who could confirm her son’s alibi was not questioned, that the courts failed to call other witnesses or to order additional experts’ analyses, etc. In the absence of any other pertinent information, however, the Committee concludes that the facts as submitted do not provide the basis for a finding of a violation of Mr. Gaporjanov’s rights under this provision of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of Mr. Gaporjanov’s rights under article 7 and article 9, paragraph 3, of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Gaporjanov with an effective remedy, including appropriate compensation and initiation and pursuit of criminal proceedings to establish responsibility for Mr. Gaporjanov’s ill-treatment. The State party is also under an obligation to avoid similar violations in the future.

11. 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 or not 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 in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee’s Views. The State party is also requested to publish the Committee’s Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**DD. Communication Nos. 1593-1603/2007, *Jung et al. v. Republic of Korea* (Views adopted on 23 March 2010, ninety-eighth session)\***

<i>Submitted by:</i>	Eu-min Jung, Tae-Yang Oh, Chang-Geun Yeom, Dong-hyuk Nah, Ho-Gun Yu, Chi-yun Lim, Choi Jin, Tae-hoon Lim, Sung-hwan Lim, Jae-sung Lim, and Dong-ju Goh (represented by counsel Jea-Chang Oh of Haemaru Law Offices)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Republic of Korea
<i>Date of communication:</i>	15 May 2007 (initial submissions)
<i>Subject matter:</i>	Conscientious objection
<i>Procedural issues:</i>	None
<i>Substantive issues:</i>	Right to freedom of thought, conscience and religion
<i>Article of the Covenant:</i>	18, paragraph 1
<i>Article of the Optional Protocol:</i>	None

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

*Meeting on 23 March 2010,*

*Having concluded* its consideration of communication Nos. 1593 to 1603/2007, submitted to the Human Rights Committee on behalf of Messrs. Eu-min Jung, Tae-Yang Oh, Chang-Geun Yeom, Dong-hyuk Nah, Ho-Gun Yu, Chi-yun Lim, Choi Jin, Tae-hoon Lim, Sung-hwan Lim, Jae-sung Lim, and Dong-ju Goh under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the authors of the communications and the State party,

*Adopts* the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1.1 The authors of the communication are Messrs. Eu-min Jung (communication No. 1593/2007), Tae-Yang Oh (communication No. 1594/2007), Chang-Geun Yeom (communication No. 1595/2007), Dong-hyuk Nah (communication No. 1596/2007), Ho-Gun Yu (communication No. 1597/2007), Chi-yun Lim (communication No. 1598/2007), Choi Jin (communication No. 1599/2007), Tae-hoon Lim (communication No. 1600/2007),

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Salvioli, Mr. Krister Thelin and Mrs. Ruth Wedgwood.

Sung-hwan Lim (communication No. 1601/2007), Jae-sung Lim (communication No. 1602/2007), and Dong-ju Goh (communication No. 1603/2007), all nationals of the Republic of Korea. They claim to be victims of a violation by the Republic of Korea of article 18, paragraph 1, of the Covenant. The authors are represented by counsel, Mr. Jae-Chang Oh of Haemaru Law Offices.

1.2 On 23 March 2010, pursuant to rule 94, paragraph 2, of the Committee's rules of procedure, the Committee decided to join the 11 communications for decision in view of their substantial factual and legal similarity.

### **The facts as presented by the authors**

#### *Mr. Eu-min Jung's case*

2.1 On an unspecified date, the State party's Military Power Administration sent Mr. Jung a notice of draft for military service. On account of his religious belief and conscience, he refused to be drafted within the prescribed period of time, whereupon he was arrested and charged under article 88 (section 1) of the Military Service Act.<sup>1</sup> On 1 September 2005, he was convicted as charged by the Seoul Northern District Court and sentenced to one and a half years of imprisonment. His appeal to the appellate court was subsequently rejected.

2.2 On 25 November 2005, the Supreme Court upheld Mr. Jung's conviction and sentence, reasoning *inter alia*, that,

“Article 39, paragraph 1 of the Constitution provides that, ‘All citizens shall have the duty of national defense under the conditions as prescribed by law’, charging the citizens who hold the sovereignty with the constitutional duty of national defense and military service, and it is justifiable in that they are necessary for the sake of the citizens of the state. [...] Also as article 18 of the International Covenant on Civil and Political Rights of which Korea is a State member appears to cover the same extent to which the protection of the fundamental rights under freedom of conscience in article 19 of the Constitution and under the freedom of religion in article 20 of the Constitution, it is concluded that the exceptional right of the defendant to be exempted from the application of article 88 paragraph 1 of Military Service Act is not derived from article 18 of the International Covenant on Civil and political Rights.”

#### *Mr. Oh's case*

2.3 Mr. Oh is a Buddhist. On an unspecified date, the State party's Military Power Administration sent him a notice of draft for military service. On account of his religious belief and conscience, he refused to be drafted within the prescribed period of time, whereupon he was arrested and charged under article 88 (section 1) of the Military Service Act. He was convicted and sentenced by a District Court to one and a half years imprisonment. His appeal to the appellate court was rejected. On 15 July 2004, the Supreme Court upheld the conviction and sentence, on the basis that,

“Freedom of conscience is merely a right to request the state to consider and protect the individual's conscience, if it is possible, it cannot be the basis for refusing to

<sup>1</sup> Article 88 of the Military Service Act provides as follows: “Evasion of Enlistment (1) Persons who have received a notice of enlistment or a notice of call (including a notice of enlistment through recruitment) in the active service, and who fails to enlist in the army or to comply with the call, even after the expiration of the following report period from the date of enlistment or call, without any justifiable reason, shall be punished by imprisonment for not more than three years: 1. Five days in cases of enlistment in active service [...]”

carry out the duties under the law or request the provision of alternative ways to replace such duties.”

*Mr. Yeom*

2.4 On an unspecified date, the State party's Military Power Administration sent him a notice of draft for military service. On account of his religious belief and conscience, he refused to be drafted within the prescribed period of time, whereupon he was arrested and charged under article 88 (section 1) of the Military Service Act. He was convicted and sentenced by a District Court to one and a half years imprisonment. His appeal to the appellate court was rejected. On 15 April 2005, the Supreme Court upheld the conviction and sentence, on the basis of similar reasoning as in the abovementioned cases.

*Mr. Dong-hyuk, Nah*

2.5 On an unspecified date, the State party's Military Power Administration sent him a notice of draft for military service. On account of his religious belief and conscience, he refused to be drafted within the prescribed period of time, whereupon he was arrested and charged under article 88 (section 1) of the Military Service Act. He was convicted and sentenced by a District Court to one and a half years imprisonment. His appeal to the appellate court was rejected. On 12 November 2004, the Supreme Court upheld the conviction and sentence, on the basis of similar reasoning as in the abovementioned cases.

*Mr. Ho-Gun, Yu*

2.6 On an unspecified date, the State party's Military Power Administration sent him a notice of draft for military service. On account of his religious belief and conscience, he refused to be drafted within the prescribed period of time, whereupon he was arrested and charged under article 88 (section 1) of the Military Service Act. He was convicted and sentenced by a District Court to one and a half years imprisonment. His appeal to the appellate court was rejected. On 24 June 2005, the Supreme Court upheld the conviction and sentence, on the basis of similar reasoning as in the abovementioned cases.

*Mr. Chi-yun Lim*

2.7 On an unspecified date, the State party's Military Power Administration sent him a notice of draft for military service. On account of his religious belief and conscience, he refused to be drafted within the prescribed period of time, whereupon he was arrested and charged under article 88 (section 1) of the Military Service Act. He was convicted and sentenced by a District Court to one and a half years imprisonment. His appeal to the appellate court was rejected. On 13 January 2005, the Supreme Court upheld the conviction and sentence, on the basis of similar reasoning as in the abovementioned cases. However, it also stated that “Although it is desirable to adopt a system of alternative service in place of military duty for those who firmly maintain and stick to their own religious or conscientious decision even facing the criminal penalty, rather than forcing them to serve in the army, this legislation is not a constitutional responsibility of the government and Military Service Act which provides only for the punishment does not provide such an exception is not an infringement of the Constitution.”

*Mr. Jin Choi*

2.8 On an unspecified date, the State party's Military Power Administration sent him a notice of draft for military service. On account of his religious belief and conscience, he refused to be drafted within the prescribed period of time, whereupon he was arrested and charged under article 88 (section 1) of the Military Service Act. He was convicted and sentenced by a District Court to one and a half years imprisonment. His appeal to the

appellate court was rejected. On 15 September 2005, the Supreme Court upheld the conviction and sentence, on the basis of similar reasoning as in the abovementioned cases.

*Mr. Tae-hoon Lim*

2.9 On an unspecified date, the State party's Military Power Administration sent him a notice of draft for military service. On account of his religious belief and conscience, he refused to be drafted within the prescribed period of time, whereupon he was arrested and charged under article 88 (section 1) of the Military Service Act. He was convicted and sentenced by a District Court to one and a half years imprisonment. His appeal to the appellate court was rejected. On 24 November 2004, the Supreme Court upheld the conviction and sentence, on the basis of similar reasoning as in the abovementioned cases.

*Mr. Sung-hwan, Lim*

2.10 On an unspecified date, the State party's Military Power Administration sent him a notice of draft for military service. On account of his religious belief and conscience, he refused to be drafted within the prescribed period of time, whereupon he was arrested and charged under article 88 (section 1) of the Military Service Act. He was convicted and sentenced by a District Court to one and a half years imprisonment. His appeal to the appellate court was rejected. On 13 January 2005, the Supreme Court upheld the conviction and sentence, on the basis of similar reasoning as in the abovementioned cases. However, it also stated that "Under the current law system, it would be desirable to introduce an alternative service to replace the mandatory military service, rather than forcing those who, like the defendant, have a strong determination to maintain a religious or conscientious decision in spite of the prison sentences to perform the military service."

*Mr. Jae-sung, Lim*

2.11 On an unspecified date, the State party's Military Power Administration sent him a notice of draft for military service. On account of his religious belief and conscience, he refused to be drafted within the prescribed period of time, whereupon he was arrested and charged under article 88 (section 1) of the Military Service Act. He was convicted and sentenced by a District Court to one and a half years imprisonment. His appeal to the appellate court was rejected. On 28 July 2005, the Supreme Court upheld the conviction and sentence, on the basis of similar reasoning as in the abovementioned cases.

*Mr. Dong-ju Goh*

2.12 Mr. Dong-ju Goh is a pacifist, Roman Catholic. On an unspecified date, the State party's Military Power Administration sent him a notice of draft for military service. On account of his religious belief and conscience, he refused to be drafted within the prescribed period of time, whereupon he was arrested and charged under article 88 (section 1) of the Military Service Act. He was convicted and sentenced by a District Court to one and a half years imprisonment. His appeal to the appellate court was rejected. On 7 December 2006, the Supreme Court upheld the conviction and sentence, on the basis of similar reasoning as in the abovementioned cases.

*The Constitutional Court decision*

2.13 On 26 August 2004, in a case unrelated to the current communications, the Constitutional Court rejected, by a majority, a constitutional challenge to article 88 of the Military Service Act on the grounds of incompatibility with the protection of freedom of conscience protected under the Korean Constitution. The Court reasoned, *inter alia*:

“The freedom of conscience as expressed in Article 19 of the Constitution does not grant an individual the right to refuse military service. Freedom of conscience is merely a right to make a request to the State to consider and protect, if possible, an individual’s conscience, and therefore is not a right that allows for the refusal of one’s military service duties for reasons of conscience nor does it allow one to demand an alternative service arrangement to replace the performance of a legal duty. Therefore the right to request alternative service arrangement cannot be deduced from the freedom of conscience. The Constitution makes no normative expression that grants freedom of expression a position of absolute superiority in relation to military service duty. Conscientious objection to the performance of military service can be recognised as a valid right if and only if the Constitution itself expressly provides for such a right.”<sup>2</sup>

2.14 Following the decisions of the Supreme and Constitutional courts, the authors state that some 700 conscientious objectors are being sentenced and imprisoned annually for one and a half years. More than 99 per cent of these conscientious objectors are Jehovah’s Witnesses.

### **The complaint**

3.1 The authors complain that the absence in the State party of an alternative to compulsory military service, under pain of criminal prosecution and imprisonment, breaches their rights under article 18, paragraph 1, of the Covenant.

3.2 The authors refer to the Committee’s Views in communications No. 1321/2004 and 1322/2004, *Yeo-Bum Yoon and Myung-Jin Choi v. the Republic of Korea*, Views adopted by the Committee on 3 November 2006, in which the Committee found a violation of article 18, paragraph 1, of the Covenant, by the State party, on the basis of similar facts as in the present communications and in which the State party was obliged to provide the authors with an effective remedy.

### **State party’s observations on admissibility and merits**

4.1 By submission of 14 November 2008, the State party responds on the merits of the communications, referring to the Committee’s Views in *Yeo-Bum Yoon and Myung-Jin Choi*<sup>3</sup> and requesting the Committee to reconsider this decision taking into account the security environment in the State party.

4.2 The State party focuses on specific aspects of the Committee’s earlier decision. As to the Committee’s argument therein that, “an increasing number of States parties to the Covenant, which have retained compulsory military service, have introduced alternatives to compulsory military service”, the State party points out that the legal systems of Germany and Taiwan Province of China, where alternatives have been introduced, are quite different from those of the State party. For example, the State party has remained divided since the

<sup>2</sup> While accordingly upholding the constitutionality of the contested provisions, the majority directed the legislature to study means by which the conflict between freedom of conscience and the public interest of national security could be eased. The dissent, basing itself on the Committee’s general comment No. 22 (1993) on the right to freedom of thought, conscience and religion, the absence of a reservation by the State party to article 18 of the Covenant, resolutions of the (then) United Nations Commission on Human Rights and State practice, would have found the relevant provisions of the Military Services Act unconstitutional, in the absence of legislative effort to properly accommodate conscientious objection.

<sup>3</sup> See para. 3.2.

end of the Second World War; in contrast, there was no war in Germany and reunification was achieved there in 1990.

4.3 Taiwan never waged war against China following the establishment of the Taiwanese government in 1955. The Korean War was fought across the Korean peninsula and lasted for three years and a month from 25 June 1950 to July 1953, when a cease-fire agreement was finally signed. It left one million dead from the south and more than 10 million Koreans were separated from their families at the end of the war. The State party submits that its painful history of war constitutes one of the reasons why its Government places such emphasis on national security as the most significant priority in its national policy agenda. From a legal perspective, the State party submits that a cease-fire agreement is still effective in the State party, which distinguishes it from areas such as Taiwan Province of China. This agreement has not yet been superseded by a new legal framework, such as a declaration ending the war or a peace agreement to ensure non-aggression and peace, despite the continued efforts to this end. In the view of the State party, the security environment is not comparable to that of either Germany or Taiwan, as it shares a border with the Democratic People's Republic of Korea which spans 155 miles. There have been numerous clashes between vessels from the Democratic People's Republic of Korea and those from the Republic of Korea, which occurred on 15 June 1999 and 19 June 2002. Thus, this demonstrates that the outbreak of war remains a possibility even in the midst of a relatively reconciliatory environment between the two countries and reaffirms the State party's need to build military means for the purposes of defence.

4.4 As to the Committee's argument that the "Republic of Korea has failed to show what special disadvantage would be involved for it if the rights of the authors under article 18 were fully respected", the State party submits that conscientious objection or the introduction of an alternative service arrangement is closely linked to national security, which is the very prerequisite for national survival and the liberty of the people. It fears that alternative military service would jeopardize national security. It highlights that 70 per cent of the Korean Peninsula is mountainous, making it all the more necessary to be equipped with enough ground forces to face guerrilla warfare. However, the number of soldiers in the State party remains at around 680,000, only 58 per cent of that of the Democratic People's Republic of Korea, which amounts to about 1,170,000. Furthermore, in the latter, between 2000 and 2005 there was a significant decrease in the number of male soldiers between 15 and 25 years. This trend is expected to continue in the future and makes it even more difficult to accept cases of exception from conscription.

4.5 According to the State party, there have always been those who are intent on "evading" conscription due to the relatively challenging conditions often required in the military, or concern over the effect such an interruption will have on one's academic or professional career. Thus, it is even more necessary to maintain its current system of a no-exception policy in mandatory military service to ensure sufficient ground forces. It submits that if it were to accept claims of exemption from military service, in the absence of a public consensus on the matter, it would be impeded from securing sufficient military manpower required for national security by weakening the public's trust in the fairness of the system, leading the public to question its necessity and legitimacy. In addition, any exceptions based on religious belief would have to apply to people of all religious faiths and, given that persons of religious faith account for a significant part of the military forces, concerns about the proliferation of requests for exemptions are not groundless. The situation would be further aggravated if the State party were to accept exemptions based on personal conscience alone rather than on a religious basis. Thus, for the State party, the recognition of conscientious objection and the introduction of alternative service arrangements should be preceded by a series of measures: stable and sufficient provisions of military manpower; equality between people of different religions as well as with those



without; in-depth studies on clear and specific criteria for recognition of an exemption and consensus on the issue among the general public.

4.6 As to the Committee's argument that, "respect on the part of the State for conscientious beliefs and manifestations thereof is itself an important factor in ensuring cohesive and stable pluralism in society", the State party is of the view that as a unique security environment prevails, fair and faithful implementation of mandatory military service is a determining factor to secure social cohesion. Respect for conscientious beliefs and its manifestations is not something that can be enforced through the implementation of a system alone. It is sustainable only if general agreement on this issue has been achieved among the members of society. A public opinion poll conducted in July 2005 and in September 2006 shows that 72.3 per cent and 60.5 per cent, respectively, expressed opposition to the recognition of alternative service arrangements for conscientious objectors. In the State party's view, the introduction of such an arrangement at a premature stage within a relatively short period of time, without public consensus, would intensify social tensions rather than contribute to social cohesion.

4.7 The State party submits that it is a very difficult task to set up an alternative service system in practice, guaranteeing equality and fairness between those who perform mandatory military service and those who perform alternative service. The majority of the soldiers of the State party perform their duties under difficult conditions and some are involved in life-threatening situations. They face the risk of jeopardizing their lives while performing their duty of defending the country. Indeed, 6 people died and 19 were wounded in the recent clash between naval vessels of the Republic of Korea and the Democratic People's Republic of Korea near Yeonpyeong-do in the Yellow Sea on 19 June 2002. Thus, it is almost impossible to ensure equality of burden with those fulfilling military service and those performing alternative service. Assuming that this disparity will continue to exist, it is imperative to gain the understanding and support of the general public before introducing an alternative service system.

4.8 The State party regrets that upon its accession to the Optional Protocol to the Covenant on 10 April 1990, the Committee had not provided a clear position on whether conscientious objection fell within the ambit of article 18. It was only on 30 July 1993, in its general comment 22 on the right to freedom of thought, conscience and religion, that the Committee announced its position that failure to recognize conscientious objection constitutes a breach of this provision.<sup>4</sup> It refers to the decisions of both its Supreme and Constitutional Courts to the effect that the failure to introduce a system at the present time cannot be interpreted as a breach of the Covenant, and that the requisite article of the Military Service Act punishing conscientious objectors is constitutional.

4.9 The State party informs the Committee that from April 2006 to April 2007, the Ministry of Defence set up a "Joint Committee between the public and private sectors to research the alternative service system". This Committee conducted research on the possibility of revising the Military Service Act and introducing an alternative service system including prospects for the future demand and supply of military personnel, the statements of those who refused military service, the opinions of experts in this field and relevant cases of foreign countries.<sup>5</sup> It is now conducting research with the aim of following the trend of public opinion from August to December 2008.

4.10 In addition, in September 2007, the State party announced its plan to introduce a system assigning social services to those who refuse conscription due to their religious

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<sup>4</sup> *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40 (A/48/40)*, annex VI, para. 11.

<sup>5</sup> The State party has not provided any indication of the results of this research.

beliefs once there is a “public consensus” on this issue. The State party informs the Committee that once there is such consensus, “as a result of the research on public opinion and positions of the relevant ministries and institutions, then it will consider introducing an alternative service system”. In conclusion, it requests the Committee to reconsider its previous view on this matter in light of the arguments presented herein.

#### **Authors’ comments on the State party’s observations**

5.1 By letter of 14 November 2008, the authors responded to the submissions of the State party. On the State party’s arguments on national security, the authors argue that security is an important issue for all countries irrespective of whether or not they are divided or there is a cease-fire in place. Germany has been providing alternative service since the 1960s, thus even before unification, and Taiwan Province of China has also done so despite its being dominated by China.

5.2 According to the authors, the official statistics demonstrate that while 340,000 men were enlisted in the military service in the State party, 8,000 were exempted, mostly due to physical disability. Among those enlisted, 270,000 soldiers served in military barracks, while another 70,000 served in “social alternative services”, such as public offices, police stations, fire stations, public health centres, prosecutors’ offices, national defence-related factories and various laboratories. The criteria for dividing those enlisted were physical state or skill, and qualification and academic degrees, which can be utilized in an alternative to military service. The fact that such a high number do service in alternative services already, demonstrates that the State party is not short of soldiers to service in military barracks. In addition, it notes that according to a “Defense White Paper, issued by the Ministry of National Defense, on 4 November 2006, the State party has dispatched as many as 2,577 soldiers overseas even though it is not directly related to the national security of the State party”.

5.3 According to the authors, the number of conscientious objectors is less than 700 annually, amounting to 0.26 per cent and 1 per cent of soldiers serving in and outside military barracks, respectively. Thus, the State party’s argument that the adoption of alternative service would jeopardize national security is unreasonable and groundless. As to the arguments relating to security concerns with the Democratic People’s Republic of Korea, the authors argue that the State party’s population is almost twice as large and its economy 30 times as large as that of the Democratic People’s Republic of Korea. Also, the latter has been under constant satellite surveillance. In addition, given that the defence budget of the State party was US\$ 15.7 billion in 2006, whereas that of the Democratic People’s Republic of Korea was estimated at US\$ 2.94 billion in the same year, as well as the fact that the State party has reduced the period of military service over the years, the State party’s arguments in this regard are not credible.

5.4 As to the State party’s argument that a no-exception policy in a mandatory system is essential in order to minimize evasion from conscription, the authors reiterate that 70,000 people have undertaken their military service outside military barracks, which is 100 times larger than that of conscientious objectors. Thus, the State party’s concern about the inequalities of alternative military service for conscientious objectors would not arise. They also referred to an announcement by the Ministry of National Defence on 18 September 2007, that the State party would pursue a plan of permitting conscientious objectors special alternative service as part of “social alternative service”, on condition that: (a) service should be the toughest of “social alternative service”, such as looking after Alzheimer patients or the highly disabled who need intensive care all the time; (b) those availing of this type of service should remain at the designated facility rather than commuting to their homes; and (c) the service should be twice as long as for those who serve in military barracks. According to the authors, given the more challenging and demanding nature of

the conditions attached, it is likely that only genuine conscientious objectors would apply for this service and it is not reasonable to suppose that the adoption of an alternative service for conscientious objectors would have an adverse effect on the military system or raise issues of inequality. This has not been the experience in either Germany or Taiwan.

5.5 As to the State party's argument that there is no "public consensus" on this issue, the authors argue that the State party has only referred to statistics from surveys carried out in 2005 and 2006 and did not mention those of 2007, which demonstrate a majority for such special alternative service (52 per cent). This figure was quoted by the former Government, and adopted by the progressive political party (the Open Democratic Party) as the reasoning behind its wish to incorporate special alternative service for conscientious objectors as set out in paragraph 4.10 above. The Government had been inspired by the Committee's Views in *Yeo-Bum Yoon and Myung-Jin Choi v. the Republic of Korea* to take such a step. However, the Government subsequently changed its view and began quoting earlier surveys to support its new opinion. When the conservative party (the Grand National Party) took power in 2008, the Ministry of National Defence decided to postpone introduction of such an expanded special alternative system.

5.6 The authors submit that by introducing alternative service for conscientious objectors, the State party would be protecting minority rights and contributing to integration and pluralism in society. Due to their criminal records, conscientious objectors suffer from social as well as economic disadvantages. For example, they are not eligible to be appointed as public officers or to join private companies.

5.7 The authors argue that the State party has an obligation under article 18 of the Covenant, as demonstrated in its Views in *Yeo-Bum Yoon and Myung-Jin Choi v. the Republic of Korea*, to grant alternative service to conscientious objectors. As various forms of such alternative service already exist, the State party could do so by simply removing the four-week training course concerning firearms. They also refer to the fact that article 18 is a non-derogable right even during times of emergency and hence the State party's arguments on national security are groundless.

## **Issues and proceedings before the Committee**

### *Consideration of admissibility*

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 In the absence of objection by the State party to the admissibility to the communication, as well as any other reason whereby the Committee should declare the communication inadmissible in whole or in part, the Committee declares the claims under article 18 of the Covenant admissible.

### *Consideration of the merits*

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee notes the authors' claim that their rights under article 18 of the Covenant have been violated, due to the absence in the State party of an alternative to compulsory military service, as result of which their failure to perform military service resulted in their criminal prosecution and imprisonment. The Committee recalls its previous jurisprudence, in similar cases against the State party, that the authors' conviction and sentence amounted to a restriction on their ability to manifest their religion or belief and

that, in those cases, the State party had not demonstrated that the restriction in question was necessary, within the meaning of article 18, paragraph 3.<sup>6</sup>

7.3 The Committee notes that in the present cases the State party reiterates arguments advanced in response to the earlier communications<sup>7</sup> before the Committee, notably on the issues of national security, equality between military and alternative service, and lack of a national consensus on the matter. The Committee considers that it has already examined these arguments in its earlier Views<sup>8</sup> and thus finds no reason to depart from its earlier position.

7.4 The Committee notes that the authors' refusal to be drafted for compulsory military service was a direct expression of their religious beliefs which, it is uncontested, were genuinely held and that the authors' subsequent conviction and sentence amounted to an infringement of their freedom of conscience and a restriction on their ability to manifest their religion or belief. The Committee finds that as the State party has not demonstrated that in the present cases the restrictions in question were necessary, within the meaning of article 18, paragraph 3, it has violated article 18, paragraph 1, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, concludes that the facts before the Committee reveal, in respect of each author, violations by the Republic of Korea of article 18, paragraph 1 of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including compensation. The State party is under an obligation to avoid similar violations of the Covenant in the future.

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 or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure 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 in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of present report.]

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<sup>6</sup> Communications No. 1321/2004 and 1322/2004 *Yeo-Bum Yoon and Myung-Jin Choi v. the Republic of Korea*, Views adopted by the Committee on 3 November 2006.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

**EE. Communication No. 1615/2007, *Zavrel v. Czech Republic*  
(Views adopted on 27 July 2010, ninety-ninth session)\***

<i>Submitted by:</i>	Bohuslav Zavrel (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	The Czech Republic
<i>Date of communication:</i>	12 March 2006 (initial submission)
<i>Subject matter:</i>	Discrimination on the basis of citizenship with respect to restitution of property
<i>Procedural issue:</i>	Non-exhaustion of domestic remedies, admissibility <i>ratione materiae</i> , admissibility <i>ratione temporis</i> , abuse of the right of submission
<i>Substantive issue:</i>	Equality before the law; equal protection of the law without any discrimination
<i>Article of the Covenant:</i>	26
<i>Articles of the Optional Protocol:</i>	2, 3, 5 paragraph (2) (b)

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

*Meeting on 27 July 2010,*

*Having concluded* its consideration of communication No. 1615/2007, submitted to the Human Rights Committee by Mr. Bohuslav Zavrel under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication and the State party,

*Adopts* the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication is Mr. Bohuslav Zavrel, a naturalized American citizen residing in the State of New York, United States of America, born in Kurim, former Czechoslovakia, on 3 January 1920. He claims to be a victim of a violation by the Czech

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Motoc, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli, and Mr. Krister Thelin.

An individual opinion signed by Committee member Mr. Abdelfattah Amor is appended to the text of the present Views.

Republic of article 26 of the International Covenant on Civil and Political Rights.<sup>1</sup> He is not represented.

### Factual background

2.1 The author states that he left Czechoslovakia with his wife for political reasons in 1970 and fled to Yugoslavia, then obtained political asylum in Italy. They lived in Switzerland briefly, before emigrating to the United States, where they have since lived. In 1982, he obtained United States citizenship and lost his Czechoslovak citizenship.<sup>2</sup>

2.2 As he left former Czechoslovakia without permission,<sup>3</sup> the author was sentenced *in absentia*<sup>4</sup> to a jail term, and to the confiscation of his property, including his family home located in Hybesova Street 40, in Kurim, and an orchard of 0.40 hectares, which he owned with his late wife. The author estimates his property to be worth US\$ 300,000 today.

2.3 Following the enactment of Act No. 119/1990,<sup>5</sup> the author was rehabilitated and his sentence was quashed. He then filed an action for restitution of his property, but the District Court of Brno-venkov rejected his claim on 16 September 1992, on the basis of Act No. 87/1991, which requires claimants to be Czech citizens, and have permanent residence in the Czech Republic. He did not appeal this decision.

2.4 It transpires from the file that the author initiated new judicial proceedings in 2005, claiming a declaration of title before the District Court of Brno-venkov, based on the fact that he was the legal owner of one half in moiety of the family house in Kurim, the building parcel on which the house was standing, and the garden. In his claim, the author requested the Court to declare that his wife, who had died in February 2002, was the owner of the other half in moiety of the above properties as at the day of her demise. The author substantiated his action by claiming that further to his rehabilitation under Act No. 119/1990, his ownership title had been restored, and by seeking a declaration of title on the basis of general principles of Czech property law. The District Court of Brno-venkov rejected the action on 8 June 2005, and the Regional Court of Brno rejected the appeal on 10 October 2006, on the ground that civil law actions for property restitution after rehabilitation under law 119/1990 could not be undertaken so as to circumvent applicable restitution legislation (i.e. Act No. 87/1991). On 28 December 2006, the author lodged an appeal before the Constitutional Court, which was dismissed as manifestly ill-founded on 5 April 2007.<sup>6</sup> He was notified of this decision by his Czech lawyer on 17 April 2007.

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<sup>1</sup> The Optional Protocol entered into force for the Czech Republic on 1 January 1993, as a consequence of the Czech Republic's notification of succession of the international obligation of Czechoslovakia, which had ratified the Optional Protocol in March 1991.

<sup>2</sup> On the basis of the United States – Czechoslovakia bilateral Naturalization Treaty of 16 July 1928, art. I.

<sup>3</sup> Reports indicate that in the former Czechoslovakia, those attempting to leave the country without authorization were subject, *inter alia*, to imprisonment.

<sup>4</sup> The author does not specify by which instance he was sentenced.

<sup>5</sup> Act No. 119/1990 Coll. on Judicial Rehabilitation rendered null and void all sentences handed down by Communist courts for political reasons. Persons whose property had been confiscated were, under section 23.2 of the Act, eligible to recover their property, subject to conditions to be spelled out in a separate restitution law.

<sup>6</sup> The Court rejected the appeal on the ground that it would only contradict the judgement of prior instances where a decision violated protected basic human rights and freedoms, which had not been the author's case.

### The complaint

3. The author alleges that he is a victim of discrimination, and argues that the requirement of citizenship for restitution of his property under Act No. 87/1991 is in violation of article 26 of the Covenant.

### State party's observations on admissibility and merits

4.1 In its submission of 13 May 2008, the State party addresses the facts, the admissibility and the merits of the communication. It notes that the author engaged in two separate judicial paths between 1992 and 2007. First, along with his wife, he engaged in restitution proceedings before the District Court of Brno-venkov against four defendants<sup>7</sup> who had obtained titles over his property after the author left Czechoslovakia. The Court rejected the claim on 16 September 1992 on the basis of Act No. 87/1991, which required that the authors be Czech citizens and permanent residents of the Czech Republic at the time of the entry into force of the law (1 April 1991), or, at the latest, at the moment of the expiry of the statutory time limit to make a restitution (1 October 1991). The author failed to meet this requirement. The State party adds that the District Court of Brno-venkov, in the same judgement, further ruled that notwithstanding the citizenship requirement, the author's action was in any event doomed to failure, since he failed to prove that he duly served the various defendants with a request for the surrender of the property within the period in which Act No. 87/1991 was in force. This judgement was not contested by any domestic remedy available, and became final on 25 November 1992. According to the State party, the author did not exhaust domestic remedies with regard to the restitution proceedings.

4.2 The State party further contends that author's communication should be declared inadmissible on the ground that it constitutes an abuse of the right to submit a communication, within the meaning of article 3 of the Optional Protocol. It notes that the last domestic decision against which the delay must be assessed is the decision of the District Court of Brno-venkov of 16 September 1992. Thus, more than 13 years elapsed before the author submitted his initial petition to the Committee on 12 March 2006. In the absence of any reasonable justification, the Committee should consider such delay to be abusive. To support its claim, the State party invokes, inter alia, the Committee's decisions in communications No. 1434/2005, *Fillacier v. France*, No. 787/1997 *Gobin v. Mauritius*, and No. 1452/2006 *Chytil v. The Czech Republic*.

4.3 The State party further claims that the communication should be declared inadmissible *ratione temporis* by the Committee, the author's property having been forfeited a long time before the entry into force of the Covenant and the Optional Protocol for the Czechoslovak Socialist Republic.<sup>8</sup>

4.4 The State party adds that to the extent that it relates to proceedings for declaration of ownership title on the basis of civil property law, the author's communication should be also declared inadmissible *ratione materiae*, as it related to the right to property, which is outside the scope of the Covenant.

4.5 On the merits, the State party notes that the right protected by article 26 of the Covenant, invoked by the authors, is an autonomous one, independent of any other right guaranteed by the Covenant. It recalls that in its jurisprudence, the Committee has reiterated that not all differences of treatment are discriminatory, and that a differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the

<sup>7</sup> Three natural persons and the Kurim state-owned farm.

<sup>8</sup> See note 1 above.

meaning of article 26. Article 26 does not imply that a State would be obliged to set right injustices of the past, especially considering the fact that the Covenant was not applicable at the time of the former communist Czechoslovakia.

4.6 Taking note of the Committee's jurisprudence on similar property restitution cases, the State party reiterates that it was not feasible to remedy all injustices of the past, and that as part of its legitimate prerogatives, the legislator, using its margin of discretion, had to decide over which factual areas, and in which way it would legislate, so as to mitigate damages. The author's action was not successful before the District Court of Brno-venkov not only because he did not comply with the citizenship requirement in Act No. 87/1991, but also because he failed to meet the statutory precondition of requesting defendants to surrender the property within a fixed time period. Another problem was the fact that the author had failed to establish, before the District Court, that some of the defendants had acquired their property titles on the basis of illegal preference, which is another mandatory criteria for restitution under Act No. 87/1991.<sup>9</sup> As for the later proceedings initiated by the author, based on civil property law, the State party contends that the process was not discriminatory. The courts correctly interpreted and applied domestic law, and as such, the matter is beyond the scope of the Committee's possible review. The State party concludes that it did not violate article 26 in the present case.

#### **Authors' comments on the State party's observations**

5. In his comments dated 2 June and 18 August 2008, the author maintains that Act No. 87/1991 is discriminatory, and in violation of the Covenant. He clarifies that for the purposes of the first instance proceedings, he sent requests for the surrender of his property to all defendants. The author does not agree with the State party's analysis of the judicial proceedings, and stresses that he exhausted domestic remedies after his appeal with the Constitutional Court was rejected on 5 April 2007. In any event, he notes that there are no available remedies offered to non-Czech citizens for property restitution in the State party. The author insists that it is the citizenship criteria which barred restitution of his property before Czech jurisdictions, and that this discriminatory requirement, which violates article 26 of the Covenant, constitutes the subject-matter of his complaint before the Committee.

#### **Additional submission by the State party**

6. On 21 May 2009, the State party submitted additional comments, in which it reiterated that the author's legal proceedings should be considered in two distinct parts. It also renewed its call to the Committee to consider the author's complaint inadmissible *ratione temporis*, or, subsidiarily, ill-founded under article 26 of the Covenant.

#### **Additional submission by the author**

7. On 8 July 2009, the author submitted additional comments, in which he reiterated that his communication should be declared admissible by the Committee, and that he was a

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<sup>9</sup> Act No. 87/1991, in addition to the citizenship and permanent residence requirements (the latter criteria was later repealed by Constitutional Court decision No. 164/1994), laid down other conditions that had to be met by claimants in order for them to be successful with their restitution claims. In particular, for protecting the current owners of property that is subject to a restitution claim, the Act stipulated that the current owner had to surrender property only if he/she had obtained the said property in breach of the laws then in force or if he/she had obtained it through unlawful preferential treatment. The State party notes that it invoked these arguments in the past, in communications No. 1533/2006 *Ondracka v. The Czech Republic*, and No. 945/2000, *Marik v. The Czech Republic*.



victim of discrimination under article 26 of the Covenant as a result of the State party's failure to allow restitution of his immovable property in Kurim.

### Issues and proceedings before the Committee

#### *Consideration of admissibility*

8.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

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

8.3 The Committee has considered the judicial proceedings initiated by the author in 2005 before the District Court of Brno-venkov for the restitution of his family house and garden, seeking a declaration of title under civil property law. The District Court of Brno-venkov rejected his claim on 8 June 2005. The author appealed this decision before the Regional Court of Brno, which rejected his appeal on 10 October 2006, and this verdict was confirmed by the Constitutional Court on 5 April 2007. The State party has not contested the admissibility of this part of the communication. The Committee therefore considers that the author has exhausted domestic remedies under article 5, paragraph 2 (b), of the Optional Protocol in relation to the second procedure initiated by the author in 2005.

8.4 The Committee has noted the State party's argument that the communication should be declared inadmissible as an abuse of the right of submission because of the long delay between the decision of the District Court of Brno-venkov of 16 September 1992 and the submission of the communication to the Committee. The Committee notes that the Optional Protocol does not establish time limits within which a communication must be submitted. It is only in exceptional circumstances that the delay in submitting a communication can lead to the inadmissibility of a communication.<sup>10</sup> Examining the second judicial proceedings, which, in essence, deal with the same subject matter as the first proceedings, and which ended on 5 April 2007 with a decision of the Constitutional Court, and considering the fact that the author's initial petition was presented to the Committee on 12 March 2006, i.e. before having exhausted domestic remedies, the author's communication is admissible under article 3 of the Optional Protocol.

8.5 The Committee also took note of the State party's claim that the communication should be declared inadmissible *ratione materiae*. Although the author's claim relates to property rights, which are not themselves protected in the Covenant, the author also alleges that the confiscations under prior Czechoslovak Governments were discriminatory and that the new legislation of the Czech Republic discriminates against persons who are not Czech citizens.<sup>11</sup> Therefore, the facts of the communication appear to raise an issue under article 26 of the Covenant, and are therefore admissible *ratione materiae*.

8.6 The Committee further noted the State party's objection to the admissibility of the present communication *ratione temporis*. It considers that although the confiscations took place before the entry into force of the Covenant and of the Optional Protocol for the Czech

<sup>10</sup> See communications No. 1434/2005, *Fillacier v. France*, para. 4.3; No. 787/1997, *Gobin v. Mauritius*, para. 6.3, and No. 1582/2006, *Kudrna v. The Czech Republic*, para. 6.3.

<sup>11</sup> See communications No. 586/1994, *Adam v. The Czech Republic*, Views adopted on 23 July 1996, para. 6.2, and No. 1574/2007, *Slezak v. The Czech Republic*, Views adopted on 20 July 2009, para. 6.4.

Republic, the new legislation that excludes claimants who are not Czech citizens has continuing consequences subsequent to the entry into force of the Optional Protocol for the Czech Republic, which could entail discrimination, in violation of article 26 of the Covenant.<sup>12</sup>

8.7 In the absence of any further objections to the admissibility of the communication, the Committee declares it admissible, in so far as it may raise issues under article 26 of the Covenant, and proceeds to its consideration on the merits.

*Consideration of the merits*

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 The issue before the Committee is whether the application to the author of Act No. 87/1991 amounted to discrimination, in violation of article 26 of the Covenant. The Committee reiterates its jurisprudence that not all differentiations in treatment can be deemed to be discriminatory under article 26. A differentiation which is compatible with the provisions of the Covenant and is based on objective and reasonable grounds does not amount to prohibited discrimination, within the meaning of article 26.<sup>13</sup>

9.3 The Committee recalls its Views in the numerous Czech property restitution cases,<sup>14</sup> where it held that article 26 had been violated, and that it would be incompatible with the Covenant to require the authors to obtain Czech citizenship as a prerequisite for the restitution of their property or, alternatively, for the payment of appropriate compensation. Bearing in mind that the author's original entitlement to his property was not predicated on his citizenship, the Committee found that the citizenship requirement was unreasonable. In communication No. 747/1997, *Des Fours Walderode*,<sup>15</sup> the Committee observed that a citizenship requirement in the law as a necessary condition for restitution of property previously confiscated by the authorities makes an arbitrary and discriminatory distinction between individuals who are equally victims of prior State confiscations, and constitutes a violation of article 26 of the Covenant. The Committee considers that the principle established in the above cases equally applies to the author of the present communication. The Committee therefore concludes that the application to the author of the citizenship requirement in Act No. 87/1991 violated his rights under article 26 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 26 of the International Covenant on Civil and Political Rights.

<sup>12</sup> See *Adam v. The Czech Republic* (note 11 above), para. 6.3.

<sup>13</sup> See communication No. 182/1984, *Zwaan-de Vries v. The Netherlands*, Views adopted on 9 April 1987, para. 13.

<sup>14</sup> Communications No. 516/1992, *Simunek v. The Czech Republic*, Views adopted on 19 July 1995, para. 11.6; No. 586/1994, *Adam v. The Czech Republic*, Views adopted on 23 July 1996, para. 12.6; No. 857/1999, *Blazek v. The Czech Republic*, Views adopted on 12 July 2001, para. 5.8; No. 945/2000, *Marik v. The Czech Republic*, Views adopted on 26 July 2005, para. 6.4; No. 1054/2002, *Kriz v. The Czech Republic*, Views adopted on 1 November 2005, para. 7.3; No. 1445/2006, *Polackova and Polacek v. The Czech Republic*, Views adopted on 24 July 2007, para. 7.4; No. 1463/2006, *Gratzinger v. The Czech Republic*, Views adopted on 25 October 2007, para. 7.5; No. 1533/2006, *Ondracka v. The Czech Republic*, Views adopted on 2 November 2007, para. 7; No. 1479/2006, *Persan v. The Czech Republic*, Views adopted on 24 March 2009, para. 7.4; and No. 1574/2007, *Slezak v. The Czech Republic*, Views adopted on 20 July 2009, para. 7.3.

<sup>15</sup> Views adopted on 30 October 2001, paras. 8.3–8.4.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including compensation if the property in question cannot be returned. The Committee reiterates that the State party should review its legislation, specifically in relation to the citizenship requirement in Act No. 87/1991, to ensure that all persons enjoy both equality before the law and equal protection of the law.

12. Bearing in mind that, by becoming a Party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not, 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 recognised in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

## Appendix

### Individual opinion of Committee member, Mr. Abdelfattah Amor (dissenting)

In my opinion, this communication should have been declared inadmissible as it brings together two separate legal actions, both in themselves inadmissible.

The first legal action concerned a claim for restitution of the author's property. By decision of 16 September 1992, the District Court of Brno-venkov, which was seized of the matter, rejected the claim on the basis of Act No. 87/1991, which specified that such claims could be submitted only by persons of Czechoslovakian nationality who had permanent residence in Czechoslovakia. The author did not appeal this decision. The requirement of the exhaustion of domestic remedies could legitimately be waived, since these remedies were rendered ineffective by the position taken by the Constitutional Court in upholding the constitutionality of Act No. 87/1991. Moreover, if the communication was admissible, article 26 of the Covenant would have been applicable, since the inclusion of a citizenship requirement in the law as a prerequisite for the restitution of property confiscated by the authorities amounted to the establishment of an arbitrary and discriminatory distinction between individuals who had all likewise been victims of confiscations in the past, and constituted a violation of that article.

In fact, this part of the communication is fundamentally distinct from the rest of the communication, as will be clarified below. The uncontested facts mention two specific dates: the court rejected the author's claim on 16 September 1992, and the communication was submitted to the Committee on 12 March 2006. Thus, a period of more than 13 and a half years elapsed between the court's decision and the submission of the communication to the Committee. This delay is manifestly excessive and undeniably constitutes an abuse of the right to submit a communication within the meaning of article 3 of the Optional Protocol. The jurisprudence of the Committee — despite being quite liberal and, frankly speaking, lacking in rigour — does not permit such long delays. Not wishing to labour the point, I would merely draw attention to my dissenting opinions in this regard, in particular my dissenting opinion on communication No. 1533/2006, *Ondracka v. The Czech Republic*. I would also like to take this opportunity to refer to my contribution to the collection of articles honouring Ahmed Mahiou entitled "Le délai de présentation des communications individuelles au Comité des droits de l'homme: Considérations sur une lacune du Protocole facultatif se rapportant au Pacte international relatif aux droits civils et politiques" (The time limit for submitting individual communications to the Human Rights Committee: Reflections on a gap in the Optional Protocol to the International Covenant on Civil and Political Rights).<sup>a</sup>

The second legal action was initiated by the author before the District Court of Brno-venkov in 2005, that is, 13 years on from the first one, and concerned a claim for declaration of title. The author substantiated this action by claiming that, further to his rehabilitation under Act No. 119/1990, his ownership title had been restored and he was consequently seeking a declaration of title on the basis of the general principles of Czech property law. The District Court of Brno-venkov rejected the claim on 8 June 2005. The Regional Court of Brno rejected the appeal brought before it in this matter "on the ground

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<sup>a</sup> In Yadh Ben Achour, Jean-Robert Henry and Rostane Mehdi, *Le débat juridique au Maghreb: De l'étatisme à l'Etat de Droit, Etudes en l'honneur d'Ahmed Mahiou* (Editions Published-IREMAM, 2009), p. 241 ff.

that civil law actions for property restitution after rehabilitation under Act No. 119/1990 could not be undertaken so as to circumvent applicable restitution legislation (i.e. Act No. 87/1991)". The author's appeal to the Constitutional Court was dismissed as ill-founded on 5 April 2007, nearly one year prior to submission of the present communication, and prior to the exhaustion of domestic remedies.

This second legal action, which differs from the first in terms of its object and the law applicable to it, can neither be combined with the first nor appended to it. The Committee itself recognizes that it constituted a new legal action, referring to it as "the second judicial proceedings" (para. 8.4), in respect of which, moreover, domestic remedies have been exhausted and the matter referred to the Committee within what could be considered a reasonable period of time. The object of this new legal action was a declaration of title, unlike that of 1992 (which was referred belatedly to the Committee), the object of which was the restitution of property. Because it concerns questions of ownership, the new action is unquestionably inadmissible *ratione materiae*, given that the right to own property lies outside the scope of the Covenant. The Committee's statement to the effect that "the second judicial proceedings" is, in essence, linked to the first arises from an assessment of the purpose, not the object, of the proceedings.

By equating the concept of object with that of purpose, by appending the second action to the first in a legally questionable manner through a reference to "consideration of the second part of the legal action", and by allowing its attention to be diverted from lack of jurisdiction *ratione materiae* by considerations relating to article 26 — which could have been applied to the first action (for restitution) — the Committee has made errors of judgement with regard to both the facts and the law.

(Signed) Mr. Abdelfattah Amor

[Done in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**FF. Communication No. 1619/2007, *Pestaño v. Philippines*  
(Views adopted on 23 March 2010, ninety-eighth session)\***

<i>Submitted by:</i>	Felipe and Evelyn Pestaño (represented by counsel, Enrique Angeles)
<i>Alleged victim:</i>	The authors' son, Phillip Andrew Pestaño (deceased)
<i>State party:</i>	Philippines
<i>Date of communication:</i>	24 April 2007 (initial submission)
<i>Subject matter:</i>	Arbitrary deprivation of life of a member of the Philippines Navy on board a ship carrying illegal cargoes; failure to conduct an adequate investigation and to initiate proceedings against the perpetrators.
<i>Procedural issues:</i>	Non-substantiation of claim; exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to life, arbitrary deprivation of life; right to an effective remedy
<i>Articles of the Covenant:</i>	6; 2, paragraph 3; 9, paragraph 1; 17, paragraph 1
<i>Articles of the Optional Protocol:</i>	2; 5, paragraph 2 (b)

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

*Meeting on 23 March 2010,*

*Having concluded* its consideration of communication No. 1619/2007, submitted to the Human Rights Committee by Mr. and Ms. Felipe and Evelyn Pestaño on behalf of their son, Ensign Phillip Andrew Pestaño, under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication, and the State party,

*Adopted* the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1.1 The authors of the communication, Mr. and Ms. Felipe and Evelyn Pestaño, Filipino nationals born respectively in 1940 and 1943, are the parents of Ensign Phillip Andrew

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Mrs. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Salvioli and Mr. Krister Thelin.

Pestaño, the victim, who died on 27 September 1995, on behalf of whom they submit the complaint. The authors claim a violation by the Philippines of their son's rights under article 6; article 2, paragraph 3; article 9, paragraph 1; and article 17, paragraph 1, of the International Covenant on Civil and Political Rights. The authors also refer to an attack against their son's honour, which would appear to raise issues under article 17, paragraph 1, of the Covenant. The authors are represented by counsel, Mr. Enrique Angeles.

1.2 The Covenant entered into force for the State party on 23 January 1986 and the Optional Protocol on 22 November 1989.

### **The facts as presented by the authors**

2.1 The authors' son, Phillip, was at the time of the alleged violation an officer of the Philippine Navy, serving as cargo officer of the BRP Bacolod City ship during its Mindanao voyage in September 1995. On or about 25 September 1995, the ship's Commander permitted the loading of more than 14,000 board feet of logs onto the BRP Bacolod City, without proper papers or authorization. The authors' son vehemently objected to the loading of such unauthorized cargoes.

2.2 On 26 September 1995, the authors received an anonymous phone call, warning them that their son's life was in danger. On the same day, they collected their son from the Navy Station at Sangley Point, Cavite City, about 100 kilometres from Manila, and took him to their house in Loyola Heights, Quezon City. That night, the victim disclosed to his father, the author, that the BRP Bacolod City ship was "dirty", and that the illegal cargo included 20 sacks of *shabu*,<sup>1</sup> worth approximately 1 billion pesos in the black market. The author tried to dissuade his son from pursuing the case, as he was concerned that any action taken by his son may jeopardize his own business, as the Philippine Navy's biggest ship repair contractor. Despite the author's warning, however, Phillip was determined to take the matter forward.

2.3 On 27 September 1995, at about 4 a.m., the authors' son left the family home and proceeded to board his ship, the BRP Bacolod City. At about 11 a.m. on the same day, the authors received a call from the Philippine Navy, asking them to proceed to the Navy Headquarters in Manila, because their son Phillip had "had an accident".

2.4 When the authors reached the Navy Headquarters, they were prevented from entering their son's suite, where he lay dead. Instead, they were immediately asked to sign an authorization for an autopsy to be conducted on their son's body, to which the authors consented after having viewed their son's body. The Navy thereafter exhibited an alleged suicide weapon and an alleged suicide note, in support of its position that the authors' son had committed suicide.

2.5 On 30 September 1995, the authors' son was buried in the National Cemetery for military personnel and given full military honours, despite a Navy policy stating that suicide victims should not benefit from such treatment.

2.6 In October 2005, after conducting their own investigations, the Criminal Investigation Division of the Philippine National Police and the National Bureau of Investigation of the Department of Justice corroborated the Navy's position, concluding that the authors' son had committed suicide.

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<sup>1</sup> Drug from methamphetamine substance, known as *shabu* in the Philippines.

2.7 In the course of the same month, after conducting its own inquiry, and despite the official Navy and police conclusions, the victim's insurance company paid the full amount of his coverage to his beneficiaries for his death.<sup>2</sup>

2.8 In October 1995, the radio operator of the BRP Bacolod City during its Mindanao voyage, and close friend of the authors' son, drowned in high seas under highly suspicious circumstances during an alleged mission where all his companions survived. The victim's body was never found.

2.9 In November 1995, another member of the Navy, who was perceived as an ally of the authors' son, and who was also aboard the BRP Bacolod City in September 1995, mysteriously disappeared after being ordered to report to the Navy Headquarters in Manila. This person is still missing and is believed to be dead.

2.10 On 15 November 1995, two Senators filed a Senate Resolution, directing the appropriate Senate Committees to conduct an inquiry into the circumstances surrounding the death of the authors' son.

2.11 In December 1995, the State party's Navy Flag Officer in Command, a Vice-Admiral, invited the authors to dinner, and requested that they refrain from pursuing their son's case against the Navy. Two weeks later, the Navy Flag Officer in Command sought to see the authors again, and presented the author, Mr. Pestaño, with his company's contract with the Navy, worth one hundred million pesos, together with an affidavit of waiver and desistance to pursue his suit against the Navy.<sup>3</sup> The authors decided that they would not abandon their son's claim. One week after this information was relayed to the Navy Flag Officer in Command, the four Navy ships being repaired by the author's company all mysteriously sank, and his company's offices in the Navy Station in Sangley Point were ransacked and looted. It is also reported that the authors' nephew, the company's property custodian, was shot dead during the same period.

2.12 On 2 January 1996, the authors received a leaked copy of an intelligence report of the State party's Armed Forces, which stated that the BRP Bacolod City carried 1 billion pesos worth of *shabu* in 20 sacks of rice during its September 1995 trip. The report also indicated that this shipment had been escorted by a security officer of the State party's Navy Flag Officer in Command, and that upon discovering the illegal cargo, the authors' son had confronted his superior, and was killed afterwards, to prevent him from revealing the criminal activities taking place on board the ship. This confidential report also identified the chief security officer of the Navy Flag Officer in Command as the most likely perpetrator of the crime.

2.13 In January 1996, another member of the Philippine Navy mysteriously died in a military hospital, after a strange and quick deterioration of his condition. This person was suspected of involvement in the "*shabu* operation" in the BRP Bacolod City, as well as in the death of the authors' son, and had engaged in discreet talks with the authors before his death. He was believed to be ready to reveal important information before he died. The death of this member of the Navy brings to four the number of persons killed in connection with the September 1995 voyage of the BRP Bacolod City. The four killings remain uninvestigated, and unaccounted for.

2.14 The authors state that they filed the following complaints against the Commanding Officer and certain crew members of the BRP Bacolod City: (a) in September 1995 with the

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<sup>2</sup> The authors appear to suggest that the insurance company did not believe that the cause of death of the authors' son was suicide, and hence paid the amount of his insurance coverage to his parents.

<sup>3</sup> Thereby threatening him to breach the agreement should the authors decide not to abandon their claim against the Navy.



Philippine Navy; and (b) in September 1995 with the Philippine National Police and the National Bureau of Investigation of the Department of Justice (both proceedings led to the conclusion that the authors' son had committed suicide); (c) in January 1998 with the Philippine Senate (Committees on Justice-Human Rights and Defence-National Security); (d) in March 2000 with the Ombudsman; (e) and in October 2005 with a new Ombudsman, who was replaced thereafter.<sup>4</sup> No action has been taken on the case by the incumbent Ombudsman since she took office in December 2005.

2.15 On 25 January 1998, after eight Committee hearings, a visual inspection of the stateroom of the authors' son in the ship, and relying, inter alia, on expert evidence<sup>5</sup> and witness testimonies, two Senate Committees<sup>6</sup> issued a joint report on the Pestaño case, which contained the following findings: (a) The authors' son did not kill himself on the BRP Bacolod City on 27 September 1995; (b) he was shot in a place in the vessel different from the one where his body was found; (c) after his death, his body was moved and laid on the bed where it was found; (d) he must have been shot on board the BRP Bacolod City before the vessel reached the Navy Headquarters on 27 September 1995; (e) there was a deliberate attempt to make it appear that the authors' son killed himself inside his stateroom; and (f) such an attempt was so deliberate and elaborate that one person could not have accomplished it by himself. The Senate Committees also recommended, inter alia, that an independent investigation be conducted on the circumstances surrounding the murder of the authors' son, so as to bring the perpetrators to justice, and identify the other individuals who participated in the deliberate attempt to portray a suicide.<sup>7</sup>

2.16 On 28 March 2000, the Ombudsman (Fact-finding and Intelligence Bureau)<sup>8</sup> in charge of the file dismissed the case without prejudice, concluding in its evaluation report that "the conduct of further investigation in order to find out the identity of the perpetrator and his accomplices, if any, will only be a waste of time, considering that the physical evidence has already been tampered with, not to mention the lapse of time".

2.17 Upon the retirement of the Ombudsman, and the appointment of his successor, whose reputation for integrity was unassailable, the authors filed a new complaint with the Office of the Ombudsman on 27 October 2005.<sup>9</sup> In December 2005, the Ombudsman<sup>10</sup>

<sup>4</sup> An administrative and criminal case was filed on 27 October 2005, for murder and grave misconduct (OMB-P-C-05-1298-J and OMB-P-A-05-1223-J) with the Office of the Ombudsman (Office of the Deputy Ombudsman for the Military and Other Law Enforcement Offices).

<sup>5</sup> Inter alia the report (of 13 August 1997) of an independent certified forensic examiner specializing in homicide events reconstruction. The report reached the conclusion that based on [his] "observations, findings, and the discrepancies demonstrated within the documentation of this case, it is this Examiner's professional expert opinion that this death would be most appropriately classified as a suspicious death, most probably being a homicide with a staged scene".

<sup>6</sup> Committee on Justice and Human Rights and Committee on National Defence and Security. The report was considered during the third regular session of the Tenth Congress of the State party.

<sup>7</sup> The Senate report also recommended that an Ombudsman investigation look into the legality of the loading of the illegal cargo on board the BRP Bacolod City, and that related liabilities be established; Other ancillary recommendations concerned, inter alia, the enactment of legislation penalizing persons concealing or destroying the body of the victim of a criminal act or related evidence, and imposing severe penalties thereof, as well as recommendations on the need to ensure that post modern medico-legal examinations conform to international standards of forensic pathology.

<sup>8</sup> According to the Ombudsman Act No. 6770, the Ombudsman and his Deputies act on complaints filed against officers or employees of the Government, or of any subdivision, agency or instrumentality thereof, including Government-owned or controlled corporations, and enforce their administrative, civil and criminal liability.

<sup>9</sup> The authors' 18-page affidavit against nine respondents is annexed to the complaint.

<sup>10</sup> Order of the Office of the Deputy Ombudsman for the Military and other Law Enforcement Offices, 6

found merit in the authors' petition, reopened the case, and requested from the Commanding Officer of the BRP Bacolod City in September 1995, and from eight senior and junior officers and enlisted personnel to submit counter-affidavits as respondents, within 10 days. Only one week after reopening the authors' case, the Ombudsman stepped down, and was replaced. Since then, the case was left uninvestigated in the Office of the Ombudsman for military affairs.

### **The complaint**

3.1 The authors submit that the State party violated their son's rights under article 2, paragraph 3; article 6; article 9, paragraph 1; and article 17, paragraph 1, of the Covenant.

3.2 They recall the Senate Committee's findings of 1998, which they believe conclusively established that their son did not commit suicide, but was murdered. They add that there was a deliberate and elaborate conspiracy to cover up his death, including through fabrication destruction or tampering of evidence, as well as misrepresentation and distortion of facts, all of which constituted an obstruction of justice, and an unlawful attack against the honour of the authors' son.

3.3 The authors add that the entire State party's apparatus, including its criminal investigation law enforcement and judicial organs, jointly and severally participated in such conspiracy, with the exception of the Senate. By so doing, the State party deprived the authors' son of his right to redress for the violation of his human rights, and thereby denied him justice for 12 years.<sup>11</sup>

### **State party's observations on admissibility and the merits**

4.1 On 18 January 2008, the State party challenged the admissibility of the communication, arguing that the author did not exhaust domestic remedies, as the authors' claim is still pending before the Office of the Deputy Ombudsman for the Military and other Law Enforcement Offices against a number of respondents, for murder and grave misconduct. In an order of 10 August 2007, the Office of the Ombudsman deemed it necessary to conduct further proceedings in the case, and directed the parties to file their respective position papers. However, the authors have not filed their paper yet, and requested two extensions of the deadline imposed to submit their position paper.<sup>12</sup>

4.2 The State party further notes that the death of the authors' son is an "ordinary criminal case", with no evidence of State participation or acquiescence. This is confirmed by the fact that the Office of the Ombudsman reopened the action. Since the case is being actively heard by the latter instance, the authors have not exhausted domestic remedies within the meaning of article 2 of the Optional Protocol. As such, the State party further contends that the premature submission of their communication to the Committee should be considered as an abuse of their right of submission, within the meaning of article 3 of the Optional Protocol.

4.3 On 8 May 2008, the State party transmitted further observations on the admissibility and merits of the communication. It reiterated that the authors did not exhaust domestic remedies, and that because they have not yet submitted their position paper to the Office of the Ombudsman, this instance could not proceed with the consideration of the case. On the procedure, the State party notes that while the Senate report on this case should be given due weight and respect, its findings cannot be deemed as conclusive, as this legislative

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December 2005, annexed to the authors' submission.

<sup>11</sup> Up to the time of the authors' complaint, i.e. in 2007.

<sup>12</sup> The authors' request for extension is annexed to the State party submission.

branch of the Government is not an appropriate organ to investigate and try such a case. The State party adds that the proper venue for the investigation and prosecution of the case is the Office of the Ombudsman,<sup>13</sup> while the *Sandiganbayan*<sup>14</sup> would be the appropriate instance in charge of the trial.

4.4 On the merits, and regarding the authors' allegation of a violation of their son's right to life, the State party contends that this claim is ill-founded, as nothing in the authors' allegations or in the evidence available is capable of establishing the participation of the State party in the alleged violation. The fact that two Senators filed a resolution on the case, which paved the way for the investigation and the very same report, of which the authors avail themselves for the present complaint, is in itself an indication that the State party cannot be accused of conspiracy to deprive the authors' son of his right to life and his right to an effective remedy.

4.5 Regarding the Senate report's recommendation that an independent investigation be initiated by the Ombudsman on the alleged illegal loading of more than 14,000 board feet on the BRP Bacolod City in September 1995, and liabilities established, charges have been filed in that respect by a number of high-ranking members of the Navy against Navy personnel.

#### **Author's comments on the State party's observations**

5.1 On 31 August 2008, the authors refute the State party's arguments. On the question of exhaustion of domestic remedies, they draw the Committee's attention to the Ombudsman's Order of 6 December 2005, which enjoined respondents in the case to file counter-affidavits, after he found merit in the authors' complaint. This Order was issued for the counts of murder and grave misconduct, and thus covered both the criminal and administrative parts of the action. The request for an extension, which they sought, only concerned the administrative part of the proceedings.

5.2 The authors add that as per the Ombudsman's Order, the deadline for the submission of affidavits by respondents was 10 days from receipt of the Order, and has therefore long elapsed. The Order expressly stated that the absence of submission of a defence by the respondents should be considered as a waiver of their right to produce rebuttal evidence. Accordingly, the case should have been considered on the basis of available evidence, without further notice. The authors had submitted all required documents for the criminal and administrative proceedings, and the case should have already have been considered a long time ago. This delay demonstrates that the Ombudsman, as an instrument of the State party, is responsible for delaying the judicial process, which in turn demonstrates that the authors do not have effective remedies at their disposal within the State party's instances. According to them, the deliberate delay of 13 years in the proceedings is tantamount to a denial of justice.

5.3 The authors also dispute the State party's contention on the merits. They argue that its direct and continuous participation in the violation of the right to life of their son is manifest. In their action filed with the Ombudsman, all respondents were members of the State party's Navy, an institution of the State party. As of 3 August 2007, respondents were represented by the Office of the Naval Judge Advocate, i.e. an agent of the State party. The authors filed complaints with the State party's Navy, National Police and National Bureau

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<sup>13</sup> "Ombudsman Act of the Philippines", R.A. 6770.

<sup>14</sup> Republic Acts No. 7975 and No. 8249. According to the Constitution, this court has jurisdiction over criminal and civil cases involving graft and corrupt practices and such other offences committed by public officers and employees, including those in Government-owned or controlled corporations, in relation to their office.

of Investigation under the Department of Justice, all instrumentalities of the State party, whose official conclusions were rejected by the Senate, an independent branch of the State party.

5.4 With regard to the State party's contention that an independent investigation was initiated on the alleged illicit loading of logs on the BRP Bacolod City, the authors affirm that the investigation in question is not independent, as charges were filed by the State party's Navy. Therefore, this procedure does not meet the express requirements of independence and transparency as understood in the Senate report recommendation.

5.5 The authors reiterate that they identified the Navy Flag Officer in Command, a Vice-Admiral, as an alleged perpetrator who showed intense interest in the case; they recall that this person asked them to sign an affidavit of desistance to pursue the case, and upon their refusal to do so, cancelled the authors' lucrative contract with the Navy. It is obvious that the Navy, as an instrumentality of the State party, committed the murder of their son. Furthermore, after the murder in September 1995, the State party's executive apparatus worked in unison to cover up the crime and protect perpetrators. The authors recall that the only Ombudsman who genuinely attempted to conduct an effective investigation into the case strangely stepped down from office only one week after reopening the case in 2005. They reiterate that after 13 years of fruitless struggle, and three distinct Presidential administrations, their struggle for justice for their son has no prospect of success within the State party's justice system.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

6.1 Before considering any claim contained in the communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the same matter is not being examined under any other international procedure, in line with the requirements of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 The State party has argued that the communication is inadmissible for failure to exhaust domestic remedies. In support of its argument, it noted that the authors' claim is still pending before the Office of the Deputy Ombudsman for the Military and other Law Enforcement Offices against a number of respondents, for murder and grave misconduct. The authors filed a complaint with the Ombudsman after the State party's Navy, National Police and the National Bureau of Investigation of the Department of Justice concluded in 1995 that their son had committed suicide. The authors claim that the procedure within the Office of the Ombudsman is an ineffective remedy, since this body failed to initiate a timely and effective investigation into the alleged murder of their son since it was seized of the case in 2000. The authors affirm that despite the fact that the case was reopened in October 2005, no meaningful action has been taken by the incumbent Ombudsman since she took office in December 2005.

6.4 The Committee recalls that it is precluded from considering any communication unless it has been ascertained that all available domestic remedies have been exhausted. For the purposes of article 5, paragraph 2 (b), of the Optional Protocol, however, domestic remedies must both be effective and available, and must not be unduly prolonged.<sup>15</sup> In the

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<sup>15</sup> See, for example, communication No. 1560/2007, *Marcellana and Gumanoy v. The Philippines*, Views adopted on 30 October 2008, para. 6.2.

circumstances of this case, the Committee notes that the State party has failed to show that any investigation has been initiated since the date of the alleged offence, with the final aim of ensuring the effective prosecution and punishment of the perpetrator/s of the alleged murder. Under these circumstances, and considering that almost 15 years have elapsed since the date of the alleged offence, the Committee considers that domestic remedies have been unreasonably prolonged. The Committee accordingly finds that article 5, paragraph 2 (b), of the Optional Protocol does not preclude it from considering the complaint.

6.5 Concerning the alleged violation of article 9, paragraph 1, of the Covenant, the authors claim that they received an anonymous call, informing them that their son's life was in danger, the day before he was found dead. However, there is no evidence that the authors reported these threats against their son to the State authorities, and if so, that the State party failed to take appropriate action for this protection. Nor is there any conclusive evidence that the State party was itself involved in threatening the authors' son. In the absence of any further arguments put forward by the authors on this issue, the Committee considers that these claims are not sufficiently substantiated for the purposes of admissibility and concludes that they are inadmissible under article 2 of the Optional Protocol.

6.6 The Committee notes that the authors' claim under article 17, paragraph 1, to the effect that the State party's attempt to make it appear that the victim committed suicide, is to be construed as an unlawful attack against his honour. It considers that this claim has not been sufficiently substantiated for the purposes of admissibility, and is inadmissible under article 2 of the Optional Protocol.

6.7 The Committee considers that the authors' claims under article 6, read in conjunction with article 2, paragraph 3, have been sufficiently substantiated, for the purposes of admissibility, and proceeds to their examination on the merits.

#### *Consideration of the merits*

7.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5, paragraph 1, of the Optional Protocol.

7.2 With regard to the authors' contention that article 6 was violated, the Committee recalls that the right to life is the supreme right, from which no derogation is permitted.<sup>16</sup> It further recalls that States parties have a positive obligation to ensure the protection of individuals against violations of Covenant rights, which may be committed not only by its agents, but also by private persons or entities.<sup>17</sup> The Committee also refers to its jurisprudence, according to which both a criminal investigation and consequential prosecution are necessary remedies for violations of human rights such as those protected by article 6.<sup>18</sup> A violation of the Covenant may therefore arise as a result of a State party's failure to take appropriate measures to punish, investigate or redress such a violation.

7.3 Despite the initial findings of the State party's National Police and Department of Justice, which both concluded in October 1995 that the victim had committed suicide, it now appears undisputed that the death of the authors' son was a violent one, resulting from

<sup>16</sup> Human Rights Committee, general comment No. 6 (1982), *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40)*, annex V, para. 1.

<sup>17</sup> Human Rights Committee, general comment No. 31 (2004), *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40, vol I (A/59/40 (Vol. I))*, annex III, para. 8.

<sup>18</sup> See, for example, communications No. 1447/2006, *Amirov v. Russian Federation*, Views adopted on 2 April 2009, para. 11.2; and No. 1436/2005, *Sathasivam et al. v. Sri Lanka*, Views adopted on 8 July 2008, para. 6.4.

a homicide. The State party's submissions of 18 January and 8 May 2008, contending that the author's case was "an ordinary criminal case", at least concede this fact. The Committee took note of the conclusions of the substantial Senate report of 25 January 1998, which established that the victim was shot on board the BRP Bacolod City on 27 September 1995, that there had been a deliberate attempt to make it appear that the authors' son killed himself, and which recommended that an independent investigation be conducted. The Committee further noted that an administrative and criminal action filed by the authors is currently pending against members of the State party's Navy, i.e. of an organ of the State party.

7.4 The Committee takes note of the authors' assertions that two other members of the State party's Navy who were close to the victim, as well as another Navy Ensign who allegedly participated in the illicit boarding of drugs on the BRP Bacolod City, and who had engaged in communications with the authors about their son's death, all died or disappeared in mysterious circumstances between October 1995 and January 1996. The authors further reported having been threatened by a Vice-Admiral of the State party's Navy that they would lose their business with the Navy should they persist in their complaint. As they pursued their action, the authors reportedly lost their business, and their nephew, the company's property custodian, was killed. In the absence of rebuttal statements, or any comments from the State party on these facts, the Committee gives due weight to the authors' contentions, which raise a strong presumption of direct participation of the State party in the violation of their son's right to life.

7.5 The Committee considers that the killing of the authors' son on board a ship of the State party's Navy warranted a speedy, independent investigation on the possible involvement of the Navy in the crime. The Committee recalls that the deprivation of life by the authorities of the State is a matter of utmost gravity, and that the authorities have the duty to investigate in good faith all allegations of violations of the Covenant made against it and its authorities. To simply state that there was no direct participation of the State party in the violation of the victim's right to life falls short of fulfilling such positive obligation under the Covenant. While close to 15 years have elapsed since the death of the victim, the authors are still ignorant of the circumstances surrounding their son's death, and the State party's authorities have yet to initiate an independent investigation. In its submission of 8 May 2008, the State party referred to an Order of 10 August 2007 of the Office of the Ombudsman, which deemed it necessary to conduct *further* proceedings [emphasis ours] in the case. The Committee is not aware, however, of any preliminary proceedings undertaken by that Office since an action<sup>19</sup> was filed *de novo* by the authors in October 2005. Since that date, no suspect was prosecuted, or tried, let alone convicted, and the authors were not compensated for the tragic loss of their son.

7.6 The Committee has given due consideration to the authors' claim under article 6 that the death of their son is directly attributable to the State party. When a person dies in circumstances that might involve a violation of the right to life, the State party is bound to conduct an investigation and ensure that there is no impunity. The State party must accordingly be held to be in breach of its obligation, under article 6, read in conjunction with article 2, paragraph 3, to properly investigate the death of the authors' son, prosecute the perpetrators, and ensure redress.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation by the Philippines of article 6, read in conjunction with article 2, paragraph 3, of the Covenant.

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<sup>19</sup> For (a) grave misconduct (administrative) and (b) grave misconduct and murder (criminal).

9. Under article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy in the form, inter alia, of an impartial, effective and timely investigation into the circumstances of their son's death, prosecution of perpetrators, and adequate compensation. The State party is also under an obligation to prevent similar violations in the future.

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 or not 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 in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**GG. Communication No. 1623/2007, *Guerra de la Espriella v. Colombia*  
(Views adopted on 18 March 2010, ninety-eighth session)\***

<i>Submitted by:</i>	José Elías Guerra de la Espriella (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Colombia
<i>Date of communication:</i>	23 January 2007 (initial submission)
<i>Subject matter:</i>	Conviction of a person in a trial with faceless judges
<i>Procedural issues:</i>	Abuse of the right to submit communications; failure to exhaust domestic remedies
<i>Substantive issue:</i>	Violation of the right to a fair trial
<i>Article of the Covenant:</i>	14
<i>Articles of the Optional Protocol:</i>	3 and 5, paragraph 2 (b)

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

*Meeting* on 18 March 2010,

*Having concluded* its consideration of communication No. 1623/2007, submitted by Mr. José Elías Guerra de la Espriella under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication, and the State party,

*Adopts* the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication, dated 23 January 2007, is José Elías Guerra de la Espriella, a Colombian citizen born on 19 June 1954, who alleges he is a victim of a violation by Colombia of article 14 of the Covenant. The Optional Protocol entered into force for the State party on 23 March 1976. The author is not represented by counsel.

**The facts as submitted by the author**

2.1 The author alleges that, on 3 May 1995, the Supreme Court of Justice ordered him to be investigated within the framework of investigations being carried out against the Rodríguez Orejuela brothers, who were “drug lords” in the town of Cali. Neither he nor his counsel was officially informed of the investigation under way until criminal investigation

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O’Flaherty, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.



proceedings were formally opened on 23 May 1995. Having learned of it unofficially, the author requested the opportunity to testify, and did so on 12 June 1995.

2.2 After much testimonial evidence had been gathered (a process in which the defence was not permitted to participate), the author was summoned for questioning on 21 June 1996, at which time he denied any connection with the Orejuela brothers. On 9 July 1996, the Supreme Court ordered him to be placed in pretrial detention for the offences of illicit enrichment (amounting to 10,000 pesos, or approximately US\$ 14,000), as well as forging of a private document (involving invoices for the purchase of a vehicle) as principal, and fraud for having received benefits in the form of services and money from companies belonging to the Rodríguez Orejuela brothers.

2.3 Owing to the fact that he was a Senator and his trial was to be conducted before the Supreme Court, without higher appeal, the author decided to give up his office and the accompanying form of jurisdiction. That would allow the case to be heard by a divisional prosecutor's office, in accordance with article 127 of the Code of Criminal Procedure, and at a second instance if necessary by a deputy prosecutor assigned to the Higher Court of the District of Bogotá. This did not come about, however, as the Court transferred the trial to the system of Regional Justice Courts (also called Public Order Courts). Contrary to the law, the Director-General of the Public Prosecutor's Office especially assigned the case to be heard by the Chief of the Public Prosecutors Unit of the Supreme Court. The author lodged a request for annulment (*recurso de reposición*) and an appeal against the decision (*recurso de apelación*) before the Attorney General, who confirmed the original decision.

2.4 Throughout the pretrial hearing in the Public Prosecutor's Office, the author underwent questioning in darkened rooms, in front of one-way mirrors concealing the person, who spoke with a distorted voice and questioned him through a loudspeaker, while he had to reply into a microphone. The charges were formally brought in an order dated 6 March 1997, on the above counts. Regarding the charge of illicit enrichment, in addition to the acts with which he had already been charged (acquisition of a vehicle for half its price), the author was also accused of acquiring an amount of 20,000 pesos (approximately US\$ 28,000), derived from drug trafficking, for use in electoral campaigns. The author denies all the charges and asserts that although he presented conclusive evidence to refute them, that evidence was not considered. The author attempted to appeal against the charge (*recurso de apelación*), but was unable to do so because the senior judge was absent. Instead, he lodged a request for annulment (*recurso de reposición*), alleging, among other reasons, that the case was time-barred. The request was rejected on 9 April 1997.

2.5 According to the author, during both the pretrial hearing and the trial, the testimony of a witness in the United States of America, who accused him of having received money from the Rodríguez Orejuela brothers, was used as key evidence. Since the witness was outside the country, the author could not refute the testimony. Moreover, the trial was handled by a faceless judge in the Regional Justice Court of Bogotá, whom he was not able to see at any moment during the trial, and there was no public hearing. He was sentenced on 17 April 1998 to 90 months' imprisonment, a fine of 30,050,000 pesos and to deprivation of his rights and a ban on holding public office for the duration of the prison sentence, for the offences of illicit personal enrichment, falsification of a private document and fraud. He was also sentenced to pay 6,282,860 pesos to the Senate for material damage.

2.6 The author appealed the decision before the National Court, which was made up of eight faceless judges. At this stage too, there was no public hearing. On 30 December 1998, the Court confirmed the decision of the first instance, but reduced the prison sentence to 72 months. The author acknowledges that he did not lodge an appeal in cassation (*recurso de casación*), on the grounds that the members of the Criminal Cassation Chamber of the Supreme Court could not be impartial, since they were the ones who had first ordered his pretrial detention, without the possibility of release on bail. The author filed an application

for legal protection (*tutela*) before the Constitutional Court, on the grounds that the Regional Justice Court and the National Court had violated his fundamental rights to due process, defence, the presumption of innocence and freedom. The Court rejected the application on the grounds that the author's complaints should have been voiced in an appeal in cassation before the Supreme Court.

2.7 Lastly, the author lodged an appeal for special review of the final judgement (*recurso de revisión extraordinaria*) before the Supreme Court, on the grounds that new evidence had emerged from a subsequent decision of the National Court, acquitting the person who had been convicted for acting as a front man for the Rodríguez Orejuela brothers and who had supposedly been the source of his illicit enrichment. That application was rejected on 4 September 2003. According to the decision, provided by the author, the Court absolved that person of criminal responsibility on some counts but not on those related to the acts with which the author was charged. Accordingly, the decision could not be considered as new evidence for the purpose of the appeal for review. The author asserts that the decision concerning that appeal was signed by the same judges of the Court who had ordered his pretrial detention, which he considers violates the principle of impartiality.

### **The complaint**

3. The author alleges that he was the victim of a violation of article 14, paragraph 1, of the Covenant, on the grounds that his rights to a public hearing and to due process were denied. He further alleges that his rights under article 14, paragraph 3 (d) and (e) were violated, on the grounds that he was convicted in first instance in a trial that took place in his absence and that of his counsel, with neither a public hearing nor an opportunity to challenge or cross-examine the prosecution witness or to refute the evidence against him, and in which no satisfactory or reasonable answers were given to the concerns, reasoning or questions of his counsel. He had no personal contact with the prosecutor who charged him, or with the judges who convicted him in first and second instance. The judges who convicted him never heard him, whether in private or in public. He was neither given a public hearing in second instance nor was he present at the moment of the verdict.

### **State party's observations on admissibility**

4.1 In a note verbale dated 20 February 2008, the State party challenged the admissibility of the communication. It pointed out that if the author believed that the sentences handed down at first and second instance constituted a violation of his right to due process, he could have made use of the special remedy of cassation (*recurso extraordinario de casación*), a mechanism which would have allowed him to redress the alleged violations he was bringing before the Committee. This effective and practicable remedy would have allowed the author directly to restore the rights that had allegedly been breached. According to article 219 of the Code of Criminal Procedure, "the main purpose of the special remedy of cassation is to give effect to material law and the guarantees owed to persons taking part in criminal proceedings, to provide compensation for loss or injury to the parties caused by the sentence under appeal, and to unify national case law".

4.2 The State party also argues that the author could have challenged the judges of the Supreme Court whom he believed would not be impartial. Nor is it clear why the author felt he should invoke his doubts about the impartiality of the Supreme Court in his decision with respect to the remedy of cassation, but not invoke those doubts when he brought his appeal for review of the final judgement before the same Court. The State party recalls the Committee's jurisprudence in the sense that mere doubts about the effectiveness of domestic remedies do not absolve the author from exhausting them. It therefore concludes that the communication should be declared inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

4.3 The State party also argues that the communication should be deemed inadmissible on the grounds of abuse of the right to submit communications owing to the time that elapsed between the events and the submission of the communication. The final criminal sentence was handed down on 30 December 1998, and the communication was transmitted to the Committee on 23 January 2007, that is, 8 years and 23 days later. In view of the requirement for legal certainty and uniformity in all decisions adopted at the domestic level, and since the author provides no convincing explanation for the time elapsed, the State party considers that the communication should be declared inadmissible.

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

5.1 In his comments of 5 March 2008, the author reiterates that he was not informed that a preliminary investigation had been opened against him, in breach of article 324, paragraph 3, of the Code of Criminal Procedure. In a ruling dated 24 July 1995, the Court refused to halt the criminal investigation and ordered that the preliminary investigation should go forward; it then ordered of its own motion the examination which was done without the participation of the author or his counsel, who were nevertheless notified of the decision, on the grounds that the proceedings were still in the hands of the pretrial judge. The author reiterates his original allegations. He contends that, given the composition of the Supreme Court, it would have been useless to lodge a remedy of cassation, and he points out that the judge who took the decision on the appeal for review was one of the judges who had earlier issued the order for pretrial detention. He also asserts that the remedy of cassation is special, and therefore not obligatory. The remedy of review is also special, and could have been effective if new evidence had come to light that was not available during the trial. Under the circumstances, it should be recognized that domestic remedies have been exhausted.

5.2 The author insists that during the preliminary phase evidence was deliberately gathered behind the back of the defence. Despite the complaint regarding this irregularity, the Court accepted the evidence. The few occasions on which the defence was allowed to participate related to evidence of no importance. By way of example, the author cites the testimony of the accountant of the Cali cartel, which was taken in the United States without either his or his counsel's presence. Although their request for him to testify again to allow them to cross-examine him was accepted, it was not complied with. Ostensibly, this was a breach of article 14, paragraph 3 (e), of the Covenant.

5.3 The author alleges that his right to due process and his right to defence were violated, on the grounds that he was investigated, tried and sentenced by a Regional Justice Court and the National Court, which, under the Code of Criminal Procedure and decree No. 2700 of 1991, were not competent in respect of the alleged facts that took place on and after 24 April 1992. These ad hoc judicial entities began to operate only after 1 July 1992. This constitutes a violation of the natural judge principle and the principle that all persons are equal before the courts of law, since those courts acted as emergency courts, parallel to the normal courts, with special, prejudicial and restrictive rules. In this regard, the author cites the Committee's Views on communication No. 848/1999, *Rodríguez Orejuela v. Colombia*, of 23 July 2002. Decree No. 2790 of 1990 (Defence of Justice Statute) established the Public Order Courts as faceless, emergency courts, competent in terrorist crimes, which were incorporated into the 1991 Code of Criminal Procedure. The provisions regarding secret trial proceedings, with no public hearing, were repealed by Act No. 504 of 1999.

5.4 The author reiterates that he was deprived of the right to a public trial with a public hearing, in the presence of his counsel and the public prosecutor, in breach of article 14, paragraph 1, of the Covenant.

5.5 The author submits that the decision on the review of the final judgement was issued on 4 September 2003, and that therefore only three years and four months had elapsed

before his submission of the communication to the Committee. During that period he conducted inquiries, and awaited the result of communication No. 1298/2004,<sup>1</sup> involving a similar case that was intimately linked to the charges brought against him. The admissibility of that case reassured him as to the efficacy of the process.

#### **State party's observations on the merits**

6.1 On 12 February 2009, the State party reiterated its arguments against admissibility. Regarding the question of abuse, it rejects the author's attempt to calculate the time frame for submitting the communication from the date of the decision dismissing the special review of the final judgement, while at the same time maintaining that cassation is a special remedy which does not need to be exhausted.

6.2 The State party asserts that the author was investigated, tried and convicted in accordance with the rules of procedure in place at that time, with the protection of procedural guarantees. Decree No. 2700 of 1991 (amended by Act No. 81 of 1993) guaranteed the adversarial nature of the preliminary proceedings and the trial. Article 323 of the Code of Criminal Procedure authorizes the compilation of all the evidence necessary to clarify the facts, and allows the individual under criminal investigation to submit a free statement (*versión libre*), which gives him the right to be informed of the content and scope of the charges against him, which, even in the preliminary phase, may already have been established.

6.3 In the author's case, on 3 May 1995, the Supreme Court decided to initiate a preliminary investigation on the basis of copies transmitted by the Department of Public Prosecutions of Bogotá of the findings of investigations carried out in Cali in connection with the so-called "8000" proceedings. When the preliminary investigation commenced on 24 May 1995, the author asked to give a *versión libre* statement, which he did on 12 June 1995, with the assistance of his personal counsel and after transmittal of all requested documents had been authorized.

6.4 Later he was asked to clarify his *versión libre* statement, which he did on 4 September 1995. On that occasion all the evidence against him was produced; he was asked to give explanations, and new copies of the records were provided. On 18 December, the lawyer was provided with copies of evidence produced by various investigations into alleged commercial relations between politicians and persons involved in or companies belonging to the Cali cartel. On 15 January 1996, the author's counsel submitted a request for several items of evidence to be produced, to which the Supreme Court agreed on 6 February 1996. Copies of the most recent evidence received by the Court were provided to the author's counsel on 12 January 1996. After the pretrial hearing was formally declared open, on 23 May 1996, the author's counsel participated in the gathering of a wealth of testimonial evidence and in judicial inspections; he also requested copies of the records, which he was always given. The State party considers that the author has failed to demonstrate that his right to due process was violated, by making vague, generalized statements, couched in abstract phrases that fail to reflect the reality of the criminal investigation proceedings.

6.5 The State party asserts that in the course of the proceedings, the author was assisted by his defence counsel and had the opportunity to be heard on several occasions during the investigation phase. In addition, he was able to submit written documents and other evidence before the Regional Justice Court, as attested by his communication of 6 June 1997, in which he submitted a first-person account of the facts on which the charges against

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<sup>1</sup> Communication No. 1298/2004, *Becerra v. Colombia*, Views adopted on 11 July 2006.

him were based. It is true that there was no public hearing during his criminal proceedings. However, the Constitutional Court, in a ruling on constitutionality handed down in 1996, found that the rule preventing public hearings in cases dealt with by the Regional Justice Courts complied with the Constitution, and noted that the replacement of such hearings by a special procedure was a suitable means of ensuring the safety of the persons involved in the proceedings. In another ruling on constitutionality, issued in 1997, the Constitutional Court recalled that due process involved rights that could be limited during states of emergency, since they were not among the non-derogable rights listed in article 4 of the Covenant. The omission of public hearings in these types of proceedings does not undermine the basic purpose of criminal trials. According to the Constitutional Court, the Covenant enshrines the right to be present, which implies the right to a hearing. However, that hearing does not have to be public, and appropriate technical measures can be used to protect the identity of the judge and prosecutor.

6.6 The State party contends that the author's statement that he had no contact with the prosecutor who charged him is not true. The criminal investigation was not carried out by the Regional Prosecutor's Office, but rather by the public prosecutor assigned to the Supreme Court, a situation of which the author was aware at all times. The fact that the trial was transferred to the Regional Justice Court did not in itself constitute a violation of due process, since each of the judicial decisions taken had a sound legal basis, and provided remedies whereby the author could have the facts and evidence reviewed by another judicial body, without it being necessary for him to know the identity of the judge.

6.7 The State party points out that the author had the possibility, through his counsel, to request, review and refute evidence, as well as to question witnesses, and provides a list thereof. In refusing to take new testimony from the witness who was in the United States, the Public Prosecutor's Office considered that the fact that the defence had not been present while the testimony was given was not a sufficient reason to call for a further testimony. That in no way affected the right to defence, since at all times the author had the opportunity to request and refute evidence.

6.8 The State party contends that, at both the first and the second instance, the various applications made by the author's counsel were studied and assessed one by one, and gives details of their content and the replies thereto. The fact that the judgement did not concur with the arguments set forth by the author is simply attributable to the evaluation made by the judicial officials of the elements brought before the Court. The State party concludes that no article of the Covenant was violated.

#### **Author's comments on the State party's observations**

7. On 24 March 2009, the author reiterated his earlier allegations and repeated that no action had been taken on his request for further testimony from the key prosecution witness, who was in the United States; nor had he been informed that the preliminary investigation had begun. He was not able to refute the evidence produced at the outset, because most of it was brought over from another trial (the so-called "8000" proceedings). He also asserts that that witness was not properly identified, which should have been sufficient to exclude him as a proper source of evidence. He points out that his trial was more political than legal, on account of which respect for the principles of due process by judicial bodies was merely formal and not real. He also observes that the appeal for review was an appropriate remedy that should be taken into consideration by the Committee for the purpose of calculating the time elapsed between the exhaustion of domestic remedies and the submission of his communication to the Committee.

## Issues and proceedings before the Committee

### *Consideration of admissibility*

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

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

8.3 The Committee takes note of the State party's argument that the communication should be considered inadmissible on the grounds of abuse of the right to submit communications, owing to the time that has elapsed between the last criminal sentence, handed down on 30 December 1998, and the submission of the communication to the Committee, on 23 January 2007. The Committee also takes note of the author's explanations in this regard, in particular the fact that he lodged an appeal for review, decided on 4 September 2003, which did not solely pertain to procedural issues, but also to substantive issues directly related to the facts on the basis of which the author was convicted. The Committee reiterates that the Optional Protocol establishes no time limit for the submission of communications and that the passage of time, other than in exceptional cases, does not in itself constitute an abuse of the right to submit a communication. In the present case, the Committee does not consider that a delay of three years and five months since the last judicial decision constitutes an abuse of the right to submit a communication.<sup>2</sup>

8.4 The Committee also takes note of the State party's observations that the author failed to exhaust domestic remedies because he did not lodge an appeal in cassation with respect to his complaints concerning the violation of his right to a trial with due process in the normal trial courts. The State party also asserts that the author could have challenged the judges of the Supreme Court whom he believed would not be impartial. In the Committee's view, the author's complaints are of two types. The first has to do with the taking of evidence, the way in which the evidence was weighed by the courts, and the impartiality of the judges of the Supreme Court. The second refers to the fact that he was tried by a faceless judge and a faceless court, that the trial was conducted without a public hearing, without his presence or the presence of his counsel, that he had no personal contact with the prosecutor who charged him or the judges who convicted him, and that those judicial bodies acted as an emergency court, established on 1 July 1992, or in other words after the acts for which he was accused.

8.5 With regard to the first type of complaints, the Committee observes that those complaints were set out in an application for legal protection that was dismissed by the Constitutional Court on the grounds that they should have been raised in an appeal in cassation. The Committee recalls its jurisprudence that mere doubts about the effectiveness of a remedy do not absolve the author from the obligation to attempt it. The Committee therefore considers that domestic remedies had not been exhausted and that this part of the communication should be considered inadmissible in accordance with article 5, paragraph 2 (b), of the Optional Protocol.

8.6 With regard to the second type of complaints, concerning the functioning of the Regional Justice Court, the Committee observes that this court was established by law in 1992, and that, as the State party indicated, the Constitutional Court had pronounced it

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<sup>2</sup> See, for example, communication No. 1479/2006, *Persan v. Czech Republic*, Views adopted on 24 March 2009, para. 6.3.

constitutional. The Committee therefore considers that the exhaustion of domestic remedies rule cannot be applied in respect to these complaints. There being no further obstacles to their admissibility, the Committee declares them admissible insofar as they raise issues in relation to article 14, paragraphs 1 and 3 (d) and (e).

*Examination of merits*

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, in accordance with article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee takes note of the author's complaints that he was tried by a faceless judge and a faceless court established after the acts with which he was charged, in trials with no public hearing, at which neither he nor his counsel were present; that he had no personal contact with the prosecutor who charged him or the judges who convicted him; and that he was interrogated in darkened rooms, in front of one-way mirrors concealing his questioner, whose voice was distorted. The Committee also takes note of the observations of the State party confirming that there was no public hearing during the trials conducted in the Regional Justice Courts, a measure which the Constitutional Court declared constitutional for the purpose of ensuring the safety of participants in the trial. The State party also affirms that the identity of the prosecutor was known to the author and that hiding the identity of the judges did not prevent the submission of evidence by the accused or appeals against decisions with which he did not agree.

9.3 The Committee recalls paragraph 23 of its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial,<sup>3</sup> and observes that, in order to guarantee the rights of the defence enshrined in article 14, paragraph 3, and in particular those contained in subparagraphs (d) and (e), all criminal proceedings must provide the accused with the right to an oral hearing, at which he or she may appear in person or be represented by counsel and may bring evidence and examine witnesses. Taking into account the fact that the author did not have such a hearing during the proceedings that culminated in his convictions and sentencing, together with the manner in which the interrogations were conducted, without observing the minimum guarantees, the Committee finds that there was a violation of the author's right to a fair trial in accordance with article 14 of the Covenant.<sup>4</sup>

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, finds that the facts before it disclose a violation of article 14 of the Covenant.

11. Pursuant to article 2, paragraph 3 (a), of the Covenant, the State party must provide the author with an effective remedy, including appropriate compensation. The State party is also under an obligation to ensure that similar violations do not occur in future.

12. Bearing in mind that, by becoming 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 or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from

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<sup>3</sup> *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40, vol. I (A/62/40 (Vol. I)), annex VI.*

<sup>4</sup> See communications No. 848/1999, *Rodríguez Orejuela v. Colombia*, Views adopted on 23 July 2002, para. 7.3; and *Becerra v. Colombia* (note 1 above), para. 7.2.

the State party, within 180 days, information about the measures taken to give effect to the present Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]



**HH. Communication No. 1629/2007, *Fardon v. Australia*  
(Views adopted on 18 March 2010, ninety-eighth session)\***

<i>Submitted by:</i>	Robert John Fardon (represented by counsel, Reeanna Maloney, The Prisoners' Legal Service Inc. in Queensland)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Australia
<i>Date of communication:</i>	1 March 2006 and 29 May 2007 (initial submissions)
<i>Subject matter:</i>	Preventive detention order after completion of prison sentence for sexual offences
<i>Procedural issues:</i>	None
<i>Substantive issues:</i>	Prohibition of double jeopardy ( <i>ne bis in idem</i> ); arbitrary detention
<i>Articles of the Covenant:</i>	14, paragraph 7; 9, paragraph 1
<i>Article of the Optional Protocol:</i>	None

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

*Meeting* on 18 March 2010,

*Having concluded* its consideration of communication No. 1629/2007, submitted to the Human Rights Committee on behalf of Mr. Robert John Fardon under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication, and the State party,

*Adopts* the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1. The communication dated 1 March 2006 and 29 May 2007 is submitted by Robert John Fardon, an Australian citizen born on 16 October 1948. The author claims to be victim of a violation by Australia of article 14, paragraph 7, and article 9, paragraph 1, of the Covenant. The author is represented by counsel, Reeanna Maloney, of the Prisoners' Legal Service in Queensland.

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

An individual opinion signed by Committee members Mr. Krister Thelin and Ms. Zonke Zanele Majodina is appended to the present document.

### The facts as presented by the author

2.1 On 30 June 1989, the author was sentenced to 14 years' imprisonment for rape, sodomy and unlawful assault on a female committed on 3 October 1988. His sentence expired on 30 June 2003. The author has not committed any offence since 3 October 1988.

2.2 On 6 June 2003, the Queensland Dangerous Prisoners (Sexual Offenders) Act 2003 (DPSOA) came into force. On 17 June 2003, the Attorney-General of Queensland filed an application under the DPSOA for an order that the author be detained for an indefinite period pursuant to section 13 of the DPSOA.<sup>1</sup> Section 13 of the DPSOA provides that a prisoner who is proven to be a serious danger to the community may be detained in custody for an indefinite term for control, care or treatment. The onus is on the Attorney-General to prove the danger.

2.3 On 27 June 2003, the Supreme Court of Queensland, based on the DPSOA, ordered the interim detention of the author until 4 August 2003. This date was later extended until 3 October 2003 and thereafter "until further order". On 6 November 2003 and 11 May 2005, the Supreme Court of Queensland reiterated that the author should "continue to be the subject of a continuing detention order". On 8 November 2006, after two preceding preliminary decisions on the matter, the Supreme Court ordered that the author be subject to a conditional supervision order and that the continuing detention order be rescinded,

<sup>1</sup> The Queensland Dangerous Prisoners (Sexual Offenders) Act 2003 (part 2, sect. 13):

#### Division 3 orders

- (1) This section applies if, on the hearing of an application for a division 3 order, the court is satisfied the prisoner is a serious danger to the community in the absence of a division 3 order (a serious danger to the community).
- (2) A prisoner is a serious danger to the community as mentioned in subsection (1) if there is an unacceptable risk that the prisoner will commit a serious sexual offence – (a) if the prisoner is released from custody; or (b) if the prisoner is released from custody without a supervision order being made.
- (3) On hearing the application, the court may decide that it is satisfied as required under subsection (1) only if it is satisfied – (a) by acceptable, cogent evidence; and (b) to a high degree of probability; that the evidence is of sufficient weight to justify the decision.
- (4) In deciding whether a prisoner is a serious danger to the community as mentioned in subsection (1), the court must have regard to the following – (a) the reports prepared by the psychiatrists under section 11 and the extent to which the prisoner cooperated in the examinations by the psychiatrists; (b) any other medical, psychiatric, psychological or other assessment relating to the prisoner; (c) information indicating whether or not there is a propensity on the part of the prisoner to commit serious sexual offences in the future; (d) whether or not there is any pattern of offending behaviour on the part of the prisoner; (e) efforts by the prisoner to address the cause or causes of the prisoner's offending behaviour, including whether the prisoner participated in rehabilitation programs; (f) whether or not the prisoner's participation in rehabilitation programs has had a positive effect on the prisoner; (g) the prisoner's antecedents and criminal history; (h) the risk that the prisoner will commit another serious sexual offence if released into the community; (i) the need to protect members of the community from that risk; (j) any other relevant matter.
- (5) If the court is satisfied as required under subsection (1), the court may order – (a) that the prisoner be detained in custody for an indefinite term for control, care or treatment (continuing detention order); or (b) that the prisoner be released from custody subject to the requirements it considers appropriate that are stated in the order (supervision order).
- (6) In deciding whether to make an order under subsection (5) (a) or (b), the paramount consideration is to be the need to ensure adequate protection of the community.
- (7) The Attorney-General has the onus of proving that a prisoner is a serious danger to the community as mentioned in subsection (1).

following which the author was released on 4 December 2006, after an unsuccessful appeal by the Attorney-General.

2.4 On 9 July 2003, the Supreme Court of Queensland held that the provisions in the DPSOA were constitutional. This decision was confirmed by the Queensland Court of Appeal on 23 September 2003. On 1 October 2004, the High Court of Australia dismissed the author's appeal contesting the constitutional validity of the provisions that authorize Queensland courts to detain persons under the DPSOA.

### The complaint

3.1 The author claims to be victim of a violation of article 14, paragraph 7 of the Covenant because his imprisonment based on the Dangerous Prisoners (Sexual Offenders) Act 2003 punished him again for an offence for which he had already been finally convicted.<sup>2</sup> The author maintains that the DPSOA imposes double punishment without further determination of criminal guilt. Despite characterizing the purpose of the imprisonment as non-punitive, the author was subject to the same regime of imprisonment as if he had been convicted of a criminal offence. Although the author acknowledges that the courts can, while sentencing someone, make an order for "preventive" reasons, his case was different as the orders for his continued detention were not contemplated at the time of sentencing.

3.2 The author argues that his imprisonment could not be justified on the basis of public safety, as he has not been charged or convicted of any crime while he was in prison. The "public order" basis upon which liberty may be deprived can only justify further temporary restrictions of liberty that are absolutely necessary and rely on the basis of clear evidence. He adds that his detention is neither justified by mental illness.

3.3 The author further submits that his detention pursuant to section 13 of the DPSOA was arbitrary and consequently in breach of article 9, paragraph 1, of the Covenant. He maintains that his preventive detention was not imposed as an aspect of his initial sentence, but following its completion, which distinguishes his communication from the Committee's previous jurisprudence.<sup>3</sup> Recalling the Committee's jurisprudence, the author argues that detention, in order to avoid the characterization of arbitrariness, must be reasonable, necessary and proportionate.<sup>4</sup> The objectives of the DPSOA being "to ensure adequate

<sup>2</sup> The author submits an article entitled "Does the Dangerous Prisoners (Sexual Offenders) Act 2003 (Q) inflict double punishment, contrary to the ICCPR?" by Patrick Keyzer and Sam Blay, referring to his case and supporting his claims. It transpires from the article that the author's criminal history dates from February 1965 (he was then 16 years old), consisting then mostly of minor property and other non-violent offences. However, the author has been convicted of three serious sexual offences. On 17 April 1967 (he was then 18), he was convicted of attempted carnal knowledge of a girl under the age of 10 years. On 20 June 1979, he was convicted of the offences of indecent dealing with a female under 14 years, rape and unlawful wounding. He was sentenced to serve 12 months, 13 years and 6 months respectively. Less than three weeks after his release from prison in relation to these offences, he was convicted of the offences mentioned in the present communication.

<sup>3</sup> See communication No. 1090/2002, *Rameka et al. v. New Zealand*, Views adopted on 6 November 2003, para. 7.2–7.3.

<sup>4</sup> See communications No. 305/1988, *van Alphen v. the Netherlands*, Views adopted on 23 July 1990, para. 5.8; No. 560/1993, *A. v. Australia*, Views adopted on 3 April 1997, para. 9.2 and 9.4; No. 900/1999, *C. v. Australia*, Views adopted on 28 October 2002, para. 8.2; No. 1014/2001, *Baban v. Australia*, Views adopted on 6 August 2003, para. 7.2; No. 1050/2002, *D. v. Australia*, Views adopted on 11 July 2006, para. 7.2; No. 1069/2002, *Bakhtiyari v. Australia*, Views adopted on 29 October 2003, paras. 9.2–9.3; No. 1128/2002; *de Morais v. Angola*, Views adopted on 29 March 2005, para. 6.1; No. 1085/2002, *Taright v. Algeria*, Views adopted on 15 March 2006, para. 8.3; and No.

protection of the community” and “to facilitate rehabilitation of a certain class of prisoners”, the author claims that his detention for an undetermined time period, which had, according to the author, a punitive character may not be rationally connected to the objective of facilitating his rehabilitation. He further maintains that the same legislative end could have been achieved by less intrusive measures, for example by his detention in a rehabilitative or therapeutic facility rather than a prison.

#### **State party’s observations on admissibility and merits**

4.1 The State party submits its observations on the merits dated on 8 September 2008. The State party adds to the facts as presented by the author. Following the author’s release on supervision order on 4 December 2006, he remained breach free until a letter of censure was issued on 1 June 2007 because he had given a talk to law students about his experience in prison and with regard to his reintegration; the release and supervision order made the author subject to conditions of supervision until 8 November 2016. From 24 July 2007 to 30 October 2007, the author was imprisoned again for breach of his supervision order. Since 3 April 2008, the author has been detained in custody following charges involving a sexual offence against an elderly woman.

4.2 With regard to the author’s allegation that his detention under the DPSOA was arbitrary, the State party submits that his detention was lawful, reasonable and necessary in all circumstances. The author, as a repeat sexual offender, needed intensive counselling and rehabilitation programs, which are not available in psychiatric facilities. Furthermore, the author refused to participate in any rehabilitation program during his initial prison term. His preventive detention was subject to periodic independent review and fulfilled the stated aims of providing rehabilitation and protection of the community. The State party explains that the author’s detention was based on procedures under the DPSOA, a law the State party’s High Court found to be constitutional. According to the DPSOA, a continuing detention order is made only if there is an unacceptable risk that the prisoner may commit a sexual offence if released. Medical, psychological and psychiatric assessments from at least two independent experts evaluate the prisoner’s propensity to commit serious sexual offences in the future, and the prisoner’s participation during the initial detention period in rehabilitation programs. The author’s continuing detention order was imposed following a full hearing before the Queensland Supreme Court, which found that supervised release was not appropriate in the author’s case. Recalling the Committee’s jurisprudence on preventive detention,<sup>5</sup> the State party underlines that the author’s preventive detention was subject to an annual review by an independent judicial body, notably the Queensland Supreme Court. To return the author to a detention facility with access to individualized rehabilitation programmes was therefore, in light of his needs, reasonably proportionate to the objectives of the DPSOA.

4.3 Regarding the author’s claim that he was victim of a violation of article 14, paragraph 7 of the Covenant, the State party notes that its High Court found no breach of the principle *ne bis in idem* in the author’s case. It held that the sentencing of the author under the DPSOA did not contain elements of his first offence and underlined the preventive character of his detention, in particular with a view to protecting the community. The State party explains that the determination of preventive detention under DPSOA is a

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1324/2004, *Shafiq v. Australia*, Views adopted on 31 October 2006.

<sup>5</sup> See general comment No. 8 (1982) on the right to liberty and security of persons, *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40)*, annex V, para. 4; communication No. 1090/2002, *Rameka et al. v. New Zealand*, Views adopted on 6 November 2003, paras. 7.2–7.4; communication No. 305/1988, *van Alphen v. the Netherlands*, Views adopted on 23 July 1990.

civil proceeding and does not involve the question of a criminal offence.<sup>6</sup> During his preventive detention, the author received intense individualized rehabilitation assistance, which could not be administered in any other facility than a prison. The author's criminal history was not the basis of the preventive detention order, nor did the court include the criminal elements of the previous offence in its determination. The State party thus submits that the civil proceedings under the DPSOA do not relate to the initial offence by the author. The State party submits that the author's preventive detention did not have punitive character. The protective character of the author's imprisonment was, in addition to providing individualized rehabilitation assistance, further derived from the need to protect public safety.

#### **Author's comments on the State party's observations**

5.1 On 18 November 2008, the author notes that he was re-imprisoned on 12 and 24 July 2007 for breaches of the supervision orders. He underlines that he has not been convicted of any crime since 29 June 2003, when he completed his initial prison sentence for offences committed in 1988. He maintains that his imprisonment under the DPSOA amounted to a double punishment considering that the court is required to have regard to the prior offences determining whether a continued imprisonment should be ordered. The author further underlines the punitive effect of his continuing imprisonment which was carried out in a prison facility and under the same imprisonment regime as if he were convicted of a criminal offence.

5.2 The author maintains that the essence of his communication lies in the fact that the preventive detention was not imposed as part of the initial criminal trial process. He cites the opinion of the dissenting judge in his case before the High Court and notes that the re-imprisonment under the DPSOA imposes a "new punishment without any intervening offence, trial or conviction". The author underlines that the imprisonment under the DPSOA is not a preventive detention but amounts to being held under continued prison regime.

5.3 The author argues that his detention is not connected rationally to any legitimate objective under the DPSOA, as according to psychiatrists, rehabilitation can only be tested when a person has some liberty. He underlines that imprisonment is not necessary to achieve the objective of protection of the community and the rehabilitation needs of a former offender. He underlines that the DPSOA inflicts imprisonment on the basis of what a person might do, rather than for what a person has done.

#### **Issues and proceedings before the Committee**

##### *Consideration of admissibility*

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of Procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

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

6.3 Concerning the requirement of exhaustion of domestic remedies, the Committee has noted that according to the information submitted by the author, all available domestic remedies, including the High Court of Australia, have been exhausted. In the absence of

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<sup>6</sup> See *Uner v. the Netherlands*, [2005] ECHR 46410/99 (16 June 2005), para. 53.

any objection by the State party, the Committee considers that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have been met.

6.4 In the Committee's view, the author has sufficiently substantiated, for purposes of admissibility, the claims under articles 9, paragraph 1, and 14, paragraph 7, of the Covenant and therefore proceeds to their examination on the merits.

*Consideration of the merits*

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee notes the State party's observations that its High Court had examined the author's claim of *ne bis in idem* and found that the detention order under the DPSOA was not based on the author's criminal history and did not relate to the author's initial offence. It further notes the State party's explanation that proceedings under the DPSOA are of civil nature and that the author's detention had a preventive character. The Committee has also noted the author's claim that his detention under the DPSOA imposes double punishment without further determination of criminal guilt and that the court failed to include any order for preventive reasons in the initial sentence. It also notes that the author's claim that he was detained under the same prison regime as for his initial prison term.

7.3 The Committee observes that article 9, paragraph 1, of the Covenant recognizes for everyone the right to liberty and the security of his person and that no one may be subjected to arbitrary arrest or detention. The article, however, provides for certain permissible limitations on this right, by way of detention, where the grounds and the procedures for doing so are established by law. Such limitations are indeed permissible and exist in most countries in laws which have for object, for example, immigration control or the institutionalized care of persons suffering from mental illness or other conditions harmful to themselves or society. However, limitations as part of, or consequent upon, punishment for criminal offences may give rise to particular difficulties. In the view of the Committee, in these cases, the formal prescription of the grounds and procedures in a law which is envisaged to render these limitations permissible is not sufficient if the grounds and the procedures so prescribed are themselves either arbitrary or unreasonably or unnecessarily destructive of the right itself.

7.4 The question presently before the Committee is whether, in their application to the author, the provisions of the DPSOA under which the author continued to be detained at the conclusion of his 14-year term of imprisonment were arbitrary. The Committee has come to the conclusion that they were arbitrary and, consequently, in violation of article 9, paragraph 1, of the Covenant, for a number of reasons, each of which would, by itself, constitute a violation. The most significant of these reasons are the following:

(a) The author had already served his 14-year term of imprisonment and yet he continued, in actual fact, to be subjected to imprisonment in pursuance of a law which characterizes his continued incarceration under the same prison regime as detention. This purported detention amounted, in substance, to a fresh term of imprisonment which, unlike detention proper, is not permissible in the absence of a conviction for which imprisonment is a sentence prescribed by law;

(b) Imprisonment is penal in character. It can only be imposed on conviction for an offence in the same proceedings in which the offence is tried. The author's further term of imprisonment was the result of Court orders made, some 14 years after his conviction and sentence, in respect of predicted future criminal conduct which had its basis in the very offence for which he had already served his sentence. This new sentence was the result of

fresh proceedings, though nominally characterized as “civil proceedings”, and falls within the prohibition of article 15, paragraph 1, of the Covenant. In this regard, the Committee further observes that, since the DPSOA was enacted in 2003 shortly before the expiry of the author’s sentence for an offence for which he had been convicted in 1989 and which became an essential element in the Court orders for his continued incarceration, the DPSOA was being retroactively applied to the author. This also falls within the prohibition of article 15, paragraph 1, of the Covenant, in that he has been subjected to a heavier penalty “than was applicable at the time when the criminal offence was committed”. The Committee therefore considers that detention pursuant to proceedings incompatible with article 15 is necessarily arbitrary within the meaning of article 9, paragraph 1, of the Covenant;

(c) The DPSOA prescribed a particular procedure to obtain the relevant Court orders. This particular procedure, as the State Party conceded, was designed to be civil in character. It did not, therefore, meet the due process guarantees required under article 14 of the Covenant for a fair trial in which a penal sentence is imposed;

(d) The “detention” of the author as a “prisoner” under the DPSOA was ordered because it was feared that he might be a danger to the community in the future and for purposes of his rehabilitation. The concept of feared or predicted dangerousness to the community applicable in the case of past offenders is inherently problematic. It is essentially based on opinion as distinct from factual evidence, even if that evidence consists in the opinion of psychiatric experts. But psychiatry is not an exact science. The DPSOA, on the one hand, requires the Court to have regard to the opinion of psychiatric experts on future dangerousness but, on the other hand, requires the Court to make a finding of fact of dangerousness. While Courts are free to accept or reject expert opinion and are required to consider all other available relevant evidence, the reality is that the Courts must make a finding of fact on the suspected future behaviour of a past offender which may or may not materialize. To avoid arbitrariness, in these circumstances, the State Party should have demonstrated that the author’s rehabilitation could not have been achieved by means less intrusive than continued imprisonment or even detention, particularly as the State Party had a continuing obligation under article 10, paragraph 3, of the Covenant to adopt meaningful measures for the reformation, if indeed it was needed, of the author throughout the 14 years during which he was in prison.

7.5 In the light of the preceding findings, the Committee does not consider it necessary to examine the matter separately under article 14, paragraph 7, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 9, paragraph 1, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including termination of his detention under the DPSOA.

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 or not, 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 in case that a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee’s views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

## Appendix

### **Individual opinion of Committee members Mr. Krister Thelin and Ms. Zonke Zanele Majodina**

Committee member Mr. Krister Thelin, with whom Ms. Zonke Zanele Majodina associated herself, was of a different view and stated:

“The majority has found a violation in this case. I respectfully disagree. The Committee’s views should in its reasoning and conclusions read as follows:

“7.1 With regard to the author’s claim that his detention under the DPSOA was arbitrary, the Committee recalls its jurisprudence establishing that detention for preventive purposes must be justified by compelling reasons and reviewable periodically by an independent body.<sup>a</sup> The Committee notes that the author was preventively detained from 27 June 2003 to 4 December 2006 and that his preventive detention was based on grounds and procedures established by law — the DPSOA — and reviewed periodically by an independent judicial body, i.e. the Queensland Supreme Court. It also notes that the two purposes of the DPOSA are public safety and the rehabilitation of a sexual offender. Nevertheless, to avoid arbitrariness, the author’s preventive detention must have been reasonable, necessary in all circumstances of the case and proportionate to achieving the legitimate ends of the State party. The Committee observes that the author’s case was thoroughly and repeatedly reviewed by the State party’s Queensland Supreme Court and also upheld on appeal, that the preconditions as set out in the DPSOA were, according to the judicial review, met and that the author’s refusal to participate in rehabilitation programs during his initial sentence contributed to the assessment that he may pose a serious danger to the community.<sup>b</sup> In the light of the circumstances of the case, the Committee therefore concludes that the author’s preventive detention was not disproportionate to the legitimate aim of the applicable law and did not, in this or any other respect, constitute a violation of article 9, paragraph 1, of the Covenant.

“7.2 The Committee notes the State party’s observations that its High Court had examined the author’s claim of *ne bis in idem* and found that the detention order under the DPSOA was not based on the author’s criminal history and did not relate to the author’s initial offence. It further notes the State party’s explanation that proceedings under the DPSOA are of civil nature and that the author’s detention had a preventive character. The Committee has also noted the author’s claim that his detention under the DPSOA imposes double punishment without further determination of criminal guilt and that the court failed to include any order for preventive reasons in the initial sentence. It also notes that the author’s claim that he was detained under the same prison regime as for his initial prison term.

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<sup>a</sup> Communications No. 1090/2002, *Rameka et al. v. New Zealand*, Views adopted on 6 November 2003, para. 7.3; No. 1385/2005, *Manuel v. New Zealand*, Views adopted on 18 October 2007, paras. 7.2–7.3; No. 1512/2006, *Dean v. New Zealand*, Views adopted on 17 March 2009, para. 7.4.

<sup>b</sup> See communication No. 1512/2006, *Dean v. New Zealand*, Views adopted on 17 March 2009, para. 7.5.



“7.3 The Committee recalls its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial,<sup>c</sup> according to which a person, once convicted or acquitted of a certain offence, cannot be brought before the same court again or before another tribunal for the same offence. The guarantee, however, only applies to criminal offences and not to disciplinary measures that do not amount to a sanction for a criminal offence within the meaning of article 14 of the Covenant.<sup>d</sup> The Committee has noted the State party’s contention that proceedings under the DPSOA are of civil nature and therefore do not fall within the remit of article 14 of the Covenant. It recalls general comment No. 32 and its jurisprudence to the effect that the criminal nature of a sanction may be extended to acts that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity.<sup>e</sup> The Committee observes that despite the preventive purposes of protection of public safety and rehabilitation of a sexual offender envisaged in the DPSOA, and the legal qualification of the DPSOA as civil proceedings, the severity of the measure — continued imprisonment subject to annual review — must be regarded as being of criminal nature.

“7.4 The Committee must therefore determine if the penal sanction under the DPSOA was based on the same offence as the author’s initial sentence. The Committee recalls that the Covenant does not limit the State party’s capacity to authorize an indefinite sentence with a preventive component.<sup>f</sup> The basis of the assessment for the author’s preventive detention was, as found by the courts, his serious danger to the community. The Committee concludes that the preventive detention was not imposed on the same grounds as his previous offence but for legitimate protective purposes. It therefore concludes that the author’s preventive detention did not constitute a violation of the principle *ne bis in idem* according to article 14, paragraph 7, of the Covenant.

“8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is consequently of the view that the facts before it do not reveal a violation of article 9, paragraph 1, and article 14, paragraph 7, of the Covenant.”

(Signed) Mr. Krister **Thelin**

(Signed) Ms. Zonke Zanele **Majodina**

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

<sup>c</sup> *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40, vol. I (A/62/40 (Vol. I)), annex VI, paras. 54 and 57.*

<sup>d</sup> See communication No. 1001/2001, *Gerardus Strik v. the Netherlands*, decision on inadmissibility adopted on 1 November 2002, para. 7.3.

<sup>e</sup> See note 3 above, para. 15; communication No. 1015/2001, *Perterer v. Austria*, Views adopted on 20 July 2004, para. 9.2.

<sup>f</sup> Communication No. 1090/2002, *Rameka et al. v. New Zealand*, Views adopted on 6 November 2003, para. 7.2.

## II. Communication No. 1635/2007, *Tillman v. Australia* (Views adopted on 18 March 2010, ninety-eighth session)\*

<i>Submitted by:</i>	Kenneth Davidson Tillman (represented by Eveline Jean Judith Crotty)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Australia
<i>Date of communication:</i>	9 October 2007 (initial submission)
<i>Subject matter:</i>	Preventive detention order after completion of initial prison sentence for sexual offences
<i>Procedural issue:</i>	Non-exhaustion of domestic remedies
<i>Substantive issues:</i>	Arbitrary detention; prohibition of double jeopardy ( <i>ne bis in idem</i> )
<i>Articles of the Covenant:</i>	9, paragraph 1; 14, paragraph 7
<i>Article of the Optional Protocol:</i>	5, paragraph 2 (b)

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

*Meeting* on 18 March 2010,

*Having concluded* its consideration of communication No. 1635/2007, submitted to the Human Rights Committee on behalf of Mr. Kenneth Davidson Tillman under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication and the State party,

*Adopts* the following:

### Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Kenneth Davidson Tillman, an Australian citizen, who was detained in New South Wales, Australia at the time of registration. The author claims to be a victim of a violation by Australia of articles 9, paragraph 1, and 14, paragraph 7, of the Covenant. The author is represented by Eveline Jean Judith Crotty, his religious visitor.

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

An individual opinion signed by Committee members Mr. Krister Thelin and Ms. Zonke Zanele Majodina is appended to the present document.

## Factual background

2.1 On 6 March 1998, the author was convicted of two counts of sexual intercourse with a child under the age of 10 years, and one count of attempted sexual intercourse with the same child. Both offences against the child were committed in July 1996. During the same proceedings, and covered by the conviction and sentence of 6 March 1998, the author also pleaded guilty to the common assault of a 15-year-old girl, which he had committed on 19 April 1997. On 6 March 1998, the author was sentenced for these crimes to concurrent terms of 10 years' imprisonment, commencing on 19 April 1997.

2.2 On 11 April 2007 (one week prior to the author's release from prison), the Attorney General of the State of New South Wales filed an application *ex officio*<sup>1</sup> under section 17, paragraph 1(b)<sup>2</sup> of the Crimes (Serious Sex Offenders) Act 2006 (New South Wales) (CSSOA) requesting the author to be detained in prison for five years from the date of the order. In the alternative, the Attorney General requested that the author be subjected to extended supervision for five years.

2.3 On 17 April 2007, the Supreme Court of New South Wales granted an interim supervision order against the author pursuant to section 8, paragraph 1, of the CSSOA.<sup>3</sup> On 3 May 2007, the full court of the New South Wales Court of Appeal overruled the order, and pursuant to section 16, paragraph 1, of the CSSOA<sup>4</sup> ordered the author's detention for a

<sup>1</sup> Crimes (Serious Sex Offenders) Act 2006 (New South Wales), sect. 14: Application for continuing detention order

(1) The Attorney General may apply to the Supreme Court for a continuing detention order against a sex offender who, when the application is made, is in custody in a correctional centre: [it would appear that correctional centre refers to a prison facility].

(a) While serving a sentence of imprisonment by way of full-time detention:

(i) for a serious sex offence; or

(ii) for an offence of sexual nature; or

(b) Pursuant to an existing continuing detention order [...];

(2) An application may not be made until the last 6 months of the offender's current custody.

<sup>2</sup> CSSOA section 17: Determination of application for continuing detention order

(1) The Supreme Court may determine an application under this Part for a continuing detention order:

(a) By making an extended supervision order; or

(b) By making a continuing detention order; or

(c) By dismissing the application.

<sup>3</sup> CSSOA section 8: Interim supervision orders

(1) If, in proceedings on an application for an extended supervision order, it appears to the Supreme Court:

(a) That the offender's current custody or supervision will expire before the proceedings are determined; and

(b) That the matters alleged in the supporting documentation would, if proved, justify the making of an extended supervision order, the Supreme Court may make an order for the interim supervision of the offender.

<sup>4</sup> CSSOA section 16: Interim detention orders

(1) If, in proceedings on an application under this Part for a continuing detention order, it appears to the Supreme Court:

(a) That the offender's current custody (if any) will expire before the proceedings are determined; and

period of 28 days. The interim detention order was renewed on 29 May 2007 for an additional 28 days. On 18 June 2007, the Supreme Court of New South Wales, held that the author should be detained in prison for one year, pursuant to section 17, paragraph 1, of the CSSOA.<sup>5</sup>

### The complaint

3.1 With regard to the exhaustion of domestic remedies, the author claims that the constitutional validity of the Queensland equivalent to the CSSOA had been tested in the High Court of Australia in the judgment of *Fardon v. Attorney General of Queensland* (2004). According to the author, in *Fardon*, the High Court of Australia confirmed the validity of the Queensland act and dismissed an appeal brought on a number of grounds, including that the Queensland act authorized double punishment. The author therefore submits that domestic remedies would have no real prospect of success and need not be exhausted.

3.2 The author submits that his re-imprisonment pursuant to the CSSOA was imposed by civil proceedings which failed to apply the procedures required for a criminal trial. The absence of any further determination of guilt amounts to double punishment and also undermines the essence of the principle that deprivation of liberty must not be arbitrary.

3.3 The author claims to be a victim of a violation of article 14, paragraph 7 of the Covenant because his imprisonment based on the CSSOA imposes double punishment without further determination of criminal guilt. It is also based on the prior offence and not on whether a new crime has been committed. The author further claims that he is subjected to the same regime of imprisonment as if convicted without having been charged, tried, or convicted of a criminal offence and his status remains that of a prisoner. The author refers to the conclusions by a minority of the Committee in communication No. 1090/2002, *Rameka et al. v. New Zealand*<sup>6</sup> and underlines that their conclusions lend further weight to the assertion that the CSSOA is a breach of article 14, paragraph 7, in particular in the absence of any indication that the preventive element was contemplated at the time of sentencing.

3.4 The author further claims to be a victim of a violation of article 9, paragraph 1, of the Covenant. He submits that his detention was ordered on grounds and in accordance with such procedures as established by law. He recalls the Committee's jurisprudence that, to avoid a characterization of arbitrariness, detention must be reasonable, necessary in all the circumstances of the case and proportionate to achieving the legitimate aims of the State party. If the State party may achieve its legitimate ends by less invasive means than detention, detention will be rendered arbitrary.<sup>7</sup>

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(b) That the matters alleged in the supporting documentation would, if proved, justify the making of a continuing detention order or extended supervision order, the Supreme Court may make an order for the interim detention of the offender.

<sup>5</sup> See note 1 above.

<sup>6</sup> See communication No. 1090/2002, Views adopted on 15 December 2003, minority opinion.

<sup>7</sup> See communications No. 560/1993, *A. v. Australia*, Views adopted on 3 April 1997, paras. 9.2 and 9.4; No. 900/1999, *C. v. Australia*, Views adopted on 28 October 2002, para. 8.2; No. 1014/2001, *Baban v. Australia*, Views adopted on 6 August 2003, para. 7.2; No. 1050/2002, *D. v. Australia*, Views adopted on 11 July 2006, para. 7.2; No. 1069/2002, *Bakhtiyar v. Australia*, Views adopted on 29 October 2003, paras. 9.2 and 9.4; No. 1128/2002, *de Morais v. Angola*, Views adopted on 29 March 2005, para. 6.1; No. 1085/2002, *Taright v. Algeria*, Views adopted on 15 March 2006, para. 8.3; No. 1324/2004, *Shafiq v. Australia*, Views adopted on 31 October 2006.

3.5 The author claims that the very nature of the right to be free from arbitrary detention justifies close scrutiny of any legislative instrument that imposes a limitation on the enjoyment of that right. The author accepts that appropriate measures for care and treatment of offenders after their release from prison is a legitimate objective, as set out in section 3 of the CSSOA<sup>8</sup> but disputes the legitimacy of re-imprisonment to achieve these objectives. The author further disputes the rationale behind imprisonment for an indefinite term and the object of rehabilitation of an offender. He further submits that the State party has not demonstrated why it is unable to establish alternative facilities that can appropriately meet the same objectives and why imprisonment is the only means possible for achieving these aims.

3.6 The author distinguishes his case from the facts of communication No. 1090/2002, *Rameka et al. v. New Zealand* as the preventive element in the present case was not included in the original sentence. He explains that in his case, the application for and the imposition of preventive sentence occurred after he had served his original sentence and therefore constituted arbitrary detention, in breach of article 9, paragraph 1.

3.7 The author submits that detention in prison is a form of punishment and does not cease to be punishment by characterizing its purpose as non-punitive. He underlines that his imprisonment cannot be justified on the basis of the necessity to protect public order, as he has not been charged or convicted of any crime while he has been in prison. Nor has he been diagnosed with any mental illness that might justify his detention.

#### **State party's observations on admissibility and merits**

4.1 The State party submits its observations on admissibility and merits dated on 8 September 2008. As to the facts, it submits that on 7 April 2008, based on a notice of motion by the State of New South Wales, uncontested by the author, the Supreme Court of New South Wales extended the detention order, pursuant to section 19, paragraph 1, of the CSSOA,<sup>9</sup> to expire on 31 October 2008. The author is participating in the Custody-Based Intensive Treatment (CUBIT) programme, which he is to complete in early October 2008. On 15 July 2008, the author was charged with further sexual offences and was therefore refused bail. Furthermore, the author's custody under the continuing detention order was suspended, while the expiry date of the order remains at 31 October 2008.

4.2 The State party submits that the communication should be declared inadmissible under article 2 and 5, paragraph 2 (b), of the Optional Protocol. The State party maintains that the author failed to exhaust all available domestic remedies because he neither sought leave to appeal to the High Court of Australia nor a writ of habeas corpus invoking the original jurisdiction of the High Court by questioning the constitutionality of the CSSOA. A successful application to the High Court could have overturned or remitted for further

<sup>8</sup> CSSOA section 3: Objects of the Act:

The objects of this Act are to provide for the extended supervision and continuing detention of serious sex offenders so as:

- (a) To ensure the safety and protection of the community; and
- (b) To facilitate the rehabilitation of serious sex offenders.

<sup>9</sup> CSSOA section 19: Detention order may be varied or revoked

(1) The Supreme Court may at any time vary or revoke a continuing detention order or interim detention order on the application of the State of New South Wales or the offender.

(2) For the purpose of ascertaining whether to make such an application in relation to a continuing detention order, the Commissioner of Corrective Services must provide the Attorney General with a report on the offender at intervals of not more than 12 months.

consideration the continuing detention order. The State party submits that the facts and some of the legislative provisions in the case of *Fardon v. Attorney-General* before the High Court were different.<sup>10</sup> It further highlights that the author has not offered prima facie evidence that these remedies are ineffective or that an application for review would inevitably be dismissed because of legal precedent.

4.3 On the merits, the State party submits that the author's detention occurred in accordance with procedures established by the CSSOA, and that the majority of the High Court found that legislation created in the same way in Queensland was constitutionally valid. It recalls the Committee's jurisprudence according to which preventive detention of persons for reasons of public security is not arbitrary per se.<sup>11</sup> The State party maintains that the author's detention order of 18 June 2007 was ordered by the New South Wales Supreme Court, an independent judicial body, after a full hearing in accordance with the common law principles of fair trial. It underlines that in the case of *Fardon*, the High Court found that the Queensland Supreme Court fulfilled its role as a judicial body in determining a similar application for continuing detention under the parallel Queensland legislation.

4.4 With regard to the necessity to remove the author from the community for public safety, the State party submits that the CSSOA establishes a stringent test to be applied by the Court before an order can be issued. The Court must be satisfied to a high degree of probability that the offender is likely to commit a further serious sexual offence. For that purpose, it must take into consideration the safety of the community, psychiatric reports, including those relating to the likelihood of recidivism, the offender's willingness to participate in rehabilitation programs and any pattern of offending behaviour. The State party further submits that supervised release was not appropriate in the author's case for reasons of safety of the community and his own protection. Continued detention further provides the best support services specifically designed for repeat sexual offenders, including counselling with a therapist trained in the treatment of sexual offenders and rehabilitation programs. The author had refused to participate in the CUBIT programme during his initial prison sentence, but continued to participate in that programme during his current imprisonment on remand in relation to different alleged sexual offences. The State party thus submits that returning the author to detention in a prison facility where he had access to rehabilitation programmes, was reasonably proportionate to the rehabilitative objectives of the CSSOA, it further satisfies the principles of natural justice and periodic independent review.

4.5 The State party submits further that a preventive detention under the CSSOA is a purely civil proceeding and does not involve the examination of a commission of a criminal offence. The author's criminal history and the criminal elements of the offence were not the basis of the order for continuing detention under section 17 of the CSSOA.<sup>12</sup> The State party maintains that the CSSOA allows continuing detention orders for the non-punitive purpose of protection of the public. It further argues that the author had access to the best available rehabilitative resources and facilities within the prison system, which enabled the State party to achieve the dual goals of ensuring the safety of the community and the

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<sup>10</sup> *Fardon v. Attorney General* (Qld) (2004) 223 CLR575 (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Hayne JJ, Kirby J dissenting).

<sup>11</sup> General comment No. 8 (1982), *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40)*, annex V, para. 4; communication No. 1090/2002, *Rameka et al. v. New Zealand*, Views adopted on 15 December 2003.

<sup>12</sup> *Oliveira v. Switzerland*, 25711/94 [1998] ECHR 68 (30 July 1998): successive prosecutions will not violate the rule against double jeopardy if they relate to separate offences arising out of the same conduct; *Uner v. Netherlands* [2005] ECHR 46410/99 (16 June 2005), para. 53: the distinction was made between criminal and administrative proceedings arising from the same factual circumstances.

rehabilitation of the author. The New South Wales Supreme Court motivated its continuing detention order by the fact that the CUBIT programme was not available outside the prison system and it linked the term of the author's continuing detention to the time taken to successfully complete the CUBIT rehabilitation programme. The State party thus submits that the author's continuing detention did not constitute double punishment within the meaning of article 14, paragraph 7, because it did not relate to the same offence and his further detention did not have a punitive character.

#### **Author's comments on the State party's observations**

5.1 The author contends the State party's additions on the facts and highlights that he has not been tried or convicted for any crime since he completed a prison sentence on 18 April 2004 for a crime for which he was convicted in 1998. He underlines that his communication relates to the proceedings which took place on 17 April, 3 May, 29 May and 18 June 2007 after completing his initial sentence.

5.2 With regard to the exhaustion of domestic remedies, the author maintains that there is no doubt about the effectiveness of the domestic remedies but his prospect of a favourable appeal to the High Court is nil. Recalling the Committee's jurisprudence, the author maintains that if a court has already substantially decided the question at issue, the complainant need not pursue a national judicial remedy.<sup>13</sup> He underlines that the CSSOA was enacted after the decision by the High Court in *Fardon* and it relied on that decision as a precedent. The author submits further that he was advised by a Senior Counsel and Law Professor not to appeal to the High Court for lack of objective prospects of success. Considering that the CSSOA and the Dangerous Prisoners (Sexual Offenders) Act considered in *Fardon* have the same substantive effect — imprisonment without a criminal trial on the basis of a prediction of risk to the community — the appeal to the High Court was objectively ineffective. The author further recalls the Committee's jurisprudence according to which a reasonable perspective that remedies would be ineffective is sufficient to demonstrate exhaustion,<sup>14</sup> for instance where it is unlikely that settled jurisprudence of the highest court would be overturned on appeal,<sup>15</sup> or where under applicable domestic laws, the claim would inevitably be dismissed.<sup>16</sup>

5.3 The author submits that the double punishment effect of the CSSOA is reinforced by the fact that the Supreme Court is required to have regard to the prior offences of a person in determining whether a continuing detention order is issued. He further argues that his continued imprisonment amounted to punishment, as he was subject to the same imprisonment regime as if he were convicted of a criminal offence. He compares his situation to that of *Fardon* where the High Court held that the Dangerous Prisoners (Sexual Offenders) Act (Queensland) did not inflict punishment at all; in spite of Mr. Fardon's continued imprisonment after the conclusion of his initial sentence.

<sup>13</sup> Communication No. 24/1977, *Lovelace v. Canada*, Views adopted on 30 July 1981.

<sup>14</sup> See communications No. 10/1977, *Altesor v. Uruguay*, Views adopted on 29 March 1982; No. 437/1990, *Patiño v. Panama*, decision on inadmissibility adopted on 21 October 1994; No. 438/1990, *Thompson v. Panama*, decision on inadmissibility adopted on 21 October 1994; No. 356/1989, *Collins v. Jamaica*, Views adopted on 25 March 1993; No. 146/1983 and No. 148-154/1983, *Baboream et al. v. Suriname*, Views adopted on 4 April 1984.

<sup>15</sup> See communications No. 511/1992, *Länsman et al. v. Finland*, Views adopted on 26 October 1994, para. 6.3; No. 1095/2002, *Gomaríz Valera v. Spain*, Views adopted on 26 August 2005, para. 6.4; No. 1101/2002, *Alba Cabriada v. Spain*, Views adopted on 3 November 2004, para. 6.5.

<sup>16</sup> Communication No. 327/1988, *Barzhig v. France*, Views adopted on 11 April 1991, para. 5.1.

5.4 The author argues that his case differs fundamentally from other cases decided by the Committee<sup>17</sup> and the European Court of Human Rights,<sup>18</sup> in which a preventive element was imposed at the time of sentencing. The imposition of the author's continuing detention order after having served his original sentence constitutes a breach of the prohibition of double punishment. His re-imprisonment was independent of the initial criminal trial and after completion of the finite sentence, without finding any new grounds of guilt. The author argues that detention based solely on potential dangerousness offers authorities a way to evade the constraints of article 14.

5.5 The author reiterates that he neither disputes the lawfulness of his continuing detention order, nor the legitimacy of the legislative objective to protect the community from harm. He disputes the utilization of re-imprisonment to achieve the objectives of the CSSOA, in particular the objective of rehabilitation. He claims that rehabilitation can only be tested when a person has (some) liberty.<sup>19</sup> He maintains that imprisonment is not necessary to achieve the legitimate objective of rehabilitation of a person in the interest of the protection of the community, which could be achieved by psychiatric and psychological services in a community setting which balances the safety of the community with the rehabilitative needs of the former offender. He submits that the CSSOA inflicts arbitrary detention contrary to article 9, paragraph 1, of the Covenant because it inflicts imprisonment on the basis of what a person might do rather than on what a person has done.

### Issues and proceedings before the Committee

#### *Consideration of admissibility*

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of Procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required by article 5, paragraph 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 has noted the State party's objection to the admissibility of the author's communication for failure to bring his case before the Australian High Court, either by seeking leave to appeal or by submitting a writ of habeas corpus. It also notes the author's argument that the CSSOA was enacted after the High Court decision in *Fardon*, in which the High Court decided that a continuing detention order, based on the Dangerous Prisoners (Sexual Offenders) Act (Queensland), the Queensland equivalent to the CSSOA, was constitutional. The Committee further observes that the State party itself refers to the constitutional validity of the CSSOA based on the *Fardon* High Court decision (see paragraph 4.3 above). The Committee recalls its jurisprudence<sup>20</sup> according to which, for the

<sup>17</sup> See communication No. 1090/2002, *Rameka et al. v. New Zealand*, Views adopted on 6 November 2003.

<sup>18</sup> *Mansell v. United Kingdom*, application No. 32072/96, Unreported, ECHR, 2 July 1997, as cited in Giles [2004] 1 AC 1; *Winterwerp v. the Netherlands*, (1979), 33 ECHR, ser A, 4, 2 EHRR 387; *De Wilde, Oms and Versyp v. Belgium*, (1971) 12 ECHR, ser. A, 6, 1 EHRR 373; *Iribarne Pérez v. France*, (1995) 325 ECHR, ser A, 48, 22 EHRR 153.

<sup>19</sup> See A. Carroll, M. Lyall and A. Forrester, "Clinical hopes and public fears in forensic mental health", *The Journal of Forensic Psychiatry and Psychology*, vol. 15, No. 3 (2004), pp. 407, 411.

<sup>20</sup> See for example communications No. 1533/2006, *Ondracka and Ondracka v. Czech Republic*, Views adopted on 31 October 2007, para. 6.3; No. 1095/2002, *Gomariz Valera v. Spain*, Views adopted on



purposes of the Optional Protocol, an author is not required to exhaust domestic remedies, if the jurisprudence of the highest domestic tribunal has decided the matter at issue, thereby eliminating any prospect of success of an appeal to the domestic courts. The Committee therefore concludes that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have been met.

6.4 In the Committee's view, the author has sufficiently substantiated, for purposes of admissibility, the claims under articles 9, paragraph 1, and 14, paragraph 7, of the Covenant and therefore proceeds to their examination on the merits.

*Consideration of the merits*

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee notes the State party's observations that the majority of its High Court had found that legislation created the same way as the DPSOA in Queensland was constitutional. It further notes the State party's explanation that proceedings under the CSSOA are of civil nature and that the author's detention had a preventive character. The Committee has also noted the author's claim that his detention under the CSSOA imposes double punishment without further determination of criminal guilt and that the court failed to include any order for preventive reasons in the initial sentence. It also notes that the author's claim that he was detained under the same prison regime as for his initial prison term.

7.3 The Committee observes that article 9, paragraph 1 of the Covenant recognizes for everyone the right to liberty and the security of his person and that no one may be subjected to arbitrary arrest or detention. The article, however, provides for certain permissible limitations on this right, by way of detention, where the grounds and the procedures for doing so are established by law. Such limitations are indeed permissible and exist in most countries in laws which have for object, for example, immigration control or the institutionalized care of persons suffering from mental illness or other conditions harmful to themselves or society. However, limitations as part of, or consequent upon, punishment for criminal offences may give rise to particular difficulties. In the view of the Committee, in these cases, the formal prescription of the grounds and procedures in a law which is envisaged to render these limitations permissible is not sufficient if the grounds and the procedures so prescribed are themselves either arbitrary or unreasonably or unnecessarily destructive of the right itself.

7.4 The question presently before the Committee is whether, in their application to the author, the provisions of the CSSOA under which the author continued to be detained at the conclusion of his 10-year term of imprisonment were arbitrary. The Committee has come to the conclusion that they were arbitrary and, consequently, in violation of article 9, paragraph 1, of the Covenant, for a number of reasons, each of which would, by itself, constitute a violation. The most significant of these reasons are the following:

(a) The author had already served his 10-year term of imprisonment and yet he continued, in actual fact, to be subjected to imprisonment in pursuance of a law which characterizes his continued incarceration under the same prison regime as detention. This purported detention amounted, in substance, to a fresh term of imprisonment which, unlike

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22 July 2005, para. 6.4; No. 511/1992, *Länsman et al. v. Finland*, Views adopted on 14 October 1993, para. 6.3.

detention proper, is not permissible in the absence of a conviction for which imprisonment is a sentence prescribed by law;

(b) Imprisonment is penal in character. It can only be imposed on conviction for an offence in the same proceedings in which the offence is tried. The author's further term of imprisonment was the result of Court orders made, some 10 years after his conviction and sentence, in respect of predicted future criminal conduct which had its basis in the very offence for which he had already served his sentence. This new sentence was the result of fresh proceedings, though nominally characterized as "civil proceedings", and fall within the prohibition of article 15, paragraph 1, of the Covenant. In this regard, the Committee further observes that, since the CSSOA was enacted in 2006 shortly before the expiry of the author's sentence for an offence for which he had been convicted in 1998 and which became an essential element in the Court orders for his continued incarceration, the CSSOA was being retroactively applied to the author. This also falls within the prohibition of article 15, paragraph 1, of the Covenant, in that he has been subjected to a heavier penalty "than was applicable at the time when the criminal offence was committed". The Committee therefore considers that detention pursuant to proceedings incompatible with article 15 is necessarily arbitrary within the meaning of article 9, paragraph 1, of the Covenant;

(c) The CSSOA prescribed a particular procedure to obtain the relevant Court orders. This particular procedure, as the State party conceded, was designed to be civil in character. It did not, therefore, meet the due process guarantees required under article 14 of the Covenant for a fair trial in which a penal sentence is imposed;

(d) The "detention" of the author as a "prisoner" under the CSSOA was ordered because it was feared that he might be a danger to the community in the future and for purposes of his rehabilitation. The concept of feared or predicted dangerousness to the community applicable in the case of past offenders is inherently problematic. It is essentially based on opinion as distinct from factual evidence, even if that evidence consists in the opinion of psychiatric experts. But psychiatry is not an exact science. The CSSOA, on the one hand, requires the Court to have regard to the opinion of psychiatric experts on future dangerousness but, on the other hand, requires the Court to make a finding of fact of dangerousness. While Courts are free to accept or reject expert opinion and are required to consider all other available relevant evidence, the reality is that the Courts must make a finding of fact on the suspected future behaviour of a past offender which may or may not materialize. To avoid arbitrariness, in these circumstances, the State party should have demonstrated that the author's rehabilitation could not have been achieved by means less intrusive than continued imprisonment or even detention, particularly as the State party had a continuing obligation under article 10, paragraph 3, of the Covenant to adopt meaningful measures for the reformation, if indeed it was needed, of the author throughout the 10 years during which he was in prison.

7.5 In light of the preceding findings, the Committee does not consider it necessary to examine the matter separately under article 14, paragraph 7, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 9, paragraph 1, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including termination of his detention under the CSSOA.

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 or not, 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 in case that a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

## Appendix

### Individual opinion of Committee members Mr. Krister Thelin and Ms. Zonke Zanele Majodina

Committee member Mr. Krister Thelin, with whom Ms. Zonke Zanele Majodina associated herself, was of a different view and stated:

“The majority has found a violation in this case. I respectfully disagree. The Committee’s views should in its reasoning and conclusions read as follows:

“7.1 With regard to the author’s claim that his detention under the CSSOA was arbitrary, the Committee recalls its jurisprudence establishing that detention for preventive purposes must be justified by compelling reasons and reviewable periodically by an independent body.<sup>a</sup> The Committee notes that the author was preventively detained from 17 April 2007 to 31 October 2008 and that his preventive detention was based on grounds and procedures established by law — the CSSOA — and reviewed periodically by an independent judicial body, i.e. the New South Wales Supreme Court. It further notes that the author had refused to participate in the CUBIT programme during his initial prison sentence and that the programme was not available outside the prison system. It also notes that the two purposes of the CSSOA are public safety and the rehabilitation of a sexual offender. Nevertheless, to avoid arbitrariness, the author’s preventive detention must have been reasonable, necessary in all circumstances of the case and proportionate to achieving the legitimate aims of the State party. The Committee observes that the author’s case was thoroughly and repeatedly reviewed by the State party’s New South Wales Supreme Court and also upheld on appeal, that the preconditions as set out in the CSSOA were, according to the judicial review, met and that the author’s refusal to participate in the CUBIT rehabilitation programme during his initial sentence contributed to the assessment that he may pose a serious danger to the community.<sup>b</sup> In the light of the circumstances of the case, the Committee therefore concludes that the author’s preventive detention was not disproportionate to the legitimate aim of the applicable law and did not, in this or any other respect, constitute a violation of article 9, paragraph 1, of the Covenant.

“7.2 The Committee has noted the author’s claim that his detention under the CSSOA imposes double punishment without further determination of criminal guilt and that the court failed to include any order for preventive reasons in the initial sentence. It also notes his claim that he was detained under the same prison regime as for his initial prison sentence. The Committee notes the State party’s observations that the detention order under the CSSOA was not based on the author’s criminal history and did not relate to the author’s initial offence. It further notes the State party’s explanation that proceedings under the CSSOA are of a civil nature and that the author’s detention had a preventive character.

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<sup>a</sup> Communications No. 1090/2002, *Rameka et al. v. New Zealand*, Views adopted on 6 November 2003, para. 7.3; No. 1385/2005, *Manuel v. New Zealand*, Views adopted on 18 October 2007, paras. 7.2–7.3; No. 1512/2006, *Dean v. New Zealand*, Views adopted on 17 March 2009, para. 7.4.

<sup>b</sup> See communication No. 1512/2006, *Dean v. New Zealand*, Views adopted on 17 March 2009, para. 7.5.

“7.3 The Committee recalls its general comment No. 32,<sup>c</sup> according to which a person, once convicted or acquitted of a certain offence, cannot be brought before the same court again or before another tribunal for the same offence. The guarantee, however, applies only to criminal offences and not to disciplinary measures that do not amount to a sanction for a criminal offence within the meaning of article 14 of the Covenant.<sup>d</sup> The Committee has noted the State party’s contention that the civil proceedings under the CSSOA do not fall within the remit of article 14 of the Covenant. It recalls, however, general comment No. 32 and its jurisprudence to the effect that the criminal nature of a sanction may be extended to acts that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity.<sup>e</sup> The Committee observes that despite the preventive purposes of protection of public safety and rehabilitation of a sexual offender envisaged in the CSSOA, and the legal qualification of the CSSOA as civil proceedings, the severity of the measure — continued imprisonment subject to review upon request — must be regarded as being of criminal nature.

“7.4 The Committee must therefore determine if the penal sanction under the CSSOA was based on the same offence as the author’s initial sentence. The Committee recalls that the Covenant does not limit the State party’s capacity to authorize an indefinite sentence with a preventive component.<sup>f</sup> The basis of the assessment for the author’s preventive detention, which was decided separately from the initial sentencing, was, as found by the courts, his serious danger to the community. The Committee concludes that the preventive detention was not imposed on the same grounds as his previous offence but for legitimate protective purposes. It therefore holds that the author’s preventive detention did not constitute a violation of the principle *ne bis in idem* according to article 14, paragraph 7, of the Covenant.

“8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is consequently of the view that the facts before it do not reveal a violation of any of the provisions of the International Covenant on Civil and Political Rights.”

(Signed) Mr. Krister **Thelin**

(Signed) Ms. Zonke Zanele **Majodina**

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

<sup>c</sup> *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI, para. 54.

<sup>d</sup> See communication No. 1001/2001, *Gerardus Strik v. the Netherlands*, decision on inadmissibility adopted on 1 November 2002, para. 7.3.

<sup>e</sup> See note 3 above, para. 15; communication No. 1015/2001, *Perterer v. Austria*, Views adopted on 20 July 2004, para. 9.2.

<sup>f</sup> Communication No. 1090/2002, *Rameka et al. v. New Zealand*, Views adopted on 6 November 2003, para. 7.2.

**JJ. Communication No. 1640/2007, *El Abani v. Libya*  
(Views adopted on 26 July 2010, ninety-ninth session)\***

<i>Submitted by:</i>	Abdelhakim Wanis El Abani (El Ouerfeli) (represented by Alkarama for Human Rights)
<i>Alleged victims:</i>	Wanis Charef El Abani (El Ouerfeli) (the author's father), the author, and the author's mother and seven brothers and sisters
<i>State party:</i>	Libyan Arab Jamahiriya
<i>Date of communication:</i>	15 October 2007 (initial submission)
<i>Subject matter:</i>	Unlawful arrest, incommunicado detention, torture and ill-treatment, arrest without a warrant, right to a fair trial, enforced disappearance
<i>Procedural issue:</i>	State's failure to cooperate
<i>Substantive issues:</i>	Right to life; prohibition of torture and cruel and inhuman treatment; right to liberty and security of the person; arbitrary arrest and detention; respect for the inherent dignity of the human person; right to a fair trial; recognition as a person before the law
<i>Articles of the Covenant:</i>	2, paragraph 3; 6, paragraph 1; 7; 9, paragraphs 1 to 4; 10, paragraph 1; 14, paragraphs 1 and 3 (a) to (d); and 16
<i>Article of the Optional Protocol:</i>	5, paragraph 2 (b)

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

*Meeting* on 26 July 2010,

*Having concluded* its consideration of communication No. 1640/2007, submitted to the Human Rights Committee by Abdelhakim Wanis El Abani (El Ouerfeli), under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication, and the State party,

*Adopts* the following:

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\* The following members of the Human Rights Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Mr. Mahjoub El Haiba, Mr. Ahmed Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli and Mr. Krister Thelin. The texts of individual opinions signed by Committee members Mr. Abdelfattah Amor and Mr. Fabián Omar Salvioli are appended to the present Views.

## Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 15 October 2007, is Abdelhakim Wanis El Abani (El Ouerfeli), a Libyan citizen, born in 1977 and currently residing in Benghazi, Libyan Arab Jamahiriya. He is acting on behalf of his father, Wanis Charef El Abani (El Ouerfeli), on his own behalf, and on behalf of his mother and his brothers and sisters, whose names he prefers not to disclose. The author claims that his father is a victim of violations by the Libyan Arab Jamahiriya of article 2, paragraph 3; article 6, paragraph 1; article 7; article 9, paragraphs 1 to 4; article 10, paragraph 1; article 14, paragraphs 1 and 3 (b) and (c); and article 16, of the Covenant. He also states that his mother, his brothers and sisters and he are victims of a violation of article 7, read in conjunction with article 2, paragraph 3, of the Covenant. He is represented by Alkarama for Human Rights. The Covenant and its Optional Protocol entered into force for the Libyan Arab Jamahiriya on 15 August 1970 and 16 August 1989, respectively.

### The facts as presented by the author

2.1 The author, Abdelhakim Wanis El Abani, is the son of the victim, Wanis Charef El Abani, judge at the court of first instance in Benghazi. Wanis Charef El Abani, born in 1948, was employed as a judge at the Benghazi court of first instance for several years, during which time he received several warnings from the Ministry of Justice, followed by threats of dismissal for not deferring to instructions from his superiors in the judgements he issued. On 19 April 1990, together with two other members of the judiciary, he was summoned for disciplinary reasons by the Minister of Justice to the Ministry's headquarters in Tripoli and was received by the Minister in his office. After reprimanding him for his attitude, the Minister indicated that he was under arrest. Members of the internal security services in fact arrested him in the Minister's office, without a warrant and without informing him of the legal grounds for his arrest. Wanis Charef El Abani was then held incommunicado and tortured with extreme cruelty for three months before being taken to Abu Salim prison (in Tripoli).

2.2 All the steps that his family took to ascertain what had happened to him and where he was being held proved fruitless; it was not until June 1996 that his wife learned that he was being held in Abu Salim prison, although she was not able to obtain any official confirmation of the fact. When she requested permission to visit her husband at the prison, the authorities denied that he was being held there. For the first six years of his detention, Mr. El Abani was held in complete isolation in a special part of the prison and had contact only with his jailers. He was transferred to a group cell just a few days before the events of 28 and 29 June 1996, when several hundred prisoners were reportedly killed by the internal security services at the prison. Having survived that massacre, he was once again held in complete isolation in an individual cell for several more years, still without any communication with the outside world or the other prisoners and without any family visits or contact with a lawyer.

2.3 On 19 April 2001, 11 years after his arrest, he was, for the first time, officially notified by the Military Prosecutor-General of the charge against him of "having been in telephone contact with opponents abroad" and "not having informed the authorities of that fact". It was not until 15 December 2001, when he was to appear before a military examining magistrate, that he was able, for the first time in 11 years, to speak with his wife, who had been given exceptional permission by the magistrate to communicate with him for one quarter of an hour before his hearing.

2.4 Brought before a military court on 1 January 2002, he was sentenced to a total of 13 years in prison, representing 10 years for "failure to report" and 3 years for "possession of

explosives”, the latter accusation being made known for the first time as the sentence was being read out.

2.5 On 13 May 2002, on appeal by the military prosecutor, the court of appeal (the Higher Court of the Armed People), set aside the first judgement and sent the case to a different military court. On 29 September 2002, that court confirmed the judgement of the court of first instance. Despite their requests, the author’s family was not able to obtain the above-mentioned decisions or to secure copies of them, with the exception of that of 13 May 2002.

2.6 On 19 April 2003, the author’s father had served his full sentence. However, he was not released and continued to be held after that date, in the same prison and in the same conditions, although his family were expecting him to be released. During 2005, his family submitted an application for his release to the People’s Court, which rejected it on the grounds that the military prosecutor did not recognize that the person concerned was detained in Abu Salim prison.

2.7 Having received confirmation from several released prisoners that Mr. El Abani was still being held at that prison, his family appointed two lawyers to file a complaint against the prison officials. The lawyers told his wife that it was not possible to file a criminal complaint against State officials or the security services for either abduction or kidnapping, and that they could only try to launch civil proceedings to ascertain whether Mr. El Abani was indeed still being held in Abu Salim prison. Ms. El Abani thus asked for an expert to be appointed to ascertain her husband’s presence in the prison. In September 2006, the prison administration refused the court-appointed expert access to the prison. Mr. El Abani’s family continued to receive information that he was still being held in the same prison up until the beginning of January 2007. During that month, they learned that the internal security services had removed him from the prison.

2.8 On 5 April 2007, the Chairperson of the Working Group on Enforced or Involuntary Disappearances sent an urgent appeal to the State party authorities.<sup>1</sup>

2.9 Mr. Wanis El Abani was released by the State party authorities on 9 April 2008, 18 years after his arrest.

### **The complaint**

3.1 The author claims that his father is a victim of a violation of article 2, paragraph 3, of the Covenant. He claims that, as a victim of enforced disappearance, he was prevented in fact from exercising his right of appeal to contest the legality of his detention. Held incommunicado, he was not materially able to lodge a complaint in court. Moreover, none of the steps taken by his family produced any results. The author claims that the State party failed in its obligation to thoroughly investigate his father’s disappearance and to criminally prosecute those deemed responsible,<sup>2</sup> thereby violating article 2, paragraph 3, of the Covenant.

3.2 The author also asserts that his father was a victim of enforced disappearance between the time of his arrest in 1990 and the time when his family first received news of him in 2001, that is, for 11 years, and then again from the time when the authorities again denied that he was being held after he had finished serving his sentence in 2003 until his release in April 2008. He believes that this enforced disappearance constituted a serious

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<sup>1</sup> See the report of the Working Group on Enforced or Involuntary Disappearances (A/HRC/7/2), para. 201.

<sup>2</sup> The author refers to communication No. 612/1995, *Vicente et al. v. Colombia*, Views adopted on 29 July 1997, para. 8.8.



threat to his father's right to life. He notes that, even though the State party was officially informed of his father's disappearance in multiple appeals, no follow-up was given to the case; his family remained in complete ignorance of his fate for nearly 12 years and then again for several years before he was released. Referring to the Committee's general comment No. 6 (1982) on the right to life, the author contends that the serious threat to his father's right to life that resulted from his enforced disappearance is a violation by the State party of article 6, paragraph 1, of the Covenant.

3.3 The author further contends that his father's enforced disappearance also constitutes inhuman or degrading treatment<sup>3</sup> in violation of article 7 of the Covenant. He also asserts that his father was subjected to physical and psychological torture during the first three months of his incommunicado detention in the facilities of the internal security services. The author claims that his father's disappearance was a paralysing, painful and agonizing ordeal for his family, as they had no information whatsoever concerning his fate for the first 11 years of his detention and then again found themselves in this position from the time that he had completed his sentence until he was released in 2008. This uncertainty was a source of profound and continuous anguish for nearly 12 years for Mr. El Abani's wife and children, who also consider themselves victims of a violation by the State party of article 7, read in conjunction with article 2, paragraph 3, of the Covenant.<sup>4</sup>

3.4 The author claims that his father's arrest on 19 April 1990 by the internal security services, without a warrant and without informing him of the legal grounds for his arrest, was carried out in complete disregard of the guarantees set forth in article 9, paragraphs 1 and 2, of the Covenant. He asserts that the incommunicado detention of his father until he was formally charged on 19 April 2001 was also a violation of article 9, paragraph 1. He was not brought before a judge until 11 years after his arrest, in flagrant violation of the right to be brought promptly before a judge or other officer authorized by law to exercise judicial power, guaranteed under article 9, paragraph 3. Moreover, the fact that his detention was not acknowledged and that the authorities continued to hold him incommunicado and concealed his fate from his family from the time he had finished serving his sentence in 2003 until his release in April 2008 is also arbitrary within the meaning of article 9 of the Covenant.<sup>5</sup>

3.5 The author also asserts that, because his father was held incommunicado for nearly 12 years and was tortured, he was not treated with humanity or respect for the inherent dignity of the human person. He therefore claims that his father was victim of a violation by the State party of article 10, paragraph 1, of the Covenant.

3.6 Under article 14, the author notes that his father was brought before a military court 11 years after his arrest and was sentenced after a closed trial to 13 years' imprisonment. He was never given access to his criminal file, and a lawyer was appointed by the military court to assist him. He adds that his family did not become aware of this procedure until the military court had taken its decision. The author asserts that the fact that his father did not

<sup>3</sup> The author refers to communications No. 449/1991, *Mojica v. the Dominican Republic*, Views adopted on 15 July 1994; No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996; and No. 542/1993, *Tshishimbi v. Zaire*, Views adopted on 25 March 1996.

<sup>4</sup> The author refers to communication No. 107/1981, *Almeida de Quinteros v. Uruguay*, Views adopted on 21 July 1983.

<sup>5</sup> The author refers to *Vicente et al v. Colombia* (note 2 above); *Tshishimbi v. Zaire* (note 3 above); *Celis Laureano v. Peru* (note 3 above); communications No. 563/1993, *Bautista de Arrellana v. Colombia*, Views adopted on 27 October 1995; No. 181/1984, *Arévalo v. Colombia*, Views adopted on 3 November 1989; No. 139/1983, *Conteris v. Uruguay*, Views adopted on 17 July 1985; No. 8/1977, *Weismann Lanza and Lanza Perdomo v. Uruguay*, Views adopted on 3 April 1980; and No. 56/1979, *Casariago v. Uruguay*, Views adopted on 29 July 1981.

appear in court until 11 years after his arrest constitutes a particularly serious violation of his right to be tried without undue delay. He further states that the fact that his father was not able to choose his own attorney runs counter to the principle of free choice of defence counsel.

3.7 The author also asserts that the fact that his father was tried before a military court even though he was a civilian, having served as a civil judge at the Benghazi court of first instance, means that the court was not competent to try or sentence him and cannot be considered impartial or independent, as it consisted of military judges working under the authority of the Minister of Defence. The author asserts that the State party cannot supply any reason why his father was tried and sentenced by a military court, nor can it demonstrate how the military court in Tripoli could have guaranteed full protection of his rights as an accused person.<sup>6</sup> Given those circumstances, he believes that his father is also a victim of a violation by the State party of article 14 of the Covenant.

3.8 The author further points out that, as a victim of enforced disappearance, his father was denied the right to be recognized as the subject of rights and obligations, in other words, as a human being deserving of respect. He adds that, as a victim of enforced disappearance, he was deprived of the protection of the law, and his right to recognition as a person before the law was denied, in violation by the State party of article 16 of the Covenant.<sup>7</sup>

3.9 As to the question of the exhaustion of domestic remedies, the author claims that his family approached various government departments, notably in the headquarters of the Ministry of Justice, from the day after his father was arrested. The family members also approached his former colleagues, judges and members of the Benghazi Office of the Public Prosecutor but, upon encountering repeated refusals to entertain their applications, soon realized that none of the legal authorities was prepared to take action to obtain the victim's release. None of the lawyers from the Benghazi or Tripoli bars whom the family approached to take legal action was prepared to lodge a complaint against the judicial authorities or the security services, for fear of reprisals. Moreover, the application for release filed with the People's Court was dismissed by the judge on the grounds that the military prosecutor did not acknowledge that the author's father was detained in Abu Salim prison. The civil proceedings that were initiated so that an expert could be appointed to establish the presence of the author's father in the prison were also obstructed (see paragraph 2.7 above). Under those circumstances, the author claims that domestic remedies are, clearly, neither available nor effective, and asserts that he is thus no longer obligated to pursue action and proceedings at the domestic level to ensure that his communication is admissible before the Committee.

#### **State party's failure to cooperate**

4. On 15 September 2008, 20 January 2009 and 24 July 2009, the State party was requested to submit information concerning the admissibility and merits of the communication. The Committee notes that this information has not been received. It regrets the State party's failure to provide any information with regard to the admissibility and/or substance of the author's claims. It recalls that, under the Optional Protocol, the State party concerned is required to submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by the State. In the

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<sup>6</sup> The author refers to the Committee's general comment No. 13 (1984) on the administration of justice.

<sup>7</sup> The author refers here to communication No. 1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007.

absence of a reply from the State party, due weight must be given to those of the author's allegations that have been properly substantiated.<sup>8</sup>

#### **Additional submission by the author**

5. On 28 May 2010, the author, through his counsel, informed the Committee that his father had been released by the State party's authorities on 9 April 2008. The author added that his father had expressed the hope that proceedings before the Committee in respect of his case should continue. In the same submission, the author observed that the requests he had made to the Committee in his initial communication of 15 October 2007 in respect of a recommendation by the Committee that the State party should give him news of his father, release him immediately and allow him to communicate with his family were no longer applicable. The author stated, however, that he wished to maintain the remainder of the communication in its entirety.

#### **Issues and proceedings before the Committee**

##### *Consideration of admissibility*

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol of the Covenant.

6.2 Under article 5, paragraph 2 (a), of the Optional Protocol to the Covenant, the Committee must ascertain that the same matter is not being examined under another procedure of international investigation or settlement. The Committee notes that the case was submitted to the United Nations Working Group on Enforced or Involuntary Disappearances in 2007. However, it observes that extra-conventional procedures or mechanisms established by the former Commission on Human Rights or the Economic and Social Council, and whose mandates are to examine and publicly report on human rights situations in specific countries or territories or on major phenomena of human rights violations worldwide, do not constitute procedures of international investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.<sup>9</sup> Accordingly, the Committee is of the view that the submission of Mr. El Abani's case to the Working Group on Enforced or Involuntary Disappearances does not render it inadmissible under that provision.

6.3 With respect to the question of exhaustion of domestic remedies, the Committee reiterates its concern that, in spite of three reminders addressed to the State party, no information or observations on the admissibility or merits of the communication have been received from the State party. Given these circumstances, the Committee finds that it is not precluded from considering the communication under article 5, paragraph 2 (b), of the Optional Protocol. The Committee finds no reason to consider the communication inadmissible and thus proceeds to its consideration on the merits in respect of the claims made under article 2, paragraph 3; article 6, paragraph 1; article 7; article 9, paragraphs 1 to 4; article 10, paragraph 1; article 14, paragraphs 1 and 3 (a) to (d); and article 16. It also notes that issues may arise under article 7, read in conjunction with article 2, paragraph 3,

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<sup>8</sup> See communications No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para. 4; No. 1295/2004, *El Alwani v. Libyan Arab Jamahiriya*, Views adopted on 11 July 2007, para. 4; No. 1208/2003, *Kurbonov v. Tajikistan*, Views adopted on 16 March 2006, para. 4; and No. 760/1997, *Diergaardt et al. v. Namibia*, Views adopted on 25 July 2000, para. 10.2.

<sup>9</sup> *Celis Laureano v. Peru* (note 3 above), para. 7.1.

with respect to the author, his mother and his brothers and sisters (that is, with respect to the wife and children of the victim).

*Consideration of the merits*

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it, as provided for under article 5, paragraph 1, of the Optional Protocol.

7.2 As to the alleged incommunicado detention of the author's father, the Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment, in which the Committee recommends that States parties should make provision against incommunicado detention. It notes that the author's father was detained incommunicado at Abu Salim prison from the time of his arrest on 19 April 1990, virtually without interruption,<sup>10</sup> until 15 December 2001, when he was brought before a military examining magistrate and was able to speak with his wife for the only time that he was allowed to do so during his detention in Abu Salim prison. Moreover, although the author's father had completed his sentence on 19 April 2003, he remained in detention in the same prison, since the military prosecutor had denied that he was being held there.

7.3 The Committee recalls the definition of enforced disappearance in article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance of 20 December 2006, which states: "For the purposes of this Convention, 'enforced disappearance' is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law."<sup>11</sup> Any act leading to such a disappearance constitutes a violation of many of the rights enshrined in the Covenant, including the right to recognition everywhere as a person before the law (art. 16), the right to liberty and security of person (art. 9), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art. 7), and the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (art. 10). It may also constitute a violation or a grave threat to the right to life (art. 6).<sup>12</sup>

7.4 The Committee notes that the State party has provided no response to the author's allegations regarding the forced disappearance of his father, nor to those that the latter was subject to acts of torture during the first three months of his incommunicado detention. It reaffirms that the burden of proof cannot rest on the author of the communication alone,

<sup>10</sup> The author mentions that his father was briefly transferred to a communal cell in 1996, but does not specify the length of time for which he was transferred.

<sup>11</sup> General Assembly resolution 61/177, annex. See also the Rome Statute of the International Criminal Court of 17 July 1998, art. 7, para. 2 (i), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 689; Inter-American Convention on Forced Disappearance of Persons, of 9 June 1994, art. 2, Organization of American States, A-60; Declaration on the Protection of All Persons from Enforced Disappearance, of 18 December 1992, General Assembly resolution 47/133.

<sup>12</sup> Communications No. 1328/2004, *Kimouche v. Algeria*, Views adopted on 10 July 2007, para. 7.2; No. 1295/2004, *El Awani v. Libyan Arab Jamahiriya*, Views adopted on 11 July 2006, para. 6.2; No. 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006, para. 9.2; and No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 31 July 2003, para. 9.3. See also the Declaration on the Protection of All Persons from Enforced Disappearance, art. 1, para. 2.

especially since the author and the State party do not always have equal access to the evidence and it is frequently the case that the State party alone has the relevant information.<sup>13</sup> It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to furnish to the Committee the information available to it. In cases where the allegations are corroborated by credible evidence submitted by the author and where further clarification depends on information that is solely in the hands of the State party, the Committee may consider an author's allegations substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party. In the absence of any explanations from the State party in this respect, due weight must be given to the author's allegations. On the basis of the information at its disposal, the Committee concludes that to have exposed the author's father to acts of torture, to have kept him in captivity for a total of nearly 18 years and to have prevented him from communicating with his family and the outside world constitute a violation of article 7 of the Covenant in respect of Mr. El Abani.<sup>14</sup>

7.5 With regard to the author and the rest of his family, the Committee notes the anguish and distress caused by the disappearance of his father from the time of his arrest in April 1990 until December 2001, when Ms. Abani was able to speak with her husband. After he served his full sentence, Mr. El Abani's fate remained unknown to his family, who were not able to obtain confirmation that he was being held in Abu Salim prison until his release in April 2008. The Committee is therefore of the opinion that the facts before it reveal a violation of article 7 of the Covenant, read in conjunction with article 2, paragraph 3, with regard to the author, his mother and his brothers and sisters.<sup>15</sup>

7.6 Regarding the complaint of violation of article 9, the information before the Committee shows that the author's father was arrested without a warrant by agents of the State party, was then held incommunicado without access to defence counsel and was not informed of the grounds for his arrest or the charges against him until he was charged by the Military Prosecutor-General on 19 April 2001, 11 years after his arrest. The Committee recalls that, in accordance with article 9, paragraph 4, judicial review of the lawfulness of detention must provide for the possibility of ordering the release of the detainee if his or her detention is declared incompatible with the provisions of the Covenant, in particular those of article 9, paragraph 1. In the case in question, the author's father was held in detention until he was brought before a judge in 2001. Although he had served his sentence in full by April 2003, he was not released until April 2008. The author's father was never able to challenge the legality of his detention. In the absence of any explanation from the State party, the Committee finds a violation of article 9 of the Covenant.<sup>16</sup>

7.7 Regarding the author's complaint under article 10, paragraph 1, that his father was held incommunicado for an initial period of 12 years and subjected to torture, the Committee reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that they

<sup>13</sup> See *El Hassy v. Libyan Arab Jamahiriya* (note 8 above), para. 6.7; *Conteris v. Uruguay* (note 5 above), para. 7.2; and communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.3.

<sup>14</sup> See *El Awani v. Libyan Arab Jamahiriya* (note 12 above), para. 6.5; *El Hassy v. Libyan Arab Jamahiriya* (note 8 above), para. 6.2; *Celis Laureano v. Peru* (note 3 above), para. 8.5; and communication No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994, para. 9.4.

<sup>15</sup> See *El Hassy v. Libyan Arab Jamahiriya* (note 8 above), para. 6.11; communication No. 107/1981, *Quinteros v. Uruguay*, Views adopted on 21 July 1983, para. 14; and *Sarma v. Sri Lanka* (note 12 above), para. 9.5.

<sup>16</sup> See *Medjnoune v. Algeria* (note 13 above), para. 8.5.

must be treated with humanity and respect for their dignity. In the absence of information from the State party concerning the treatment of the author's father in Abu Salim prison, the Committee concludes that his rights under article 10, paragraph 1, were violated.<sup>17</sup>

7.8 As to the author's allegations under article 14, the Committee observes that the author's father was tried 11 years after his arrest and sentenced after a closed trial to 13 years' imprisonment. He was never given access to his criminal file, and a lawyer was appointed by the military court to assist him. The Committee also notes that Mr. El Abani was tried by a military court even though he was a civilian, having served as a civil judge at the Benghazi court of first instance. The Committee recalls its general comment No. 32 (2007), in which it states that, while the Covenant does not prohibit the trial of civilians in military courts, nevertheless such trials should be exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14. It is incumbent on a State party that does try civilians before military courts to justify the practice. The Committee considers that the State party must demonstrate, with regard to the specific class of individuals at issue, that the regular civilian courts are unable to undertake the trials, that other alternative forms of special or high-security civilian courts are not up to the task and that recourse to military courts ensures the full protection of the rights of the accused pursuant to article 14.<sup>18</sup> In the present case, the State party has failed to comment on why recourse to a military court was required. The Committee therefore concludes that the trial and sentencing of the author's father to 13 years' imprisonment by a military court discloses a violation of article 14, paragraphs 1 and 3 (a) to (d), of the Covenant.

7.9 In respect of article 16, the Committee reiterates its established case law, according to which intentionally removing a person from the protection of the law for a prolonged period of time may constitute a refusal to recognize that person before the law if the victim was in the hands of the State authorities when last seen and, at the same time, if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (art. 2, para. 3, of the Covenant) have been systematically impeded.<sup>19</sup> In the present case, the author alleges that his father was arrested on 19 April 1990 without a warrant and without being informed of the legal grounds for his arrest. He was then taken to an unknown place where he was subjected to acts of torture, before being taken to Abu Salim prison. None of the steps taken by his family produced any results until he was formally charged, tried and sentenced in 2002. The Committee also observes that the author's father disappeared again after having served his full sentence. The State party authorities denied that he was in Abu Salim prison but did not carry out any inquiry to ascertain his fate and have him released. The Committee finds that the enforced disappearance of the author's father for nearly 12 years, in the absence of any inquiry, deprived the author's father of the protection of the law during that period, in violation of article 16 of the Covenant.

7.10 The author invokes article 2, paragraph 3, of the Covenant, which requires States parties to ensure that individuals have accessible, effective and enforceable remedies for asserting the rights recognized in the Covenant. The Committee reiterates the importance it attaches to States parties' establishment of appropriate judicial and administrative mechanisms for addressing alleged violations of rights under domestic law. It refers to its general comment No. 31 (2004) on the nature of the general legal obligation imposed on

<sup>17</sup> See general comment No. 21 (1992) on humane treatment of persons deprived of their liberty, para. 3; communication No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2; and *El Hassy v. Libyan Arab Jamahiriya* (note 8 above), para. 6.4.

<sup>18</sup> See communication No. 1173/2003, *Benhadj v. Algeria*, Views adopted on 20 July 2007, para. 8.8.

<sup>19</sup> *Grioua v. Algeria* (note 7 above), para. 7.8; and communication No. 1495/2006, *Zohra Madaoui v. Algeria*, Views adopted on 28 October 2008, para. 7.7.

States parties to the Covenant, in which it states that failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.<sup>20</sup> In the present case, the information before the Committee indicates that the author's father did not have access to an effective remedy, and the Committee therefore concludes that the facts before it reveal a violation of article 2, paragraph 3, read in conjunction with article 6, paragraph 1, and article 7.<sup>21</sup>

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, finds that the facts before it reveal violations by the State party of article 2, paragraph 3, read in conjunction with article 6, paragraph 1, and article 7 standing alone, article 9, article 10, paragraph 1, article 14, paragraphs 1 and 3 (a) to (d), and article 16, of the Covenant with regard to the author's father. The facts also reveal a violation of article 7, read in conjunction with article 2, paragraph 3, with regard to the author, his mother and his brothers and sisters.

9. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, which would include a thorough and effective investigation into the disappearance of the author's father, adequate information on the results of its investigations and appropriate compensation for the author's father, as well as for his mother and his brothers and sisters, for the violations suffered. The Committee considers the State party duty-bound to conduct thorough investigations into alleged violations of human rights, particularly enforced disappearances and acts of torture, and to prosecute, try and punish those responsible for such violations.<sup>22</sup> The State party is also under an obligation to take measures to prevent similar violations in the future.

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 or not 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 in the event that a violation is established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

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<sup>20</sup> See paras. 15 and 18.

<sup>21</sup> See *El Hassy v. the Libyan Arab Jamahiriya* (note 8 above), para. 6.9; and communication No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 9.9.

<sup>22</sup> See *El Hassy v. Libyan Arab Jamahiriya* (note 8 above), para. 8; *Boucherf v. Algeria* (note 21 above), para. 11; and *Medjnoune v. Algeria* (note 13 above), para. 10.

## Appendix

### **Individual opinion of Committee member, Mr. Abdelfattah Amor**

This opinion is limited to certain legal aspects relating to the admissibility of the communication.

The communication was submitted by Mr. Abdelhakim Wanis El-Abani (El Ouerfeli), on his own behalf and on behalf of his father, Mr. Wanis Charef El-Abani (El Ouerfeli), who was being held in prison without any contact with his family at the time of the submission of the communication — 15 October 2007 — and who was released on 9 April 2008. The communication was also submitted on behalf of the author's mother and his seven brothers and sisters.

The locus standi of the son as a victim is not debatable in the present case, either at the time of the submission of the communication, for which purpose he duly empowered his attorney, or following the release of his father.

The locus standi of the father, as a victim, is not debatable either. It was not debatable while he was in detention. And it was not debatable following his release, since he expressed the hope that proceedings before the Committee in respect of his case should continue.

The question of the admissibility of the communication does arise, however, with respect to the mother, the two sisters and the five brothers. I think that the Committee should have declared the communication inadmissible in relation to them, for two reasons. The first relates to the anonymity of the communication, the second to the lack of power of attorney.

Regarding the first reason, the Optional Protocol establishes under article 3 that: "The Committee shall consider inadmissible any communication [...] which is anonymous." Rule 96 (a) of the rules of procedure contains the same provision. The author claims to be acting on behalf of his brothers and sisters, whose surnames, forenames and ages are not indicated in the interest of protecting them. He has therefore preferred not to reveal the names of his mother and his brothers and sisters, which renders them anonymous and may raise problems with respect to their legal capacity and, therefore, the rules on their representation in legal proceedings. The Committee should have taken into account the clear distinction between anonymity and confidentiality. Unquestionably, anonymity renders the communication inadmissible. Confidentiality with regard to surnames, forenames, ages and other specific circumstances is possible and has often been observed by the Committee pursuant to rule 102, paragraph 4, of the rules of procedure. These establish that: "When a decision has been taken on the confidentiality pursuant to paragraph 3 above, the Committee, the Working Group established pursuant to rule 95, paragraph 1, or the Special Rapporteur designated pursuant to rule 95, paragraph 3, may decide that all or part of the submissions and other information, such as the identity of the author, may remain confidential after the Committee's decision on inadmissibility, the merits or discontinuance has been adopted."

It therefore appears that the Committee has overlooked the requirement for non-anonymity set forth in article 3 of the Optional Protocol and has not taken it upon itself to invite the author to provide the necessary information while availing himself of the rules on confidentiality.



Nor has the Committee taken upon itself to ensure compliance with the rules of representation. Rule 96 (b) of the rules of procedure states that: "Normally, the communication should be submitted by the individual personally or by that individual's representative; a communication submitted on behalf of an alleged victim may, however, be accepted when it appears that the individual in question is unable to submit the communication personally."

Was the author empowered to act on behalf of his mother and his brothers and sisters, who may be adults and presumably legally capable? Does he have any authorization to legally represent his brothers and sisters if they are minors? The case file contains no power of attorney or any other authorization to act in a representative capacity. Nor does it contain any explanations regarding the inability referred to in rule 96 (b) of the rules of procedure. The author's counsel indicated in a letter sent the day before the Committee considered the communication that he had not been able to obtain power of attorney from the author's seven brothers and sisters, partly for fear of reprisals from the authorities. That is "the reason why, in the interest of protecting them, he [the author] did not want their surnames and forenames to be cited in the proceedings". The counsel added that "most of the people we deal with believe, rightly or wrongly, that they are under police surveillance and that their phone calls and e-mails are intercepted". In short, these are reasons which do not directly address the requirements of rule 96 (b) of the rules of procedure, but which belong much more to meta-law than to the law itself. Possibly it is because he is aware of the limits of the explanations provided that the counsel accepts "that the communication may be considered on behalf of only the author and the father, the victim".

Nevertheless, the Committee considered that the communication was also admissible with respect to the mother and the brothers and sisters. This is a legally questionable position that I cannot accept. Particularly given that it is likely to encourage further slippage towards *actio popularis*, which the Optional Protocol does not recognize.

(Signed) Mr. Abdelfattah Amor

[Done in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

## Individual opinion of Committee member, Mr. Fabián Omar Salvioli

1. With my affirmative vote, I have concurred with the Committee's conclusions contained in communication No. 1640/2007 submitted by Mr. Abdelhakim Wanis El Abani against the Libyan Arab Jamahiriya. Nevertheless, I feel obliged to set down my thoughts on an issue on which, regrettably, my views differ from those of the majority on the Committee. The issue in question is the scope of military jurisdiction within the framework of the International Covenant on Civil and Political Rights.

2. Paragraph 7.8 of the ruling on communication No. 1640/2007 states that the Committee "... recalls its general comment No. 32 (2007), in which it states that, while the Covenant does not prohibit the trial of civilians in military courts, nevertheless such trials should be exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14. It is incumbent on a State party that does try civilians before military courts to justify the practice".

3. I must state unequivocally that general comment No. 32 falls down badly on this point. In its decision on the *El Abani* case, the Committee missed a clear opportunity to declare that the trial of civilians by military courts is incompatible with article 14 of the Covenant and to correct a regressive aspect of human rights law.

4. It is true, as the Committee states, that "the Covenant does not prohibit the trial of civilians in military courts"; but does that mean that it permits the practice? A close reading of article 14 shows that the Covenant does not even suggest that military justice might be applied to civilians. Article 14, which guarantees the right to justice and due process, does not contain a single reference to military courts. States have on numerous occasions — and always with negative consequences as far as human rights are concerned — empowered military courts to try civilians, but the Covenant is completely silent on the subject.

5. The Committee's reasoning in drafting general comment No. 32 should have been the exact opposite: as the trial of civilians by military courts is an exceptional exercise of competence (the trial of non-members of the military in the military jurisdiction) and moreover takes place within an exceptional jurisdiction (military justice represents an exception to ordinary justice), it is a doubly exceptional exercise of competence and as such should have been explicitly provided for in the Covenant to ensure compatibility with the Covenant, because it obviously takes civilians away from those who are their natural judges.

6. Lest we forget, the exceptions and restrictions to rights — in this case the restriction on the right to be judged by a "natural judge" as part of the rights to justice and due process — must in their turn be interpreted restrictively and not so readily deemed to be compatible with the Covenant.

7. It would have been far more reasonable for the Committee to point out that the Covenant does not allow civilians to be tried by military courts, rather than to state, somewhat meaninglessly, that the Covenant does not prohibit such trials.

8. The idea is not — nor is it the Committee's role — to interpret the Covenant to take account of actual practices on the part of States that in fact entail proven violations of human rights, but rather to help States parties to meet modern standards of due process and explicitly indicate, where applicable, the modifications that must be made to domestic legislation to bring it into line with the Covenant.

9. Military jurisdiction, as applied with tragic results throughout the world from the Second World War to the present day, has meant, without exception, the entrenchment of

impunity for military personnel accused of serious mass violations of human rights. Moreover, when military criminal justice is applied to civilians, the outcome is convictions obtained on the basis of proceedings vitiated by abuses of all kinds in which not only does the right to a defence become a chimera, but much of the evidence is obtained by means of torture or cruel and inhuman treatment.

10. The Covenant does not prohibit military courts, nor is it the intention of this opinion to eliminate them. Military criminal justice is, however, a jurisdiction that must be contained within suitable limits if it is to be fully compatible with the Covenant: *ratione personae*, military justice should apply to serving military personnel, never to civilians or retired military personnel; *ratione materiae*, military justice should be competent to try disciplinary offences, never ordinary offences and certainly not human rights violations. Only under these conditions can military jurisdiction be compatible with the Covenant.

11. General comment No. 32 is an important legal document for the human right to due process, but on the issue under discussion here falls down badly. Three years have passed since it was adopted, and the Committee should take steps to correct the notion that military courts may try civilians; its current position is completely out of step with modern standards of international human rights protection and with the most enlightened doctrine on the subject.

12. The Committee does not need to draft a new general comment in order to move forward *pro homine* on this particular point, merely to take account of developments in the system of human rights protection. Individual communications under the Optional Protocol — where cases before the Committee are similar to this *El Abani* case, in which a civilian is tried by a military court — and concluding observations on States' reports under article 40 of the Covenant, also provide appropriate opportunities to perform this indispensable legal task and thereby contribute to the better fulfilment of the object and purpose of the Covenant.

13. As soon as this position is adapted, the States parties, as members of the international community, will in good faith adjust their domestic legislation, and military courts with the power to try civilians will become part of a sad past happily left behind.

14. Throughout its history, the Committee has made notable contributions to international human rights law and been a source of inspiration to other international and regional jurisdictions. On the issue addressed in this opinion, however, the Committee is moving in the exact opposite direction.

15. As has been seen in thousands of cases, and regrettably, again here in the *El Abani* case, the abolition of the military jurisdiction for trying civilians is still an outstanding issue that impatiently awaits a clear and appropriate response from the Human Rights Committee.

(Signed) Mr. Fabián Omar **Salvioli**

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**KK. Communication No. 1742/2007, *Gschwind v. Czech Republic*  
(Views adopted on 27 July 2010, ninety-ninth session)\***

<i>Submitted by:</i>	Nancy Gschwind (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	The Czech Republic
<i>Date of communication:</i>	6 November 2007 (initial submission)
<i>Subject matter:</i>	Discrimination on the basis of citizenship with respect to restitution of property
<i>Procedural issue:</i>	Non-exhaustion of domestic remedies
<i>Substantive issues:</i>	Equality before the law; equal protection of the law
<i>Article of the Covenant:</i>	26
<i>Article of the Optional Protocol:</i>	5, paragraph 2 (b)

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

*Meeting on 27 July 2010,*

*Having concluded* its consideration of communication No. 1742/2007, submitted to the Human Rights Committee by Ms. Nancy Gschwind under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the authors and the State party,

*Adopts* the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication is Ms. Nancy Gschwind, born on 16 August 1939, and sole heir to the estate of Kamil Stephan Gschwind, who died on 14 April 2005. Prior to his death, the deceased was a citizen of the United States of America and a former citizen of Czechoslovakia. The author claims to be a victim of a violation by the Czech Republic of article 26 of the International Covenant on Civil and Political Rights.<sup>1</sup> She is not represented by counsel.

\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Mahjoub El Haiba, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

<sup>1</sup> The Optional Protocol entered into force for the State party on 22 February 1993.

**The facts as presented by the author**

2.1 On an unspecified date, the author married Kamil Stephan Gschwind, a political refugee from Czechoslovakia from where he had “escaped” in 1958. He acquired United States citizenship and, pursuant to the treaty then in force between the two countries, he automatically lost his Czechoslovakia citizenship. Mr. Kamil Gschwind inherited from his mother, Ms. Miroslava Gschwind, one-eighth of an apartment building in 30, Graficka St., Prague 5, 150 00 Czech Republic. The rest of the building was returned to other members of the Mr. Gschwind’s family. He passed away on 14 April 2005 and the author is his sole heir.

2.2 According to the decision of the Office of Prague Municipality No. 5 dated 24 January 2001, those entitled to the property in question under Law 87/1991 are Messrs. Kamil and Ota Gschwind. However, according to a letter from the Municipal Office of Prague Municipality No. 5, of 8 November 2000, Mr. Gschwind’s American citizenship was a legal obstacle to his claim for the above-mentioned property.

2.3 On 11 November 2002, the Municipal Court of Prague No. 5 decided that Kamil Gschwind was the owner of one-eighth of the apartment building in question. On 24 October 2003, on appeal, the Prague City Court overturned this decision and decided that Mr. Gschwind’s part had been put under national custody under Decree 5/1945. Transfer of the ownership right occurred at the moment when the owner abandoned this property with the intention of giving up his ownership right. The court concluded that the State obtained the ownership of this property under the law in force at the time.

2.4 The author challenges the court’s reasoning by stating that Decree 5/1945 was used after the Second World War against Germans, Hungarians and others who were considered to be traitors. Mr. Gschwind “defected when his university class went to see architecture in East Berlin”. The building in question was never abandoned and continued to be administered by his uncle, Jan Sammer.

2.5 On 22 December 2005, an extraordinary appeal to the Supreme Court of the Czech Republic was rejected. On 15 June 2006, a complaint to the Constitutional Court was considered inadmissible.

**The complaint**

3. The author claims that the Czech Republic violated her rights under article 26 of the Covenant, by enforcing a discriminatory property restitution law. Had her husband escaped anywhere else but to the United States, he would have had no difficulties in recovering his property. To support her claim she refers to the case of a family member who immigrated to Canada in 1966, did not lose his Czech citizenship and subsequently successfully recovered his property.

**State party’s observations on admissibility and merits**

4.1 On 6 June 2008, the State party submitted comments on the admissibility and merits of the communication.

4.2 On the facts, the State party submitted that the action filed on 14 May 2001 in the Prague District Court No. 5 was a request by Mr. Gschwind, pursuant to section 126 of the Civil Code, in conjunction with Section 80(c) of the Rules of Civil Procedure, to declare him the owner of the property in question. The Municipal Court in Prague, acting as the appellate court, reversed the judgment of the court of first instance. It held that Mr. Gschwind had lost his ownership right to the contentious properties as a result of dereliction and that the said right had passed to the State; that the Act No. 87/1991 on Extra-Judicial Rehabilitations offered an opportunity to redress such situations; however,

Mr. Gschwind failed to lodge a restitution claim under that Act and, instead, lodged an action under a general legal regulation. The State party further submits that the author's husband then brought an appeal on points of law before the Supreme Court which was rejected on the same grounds. The author then brought the case before the Constitutional Court which declared it inadmissible on 15 June 2006 for being premature. A new constitutional appeal by the author was rejected for being manifestly ill-founded on 17 July 2007.

4.3 On admissibility, the State party submits that any claims relating to events prior to 12 March 1991 are incompatible *ratione temporis*, given that the Optional Protocol only entered into force after that date. Also, to the extent that the author contends a violation of the protection of ownership of a part of the contentious properties, her communication is incompatible *ratione materiae* with the Covenant, given that the right to property is not, as such, protected by the Covenant.

4.4 The State party submits that the author has not exhausted domestic remedies, as both she and her deceased husband failed to initiate restitution proceedings under the Act on Extra-Judicial Rehabilitation to obtain a decision on the merits of their property claims.

4.5 The State party submits that the case is inadmissible under article 3 of the Optional Protocol as an abuse of the right of submission. The domestic proceedings were concluded on 15 June 2006 and the author approached the Committee on 6 November 2007. Thus, it argues that, as the author did not approach the Committee until almost one and a half years after completion of the domestic court proceedings without providing any objective and sustainable reasonable explanation, she abused her right to submit a communication to the Committee. The State party refers to the jurisprudence of the Committee in this regard, and shares the views of Mr. Amor in his dissenting opinion in the case of *Ondrackova v. Czech Republic*.<sup>2</sup> It also refers to a similar complaint made by the author to the European Court of Human Rights. In its view, communications that are submitted after the case has been subject to proceedings before another body for monitoring the observance of human rights should be assessed more strictly.

4.6 On the merits, the State party disputes the claim that the court proceedings described by the author constituted a violation of her rights. In its view, these proceedings concluded that the author's husband did lose the ownership right to the property in question after having emigrated, the ownership having passed to the State, and that after 1989 the author's husband had the possibility of seeking restitution of the property solely through restitution proceedings and not through a declaratory action under the Civil Code. These conclusions are fully in conformity with the domestic law. The relationship between restitution legislation and general civil law regulations as declared by the courts was a logical result of the application of the principle of legal certainty.<sup>3</sup> Restitution legislation was based on the one hand on the principle of continuity of the validity of legal acts from the past and, on the other hand, on defined equal substantive and procedural criteria under which certain acts

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<sup>2</sup> Communication No. 1533/2006, Views adopted on 31 October 2007.

<sup>3</sup> The State party refers to the Judgement of the Grand Chamber of the Civil Law Division of the Supreme Court, dated 11 September 2003, which stated that "an eligible person whose real property was taken over by the State during the decisive period (from 25 February 1948 through 1 January 1990) in spite of the absence of legal grounds, may not seek protection of their ownership right under Section 126(1) of the Civil Code, not even through a declaration of ownership right pursuant to Section 80(c) of the Rules of Civil Procedure, inasmuch [it is understood that this should be "unless"] as she/he may have requested the surrender of the thing (property) under the provisions of the restitution (rehabilitation) law". It also refers to the Constitutional Court's "plenum"/opinion of 1 November 2005, which concluded that an action for the declaration of an ownership right could not be used to circumvent the meaning and purpose of restitution legislation.

relating to property could be challenged in restitution proceedings. Such proceedings were set up as the only mechanism suitable to contest long existing property relationships. The State party submits that the courts in question, at no stage of the proceedings, assign any importance to the citizenship of the author or her husband, and thus acted in no way arbitrarily or discriminatorily.

4.7 The State party argues that the author's and her husband's failure to choose the appropriate procedure, a petition to commence restitution proceedings, rather than a declaratory action under the civil code, cannot be attributable to the State party. All the more so when they were represented by counsel.

4.8 The State party submits that the author cannot claim a purely hypothetical violation of the Covenant that may have occurred if the author, or her husband, had made the appropriate application. Regardless of the question of citizenship, the Act on Extra-Judicial Rehabilitation laid down other preconditions for a restitution claim to be successful. In particular, the law laid down a limitation period prior to which the claim had to be lodged against the liable person to return the property, i.e. 1 May 1995. The outcome of the restitution proceedings would also have depended on whether the liable person met certain conditions. According to the State party, it is clear, among other things, that when the author's husband filed the action under the Civil Code on 14 May 2001, the aforementioned time limit laid down by the Act on Extra-Judicial Rehabilitation had been exceeded by more than 6 years and that his entitlement would have expired. Thus, the statutory requirements for granting the petition would not have been met in restitution proceedings due to passage of time. Accordingly, it should not be inferred that the courts would have denied Mr. Gschwind's claim solely on the ground of citizenship and that they may have thereby committed any discrimination.

4.9 As to the letters/memos from the District Authority dated 8 November 2000 and 24 January 2001, which note the obstacle to citizenship, the State party notes that the legal opinion of a government authority, moreover given outside the examination of a particular matter, is not binding on third parties under Czech law and even less so on independent courts that would be considering the matter in the future. In terms of assessing a potential violation of the Covenant in possible restitution proceedings such opinions are therefore irrelevant.

4.10 Finally, with respect to the claim of discrimination on the grounds that another person from the author's family, who immigrated to Canada, did not lose his citizenship and thus successfully recovered his property, the State party argues that the author did not submit accurate information about this claim. It has no doubt that the individual in question raised their claims within the time limit applicable under the restitution legislation applicable, unlike that of the author's husband.

#### **Author's comments on the State party's observations**

5.1 On 21 July 2008, while acknowledging that both the Municipal Court of Prague and the Supreme Court stated that the author's husband should have proceeded under the restitution act of 87/1991, the author submits that this was precisely the discriminating law, as it disqualified anybody who did not have Czech citizenship between 1 April and 1 October 1991. Her husband was not an "eligible person" under that Act, as he did not have Czech citizenship during the relevant period. Accordingly, his claim would have been fruitless. She recalls that it was firmly established by the Constitutional Court decision of 6 October 1999 that the requirement of citizenship for restitution was reasonable. She also refers to Law 289/1999 in the "Collection of Laws", which she claims allows for those who do not meet the conditions of citizenship to assert their rights according to the Civil Code.

5.2 On the issue of delay, the author submits that the delay was due to the fact that her husband was involved in other proceedings and was ultimately refused compensation on citizenship grounds under Law 261/1991, relating to a “Monetary Award for Participants of the National Struggle for Liberation in the II World War and for their Orphans”.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

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

6.3 The State party has argued that the communication is inadmissible, inter alia, for non-exhaustion of domestic remedies, as the author is claiming a violation of article 26 of the Covenant with respect to Act No. 87/1991 on Extra-Judicial Rehabilitation, without there having been any claim made in this regard before the domestic courts. The author does not dispute the fact that all of the proceedings taken before the national authorities related to a claim under different legislation – section 126 of the Civil Code, in conjunction with section 80(c) of the Rules of Civil Procedure. Neither does the author dispute the fact that both the Municipal Court of Prague and the Supreme Court advised the author’s husband to pursue his claims under the appropriate law – Act No. 87/1991.

6.4 The Committee refers to its established jurisprudence that, for purposes of the Optional Protocol, the author of a communication need not exhaust domestic remedies when these remedies are known to be ineffective. The Committee notes that because of the preconditions of Law No. 87/1991, the author could not claim restitution at the time because he no longer had Czech citizenship. In this context the Committee notes that other claimants have unsuccessfully challenged the constitutionality of the law in question; that earlier views of the Committee in similar cases remain unimplemented and that despite those complaints, the Constitutional Court upheld the constitutionality of the Restitution Law. The Committee therefore concludes that no effective remedies were available to the author.<sup>4</sup> Furthermore, with regard to the State party’s argument that Mr. Gschwind did not meet other conditions set up in Act No. 87/1991, the Committee considers it to be irrelevant, since under the explicit terms of the law he was excluded from the restitution scheme from the outset.

6.5 In the circumstances, the Committee finds that article 5, paragraph 2 (b), of the Optional Protocol does not preclude the Committee’s consideration of the present communication.

6.6 For the above reasons, the Committee declares the communication admissible in so far as it may raise issues under article 26 of the Covenant.

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<sup>4</sup> The Committee reached a similar conclusion in communication No. 1497/2006, *Preiss v. Czech Republic*, Views adopted on 17 July 2008, para. 6.5.



*Consideration of the merits*

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 With regard to the author's claim that he is a victim of discrimination, since Act No. 87/1991 makes restitution of his property conditional on having Czech citizenship, the Committee reiterates its jurisprudence that not all differentiations in treatment can be deemed to be discriminatory under article 26. A differentiation which is compatible with the provisions of the Covenant and is based on objective and reasonable grounds does not amount to prohibited discrimination within the meaning of article 26.

7.3 The Committee further recalls its Views in the cases, inter alia, of *Simunek, Adam, Blazek, Des Fours* and *Gratzinger*, where it held that article 26 of the Covenant had been violated and that it would be incompatible with the Covenant to require the authors to meet the condition of Czech citizenship for the restitution of their property or alternatively for its compensation.<sup>5</sup> The Committee considers that the principle established in the above cases equally applies to the author's husband in the present communication and that the application to him of the citizenship requirement laid down in Act No. 87/1991 violated his and the author's rights under article 26 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 26 of the International Covenant on Civil and Political Rights.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation if the property in question cannot be returned. The Committee reiterates that the State party should review its legislation and practice to ensure that all persons enjoy both equality before the law and equal protection of the law.

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 or not, 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 in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of present report.]

<sup>5</sup> Communications No. 516/1992, *Simunek v. Czech Republic*, Views adopted on 19 July 1995, para. 11.6; No.586/1994, *Adam v. Czech Republic*, Views adopted on 23 July 1996, para. 12.6; No. 857/1999, *Blazek v. Czech Republic*, Views adopted on 12 July 2001, para. 5.8; No. 747/1997, *Des Fours v. Czech Republic*, Views adopted on 30 October 2001, para. 8.3; No. 1463/2006, *Gratzinger v. the Czech Republic*, Views adopted on 25 October 2007, para. 7.4; and No. 1497/2006, *Preiss v. Czech Republic*, Views adopted on 17 July 2008, para. 7.3.

**LL. Communication No. 1797/2008, *Mennen v. The Netherlands*  
(Views adopted on 27 July 2010, ninety-ninth session)\***

<i>Submitted by:</i>	Thomas Wilhelmus Henricus Mennen (represented by counsel Mr. Willem Hendrik Jebbink)
<i>Alleged victim:</i>	The author
<i>State party:</i>	The Netherlands
<i>Date of communication:</i>	8 May 2008 (initial submission)
<i>Subject matter:</i>	Right to have his sentence and conviction reviewed by a higher tribunal, effective remedy
<i>Procedural issues:</i>	None
<i>Substantive issues:</i>	Degree of substantiation of claims
<i>Articles of the Covenant:</i>	2, paragraph 3, 14, paragraph 5
<i>Article of the Optional Protocol:</i>	2

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

*Meeting on 27 July 2010,*

*Having concluded* its consideration of communication No. 1797/2008, submitted to the Human Rights Committee on behalf of Mr. Thomas Wilhelmus Henricus Mennen under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the authors of the communication, and the State party,

*Adopts* the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication is Mr. Thomas Wilhelmus Henricus Mennen, a national of the Netherlands, born on 25 December 1981. He claims to be a victim of violations by the Netherlands of articles 2, paragraph 3, and 14, paragraph 5, of the International Covenant on Civil and Political Rights.<sup>1</sup> He is represented by counsel, Mr. Willem Hendrik Jebbink.

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Mahjoub El Haiba, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

An individual opinion signed by Committee member Mr. Krister Thelin is appended to the text of the present Views.

<sup>1</sup> The Covenant and the Optional Protocol entered into force in relation to the Netherlands on 11 December 1978.

### Facts as submitted by the author

2.1 On 17 June 2007, the author was summoned to appear before the District Court of Dordrecht on 14 September 2007, for failing to comply with an administrative order to move away from a railroad track, where he was demonstrating, as part of a group, against its use. Failure to comply with such an order is a criminal offence, under article 184 of the Criminal Code of the Netherlands.

2.2 The author didn't appear in person at the trial, but was represented by a lawyer. An oral judgment was rendered convicting the author without any reasoning and sentencing him to a fine of €200. In accordance with article 365 (a) of the Code of Criminal Procedure (CCP), the judge pronounced an "abridged" oral judgment, which did not need to be supplemented with evidence. Given that under articles 365 (a), 378 and 378 (a) of the CCP, it is not necessary to draw up a trial transcript, none was drawn up in this case.

2.3 On 27 September 2007, the author applied for leave to appeal against this verdict in accordance with article 410 (a) of the CCP. On 8 October 2007, the author submitted his grounds of appeal, but had no reasoned written judgment upon which he could base it. On 19 November 2007, the presiding judge of the Court of Appeal of The Hague issued a decision declaring that the appeal would not be considered as the interests of proper administration of justice did not require this case to be heard on appeal.

2.4 According to article 410 (a) (7) of the CCP it is not possible to lodge a cassation appeal against the decision of the Court of Appeal.

### The complaint

3.1 The author claims that his right under article 14, paragraph 5, has been violated in two ways. First, he has not been able to exercise his right to appeal in an effective and meaningful way. He invokes paragraph 49 of general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial,<sup>2</sup> which refers to the right to have access to a duly reasoned, written judgment of the trial court and at least in the court of first appeal, and to other documents such as trial transcripts. In the present case, the author did not have access to these documents. He also quotes several Views of the Human Rights Committee, where States parties have been found in violation of article 14, paragraph 5, of the Covenant, as they had not provided access to the trial transcript or to duly reasoned written judgments in the trial court and in the court of first appeal.<sup>3</sup>

3.2 Secondly, the author invokes paragraph 48 of general comment No. 32 on the scope of review and refers to several recent cases against Spain. He states that the Covenant imposes an obligation on States parties to ensure that the higher tribunal deciding upon leave to appeal requests carries out a substantive assessment of the conviction and the sentence, both on the basis of sufficiency of the evidence and of the law, to allow for a proper assessment of the nature of the case. The author claims that in his case a substantive assessment has not taken place nor could it have taken place, as the higher tribunal did not possess a properly reasoned judgment of the court of first instance, a statement of the evidence used, or a transcript of the first instance trial. Lastly, the higher tribunal's judgment did not reflect a meticulous and thorough investigation of the arguments put forward by the author on appeal.

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<sup>2</sup> *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40, vol. I (A/62/40 (Vol. I)), annex VI.*

<sup>3</sup> *Communications No. 662/1995, Lumley v. Jamaica, Views adopted on 31 March 1999, para. 7.5; No. 903/2000, Van Hulst v. Netherlands, Views adopted on 1 November 2004, para. 6.4; No. 230/1987, Henry v. Jamaica, Views adopted on 1 November 1991, para. 8.4.*

**State party's observations on admissibility and merits**

4.1 On 25 August 2008 and on 5 January 2009 the State party submitted that the communication should be declared inadmissible under article 5, paragraph 2 (b), of the Optional Protocol for failure to exhaust the domestic remedies. Should the Committee not endorse that conclusion, the State party submits that the communication is unfounded. It provides detailed observations concerning the facts of the case, the applicable legislation, the admissibility and the merits of the communication.

4.2 As to the facts, the State party maintains that, on 16 June 2007, the author was arrested and charged as a result of intentionally failing to comply with an order to leave a railroad track, issued in accordance with a statutory regulation by a police officer. When he refused to comply with the order, he was arrested, refused to prove his identity, then was detained overnight in a police station and released the next day.

4.3 The State party confirms that, on 17 September 2007, the author's case was heard by a single judge, who issued an oral judgment sentencing the author to a fine of €200, in accordance with article 184 of the Criminal Code of the Netherlands. The State party notes that the author's counsel had submitted a 15-page memorandum of oral pleading for the first instance court hearing. The State party confirms that the oral judgment does not present any reasons for the judicial finding of fact and that it was issued on the basis of articles 365 (a), 378 and 378 (a) of the CCP.

4.4 The State party also submits that, on 25 September 2007, the author's counsel was provided with a number of official police reports on the case upon his request. On 27 September 2007, the author filed an application for leave to appeal and on 8 October 2007 his counsel submitted a statement of grounds for appeal, claiming that the judge has erred in (a) declaring the case to be admissible and (b) not acquitting the author. The State party confirms that, on 19 November 2007, the presiding judge of the Court of Appeal, having taken cognizance of the author's request and of the case documents, turned down the application for leave to appeal on the grounds that a hearing of the appeal was not in the interests of the proper administration of justice and that counsel's contentions were not supported in law.

4.5 On the applicable legislation, the State party quotes article 184 of the Criminal Code and articles 365 (a), 378, 378 (a) and 410 (a) of the CCP. The State party explains the legislative history of those provisions and submits that the nature and scope of procedural obligations in the State party are adapted to the weight of the interests at stake in a case: the more important the case in terms of consequences for the parties, the more precise and exacting the requirements of keeping the official record of the trial and the court's judgment.

4.6 On admissibility, the State party submits that the author did not invoke explicitly or implicitly article 14, paragraph 5, of the Covenant before the Court of Appeal or any other national court, thereby denying them the opportunity to respond. At the time of the submission of the statement containing the grounds of appeal against the judgment of the Dordrecht District court, the author was aware that the presiding judge could determine that the hearing of the appeal was not required in the interest of justice. Therefore, the State party maintains that had he challenged article 410 (a) of the CCP, the Court of Appeal could have included this in its determination of whether such an appeal was required in the interest of the proper administration of justice. The State party concludes that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol for failure to exhaust domestic remedies.

4.7 On the merits, the State party refers to paragraphs 45 to 51 of general comment No. 32 of the Human Rights Committee. It maintains that it has not violated article 14, paragraph 5, of the Covenant, as the above article does not prevent a State from using a

system in which the right to appeal in less serious criminal cases is limited by means of a system of leave, and emphasizes that a decision taken by the presiding judge of a Court of Appeal on an application for appeal can be considered to constitute a review within the meaning of this provision.

4.8 The State party explains that its system of leave to appeal proceedings operates de facto for less serious criminal convictions, leading to fines of no more than €500. The aims of the system are to prevent the administration of justice from being overburdened, to guarantee timely trials and to ensure that the administration of justice remains affordable. It submits that the Public Prosecution Service had indicated that without such a system they would have to deal with 4,200 additional appeals. The State party further refers to the drafting history of article 14, paragraph 5, of the Covenant, pointing out that the initial version of the text contained an exception for minor offences, which was removed following a proposal by the Ceylon delegation and replaced by a provision that the review by a higher tribunal will take place “according to law”. The State party concludes that the authors of the Convention never intended to rule out the possibility of limiting the right to appeal for less serious convictions.

4.9 The State party further refers to article 2, paragraph 2, of Protocol 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which is comparable to article 14, paragraph 5, of the Covenant and points out that the former provides an exception for offences of a minor character.

4.10 The State party maintains that an unconditional right to appeal would be incompatible with a streamlined system of disposal of criminal cases; that it is reasonable to assume a degree of proportionality between the demands placed on appeal in criminal cases and the gravity of the case; and that the Committee itself places the heaviest demand on cases involving death penalty. In the State party’s view, even though in general comment No. 32 the Committee has noted that the right to appeal is not confined to the most serious offences, that does not mean that the right to appeal is fully and generally applicable to all criminal cases, including “the least serious offences”. In support of its view the State party refers to paragraph 7.3 of *Lumley v. Jamaica* and paragraphs 2.3, 4.1–5 and 7.2 of *Bryhn v. Norway*.<sup>4</sup>

4.11 The State party is of the opinion that a “review” at second instance does not imply a new and full assessment of questions of fact and law. It also states that while there is a difference of opinion with the author, as to the interpretation of “least serious offences”, the individual complaints procedure does not provide for the review, in abstract terms, of alleged shortcomings in national legislation or legal practice.<sup>5</sup> The State party emphasizes that the sentence handed out was small by local standards and that there was no question of a custodial sentence, which would, according to the Committee’s practice, be serious enough to require a review by a higher tribunal.<sup>6</sup> The State party maintains that while the Committee’s case law does require substantially reviewing the conviction and sentence, it does not require a factual retrial.

4.12 The State party does not dispute that the decision not to grant leave to appeal was not based on the abridged oral judgment of the first instance court. However, it maintains that the presiding judge based its decision on the entire case file, including on documents from the preliminary inquiry, as well as on the defendant’s memorandum of oral pleading

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<sup>4</sup> Communications No. 662/1995, Views adopted on 30 April 1999, and No. 789/1997, Views adopted on 2 November 1999, respectively.

<sup>5</sup> The State party refers to communication No. 35/1978, *Aumeeruddy-Cziffra et al. v. Mauritius*, para. 9.3.

<sup>6</sup> The State party refers to communication No. 64/1979, *Salgar de Montejó v. Colombia*, para. 10.4.

from the first instance and the defendant's contentions regarding why in his opinion the initial judgment could not be upheld and must be heard on appeal. The State party specifies that the defence must indicate clearly why the hearing of the appeal is required in the interests of the proper administration of justice, according to the clear criteria of which cases may come under the limited system of leave set in article 410 (a) of the CCP. The State party further submits that within that framework the author could have argued that the case concerned a serious offence and that withholding the leave to appeal would have violated article 14, paragraph 5, of the Covenant, but he did not do so.

#### **Author's comments on the State party's observations**

5.1 On 2 March 2009 the author reiterated most of his previous arguments.

5.2 He challenges the State party's view concerning admissibility, stating that he did not need to make an express complaint about a violation of article 14, paragraph 5, of the Covenant, as the right guaranteed in this provision had not been violated until the decision of the Court of Appeal was delivered. At the time the violation appeared, no domestic remedy was available to the author since no cassation appeal exists against the judgment of the presiding judge of the Court of Appeal.

5.3 The author also challenges the State party's position that in his case a less serious criminal conviction appeared and points out that even under the case law of the European Court of Human Rights, a conviction for an offence that, according to law prescribes up to 15 days of detention as a maximum penalty, was considered sufficiently severe not to be regarded as being of "minor character" within the meaning of article 2, paragraph 2, of Protocol 7.<sup>7</sup> He argues that according to the practice of the European Court of Human Rights, a conviction might be considered of a "minor character" only when a risk of deprivation of liberty does not appear and that in the instant case the author risked a maximum term of imprisonment of three months. In fact, he was sentenced to a fine of €200, and the District Court also ruled that if he refused to pay, he would be alternatively detained for four days.

5.4 The author also notes that the wording, "according to law", in article 14, paragraph 5, of the Covenant has never been interpreted by the Human Rights Committee so as to exclude certain offences of a criminal character of a review by a higher tribunal and refers to paragraph 7.2 of communication No. 1073/2002, *Terrón v. Spain*, Views adopted on 5 November 2004, which reads: "The Committee recalls that the right set out in article 14, paragraph 5, refers to all individuals convicted of an offence."

5.5 The author further states that the State party failed to point out how the presiding judge of the Court of Appeal was able to perform a full review of the initial verdict, as he was not provided with a properly motivated judgment and a trial transcript of the first instance trial. He maintains that in the absence of these documents it is illusionary to suggest that the presiding judge could have been able to offer a reasoned review (as required under article 410 (a) of the CCP) on the sufficiency of the evidence and the law. He stresses that the District Court did not provide a statement of the evidence used, neither orally nor in writing, during or after its decision of 14 September 2007.

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<sup>7</sup> References to *Galstyan v. Armenia*, 15 November 2007, application No. 26986/03; *Gurepka v. Ukraine*, 6 September 2005, application No. 61406/00, and *Ashughyan v. Armenia*, 17 July 2008, application No. 33268/03.

### **Additional comments by the parties**

6.1 The State party submitted additional observations, maintaining that the communication should be declared inadmissible, as the author, being familiar with the Dutch system, was aware that it was not possible to institute an appeal in cassation against an appellate court's decision to dismiss an appeal and therefore should have raised the substance of his communication at that stage of the domestic proceedings.

6.2 As to the reference of the author to the case law of the European Court of Human Rights, the State party stresses that in all of the cited examples the complainants were not only in jeopardy of imprisonment, but were actually given custodial sentences and that fact played a role in the Court's decisions. The State party notes that in the instant case no custodial sentence was imposed and the offence was of limited gravity.

6.3 Further, the State party clarifies that it does not maintain that article 14, paragraph 5, of the Covenant does not apply to certain criminal offences, but rather that the review requirements of that article can be met in different ways, depending on the gravity of the offence, and makes a reference to paragraph 7.5 of communication No. 984/2001, *Shukuru Juma v. Australia*, Views adopted on 28 July 2002.

6.4 The State party restates that the presiding judge evaluated the conduct of the trial and took the entire case file into consideration, including the various official reports, counsel's memorandum of oral pleading at the first instance and counsel's statement of grounds for appeal.

6.5 Lastly, the State party informs the Committee that the State party intends to ratify Protocol 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, article 2 of which stipulates the right to appeal in criminal matters. The State party declares that this intention does not affect its position in the present case in any way and that the appeals system laid out in article 410 (a) of the CCP meets the human rights standards of the above Protocol 7.

6.6 The author submits an additional comment, stating that the State party, in its observation that in European Court of Human Rights cases the fact that a custodial sentence was imposed played a role in the Court's decision, failed to substantiate what role that would be. In the author's opinion, from the decisions of the European Court of Human Rights it appears that this Court takes notice of the nature of the offence and moreover the explanatory report to Protocol 7 states in paragraph 21 that "When deciding whether an offence is of a minor character, an important criterion is the question of whether the offence is punishable by imprisonment or not."

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

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

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

7.3 The Committee notes the State party's contention that the communication is inadmissible for failure to exhaust domestic remedies. However, the Committee observes that at the time of his application for leave to appeal, the author still had the realistic possibility to have the appeal granted by the Court of Appeal, and therefore he could not claim that his right to appeal under article 14, paragraph 5, of the Covenant were violated.

The Committee also notes that according to the domestic legislation no cassation appeal exists against the judgment of the presiding judge of the Court of Appeal not to grant a leave to appeal. Accordingly, the Committee finds that all available remedies have been exhausted, declares the communication admissible and proceeds to a consideration of its merits.

*Consideration of the merits*

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it, as provided under article 5, paragraph 1, of the Optional Protocol.

8.2 As to the author's claim that he has not been able to exercise his right to appeal under article 14, paragraph 5, in an effective and meaningful way, since he did not have access to a duly reasoned, written judgment of the trial court and to other documents such as trial transcripts, the Committee notes that the State party confirmed that in the present case no such document had been produced. The Committee notes the State party's submission that the author's counsel was provided with a number of official police reports on the case prior to his application for leave to appeal, without specifying their content and relevance to the verdict. The Committee, however, observes that these reports could not have provided guidance as to the motivation of the first instance court in convicting the author of a criminal offence, nor indication on what particular evidence the court had relied. The Committee recalls its established practice that in appellate proceedings guarantees of a fair trial are to be observed, including the right to have adequate facilities for the preparation of his defence.<sup>8</sup> In the circumstances of the instant case, the Committee does not consider that the reports provided, in the absence of a motivated judgment, a trial transcript or even a list of the evidence used, constituted adequate facilities for the preparation of the author's defence.

8.3 The Committee further notes that, according to the State party, the President of the Court of Appeal denied the leave to appeal with the motivation that a hearing of the appeal was not in the interests of the proper administration of justice and that counsel's contentions were not supported in law. The Committee considers this motivation inadequate and insufficient in order to satisfy the conditions of article 14, paragraph 5, of the Covenant, which require a review by a higher tribunal of the conviction and the sentence. Such review, in the frame of a decision regarding a leave to appeal, must be examined on its merits, taking into consideration on one the hand the evidence presented before the first instance judge, and on the other hand the conduct of the trial on the basis of the legal provisions applicable to the case in question.

8.4 Accordingly, in these specific circumstances, the Committee finds that the right to appeal of the author under article 14, paragraph 5, of the Covenant has been violated, due to failure of the State party to provide adequate facilities for the preparation of his defence and conditions for a genuine review of his case by a higher tribunal.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violation of article 14, paragraph 5, of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy which allows a review of his conviction and sentence by a higher tribunal, and adequate compensation. The

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<sup>8</sup> See general comment No. 13 (1984) on the administration of justice, *Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 40 (A/39/40)*, annex VI.



Committee invites the State party to review the relevant legislation with a view to aligning it with the requirements of article 14, paragraph 5, of the Covenant. The State party is also under an obligation to take measures to prevent similar violations in the future.

11. By becoming a party to the Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and, pursuant to article 2 of the Covenant, the State party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. In this respect, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

## Appendix

### **Individual opinion by Committee member Mr. Krister Thelin (dissenting)**

The majority has found a violation of article 14, paragraph 5, of the Covenant. I disagree.

The facts are not in dispute: The author, represented by counsel at the time, was convicted by the District Court of Dordrecht and sentenced to a fine of €EUR. In accordance with the applicable Dutch law, the single judge pronounced an abridged oral judgment, which did not need to be supplemented with evidence. The author, through his counsel, appealed the judgment, after he had been provided with a number of official police reports on which the judgment obviously was based. For the appeal to be heard, the Dutch law requires that leave to appeal is granted. The Court of Appeal for The Hague, sitting with its presiding Justice, having to decide on the matter, denied leave to appeal, after having reviewed the entire case file, including the police reports, as well as counsel's memorandum of oral pleading at the District Court.

At issue is not whether the Dutch system of leave to appeal is in violation of article 14 paragraph 5, of the Covenant, which provides that "(e)veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." It clearly is not.<sup>a</sup>

Rather, what is in dispute is whether the Dutch law, in this case, gives the author enough guarantees to satisfy his right to have the District Court judgment reviewed by a second instance court.

Despite the absence of a motivated judgment, i.e. by only an abridged oral judgment, which the Dutch procedural law prescribes for certain minor criminal offences, the author and his counsel were clearly able to prepare and conduct a proper defence at the trial and launch the request for leave to appeal.

The appellate level reviewed the case file in its entirety, thus taking into account both matters of law and fact as they had obviously been considered by the lower court, and decided to use its discretion under the law not to grant leave to appeal.

Against this factual background, it is difficult to find that the author did not have his lower court conviction and sentence reviewed by a higher tribunal. He clearly had.

Consequently, I am of the view that there has not been a violation of article 14, paragraph 5, of the Covenant in the case before us.

*(Signed)* Mr. Krister **Thelin**

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

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<sup>a</sup> See communication No. 789/1997, *Bryhn v. Norway*, Views adopted on 2 November 1999.

**MM. Communication No. 1799/2008, *Georgopoulos et al. v. Greece*  
(Views adopted on 29 July 2010, ninety-ninth session)\***

<i>Submitted by:</i>	Antonios Georgopoulos, Chrysafo Georgopoulou and their seven children (represented by counsel, Panayote Dimitras, Greek Helsinki Monitor)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Greece
<i>Date of communication:</i>	22 June 2007 and 5 February 2008 (initial submissions)
<i>Subject matter:</i>	Forced illegal eviction and demolition of housing of a Roma family
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Cruel, inhuman and degrading treatment; right to privacy, family and reputation; protection of the family; right to equality before the law; protection of minorities
<i>Articles of the Covenant:</i>	7 alone and in conjunction with 2, paragraphs 1 and 3; 17, paragraphs 1 and 2; 23, paragraph 1; 26; 27 alone and in conjunction with 2, paragraphs 1–3
<i>Article of the Optional Protocol:</i>	5, paragraph 2 (b)

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

*Meeting on 29 July 2010,*

*Having concluded* its consideration of communication No. 1799/2008, submitted to the Human Rights Committee on behalf of Mr. Antonios Georgopoulos, Ms. Chrysafo Georgopoulou and their seven children, under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication, and the State party,

*Adopts* the following:

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

The text of an individual opinion signed by Committee member Mr. Fabián Omar Salvioli is appended to the present Views.

## Views under article 5, paragraph 4, of the Optional Protocol

1.1 The authors of the communication, dated 22 June 2007 and 5 February 2008, are Antonios Georgopoulos (first author, born on 8 September 1983) and Chrysafo Georgopoulou (second author, born on 25 June 1982) and their seven children: Asimakis (born on 13 June 1999), Marios (3 September 2000), Konstantinos (7 September 2001), Christos (29 October 2002), Giorgos (21 February 2004), Tsabikos (20 May 2005), and unnamed (6 January 2007). They claim to be victims of a violation by Greece<sup>1</sup> of article 7 alone and read in conjunction with article 2, paragraphs 1 and 3; articles 17, paragraphs 1 and 2, 23, paragraph 1, 26 and 27 alone and read in conjunction with article 2, paragraphs 1, 2 and 3, of the International Covenant on Civil and Political Rights. They are represented by counsel, Mr. Panayote Dimitras, Greek Helsinki Monitor (GHM).

1.2 On 1 December 2008, the Special Rapporteur on new communications and interim measures decided on behalf of the Committee to examine the admissibility of the communication together with the merits.

### The facts as presented by the authors

2.1 The authors were born and raised in the Roma settlement of Riganokampos in Patras. Throughout their lives, they have been living in sheds in the settlement, without access to electricity or sewage. Garbage disposal is erratic and there are only two taps of running water catering for the settlement's needs. In January 2004, while visiting the Riganokampos settlement, the Prime Minister's Advisor on Quality of Life stated that it was "the worst of the 75 settlements throughout the country and an insult to our humanity". The authors state that despite this statement, their living conditions have not improved. All attempts to either ameliorate the community's living conditions or to relocate the Roma to an organized settlement failed due to reactions by Greek residents of the area where they live or where they were to be relocated to.

2.2 During July and August 2006, the authors and their children temporarily left Patras for the city of Agrinio for seasonal employment and to visit relatives. On 25 or 26 August 2006, a crew of the Municipality of Patras visited the Roma settlement of Riganokampos and demolished all the sheds of the inhabitants who were not present at that time, including the authors'. Upon return, the authors visited the Welfare Department of the municipality of Patras to complain. There, they were told that they should start looking for an apartment to rent and that the municipality would undertake to provide them with rental subsidies. They were then given a sum of approximately €200 in compensation for the destruction of their home and some of their belongings.

2.3 While looking for an apartment, the authors lived in the shed of a relative in Riganokampos, one of the three that had not been demolished. Due to overcrowding, the authors decided to erect a new shed in the settlement. On 26 September 2006, a police patrol car and a bulldozer were dispatched, and the authors were told to stop erecting their shed otherwise they would be arrested. Faced with the threat of arrest, the authors decided not to oppose the demolition of their shed.

2.4 On the same day, the Council of Europe's Commissioner for Human Rights, Thomas Hammarberg, visited Patras at the invitation of the authors' counsel. The authors told the Commissioner what had happened in the morning, showed him the tracks of the bulldozer as well as the materials with which they had tried to build the shed. They also stated that the officials from the municipality of Patras, who were informed of the

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<sup>1</sup> The Optional Protocol entered into force for Greece on 5 May 1997.

Commissioner's visit, had told them not to complain about their living conditions or of the municipality's attitude towards them. Two deputy Mayors of Patras who arrived later at the site explained that this was not a demolition, but a cleaning operation. The family resorted to living in the back of their pick-up truck. On 1 December 2006, the European Commissioner for Human Rights addressed a letter to the State party's Minister of Interior concerning the situation of the Roma in Greece. He stated that the authors' family had been victim of an eviction on 26 September 2006, and that the unchecked anti-Roma attitude of local non-Roma residents, as well as the failure of the authorities to combat and condemn their behaviour, seriously hindered the Roma's integration into local society.

2.5 The authors state that, whereas other Roma are from time to time offered rental subsidies, they were never included in any rent subsidy scheme. When they asked a municipal official as to the reasons for this exclusion, he answered that the authors talked too much to people and that in this way, they had brought shame to the city.

2.6 At the time of submission of the communication, the authors were still living in the Riganokampos settlement in the shed of their relative, under the same unacceptable living conditions.

### **The complaint**

3.1 The authors claim that their forced relocation and demolition of their shed were acts which had not been authorized by any judicial or other decision, and thus could not be the subject of judicial review.<sup>2</sup> Their forced relocation and demolition of their shed were termed as "cleaning operations". They claim that the absence of any judicial or administrative authorization of these acts deprived them of the opportunity to challenge them before a court and therefore, they did not have any effective remedy available under article 5, paragraph 2 (b), of the Optional Protocol. Furthermore, there is no legal remedy that would reinstate their right following an eviction, because the State party does not recognize that squatters are entitled to compensation or provision of alternative accommodation. The authors live on land they do not own, on the basis of a decision by the municipality which held that they had a right not to be evicted until relocated. Moreover, their shed was built informally, in violation of the town planning regulations, and therefore no civil remedy is available to the authors that could lead to the reinstatement of the plot of land they were evicted from. Other potential legal options (such as lodging a complaint for damages or criminal proceedings against those who forcibly evicted them) would be ineffective since they would at most lead to either an award of damages for the actual monetary loss or the conviction of state officials for breach of duty. In both cases however, the authors would not be allowed to return to the plot of land from where they were evicted.<sup>3</sup>

3.2 The authors note that the State party is implementing an "Integrated Action Plan for the Social Integration of Greek Gypsies". In the framework of this Action Plan, the municipality of Patras submitted in October 2001 a proposal on housing rehabilitation of Roma, including the authors. However, this has not been implemented, because local

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<sup>2</sup> The authors refer to court proceedings in 2005, when the municipality tried to evict them based on a protocol of administrative eviction, which was quashed by the Patras Magistrate Court. The Court held that eviction without relocation assistance of the authorities is abusive and therefore illegal.

<sup>3</sup> The authors claim that their situation is different from Committee against Torture communication No. 161/2000, *Dzemajl et al. v. Serbia and Montenegro*, Views adopted on 21 November 2002, in which the issue of exhaustion of domestic remedies was pertinent, as the complainants owned the properties that were destroyed.

residents have persistently protested against any relocation proposal.<sup>4</sup> In addition to that, the authorities are not willing to let the authors and other residents of the Riganokampos settlement implement improvement measures at their own initiative. The authors further claim that numerous prosecutors have not only failed to launch criminal investigations in relation to the failure of local authorities to deal with Roma's housing problem for the last 10 years, but they also employ blatantly racist arguments in reaching their decisions, which remain unsanctioned.

3.3 The authors further argue that they had immediately denounced their eviction to the two deputy mayors on 26 September 2006, as well as to the high ranking police officer who accompanied the Council of Europe's Commissioner for Human Rights, however no impartial, objective and effective investigation has been launched.

3.4 Recalling the decision by the Committee against Torture in *Dzemajl et al v. Serbia and Montenegro*,<sup>5</sup> the authors submit that the destruction of their houses twice and their unfulfilled expectation with regard to their non-eviction pending relocation, which was based on the Magistrate Court decision of 15 June 2005 and on the proposal of the mayor of Patras, amounts to cruel, inhuman and degrading treatment in violation of article 7 of the Covenant. They further claim that no effective remedy is available to them, which amounts to a violation of article 7 alone and read in conjunction with article 2, paragraphs 1 and 3, of the Covenant.

3.5 The authors contend that the eviction they suffered twice constitutes an "arbitrary and unlawful" interference with their family and home. In both cases, state officials demolished their home while the authorities failed to provide them with emergency accommodation or at least allow them to rebuild their shed and provide them with guarantees that they would not be evicted, pending their relocation. The authors also note that the demolition of their house is unlawful in so far as the requirements laid down by domestic law (namely, issuing and serving of a protocol of administrative eviction) were not met. They further argue that domestic law, in violation of article 17, paragraphs 1 and 2, does not offer them any protection from such kind of interference with their family and home. They claim that the absence of effective remedies under the domestic legislation concerning demolition of Roma informal houses is in violation of article 17 in conjunction with article 2, paragraphs 1, 2 and 3.

3.6 Recalling the jurisprudence by the European Committee of Social Rights, the authors note that article 16 of the European Social Charter<sup>6</sup> is similar to article 23 of the Covenant.<sup>7</sup> They submit that the State party failed to provide them with a permanent dwelling and has repeatedly and forcefully evicted them, which consigned them to living in inhuman conditions with highly adverse impacts on their family life, which constitutes a violation of article 23 of the Covenant. They also complain that the absence of effective remedies (such as launching pre-emptive legal action in order to prevent their eviction and

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<sup>4</sup> See European Committee of Social Rights, decision No. 15/2003 of 8 December 2004, in which the European Committee of Social Rights considered that Greece had breached article 16 of the European Social Charter, by not offering any remedy or progress in the right of Roma to adequate housing and by continuing to evict Roma from settlements without offering alternative housing.

<sup>5</sup> See note 3 above.

<sup>6</sup> The right of the family to social, legal and economic protection:

"With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means."

<sup>7</sup> See European Committee of Social Rights jurisprudence, decision of 8 December 2004 in relation to the Collective Complaint No. 15/2003 *European Roma Rights Centre v. Greece*.

the absence of effective remedies for them to demand compensation and the provision of emergency housing), as well as the fact that only Roma face such problems, are in violation of article 23 read in conjunction with article 2, paragraphs 1, 2 and 3.

3.7 In reference to the Committee's concluding observations on the initial report of the State party (CCPR/CO/83/GRC), the authors, having been evicted and not provided with any remedy, claim that they have been discriminated against because of their ethnic origin, in violation of articles 26 and 27 of the Covenant. In addition to that, they claim that the Greek legal system does not provide them with adequate and effective remedies, capable of addressing their complaints, which constitutes a violation of articles 26 and 27 read in conjunction with article 2, paragraphs 1, 2 and 3.

#### **State party's observations on admissibility and merits**

4.1 On 22 October 2008, the State party forwarded its comments on admissibility. The State party repeats the facts as presented by the authors and adds that in 2005, the State Real Estate Agency, as the owner of the land of the Riganokampos Roma settlement, issued a protocol of administrative eviction to evict all inhabitants of the Riganokampos settlement. The protocol of administrative eviction was successfully challenged before the Magistrate Court of Patras. In its decision 312/2005, the Patras Municipal Court ruled that the State had a legal obligation to present the inhabitants of the Riganokampos settlement with an alternative solution before proceeding to their eviction. The State party underlines that by virtue of the decision 312/2005, the authors have a legal right to occupy publicly owned property until the local authorities found an area of relocation. According to the State party, the Court stated:

“Their [the Roma of the Riganokampos settlement] removal from that area without prior solution to the problem of their resettlement which is a legal obligation of the State ... will have serious consequences on them ... And this because it is commonly known that residents of the areas where they [the Roma] are to be relocated react to that prospect [and] this makes it extremely difficult for them to find another area to relocate, without the help of the authorities. In the light of the aforementioned, the exercise by the State of its right to evict them [the Roma] from the plot of land it owns is abusive and as a result the issuing of a protocol of administrative eviction is in violation of article 281 of the Greek Civil Code<sup>8</sup> and is therefore illegal.”

4.2 The State party argues that therefore, as of 2005, when the Patras Municipal Court gave the authors a legal right to occupy public property owned by the State Real Estate Agency, the authors were in legal possession of the land in Riganokampos<sup>9</sup> and that they should have raised a civil action against the municipality of Patras for intrusion into their legal possession (art. 997 of the Civil Code). According to article 997 of the Civil Code, a squatter enjoys legal protection against third persons if the individual occupies the land

<sup>8</sup> Art. 281 of the Greek Civil Code provides that “the exercise of a right is prohibited where it manifestly exceeds the bounds of good faith, morality or the economic or social purpose of that right”.

<sup>9</sup> The State party cites the following domestic case law: A.P. 821/1995, D/VN 1997/618, A.P. 544/1993, D/VN 1994/1090, A.P. 462/1990, E.E.N. 1991/78, as well as the Greek Civil Code, art. 997, according to which in order to enjoy legal protection against third persons, it is required to occupy the land with permission of the owner or have a legal relationship as the lessee or keeper of the property. In addition to that, according to art. 4 of Law (A.N.) 263/1968 as amended with art. 2, para. 1 of Statute decree (N.D.) 1154/1972 and art. 1, para. 1 of Law 719/1977, a squatter on public property may request to buy off the property; if the squatter does not request to buy it off, he/she can be evicted on the basis of a protocol of administrative eviction.

with permission of the owner or is a lessee or keeper of the property. In view of the non-exhaustion of domestic remedies, the State party submits that the communication should be declared inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

4.3 On 19 January 2009, the State party submitted its observations on the merits and argued that the communication should be dismissed as ill-founded. Referring to a document of the police station in Patras dated 25 August 2006, the State party states that on 25 August 2006, two police officers, deployed upon request by the Vice-Mayor for the Environment and City Image, met a cleaning group of the municipality at the Riganokampos settlement; however, no cleaning operation was carried out that day. On 26 August 2006, the police was not dispatched and therefore no cleaning operation was undertaken with the assistance of the police.<sup>10</sup> The State party also contests that police was dispatched during the visit of the Council of Europe's Commissioner for Human Rights on 26 September 2006. It confirms that the police was dispatched to the Riganokampos settlement on 26 September 2006, however, due to the construction of a new shed by a third party, Georgios and Konstantina Georgopoulos, and not the authors. Based on the explanation by the president of the local cultural association, according to which the construction of new sheds was not allowed, as the site would be landscaped, the third party agreed to have their building materials removed by a bulldozer.<sup>11</sup>

4.4 On 23 June 2006, the second author, Chrysafo Georgopoulou, and her children were recognized as beneficiaries of housing assistance with the right to apply for a loan of €60,000. On 12 September 2008, the Head of the Real Estate Service confirmed that the authors still lived in the Riganokampos settlement.

4.5 Regarding the authors' allegation of a violation of article 7 alone and read in conjunction with article 2, paragraphs 1 and 3, of the Covenant, the State party submits that the allegations of demolition and eviction are not confirmed by facts, given that no cleaning operation had been carried out neither on 25 nor on 26 August 2006, and that the authors had not been evicted due to their absence on these dates. It further notes that the authors' allegation of the demolition of their shed on 26 September 2006 has also not been confirmed by the facts; the demolition concerned a third party who consented to its demolition.

4.6 The State party further submits that the allegations of a violation of article 17 alone and read in conjunction with article 2, paragraphs 1, 2 and 3, of the Covenant are manifestly ill-founded, as the municipality of Patras had not undertaken any cleaning works on 25 or 26 August 2006. It therefore maintains that in the absence of any eviction of the authors, there has not been any interference with their privacy and family life. According to information by the Real Estate Service, the authors still live in sheds at Riganokampos in 2008. In addition to that, the State party highlights that they were given the opportunity of residential rehabilitation by granting the second author the possibility to apply for a housing loan.

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<sup>10</sup> Document No. 1032/2/123-a/29 September 2006 states that on 25 August 2006, a patrol car of the police went to the Riganokampos settlement, where they met a cleaning group of the municipality. However, according to that document, the cleaning group did not carry out any cleaning operation. Moreover, according to the document, the police did not provide any assistance to any cleaning groups on 26 August 2006.

<sup>11</sup> See document No. 4808/4/13-ra/9 September 2008, which explains that the president of the local cultural association explained that the site would be landscaped and therefore the construction of new sheds was not allowed, as a result the family of Georgios Georgopoulos consented to the removal of the building materials.



4.7 Regarding the authors' allegation of a violation of article 23 alone and read in conjunction with article 2, paragraphs 1, 2 and 3, of the Covenant, the State party reiterates its previous arguments that in the absence of any demolition or eviction and by providing the second author the possibility to apply for a housing loan, the State party complied with its obligation to protect the family.

4.8 Finally, the State party recalls the Committee's jurisprudence on article 26, according to which not all differences of treatment are prohibited under article 26, but that any differentiation must be based on reasonable and objective criteria.<sup>12</sup> The State party submits that the authors were not treated differently from any other group of citizens; on the contrary they were treated more favourably given they belong to the vulnerable Roma group. It therefore submits that the allegations of a violation of articles 26 and 27 alone and read in conjunction with article 2, paragraphs 1, 2 and 3 are ill-founded.

#### **Authors' comments on the State party's observations**

5.1 On 3 March 2009, the authors submitted their comments on the State party's observations on admissibility and merits. With regard to the State party's argument that the authors failed to exhaust domestic remedies, the authors submit that the Patras Municipal Court decision of 2005 did not confer any property deed to the authors, as the land continues to be property of the State party. They underline that the State party has failed to adduce concrete evidence that there exist domestic remedies accessible and effective in practice and has not provided any concrete examples of similar cases which produced a favourable outcome. Citing an example of administrative court proceedings related to compensation following Roma eviction in the municipality of Aspropyrgos pending since July 2002, the authors note that all proceedings before administrative courts last for years. The authors reiterate that the essence of their complaint relates to the absence of any protocol of administrative eviction, which prevented their access to any remedy that they could exhaust. They further submit that no remedy could have provided them with alternative accommodation.<sup>13</sup> The authors further contend that they could not have been expected to take any measures to protect themselves from illegal actions on the part of the State party, given its obligation to conform to judicial decisions and abide by them.

5.2 The authors inform the Committee that following their complaint to the Patras Prosecutor's Office, a criminal investigation was launched in December 2006; however it has not been concluded, despite the State party's legislation that provides for an upper limit of four months for such investigations. The authors also filed a complaint with the Ombudsman, who appears to have investigated the allegations; however, despite the authors' request, the Ombudsman has not informed them of the outcome.<sup>14</sup>

5.3 Referring to the State party's observations on the authors' eviction of 25 or 26 August 2006, the authors quote the police document submitted by the State party, according to which "police assistance is requested during the cleaning operations in the Riganokampos settlement where itinerant Roma had settled". The authors underline that

<sup>12</sup> See communications No. 689/1996, *Maille v. France*, Views adopted on 10 July 2000, para. 10.4; and No. 854/1999, *Wackenheim v. France*, Views adopted on 10 July 2002, para. 7.3.

<sup>13</sup> The authors cite the observations by Greece before the European Court of Human Rights in the pending case *Tzamalīs v. Greece*, regarding a Roma eviction in Crete, in which the State party accepted that no remedy existed that would have allowed the applicants to resettle on the plot of land from where they were illegally evicted.

<sup>14</sup> The authors cite an article published by the Ombudsman's office in December 2006, in which forced evictions in Riganokampos of Patras with or without protocols of administrative eviction are mentioned [no date of these evictions is provided]. It also describes that these evictions are termed as "cleaning operations" and usually happen without previous relocation.

they find it offensive, as they are not itinerant but were born in that settlement, and as police protection was sought for the removal of garbage, which was probably requested due to anticipated resistance against the demolition of homes. They further note that it was also requested “to police effectively the areas so as to prevent re-settlement of itinerant Roma”. The authors maintain that according to the police report, the police officers were turned back by the municipality after a short stay at Riganokampos settlement on 25 August 2006 and they did not return to the settlement on 26 August 2006, hence they would not be in a position to provide any information on what happened on these days.

5.4 With regard to the demolition of a shed on 26 September 2006, the authors note that the State party claims that this was not the shed of the authors, but of Georgios Georgopoulos. The authors reiterate the facts as submitted, according to which following the demolition of their home in August 2006, they lived with relatives, namely the father of the first author, Georgios Georgopoulos. On 26 September 2006, it was the first author’s father who helped the authors to build a new shed and who decided to take the blame on himself, for it not to be his son who was blamed. Referring to the police document submitted by the State party, the authors clarify that it was not the first author’s father who consented to the demolition but “the Roma”, meaning all Roma involved in its construction. The authors adduce further evidence with regard to the demolition of 26 September 2006. In a statement made during the Patras Prosecutor’s criminal investigation, a member of Patras parliament, who accompanied the Council of Europe’s Commissioner for Human Rights on that day, stated that the deputy mayor present during the visit did not provide any answer to the authors as to where they could relocate after the second demolition of their home. In the framework of the same investigation, a local political leader confirmed having witnessed during the same visit the demolition of six or seven shacks in the Riganokampos settlement.

5.5 With regard to the claims invoked by the authors, they maintain that they have demonstrated with compelling evidence that they were victims of unlawful evictions. Regarding the State party’s argument that they are eligible for a housing loan, the authors state that they did not secure any such housing loan. In addition to that, they underline that being illiterate, destitute and having a large family, they could not be expected to apply for a housing loan through a complicated bureaucratic procedure. Furthermore, they would never be able to pay back the loan and it would be insufficient to house their family. They further highlight that due to their Roma origin, they frequently face discrimination, including forced eviction, absence of any remedy and anti-Roma prejudice by State party officials. They therefore reiterate their claims under article 7 alone and in conjunction with article 2, paragraphs 1 and 3; and articles 17, 23, 26 and 27 read alone and in conjunction with article 2, paragraphs 1, 2 and 3, of the Covenant.

## **Issues and proceedings before the Committee**

### *Consideration of admissibility*

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required by article 5, paragraph 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 the State party’s objection on the admissibility of the communication due to the authors’ failure to exhaust domestic remedies. It notes the State party’s explanation, according to which the decision No. 312/2005 of the Patras Municipal Court conferred upon the authors a legal right to occupy public property until relocation

and the authors should have challenged the intrusion into their possession pursuant to article 997, of the Greek Civil Code. The Committee also notes the authors' argument that in absence of any judicial or administrative decision in relation to their eviction and the demolition of their shed, no domestic remedies were available to them. It notes the authors' explanation according to which they live on land they do not own and the 2005 Patras Municipal Court decision only provided them with a right not to be evicted until relocated and was not a deed of property. It further notes the authors' argument that the State party failed to provide concrete information on the remedies that would be accessible and effective with a favourable outcome, providing them alternative accommodation. The Committee has also noted that the authors filed an application to the Patras Prosecutor's Office and a criminal investigation was launched in December 2006, which to date remains uncompleted.

6.4 While having noted article 997 of the State party's Civil Code, according to which a squatter may challenge any intrusion by a third party, if the owner has permitted the occupation of the property or if the squatter is a lessee or a keeper, as well as the 2005 Patras Municipal Court decision, which declared the authors' previous eviction by the Real Estate Agency (the owner) abusive due to the absence of any solution to the community's resettlement, the Committee nevertheless considers that the State party has not provided any detailed information on the availability and effectiveness of the remedy under its Civil Code in the particular circumstances of the authors' case. The Committee observes that the alleged and contested eviction and demolition of the authors' home was undertaken by the State party's municipality, to which the 2005 Patras Municipal Court decision had been addressed. Hence, the Committee considers that, it cannot be expected that the authors should have to take further legal actions to ensure that the State party conforms to its own court decision. It notes that upon complaint by the authors, the Prosecutor's Office started an investigation in December 2006 and that this investigation remains pending. Under the circumstances, the Committee is satisfied that the authors, by bringing their complaint to the Patras Prosecutor's Office, have exhausted domestic remedies, in accordance with article 5, paragraph 2 (b), of the Optional Protocol.

6.5 The Committee considers that the facts as presented by the authors appear to be sufficiently serious not to preclude the admissibility of the claim under article 7 read alone and in conjunction with article 2, paragraphs 1 and 3, of the Covenant. It further considers that the authors' claims under articles 17, 23, 26 and 27 read alone and in conjunction with article 2, paragraphs 1, 2 and 3 are sufficiently substantiated, for purposes of admissibility, and it therefore proceeds to their examination on the merits.

#### *Consideration of the merits*

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee notes the State party's argument that, since neither on 25 nor on 26 August 2006 did the police or municipality carry out any evictions or cleaning operations, and since the demolition of a shed on 26 September 2006 in the Roma Riganokampos settlement did not concern the authors but a third party who consented to its demolition, the communication is manifestly ill-founded. It also notes the authors' contention according to which the police report provided by the State party only attests to the fact that the police was deployed to the Riganokampos settlement on 25 August 2006 and did not return to it on 26 August 2006, but that it does not provide any evidence of what happened on these days. It further notes the authors' argument that the demolition of 26 September 2006 was directed against the authors themselves and not a third party, as they were being helped in the construction by the first author's father who decided to take the blame for it rather than

his son. Moreover, it notes that, while disputing the authors' allegations, the State party acknowledges their Roma origin. The Committee also notes the authors' argument that it was due to their Roma origin that they suffered the alleged violations.

7.3 The facts, as to whether and when a home demolition occurred in the Roma Riganokampos settlement, are in dispute. However, the Committee notes the information provided by the authors, according to which the Patras Prosecutor launched an investigation in December 2006, which remains pending. The Committee observes that the State party refuted the authors' allegations based on two police reports but, nevertheless, has not adduced any further evidence on the planned "cleaning operation" by the municipality in the Roma Riganokampos settlement on 25 or 26 August 2006. It further notes that the State party has not explained the length of the criminal investigation into the authors' allegations before the Patras Prosecutor, which has not led to any decision. The Committee considers that the authors' allegations, also corroborated by photographic evidence, claiming arbitrary and unlawful eviction and demolition of their home with significant impact on the authors' family life and infringement on their rights to enjoy their way of life as a minority, have been sufficiently established. For these reasons, the Committee concludes that the demolition of the authors' shed and the prevention of construction of a new home in the Roma Riganokampos settlement amount to a violation of articles 17, 23 and 27 read alone and in conjunction with article 2, paragraph 3, of the Covenant.

7.4 In the light of the Committee's findings, it does not deem it necessary to examine the authors' allegation of a violation under articles 7 and 26 alone and read in conjunction with article 2, paragraphs 1, 2 and 3, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is consequently of the view that the facts before it disclose a violation by the State party of articles 17, 23 and 27, alone and read in conjunction with article 2, paragraph 3, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, as well as reparations to include compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

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 or not, 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 in case that a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

## Appendix

### Individual opinion of Committee member Mr. Fabián Omar Salvioli

1. I concur with the decision on communication No. 1799/2008, *Georgopoulos et al. v. Greece*, as I fully share the Committee's reasoning and conclusions. However, I would like to add some comments on two issues which, I believe, deserve fuller treatment in the future jurisprudence of the Human Rights Committee: the concept of degrading treatment; and the interdependence of civil and political rights and economic, social and cultural rights.

2. The Committee rightly declared the case of *Georgopoulos et al. v. Greece* to be admissible for a possible violation of article 7 of the Covenant, which governs the right of every person to integrity of the person, prohibiting torture and cruel, inhuman or degrading treatment. The Committee's jurisprudence has made it clear that this article protects both physical and mental integrity.

3. The authors in the present case argue in their complaint that the destruction of their houses twice and their unfulfilled expectation with regard to their non-eviction pending relocation, which was based on the Magistrate Court's decision of 15 June 2005 and on the proposal of the mayor of Patras, amounts to cruel, inhuman and degrading treatment. While in this case the Committee, on the basis of the evidence before it, did not find it necessary to address this possible violation in its consideration of the merits, the declaration of admissibility shows that the Committee is prepared to consider such arguments and reflects the trend in contemporary international human rights law away from the fictitious and artificial division of rights into "categories" and towards the view that all human rights are universal and interdependent.

4. In fact, economic or social deprivation that derives from acts (or omissions) of the State may in some cases amount to violations of the International Covenant on Civil and Political Rights. The principle of non-discrimination (art. 2, para. 1), equality before the law (art. 26), the prohibition of torture and cruel, inhuman or degrading treatment (art. 7), the prohibition of slavery or servitude (art. 8), the prohibition of arbitrary interference with a person's privacy, family, home or correspondence (art. 17), freedom of association (art. 22), protection of the family (art. 23), the rights of children (art. 24) and the rights of minorities (art. 27) are some of the legal standards in the Covenant that enable rights to be exercised in the "social domain".

5. The prohibition of torture and cruel, inhuman or degrading treatment is absolute; it is a norm of international public law (*jus cogens*) and as such has attracted unanimous support in international human rights jurisprudence. It remains to further develop the jurisprudence specifically on "degrading treatment", a concept with huge potential and a valuable weapon for the future jurisprudence of human rights bodies.

6. All human rights are universal, indivisible and interdependent and interrelated. This is the consensus of the international community as expressed in the Vienna Declaration and Programme of Action (para. 5) and at the historic World Conference on Human Rights held in 1993. Those guiding principles of international human rights law, which must guide the international human rights bodies in their work of interpretation, cannot be ignored.

7. The Human Rights Committee's mandate and duty is to apply the International Covenant on Civil and Political Rights. To be effective, it must do this in the light of the universality, indivisibility and interdependence of all rights inherent in the human person.

The declaration of admissibility for a possible violation of article 7 in the case of *Georgopoulos et al. v. Greece* is a valuable precedent in this respect.

(Signed) Mr. Fabián Omar **Salvioli**

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**NN. Communication No. 1870/2009, *Sobhraj v. Nepal*  
(Views adopted on 27 July 2010, ninety-ninth session)\***

<i>Submitted by:</i>	Mr. Charles Gurmurkh Sobhraj (represented by Isabelle Coutant Peyre)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Nepal
<i>Date of communication:</i>	21 November 2008 (initial submission)
<i>Subject matter:</i>	Life sentence following unfair trial
<i>Procedural issue:</i>	None
<i>Substantive issues:</i>	Unfair trial, arbitrary arrest and detention; life sentence imposed following unfair trial
<i>Articles of the Covenant:</i>	10; 14, paragraphs 1, 2, 3, 5 and 7; and 15, paragraph 1
<i>Articles of the Optional Protocol:</i>	2

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

*Meeting on 27 July 2010,*

*Having concluded* its consideration of communication No. 1870/2009, submitted to the Human Rights Committee on behalf of Mr. Charles Gurmurkh Sobhraj under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication, and the State party,

*Adopts* the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication is Mr. Charles Gurmurkh Sobhraj, a French national, born on 6 April 1944 in Saïgon, Viet Nam. He claims to be a victim by Nepal of violations under article 10; article 14, paragraphs 1, 2, 3, 5 and 7; and article 15, paragraph 1, of the Covenant. He is represented by a lawyer, Ms. Isabelle Coutant Peyre. The Optional Protocol entered into force for the State Party on 4 March 1996.

**The facts as presented by the author**

2.1 On 13 September 2003, the author was arrested by the Nepalese police in Kathmandu, while in possession of a legal visa issued by the Consulate of Nepal in Paris. He was detained for 25 days without the assistance of a lawyer, supposedly for verification

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Mr. Mahjoub El Haiba, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

of identity. He was first accused of being in possession of false documents, then accused of having committed a murder, which allegedly had occurred in December 1975.<sup>1</sup> During the trial, the author was not able to confront any of the witnesses testifying against him nor was he allowed to request the hearing of any witness for his defence, as he did not speak or understand Nepali. On 12 August 2004, the Kathmandu District Court sentenced him to life imprisonment.

2.2 The author appealed to Patan Appeal Court. During the court hearings, the author's lawyers had to make the same defence plea on three occasions (30 March, 14 July and 4 August 2005). The court sessions before the Appeal Court were postponed twice (10 March and 9 June 2005), at the last minute and upon the request of the Public Prosecutor, despite the fact that a French lawyer had flown in each time from Paris for this purpose. On 14 July 2005, after a day of pleadings by the author's lawyers, the two judges of the Appeal Court decided not to adopt the judgement. The author's lawyers produced a report, prepared by an expert on 18 March 2005, and certified by the French courts, concerning the only evidence presented by the prosecution. This report established that the documents<sup>2</sup> presented by the police against the author were practically impossible to read and were obviously forged documents. The report stressed that no conclusion could be drawn from these photocopies. The Nepalese assessment previously undertaken by the Nepalese police laboratory had also established that no conclusion could be made without examining the original documents. The originals were never produced. On 4 August 2005, a different set of judges confirmed the First Instance judgement.<sup>3</sup>

2.3 The author appealed to the Supreme Court. At the time of the initial complaint on 21 November 2008 before the Committee, the Supreme Court had not yet returned its verdict, although 38 hearings had already been scheduled. On 18 June 2006, the Court ordered the prosecution to produce the originals of the materials used as evidence before the court.<sup>4</sup> The Court confirmed its order to the prosecution on 6 December 2006. The appearance before the Court of the two witnesses who were in the hotel at the time of the incriminated facts (December 1975) was also required. The witnesses were heard on 1 January 2007. On 29 January and 4 February 2007, the hotel managers and the police confirmed that the originals of the documents produced by the police did not exist. On 4 February 2007, the investigation before the Court ended and only the pleadings by the Prosecution and the Defence were to be heard. These pleadings had to be repeated several times, at different hearings. On 4 November 2007, the final decision of the Supreme Court was scheduled. The hearing however did not take place as one of the judges was ill. At the following hearing on 25 November 2007, another judge was absent as his daughter was getting married. On 19 December 2007, the two judges who were finally present ordered the reopening of the procedure, on the ground that they had overlooked one aspect of the file. Another dozen or so of hearings took place before the author submitted his complaint before the Committee.

2.4 The author was held in pretrial detention from the date of arrest. Since 1 November 2004, he has been held almost permanently in isolation, with no possibility to challenge this

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<sup>1</sup> The author affirms that he went to Nepal for the first time in 2003, the year of his arrest by the Nepalese authorities.

<sup>2</sup> These were the hotel registration cards for two hotels in December 1975, which could prove the presence of the author at the time of the commission of the murder.

<sup>3</sup> The author emphasizes that in Nepal, each court hearing has a different set of judges who are designated each morning (rotating system), hence the different set of judges returning the verdict on 4 August 2005. In a subsequent letter dated 10 March 2010, the Counsel refers to a different date, i.e. 8 August 2005.

<sup>4</sup> In Nepal, photocopies cannot be considered as evidence in court.



decision. During the summer of 2008, he was put in isolation with shackles, on the ground that he had had a disagreement with another prisoner. Because of inadequate and unsanitary conditions at Kathmandu Central Prison, as well as a lack of medical health care, the author's health condition has deteriorated dramatically.

2.5 On 27 February 2009, the author sent an additional letter to the Committee stating that on 13 January 2009, the Supreme Court, which had not yet returned its verdict, adopted a deferment, ordering the Patan Appeal Court to decide whether the author had entered Nepalese territory illegally and using a false identity in December 1975. In order to justify this deferment, the Supreme Court considered that an existing immigration law could apply retroactively to the author's case. In a letter submitted on 13 August 2009, the author noted that in its previous decision dated 4 August 2005, the Patan Appeal Court had already established that no particular immigration law existed in 1975; no other legislation required a visa to enter Nepal; and that the new law could not apply retroactively to the incriminated facts. Despite this ruling, the Supreme Court ordered the Patan Appeal Court to find that the Immigration Act 2049 could be applied albeit retroactively. On 4 June 2009, the Patan Appeal Court quashed its previous judgement and sentenced the author to one year imprisonment and a fine of 2,000 Nepalese rupees for illegal entry into the Nepalese territory in 1975. The author has already completed the sentence as he has been detained since 2003. The matter was then referred back to the Supreme Court for the main trial to continue.

2.6 In a letter dated 23 April 2009, the author informed the Committee that on 9 November 2008, the judgement of the Supreme Court was supposed to be handed down. However, the hearing was cancelled at the last minute as one of the judges took an unexpected leave. It was rescheduled for 13 January 2009. However, the Supreme Court returned the case to the Appeal Court on the issue of illegal entry into the Nepalese territory (see paragraph 2.5 above). From 26 March 2006 until 23 April 2010, 41 hearings took place. This does not include the hearings which were either postponed or cancelled.

### **The complaint**

3.1 The author claims that the State Party violated article 10; article 14, paragraphs 1, 2, 3, 5 and 7; and article 15, paragraph 1, of the Covenant.

3.2 The author claims that since his arrest, he has not been afforded the judicial guarantees provided for by article 14 of the Covenant. The only evidence introduced by the prosecution were simple photocopies, which Nepalese law does not consider valid. The author contends that the judgements passed by the Kathmandu District Court and the Patan Appeal Court therefore violate article 14, paragraph 2. Despite its order to produce originals and the failure of the prosecution to do so, the Supreme Court did not dismiss the case, which would also contravene article 14, paragraph 2 of the Covenant.<sup>5</sup>

3.3 The author claims a violation of article 14, paragraph 3 (f) by the State party as he was not afforded the free assistance of an interpreter during the court's proceedings as well as when the judgement was adopted. The author can neither read, nor understand, nor write Nepali. As he could not understand anything during the hearings of the First Instance Court,

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<sup>5</sup> Despite the fact that the author has not clearly made this line of argument, this can be assumed from the facts as presented by the author and his general claim under article 14, paragraph 2, of the Covenant.

he was unable to prepare his defence and call any witnesses, in violation of article 14, paragraph 3 (a), (b), (d) and (e) of the Covenant.<sup>6</sup>

3.4 The author considers that the review carried out by the Patan Appeal Court of the First Instance judgement did not follow the minimum procedural guarantees, under article 14, paragraph 5 of the Covenant.

3.5 From the date of his arrest until the date of the last correspondence sent to the Committee, seven years have elapsed. The author considers that his trial was unreasonably prolonged, in violation of article 14, paragraph 3 (c) of the Covenant.

3.6 The author also contends that his prolonged detention since 1 November 2004, almost continuously in isolation, with no justification and no possibility to challenge this decision, amounts to torture, in violation of article 10 of the Covenant.

3.7 The author also contends that the deferment by the Supreme Court to the Patan Appeal Court, on the ground that existing immigration laws could apply retroactively to the author's alleged entry into Nepalese territory in 1975 under a false identity, violates article 15, paragraph 1, of the Covenant. The author insists that there was no particular immigration law nor was there an obligation to hold an entry visa in 1975. This obligation derives from a law that was adopted several years after the incriminated facts. The Supreme Court's imposition on the Patan Appeal Court to quash its own decision dated 4 August 2005 and establish that this new legislation could retroactively apply to facts, which did not qualify as a criminal offence in 1975, implies that the acquittal of the author with regard to that particular charge by the Appeal Court was reversed upon the order of the Supreme Court. The author considers therefore that the State party has violated articles 15, paragraph 1, and 14, paragraph 7 of the Covenant.

#### **State party's observations on admissibility and merits**

4.1 On 23 April 2010, the State party submitted its observations on the admissibility and merits of the communication. It first contends that the Covenant is only applicable to ordinary citizens and not to convicted persons serving a criminal offence. The State party further considers that the allegation that the documents submitted by the police were forged is not tenable since these documents were thoroughly examined by the relevant experts, following a regular procedure of verification. As for the results of the Nepalese assessment of the photocopies previously undertaken by the police laboratory (see paragraph 2.2 above), the State party emphasizes that the production of originals only had the purpose to reinforce the conclusion of the police experts.

4.2 The State party contests the allegation of the author that the originals of the hotel registration cards did not exist. Not all the records were available owing to the change in the management of the hotel. However, one of the hotel managers attested that the hotel registration card produced to the court had indeed been issued by the management in place at the time of the incriminated facts. The State party therefore concludes that the author's trial was carried out in conformity with Nepalese law, that the author is currently imprisoned following a decision by a court of law and that his appeal is under consideration by a higher court.

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<sup>6</sup> Although the author did not specifically refer to subparagraphs (a), (b), (d) and (e), the arguments provided in the communication relate to these provisions.

### **Author's comments on the State party's observations**

5.1 On 17 May 2010, the author rejects the arguments submitted by the State party. On the first argument, the author notes that the whole purpose of the Covenant is to protect from arbitrary procedures. He points out that the State party did not enter any reservation to the Covenant and can therefore not exclude convicted persons serving a criminal offence from the persons entitled to protection under the Covenant. He further emphasizes that articles 9, 10, 14 and 15 precisely refer to persons deprived of liberty, whether they have already been sentenced or not.

5.2 With regard to the second, third and fourth arguments of the State party, the author reiterates that no material evidence has been produced and the only documents presented to the Court were forged photocopies.

5.3 As for the allegations submitted under article 14, the author notes that the State party limits itself to stating that his trial was carried out in conformity with Nepalese law; that he is detained following a decision by a court of law and that the verdict is currently being reviewed by a higher court. It does not give any explanation on, inter alia, the reason why the trial was carried out in a language that the author does not understand; why the author was not able to call his own witnesses and confront the prosecution witnesses; why he was detained for 25 days after his arrest without being assisted by a counsel; and why the trial was unduly delayed. The author insists on the fact that he is presumed innocent until proven guilty and that the right to have his sentence reviewed by a higher tribunal, under article 14, paragraph 5, is undermined by the excessive length of the proceedings, the lack of impartiality of the courts and the numerous violations of the right of defence.

5.4 The author also notes that the State party has not provided any justifications for the author's inhumane conditions of detention, which allegedly violate article 10 of the Covenant. The author also reiterates his concern with regard to the alleged violation of article 15, paragraph 1 of the Covenant (see paragraph 2.5 and 3.7 above).

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes, as required by article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under any other international procedure of investigation or settlement.

6.3 The Committee notes that the author has conceded non-exhaustion of domestic remedies but claims that remedies have been ineffective and unreasonably prolonged. The Committee refers to its case law, to the effect that, for the purposes of article 5, paragraph 2 (b), of the Optional Protocol, domestic remedies must both be effective and available, and must not be unduly prolonged.<sup>7</sup> The author was arrested on 13 September 2003 and was sentenced by the First Instance Court in 2004. A year later, the Appeal Court confirmed the life sentence. To date, the appeal filed in 2005 before the Supreme Court has not been resolved and remains pending due to successive postponements and cancellations of court hearings. The Committee considers that, in the circumstances of the present case, domestic

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<sup>7</sup> Communications No. 1560/2007, *Marcellana and Gumanoy v. The Philippines*, Views adopted on 30 October 2008, para. 6.2; and No. 1469/2006, *Sharma v. Nepal*, Views adopted on 28 October 2008, para. 6.3.

remedies have been unreasonably prolonged. The Committee notes that the State Party does not challenge the admissibility of the communication because of non-exhaustion of domestic remedies. Accordingly, it finds that article 5, paragraph 2 (b), of the Optional Protocol does not preclude it from considering the complaint.

6.4 The State party challenges the admissibility of the author's claim on the ground that the Covenant only applies to ordinary citizens and not to persons convicted and serving their sentence. The Committee recalls that this argument has no basis in law. The Committee reiterates its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial,<sup>8</sup> where it has established that the right of access to courts and tribunals and equality before them is not limited to citizens of States parties, but must also be available to all individuals, regardless of nationality or statelessness, or whatever their status, whether asylum-seekers, refugees, migrant workers, unaccompanied children or other persons, who may find themselves in the territory or subject to the jurisdiction of the State party. The committee also notes that the protection afforded by article 14 applies to all individuals facing criminal charges, whether they have already been sentenced or not. This is also true of articles 9 and 15 of the Covenant. Considering the amount of information provided by the author on the circumstances of his arrest and the circumstances in which he was tried by the District Court, the Appeal Court and the Supreme Court, the Committee considers that the author has sufficiently demonstrated, for purposes of admissibility, that the treatment he was subjected to in detention and the trial he has faced raise issues under articles 10, 14 and 15 of the Covenant, which should be examined by the Committee on the merits.

#### *Consideration of the merits*

7.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee notes the author's claim that after his arrest, he was detained for 25 days without the assistance of a lawyer. He was not afforded the free assistance of an interpreter during the court's proceedings as well as when the judgement was handed down. As the author can neither read, nor understand, nor write Nepali, he could not understand the issues raised during the hearings of the First Instance Court and was therefore unable to prepare his defence, call his witnesses or confront the prosecution witnesses. Considering that the State party has not commented on that allegation, the Committee must give due consideration to the allegations submitted by the author. It refers to its general comment No. 32, where it stated that the right to have the free assistance of an interpreter if the accused cannot understand or speak the language used in court as provided for by article 14, paragraph 3 (f) enshrines another aspect of the principles of fairness and equality of arms in criminal proceedings.<sup>9</sup> The importance of this principle has also been emphasized in the Committee's jurisprudence where it considered that the right to a fair trial implies that the accused be allowed, in criminal proceedings to express himself in the language in which he normally expresses himself, and that the denial of an interpreter constitutes a violation of article 14, paragraph 3 (e) and (f).<sup>10</sup> In the present case, the Committee considers that the author's lack of access to an interpreter from the time of arrest and during

<sup>8</sup> *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40, vol. I (A/62/40 (Vol. I)), annex VI, para. 9.*

<sup>9</sup> *Ibid.*, para. 40.

<sup>10</sup> Communication No. 219/1986, *Guesdon v. France*, Views adopted on 25 July 1990, para. 10.2. See *a contrario* communications No. 221/1987 and No. 323/1988, *Cadoret v. France* and *Le Bihan v. France*, Views adopted on 11 April 1991, para. 5.7.

the District Court hearings, as well as the lack of access to a lawyer at the initial phase of the procedure, not only violates the two provisions cited above but also violates the right to a defence, under article 14, paragraph 3 (a), (b) and (d), of the Covenant.

7.3 With regard to the allegation of a violation of the presumption of innocence, the author claims that the only evidence provided by the prosecution were simple photocopies, which Nepalese law does not consider valid. Moreover, despite its order to produce originals and the failure of the prosecution to do so, the Supreme Court did not dismiss the case. The State party considers on the other hand, that the allegation that the documents submitted by the police were forged is not tenable since these documents were thoroughly examined by the relevant experts, following a regular procedure of verification. As for the results of the Nepalese assessment of the photocopies previously undertaken by the police laboratory (see paragraph 2.2 above), the State party emphasizes that the production of originals only had the purpose to reinforce the conclusion of the police experts. The Committee is concerned to note the assertion in both the District Court's and the Patan Appeal Court's judgements that if the person claims that he was in another place during the incident, then he has to prove it and if he cannot, then it should not be held against him. The Committee refers to its general comment No. 32, where it stated that the presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle.<sup>11</sup> The Committee insists on the fact that a criminal court may convict a person only when there is no reasonable doubt of his or her guilt, and it is for the prosecution to dispel any such doubt.<sup>12</sup> In the present case, both the District Court and the Patan Appeal Court have shifted the burden of proof to the detriment of the author, thereby violating article 14, paragraph 2, of the Covenant.

7.4 On the length of the proceedings, the Committee notes the author's argument that from 26 March 2006 until 23 April 2010, 41 hearings have been scheduled, which do not include the hearings which were either postponed or cancelled prior to these dates. The Committee also notes that most court hearings were allegedly cancelled or postponed at the last minute and without reasons being provided. The State party has not provided any information on the reason for such delays. The Committee refers to its jurisprudence, where it stated that the right of the accused to be tried without undue delay relates not only to the time between the formal charging of the accused and the time by which a trial should commence, but also the time until the final judgment on appeal.<sup>13</sup> All stages, whether in first instance or on appeal, must take place without undue delay. In the present case, although the decisions of the District Court and the Appeal Court were adopted within two years, the proceedings before the Supreme Court started in 2005 and were still ongoing to date. The Committee reiterates its position that States parties have an obligation to organize their system of administration of justice in such a manner as to ensure an effective and expeditious disposal of the cases.<sup>14</sup> The length of the proceedings before the Supreme Court and most importantly the high number of postponements and cancellations of court hearings cannot be justified under the present circumstances. Accordingly, the Committee

<sup>11</sup> See note 8, para. 30.

<sup>12</sup> Communication No. 1421/2005, *Larrañaga v. The Philippines*, Views adopted on 24 July 2006, para. 7.4.

<sup>13</sup> Communications No. 1089/2002, *Rouse v. The Philippines*, Views adopted on 25 July 2005, para. 7.4; No. 1085/2002, *Taright et al. v. Algeria*, Views adopted on 15 March 2006, para. 8.5.

<sup>14</sup> Communication No. 1466/2006, *Lumanog and Santos v. The Philippines*, Views adopted on 20 March 2008, para. 8.5.

finds that the author's rights under article 14, paragraph 3 (c) of the Covenant, have been violated.

7.5 The Committee notes the author's allegation that his right to have his sentence reviewed by a higher tribunal was undermined by the excessive length of the proceedings, the lack of impartiality of the courts and the numerous violations of the right to defence. It notes that the State party confined itself to stating that the author's trial was carried out in accordance with Nepalese law. The Committee reminds the State party of its obligations under article 2, paragraph 2, of the Covenant, whereby it has to take the necessary steps and adopt appropriate legislation as may be necessary to give effect to the rights recognized in the present Covenant. Where national law is not in conformity with the Covenant, appropriate amendments to that law should be adopted. The Committee is of the view that the impartiality of the courts in the present case indeed raises issues under article 14, paragraph 1, as pointed out by the author. It also considers that his right to have his sentence reviewed by a higher tribunal has been undermined by the excessive length of the proceedings before the Supreme Court, the lack of impartiality of the courts in their observance of the principle of presumption of innocence, and the violations of the right to defence outlined above. The Committee therefore considers that in the current circumstances, the author's rights under article 14, paragraphs 1 and 5, have been violated.

7.6 As to the claim under article 15, paragraph 1, and article 14, paragraph 7, the Committee notes that the Supreme Court adopted a deferment to the Patan Appeal Court, ordering it to determine whether article 5, paragraph 1 (2) of the new Immigration Act 2049 applied to the alleged entry of the author into Nepalese territory in 1975. It further notes that the same Appeal Court had already decided on that matter, rejecting the application of this new law, in its decision of 4 August 2005; and that the Supreme Court ignored such decision and ordered the Appeal Court to review its previous verdict on this specific issue. The Committee takes note of the absence of any observations by the State party on the author's claim under article 15, paragraph 1, and recalls that it should therefore give due consideration to the allegations submitted by the author. The Committee refers to its jurisprudence where it stated that article 15, paragraph 1, requires any "act or omission" for which an individual is convicted to constitute a "criminal offence". Whether a particular act or omission gives rise to a conviction for a criminal offence is not an issue which can be determined in the abstract; rather, this question can only be answered after a trial pursuant to which evidence is adduced to demonstrate that the elements of the offence have been proven to the necessary standard. If a necessary element of the offence, as described in national or international law, cannot be properly proven to have existed, then it follows that a conviction of a person for the act or omission in question would violate the principle that no one shall be held guilty of any criminal offence on account of any act or omission which does not constitute a criminal offence, under national or international, at the time when it was committed, as provided by article 15, paragraph 1.<sup>15</sup> The Committee has already established that the national courts had shifted the burden of proof to the detriment of the author. The latter was left with the responsibility to prove that he had not entered the Nepalese territory in 1975. The above clearly discloses a violation, by the State party of article 15, paragraph 1, and article 14, paragraph 7, of the Covenant.

7.7 The Committee notes the author's claim that, since 1 November 2004, he has been held almost permanently in solitary confinement, with no possibility to challenge this decision; during the summer of 2008, he was put in isolation with shackles, on the ground that he had a disagreement with another prisoner; and because of inadequate and unsanitary conditions at Kathmandu Central Prison, as well as a lack of medical health care, the

<sup>15</sup> Communication No. 1080/2002, *Nicholas v. Australia*, Views adopted on 19 March 2004, para. 7.5.

author's health condition has deteriorated dramatically. It notes that the State party has provided no information or argument against the author's allegation. It draws the attention on its general comment No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment, where it has considered that prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7.<sup>16</sup> The Committee also refers to its jurisprudence, where it stated that persons deprived of liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that the measure of their treatment under the Covenant is as set out, inter alia, in the Standard Minimum Rules for the Treatment of Prisoners (1957).<sup>17</sup> The Committee does not have enough elements to determine whether the treatment the author has been subject to amounts to a violation of article 7. It however finds that those conditions of detention, as described by the author, including placement in solitary confinement, shackling without a possibility to appeal, and alleged lack of access to appropriate health care,<sup>18</sup> fail to respect the inherent dignity of the human person,<sup>19</sup> in violation of article 10, paragraph 1, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 10, paragraph 1; 14, paragraphs 1, 2, 3, 5 and 7; and 15, paragraph 1, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including the speedy conclusion of the proceedings and compensation. The State party is also under an obligation to prevent similar violations in the future.

10. In becoming a State party to the Optional Protocol, the State party recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. 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 in case a violation has been established. The Committee wishes to receive from the State Party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

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<sup>16</sup> *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A, para. 6.

<sup>17</sup> Communication No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2.

<sup>18</sup> Communication No. 253/1987, *Kelly v. Jamaica*, Views adopted on 8 April 1991, para. 5.7.

<sup>19</sup> Communication No. 109/1981, *Gomez de Voituret v. Uruguay*, Views adopted on 10 April 1984, para. 13.

## Annex VI

## Decisions of the Human Rights Committee declaring communications inadmissible under the Optional Protocol to the International Covenant on Civil and Political Rights

### A. Communication No. 1079/2002, *A. et al. v. Uzbekistan* (Decision adopted on 19 March 2010, ninety-eighth session)\*

<i>Submitted by:</i>	A. et al. (not represented by counsel)
<i>Alleged victim:</i>	The author, her father, B., her brother, C., and her uncle, D.
<i>State party:</i>	Uzbekistan
<i>Date of communication:</i>	29 April 2002 (initial submission)
<i>Subject matter:</i>	Enforced disappearance; unfair trial; discrimination on political grounds
<i>Procedural issue:</i>	Level of substantiation of claim
<i>Substantive issue:</i>	Persecution of a high-level official and his family for political reasons
<i>Articles of the Covenant:</i>	2; 7; 9; 10; 11; 14; 19; 26
<i>Article of the Optional Protocol:</i>	2

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

*Meeting* on 19 March 2010,

*Adopts* the following:

#### Decision on admissibility

1. The author of the communication is A., an Uzbek national born in 1968. She submits the communication on her behalf and on behalf of B. (her father), an Uzbek national born in 1948; her brother, C., an Uzbek national born in 1977; and her uncle, D., also an Uzbek national born in 1961.<sup>1</sup> The author claims that they are all victims of

\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

<sup>1</sup> At the time of registration of the communication, the author has submitted written authorizations to act on behalf of her brother and her uncle, but not on behalf of her father, who had allegedly disappeared at that moment. Subsequently, given that the author's father had reappeared, the author



violations by Uzbekistan of their rights under articles 2; 7; 9; 10; 11; 19; and 26 of the Covenant. Her allegations also raise issues under article 14 of the Covenant, although the author does not invoke this provision of the Covenant specifically in her initial submission. The author is unrepresented. The Optional Protocol entered into force for the State party on 28 December 1995.

### **The facts as presented by the author**

2.1 B., the author's father, was the Chair of the State-owned stock company Uzbkhlebprodukt from April 1997 to April 2000. The company was made up of some 400 firms dealing with storage and processing of cereals, flour, and bread production, and it employed some forty-four thousand individuals. According to the author, her father was a skilled manager, which was not appreciated by some. He started receiving threats, blackmail attempts, and offers of bribes in exchange for services. At some point in 2000, her father was asked to pay half a million United States dollars in order to retain his position. Soon afterwards, the author was contacted by an individual who presented himself as a relative of the then Vice-Prime Minister, who warned her that her father would have to pay one million United States dollars in order to avoid problems.

2.2 The author affirms that her father had told her that his deputies had signed several documents in his absence which had resulted in the release and disappearance of several thousands of tons of flour from the State reserve, creating serious problems.<sup>2</sup> Her father's efforts to bring the situation to the attention of the President were in vain. According to the author, she discovered sometime later that the Vice-Prime Minister had provided the President with false information in this respect.

2.3 An official inquiry into the release and disappearance of several hundreds of tons of flour from the State reserve was opened in March 2000. Officials of the firm Uzbkhlebprodukt were investigated, and were accused of misappropriation of State property, abuse of power, and other crimes. As a result, 22 criminal cases were opened, involving more than three hundred persons. In this context, on 27 March 2000, the author's uncle, D. was arrested and charged for the alleged unlawful privatization of the firm Uch Kakhramon non. The same day the authorities arrested the deputy-chairman of Uzbkhlebprodukt in charge of the economic matters, charging him with unlawful distribution of flour and irregular distribution of loans with special conditions.

2.4 In the morning of 31 March 2000, the author's father travelled to the city of Dzhizak, to attend the meeting of the Committee of Ministers. Later that day, the author was informed that her father had been arrested; subsequently, the police explained that in fact her father's whereabouts were unknown and that an arrest warrant against him had been issued. The same day, at her mother's insistence, the author left Uzbekistan. All subsequent requests in respect to B.'s whereabouts made by the family to different institutions have remained unanswered.<sup>3</sup>

2.5 On 5 April 2000, the President issued an order for the dismissal of B. as Chairman of Uzbkhlebprodukt. The author affirms that shortly thereafter, the authorities started publicly naming her father as a dangerous criminal who had escaped in order to avoid

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submitted also a written authorization to act on her father's behalf. The author has not presented details on the exact circumstances of the reappearance of her father.

<sup>2</sup> According to the author, the whole system for recording the wheat available in the State depot in Uzbekistan was inaccurate, and her father was one of the first officials who started drawing the authorities' attention to this.

<sup>3</sup> The author claims that such requests were addressed to the President, the Prosecutor General's Office, the Ministry of Interior, etc.

responsibility. The author claims that her mother and other relatives were interrogated and constantly pressured by the authorities.

2.6 The author contends that prior to her departure from Uzbekistan, she was responsible for the international relations of a private company called NZI. The director of the company was questioned by the police and allegedly beaten in an attempt to force her to provide the author's whereabouts and information on the functioning of the firm. The company's belongings and stamps were seized. Allegedly, the investigators were trying to establish the author's responsibility for the misappropriation of a large sum of money. An arrest warrant against the author was issued on these grounds.

2.7 The author affirms that the investigators had also "fabricated" charges against her father and her brother. The charges against her father included breach of the rules of distribution of flour from the State reserve, theft of State property, abuse of power, etc. She explains that she and her brother have fled Uzbekistan, as they do not trust the authorities.

2.8 On 7 March 2001, the Tashkent City Court sentenced the author's uncle to a nine-year prison term. According to her, his sentence was groundless and his guilt was not proven. His conviction was partly based on witnesses' statements unlawfully obtained, including under duress. According to the author, all claims formulated during the trial were rejected by the court without sufficient argumentation or were simply ignored. No economic experts' examinations have been carried out, according to the author. In addition, her uncle received a copy of the sentence only 40 days after its pronouncement and not within 10 days as required by law. For this reason, according to the author, her uncle was unable to file an appeal on time.<sup>4</sup>

2.9 The author claims that her father was investigated in 22 criminal cases, together with some three hundred individuals, all accused of having organized serious theft and other crimes. Neither the investigators nor the courts have ordered the conduct of any economic expert examination that might justify or explain the missing wheat, as well as the accuracy of distribution system of cereals from the State reserve. According to the author, her father and his family were all victims of an organized campaign, initiated by high-level officials in order to avoid the engagement of their own responsibility in the mismanagement that had occurred in the bread sector in Uzbekistan. The criminal proceedings against the family were arbitrary and are based, according to the author, on unsubstantiated evidence.

### **The complaint**

3. The author claims that the facts as presented amount to a violation of her, her father's, her brother's and her uncle's rights under articles 2; 7; 9; 10; 11; a 19; and 26 of the Covenant. Her allegations on the bias of the authorities in respect of the criminal investigations against her family, and the trial of her uncle also raise issues under article 14, although the author does not invoke this provision specifically in her initial complaint.

### **State party's observations on admissibility and merits**

4.1 The State party presented its observations by note verbale of 31 July 2007. It explains that B., then Chairman of the Board of Directors of the Uzdonmahsulot State Joint-stock company, had established a criminal society with his son, and other individuals. Using fake signatures of the staff of the Uch Qahramon subsidiary company, D. privatized

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<sup>4</sup> The author further claims, however, that at that moment, her uncle's cassation claim to the Supreme Court had not yet been examined, and expresses concerns that the cassation claim would most probably only be examined formalistically, as was the case with the appeal examination of the Criminal College of the Tashkent City Court.

the company, causing a harm to the State equal to 34,235,459 Uzbek sum,<sup>5</sup> as assessed by the Committee on the Management of State property. As a result, D. and C. officially became the new owners of the company that was called Uch Qahramon Ltd.

4.2 Subsequently, according to the State party, A. also, acting in a prior criminal agreement with his deputy, authorized the delivery of important quantities of flour to Uch Qahramon Ltd, without having grounds for this and to the detriment of other bread producers in Uzbekistan.

4.3 The author of the communication, working in the NZI Ltd. company had, according to the State party, under her father's auspices and pressure, concluded a number of contracts with companies of the State holding Uzdonmahsulot for the delivery of polypropylene bags on advanced payment, which resulted in serious damages (150,780,300 sum).

4.4 The State party further contends that in 1997, the author's father had established a joint-venture company Yangi zamon under the name of a friend. From 1997 to 2000, B. engaged in criminal agreement with close friends and transferred the property of 10 companies (valued at US\$ 13,499,300) from the Uzdonmahsulot State company to the joint venture. Thus, he had committed fraud and had unlawfully acquired State property.

4.5 During 1998–2000, A. had also transferred the income from the sales of the products of 10 bakeries belonging to Yangi zamon joint-venture; the funds were transferred to different bank accounts and were used to acquire raw materials which were later sold and the money was misappropriated using false documents.

4.6 The State party contends that the criminal activities of B. and the group under his leadership caused damages (to the public interest) for a total of 732,712,710 sum and US\$ 13,499,300. On this basis, on 7 April 2000, and due to their absence, B., his daughter and his son were charged in absentia,<sup>6</sup> and arrest warrants were issued against them. In 2001, due to the absence of information on their whereabouts, the investigation of the criminal case in connection to them was suspended, in accordance with article 364 of the Criminal Procedure Code (suspension of preliminary investigation).

4.7 D. was sued for misappropriation of State property in particularly large amount, which he had committed together with his brother, B. and the criminal group headed by the latter. In accordance with the decision of the Tashkent City Court of 7 March 2001, D. was sentenced to a 9-year prison term. Pursuant to article 9, paragraph (a), of the Act of Amnesty of 28 August 2000, his penalty was reduced to six years.

4.8 The court had established that D. was the Director of the company Uch Qahramon non from 1995 to 1999. From October 1999, he entered into a criminal arrangement with his brother, B. and a Deputy Chairman of the same company, and committed crimes relating to misappropriation of property of others, causing material damage to public interests in especially important amount.

4.9 The State party explains in particular that D., by entering into a criminal arrangement with B. and C., changed the status of the subsidiary company Uch Qahramon non without the consent of its staff and workers to establish a limited responsibility company, falsified documents and privatized the company (under his own name and the

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<sup>5</sup> Equal at that time to around \$US 145,000 (see <http://data.un.org/CountryProfile.aspx?crName=Uzbekistan>).

<sup>6</sup> According to the State party, they were charged under article 205 of the Criminal Code (Abuse of power or abuse of authority by an official).

name of his nephew, C.) with a total value of 34,235,459 sum, through illegal means and without investing any financial capital.

4.10 In addition, D., again acting in a prior criminal arrangement with his brother and his brother's deputy, obtained through Uzdonmahsulot flour and related materials at cut-prices for the Uch Qahramon Ltd. company. According to the State party, D. had thus used the funds for his own interest, and he had contributed to the decreasing of the amount of flour funds distributed by the Government among other regions of the country.

4.11 The State party further contends that the author's allegations in the present communication are groundless.<sup>7</sup>

4.12 According to the State party, during the preliminary investigation and in court, D. had stated that his term of office as Director of the company Uch Qahramon non was from 1995 to March 1999, that he had not registered the company illegally, had not committed misappropriation of someone else's property, and had not taken funded flour from Uzdonmahsulot; he had also affirmed that the charges against him constituted slander. Notwithstanding, the court found him guilty on the basis of the exiting evidence which was dully assessed during the trial. A number of officials had confirmed in court that Uzdonmahsulot State Company had provided Uch Qahramon non with several hundred tons of flour. One of D.'s co-accused had also confirmed the above-mentioned facts, and had explained that he had allocated the flour, due to insistent demands by his chief, B., to supply Uch Qahramon non with flour in any way.<sup>8</sup>

4.13 Another witness confirmed that the staff of the Uch Qahramon non company had never signed the relevant forms for the privatization of the company. Other witnesses had stated during the investigation and in court that D. and C. should have submitted specific documents on the privatization of the company to the Uzdonmahsulot State Company, but they never did.

4.14 Additional witnesses contended during the investigation and in court that the Uzbekistan-Ukraine Friendship Society was established in 1998, with B. as its Chairperson. Under a secret order of B., a bank account of the Society was opened, and a number of money transfers were received from companies operating the Uzdonmahsulot sphere.

4.15 An inspector of the State Tax Inspectorate had confirmed in court that an official inspection of Uch Qahramon non company revealed a number of irregularities in the company's accountant documents, and that the real profit exceeded the amount declared by the company.

4.16 The State party further notes that in accordance with the conclusions of an official audit carried in July 2000, Uch Qahramon non had been illegally privatized and it had

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<sup>7</sup> The State party mentions, in particular: (a) the author's allegations on the unfounded nature of the conviction of D., and the statement that it was based on non-established evidence; (b) her allegations that her father had disappeared in March 2000, after having left for a meeting of the Cabinet of Ministers; the allegedly unsubstantiated character of the charges of the initial investigation against her father and her brother, C. (under search); (c) her allegations on the absence of designation by the preliminary investigation and the court of economic expert examination to identify the reasons of deficiency, as well as the correctness or incorrectness of the distribution of grain funds in the State reserve; (d) her allegations on the absence of any irregularities in the activity of the NZI company; (e) her allegations on the psychological and physical pressure constantly exerted on the A. family during the preliminary investigation, which caused several members of the family to leave Uzbekistan.

<sup>8</sup> According to the State party, the Chief of the Distribution section of Uzdonmahsulot had confirmed in court that, under the orders of one of the deputies of the author's father, he had released 710 tons of flour to Uch Qahramon non Ltd from a non-reimbursable fund.

subsequently received different quantities of flour on credit without interest; flour was also received without payment; and preferential loans for several dozens of millions of sum were given to the company by Uzdonmahsulot Corporation in 1998 and 1999.

4.17 According to the State party, it was established that the Uch Qahramon non company had received inappropriately several hundreds tons of flour on the account of unused funded flour for other regions of Uzbekistan in 1999/2000.

4.18 The State party also points out that by decision of 27 June 2000, the Tashkent City Economic Court found null and void the decision of the governor of Yunusobod district of October 1997 on the establishment of Uch Qahramon Ltd.

4.19 According to the State party, the above-mentioned facts have also been confirmed by the testimonies of D.'s co-accused in the same case, who were also convicted, and by other evidence.

4.20 The State party finally affirms that the initial investigation and the judicial proceedings have been conducted in accordance with the Uzbek Criminal Procedure Code, all complaints have been considered thoroughly, the evidence was assessed correctly, the guilt of D. was fully established, and his sentence was proportionate to the crimes committed.

#### **Author's comments on the State party's observations**

5.1 The author's comments on the State party's observations were received on 6 July 2009. First, the author affirms that the State party's reply tends to present the case against her family as a purely economic one. According to her, however, her father was persecuted because he was not corrupt and had refused to obey illicit orders from his superiors.<sup>9</sup> B. had served for 22 years on decision-making posts in the domain of the bread in Uzbekistan and was a recognized professional. According to the author, the campaign against her father started only when he tried to warn the President about the irregularities and problems existing in the State's bread industry.

5.2 The author explains that her family was obliged to leave the country for the Russian Federation, where they've spent two and a half years. Subsequently, the family moved to a country in the European Union and was granted political asylum there.

5.3 The author contends that her family is a victim of violations by Uzbekistan of their rights under article 7 of the Covenant. The author's mother was psychologically pressured by law-enforcement authorities to force her to provide information on the author's and her father's activities. Her grandmother was humiliated by the police when searching her house, apparently trying to find the "millions" hidden by B. there. Her uncle was subjected to violence during the preliminary investigation but also subsequently to his conviction, according to the author, to force him to testify against her and her father.

5.4 With reference to article 14 of the Covenant, the author claims that during the preliminary investigation, her mother had to change lawyers several times, because of pressure by the authorities. During the court trial of her uncle, the author prepared a number of complaints that were adduced to the case file but were never examined or were simply rejected. The Ombudsman, like other institutions, ignored their complaints.

5.5 The author further claims that the appeal filed by her uncle was dismissed. In addition, due to alleged pressure, no one accepted to testify on his behalf.

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<sup>9</sup> The author claims, for example, that her father had refused to carry out requests by the Prime Minister to falsify documents on the de facto available quantities of grain or to produce wrong data on the grain quality (humidity, etc.).

5.6 With reference to article 17 of the Covenant, the author claims that while questioning her mother, police officers arbitrarily interfered in her family life, as they alleged that B. had had extra-marital relations and children. The author contends that these statements sought to destabilize her mother in order to obtain evidence against the author's father.

5.7 The author invokes article 19 of the Covenant, and emphasizes that the family's repression started when her father wrote officially to high-ranked officials to inform them about the existing problems within the bread sector in Uzbekistan.

5.8 The author notes the State party's affirmation that her brother and her uncle had committed a theft in a particularly important amount, through an unlawful privatization of a company, unlawful acquisition of flour from the State reserve, and unlawful obtaining of credits. She provides details about the history of the acquisition of the company by her uncle and brother, and information on the functioning of the firm. According to her, the investigation and the court proceedings were biased, as the company in question was acquired legally, not through privatization but through a transaction financed by a loan, the flour was also procured lawfully, and no irregularities were committed in the obtaining or the use of the loans in question.

5.9 The author further affirms that the State party's explanation that her father was the founder of an Uzbek-American joint venture, and that he had abused of his official situation in order to unlawfully acquire 10 mini-bakeries is not correct. She contends that when the authorities had accused her father of having appropriated the mini-bakeries in question, the latter still appeared in the accounts of the State property Committee. Later, the bakeries were sold by this Committee to the joint-venture, through an official tender following a decision by the Committee of Ministers.

5.10 The author further challenges the State party's affirmation on her father's involvement in financial irregularities through the society Uzbekistan-Ukraine. According to her, all decisions on loans, salaries, etc. were taken exclusively by the society's executive director, and not by her father (the society's Chair). Therefore, in the author's opinion, all irregularities in the functioning of this society should not be imputed to her father. According to the author, her father's charges in this respect were based only on the testimonies of two witnesses, obtained through unlawful means.

5.11 The author further rejects the State party's affirmation that she had obtained a preferential loan when working for the company NZI and that she had transferred the funds to her personal account, thus causing a loss of more than 150 million sum. She admits that the loan was contracted by the company, which made it possible to pay a counterpart in advance. Later, the counterpart failed to comply with its obligations, which was confirmed by a court decision. However, as the authorities had started persecuting her and all NZI bank accounts were blocked and the seals, etc. were seized, the money in question could never be recovered from the counterpart. Subsequently, the belongings of NZI were sold by the authorities.

## **Issues and proceedings before the Committee**

### *Consideration of admissibility*

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with the rule 93 of its Rules of Procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

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

6.3 The Committee has noted the author's allegations that her and the other alleged victims' rights under articles 2; 7; 9; 10; 11; 14; 19; and 26 have been violated. It notes that these allegations have not been directly refuted, even if the State party had affirmed that all the author's allegations were groundless. In the light of the material on file, however, and in the absence of any other pertinent, detailed, and documented information in this respect by the parties, the Committee considers that these allegations are insufficiently substantiated, for purposes of admissibility, and are accordingly inadmissible under article 2 of the Optional Protocol.

7. The Committee therefore decides:

(a) That the communication is inadmissible pursuant to article 2 of the Optional Protocol;

(b) That this decision will be transmitted to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**B. Communication No. 1174/2003, *Minboev v. Tajikistan*  
(Decision adopted on 19 March 2010, ninety-eighth session)\***

<i>Submitted by:</i>	Bakhrullo Minboev (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Tajikistan
<i>Date of communication:</i>	20 May 2003 (initial submission)
<i>Subject matter:</i>	Criminal procedure violations in a death penalty case
<i>Procedural issues:</i>	Non-cooperation by the State party; evaluation of facts and evidence by courts; insufficient substantiation of allegations
<i>Substantive issues:</i>	Unlawful detention; unfair trial; access to a lawyer of own choice; right to obtain attendance and examination of witnesses
<i>Articles of the Covenant:</i>	6, paragraphs 1 and 2; 9, paragraphs 1 and 2; and 14, paragraph 3 (b) and (e)
<i>Article of the Optional Protocol:</i>	2

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

*Meeting on 19 March 2010,*

*Adopts the following:*

**Decision on admissibility**

1.1 The author of the communication is Mr. Bakhrullo Minboev, a citizen of Tajikistan, currently serving a prison sentence in Tajikistan, who claims to be the victim of violations by the State party of his rights under article 6, paragraphs 1 and 2; article 9, paragraph 1 and 2; and article 14, paragraphs 1 and 3 (b) and (e), of the Covenant. The author is not represented.

1.2 On 21 May 2003, pursuant to rule 92 of its rules of procedure, the Human Rights Committee, acting through the Special Rapporteur on new communications and interim measures, requested the State party not to carry out the death sentence against the author, while his case is under consideration by the Committee.

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.



**The alleged facts as presented by the author**

2.1 On 1 November 2000, the author was detained on suspicion of theft. He was not presented with charges until 19 November 2000. During interrogations, the author confessed that he committed a murder in October 1997. At that time, he was working for the Ministry of Interior, and was asked by his chief to kill one of the victims. He was threatened that he and his family would be killed if he did not carry out the murder. On 5 November 1997, when he was in the same car as the victims, he fired a shot, but the bullet went through the intended victim's head and hit also a man sitting next to him. Both men died.

2.2 During investigation, the author was refused a lawyer of his choice. He had no legal defence for a period of three months, although under the Criminal Procedure Code legal assistance is compulsory in cases involving the death penalty starting from the pretrial investigation. Later, he was assigned a public lawyer, who was not licensed for law practice. In addition, the order assigning this lawyer was invalid, as it was issued on 20 January 2000, while the author was detained only on 7 November 2000.

2.3 On 9 April 2001, he was convicted of premeditated murder of two or more persons and sentenced to death. During the trial, the author was able to have the lawyer of his choice, who requested forensic tests to be made to show that both deaths were caused by one bullet. The request was dismissed by the court. The author confessed to having committed the murder, but added that only one of the deaths was caused by premeditated murder. The second person was killed accidentally. The court ignored this claim as well as the request by the defence to invite additional witnesses.

2.4 The author's cassation appeal was dismissed by the Cassation Court. However, an appeal to the Presidium of the Supreme Court under the supervisory review procedure resulted in the judgment being overturned and the case sent back for retrial on 11 January 2002. This decision was based on the following procedural flaws: (a) lack of legal assistance of the author's own choosing; (b) the author's identity had not been fully established; and (c) failure to investigate a possible accidental death of the second victim. The case was sent to the same investigator who had conducted the original investigation and who was biased, and had his own interest in the outcome of the second investigation. Again, the lawyer selected by the author for his defence was not accepted by the judge, who assigned another lawyer. This lawyer allegedly signed procedural documents without the author's knowledge and failed to inform him of his right to study the investigation materials.

2.5 During the second trial, it was shown that one bullet killed both victims. However, the court ignored this fact and again sentenced the author to death on 24 September 2002.

2.6 The author was not allowed to be present during the review of his case at the cassation level, although, under the Tajik Criminal Procedure Code, he was entitled to be there.

2.7 His cassation appeal of 15 November 2002 was declined by the Criminal Collegium of the Supreme Court. Similarly, his application for judicial review to the Chair of the Supreme Court was also dismissed. The author submits that the same matter is not being examined under another international procedure of investigation or settlement and that he has exhausted all available domestic remedies.

2.8 In his submission on 12 July 2003, the author adds that his mental health condition has deteriorated due to the stress of awaiting his execution.

### **The complaint**

3.1 The author invokes article 6, paragraphs 1 and 2, of the Covenant, as he claims that his right to life was violated due to the unfair judgement issued by an incompetent court.

3.2 The author claims that his rights under article 9, paragraphs 1 and 2, were violated as his detention was unlawful and he was not informed about the charges against him for more than a week.

3.3 The author invokes article 14, paragraph 1, as he claims that the court was biased because it ignored his testimonies and the results of forensic examinations.

3.4 The author claims that his rights under article 14, paragraph 3 (b), of the Covenant were violated, as he had no legal defence for a period of three months, and he was not able to be represented by the lawyer of his own choice. Furthermore, the assigned lawyer was not licensed for law practice and he was not able to communicate with him.

3.5 The author also invokes article 14, paragraph 3 (e), as the court ignored the defence's request to invite additional witnesses.

### **State party's submission and failure to address questions of admissibility and merits**

4.1 On 13 October 2003, the State party submitted that the author was pardoned on 4 September 2003 and his death sentence was commuted to 20 years' imprisonment.

4.2 The State party was invited to present its observations on the admissibility and merits of the communication in May 2003. A reminder was sent in this respect in July 2005. The Committee notes that no information has been received. The Committee regrets the State party's failure to provide any information with regard to admissibility or the substance of the authors' claims. It recalls that under the Optional Protocol, the State party concerned is required to submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that it may have taken. In the absence of a reply from the State party, due weight must be given to the authors' allegations, to the extent that they have been properly substantiated.

### **Author's failure to provide additional information**

5. The author, whose present whereabouts are unknown, did not provide any comments to the submission by the State party, despite reminders sent. The last communication from the author was received on 12 July 2003. Repeated requests as to his wish to continue his case, which were sent in 2005, 2006 and 2007, remain unanswered.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant. The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the matter is not being examined under another procedure of international investigation or settlement.

6.2 The Committee notes the author's allegations that the trial court was unfair and biased, as it ignored his testimonies and the results of forensic examinations violating article 14, paragraph 1. It notes, however, that these claims largely relate to the evaluation

of facts and evidence by the State party's courts. The Committee refers to its jurisprudence<sup>1</sup> and reiterates that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that it was clearly arbitrary or amounted to a denial of justice. The material before the Committee does not reveal that the conduct of the trial suffered from any such defects. Accordingly, the Committee considers that the author has not substantiated these allegations for purposes of admissibility and that the claims are thus inadmissible pursuant to article 2 of the Optional Protocol.

6.3 The Committee also notes the author's allegation of unlawful detention and not being informed of the charges against him for more than a week under article 9, paragraphs 1 and 2, of the Covenant. It further notes the author's allegations under article 14, paragraph 3 (b) and (e), that he had no legal defence for a period of three months; he was not able to communicate with the lawyer assigned to him; and he was not represented by the lawyer of his own choice, while the assigned lawyer was not licensed for law practice. The Committee notes, however, that the author did not substantiate these allegations in his initial communication and The Committee was not able to re-establish contact with the author to obtain further information despite numerous attempts. In these circumstances, the Committee considers that the author's claims are not sufficiently substantiated for purposes of admissibility and that the claims are thus inadmissible pursuant to article 2 of the Optional Protocol.

6.4 With regard to the author's allegations under article 6, paragraphs 1 and 2, the Committee notes the State party's submission that the author's death sentence was commuted to 20 years' imprisonment. In the light of this, and given the Committee's conclusion on the absence of a violation of the author's rights under article 14 of the Covenant in the present case, the Committee considers that this part of the communication is also inadmissible, under article 2 of the Optional Protocol.

7. The Committee therefore decides:

- (a) That the communication is inadmissible under article 2 of the Optional Protocol;
- (b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

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<sup>1</sup> See for example: communications No. 541/1993, *Simms v. Jamaica*, decision on inadmissibility adopted on 3 April 1995 and No. 1234/2003, *P.K. v. Canada*, decision on inadmissibility adopted on 20 March 2007; No. 1188/2003, *Riedl-Riedenstein et al. v. Germany* decision on inadmissibility adopted on 2 November 2004; No. 886/1999, *Schedko and Bondarenko v. Belarus*, decision on admissibility adopted on 3 April 2003; No. 1138/2002, *Arenz et al. v. Germany*, decision on admissibility adopted on 24 March 2004.

**C. Communication No. 1240/2004, R.A. v. Tajikistan  
(Decision adopted on 23 October 2009, ninety-seventh session)\***

<i>Submitted by:</i>	S.A. (not represented by counsel)
<i>Alleged victim:</i>	The author's son, R.A.
<i>State party:</i>	Tajikistan
<i>Date of communication:</i>	6 January 2004 (initial submission)
<i>Subject matter:</i>	Death sentence after an unfair trial with use of torture during investigation
<i>Procedural issue:</i>	Level of substantiation of claim
<i>Substantive issues:</i>	Forced confessions; bias of tribunals; presumption of innocence
<i>Articles of the Covenant:</i>	6; 7; 14, paragraph 1
<i>Articles of the Optional Protocol:</i>	2; 5, paragraph 2 (b)

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

*Meeting on 23 October 2009,*

*Adopts the following:*

**Decision on admissibility**

1.1 The author of the communication is S.A., a Tajik national born in 1937. He claims that his son, R.A., also a Tajik, born in 1983, who at the time of the submission of the communication was detained on death row,<sup>1</sup> is a victim of violations of his rights under article 6, paragraphs 1 and 2; article 7; and article 14, paragraph 1, of the International Covenant on Civil and Political Rights. The author is unrepresented by counsel. The Optional Protocol entered into force for the State party on 4 April 1999.

1.2 When registering the communication on 16 January 2004, and pursuant to rule 92 of its rules of procedures, the Human Rights Committee, acting through its Special Rapporteur on new communications and interim measures, requested the State party not to carry out R.A.'s execution pending the consideration of his case. By note verbale of 4 May 2004, the State party informed the Committee that R.A. had been granted pardon, and his death sentence had been commuted to a long prison term.<sup>2</sup>

\* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

<sup>1</sup> Following a death sentence imposed on 13 August 2003 by the Supreme Court of Tajikistan.

<sup>2</sup> From a subsequent submission by the State party, it transpires that R.A.'s death sentence was commuted to 25 years of imprisonment.

**The facts as submitted by the author**

2.1 During a theft committed on 13 October 2001 on the premises of the company Ora International in Dushanbe, a guard was killed. On 14 October 2001, three individuals, including the author's son, were arrested in this connection and were informed that they were suspected of theft, robbery and murder.

2.2 According to the author, at the beginning of the investigation his son confessed his participation in the theft, but he denied any involvement in the murder of the guard. He had affirmed that he and his co-accused had planned only to commit the theft, and that the guard was killed by his two accomplices when he was in another part of the building. The police however, charged him with murder.

2.3 The author claims that the principle of presumption of innocence was violated in respect to his son. On 17 October 2002, the latter was shown in a television programme called "VKD soobshchaet" ("The Ministry of Internal Affairs informs"), as one of the three criminals, responsible for a murder and theft, that had been arrested. This was done without his son's consent, and, according to the author, was in violation of the Criminal Procedure Code.

2.4 The author further claims that during the preliminary investigation, his son was subjected to torture. While in the premises of the Frunze district department of the Ministry of Internal Affairs in Dushanbe, immediately after his arrest, his son was asked by the police officers to produce written confessions. He did so, and the police officers left the room. They returned shortly afterwards and started beating him. Later, they asked him to write new confessions. The author affirms that, as a result of the beatings, his son wrote down what the officers dictated to him.

2.5 Once the investigation was completed, the author's son and his lawyer were given the opportunity to examine the case file. According to the documents, the author's son was charged only with murder and theft. In court, however, when the presiding judge was reading the charges, it transpired that his son was also charged with a count of involvement of minors into criminal activities (article 165 of the Criminal Code of Tajikistan). Following an objection by the lawyer of R.A., the case was sent back for further investigation. Afterwards, the author's son was officially charged under this additional count.

2.6 The author contends that during the trial, the judges acted in a biased and unfair manner. Allegedly, they ignored some depositions of defence witnesses and the statements of the accused. For example, the two other co-accused repeated several times that the author's son was not present during the murder and did not participate in the beatings of the guard. The court ignored their statements and sentenced the author's son and one of his co-accused to death.

2.7 The lawyer of the author's son filed an appeal to the appeal body of the Supreme Court. On an unspecified date, the appeal body rejected his claim and confirmed the sentence.

**The complaint**

3. The author contends that the facts as presented, reveal a violation of his son's rights under article 7, as he was tortured in order to confess guilt; article 14, paragraph 1, as the court was partial and ignored certain witnesses' testimonies; and article 6, paragraphs 1 and 2, given that a death sentence was imposed on his son following a trial that did not meet the basic criteria of fairness.

### **State party's observations**

4.1 The State party presented its observations on the merits of the communication, on 1 March 2006, in the form of two separate submissions prepared by the Supreme Court and the Office of the Prosecutor General of Tajikistan.

4.2 The Supreme Court recalls the facts of the case: the author's son entered in a preliminary agreement with one D. and one A., both then minors, to commit a theft of an important sum of money contained in the firm where he worked, "ORA International". In the morning of 13 October 2002, he and his accomplices went to the company's premises. There, the author's son suggested to the guard, S., to take a lunch break and offered to replace him during his absence. When the guard left, the author's son and his accomplices entered the building and started cutting the company's safe with an electric device. Inside the safe, they found US\$ 6,202, which the author's son divided among them. Following this, they decided to kill the guard in order to conceal the theft. When the guard returned, at around 1 p.m., the author's son caught him from behind, and A. struck him on the head using a metal tube. The guard fell, and D. continued to strike him on the head with the tube. The author's son and D. gave additional blows. The guard died as a result of his injuries.

4.3 According to the Supreme Court, the guilt of the author's son was established not only by his confessions during the preliminary investigation, which were confirmed partly by him in court, but also by the depositions of his co-accused, the testimonies of several witnesses, reports on the examination of the crime scene, evidence seized, medical forensic expert's conclusions, biological expert's conclusions, as well as other evidence examined in court.

4.4 As to the author's claims in the present communication, the Supreme Court notes, first, in respect to confessions that were allegedly obtained under coercion during the preliminary investigation, that R.A. was interrogated on 19 October and 27 November 2002. On those two occasions, he fully admitted his involvement in the murder, in the presence of his privately hired lawyers M. and U., in conditions that were free of any form of coercion. The Supreme Court notes that neither the author's son nor his lawyers have ever complained throughout the investigation about the use of torture or other forms of inhuman or degrading treatment. Furthermore, the criminal case file does not contain any record in this respect.

4.5 The Supreme Court further rejects as groundless the author's allegations that the court was biased and ignored witnesses' testimonies. It contends that during the first meeting of the trial court, six witnesses testified in court. Each testimony was given due legal assessment and served as basis to conclude that the accused was guilty.

4.6 As to the author's allegations in respect of the broadcast "The Ministry of Internal Affairs informs", the Supreme Court affirms that the fact that it was affirmed in a television broadcast that the author's son was a criminal does not mean that he really was one. The author's son could only be recognized as a criminal by a court sentence.

4.7 As to the author's allegations that his son was not informed of his charges under article 165 of the Criminal Code, the Supreme Court affirms that the author's son was indeed charged under this provision on 27 November 2002, and this count was maintained following additional inquiries, on 28 June 2003.

4.8 The Supreme Court concludes that in the light of the above, it does not believe that the rights of R.A. under the Covenant have been violated.

4.9 In its submission, the General Prosecution Office also recalls extensively the facts and the proceedings of the case. It contends that the criminal responsibility of the author's son was grounded. It also notes that neither the author's son nor his lawyers ever complained, during the investigation or in court, about any use of unlawful methods of

investigation by officials. The legal qualification of the son of the acts committed by the author's son was correct. No violation of the criminal procedure legislation occurred during the examination of the case in court.

#### **Author's comments on the State party's observations**

5.1 The author presented his comments on the State party's submission on 6 July 2009. He reiterates that the investigators forced his son to confess guilt in the murder. According to him, in their replies, neither the Supreme Court nor the General Prosecutor's Office refute his claim that his son was forced to confess his guilt of the murder. Even if during the investigation his son confessed in the presence of a lawyer, his confessions were obtained while he was in custody, and the State party has not presented any evidence to show that his son was not subjected to coercion. According to the author, a State party to the Covenant has a responsibility to investigate acts of torture, but in the present case no thorough investigation took place. According to the author, the fact that neither his son nor his lawyer ever complained about torture does not mean that no torture did take place.

5.2 The author finally explains that during the television broadcast of 17 October 2002, his son and his son's co-accused were not designated as suspects but as criminals who had committed murder and theft.

#### **Additional observations by the State party**

6. By note verbale of 21 October 2009, the State party reiterated in detail its previous observations.

#### **Issues and proceedings before the Committee**

##### *Consideration of admissibility*

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee notes, as required by article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under any other international procedure of investigation or settlement.

7.3 The Committee notes the author's claim that the investigators forced his son to confess his guilt in a murder, in violation of article 7 of the Covenant. The State party has denied these allegations as groundless, and pointed out that no such allegations were ever formulated by the author's son or by his defence lawyers during the preliminary investigation or in court. In the absence of any other pertinent information on file in this respect, including a description of the alleged acts of ill-treatment or torture and of those who allegedly inflicted them, or any medical records in this regard, and in absence of any explanation from the author as to why these allegations were not raised before the competent authorities at the time, the Committee concludes that this part of the communication is insufficiently substantiated, for purposes of admissibility, and is therefore inadmissible under article 2 and article 5, paragraph 2 (b), of the Optional Protocol.

7.4 The author has also claimed, in general terms, violations of article 14, paragraph 1, as his son's trial allegedly comported a number of irregularities, the court failed to take into consideration a number of evidence and testimonies and refused to call a number of witnesses. The Committee notes that the State party has replied that no procedural violations of the rights of the author's son have occurred in the present case. It further notes that the author's allegations lack in precision and substantiation and tend to challenge

mainly the manner in which the courts accepted and assessed evidence. The Committee reiterates its jurisprudence that it is generally for the courts of States parties to evaluate facts and evidence in a particular case, unless it can be demonstrated that the evaluation was clearly arbitrary or amounted to a denial of justice.<sup>3</sup> In the absence of any other pertinent information on file in this respect, the Committee considers that these particular allegations have been insufficiently substantiated, for purposes of admissibility, and, accordingly, this part of the communication is inadmissible under article 2 of the Optional Protocol.

7.5 The author has also alleged that his son's presumption of innocence was violated, as he was portrayed as a criminal in a TV broadcast, guilty of theft and murder. The Committee notes that nothing in the case file suggests that this allegation was ever raised in court. In the circumstances, and in the absence of any other pertinent information on file, the Committee decides that this part of the communication is insufficiently substantiated, for purposes of admissibility, and is therefore inadmissible under article 2 and article 5, paragraph 2 (b), of the Optional Protocol.

7.6 In light of the above findings, the Committee does not consider it necessary to examine separately the author's remaining allegations under article 6 of the Covenant.

8. The Human Rights Committee therefore decides:

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

(b) That the present decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

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<sup>3</sup> Communication No. 541/1993, *Simms v. Jamaica*, decision on inadmissibility adopted on 3 April 1995, para. 6.2.



**D. Communication No. 1343/2005, *Dimkovich v. Russian Federation*  
(Decision adopted on 26 July 2010, ninety-ninth session)\***

<i>Submitted by:</i>	Bogdan Dimkovich (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Russian Federation
<i>Date of communication:</i>	28 August 2004 (initial submission)
<i>Subject matter:</i>	Alleged violation of a right to obtain examination of a witness
<i>Procedural issue:</i>	Evaluation of facts and evidence
<i>Substantive issue:</i>	Right to obtain examination of a witness
<i>Articles of the Covenant:</i>	14, paragraph 3 (e)
<i>Article of the Optional Protocol:</i>	2

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

*Meeting on 26 July 2010,*

*Adopts the following:*

**Decision on admissibility**

1. The author of the communication is Mr. Bogdan Dimkovich, a citizen of the Russian Federation, born in 1959. He claims to be the victim of a violation by the Russian Federation of article 14, paragraph 3 (e), of the Covenant. The Optional Protocol came into force for the State party on 1 January 1992. He is unrepresented.

**The facts as presented by the author**

2.1 In August 2000, the author was charged under article 264 of the Criminal Code for negligent driving and causing a serious injury, by overtaking another vehicle in dangerous circumstances which resulted in a collision. During the proceedings at Belorechenski Regional Court on 11 October 2001 and 29 November 2001, the author made a written request to call and examine one Mr. Komzarov, allegedly an eyewitness of the accident, whose testimony, he believes, would support his account. However, the request was denied. On 3 December 2001, the author was found guilty and sentenced to six months of correctional labour.

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

2.2 The author submits that the evidence against him consisted mainly of the statements by the driver of the other vehicle involved in the accident, by his passenger, by the author and by the author's wife. He claims that Mr. Komzarov was available to give testimonies throughout the duration of the hearing. The author first requested to call Mr. Komzarov as a witness at the beginning of the court hearing, which was on 11 October 2001. The Court rejected the request allegedly because the author had not previously stated that the person in question had in fact witnessed the accident.

2.3 The author filed an appeal with the Krasnodarsk Regional Court, in which he sought to have his conviction overturned on a number of grounds, including the lower court's refusal to allow him to call and examine Mr. Komzarov. On 23 January 2002, the court dismissed his appeal, but made no reference to the author's complaint that the witness was not called. The author then filed an application for supervisory review with the Supreme Court, where again he complained about not being able to call the witness in question. On 28 August 2003, the Supreme Court dismissed the application, but did not refer to his complaint about not being able to call the witness.

2.4 The author claims that in each appeal, the Court stated that the conviction was supported by evidence from a number of sources, including forensic evidence gathered from the scene of the accident, and the facts that the author had not disputed.

### **The complaint**

3. The author claims that his right under article 14, paragraph 3 (e) has been violated as he was not allowed to obtain the examination of the witness Mr. Komzarov.

### **State party's observations**

4.1 On 21 June 2005, the State party reiterated that the author was found guilty of violating the traffic rules and rules of transport exploitation under section 264 of the Criminal Code and sentenced to six months of correctional labour with 10 per cent withdrawal from the salary. On 19 August 2000, the author, while driving his vehicle M 2141 and overtaking the vehicle ZAZ, went onto the opposite lane, where it collided with the vehicle GAS 31029. As a result, the wife of the author was injured.

4.2 The State party submits that the circumstances of the crime were established on the basis of an inspection of the accident scene, testimonies by the parties and conclusions of auto and forensic expertise. The court sentence was confirmed by the cassation court. It submits that the main argument of the author is that the court illegally denied his request to examine the witness Mr. Komzarov, thus his sentence is illegal. It argues that the author's requests during the court proceedings were considered in accordance with the Criminal Procedure Code, which was in force at the time. From the explanations given by Mr. Komzarov during the pretrial investigation, it was inferred that he did not witness the accident. At the beginning the request for examination of Mr. Komzarov was filed by the author's wife, who at the same time confirmed that he was not an eyewitness.

4.3 The State party confirms that during the court proceedings on 29 November 2001, the author requested the examination of Mr. Komzarov to confirm the misconduct of the driver of the ZAZ vehicle, which was in front of the author's vehicle during the accident. It submits that in a situation of danger, a driver should take all measures to reduce the speed of his vehicle. In the circumstances of the case, the author should have kept a distance from the vehicle in front and reduced his speed. The case materials show that the author signed the detailed scheme of the accident. Neither during the pretrial investigation nor during the court proceedings did the author claim that the scheme was imprecise or incorrect. Instead he confirmed that he agreed with it.

4.4 The State party submits that under article 14, paragraph 3 (e), of the Covenant the state authorities are obliged to investigate the evidence in order to establish the circumstances of the crime and the guilt. It argues that the testimony of Mr. Komzarov is irrelevant in the present case and the author's contention in that respect is unfounded.

4.5 The decision of the Collegium of the Krasnodarsk Regional Court dismissing the appeal of the author on 23 January 2002 left the sentence unchanged. The decision of the Supreme Court of 28 August 2003 rejected the appeal of the author under the supervisory review procedure. The State party submits that no violations of the rights of the author during the court proceedings are revealed and that the communication should be declared inadmissible.

#### **Author's comments on the State party's observations**

5.1 On 3 August 2005, the author submitted his comments on the State party's observations and claimed that the State party acknowledged the fact that the court rejected his requests to call Mr. Komzarov to give evidence, however the State party did not recognize that this constituted a violation of his right. He refers to the statement by the State party that Mr. Komzarov was not an eyewitness of the accident, and claims that the State party's arguments do not have a legal basis, as under the Criminal Procedure Code, one cannot refer to circumstances that have not been examined during the court proceedings and not noted in court transcript. Therefore, the State party cannot assess whether Mr. Komzarov was an eyewitness to the accident or not, as such matter can be examined only by a court.

5.2 The author claims that under article 14, paragraph 3 (e), of the Covenant, he had a right to obtain examination of witnesses under the same conditions as for witnesses who testified against him. The court invited two witnesses, Beshuk M.A. and Beshuk R.M., who testified against the author. However the court refused to invite Mr. Komzarov, who could have testified that the main guilty person of the accident was the driver of the vehicle ZAZ, who ran away from the crime scene and could not be found.

#### **Additional comments by the State party**

6.1 On 24 May 2006, the State party submitted that the author's reference to the Criminal Procedure Code was distorted. Under section 240, part 3, of the Code the verdict could be based only on those circumstances which were examined during the court proceedings. The decisions that were taken based on petitions initiated during the court proceedings would be liable to be excluded from such consideration. The procedure for such petitions is established under section 271 of the Criminal Procedure Code.

6.2 The State party reiterates that the author was sentenced to six months of correctional works with withdrawal of 10 per cent of the wage. It submits that during the court proceedings the author requested to invite Mr. Komzarov or to read out his testimony given during the pretrial investigation. The court refused, as Mr. Komzarov was not included in the list of persons who needed to be called to the court proceedings. Besides, the author did not inform the court whether Mr. Komzarov was in fact a witness of the accident or whether he could give testimony on the substance of the charges. Beshuk M.A. and Beshuk R.M. were included in the list as they were the eyewitnesses to the accident and their testimonies were of value as evidence. There was no ground to doubt the credibility of their testimony as they eyewitnessed the accident and gave similar versions of the incident during the pretrial investigation. The case materials also show that Mr. Komzarov was not an eyewitness of the accident. The fact that Mr. Komzarov was not invited to the court proceedings did not in any way affect the completeness or validity of the proceedings. The decision of the Collegium of the Krasnodarsk Regional Court of 23 January 2002 left the sentence unchanged.

## Issues and proceedings before the Committee

### *Consideration of admissibility*

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant. The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the matter is not being examined under another procedure of international investigation or settlement.

7.2 The Committee notes the author's allegations under article 14, paragraph 3 (e), of the Covenant that the court refused to invite and examine the witness Mr. Komzarov, which, in his view, was fundamental to establishing the author's innocence. The Committee also notes the State party's submission that Mr. Komzarov was not an eyewitness to the accident and that is why he was not included in the list of witnesses as required by the procedure. Moreover, the author did not state positively that Mr. Komzarov could give testimony on the substance of the charges. The Committee notes that the author has not provided any explanation on the relevance of Mr. Komzarov's possible testimony to the charges against him. The Committee observes that the author's claims relate primarily to the evaluation of facts and evidence by the State party's courts. It recalls that it is generally for the courts of States parties to evaluate facts and evidence in a particular case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice.<sup>1</sup> The materials before the Committee do not contain sufficient elements to demonstrate that the court proceedings suffered from any such defects. Accordingly, the Committee considers that the author's claim is insufficiently substantiated for purposes of admissibility under article 2 of the Optional Protocol.

8. The Committee therefore decides:

- (a) That the communication is inadmissible under article 2 of the Optional Protocol;
- (b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the report.]

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<sup>1</sup> See, inter alia, communication No. 541/1993, *Simms v. Jamaica*, decision on inadmissibility adopted on 3 April 1995, para. 6.2.

**E. Communication No. 1471/2006, *Rodríguez Domínguez et al. v. Spain* (Decision adopted on 27 October 2009, ninety-seventh session)\***

<i>Submitted by:</i>	Luis Rodríguez Domínguez and José Neira Fernández (represented by counsel, Emilio Ginés Santidrián)
<i>Alleged victim:</i>	The authors
<i>State party:</i>	Spain
<i>Date of communication:</i>	6 December 2005 (initial submission)
<i>Subject matter:</i>	Scope of the remedy of cassation in a criminal case
<i>Procedural issues:</i>	Failure to exhaust domestic remedies; failure to substantiate the claims
<i>Substantive issue:</i>	Right to have the conviction and sentence reviewed by a higher tribunal
<i>Articles of the Covenant:</i>	14, paragraph 5
<i>Articles of the Optional Protocol:</i>	2; 5, paragraph 2 (b)

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

*Meeting on 27 October 2009,*

*Adopts the following:*

**Decision on admissibility**

1.1 The authors of the communication, dated 6 December 2005, are Luis Rodríguez Domínguez and José Neira Fernández, Spanish citizens born in 1952 and 1951, respectively. They claim to be victims of a violation by Spain of article 14, paragraph 5, of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The authors are represented by counsel, Emilio Ginés Santidrián.

1.2 On 11 August 2006, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, agreed to the State party's request that the admissibility of the communication should be considered separately from the merits.

**The facts as submitted by the authors**

2.1 On 13 April 1998, the Audiencia Nacional (National High Court) sentenced Luis Rodríguez Domínguez, Chief Inspector of the National Police Force in Barcelona, to four years' imprisonment and a fine of 50 million pesetas (€300,000), with a further three

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\* The following members of the Committee took part in the consideration of the communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

months' imprisonment should he fail to pay the fine owing to insolvency, for an attempted offence against public health (drug trafficking) and to a month and a day of detention for unlawful possession of firearms. José Neira Fernández, a businessman in the hotel and catering industry, was also sentenced for an attempted offence against public health to six years' imprisonment and a fine of 50 million pesetas, without a further term of imprisonment in lieu of the fine. The sentences were handed down in criminal proceedings for drug trafficking in which there were 11 defendants.

2.2 The authors filed a cassation appeal before the Supreme Court in which, among other matters, they contested the assessment of the facts with regard to the charges brought against them by the Audiencia and the violation of the right to presumption of innocence on the grounds that the sentence and conviction were based on insufficient evidence. The appeal was rejected in a judgement of 13 March 2000.

2.3 The authors have provided the Committee with a copy of the cassation judgement. Regarding the assessment of the facts, the Supreme Court referred to the findings of the Audiencia, according to which the authors had engaged in a series of operations in order to obtain cocaine for purposes of trafficking, although it had not been proven that this undertaking had actually been carried through. The Audiencia, referring to the case law of the Supreme Court, understood that these acts were punishable as an attempted offence against public health. The authors claim that, in his brief to the Supreme Court, the prosecutor argued that the alleged facts did not fit the definitions of any of the forms of this offence established in the Criminal Code because no amount of any drug had been used. Regarding this argument, the Supreme Court recalled its case law, according to which "an attempt to acquire possession which takes the form of actions conducive to this end shall be punishable as an attempted offence when possession is not obtained for reasons beyond the person's control".

2.4 Concerning the possible violation of the right to presumption of innocence, Mr. Rodríguez Domínguez told the Supreme Court that this right had been violated because the Audiencia had inferred that he had taken part in the acts on the basis of nothing more than a telephone conversation. The Supreme Court examined the content of the conversation and agreed with the Audiencia's assessment.

2.5 The authors filed an application for amparo before the Constitutional Court, and this was also rejected. Mr. Rodríguez Domínguez stated that his rights to due process, to presumption of innocence and to the principle of legality in criminal proceedings had been violated because the Audiencia Nacional and the Supreme Court had altered the proven facts, as the account of those facts did not reveal any activity that could be characterized as an attempt to commit the offence for which he was ultimately convicted. Moreover, the Supreme Court had not taken into consideration the prosecutor's contention that the facts could not be legally characterized in that way, since they referred to the truncated execution of the offence of drug trafficking. The application for amparo filed by Mr. Neira Fernández claimed that these judgements violated his rights to the inviolability of the home, the confidentiality of communications, due process and presumption of innocence.

### **The complaint**

3. The authors claim that they were deprived of their right under article 14, paragraph 5, of the Covenant to have their conviction and sentence reviewed by a higher court. They state that the prosecutor of the Supreme Court asked for an acquittal owing to the lack of sufficient evidence for the conviction. If Spanish criminal procedure had provided for a review by a higher court with all the relevant guarantees, including a re-examination of all the evidence, facts and points of law, then, when the prosecutor asked for an acquittal, the authors would not have been sentenced and convicted, because there would have been no charges brought in the proceedings before the higher court. The court of cassation does not

re-examine the evidence because, by law, it must always refer to the assessment of the evidence made by the court of first instance, in this case the Audiencia Nacional.

#### **State party's observations on admissibility and the merits**

4.1 In a note verbale of 10 July 2006, the State party indicates that the communication should be declared inadmissible. It affirms that, when formulating the cassation appeal before the Supreme Court, the authors did not raise any issues regarding the alleged limitation of the judicial review they were requesting. This point was not raised in the application for *amparo* either, even though the Constitutional Court has repeatedly insisted that the cassation appeal has to be given sufficient scope to comply with the requirements of article 14, paragraph 5, of the Covenant. Consequently, the authors have not exhausted domestic remedies in accordance with article 5, paragraph 2 (b), of the Optional Protocol.

4.2 According to the State party, the authors do not indicate what specific pieces of evidence should have been re-examined but were not. Their complaint bears no substantive relationship to article 14, paragraph 5, of the Covenant. Rather, it appears to involve an attempt to introduce a new element in the Supreme Court. However, there is no new element, and the Supreme Court confirmed the judgement delivered by the Audiencia Nacional without making any factual changes. In addition, the Court ruled on all the questions raised by the authors. The State party therefore argues that, in accordance with article 3 of the Optional Protocol, the communication should be declared inadmissible on the grounds that the authors are availing themselves of the Covenant in a way that is clearly an abuse of its purpose.

#### **Authors' comments**

5. On 12 February 2009, the authors reiterated that, if the Spanish legal system had guaranteed the right to have a conviction and sentence reviewed by a higher court, they would have been acquitted by the appellate court since, according to the prosecutor of the Supreme Court, there was clearly insufficient evidence for the Audiencia Nacional to convict them. Under the Spanish system, it is the prosecutor who must pursue the charges and, in the absence of charges, the court cannot hand down a conviction.

#### *Consideration of admissibility*

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

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

6.3 The Committee notes the State party's argument that domestic remedies were not exhausted because the alleged violation of the Covenant submitted to the Committee was never brought before the domestic courts. However, the Committee recalls its established jurisprudence, which indicates that it is necessary to exhaust only those remedies that have a reasonable prospect of success.<sup>1</sup> An application for *amparo* had no prospect of success in relation to the alleged violation of article 14, paragraph 5, of the Covenant, and the Committee therefore considers that domestic remedies have been exhausted.

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<sup>1</sup> See, for example, communications No. 1095/2002, *Gomariz Valera v. Spain*, Views adopted on 22 July 2005, para. 6.4; No. 1101/2002, *Alba Cabriada v. Spain*, Views adopted on 1 November 2004, para. 6.5; and No. 1293/2004, *de Dios Prieto v. Spain*, decision adopted on 25 July 2006, para. 6.3.

6.4 The authors claim that they were deprived of their right under article 14, paragraph 5, of the Covenant to have their conviction and sentence reviewed by a higher court because Spain's remedy of cassation is not an appeal procedure and does not permit re-examination of the evidence on which the sentence was based. However, the Committee observes that a reading of the Supreme Court's decision clearly indicates that the Court examined all the grounds on which the authors filed their appeal, including those relating to the characterization of the facts as an attempted offence against public health and the telephone conversation that, according to the Audiencia, proved Mr. Rodríguez Domínguez's participation in these events. The Supreme Court concluded, in keeping with its case law, that the Audiencia Nacional's assessment of those elements had been correct. Consequently, the Committee considers that the complaint relating to article 14, paragraph 5, has not been sufficiently substantiated for purposes of admissibility and concludes that it is therefore inadmissible under article 2 of the Optional Protocol.<sup>2</sup>

7. Consequently, the Committee decides:

- (a) That the communication is inadmissible under article 2 of the Optional Protocol;
- (b) That this decision shall be communicated to the authors and to the State party.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

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<sup>2</sup> See communications No. 1490/2006, *Pindado Martínez v. Spain*, decision adopted on 30 October 2008, para. 6.5, and No. 1489/2006, *Rodríguez Rodríguez v. Spain*, decision adopted on 30 October 2008, para. 6.4.



**F. Communication No. 1522/2006, *N.T. v. Kyrgyzstan*  
(Decision adopted on 19 March 2010, ninety-eighth session)\***

<i>Submitted by:</i>	N.T. (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Kyrgyzstan
<i>Date of communication:</i>	26 June 2006 (initial submission)
<i>Subject matter:</i>	Complaints-handling system in public administration
<i>Procedural issue:</i>	Non-substantiation
<i>Substantive issue:</i>	Right to a fair hearing
<i>Articles of the Covenant:</i>	2, and 14, paragraph 1
<i>Article of the Optional Protocol:</i>	2

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

*Meeting on 19 March 2010,*

*Adopts the following:*

**Decision on admissibility**

1. The author of the communication is N.T., a citizen of Kyrgyzstan, who claims to be the victim of violations by the State party of his rights under articles 2 and 14, paragraph 1, of the Covenant. The author is not represented.

**The facts as presented by the author**

2.1 On 15 February 2006, the author approached the Ministry of Finance to hand in a complaint against the activities of the Ministry. He was not allowed to enter the building of the Ministry, and was told to place his complaint in a box installed for such purposes at the entrance hall. The author refused. He phoned the department of the Ministry responsible for handling complaints and demanded that his complaint be received in person and that he be provided with a receipt and a registration number. The officer of the department refused to accept the complaint in person, explaining that the Minister's special regulation set an order for submission of individual complaints, whereby complaints should be placed in the box at the building's entry hall.

2.2 Finally, the author placed his complaint in the box and the following day, he contacted the officer of the Department dealing with complaints, again asking him for a

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina Mme. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

registration number for his complaint. The officer replied that the author's complaint had not been received.

2.3 On 16 February 2006, the author sent a letter to the Ministry by post claiming that the complaints handling system of the Ministry is at the discretion of its officers and allows them to disregard complaints. The Ministry responded that the system did not violate any laws and referred to the high professional ethics of civil servants.

2.4 On 22 March 2006, the author filed a complaint with the Bishkek Inter-District Court challenging the legality of the procedure. On 5 April 2006, the Bishkek Inter-District Court dismissed his complaint, as unsubstantiated.

2.5 On 12 April 2006, the author filed an appeal with the Bishkek City Court. On 25 May 2006, the Bishkek City Court upheld the decision of the court of the first instance. This decision of the Bishkek City Court, according to the author, is final and cannot be appealed any further.

### **The complaint**

3. The author claims that his rights under articles 2, paragraph 3, and 14, paragraph 1, of the Covenant were violated, as his complaints were ignored by the courts.

### **State party's failure to cooperate**

4. The State party was invited to present its observations on the admissibility or/and the merits of the communication in November 2006, and reminders were sent in this respect in February 2009 and October 2009. The Committee notes that this information has not been received. The Committee regrets the State party's failure to provide any information with regard to admissibility or the substance of the authors' claims. It recalls that under the Optional Protocol, the State party concerned is required to submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that it may have taken. In the absence of a reply from the State party, due weight must be given to the authors' allegations, to the extent that these have been properly substantiated.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant. The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the matter is not being examined under another procedure of international investigation or settlement.

5.2 The Committee notes the author's allegations of a violation of article 2, paragraph 3, of the Covenant in relation to his right to an effective remedy and observes that the provisions of article 2 of the Covenant, which lay down general obligations for State parties, cannot, in isolation, give rise to a claim in a communication under the Optional Protocol.<sup>1</sup> The Committee considers that the author's contentions in this regard are inadmissible under article 2 of the Optional Protocol.

5.3 The author claims that his rights under article 14, paragraph 1, of the Covenant were violated because his complaint against the complaints handling procedure of the Ministry of

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<sup>1</sup> Communication No. 316/1988, *C.E.A. v. Finland*, decision adopted on 10 July 1991, para. 6.2.

Finance was ignored by the domestic courts. In the absence of any further information or explanations in this respect, the Committee considers that the author has failed to sufficiently substantiate his claim, for purposes of admissibility, and declares this part of the communication inadmissible under article 2 of the Optional Protocol.

6. The Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**G. Communication No. 1523/2006, *Tiyagarajah v. Sri Lanka*  
(Decision adopted on 19 March 2010, ninety-eighth session)\***

<i>Submitted by:</i>	Chelliah Tiyagarajah (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Sri Lanka
<i>Date of communication:</i>	15 June 2006 (initial submission)
<i>Subject matter:</i>	Unfair court proceedings initiated by the author after an unfair dismissal
<i>Procedural issues:</i>	Non-substantiation of allegation; non-exhaustion of domestic remedies
<i>Substantive issues:</i>	Unfair trial; discrimination
<i>Articles of the Covenant:</i>	14, paragraph 1; 26
<i>Articles of the Optional Protocol:</i>	2; 5, paragraph 2 (b)

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

*Meeting on 19 March 2010,*

*Adopts the following:*

**Decision on admissibility**

1. The author of the communication is Mr. Chelliah Tiyagarajah, a Sri Lankan citizen, residing in Sri Lanka, belonging to the ethnic Tamil minority. He claims to be a victim of violations by the State party of articles 14, paragraph 1, and 26, of the International Covenant on Civil and Political Rights. He is not represented. The Covenant and the Optional Protocol entered into force for the State party on 11 September 1980 and 3 January 1998, respectively.

**Factual background**

2.1 The author was employed by the State-owned Sri Lanka Broadcasting Corporation (hereinafter SLBC),<sup>1</sup> based in Colombo, from 1967 to 1998. In 1971, he was appointed to the post of sorter of letters and other correspondence, as a “grade five” labourer. Although he subsequently applied for several promotions, he never obtained any.

2.2 The author indicates that in both State and private companies, optional retirement can be chosen from the age of 55, while compulsory retirement is fixed at the age of 60

\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O’Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

<sup>1</sup> The SLBC was established pursuant to the Ceylon Broadcasting Corporation Act, No. 37 of 1966.

years. On 31 July 1997, the SLBC Board of Directors adopted a policy decision, to the effect that no person would be employed beyond the age of 55 years as of that date. This decision was shared with employees via Staff Notice No. SLBC-2489 of 8 August 1997, which decided to “confine the extension of service of employees of the corporation beyond the age of 55 years up to 31.12.1997”.

2.3 On 17 February 1998, the author reached the age of 55 years, and asked for an extension of his service, which was rejected by the SLBC.<sup>2</sup> The author claims that termination of his service was without just cause, unfair and unreasonable. He further states that the SLBC employed several persons, even after they reached the age of 60.

2.4 The author filed a legal action under the Industrial Disputes Act<sup>3</sup> before the Labour Tribunal. On 10 November 2003, the Tribunal decided that termination of the author’s service was unfair, and ordered his employer to pay him the equivalent of one year’s salary,<sup>4</sup> as compensation. The SLBC appealed the Labour Tribunal decision before the High Court of the Western Province of Sri Lanka. On 7 January 2005, the High Court set aside the Labour Tribunal’s Order, on the ground that a similar case filed before the Supreme Court of Sri Lanka by other employees of the SLBC had been dismissed by the Supreme Court.<sup>5</sup> In that case, 14 applicants, employees of the SLBC, had filed a fundamental rights application against the SLBC Staff Notice No. SLBC-2489. They argued that the Notice denied them their right to equal protection of the law, guaranteed by the Constitution of Sri Lanka. The Supreme Court found that the 14 petitioners had failed to establish a prima facie case, and therefore refused to grant leave to appeal. Since the High Court found the author’s complaint to be similar, in substance, to the Supreme Court case mentioned above, it felt bound to rule against the author.

2.5 The author lodged an appeal against the High Court’s decision with the Supreme Court of Sri Lanka, which was dismissed on 28 April 2005, as the court deemed that there was no basis to grant leave to appeal.

2.6 The author contends that his action was based on the wrongful termination of his employment under the Industrial Disputes Act, whereas the Supreme Court decision, on the basis of which the High Court rejected his claim, dealt with an action on fundamental rights for alleged unequal treatment. He adds that the dismissal of his appeal by the Supreme Court left him without access to a judicial or administrative remedy.

2.7 The author further claims that with the Supreme Court’s decision not to grant leave to appeal, he realized that he had been discriminated against, since he belongs to the Tamil minority. He affirms that his surname is unmistakably identified as Tamil, and that both the High Court and the Supreme Court are located in the South of Sri Lanka where the Tamils represent a minority. Hence, the author contends that he has been a victim of discrimination on the basis of race.

### **The complaint**

3. The author claims that by ruling on the basis of a Supreme Court decision, the cause of action of which differed from his own action, the High Court violated his right to a fair trial, in breach of article 14, paragraph 1, of the Covenant. He further claims that he was denied relief by the High Court and the Supreme Court because he was discriminated

<sup>2</sup> Presumably on the basis of the SLBC Staff Notice No. SLBC-2489, which entered into force on 1 January 1998.

<sup>3</sup> No. 43 (1950).

<sup>4</sup> Rs. 74,532, i.e. US\$ 7,400.

<sup>5</sup> Case No. 75/98.

against on the basis of being a member of the Tamil ethnic minority, in violation of article 26 of the Covenant.

#### **State party's failure to cooperate**

4. By notes verbales of 27 November 2006, 29 July 2008, 26 February 2009 and 12 October 2009, the State party was requested to submit to the Committee information on the admissibility and merits of the communication. The Committee notes that this information has not been received, and regrets the State party's failure to provide any information with regard to the admissibility or the substance of the author's claims. The Committee recalls that under the Optional Protocol, the State party concerned is required to submit to the Committee written explanations or statements, clarifying the matter and the remedy, if any, it may have taken. In the absence of a reply from the State party, due weight must be given to the author's allegations, to the extent that they have been properly substantiated.

#### **Issues and proceedings before the Committee**

##### *Consideration of admissibility*

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant. The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the matter is not being examined under another procedure of international investigation or settlement.

5.2 The Committee notes the author's claim that by ruling on the basis of a Supreme Court decision which differed from his own action, the High Court violated his right to a fair trial, in breach of article 14, paragraph 1, of the Covenant. The Committee observes that the State party's Supreme Court considered a case similar, in substance, to the author's. In that case, 14 employees of the SLBC had filed a fundamental rights application against a number of respondents, complaining about the implementation of SLBC Staff Notice No. 2489. The Supreme Court ruled that the SLBC refusal to grant employees an extension of service beyond 55 years was not in breach of their rights to equal protection of the law, and therefore rejected their leave to appeal. In the present situation, the High Court applied the Supreme Court ruling to the author's case, as a binding precedent. The Committee notes that other than stating that the subject matter of the author's claims differed from those of the other employees, he has not substantiated any further on how they differed. The Committee recalls its jurisprudence that it is generally for the courts of State parties to the Covenant to review the facts and evidence, or the application of domestic legislation, unless it can be shown that such review or application was clearly arbitrary, amounted to a denial of justice, or that the court otherwise violated its obligation of independence and impartiality.<sup>6</sup> In the present case, the author failed to demonstrate that the application, by the High Court of the Western Province of Sri Lanka, of a Supreme Court precedent, as *res judicata*, amounted to arbitrariness or to a denial of justice on his behalf. This claim is therefore inadmissible under article 2 of the Optional Protocol.

5.3 Regarding the author's claim under article 26, arguing discrimination on the basis of race, as he is a member of the Tamil minority, the Committee notes that the author failed to provide it with sufficient information on comparable cases, so as to demonstrate that either

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<sup>6</sup> See, for example, communications No. 1537/2006, *Gerashchenko v. Belarus*, decision on inadmissibility adopted on 23 October 2009, para. 6.5; No. 1403/2005, *Gilberg v. Germany*, decision on inadmissibility adopted on 25 July 2006, para. 6.6.

the termination of his employment, or the fact that the Supreme Court denied him leave to appeal, amounted to discrimination or unequal treatment, based on race, under this provision. The Committee thus finds that the author has failed to substantiate sufficiently, for purposes of admissibility, any claim of a potential violation of article 26, on the ground of race. As such, this part of the claim is also inadmissible under article 2 of the Optional Protocol.

5.4 The Human Rights Committee therefore decides:

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

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

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**H. Communication No. 1537/2006, *Gerashchenko v. Belarus*  
(Decision adopted on 23 October 2009, ninety-seventh session)\***

<i>Submitted by:</i>	Yekaterina Gerashchenko (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	13 December 2006 (initial submission)
<i>Subject matter:</i>	Allegation of procedural violations
<i>Procedural issues:</i>	Insufficient substantiation; evaluation of facts and evidence; non-exhaustion of domestic remedies
<i>Substantive issues:</i>	Fair trial; discrimination
<i>Articles of the Covenant:</i>	14 and 26
<i>Articles of the Optional Protocol:</i>	2 and 5, paragraph 2 (b)

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

*Meeting on 23 October 2009,*

*Adopts the following:*

**Decision on admissibility**

1. The author of the communication is Ms. Yekaterina Gerashchenko, a citizen of Belarus born in 1950. She claims to be a victim of a violation by Belarus of her rights under articles 14 and 26 of the Covenant. The Optional Protocol entered into force for the State party on 30 December 1992. The author is unrepresented.

**The facts as presented by the author**

2.1 From 2001 to April 2003, the author worked as a guard in a collective agricultural firm in Gomel, Belarus. During her work, she witnessed repeatedly that staff from the administration of the firm was involved in stealing firm's products.

2.2 On 29 July 2002, the author also witnessed the chief of the firm's guards, Mr. Rakushevich severely beating a former employee. After she denounced the facts, she received threats that she would be fired from her job. On 14 April 2003, while the author was at work, she received a visit by Mr. Rakushevich. Ten minutes after he left, she was approached by two policemen, friends of Mr. Rakushevich, the deputy to Mr. Rakushevich and a cleaner named Ms. Kuzmenko. She claims that they accused her of being drunk and

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\* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.



Ms. Kuzmenko tested her with an alcohol tester. The author claims that day she had not drunk and had only taken a medication for her heart, which contained alcohol. The author submits that Ms. Kuzmenko was not qualified to do the alcohol test and provided copy of a letter from the Ministry of Health in that regard. The author requested to be taken to a medical centre, but her request was ignored. She also asked the administration to be allowed to leave her post, so that she could go to a medical centre, but her request was rejected again. She claims that she could not leave her post without the administration's permission as, in such case, she could be fired for being absent during working hours. After the incident she worked for three more consecutive days. She argues that if the allegations of her being drunk were true, she would have been immediately removed from her post. She was dismissed on 18 April 2003 and she claims that the trade union, which she belonged to, was not informed of her dismissal.

2.3 The author complained to the Gomel District Court about her dismissal. On 4 April 2003, the court rejected her complaint, confirming that her dismissal was lawful. The author claims that the court ignored the fact that Ms. Kuzmenko did not have a required medical qualification to do the alcohol test. It allegedly argued that she could have undergone another test at a medical establishment if she did not agree with the test results.

2.4 The author appealed the decision of the Gomel District Court to the Gomel Regional Court. Separately from her appeal, on 9 September 2003, the Gomel District Prosecutor also introduced a cassation motion to the Gomel Regional Court against the decision of the Gomel District Court, and requested her re-employment, and returning her case for further investigation. On 30 September 2003, the Gomel Regional Court upheld the decision of the Gomel District Court. On an unspecified date, the author complained under a supervisory review procedure to the Supreme Court of Belarus. On 24 March 2004, the Court dismissed her appeal.

### **The complaint**

3.1 The author claims that the alcohol test was carried out in violation of established procedures, as it was made by a cleaner with no medical qualifications. This aspect was allegedly ignored by the court, which raises issues under article 14, paragraph 1, of the Covenant.

3.2 The author does not provide any information related to her allegations of violation of article 26 of the Covenant.

### **State party's observations on admissibility and merits**

4.1 On 22 February 2007, the State submits, that the author has not exhausted domestic remedies, since, under section 436 of the Civil Procedure Code, a supervisory review appeal can be submitted within three years after the court's decision enters into force. The author did not submit such an appeal to the Prosecutor's office.

4.2 The State party reiterates that the author was fired from her job under section 42, paragraph 7, of the Labour Code for being drunk during her working hours. It contends that her state of inebriation was confirmed by evidence examined during the court proceedings, including witness statements and the result of an alcohol test. Therefore, no violation of the Covenant took place in connection with the termination of her employment contract.

4.3 The same arguments were reiterated by the State party in its submission of 10 June 2008.

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

5.1 On 23 June 2006, the author refutes the State party's argument regarding non-exhaustion of domestic remedies and submits that she appealed under the supervisory review procedure to the Supreme Court, but the appeal was rejected. She argues that an appeal to the Prosecutor's office under the supervisory review procedure is optional and not mandatory, as the Prosecutor's office is not responsible for review or annulment of court decisions.

5.2 On 28 July 2008, the author submits that the court relied mainly on testimonies by the witnesses proposed by the defendant, namely the local policemen, friends of Mr. Rakushevich, and Ms. Kuzmenko. The author claims that the letter from the Ministry of Health, which states that such tests can be conducted only by medical personnel, was ignored by the court.

5.3 The author adds that the court materials included a document which confirms that the alcohol tester used to test her level of alcohol intake did not undergo a technical examination to verify that it functioned properly. She claims that her case was fabricated.

**Issues and proceedings before the Committee***Consideration of admissibility*

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes, as required by article 5, paragraph 2 (a) and (b), of the Optional Protocol, that the same matter is not being examined under any other international procedure of investigation or settlement.

6.3 The Committee notes the State party's argument that the author failed to appeal to the Prosecutor's office under the supervisory review procedure of section 436 of the Civil Procedure Code. The author contests this argument, stating that an appeal to the Prosecutor's office under the supervisory review procedure is optional. The Committee recalls its previous jurisprudence, according to which supervisory review procedures against court decisions which have entered into force constitute an extraordinary mean of appeal which is dependent on the discretionary power of a judge or prosecutor. When such review takes place, it is limited to issues of law only and does not permit any review of facts and evidence.<sup>1</sup> In such circumstances and also noting that the author has appealed to the Supreme Court, which has rejected her appeal, the Committee considers that, in the present case, it is not precluded, for purposes of admissibility, by article 5, paragraph 2 (b), from examining the communication.

6.4 The Committee notes the author's claim that her right under article 26 of the Covenant was violated. However, the author does not provide information to illustrate her claims in this respect. Accordingly, this part of the communication is deemed inadmissible, as insufficiently substantiated, under article 2 of the Optional Protocol.

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<sup>1</sup> See the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI, para. 50: "A system of supervisory review that only applies to sentences whose execution has commenced does not meet the requirements of article 14, paragraph 5, regardless of whether such review can be requested by the convicted person or is dependent on the discretionary power of a judge or prosecutor." See also, for example, communication No. 836/1998, *Gelazauskas v. Lithuania*, Views adopted on 17 March 2003.

6.5 With regard to the alleged violation of article 14, paragraph 1, the Committee notes the author's claim that the court relied mainly on the testimonies of the witnesses invited by the defendant as well as her claim of irregularities in the manner in which the alcohol test was carried out. The Committee also notes the State party's submission that her state of inebriation was confirmed by evidence examined during the court proceedings. The Committee observes, however, that the author's claims relate to the evaluation of facts and evidence by the State party's courts. It recalls that it is generally for the courts of States parties to evaluate facts and evidence in a particular case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice.<sup>2</sup> The material before the Committee does not contain any elements to demonstrate that the court proceedings suffered from such defects. Accordingly, the Committee considers that the author has failed to substantiate her claims of a violation of article 14, paragraph 1, under article 2 of the Optional Protocol, and nor in this respect can the communication therefore be admitted.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That the present decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

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<sup>2</sup> See, inter alia, communication No. 541/1993, *Simms v. Jamaica*, decision on inadmissibility adopted on 3 April 1995, para. 6.2.

**I. Communication No. 1541/2007, *Gaviria Lucas v. Colombia*  
(Decision adopted on 27 October 2009, ninety-seventh session)\***

<i>Submitted by:</i>	Luis Carlos Gaviria Lucas (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Colombia
<i>Date of communication:</i>	1 November 2006 (initial submission)
<i>Subject matter:</i>	Revocation of the author's disability pension
<i>Procedural issues:</i>	Lack of substantiation; non-exhaustion of domestic remedies
<i>Substantive issues:</i>	Violation of the right to due process; persecution of the author for being a former trade unionist
<i>Articles of the Covenant:</i>	14, paragraph 1; 22
<i>Articles of the Optional Protocol:</i>	2; 5, paragraph 2 (b)

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

*Meeting on 27 October 2009,*

*Adopts the following:*

**Decision on admissibility**

1. The author of the communication, dated 1 November 2006, is Luis Carlos Gaviria Lucas, a Colombian citizen. He claims that his rights have been violated by Colombia, but invokes no specific article of the Covenant. The Optional Protocol entered into force for the State party on 23 March 1976. The author is not represented by counsel.

**The facts as submitted by the author**

2.1 The author began working at the Cartagena maritime and river terminal of the Government enterprise Puertos de Colombia (COLPUERTOS) on 18 March 1971. Shortly thereafter he sought membership in the enterprise's trade union, SINDICATERMA. In 1987, he was elected president of the Executive Committee of the Colombian National Federation of Dock Workers. While he held that post, he lost the sight in his right eye and suffered a significant impairment in his left eye as a result of a detachment of the retina. The firm's doctors in Bogotá (where COLPUERTOS was headquartered) determined that

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\* The following members of the Committee took part in the consideration of the communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez Cerro, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

In accordance with rule 90 of the Committee's rules of procedure, Mr. Rafael Rivas Posada did not take part in the adoption of this decision.

he had lost more than 66 per cent of his earning capacity and recommended that he receive a disability pension. This decision was announced on 25 April 1991, effective beginning 16 December 1990.

2.2 As a result of the liquidation of COLPUERTOS in 1991, the Government established a Social Liability Fund (FONCOLPUERTOS) to pay the labour-related obligations no longer covered by the company to its workers, including pensions. The Fund was subsequently replaced by the Internal Working Group for the Administration of Social Liabilities of the Former COLPUERTOS. According to the author, this body reviewed his disability status using a consolidated classification manual that was drawn up 10 years after his disability occurred and decided to decrease his disability rating. He notes, however, that the law stipulates that a person's disability must be reviewed using the materials that were in existence on the date that the incident occurred.

2.3 Following this review, in May 2002 the author was informed of an administrative decision decreasing the amount of his pension. Then, on 27 March 2003, the Internal Working Group decided to revoke the pension. The author also states that, in addition to revoking his pension, the Administration requested that he repay the money he received over and above what he was legally owed, amounting to approximately 1 billion pesos.

2.4 The author filed a complaint with the Administrative Court of Bolívar. Over the course of three years, several different courts declined jurisdiction over the case. The author then withdrew that complaint and filed a labour-related one. He also began the process of applying for his retirement pension, since he had completed 21 years of service and was 55 years old. In a decision of 9 June 2006, the Internal Working Group granted him the retirement pension, but deducted from it the debt arising from the disability pension. The author filed a number of claims, including an application for protection against the violation of his fundamental rights, with the Superior Court of the Judicial District of Cartagena (Labour Chamber) with a view to securing the reinstatement of his disability pension. The decision, however, went against him. He also appealed the decision before the Council of State and lodged a claim with the Constitutional Court, both of which also ruled against him.

### **The complaint**

3.1 The author complains that the decision to revoke his pension and to order the repayment of money he had received was not made by a judicial body but by the Internal Working Group. He points out that, under Colombian law, only judges are empowered to revoke, reduce or modify pensions. He asserts that the Internal Working Group exceeded its powers, since it had authority only to review the injury, which had in fact gotten worse, but not to reclassify it.

3.2 The author does not claim a violation of specific provisions of the Covenant. He states, however, that the facts he has described constitute a violation of his right to due process. He also declares that he and many other former members of the executive boards of dock-worker trade unions and former board employees have been persecuted by the Colombian authorities.

### **State party's observations on admissibility and merits**

4.1 On 18 May 2007, the State party argued against the admissibility of the communication. It pointed out that, in the 1990s, the author petitioned a number of circuit labour courts for the recognition of his entitlement to labour-related accruals and adjustments to his disability pension. The judges found in his favour and, in accordance with those rulings, the former Social Liability Fund of COLPUERTOS (FONCOLPUERTOS) issued a number of administrative acts ordering various payments

and the recalculation of his pension. As a result, the author's monthly pension came to exceed the maximum established under Act No. 71 of 1988. In fact, in 2002 it amounted to more than 15 million pesos, when it should have been a little over 5 million.

4.2 According to the State party, the judicial decisions mentioned above should have been subject to the level-of-jurisdiction requirement known as "consultative status" (*grado jurisdiccional de consulta*) provided for in article 69 of the Labour Procedure Code. However, the judges of the circuit labour courts did not abide by this requirement, and this situation was permitted to continue by FONCOLPUERTOS. After the Fund was liquidated and it became apparent that this serious omission had been committed, not only in the author's case but in many other similar cases, the Administrative Chamber of the Higher Council of the Judiciary took measures to ensure that those cases were reviewed and brought into conformity with the law. The decisions of the courts of first instance in the author's favour were consequently revoked, and a number of decisions were handed down establishing that the author had unduly received more than 1 billion pesos. He was therefore ordered to repay the money he had received over and above the legal maximums.

4.3 The State party asserts that, in accordance with the Labour Procedure Code, a remedy could have been sought before the labour courts against the Internal Working Group's decision of 29 April 2002, which adjusted the author's pension in order to bring it into line with the maximums established under Act No. 71 of 1988. The author provides no evidence that he pursued that remedy and gives no information regarding its outcome; nor has the Internal Working Group been notified of any such action brought by the author in relation to this decision.

4.4 The decision of 27 March 2003 revoking the author's pension was taken during the review of his disability status in accordance with article 44 of Act No. 100 of 1993, which stipulates that benefits should be revoked when the pension recipient no longer exhibits the percentage of lost earning capacity necessary to qualify as disabled. The Disability Classification Board of the Bolívar region, in its finding No. 357 of 19 December 2000, determined that the author's loss of earning capacity was equivalent to 62.93 per cent and thus below the 66 per cent level established by the 1989–1990 Collective Labour Agreement, which the Cartagena maritime terminal was bound by. The author could have appealed the Disability Classification Board's decision against him, and he was informed of this possibility in the notification papers. Those remedies were not filed. He could also have challenged the finding before the labour courts, but did not.

4.5 The State party observes that the author's communication indicates that he expects the Committee to act as a court of appeal to deal with matters that were appropriately addressed at the domestic level. It is not the role of the Committee to consider decisions of fact or law taken by the domestic courts or to annul judicial decisions in the manner of an appellate court, but rather to ensure that States provide their citizens with courses of legal action that uphold the principles of due process enshrined in the Covenant. Therefore, this part of the communication is not sufficiently substantiated for purposes of admissibility and is inadmissible under article 2 of the Optional Protocol.

4.6 The State party asserts that the Internal Working Group had the authority to issue the administrative acts it issued in respect of the author. If the author did not agree, he could have filed an action for annulment with the Administrative Disputes Court under article 85 of the Administrative Disputes Code; he did not. The State party therefore concludes that the author did not exhaust domestic remedies.

4.7 On 17 July 2007, the State party submitted its observations on the merits. In its view, the author's communication fails to demonstrate any violation of the rights protected by the Covenant. The State nevertheless takes the liberty of associating the author's

complaints with the rights protected under article 7, article 14, paragraph 1, and article 22, paragraph 1, of the Covenant.

4.8 With regard to a possible violation of the right to due process under article 14, paragraph 1, the State party reiterates that the judicial decisions under which the pension was granted should have been subject to the level-of-jurisdiction requirement known as “consultative status” as provided for in article 69 of the Labour Procedure Code, a requirement with which the circuit labour court judges did not comply. As a result, those decisions were later rescinded by the Labour Case-Backlog Chamber of the Superior Court of the Judicial District of Bogotá in a decision of 15 February 2001.

4.9 The State party cites the jurisprudence of the Worker Appeals Chamber of the Supreme Court, whereby, under the terms of article 69 of the Labour Procedure Code, the consultative level-of-jurisdiction requirement shall apply, *inter alia*, in cases where the decision in first instance may prejudice the interests of the nation, a department or a municipality. When it is determined that a decision must be taken on a consultative basis, it must be formally reviewed by a higher court before the decision becomes enforceable.

4.10 With respect to a possible violation of articles 7 and 22, paragraph 1, of the Covenant, the State party observes that, according to the author, the State is persecuting former members of the executive boards of dock-worker unions and former board employees. However, the author does not provide reasons or evidence for his view that the State has violated his rights in this regard. The State therefore requests the Committee to dismiss these complaints as unfounded and unproven.

#### **Author’s comments on the State party’s observations**

5. On 28 August 2008, the author submitted his comments on the observations of the State party. He cites several decisions of the Constitutional Court which he believes are pertinent to his case. He also points out that the Office of the Procurator-General found that, with respect to the recalculation of FONCOLPUERTOS pensions, the Internal Working Group had taken unilateral decisions regarding adjustments and reductions without the express and written consent of the beneficiaries in disregard of article 73 of the Administrative Disputes Code. He states that the right to a pension and the pension payments were accepted in good faith. In this regard, the Office of the Procurator-General observed that the evidence showed that bad faith could not be imputed to the beneficiaries and that it was therefore inappropriate to request the return of payments received. He adds that the administration wholly disregarded the required legal procedure for handling disputed decisions. Under that procedure, the State must, within two years, bring an action for annulment of the administrative decisions under which the pensions were granted. This procedure was not initiated within that time period, and the action for annulment therefore expired.

#### *Consideration of admissibility*

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

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

6.3 The author claims that the Administration exceeded its powers and committed irregularities that violated his right to due process when it decided to review his disability status and to deprive him of the pension he had been receiving in accordance with a number of judicial decisions. The State party asserts that the administrative decision under which

his pension was recalculated could have been challenged before the labour courts, but was not. It adds that the author also failed to pursue the available legal remedies against the decision of the Disability Classification Board to lower the percentage of his loss of earning capacity. The author has not explained why he did not use those remedies. The Committee therefore finds that the author has not exhausted the available domestic remedies and decides that this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.4 With respect to the author's claims that he was persecuted by the State party for being a trade unionist, the Committee considers that those claims have been presented in a very general and insufficiently precise manner. The Committee therefore finds that this part of the communication has not been sufficiently substantiated for the purposes of admissibility under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

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

(b) That this decision shall be transmitted to the State party and to the author of the communication.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]



**J. Communication No. 1555/2007, *Suils Ramonet v. Spain*  
(Decision adopted on 27 October 2009, ninety-seventh session)\***

<i>Submitted by:</i>	Juan Suils Ramonet (represented by counsel, Jordi Llobet Pérez)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	18 September 2006 (initial submission)
<i>Subject matter:</i>	Scope of the remedy of cassation in a criminal case
<i>Procedural issues:</i>	Failure to exhaust domestic remedies; failure to substantiate claims
<i>Substantive issue:</i>	Right to have the conviction and sentence reviewed by a higher tribunal
<i>Article of the Covenant:</i>	14, paragraph 5
<i>Articles of the Optional Protocol:</i>	2; 5, paragraph 2 (b)

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

*Meeting on 27 October 2009,*

*Adopts the following:*

**Decision on admissibility**

1.1 The author of the communication, dated 18 September 2006, is Mr. Juan Suils Ramonet, a Spanish national born in 1953. He claims to be the victim of a violation by Spain of article 14, paragraph 5, of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The author is represented by counsel, Mr. Jordi Llobet Pérez.

1.2 On 17 July 2007, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, agreed to the State party's request that the admissibility of the communication should be considered separately from the merits.

**Factual background**

2.1 In its judgement of 7 November 2001, the Barcelona Provincial High Court sentenced the author to four years and six months of imprisonment for the continuing offence of fraud in the course of operations whereby the author attracted venture capitalists

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvio, Mr. Krister Thelin and Ms. Ruth Wedgwood.

with offers of high interest payments. The conviction was submitted for cassation review by the Supreme Court, which rejected the appeal on 23 December 2003.

2.2 The author supplied a copy of the cassation judgement, which ruled on each of the various grounds for cassation adduced by the author and dismissed them all. First, the author alleged a violation of his right to effective legal protection on the ground that his sentence was unfounded. With regard to that ground, the Supreme Court found as follows:

“The Court has imposed a sentence of four and a half years of imprisonment and a fine in view of the aggravated nature of the offence, for which the penalty is from one to six years of imprisonment and a fine. Moreover, it is a continuing offence, which carries a penalty of from three and a half to six years of imprisonment. The sentence of four and a half years falls within the lower half of the established range of penalties. The Court also takes into consideration not only the magnitude of the amounts that were defrauded per se, but also the fact that their sheer size speaks of a degree of unlawfulness that goes beyond that covered by aggravation. This situation may be addressed by means of the individualization of penalties, an approach which was employed in determining the fine and which can also be applied to the custodial penalty.”

2.3 In advancing a second ground for cassation, the author challenged the classification of the acts as a continuing offence. In this respect the Supreme Court stated that the two instances of fraud, one involving a sum of 15 million and the other one of 6 million, were subsumed in the offence of aggravated fraud and that its classification as a continuing offence was due to the plurality of the actions comprising the fraud.

2.4 The third ground for cassation concerned undue delays in the proceedings. In this regard, the Court stated the following:

“The allegation simply contends that an excessive amount of time elapsed between the initiation of the proceedings in April 1997 and the date when the oral proceedings were held in November 2001. The applicant did not complain of delays or describe them as undue during the pretrial proceedings or during the prosecution of the case itself; nor did he claim any violation of his right. The appeal of cassation merely refers to a delay in the proceedings, without indicating any period of time in which they failed to move forward for reasons not attributable to the parties.”

2.5 The fourth ground for cassation cited by the author was the existence of an error of fact in the weighing of the evidence, in proof whereof he submitted a bank receipt, a letter signed by a bank representative, a complaint, a witness statement and the list of charges brought by one of the parties. In recalling the requirements that a document must meet in order to be used as evidence, the Court stated that:

“None of the documents in question may be considered to attest to the error alleged in the author’s request for judicial review. The letter is a personal account of certain facts which, had it been presented in the trial court, would constitute testimony subject to the court’s immediate appraisal but which would not carry the weight of a formal document. Similarly, the complaints and the charges refer to the prosecution of an individual but do not substantiate the alleged error, inasmuch as the documentation of acts of this nature requires the bringing of evidence. The document referring to an accounting transaction appears to be a photocopy, and its content is lacking in the authenticity required as proof of an error, which, in any event, is not relevant to the actual economic damages sustained by the second victim.”

2.6 The author also adduced the fact that the High Court had refused to admit into evidence two items that he had attempted to submit. One of those items was documentary

in nature and consisted of photocopies of newspaper advertisements offering a stated rate of return on business transactions with certain banks. The other was a statement from someone unrelated to the events, which, according to the author, substantiated the existence of business transactions similar to those that he had offered. In respect of the former, the Court found the following: “The documentary evidence was justifiably dismissed. Firstly, because it was not documentary evidence properly speaking, but rather photocopies of newspaper clippings and thus lacked documentary status. Above all, however, it bore no relation to the proceedings. The fact that banks offer to conduct certain operations at high interest rates has nothing to do with the object of the proceedings, namely a fraud in the terms established in the charge.” Regarding the proposed testimony, the Court said the following:

“The record of the hearing makes no mention of a formal protest against the refusal to admit evidence; if this requirement had been met, it would have enabled the Court to review the ruling handed down on this matter from the standpoint of the right to defence, which is the right being invoked. Nor does it present any justification concerning the reason why it was necessary for the witness to appear in court, which would permit a better understanding of the interests at stake. Moreover, as in the case of the documentary evidence, the testimony was not relevant to the trial. The application for review in cassation states that the witness would corroborate the existence of high-interest business operations with guarantees similar to those offered by the accused; even if the testimony were admitted, it would have no bearing on the charge that assets were obtained from another by deception based on a business proposition that was used to mount a typical confidence trick.”

2.7 The author then challenged the ruling on the appeal in cassation by lodging an application for judicial review before the Second Chamber of the Supreme Court based on the existence of new evidence. In its ruling, the Court stated that: “The only items that can be admitted as new evidence are the (...) receipts of transfers in the name of Walter Marrozos, which purport to show that the applicant was simply an intermediary. Be that as it may, and although the documents prove nothing in themselves (one reason being that they are dated 11 June 1996, which was prior to the date on which the proven events took place), the demonstration that a third party was involved could lead to his or her criminal prosecution but would not reduce the applicant’s participation in the acts in question. There is therefore no way in which they could be seen as demonstrating his innocence.” The Chamber consequently rejected the appeal on 14 September 2004. Finally, the author filed an application for *amparo* with the Constitutional Court, which, in its ruling of 5 September 2006, denied leave to appeal because the application had been submitted after the deadline.

### **The complaint**

3. The author alleges a violation of his right to have his conviction and sentence reviewed by a higher court pursuant to article 14, paragraph 5, of the Covenant, owing to the limited scope of cassation appeals in the Spanish judicial system.

### **State party’s observations on admissibility**

4.1 By a note verbale dated 7 June 2007, the State party challenged the admissibility of the communication. It argued that the author confined himself to making references of a general nature without specifying which acts or claims were not considered and reviewed on appeal. It contended that the case in question constitutes an abuse of the right to submit a communication, which is a right to a review of specific cases of alleged violations, rather than of a given legal system as a whole.

4.2 The State party also argued that the author had not exhausted domestic remedies and had then attempted to reinstate them after the fact by filing an inadmissible review remedy once it was no longer possible to appeal the judgement upholding the conviction before the

Constitutional Court. It contended that the communication was therefore inadmissible under article 2 and article 5, paragraph 2 (b), of the Optional Protocol.

#### **Author's comments on the State party's observations**

5. On 4 October 2007 the author reiterated that the Spanish judicial system is not in accordance with article 14, paragraph 5, of the Covenant. He stated that the decision in cassation regarding the present case, dated 2 December 2003, pre-dates Act No. 19/2003, which expands the right to appeal to a higher court in Spain, and was therefore handed down at a time when the appeal in cassation did not allow a full review of the evidence and the facts of a case.

#### *Consideration of admissibility*

6.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether or not the communication is admissible under the Optional Protocol to the International Covenant on Civil and Political Rights.

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

6.3 The Committee takes note of the State party's argument that domestic remedies were not exhausted because the author did not observe the time limit established by law for the submission of an application for amparo to the Constitutional Court. The Committee recalls its settled jurisprudence, which indicates that only those remedies that have a reasonable prospect of success must be exhausted.<sup>1</sup> The application for *amparo* had no chance of succeeding with regard to the alleged violation of article 5, paragraph 14, of the Covenant; the Committee therefore considers that domestic remedies have been exhausted.

6.4 The author claims that he was deprived of his right under article 14, paragraph 5, of the Covenant to have his conviction reviewed by a higher court because in Spain an appeal in cassation does not allow for a full review of evidence and the facts of a case. The Committee observes, however, that the author has lodged his complaint in general terms, without specifying the particular points that he believes were not reviewed by the Supreme Court. In addition, the Supreme Court's judgement indicates that it undertook a detailed examination of all the grounds for cassation adduced by the author, including the reasons for the sentence, the assessment of the facts, the possible delay in the proceedings, the assessment of evidence and the refusal to admit certain items into evidence. The Committee therefore considers that the complaint relating to article 14, paragraph 5, of the Covenant has not been sufficiently substantiated in terms of its admissibility and thus finds it inadmissible under article 2 of the Optional Protocol.<sup>2</sup>

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

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<sup>1</sup> See, for example, communications No. 1095/2002, *Gomariz Valera v. Spain*, Views adopted on 22 July 2005, para. 6.5; No. 1101/2002, *Alba Cabriada v. Spain*, Views adopted on 1 November 2004, para. 6.5; and 1293/2004, *de Dios Prieto v. Spain*, decision on admissibility adopted on 25 July 2006, para. 6.3.

<sup>2</sup> See communications No. 1490/2006, *Pindado Martínez v. Spain*, decision adopted on 30 October 2008, para. 6.5; and No. 1489/2006, *Rodríguez Rodríguez v. Spain*, decision adopted on 30 October 2008, para. 6.4.

(b) That this decision shall be communicated to the State party and to the author of the communication.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**K. Communication No. 1572/2007, *Mathioudakis v. Greece*  
(Decision adopted on 19 March 2010, ninety-eighth session)\***

<i>Submitted by:</i>	Panteleimon Mathioudakis (represented by counsel, Yatagantzidis and Metaxaki)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Greece
<i>Date of communication:</i>	12 January and 12 November 2006 (initial submissions)
<i>Subject matter:</i>	Revocation of the author's university degree on falsification and forgery charges
<i>Procedural issues:</i>	Incompatibility of claims with the Covenant; non-exhaustion of domestic remedies
<i>Substantive issues:</i>	Presumption of innocence; right to review by a higher tribunal according to law
<i>Article of the Covenant:</i>	14, paragraphs 2 and 5
<i>Articles of the Optional Protocol:</i>	3; 5, paragraph 2 (b)

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

*Meeting on 19 March 2010,*

*Adopts the following:*

**Decision on admissibility**

1. The author of the communication, dated 12 January and 12 November 2006, is Mr. Panteleimon Mathioudakis, a Greek citizen born in 1968. The author claims to be a victim of a violation by Greece of his right to be presumed innocent and to appeal to a higher court, under article 14, paragraphs 2 and 5, of the Covenant. The author is represented by counsel, Mr. Panayotis Yatagantzidis and Ms. Eleni Metaxaki.

**The facts as presented by the author**

2.1 On 15 May 1998, the Senate of the National Technical University of Athens revoked the author's diploma in Electrical and Computer Engineering awarded in 1995, on the grounds of lack of promotional grades on eight courses and the existence of forged (improved) grading on nine other courses, without making any reference on the author's implication in the falsification and forgery. It further decided that an Administrative Inquiry

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

would evaluate if further actions were to be taken. For a job application, the author had asked the National Technical University for a statement of his grade points obtained during his studies. On 14 November 2000, the Administrative Court of Appeal of Athens annulled the University Senate's decision on the grounds that the author had not been heard. On 26 January 2001, after hearing of the author, the Senate of the University revoked his diploma on the same grounds as initially advanced. On 1 February 2002, the Athens Administrative Appeal Court dismissed the author's appeal. The court partly based its decision on the judgment by the one-member Misdemeanour Court of Athens sentencing the author on 1 September 2000 to 18 and 12 months imprisonment for the offences of forgery of certificates and of obtaining by fraud a false certificate (see paragraph 2.2 below). The author claims that an appeal in cassation before the Council of State would not have been effective, because such review is limited to legal errors and does not pertain to the ruling on questions of facts.

2.2 As mentioned, on 1 September 2000, the author was sentenced by the Misdemeanour Court of Athens, sitting as a single judge panel, to 18 and 12 months imprisonment for the offences of forgery of certificates and of obtaining by fraud a false certificate. The court found that he had forged his degree awarded by the Technological Education Institute, which allowed him to enter the University and that he had obtained his Electrical and Computer Engineering degree by fraud. On 14 January 2003, the Misdemeanour Court of Athens, sitting as a board of three on appeal, confirmed his conviction. Considering that the court had not proceeded to a new examination of the facts, the author appealed to the Supreme Court, claiming lack of legitimate basis for the decision and absence of reasons in the ruling. His appeal was dismissed on 16 July 2003.

2.3 On 5 November 2004, the European Court of Human Rights declared the author's complaint inadmissible.<sup>1</sup>

### **The complaint**

3.1 The author claims to be the victim of violations by the State party of article 14, paragraphs 2 and 5, of the Covenant. He claims that the decisions by the Administrative Court of Appeal violated the presumption of innocence, principle which according to the author, judges consider *ex officio*, as this decision was entirely based on the one-member Misdemeanour Court judgement, while the author's appeal was pending. The author further claims that the Supreme Court ruling of 16 July 2003 also violated article 14, paragraph 2, as it did not contain any reasoning for its dismissal. He further claims that the Misdemeanour Court decision of 1 September 2000 was based entirely on the administrative inquiry and did not proceed to a substantive examination of his case. Finally, he claims that the domestic courts evaluated the facts and evidence in his case arbitrarily, and that they did not address the issue of his knowledge of the forged content of his grading card, and that this amounts to a denial of justice.

3.2 The author further claims that Law No. 2944/2001, by virtue of which the decision rendered by the Administrative Court of Appeal is not subject to appeal, amounts to a violation of article 14, paragraph 5, of the Covenant. He maintains that an appeal in cassation before the Council of State could not be considered effective, as it does not rule on facts.<sup>2</sup> The author argues that despite the administrative nature of the procedure before

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<sup>1</sup> The application was declared inadmissible under articles 34 and 35 of the European Convention on Human Rights.

<sup>2</sup> See communications No. 836/1998, *Gelazauskas v. Lithuania*, Views adopted on 17 March 2003; No. 986/2001, *Semey v. Spain*, Views adopted on 30 July 2003; No. 1073/2002, *Terrón v. Spain*, Views adopted on 5 November 2004.

the Administrative Court of Appeal, the consequence of the cancellation of his university diploma resulted in his social marginalization and financial disablement and should be regarded as punishment.<sup>3</sup> The author submits that by not allowing an appeal of the Administrative Court of Appeal decision, the State party violated article 14, paragraph 5, of the Covenant.

#### Issues and proceedings before the Committee

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

4.2 The Committee notes the author's claim that the decision by the Administrative Court of Appeal was based on his first instance sentence while his appeal was still pending and that the Misdemeanour Court, sitting as a panel of a single judge, based its judgement on the administrative inquiry made by the University, as well as that the Supreme Court ruling lacked sufficient reasoning. The Committee recalls its general comment 32 (2007) on the right to equality before courts and tribunals and to a fair trial and its jurisprudence, according to which the presumption of innocence under article 14, paragraph 2, of the Covenant only applies to criminal procedures.<sup>4</sup> It therefore considers the author's claim with regard to the administrative proceedings to be incompatible with the provisions of the Covenant and therefore declares this part of the communication inadmissible under article 3 of the Optional Protocol.

4.3 With regard to the author's claims of a violation by the State of article 14, paragraph 2, of the Covenant, the Committee notes that the author has failed to substantiate this claim, and therefore declares this part of the communication inadmissible under article 2, of the Optional Protocol.

4.4 The Committee has noted the author's claim that despite the administrative nature of the procedure before the Administrative Court of Appeal, the cancellation of his university diplomas should be regarded as punishment. It also notes that the author's case was examined by both administrative and criminal courts. Recalling its general comment 32, the Committee observes that article 14, paragraph 5, of the Covenant does not apply to any other procedure not being part of a criminal process.<sup>5</sup> Accordingly, the Committee considers that the author's allegation under article 14, paragraph 5, is incompatible with the provisions of the Covenant, and therefore declares this part of the communication inadmissible under article 3 of the Optional Protocol.

5. The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under article 2 and 3, of the Optional Protocol;
- (b) That the decision be transmitted to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

<sup>3</sup> See *Engel and others v. the Netherlands*, ECHR, judgment of 23 November 1976; *Albert and Le Compte v. Belgium*, ECHR, judgement of 24 October 1983; *Garyfallou Aebe v. Greece*, ECHR, judgment 24 September 1997; communication No. 50/1979, *Van Duzen v. Canada*, Views adopted on 7 April 1982, para. 10.2.

<sup>4</sup> *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI, para. 3.

<sup>5</sup> *Ibid.*, para. 46.



**L. Communication No. 1573/2007, Šroub v. Czech Republic  
(Decision adopted on 27 October 2009, ninety-seventh session)\***

<i>Submitted by:</i>	Vaclav Šroub (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Czech Republic
<i>Date of communication:</i>	3 December 2006 (initial submission)
<i>Subject matter:</i>	Irregularities with respect to restitution of property
<i>Procedural issues:</i>	Inadmissibility <i>ratione materiae</i> ; non-exhaustion of domestic remedies; same matter examined under another procedure of international investigation or settlement; abuse of right of submission
<i>Substantive issues:</i>	Arbitrary interference into the home; equality before the law
<i>Articles of the Covenant:</i>	1, paragraph 2; 17; 26; 47
<i>Articles of the Optional Protocol:</i>	1; 3; 5, paragraph 2 (a) and (b)

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

*Meeting on 27 October 2009,*

*Adopts the following:*

**Decision on admissibility**

1. The author of the communication dated 3 December 2006 is Vaclav Šroub, a Canadian and Czech citizen residing in Canada and born in 1939 in Příbram, Czechoslovakia. He claims to be a victim of a violation by the Czech Republic of articles 1, paragraph 2; 17, paragraphs 1 and 2; 26 and 47 of the International Covenant on Civil and Political Rights. He is not represented.

**Factual background**

2.1 Between 1959 and 1960, the author and his fiancée purchased two parcels of land, 2008/1 and 2008/2, in Příbram, Czechoslovakia. In 1961, they got married and built a house and shop on those plots. The author inherited from his father the neighbouring parcel 2008/3. In 1978, the author's wife died and the authorities prohibited the author's professional activities, which consisted of repairing churches. In 1980, the local court

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

designated the National Committee of the district of Pribram as the trustee of the author's wife's share of the property. In 1981, the author and his two children fled the country and obtained refugee status the following year. On 30 April 1982, the District Tribunal of Pribram sentenced the author to imprisonment in absentia. Owing to this conviction, the remainder of his property was confiscated and its administration was entrusted to the Pribram National Committee.

2.2 In 1991 or 1992, the author discovered that on 8 July 1982, the Pribram National Committee had transferred the administration of his and his wife's common property to the Pribram National Municipal Committee and that, on 1 December 1982, the latter had sold the property to a State-owned company. This company proceeded to renovate and expand the family house.

2.3 On 7 December 1990, the author's sentence to imprisonment and property confiscation was annulled *ex tunc* by virtue of Law No. 119/1990 on judicial rehabilitation. On 31 January 1991, the Prague Regional Court confirmed that the author had inherited from his father property No. 2008/3, for which he subsequently concluded a lease agreement with the same State-owned company that had bought the author's property. On 18 March 1992, the author filed an application with the Pribram District Court seeking an order under Law No. 87/1991 on extrajudicial rehabilitation<sup>1</sup> for the restitution of his family house and plots 2008/1-2.

2.4 On 21 September 1992, the Pribram district prosecutor contested as contrary to Law No. 87/1991 the decision of 8 July 1982 (see paragraph 2.2 above), by which the administration of the author's and his wife's common property was transferred to the Pribram National Municipal Committee. The prosecutor argued that, after the author's wife's death, a succession procedure should have been instituted for her property, and that there was no proof that the State had a full ownership title to that property. On 23 October 1992, the Pribram District Office annulled the decision of 8 July 1982. On 1 June 1993, the annulment was confirmed by the Ministry of Finance. As a result, the Land Registry Office registered the author as the owner of parcels 2008/1-2 and renewed the original record in the author's name. The author has been paying property taxes for this land since then.

2.5 On 5 September 1993, the author lodged a complaint asking for attribution of the family house to him. However, on 19 October 1993, the municipality ordered its demolition. On 20 October 1994, the Prague Regional Tribunal quashed the demolition order. The Tribunal held that the author should have, but had failed to file an application for

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<sup>1</sup> See communication No. 516/1992, *Simunek et al. v. Czech Republic*, Views adopted on 19 July 1995, paras. 2.4–2.5, on Law No. 87/1991:

“On 2 February 1991, the Czech and Slovak Federal Government adopted Act 87/1991, which entered into force on 1 April 1991. It endorses the rehabilitation of Czech citizens who had left the country under communist pressure and lays down the conditions for restitution or compensation for loss of property. Under Section 3, subsection 1, of the Act, those who had their property turned into State ownership in the cases specified in Section 6 of the Act are entitled to restitution, but only if they are citizens of the Czech and Slovak Federal Republic and are permanent residents in its territory.

“Under Section 5, subsection 1, of the Act, anyone currently in (illegal) possession of the property shall return it to the rightful owner, upon a written request from the latter, who must also prove his or her claim to the property and demonstrate how the property was turned over to the State. Under subsection 2, the request for restitution must be submitted to the individual in possession of the property, within six months of the entry into force of the Act. If the person in possession of the property does not comply with the request, the rightful owner may submit his or her claim to the competent tribunal, within one year of the date of entry into force of the Act (subsection 4).”

the restitution of his property rights under law No. 229/1991 (which deals with property on agricultural land) following the annulment of his conviction.

2.6 On 3 March 1994, the State Farming Machinery Enterprise (SPZT) that succeeded the State-owned company lodged a civil suit before the Pribram District Court to have its property rights to plots 2008/1-2 recognized. On 7 March 1994, encouraged by a constructive dialogue with the SPZT on reaching an extrajudicial agreement, the author withdrew his restitution claim of 18 March 1992 (see paragraph 2.3) and his claim of 5 September 1993 requesting that the family home be attributed to him (see paragraph 2.5). On 8 November 1995, the Municipal Office confirmed that land plots 2008/1-3 were the author's property. On 1 January 1996, however, the SPZT started a liquidation process and on 28 February 1996, the Pribram District Court held that plots 2008/1-2 belonged to the SPZT. The Court ruled that the annulment by the Pribram District Office of the decision of 8 July 1982 (see paragraph 2.2), which was confirmed by the Ministry of Finance, did not constitute a proper transfer of the property title and that on 7 March 1994, the author effectively withdrew his restitution claims for the land and building. Nonetheless, the author continued to pay property taxes. On 3 December 1996, the Prague Regional Court revised the District Court's ruling of 28 February 1996 and held that the annulment decision of 7 December 1990 (see paragraph 2.3) could not restore former property rights but that these are regulated by Law No. 87/1991 on extrajudicial rehabilitation (*lex specialis*). It considered that the State-owned company, the SPZT and its successor companies were merely administrators or managers of the property as opposed to owners and that the property continued to belong to the State.

2.7 On 17 February 2000, the Pribram District Court rejected the author's request asking for attribution of the expanded building constructed by the State-owned company on plots 2008/1-3. The Court held that there was insufficient evidence of the author's property rights and that he failed to complete the process according to Law No. 87/1991 on extrajudicial rehabilitation. On 30 October 2000, the Regional Court confirmed this decision and stated that the administrative decisions by the Pribram District Office and the Ministry of Finance could only transfer the administration of the property, which remained in State possession. On 28 June 2001, the Supreme Court dismissed as inadmissible the author's application for failure to raise a question of judicial importance. In his application, the author had asked if the annulment of 7 December 1990 and his subsequent registration in the Land Registry constituted a property title under civil law.

2.8 On 22 October 2002, the Constitutional Court declared inadmissible the author's constitutional complaint by which he claimed a violation of his right to judicial protection, to fair proceedings and a violation of his property rights. The Court held that his claim was prescribed as well as insufficiently substantiated.

2.9 On 14 April 2004, the Land Registry Office registered the State as owner of plots 2008/1-2, based on the confiscation title of 30 April 1982. In November 2004, the Land Registry Office advised the author that it had rectified the registration of 14 April 2004 and re-registered him as the owner. Following an administrative procedure, the Land Registry Office re-registered the State as owner of plots 2008/1-2 in accordance with a judicial precedent, a Constitutional Court decision holding that the annulment of a property confiscation decision is not tantamount to the conferral of a property title.

2.10 On 28 November 1996, a Committee of three members of the former European Commission of Human Rights declared inadmissible the author's application contesting the legality of the construction permit granted to the State-owned company to extend the

original building (see paragraph 2.2).<sup>2</sup> On 24 September 2002, the European Court of Human Rights (ECHR) declared inadmissible the author's second complaint claiming that the decision by the Prague Regional Court of 3 December 1996 (see paragraph 2.6) had violated his property rights, as well as his right to fair proceedings.<sup>3</sup> On 17 January 2006, the ECHR found a violation of the author's right to fair proceedings, in particular his right to access a court. It held that the overly rigorous interpretation of procedural requirements had deprived the author of access to a court and amounted to a violation of his right to fair proceedings.<sup>4</sup>

2.11 In January and March 2003 and in 2004 and 2005, the author lodged criminal claims against a State party representative, based in Strasbourg, who appeared before the ECHR. The author alleges that the representative submitted false evidence in the examination of his case. For this reason, he has asked the ECHR and the Council of Europe to strip the representative of his immunity.

### **The complaint**

3. The author claims to be a victim of violations by the State party of articles 1, paragraph 2; 17, paragraphs 1 and 2; 26;<sup>5</sup> and 47 of the Covenant.

#### *The State party's observations on admissibility and merits*

4.1 On 10 January 2008, the State party submitted its observations on admissibility and merits. It clarifies the facts as presented by the author and explains that the annulment decision by the Příbram District Authority of 23 October 1992, following the protest by the district prosecutor, concerned the transfer to the Municipal National Committee and subsequently to the Machinery and Tractor Station National Enterprise, of management as opposed to ownership of the property. On 1 June 1993, the Ministry of Finance rejected an appeal filed by the Machinery and Tractor Station National Enterprise against the decision. On the basis of the District Authorities' decision of 23 October 1992, the Land Registry mistakenly issued the author, on 21 July 1993, an official copy of the entry in the Land Registry.

4.2 On 25 March 2004, the representative of the State party before the ECHR advised the Government Representation in Property Affairs in the Czech Republic that the information in the author's case before the ECHR suggested that the State was the owner of the properties in question. Based on this information, the Government Representation in Property Affairs requested the Land Registry Office to register the property in the State party's name. Following the reversal of this decision in May 2004 and the re-registration of the property in the State party's name in November 2004, the author filed an appeal with the Geodesy and Cadastre Inspectorate, which confirmed the State party's ownership on 21 March 2005.

4.3 On 10 April 2007, the author filed an application against the State party before the Příbram District Court seeking a declaration of his ownership of parcels 2008/1-2. These proceedings are currently pending.

4.4 The State party underlines that the author's initial submission is not sufficiently clear as to how he considers that his rights under the Covenant have been violated. It

<sup>2</sup> See European Commission of Human Rights, application No. 32116/96, *Šroub v. Czech Republic*.

<sup>3</sup> See European Court of Human Rights, application No. 40048/98, *Šroub v. the Czech Republic*.

<sup>4</sup> See European Court of Human Rights, application No. 5424/03, *Šroub v. the Czech Republic*, judgement of 17 January 2006.

<sup>5</sup> See *Simunek et al. v. Czech Republic* (note 1 above), para. 11.8.

maintains that the author seems to claim that the change of entry in the Land Registry in November 2004 violated his property rights. The State party submits that the Covenant does not protect property rights, and therefore the communication should be declared inadmissible *ratione materiae*. It further submits that the author's claim before the Pribram District Court in April 2007 remains pending and that the author thus failed to exhaust domestic remedies within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

4.5 The State party further submits that domestic courts have ascertained that the 30 April 1982 annulment of the author's sentence in absentia did not constitute a property title. It maintains that the author voluntarily withdrew his application seeking the surrender of his property under the Law on extra-judicial rehabilitation. It concedes that registering the author in the Land Registry was a mistake, as was the delay of 10 years before this was corrected. However, it submits that these facts have no relevance for the assessment of the merits. It submits that the State party has been the owner of the property since 1982 and that bringing the entry in the Land Registry in line with the actual legal state of affairs did not constitute a violation of the Covenant. It further submits that none of the State actors has ever acted *ultra vires* and distances itself from allegations by the author on reported pressure exerted on the Land Registry or the existence of agreements between the State party and the President of the ECHR on property restitution cases.

#### **Author's comments on the State party's observations**

5.1 On 21 February 2008, the author submits comments to the State party's observations and claims that the State party has presented "half-truths and lies" in its submission. The author clarifies the facts and maintains that on 18 March 1992, he filed an application against the State for property restitution (see paragraph 2.3) and only withdrew it because of the SPZT misrepresentation that it was acting on behalf of the State and thus empowered to reach an extrajudicial agreement with the author on the issue of restitution. The author further explains that this withdrawal was motivated by prospects of a settlement between himself and the SPZT as well as the Machine and Tractor Enterprise with regard to plots 2008/1-2 and his family house.

5.2 He reiterates that in agreement with the district prosecutor's protest of 21 September 1992, his wife's property never belonged to the State, as after her death in 1978, succession proceedings should have been initiated. The author further clarifies that, following the official issuance of the entry in the Land Registry on 21 July 1993, he started repairs on the original building and preparations for his family's move from Canada to the Czech Republic. He claims to have spent over Can\$ 15,000 for these undertakings.

5.3 With regard to the correction of the entry in the Land Registry undertaken by the representative of the State party before the ECHR, the author underlines that this was done based on an invalid certificate,<sup>6</sup> considering that the Prague Regional Court on 3 December 1996 invalidated the State's ownership certificate issued by the Land Registry. He claims that this fraudulent action constitutes an abuse of power.

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<sup>6</sup> According to Law No. 265/92 on Land Registry, article 10/1 states that "if anyone claims ownership, but cannot plausibly support his/her claim, the appropriate agent of the Republic will invite him to submit, within one month a petition to the courts to establish ownership".

5.4 As concerns the proceedings before the ECHR, the author underlines that restitution matters are regarded as political issues according to an agreement between the President of the State party and the President of the ECHR.<sup>7</sup>

5.5 Based on the judgement by the ECHR holding that the State party had violated the author's right to fair proceedings, in particular before the Constitutional Court, the author filed an application for review proceedings before the Constitutional Court. On 20 April 2007, the Constitutional Court decided that, according to a Bill of Parliament introduced by the Government in 2004, new proceedings could not be initiated in the author's case. He therefore initiated new proceedings on 10 April 2007 before the Příbram District Court and underlines that he expects these proceedings to be delayed considerably due to the attitude and pressure of the Government.

5.6 With regard to the admissibility and the merits of his case, the author submits that due to the indivisibility of the plots 2008/1-3, he was deprived of all his property despite the fact that the attribution of plot 2008/3 to him is undisputed. He underlines that he is a victim of a continuous violation of his rights by the State party.

#### **Further submission by the parties**

6.1 On 8 January 2009, the State party submits additional observations informing the Committee that on 1 February 2008, the Příbram District Court rejected the author's application of 10 April 2007 (see paragraph 5.5), and that on 26 June 2008, the Prague Regional Court upheld this decision. The Court held that the author could not claim to have believed in good faith to be the owner of the plots 2008/1-2, given that he started but then withdrew proceedings under the law on extrajudicial rehabilitation (No. 87/1991) on 7 March 1994. It further decided that in the absence of good faith, the author did not acquire the property by adverse possession from 1993 to 2004. The State party reiterates that the author's claims were unsubstantiated and that he failed to exhaust domestic remedies, as the case remains pending before the Supreme Court. It also submits that the author lodged another application on 2 September 2008 before the Příbram District Court seeking restitution of the land parcels 2008/1-2, which remains pending in the first instance.

6.2 The State party further submits that the communication should be rejected as an abuse of submission according to article 3 of the Optional Protocol, considering that the author neglected to inform the Committee of all the proceedings he has initiated at the national level.

7. On 29 January and 17 August 2009, the author reiterated that he considers himself the rightful owner of parcels 2008/1-2 with its original buildings. He considers that the essence of his communication is contained in the modification of title to these properties by the Land Registry on 14 April 2004 without notifying him. He considers that this was done fraudulently and in abuse of power. The author further underlines that the new proceedings pending before domestic courts are related to other authorities and do not address the violations caused by the decision of 14 April 2004. On 17 August 2009, the author further requested the Committee to suspend his communication, as his case is pending before the European Court of Human Rights.

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<sup>7</sup> The author refers to article 295 of the Treaty Establishing the European Community: "This treaty shall in no way prejudice the rules in member states governing the system of property ownership."

## Issues and proceedings before the Committee

### *Consideration of admissibility*

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee notes that certain facets of the same matter have already been considered by the ECHR and concluded by inadmissibility decisions of 28 November 1996 and 24 September 2002, as well as by judgement of 17 January 2006 finding a violation of the author's right to fair proceedings. The Committee further notes the author's request that the Committee suspend its proceedings, as his case is pending before the ECHR. However, the author has not provided the Committee with details on the object of his ECHR complaint. With regard to matters that have already been decided by the ECHR, the Committee recalls its jurisprudence<sup>8</sup> that it is only where the same matter *is being* examined under another procedure of international investigation or settlement that the Committee has no competence to deal with a communication under article 5, paragraph 2 (a), of the Optional Protocol. The Committee observes further that in the absence of any details with regard to the author's case before the ECHR and in light of the author's request to suspend proceedings before the Committee, it considers that, article 5, paragraph 2 (a), of the Optional Protocol, constitutes an obstacle to the admissibility of the present communication.

8.3 The Committee notes that the State party contests the admissibility of the communication on grounds of non-exhaustion of domestic remedies. The Committee notes that the author's claim, which seeks a declaration of his property rights on parcels 2008/1-2 and on the original building, still remains pending in the Supreme Court. The Committee also notes that the author initiated new domestic proceedings on 2 September 2008, by which he seeks restitution of the property in question. The author claims that these proceedings do not relate to his communication before the Committee, with which the author seeks to establish a violation of his rights under the Covenant with regard to the 14 April 2004 change of property registration in the Land Registry initiated by the representative of the State party before the ECHR. The Committee nevertheless considers that his pending claims before the domestic courts are intrinsically linked to his alleged violations of articles 17 and 26 of the Covenant. It also notes that his claim would become moot if domestic courts confirmed his property rights to parcels 2008/1-2 and the original building. The Committee therefore considers that the author has not exhausted all available and effective domestic remedies, and declares this part of the communication inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

8.4 Concerning the author's claims relating to the confiscation of his property, the Committee observes that the right to property is not expressly protected under the Covenant. The allegation concerning a violation of the author's right to property per se is thus inadmissible *ratione materiae*, under article 3 of the Optional Protocol.

8.5 With regard to the author's claim under article 1, paragraph 2, of the Covenant, the Committee refers to its jurisprudence on the need for there to be a claim of a "people" within the meaning of article 1 of the Covenant and that article 1 cannot on its own be the

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<sup>8</sup> See communications No. 824/1998, *Nicolov v. Bulgaria*, decision on admissibility adopted on 24 March 2000, para. 8.2; No. 1185/2003, *Van den Hemel v. the Netherlands*, decision on admissibility adopted on 25 July 2005, para. 6.2; No. 1193/2003, *Sanders v. the Netherlands*, decision on admissibility adopted on 25 July 2005, para. 6.2.

subject of a communication under the Optional Protocol.<sup>9</sup> This aspect of the communication falls outside the scope of the Optional Protocol *ratione materiae* and *ratione personae*, respectively, and must be declared inadmissible under articles 1 and 3 of the Optional Protocol.

8.6 With regard to the author's claim under article 47 of the Covenant, the Committee recalls that it does not have competence under the Optional Protocol to consider claims that do not relate to violations of individual rights. These rights are set out in part III (arts. 6 to 27) of the Covenant. It follows that this part of the communication is inadmissible under article 1 of the Optional Protocol.<sup>10</sup>

9. The Committee therefore decides:

(a) That, under the Optional Protocol, it does not have competence to consider claims that do not relate to violations of individual rights set forth in part III (articles 6 to 27) of the Covenant;

(b) That the communication is inadmissible under articles 1, 3 and 5, paragraph 2 (a) and 2 (b), of the Optional Protocol;

(c) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the present report.]

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<sup>9</sup> See communications No. 167/1984, *Ominayak et al. (Lubicon Lake Band) v. Canada*, Views adopted on 26 March 1990, paras. 13.3 and 32.1; No. 1169/2003, *Antonio Hom v. Philippines*, decision on inadmissibility adopted on 30 July 2003, para. 4.2.

<sup>10</sup> See communication No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 4.4.



**M. Communication No. 1609/2007, *Chen v. The Netherlands*  
(Decision adopted on 26 July 2010, ninety-ninth session)\***

<i>Submitted by:</i>	Chen, Zhi Yang (represented by counsel, Michel Arnold Collet)
<i>Alleged victim:</i>	The author
<i>State party:</i>	The Netherlands
<i>Date of communication:</i>	21 May 2007 (initial submission)
<i>Subject matter:</i>	Deportation of the author, who was a minor at the time of his asylum application, to China
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; claim inadmissible <i>ratione materiae</i>
<i>Substantive issues:</i>	Inhuman or degrading treatment or punishment; arbitrary or unlawful interference with privacy and family life; measures of protection due to a child
<i>Articles of the Covenant:</i>	7, 17, and 24
<i>Articles of the Optional Protocol:</i>	2; 3; 5, paragraph 2 (b)

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

*Meeting on 26 July 2010,*

*Adopts the following:*

**Decision on admissibility**

1. The author of the communication, dated 21 May 2007, is Mr. Chen, Zhi Yang, a Chinese national from the Sichuan Province, born in 1988. He claims violations by the Netherlands of articles 7, 17, and 24 of the International Covenant on Civil and Political Rights. He is represented by counsel.

**The facts as presented by the author**

2.1 On 22 July 2003, upon his return from the market, the author found both his parents lying dead in the garden.<sup>1</sup> The author thought that they were killed because of his father's debts. After he buried his parents, the author approached the neighbours, but they could not help him. He did not find it necessary to go to the police, as he did not have money to pay

\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

<sup>1</sup> The author does not give indications on the place where he used to live with his parents.

them, and the police would only help people with the means to pay large bribes. Four days later, a man approached the author and informed him that he had “bought” him from his late father, as a payment for his debts. This individual beat the author, locked him up, and finally abducted him to the Netherlands, where he arrived in August 2003. The author was able to escape from his abductor, and submitted an asylum application on 20 August 2003 at Schiphol Airport.

2.2 The first interview took place on 21 August 2003, followed by a second one on 26 February 2004. Both interviews were carried out in Mandarin, with the assistance of an interpreter. On 14 December 2004, in reaction to the delay in adoption of a decision on his asylum demand, the author applied for judicial review before the Hague District Court sitting in Zwolle. By decision of 5 July 2005, the Immigration and Naturalisation Office rejected the author’s application for a temporary asylum residence permit and for the issuance, *ex proprio motu*, of a temporary regular residence permit, mainly on the ground that his account of facts was not credible, notably as he could not satisfactorily explain why he failed to seek the assistance and protection of the Chinese authorities. The Immigration and Naturalisation Office also found that there were sufficient institutions dedicated to the protection of minors in China, where the author could have sought refuge. On 5 December 2006, the Hague District Court confirmed the Immigration and Naturalisation Office decision. By judgement of 11 January 2007, the Administrative Jurisdiction Division of the Council of State rejected a further appeal by the author as inadmissible.

### **The complaint**

3.1 The author claims that should it deport him to China, the State party would breach articles 7, 17 and 24 of the Covenant. Concerning article 7, he claims that he would be exposed to inhumane treatment or degrading treatment or punishment if returned to China, as he left China at the age of 15 years old, without a *Hukou* registration,<sup>2</sup> which is obtained by adults. While it is possible to obtain an identity card at the age of 16, the *Hukou* is a prerequisite. As he will not be able to establish his identity, and cannot afford to pay the necessary bribes to public officials, the author claims that he will be denied access to education, health care, as well as any other social assistance in China, in violation of article 7 of the Covenant. The author adds that the person who abducted him and “bought” him may threaten him again and expose him to risks for his safety, as he will not be in a position to pay off his father’s debts.

3.2 The author further claims that his deportation to China by the State party would be in breach of article 17, as he has been living in the Netherlands since the age of 15 years, where he currently goes to school, has developed a social life, and “feels at home”.<sup>3</sup> He adds that he does not have family in China, and claims that his return to China would entail a breach of his right to privacy and his family life, in violation of article 17.

3.3 He further claims that his deportation to China would be in breach of the State party’s obligations under article 24 of the Covenant.<sup>4</sup> He notes that he arrived in the Netherlands at the age of 15 as an unaccompanied minor, and while he is no longer a minor, he spent a crucial period of his development in the Netherlands, where he has proved to be

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<sup>2</sup> A *Hukou* appears to refer to the system of residency permits prevailing in China, where household registration is required by law, and which officially records and identifies a person as a resident of an area. The *Hukou* includes identifying information such the name of the person, date of birth, the names of parents, and name of spouse, if relevant.

<sup>3</sup> The author refers to communications No. 930/2000, *Winata and Li v. Australia*, Views adopted on 26 July 2001, and No. 1069/2002, *Bakhtiyari v. Australia*, Views adopted on 29 October 2003.

<sup>4</sup> The author also alleges a violation of art. 3 of the Convention on the Rights of the Child.

integrated, and has learned the Dutch language. He claims that in their decisions, the immigration authorities did not take into account the author's best interest as a minor. Moreover, the author contends that during the asylum procedures, the burden to prove that he would not have an orphanage available in China was wrongly placed on him. He further reiterates that he does not have family in China, as well as the difficulties which would derive from his inability to prove his identity, thereby forcing him to live on the streets.

3.4 On 29 May 2007, the author informed the Committee that he was not receiving financial support in the Netherlands and that he was not legally entitled to work, rent a place to live and benefit from medical care. He had been deprived of his identity card by the State party's authorities at the end of the negative asylum procedure. In addition, he was unable to obtain a passport since he could not prove his Chinese origin and did not have a valid *Hukou* registration. The author therefore pointed to the difficulty of the situation, whereby he was not legally allowed to stay in the Netherlands, but could not return to China for lack of ability to establish his identity.

#### **State party's observations on the admissibility and merits**

4.1 On 27 November 2007, the State party raises the fact that the author's allegations under article 17 and 24 of the Covenant were not addressed before the State party's jurisdictions, and should as such be declared inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

4.2 On 7 May 2008, the State party further states that the author's allegation that he will be denied access to social advantages in China, for lack of a *Hukou* registration, was not raised before the Courts of the State party. As far as his claim under article 7 of the Covenant is based on this factual element, the State party claims that this allegation should also be declared inadmissible under article 5, paragraph 2 (b), of the Optional Protocol for non-exhaustion of domestic remedies.

4.3 On the merits, the State party claims that concerning his allegations under article 7 of the Covenant, the author failed to raise sufficient information indicating that there is an inevitable and predictable consequence that he will be exposed to treatment contrary to article 7 should he be returned to China. The State party affirms that based on information from its Ministry of Foreign Affairs, every family in China has a *Hukou Ben*, which is a household booklet reflecting information such as birth, civil status, marriage and death. Any Chinese national can be registered under the *Hukou* system, even at an advanced stage in life, and even after a protracted stay abroad, even though bureaucratic obstacles may sometimes delay the process of registration. The author was once registered on his father's passport, and as he claimed in his asylum interviews that he went to school in China, his name must be recorded in the population register. He has not submitted any official document supporting his allegations, and did not ask the Chinese diplomatic representation in the Netherlands about his *Hukou* registration, so as to be able to credibly establish that he would not be able to prove his identity in China and, as a result, be denied the associated social benefits. The State party adds that upon his return to China, the author, who is now 22 years old, will be like any other young adult of his age, and, as such, presumed to be capable of supporting himself. He did not adduce evidence to the contrary. The State party further notes that the scope of article 7 of the Covenant does not extend to allowing the author the right to stay in the Netherlands so as to be able to access social benefits. Regarding his allegations that the person who once "bought" him may threaten him, the State party contends that the author failed to show that the Chinese authorities are unwilling or incapable of offering him protection. The State party concludes that the author's allegations under article 7 of the Covenant are ill-founded.

4.4 Regarding article 17, the State party observes that the author was never granted a residence permit, nor was he given any assurance that he would be granted one. It is

therefore at his own risk that he developed a social network and personal ties in the Netherlands. He has lived in China for most of his life, speaks Chinese, and is familiar with Chinese customs. He has not adduced evidence showing that he could no longer adapt to life in China. The State party adds that the author's references to previous jurisprudence of the Committee are irrelevant as, contrary to the facts in that case, the author does not have family in the Netherlands, and has already reached the age of majority.<sup>5</sup>

4.5 With regards to the author's allegations that his return to China would lead to a breach of the State party's obligation to provide measures of protection to minors under article 24, the State party notes that under Dutch asylum law<sup>6</sup> and practice, due account is taken of the applicant's age when conducting interviews and assessing their account of the facts in support of their application. Unaccompanied minors whose asylum applications were denied must in principle return to their country of origin, or another country where they can reasonably be expected to go. Such minors may be granted a temporary residence permit, but are in principle required to return to their country of origin when adequate care and protection are deemed available in the country of return. The applicant can however adduce evidence showing that no such protection is available in the country of return, or that it is not adequate by local standards. In the author's case, the State party determined, based on various country reports, that adequate care is available in China for unaccompanied minors. The author did not adduce any evidence to the contrary. The State party reiterates that upon his return to China, the author, who is an adult, is presumed to be capable of supporting himself. The State party therefore concludes that his allegations under article 24 are ill-founded.

#### **Author's comments on the State party's observations**

5. On 21 July 2008, the author reaffirms that it was not in his best interest as a child to be sent back to a country where he no longer has relatives and a familiar social environment. This is *a fortiori* the case since, over the years, he has developed strong ties with the Netherlands. He adds that having left China illegally, it will be impossible for him to register again upon return without paying a fine. The author further claims that while it is possible to prove that one's name is registered by the authorities, the opposite is impossible to establish. The *Hukou* system is based on the household, and is regularly updated when people no longer live in the country or die. As he left the country as a minor, he did not have a *Hukou* of his own, and since his father died, his name must therefore have disappeared from all registers. As such, he cannot count on any protection from the police. The author claims that deporting him to China would be in violation of his right to his private life, as he is no longer familiar with the Chinese culture, and does not have family or friends on whom he can rely.

#### **Issues and proceedings before the Committee**

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

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

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<sup>5</sup> *Winata v. Australia*, (note 3 above).

<sup>6</sup> Aliens Act of 2000, Aliens Decree of 2000, Regulations on Aliens of 2000, and the Aliens Act Implementation Guidelines of 2000.

6.3 Regarding his allegations under article 7 of the Covenant, the Committee takes note of the author's allegation that if deported to China, he would face a risk of torture or cruel, inhuman or degrading treatment or punishment prohibited by article 7 of the Covenant, as a result of his inability to prove his identity to the Chinese authorities. The State party contends that the author failed to exhaust domestic remedies on that count, and the author did not contest this. The Committee observes that before the State party's jurisdictions, the author's asylum claim was mainly based on his contention that, if returned to China, he would face a risk of persecution by the individuals who allegedly abducted him. Recalling that the requirement of exhaustion of domestic remedies, which allows the State party to remedy an alleged violation before the same issue is raised before the Committee, obliges authors to raise the substance of the issues submitted to the Committee before domestic courts, the Committee declares this part of the communication inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.4 With regard to the author's allegation under article 7, that the individual who allegedly abducted him may threaten or harm him should he return to China, the Committee observes that these acts are attributed to a non-State actor, and the author has not demonstrated, for admissibility purposes, that the Chinese authorities are unable or unwilling to protect him from such private acts.<sup>7</sup> The Committee hence declares this part of the communication inadmissible under article 2 of the Optional Protocol.

6.5 Concerning articles 17 and 24, the Committee takes note of the State party's contention that these claims were not raised before the domestic courts. The author does not contest this. The Committee thus declares this part of the communication inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.6 The Committee further observes, concerning article 24, that the author, who was born in 1988, is at the present time no longer a minor. As a result, any future removal would not touch upon any right under this article. The author's claim under article 24 is therefore also inadmissible *ratione materiae* under article 3 of the Optional Protocol, as incompatible with the provisions of the Covenant.<sup>8</sup>

7. The Committee therefore decides:

(a) That the communication is inadmissible under articles 2, 3 and 5, paragraph 2 (b) of the Optional Protocol;

(b) That this decision shall be communicated to the author and to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

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<sup>7</sup> See communication No. 1302/2004, *Khan v. Canada*, decision on admissibility adopted on 25 July 2006, para. 5.6.

<sup>8</sup> See *Benali v. the Netherlands*, decision on inadmissibility of 23 July 2004, para. 6.2.

**N. Communication No. 1616/2007, *Manzano et al v. Colombia*  
(Decision adopted on 19 March 2010, ninety-eighth session)\***

<i>Submitted by:</i>	Hernando Manzano, Maria Cristina Ocampo de Manzano and Belisario Deyongh Manzano (represented by counsel, Carlos Julio Manzano)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Colombia
<i>Date of communication:</i>	3 August 2007 (initial submission)
<i>Subject matter:</i>	Violations of due process in the proceeding that led to the authors' conviction
<i>Procedural issue:</i>	Lack of substantiation of the allegations
<i>Substantive issues:</i>	Right to a hearing before an impartial tribunal
<i>Article of the Covenant:</i>	14, paragraph 1
<i>Article of the Optional Protocol:</i>	2

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

*Meeting on 19 March 2010,*

*Adopts the following:*

**Decision on admissibility**

1. The authors of the communication, dated 18 July 2007, are Hernando Manzano, Maria Cristina Ocampo de Manzano and Belisario Deyongh Manzano, Colombian citizens, who allege that their rights under article 14, paragraph 1, of the Covenant have been violated by Colombia. The Optional Protocol entered into force for the State party on 23 March 1976. The authors are represented by counsel, Carlos Julio Manzano.

**The facts as submitted by the authors**

2.1 Mr. Manzano and Mr. Deyongh had had a law office in Barranquilla since 1984. Their clientele included employees of Puertos de Colombia (Colpuertos), a Government enterprise responsible for all port activities in the country and owner of all assets used for those activities. By Act No. 01 (1991) the State decided to sell the enterprise's assets to private-sector buyers, making payment of outstanding debts chargeable to the national budget. Under Decree No. 36 (1992), the Government established the Social Liability Fund

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

According to article 90 of the Committee's rules of procedure, Mr. Rafael Rivas Posada, Committee member, did not take part in the adoption of this ruling.

for the Liquidation of Puertos de Colombia (Foncolpuertos), which would be responsible for servicing all Colpuertos' outstanding debts. While Act No. 01 of 1991 had envisaged the possibility that the private port corporations created to buy the port assets would help pay those debts, that never materialized.

2.2 Foncolpuertos began operations on 1 January 1993, at which time the authors' law office had approximately 100 clients, all in receipt of a pension from Colpuertos, who had approached the office because delays had begun to occur in the payment of their pensions. After Foncolpuertos assumed liability for the full servicing of debts left by Colpuertos, payments became increasingly delayed, forcing thousands of pensioners to seek the assistance of lawyers. By 1998 Mr. Manzano's law office had some 5,000 clients, who freely and spontaneously granted it authority to represent them before the labour tribunals to obtain payment of the months of pension to which they were legally entitled. By that time payment of Foncolpuertos' debt was being charged entirely to the national budget, with the port corporations contributing nothing, which created a major fiscal problem. Legal claims were heard by the relevant labour courts and tribunals, giving rise to amicable settlements, as appropriate, through the Labour Inspectorates attached to the Ministry of Social Security.

2.3 The authors contend that, faced with the resulting budget deficit, and in order to avoid paying the pensions, the State launched a campaign of indiscriminate persecution against all those who in one way or another were defending the pensioners. At the beginning of 1999, Senator Jaime Vargas, a political opponent of the Manzano family, sent his assistant to the Barranquilla labour courts to study the cases filed by Mr. Manzano. Following that visit, the prosecutor's office, for no reason whatsoever, initiated a preliminary investigation into the authors' business dealings. In August 1999, during an official session of Parliament, Senator Vargas read out a list of individuals seeking payment of overdue monthly pension amounts from Foncolpuertos, a list that included judges, court clerks, inspectors of the Labour Office, directors of the Fund and lawyers, and asked the Attorney General to investigate. Hernando Manzano's name was on that list. On 13 October 1999 the prosecutor's office summoned him to explain alleged irregularities found in the context of the proceeding that had been launched against him on 14 April 1999. Despite his explanations, the prosecutor's office brought criminal charges against him. At the same time a group of his clients lodged complaints against him with the regular criminal court demanding payment of amounts greater than those agreed to when contracting his services. Those complaints were settled in the author's favour.

2.4 The persons on the "Vargas list" were not tried in the ordinary courts; the High Council of the Judiciary, in Decision No. 1799 of 14 May 2003, established a special judicial body solely for criminal proceedings concerning acts related to the liquidation of Colpuertos and Foncolpuertos. That body was made up of two criminal circuit courts and one district high court, all located in Bogotá. The decision states that it is issued pursuant to article 63 of Act No. 270 (1996) on Organization of the Administration of Justice, which deals with measures to reduce backlogs in the judicial system. The authors' case should have been assigned to a criminal court in Barranquilla, given that the alleged events occurred and the accused resided in that city. The case was heard, however, by the first of the courts mentioned above, which on 24 September 2004 found the authors guilty of being accessories in the offence of aggravated fraud and principals in the offences of peculation by appropriation for the benefit of third parties, of perversion of the course of justice, and of providing false information in and forging of a public document on the part of an official. They were sentenced to 150 months' imprisonment, deprivation of their rights and public duties for 10 years, and a fine. The authors lodged an appeal, which was heard by the High Court of the Judicial District of Bogotá, Criminal Chamber for the Clearance of Foncolpuertos cases, on 31 May 2005. The Court overturned the guilty verdict for the offence of aggravated fraud. For the charges of perpetrating and being criminally

responsible for the offences of peculation by appropriation for the benefit of third parties, perversion of the course of justice, and providing false information in and forging of a public document on the part of an official, the Court reduced the sentence to eight years and one month's imprisonment, deprivation of rights and public duties for a period equivalent to that of the main penalty, and a fine.

2.5 The authors lodged an appeal in cassation with the Supreme Court, which, by decision dated 27 March 2007, declared the criminal proceedings relating to fraud, perversion of the course of justice and providing false information in and forging of a public document on the part of an official to be time-barred. The Court did not, however, declare the proceeding for peculation to be time-barred. The Court reviewed the authors' arguments for cassation, including the contention that the judicial body's decision was invalid on the grounds that it did not have jurisdiction owing to alleged violation of the principle of the natural judge ("*juez natural*"), and rejected the appeal by decision dated 9 April 2007. With regard to the judicial body's alleged lack of jurisdiction, the Supreme Court stated inter alia that the appellants had not demonstrated how their guarantees of due process had been restricted in practice or how the rules for their trial had been altered to the detriment of their rights, and confirmed that the establishment of the judicial bodies in question by the Administrative Chamber of the High Council of the Judiciary had its legal basis in articles 25 and 63 of Act No. 270 (1996).

2.6 The authors also filed an application for reconsideration of that decision, requesting that the criminal proceeding for peculation be declared time-barred. The Supreme Court rejected that application by decision dated 20 April 2007.

2.7 The authors maintain that as a result of the trial they received threats from guerrilla groups and were forced to flee the country. In execution of their sentence, all their assets were seized.

### **The complaint**

3. The authors allege that they are the victims of a violation of the right to due process under article 14, paragraph 1, of the Covenant, for the following reasons:

(a) The court which dealt with their case was created especially in 2003 to try the acts of which they had been accused, and therefore biased since it was ensured that the appointed judges would accept the unfounded charges laid by the prosecution. That is a violation of article 6 of the Code of Criminal Procedure, according to which no one may be tried except by a competent judge or court already existing at the time when the alleged act was committed. Those bodies were established on a temporary basis, for four months, and yet are still functioning. The authors state that they filed a criminal complaint in that regard but that their complaint was never taken up;

(b) The alleged acts do not constitute the offence of peculation for which they were convicted. Peculation (*peculado*) is defined in the Criminal Code of Colombia as an offence committed by a "public official who appropriates for his own profit or that of a third party assets belonging to the State or to enterprises or institutions in which the State maintains an interest, or parafiscal assets or funds, or assets belonging to individuals the administration or custody of which have been entrusted to the official concerned by virtue of his functions". According to the authors, two fundamental elements in that offence did not exist in their case: the status of public official and profit. The authors were not public officials but merely practising lawyers, who had in fact filed suit against the State. Their judicial function was limited to demanding payment on behalf of a group of retirees of work-related debts owed but not paid by the State. As for the element of "profit", throughout the trial both the prosecution and the judges acknowledged that the fees charged



by the author were completely legal and in accordance with his clients, so that there is no basis for the charge of profiting;<sup>1</sup>

(c) Owing to unjustified delays in court proceedings attributable to the legal officials responsible for the case, the time limit for the criminal proceedings expired on 22 April 2006. Nevertheless the Supreme Court, in rejecting the appeal in cassation by decision dated 20 April 2007, stated only that the time limit had expired for part of the appeal, without addressing the prescription period for the offence of peculation;

(d) There were numerous errors in the appreciation of evidence. In particular, the prosecution accused the authors of having received sums of money owed by the State on behalf of clients who allegedly had not granted them authority to do so. The authors maintain that they had copies of some but not all of those powers of attorney because they were removed by the prosecution following the search of the authors' law office. In order to prove that they did have their clients' proxies, the authors requested a judicial audit of the clients' records in Foncolpuertos. However, due to negligence on the part of the investigating judges, that piece of evidence was replaced by a request to Foncolpuertos to certify that they existed. The requested certification was never provided in the event by Foncolpuertos and the judge did not seek the evidence requested by the authors. Given the lack of that evidence, the judgement was based on the false assumption that the powers of attorney did not exist, which led to a denial of justice. The few clients whom the judges agreed to question, at the insistence of the authors, confirmed that they had indeed given proxies to the authors.

#### **The State party's observations on admissibility and merits**

4.1 On 16 January 2008, the State party submitted a note verbale containing observations on the admissibility of the communication, arguing that it should be declared inadmissible.

4.2 The State party points out that the communication was submitted by Carlos Julio Manzano on behalf of his brother, pursuant to the authority granted to him in the latter's general power of attorney, as well as on behalf of his mother, Maria Cristina Ocampo de Manzano, and his cousin Belisario Deyongh Manzano. He has not, however, produced any power of attorney from the latter two, supposedly because their whereabouts are unknown. The State party argues that the communication should be declared inadmissible under article 1 of the Optional Protocol on the grounds that Carlos Julio Manzano is not authorized to act on behalf of those two persons and does not submit any proof of why the alleged victims are unable to file a complaint in their own name.

4.3 The State party argues that the reason why bodies are established to relieve backlogs in the courts is to ensure prompt, effective and efficient justice. They are temporary because they are created to resolve the problem of backlogs in judicial proceedings and thereby guarantee the efficient administration of justice. Backlog courts ("*juzgados de descongestión*") have a legal basis under article 63 of the Act on Organization of the Administration of Justice (1996), which grants the Administrative Chamber of the High Council of the Judiciary the power to appoint, on a temporary basis, special substantiating

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<sup>1</sup> The authors provided the Committee with copies of the guilty verdicts. The cassation judgement of 9 April 2007 refers (p. 142) to the issue of whether the facts met the definition of the crime of peculation. The Supreme Court did not agree with the authors' contention that an individual who is not a public official may not be punished for perpetrating the offence of peculation. The Court ruled that article 30 of the Criminal Code on participants in a crime was applicable and recalled that according to the last paragraph of that article, participants who do not meet the criteria for a specific crime have their sentence reduced by one quarter.

or trial judges or magistrates. Furthermore, article 257, subparagraph 2, of the Constitution provides that the High Council of the Judiciary is empowered to create, abolish, merge or transfer responsibilities within the justice system.

4.4 In the current case, the aforementioned backlog courts were set up to address the paralysis in proceedings before the circuit criminal courts across the country arising out of offences committed by Foncolpuertos, and also in view of the importance of the case, involving millions of State funds, which had given rise to the investigations, and of the need to ensure that justice was served properly and promptly. The First Chamber of the Council of State, in a decision dated 20 May 2004, when dealing with the petition for annulment of the rulings of the Administrative Chamber establishing the backlog courts (“*juzgados de descongestión*”), found that those courts were established in response to the need to relieve the backlog in the labour tribunals of the Barranquilla, Cartagena, Santa Marta, Buenaventura, Tumaco and Bogotá Judicial Circuits, as well as the Labour Chamber of the Barranquilla Judicial District. In the opinion of the First Chamber, it was the law with the higher ranking (article 63 of the 1966 Act), and not the challenged rulings, that provided the legal basis for modifying the rules of jurisdiction for the purpose of reducing the backlog in the court system. The constitutionality of that provision was submitted to review and was declared valid by decision C-037 of 1996.

4.5 The State party also argues that the communication should be declared inadmissible under article 2 of the Optional Protocol, on the grounds that the authors want the Committee to act as a fourth instance and review facts and evidence already considered by the domestic courts, in order to prevent execution of the criminal conviction and payment of the fine through the sale of their property.

4.6 With regard to the merits, the State party, in a letter dated 20 May 2008, referred moreover to the authors’ allegations concerning the partiality of the judges. According to the State party, the authors adduce no evidence in support of their contentions, nor did they ever raise the matter before the domestic courts. The proceedings were fully in conformity with judicial guarantees and even resulted in recognition that the criminal charges relating to aggravated fraud, perversion of the course of justice and providing false information in and forging of a public document on the part of an official were time-barred.

4.7 According to the authors there was a violation of article 14 because unjustified delays in the proceedings led to prescription of the offences but the Supreme Court only declared time-barred the charges of forgery and perversion of the course of justice, not that of peculation. The State party argues that the guarantee enshrined in article 14 is complemented by the guarantee in article 9 relating to a detainee’s right either to be tried within a reasonable time or released. Mr. Manzano and Mr. Deyongh were never detained and are even fugitives from Colombian justice, so they cannot allege that they were affected by any undue delay in delivery of the criminal sentence, especially since the criminal charges relating to aggravated fraud, prevention of the course of justice and providing false information in and forging of a public document on the part of an official were declared to be time-barred, in order to clarify the legal situation of the accused and absolve them of those charges. In conclusion, the State party affirms that the authors’ arguments are without merit and that there was no violation of the Covenant.

#### **Authors’ comments on the observations of the State party**

5.1 In their comments dated 21 October 2008, the authors maintain that the communication should be deemed admissible. With respect to the issue of counsel’s lack of authority to represent Maria Cristina Ocampo de Manzano and Belisario Deyongh Manzano, counsel submitted to the Committee documents signed by each of those persons empowering him to represent them before the Committee and expressing approval of steps already undertaken.

5.2 With regard to the legality of the judicial bodies created to deal with the Foncolpuertos-related cases, the authors argue that the Act on Organization of the Administration of Justice under which they were established violates the competent judge principle and is therefore contrary to article 14 of the Covenant. Furthermore, article 11 of the Code of Criminal Procedure, in establishing the natural judge (“*juez natural*”) principle, states that “no one may be tried except by the competent judge or tribunal already existing at the time when the alleged act was committed”. They also note that the press, which did great damage to the interests of justice, was not excluded from all the proceedings. The media labelled the accused guilty in advance, and as a result an effort was made to find judges who would accept the prosecution’s charges. Since none were found, a special court was created that would heed the calls for guilty verdicts from some political circles and from the press.

5.3 The authors resided in the city of Barranquilla and the facts under investigation occurred there. It would therefore have been natural for the case to be tried by the Barranquilla circuit courts in first instance and the High Court in the event of appeal. Despite that, the cases were heard by judicial bodies located in Bogotá, some 1,000 km distant from Barranquilla. That was a violation of articles 85 to 88 of the Code of Criminal Procedure, which lay down rules with respect to any change of venue in criminal proceedings.

5.4 According to the authors, article 63 of Act No. 270 does not allow the Administrative Chamber of the High Council of the Judiciary to transfer proceedings from one city to another, in disregard of the principle of territorial jurisdiction. Nor does it permit the Chamber to appoint judges and create tribunals after the facts under investigation have occurred. The Council may only appoint judges, not create tribunals, and only on a temporary basis and within the territory of jurisdiction of the natural judge (“*juez natural*”). They argue that the aim of Chamber of Representatives Bill No. 286 (2007) and Senate Bill No. 23 (2006), amending Act No. 270 (1996) on Organization of the Administration of Justice, had been to modify the Code of Criminal Procedure and the Criminal Code so as to establish new rules of competence with regard to the venue for proceedings, which would henceforth be the responsibility of the High Council of the Judiciary and the Sectional Councils of the Judiciary, instead of the Supreme Court and the Judicial District High Courts. The authors see this as proof that, prior to those bills, the High Council of the Judiciary had no such competence. They point out that, in a ruling dated 15 July 2008, the Constitutional Court declared the proposed amendment unconstitutional.

5.5 With regard to the merits, the authors refer, inter alia, to the decision of the First Chamber of the Council of State of 20 May 2004 referred to by the State party, according to which the establishment of the courts in question was based on the need to relieve the backlog in the labour tribunals of the Barranquilla, Cartagena, Santa Marta, Buenaventura, Tumaco and Bogotá Judicial Circuits, as well as the Labour Chamber of the Barranquilla Judicial District. According to the authors, that decision applies only to the backlog in those labour tribunals and cannot legitimize the appointment of backlog criminal courts (“*juzgados de descongestión*”) in Bogotá and the related District High Court.

5.6 The authors argue that in its observations the State party does not respond to the allegations in their submission to the Committee regarding violations of the right to due process arising from irregularities in the use of evidence.

5.7 The authors reject the State party’s assertion that they were never detained. They point out that Hernando Manzano was detained from 13 October 1999 to 24 July 2001, while Belisario Deyongh was detained from February 2000 to July 2001. Maria Cristina Ocampo was not detained on account of her age (74 at the time).

### Decision on admissibility

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

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

6.3 The Committee takes note of the State party's observation that the authors' counsel did not produce any power of attorney for two of them and that the communication should therefore be considered inadmissible under article 1 of the Optional Protocol. The Committee observes that while those powers of attorney were not submitted initially, they were made available to the Committee subsequently. It therefore finds that the ground for inadmissibility put forward by the State party is not relevant.

6.4 The authors allege that they were victims of violations of their right to due process on the grounds that the judicial bodies that tried them: committed irregularities in the appreciation of evidence; convicted them of the offence of peculation, when the definition given in the Criminal Code did not correspond to the acts of which they were accused; and erred in calculating the prescription period for that offence. The Committee observes that these allegations relate to the evaluation of facts and evidence by the courts of the State party. The Committee recalls its jurisprudence according to which it is incumbent on the courts of State parties to evaluate the facts and evidence in each case, or the application of domestic legislation, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice.<sup>2</sup> The Committee has studied the materials submitted by the parties, including the guilty verdict of the court of first instance and the decisions on the remedies of appeal and cassation exercised by the authors, which deal with the complaints now lodged with the Committee by the authors. The Committee is of the opinion that the materials submitted do not indicate that those proceedings were flawed as alleged. The Committee therefore finds that the authors have not sufficiently substantiated their complaints of a violation of article 14, paragraph 1, and that the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.5 The authors further allege that they were tried by a court and a tribunal that did not meet the requirement of impartiality, because they were established in an ad hoc manner and in violation of the natural judge ("*juez natural*") principle. The Committee is of the opinion that article 14 does not necessarily prohibit the creation of criminal courts with special jurisdiction if that is permitted under domestic legislation and those courts operate in conformity with the guarantees laid down in article 14.<sup>3</sup> With respect to the first of these requirements, the Committee observes that the Supreme Court, after hearing the authors' appeal in cassation, concluded that the creation of those bodies had its legal basis in the Act on Organization of the Administration of Justice. The Committee is of the opinion that its role is not to evaluate the interpretation of domestic legislation by national courts.<sup>4</sup> Regarding the second requirement, the Committee considers the fact that the judicial bodies were created specifically for proceedings relating to Foncolpuertos does not mean that they

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<sup>2</sup> See general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI. See also communication No. 541/1993, *Simms v. Jamaica*, decision on inadmissibility adopted on 3 April 1995, para. 6.2.

<sup>3</sup> General comment No. 32 (note 2 above), para. 22.

<sup>4</sup> Communication No. 1528/2006, *Fernández Murcia v. Spain*, decision on inadmissibility adopted on 1 April 2008, para. 4.3.

operated with partiality. Other elements are necessary to prove partiality, the existence of which cannot be deduced from the materials available to the Committee. The Committee therefore finds that the authors have not sufficiently substantiated their allegation in that regard and that that part of the communication is also inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under article 2 of the Optional Protocol;
- (b) That this decision should be transmitted to the State party, to the authors and to counsel.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**O. Communication No. 1618/2007, *Brychta v. Czech Republic*  
(Decision adopted on 27 October 2009, ninety-seventh session)\***

<i>Submitted by:</i>	Frantisek Brychta (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Czech Republic
<i>Date of communication:</i>	20 September 2006 (initial submission)
<i>Subject matter:</i>	Right to a fair trial with regard to a labour law dispute
<i>Procedural issues:</i>	Abuse of the right of submission; matter examined under another procedure of international investigation or settlement; non-substantiation of claim
<i>Substantive issue:</i>	Right to a fair trial
<i>Article of the Covenant:</i>	14, paragraph 1
<i>Articles of the Optional Protocol:</i>	2; 3; 5, paragraph 2 (a)

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

*Meeting on 27 October 2009,*

*Adopts the following:*

**Decision on admissibility**

1. The author of the communication is Frantisek Brychta, born in 1949 in Stitary, former Czechoslovakia, and residing in Moravské Budejovice, Czech Republic. He claims to be a victim of a violation by the Czech Republic of article 14 paragraph 1 of the Covenant.<sup>1</sup> The author is not represented.

**Factual background<sup>2</sup>**

2.1 The author filed an action against his former employer before the District Court of Trebic for the payment of his salary for six days of leave which he had to use for the

\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Ladhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvio, Mr. Krister Thelin and Ms. Ruth Wedgwood.

<sup>1</sup> The Optional Protocol entered into force for the Czech Republic on 1 January 1993, as a consequence of the Czech Republic's notification of succession of the international obligation of Czechoslovakia, which had ratified the Optional Protocol in March 1991.

<sup>2</sup> Due to chronological and factual gaps in the author's submission, this section was drafted on the basis of the author's submission, legal decisions adopted, and the State party submission.

preparation of examinations at university, within the framework of external studies during employment. The author claimed that by denying him payment of these six days of leave, his former employer breached article 1, paragraph 2, of Decree 140/68, and article 187, paragraph 2, of the Labour Code, and also breached the International Convention concerning Paid Educational Leave.<sup>3</sup> The District Court of Trebic rejected the claim on 22 August 1991. The author appealed before the Regional Court of Brno, sitting as the Court of Appeal, which delivered its judgment on 18 March 1992 (File No. 12 Co 452/91). The Regional Court upheld the main part of the first instance judgment, and remanded the remaining issues (related to the issue of a compensation claim of CSK 22) back to the District Court of Trebic. On 22 October 1992, the District Court of Trebic rejected the remainder of the issues. On 19 November 1992, the author filed an action with the Regional Court of Brno, by which he asked for the withdrawal of his claim regarding the remaining contentious issues. As a result, the Regional Court of Brno adopted resolution N° 12 Co 17/93, dated 29 August 1994, allowing the withdrawal of the action, quashing the judgment of the Trebic District Court of 22 October 1992, and discontinued the proceedings. The Regional Court decision became executory on 16 December 1994.

2.2 By motion of 30 August 1995,<sup>4</sup> the author lodged an appeal before the Constitutional Court, which subsequently invited him to remedy defects in his submission, including the required legal representation. The author re-submitted his request for leave for appeal on 27 March 1996. On 25 April 1996, the Constitutional Court dismissed the appeal as having been submitted out of time.

2.3 The author claims that instead of ruling against the Judgment of the Regional Court of Brno No. 12 Co. 452/92, the Constitutional Court rendered judgment No. I. US 200/95, which is a judgment against the Court ruling of the Regional Court of Brno No. 12 Co. 17/93. The author contends that he never lodged an appeal against the latter decision. He further claims that another difficulty is the fact that the judge who delivered the judgment of the Regional Court of Brno (File No. 12 Co 452/91) is a Constitutional Court judge who was at that time also serving as presiding judge in the Regional Court of Brno. He contends that as a result, he experienced difficulties finding a lawyer who would accept to represent him,<sup>5</sup> which in turn resulted in his late submission for appeal before the Constitutional Court. The author claims that there is no remedy available against decisions of the Constitutional Court.

2.4 After the Constitutional Court verdict, the author also submitted an application to the European Court of Human Rights, which was declared inadmissible on 8 December 1997.

### **The complaint**

3. The author claims that by ruling on the basis of the wrong decision, the Constitutional Court violated his right to a fair trial, guaranteed by article 14, paragraph 1, of the Covenant.

### **State party's submission on admissibility and merits**

4.1 On 19 May 2008, the State party commented on the admissibility and merits of the communication. On admissibility, it contends that the author's communication was

<sup>3</sup> International Labour Organization, Convention No. 140 (1974).

<sup>4</sup> While there are discrepancies on the date of the initial submission, it is here referred to the date mentioned in the Constitutional Court decision adopted on 25 April 1996.

<sup>5</sup> Formal representation by a lawyer is a statutory requirement to file an appeal before the Constitutional Court.

submitted too late, and should therefore be declared inadmissible for abuse of the right of petition, under the meaning of article 3 of the Optional Protocol: The State party notes that the last domestic decision was adopted on 25 April 1996, and the decision of the European Court of Human Rights was taken on 8 December 1997. The author's initial submission to the Committee was on 20 November 2006. Therefore, more than 10 and a half years elapsed since the last domestic decision. In the State party's opinion, this delay, in the absence of any reasonable justification from the author, should be considered as abusive by the Committee.<sup>6</sup>

4.2 Subsidiarily, on the merits, the State party contends that the author's communication under article 14 of the Covenant is manifestly ill-founded. It notes that article 14, paragraph 1, does not provide detailed rules pertaining to the domestic judicial systems with regard to private law disputes. Therefore, it considers that States parties should enjoy a margin of discretion on how they implement article 14, including the issue of review of judicial decisions in private law disputes. It is moreover for domestic courts to interpret and apply domestic law, a fortiori where it pertains to the interpretation of rules of procedure. The Committee is only competent to review domestic decisions where a violation of the Covenant may have resulted from a domestic decision.

4.3 On the issue of the identity of the decision reviewed by the Constitutional Court, and the alleged prejudice suffered by the author as a result, the State party claims that if there are any doubts as to the identity of the decision reviewed, they are solely attributable to the author. His first submission to the Constitutional Court was presented on 30 August 1995, and its wording clearly suggested that it was meant as an appeal against the decision of the Regional Court of Brno No. 12 Co. 17/93 of 29 August 1994. The author specifically referred to this decision in his submission, and only referred to the decision No. 12 Co. 452/91 as part of numerous pieces of supporting evidence. In his second submission of 27 January 1996 to the Constitutional Court, the author also clearly referred to the quashing of decision No. 12 Co. 17/93, which is obvious from the title of the submission and the fact that the submission omits any mention of decision No. 12 Co. 452/91. It was not until the third submission of 27 March 1996 that the author introduced a motion to quash decision No. 12 Co. 452/91. Therefore, the Constitutional Court correctly maintained the initial identification of the decision of the Regional Court of Brno against which the constitutional appeal was filed, i.e. decision No. 12 Co. 17/93 of 29 August 1994.

4.4 The State party further notes that the Constitutional appeal was rejected on formal grounds, as the author failed to file his appeal within the statutory limit of 60 days since the day the Regional Court decision became final. Decision No. 12 Co. 17/93 became final on 16 December 1994, and the author's last submission to the Constitutional Court was made on 27 March 1996, i.e. well beyond the statutory limit of 60 days. The State party notes that if the author failed to meet the time limit with respect to the former decision, he would have been a fortiori beyond the statutory delay with regard to earlier decision No. 12 Co. 452/91 of 18 March 1992, and the outcome of his Constitutional Court appeal would in any event have been identical, i.e. would have been rejected on formal grounds.

4.5 On the question of the issuance of the Regional Court of Brno judgment (File No. 12 Co 452/91) by a Constitutional Court judge, the State party contends that the author suffered no prejudice, as the judge in question did not take part in the Constitutional Court

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<sup>6</sup> The State party refers to the Committee's communications No. 1434/2005, *Fillacier v. France*, decision on inadmissibility adopted on 27 March 2006, No.787/1997, *Gobin v. Mauritius*, decision on inadmissibility adopted on 16 July 2001, No. 1452/2006, *Chytil v. Czech Republic*, decision on inadmissibility adopted on 24 July 2007, and No. 1533/2006, *Ondracka v. Czech Republic*, Views adopted on 31 October 2007.



proceedings the author initiated. In addition, as the author's appeal was rejected on formal grounds, a judge's subjective appreciation would in any event have had no bearing on such a ruling. The State party claims that in light of these facts, there was no violation of article 14 of the Covenant.

### **Authors' comments**

5.1 In his comments, the author maintains that his communication should be declared admissible by the Committee. On the issue of delay, he states that he only approached the Committee when he received a negative decision from the former European Commission of Human Rights, which declared his communication inadmissible on 8 December 1997. He claims that he first approached the Committee in October 1999, but that he did not receive an answer. The author later tried to file an appeal with the European Court of Human Rights, an attempt which was rejected on 22 October 2004. He then approached the Committee on 20 September and 20 November 2006.

5.2 On the issue of the rejection of his appeal by the Constitutional Court on formal grounds, the author refers to a letter of 8 March 1996 of the Constitutional Court, which extended the deadline for the removal of defects until 31 March 1996. As such, his submission of 27 March 1996 was introduced within the delay granted. His appeal should therefore have been formally accepted, and the Constitutional Court should have ruled against the Regional Court of Brno decision No. 12 Co. 452/91. By failing to do so, it has violated article 14, paragraph 1, of the Covenant in his regard.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

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

6.2 The Committee notes that this matter was already considered by the European Court of Human Rights on 8 December 1997. However, it recalls its jurisprudence that it is only where the same matter *is being* examined under another procedure of international investigation or settlement that the Committee has no competence to deal with a communication under article 5, paragraph 2 (a), of the Optional Protocol.<sup>7</sup> Thus, article 5 paragraph 2 (a), does not bar the Committee from considering the present communication.

6.3 The Committee has noted the State party's argument that the submission of the communication amounts to an abuse of the right of submission under article 3 of the Optional Protocol, since the author waited almost nine years since the final European Commission of Human Rights decision, and more than 10 and a half-year since the last domestic decision in the case before submitting his complaint to the Committee. The Committee reiterates that the Optional Protocol does not establish any deadline for the submission of communications, and that the period of time elapsing before doing so, other than in exceptional cases, does not in itself constitute an abuse of the right to submit a communication. The author argues that he first approached the Committee in 1999, after his complaint was considered inadmissible by the former European Commission, but that he did not receive an answer. Further to the European Commission's decision of 8 December 1997, declaring his communication inadmissible, the author tried to file another appeal with

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<sup>7</sup> See communications No. 824/1998, *Nicolov v. Bulgaria*, decision adopted on 24 March 2000, and No. 1193/2003, *Sanders v. the Netherlands*, decision on inadmissibility adopted on 25 July 2005.

the European Court of Human Rights, but was informed on 22 October 2004 that the inadmissibility decision was final and not subject to appeal. Taking account of these particular circumstances, the Committee does not consider the delay of nine years since the inadmissibility decision of the former European Commission of Human Rights to amount to an abuse of the right of submission.<sup>8</sup>

6.4 With regard to the author's contention that his right to a fair trial, guaranteed under article 14, paragraph 1, of the Covenant has been violated, the Committee noted the State party's claim that the author is at the origin of the confusion in the identity of the decision which was to be reviewed by the Constitutional Court. The author did not contest this. The Committee also noted the State party's argument that the author failed to introduce his appeal before the Constitutional Court within the statutory delay, and its contention that the author's appeal would have been rejected on the same formal grounds by the Constitutional Court had the decision appealed been the Regional Court of Brno File N° 12 Co. 452/91 of 18 March 1992.

6.5 The Committee wishes to recall that while article 14, paragraph 1, guarantees procedural equality and fairness, it cannot be interpreted as ensuring the absence of any error on the part of the competent tribunal.<sup>9</sup> The Committee further reiterates that it is generally for the courts of States parties to the Covenant to review facts and evidence, or the application of domestic legislation in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice, or that the court otherwise violated its obligation of independence and impartiality.<sup>10</sup> The material before the Committee does not show that the judicial process in question suffered from any such defects and the author failed to present sufficient arguments substantiating, for the purposes of admissibility, that his trial was unfair, within the meaning of article 14, paragraph 1, of the Covenant. As such, this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.6 As for the author's contention that his case was complicated by the fact that the judgment of the Regional Court of Brno File No. 12 Co. 452/91 was delivered by a judge of the Constitutional Court of the Czech Republic, the Committee notes that he did not substantiate, for the purposes of admissibility, that the presence of this judge before the Constitutional Court bench violated his rights guaranteed under the Covenant, including article 14, paragraph 1. As such, this part of the communication is also inadmissible under article 2 of the Optional Protocol.

6.7 The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under 2 of the Optional Protocol;
- (b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

<sup>8</sup> See, for example, communications No. 1463/2006, *Gratzinger v. Czech Republic*, Views adopted on 25 October 2007, para. 6.3; communication No. 1479/2006, *Persan v. Czech Republic*, Views adopted on 24 March 2009, para. 6.3.

<sup>9</sup> See general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI (2007), para. 26, and communications No. 273/1988, *B.d.B. et al. v. the Netherlands*, para. 6.3; and No. 1097/2002, *Martínez Mercader et al. v. Spain*, para. 6.3.

<sup>10</sup> See general comment No. 32, para. 26, and communication No. 541/1993, *Simms v. Jamaica*, decision on inadmissibility adopted on 3 April 1995, para. 6.2.

**P. Communication No. 1624/2007, *Seto Martínez v. Spain*  
(Decision adopted on 19 March 2010, ninety-eighth session)\***

<i>Submitted by:</i>	José Conrado Seto Martínez (represented by counsel, Miquel Nadal Borrás)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	27 June 2007 (initial submission)
<i>Subject matter:</i>	Imposition of prison sentence for non-payment of alimony
<i>Procedural issues:</i>	Non-substantiation of claim; evaluation of facts and evidence; incompatibility <i>ratione materiae</i>
<i>Substantive issues:</i>	None
<i>Articles of the Covenant:</i>	11; and 14, paragraph 2
<i>Article of the Optional Protocol:</i>	3

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

*Meeting on 19 March 2010,*

*Adopts the following:*

**Decision on admissibility**

1. The author of the communication, dated 27 June 2007, is José Conrado Seto Martínez, a Spanish national born in 1948. He claims to be victim of a violation by Spain of articles 11 and 14, paragraph 2, of the Covenant. He is represented by counsel, Mr. Miquel Nadal Borrás. The Optional Protocol entered into force for Spain on 25 April 1985.

**Factual background**

2.1 The author and his wife separated by mutual agreement in 1997. On 15 November 2002, the criminal court No. 7 of Barcelona found the author guilty of the offence of failure to pay alimony (*abandono de familia*) under article 227 of the Spanish Criminal Code and sentenced him to 12 weekends' imprisonment and reimbursement of the sums owed to his ex-wife.

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\* The following members of the Working Group of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

2.2 On 11 March 2003, the Barcelona Provincial Court (*Audiencia Provincial de Barcelona*) upheld the earlier ruling, while limiting the payment to the amounts outstanding for the period from July 1997 to March 2002.

2.3 On 25 July 2003, the author appealed (*amparo*) to the Constitutional Court, claiming a breach of constitutional provisions, such as the presumption of innocence and article 11 of the Covenant, which is considered to be part of Spanish law. On 25 January 2005, the Constitutional Court rejected the appeal. With respect to the presumption of innocence, it considered the claim unsubstantiated in view of the evidence available on file, which had been obtained lawfully. As regards the claim on article 11 of the Covenant, the Court noted first, that alimony payments could not be characterized as “contractual” obligations, and second, that it was proven that the author had sufficient financial means to fulfil his alimony obligation.

2.4 On 16 May 2007, the European Court of Human Rights declared the author’s case inadmissible on the ground that the facts presented by him did not appear to constitute a violation of any of the articles of the European Convention on Human Rights and its Protocols.

### **The complaint**

3.1 The author alleges a violation of article 11 of the Covenant, insofar as he was sentenced to deprivation of liberty for a debt which he had failed to pay solely for lack of financial resources and not deliberately.

3.2 He also claims a violation of article 14, paragraph 2, of the Covenant, as the existence of sufficient financial means was not duly proven in the Spanish courts.

### **Issues and proceedings before the Committee**

4.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

4.2 The Committee has ascertained that the author has exhausted all available domestic remedies, as required under article 5, paragraph 2 (b), of the Optional Protocol.

4.3 With regard to the alleged violation of article 11 of the Covenant by the imposition of a custodial sentence for failure to pay alimony, the Committee notes that the case concerns a failure to meet not a contractual obligation but a legal obligation, as provided in article 227 of the Spanish Criminal Code. The obligation to pay alimony is derived from Spanish law and not from the separation or divorce agreement signed by the author and his ex-wife.<sup>1</sup> Consequently, the Committee finds the communication incompatible *ratione materiae* with the provisions of article 11 of the Covenant, and thus inadmissible under article 3 of the Optional Protocol.

4.4 With regard to the claim under article 14, paragraph 2, the author claims that it has not been proven in court that he had sufficient financial means to fulfil his alimony obligations. In this regard, the Committee recalls its jurisprudence<sup>2</sup> that it is generally for the domestic courts to evaluate facts and evidence in a particular case, unless it can be ascertained that such evaluation was clearly arbitrary or amounted to a denial of justice.

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<sup>1</sup> Communication No. 1333/2004, *Calvet Ràfols v. Spain*, decision on inadmissibility adopted on 25 July 2005, para. 6.4.

<sup>2</sup> See communication No. 541/1993, *Simms v. Jamaica*, decision on inadmissibility adopted on 3 April 1995, para. 6.2.

The material before the Committee does not show that the conduct of the trial suffered from any such defects. Accordingly, this part of the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

4.5 The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 3 of the Optional Protocol;

(b) That the decision be transmitted to the State Party, to the author and to his counsel.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**Q. Communication No. 1747/2008, *Bibaud v. Canada*  
(Decision adopted on 19 March 2010, ninety-eighth session)\***

<i>Submitted by:</i>	Mireille Boisvert (not represented by counsel)
<i>Alleged victim:</i>	Michael Bibaud (her husband)
<i>State party:</i>	Canada
<i>Date of communication:</i>	23 July 2008 (initial submission)
<i>Subject matter:</i>	Right to represent others in court
<i>Procedural issues:</i>	Exhaustion of domestic remedies; incompatibility with certain provisions of the Covenant
<i>Substantive issues:</i>	Right to a fair trial; non-discrimination; right to legal personality; right to redress
<i>Articles of the Covenant:</i>	2; 5; 14, paragraph 1; 16; and 26
<i>Articles of the Optional Protocol:</i>	3 and 5, paragraph 2 (b)

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

*Meeting on 19 March 2010,*

*Adopts the following:*

**Decision on admissibility**

1.1 The author of the communication is Ms. Mireille Boisvert, a Canadian national born on 25 December 1966 in Montreal (Quebec). She considers that her husband, Mr. Michel Bibaud, is a victim of a violation by Canada of articles 2; 5; 14, paragraph 1; 16; and 26 of the Covenant. She is not represented by counsel. The Optional Protocol entered into force for Canada on 19 May 1976.

1.2 On 6 June 2008, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, decided that the admissibility of the communication should be considered separately from the merits.

**The facts as submitted by the author**

2.1 On 29 July 1999, Mr. Michel Bibaud, the author's husband, had a car accident. Since the accident, he has suffered from chronic back and leg pain. To ease the pain, and on medical advice, he consumes cannabis for therapeutic purposes.<sup>1</sup> Mr. Bibaud filed claims

\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Salvioli and Mr. Krister Thelin.

<sup>1</sup> He consumes up to four to six cigarettes per day, supplied by Santé-Canada.

for compensation following his accident. In 2002, dissatisfied with the decisions handed down on his claims, he brought an action for damages against the Régie de l'assurance maladie du Québec (the Quebec health insurance fund) and the Société de l'assurance automobile du Québec (a car insurance company). He filed this action himself, without the aid of a lawyer, as permitted under article 61 of the Code of Civil Procedure of Quebec, because of a previous bad experience with a member of the Bar and for financial reasons. He was not entitled to legal aid, which is only granted in Canada to defend oneself and not to institute legal proceedings. After filing the action, the author filed an application for voluntary intervention under article 208 of the Code of Civil Procedure. As part of this procedure, she asked to be allowed to represent her husband as, in her view, he would not be capable of representing himself due to his state of health. A note from the family doctor and a notarized power of attorney were submitted to the court.<sup>2</sup>

2.2 On 22 October 2002, the Superior Court of Canada dismissed her application to intervene as being inadmissible. According to this decision, the sole purpose of the application for voluntary intervention was to represent Mr. Bibaud, as a lawyer would do, and not to assert any personal interests, as specified in the provision. It was also argued that only lawyers could represent another person in court. On 8 November 2002, the Quebec Court of Appeal dismissed the appeal against the decision. On 10 June 2004, the Supreme Court of Canada dismissed the request for appeal. It considered that, pursuant to the provisions in force,<sup>3</sup> the application did not conform to the usual intervention circumstances provided for in the Code of Civil Procedure. The author gave as her sole purpose for intervening the representation of her husband's interests, meaning recognition of her right to represent him. The application had been considered not only incompatible with the legislative provisions but also with the protective supervision for incapable persons under Quebec civil law.<sup>4</sup> The author asked for a review of that decision, and it was dismissed by the Supreme Court on 28 October 2004.

2.3 The author has since submitted a brief to the Committee on Institutions for general consultation on the reform of the Code of Civil Procedure of Quebec, on the recommendation of the Associate Director-General of Legislative Affairs. However, the Government has changed and there is now no guarantee that the procedures will be followed up. She has also written to several eminent persons and organizations, including the Minister of Justice, the Office for Disability Issues and the Canadian Human Rights Commission. The author intervened in this action, pursuant to article 208 of the Code of Civil Procedure, to ask to be allowed to "aid, assist and represent" her husband.

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<sup>2</sup> Pursuant to a decision of the Supreme Court of Canada, the power of attorney has not been registered, as required under article 2166 of the Code of Civil Procedure of Quebec, and is therefore not enforceable.

<sup>3</sup> The Code of Civil Procedure and the Act respecting the *Barreau du Québec* govern the legal framework for the right to act. On the one hand, the law recognizes the right to represent oneself (article 61 of the Code of Civil Procedure) and, on the other hand, the law imposes the requirement to engage a lawyer to act for another person (article 62 of the Code and article 128 of the Act respecting the *Barreau du Québec*). Representation by spouses, relatives, persons connected by marriage or friends is only permitted for proceedings falling under the jurisdiction of the small claims division of the Court of Quebec (article 959 of the Code of Civil Procedure).

<sup>4</sup> In its judgement, the Supreme Court stressed that such protection is governed by a procedure that must formally recognize an adult person's incapacity. Such a decision is governed by the law and cannot be made in the course of judicial proceedings or arbitrarily decided by a judge. See the Supreme Court of Canada's judgement of 10 June 2004.

### **The complaint**

3.1 The author maintains that the State party has violated articles 2, 5, 14, 16 and 26 of the Covenant.<sup>5</sup> She considers that, under Canadian law, persons may choose either to represent themselves or to be represented by a lawyer. However, persons who are mentally or physically incapable and who cannot represent themselves alone must be represented by a lawyer. According to the author, persons with disabilities who are incapable of representing themselves alone should not have their choices restricted and must have the same rights as any other person. Currently, if such persons cannot have access to legal representation by a lawyer because of their financial situation or personal choice, they must abstain from legal proceedings.

3.2 There are exceptions to this principle, with respect to small claims and immigration matters in the administrative courts. In such cases, it is not compulsory for a lawyer to represent another person. The Code of Civil Procedure provides that no one is obliged to be represented by a lawyer, with the exception of legal persons, trustees, collecting agents and persons acting on behalf of another person pursuant to Act 59 of the Code. This provision specifies that “[a] person cannot use the name of another to plead, except the State through authorized representatives”. However, when several persons have a common interest in a legal action, one of them may institute legal proceedings on behalf of all the other persons if given authorization to do so. Tutors, curators and others representing persons who are not able to fully exercise their rights may appear in court in their own name and respective capacity. The same applies to trustees in administering all aspects of the property of another person and to proxies in executing the power of attorney granted to them by adult persons, who are making provision for when they become incapable of taking care of themselves or administering their own property. Thus, no persons wishing to represent an incapable person, by virtue of a notarized power of attorney or a mandate in case of incapacity (advance directive), may represent that person in their own name and are obliged to engage a lawyer.

3.3 The author also refers to article 208 of the Code of Civil Procedure, according to which “any person interested in an action to which he is not a party, or whose presence is necessary to authorize, assist or represent a party who is incapable, may intervene therein at any time before judgment”. She considers that she has a clear interest in representing her husband. She therefore contends that, by not allowing her to represent her husband as would a lawyer, he is a victim of discrimination.

### **State party’s observations on admissibility**

4.1 On 3 June 2008, the State party challenged the admissibility of the communication on the grounds that it is incompatible with the provisions of the Covenant with respect to articles 2; 14, paragraph 1; and 26 of the Covenant, that there has been no prima facie violation of articles 5 and 16, and that domestic remedies have not been exhausted.

4.2 Recapitulating the facts, the State party explains that on 29 July 1999 Mr. Bibaud was a victim of a car accident, followed by an operation in 2002, which left him in an almost total state of incapacity, needing constant help. Given his state of health, on 30 May 2002 he signed a general power of attorney in favour of his spouse, Ms. Boisvert (the author), in front of a notary, empowering her, where the law allows, to institute any legal action, lawsuit or proceedings on his behalf. He also agreed to a power of attorney appointing her as a proxy should he become incapable. The State party notes in this respect

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<sup>5</sup> Having listed the provisions of the Covenant that have allegedly been violated in this case, the author presents her argument without linking it to those provisions.



that, as the mandate in case of incapacity was never approved and his incapacity was never certified and declared by a court, its author is still legally presumed to be capable of representing himself.

4.3 On 12 June 2002, the author signed a statement on behalf of her husband to file an action for damages in the Superior Court of Quebec against the Société de l'assurance automobile du Québec and the Régie de l'assurance maladie du Québec, alleging that certain acts by these bodies (false diagnoses, falsification of reports and withholding of information concerning the health of the author's husband) might have caused him prejudice. In October 2002, through a declaration of voluntary intervention made pursuant to article 208 of the Code of Civil Procedure, the author asked the Court for permission to represent her husband, alleging that he was incapable of representing himself physically or mentally, and that he did not wish to be represented by a lawyer. This provision allows a person who has an interest in an action to which he/she is not a party, or whose presence is necessary to authorize, assist or represent a party who is incapable, to intervene therein at any time before judgement. In the latter circumstance, the incapacity must be certified and declared by a court, which had not been done in Mr. Bibaud's case. The application for intervention was dismissed by the Superior Court, invoking in support of its decision the provisions of the Code of Civil Procedure of Quebec and the Act respecting the *Barreau du Québec*, reserving the right for lawyers to represent another person as counsel in the courts.

4.4 A request made by the author for permission to appeal to the Court of Appeal was dismissed on the grounds that the first instance judgement was well founded. In June 2003, the Supreme Court of Canada granted the author's request for permission to appeal and a lawyer was appointed by the Court to help her sort through the legal issues involved. After the hearing, and noting that the author's intervention was not to ensure a personal interest, separate from her husband's interest, but to act for him as would a lawyer, the Supreme Court dismissed the appeal on 10 June 2004. The Supreme Court recognized that Quebec had made a legislative choice in recognizing, on the one hand, the right of a physical person to represent himself while, on the other hand, imposing the requirement to engage a lawyer to represent another person. For the Court, the option of intervening in a case, pursuant to article 208, changes nothing since persons who represent another person must themselves be represented by a member of the Bar. The appeal was therefore dismissed by the Court, which concluded that the intervention requested did not conform to the usual circumstances for intervention set out by the Code of Civil Procedure. It was also incompatible with the legislative provisions governing representation in the Quebec civil courts. On 7 July 2004, Ms. Boisvert lodged an appeal with the Supreme Court for a new hearing, invoking articles 7 and 15 of the Canadian Charter of Rights and Freedoms and articles 47–50, 53 and 55 of the Charter of Human Rights and Freedoms of Quebec. On 28 October 2004, the Supreme Court dismissed the appeal.

4.5 The State party puts forward three grounds for inadmissibility. First, under article 3 of the Optional Protocol, the communication would be incompatible with the provisions of the Covenant. According to the State party, the Committee has already expressed the opinion that making it a requirement to be represented by a proxy in court does not constitute a violation of articles 14 and 26 of the Covenant. In this respect, it refers to general comment No. 18 (1989) on non-discrimination and the Committee's Views and points out that article 26 recognizes the possibility, subject to certain criteria, of allowing for differentiation in applying equality before the law. Moreover, the Committee considered that imposing the requirement for legal representation in the highest court of Spain was based on objective and reasonable criteria and was therefore in conformity with articles 14 and 26 of the Covenant. The State party considers that the requirement in Quebec to be represented by a lawyer is based on objective and reasonable criteria and that the need to protect the public (see article 26 of the Professional Code of Quebec) is a pivotal argument that justifies making certain activities the exclusive domain of particular professions, such

as making representation of persons in court the exclusive preserve of lawyers. The Supreme Court in fact dismissed the author's appeal, considering that "the special rules governing the practice of the legal profession are justified by the importance of the acts that advocates engage in, the vulnerability of the litigants who entrust their rights to them, and the need to preserve the relationship of trust between advocates and their clients". The State party concludes that when persons have no wish to represent themselves, the requirement in Quebec to be represented by a lawyer is based on objective and reasonable criteria and does not constitute a violation of the Covenant.

4.6 The communication is incompatible with the Covenant insofar as the right that the author wishes to see enforced is not covered by the right to a fair trial provided for in article 14, paragraph 1; nor is it a right protected elsewhere in the Covenant. The author requests the Committee to recognize her right to be allowed to represent her husband freely in any court, regardless of whether or not she is authorized to act as a lawyer. The State party maintains that this right is not covered by article 14, paragraph 1, or any other provision of the Covenant. No violation can therefore arise.<sup>6</sup> In addition, article 2 does not confer a free-standing right to reparation. The State party refers to general comment No. 31 (2004) on the nature of the general legal obligation imposed on States Parties to the Covenant and to the Committee's case law in this respect and considers that this part of the communication is incompatible with the provisions of the Covenant.

4.7 The State party does not consider, moreover, that articles 5 and 16 are relevant to the issues raised in the communication. Moreover, there are no facts or evidence to substantiate or uphold the author's allegations concerning these articles.

4.8 Lastly, the State party argues that the rights that the author wishes the Committee to enforce could have been the subject of an appeal under article 24 of the Canadian Charter of Rights and Freedoms and article 74 of the Charter of Rights and Freedoms of Quebec, by reference to the rights in those two instruments that correspond with those of the Covenant. Unfortunately, they were never invoked by the author. She did try to bring her case once more before the Supreme Court, and specifically referred to the rights provided for by the Canadian Charter of Rights and Freedoms, but this request was dismissed as the Court had already handed down its decision and thus could not grant the author's request. The State party recalls the Committee's case law that requires the author to raise the substantive issues submitted to the Committee in the domestic courts. Similarly, the Committee decided that the rule on exhaustion of domestic remedies includes, in addition to traditional remedies, complaints of a constitutional nature (such as those provided for in the Canadian Charter of Rights and Freedoms) when fundamental rights are in question.<sup>7</sup> These remedies were available to the author, but she did not avail herself of them.

#### **Author's comments on the State party's observations**

5.1 In her comments of 31 July 2008, the author first remarks on the facts summed up by the State party, which, in her view, omit certain important information. The State party did not state that one of the reasons why Mr. Bibaud is unable to represent himself in court is connected to his substantial consumption of cannabis, which is for medicinal purposes and exempt from prosecution under federal law. The author also points out that although Mr. Bibaud would have liked to receive legal aid, it was refused over the telephone, with no

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<sup>6</sup> The State party refers to communication No. 419/1990, *O.J. v. Finland*, decision on inadmissibility adopted on 6 November 1990, *ratione materiae* on the right to property.

<sup>7</sup> The State party cites communication No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, decision on admissibility adopted on 2 November 2004.

official confirmation.<sup>8</sup> Mr. Bibaud therefore had the choice of either representing himself, while under the effects of cannabis and in chronic pain, or being represented by a lawyer, whom he could not afford.

5.2 The author adds that there are some exceptions to the requirement for representation by a lawyer. In fact, it is not compulsory for a person to have a lawyer in the small claims court for sums not exceeding Can\$7,000, for matters relating to immigration in the Administrative Tribunal of Quebec or before the Commission de la santé et de la sécurité du travail du Québec (occupational health and safety commission). However, when the interests of persons with disabilities are involved, as in this case, there are no exceptions to this rule. For the author, this amounts to flagrant discrimination.

5.3 The author also recalls that, despite the State party's claim to the contrary, she has proved a personal interest before the Supreme Court, by stating that the outcome of the trial would have an indisputable direct bearing on the family's wealth. She therefore clearly has an interest. As for the lawyer who, according to the State party, is supposed to have been involved in the proceedings in order to assist Mr. Bibaud and the author, she says that this *amicus curiae* called her only once, to talk about general matters.

5.4 The author does not agree with the State party's challenge to the admissibility of the communication on grounds of incompatibility with the Covenant's provisions since, in her view, everyone is not treated equally in the courts. Equality is broken between healthy persons who are able to represent themselves, without having to pay for a lawyer in court, and persons with disabilities, who must engage a lawyer to represent them. This situation violates both article 14, paragraph 1, and article 26. As for article 16, which guarantees everyone's right to a legal personality, the author notes that persons with disabilities are not recognized as legal persons since their right to represent themselves is not guaranteed. Concerning article 5, the fact that a person with disabilities is denied the same rights as a healthy person violates a fundamental right that should not be obstructed. Lastly, article 2, paragraph 1, specifies that the State must respect the Covenant without distinction of any kind. In this case, the State party is making a distinction, as it does not accord everyone the same rights and access to justice.

5.5 Contrary to the comments made by the State party on the lack of facts and evidence establishing the *prima facie* violation of articles 5 and 16, the author maintains that the Quebec authorities were well aware of the allegations and that, despite the many letters sent to the various ministers concerned, they did nothing to remedy the situation.

5.6 With regard to the exhaustion of domestic remedies, the author says that she cited the Canadian Charter of Rights and Freedoms and the Charter of Human Rights and Freedoms of Quebec during the Supreme Court hearing. The latter did not hand down a ruling on these points. In addition, in letters addressed to various authorities, including to the Minister of Justice, the author asked for the issue of representation to be debated in Parliament. Despite the numerous attempts to contact them, it was clear that they had no desire to follow up on this case. The author recalls that there are exceptions to the requirement to exhaust domestic remedies when there is little chance of success or when additional remedies would cause unreasonable delays. Despite all her efforts, the author has received only unsatisfactory answers on this case. Consequently, any other appeal would have been pointless.

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<sup>8</sup> He was refused an official response in writing.

**Additional submission by the State party on the author's comments**

6.1 On 18 November 2008, the State party submitted additional observations in response to the author's comments. On the issue of allowing representation by a non-lawyer in certain courts, it explains that such cases are an exception to the generally applicable rule of representation by a lawyer. In the small claims court, no one is allowed to be represented by a lawyer, even legal persons. The purpose of this measure is to eliminate formalities, reduce costs and expedite treatment of cases. The judge at the hearing is responsible for directing discussions, questioning witnesses and listening to the parties. A physical person may, however, authorize a relative to represent him or her in such proceedings. In exceptional circumstances, when a complex question is raised on a point of law in a case, the judge may allow parties to be represented by a lawyer. The fees are paid by the Ministry of Justice. Representation by another person in the Administrative Tribunal of Quebec is restricted to particular domains mentioned in the law, such as appeals submitted pursuant to the law on industrial accidents or compensation for asbestos victims.

6.2 As for the non-exhaustion of domestic remedies pursuant to the Canadian Charter of Rights and Freedoms and the Charter of Human Rights and Freedoms of Quebec, the State party contends that the author raised these issues for the first time when requesting a new hearing in the Supreme Court. This request was dismissed by the Court on 28 October 2004. Such a hearing is an exceptional measure at the discretion of the Court and has no bearing on the merits of a case. The State party recalls that under Canadian law, courts do not take up constitutional questions on their own initiative. Because of the contradictory nature of the judicial process, it is the parties to a legal action who must initiate a constitutional challenge. These issues must normally be raised at the court of first instance. Raising such issues on appeal is allowed only in exceptional circumstances. In this case, the late stage at which these arguments were introduced would have prevented the Attorney General from presenting counter arguments. Prior notice must be given to the Attorney General when the constitutionality of a law is called into question, but the author never gave such notice. This rule is justified by the fact that constitutional issues affect more than just the parties concerned and have an impact on the public interest. The State, represented by the Attorney General, should have enough time to enable it to defend its legislative choices. A judgement of unconstitutionality is a serious outcome, and a certain procedure must be followed. Judicial review is always accompanied by procedural rules, including the requirement to formulate new claims within a set time limit. Moreover, the right to be heard and to present the arguments in their defence is a fundamental principle that must be guaranteed for both parties. On this basis, the State party continues to maintain that the communication is inadmissible.

6.3 Regarding the incapacity of Mr. Bibaud, the author's husband, the State party stresses that Quebec does not underestimate his condition. However, as his incapacity has never been certified or recognized by a court in compliance with the provisions of the Civil Code of Quebec, the author has never been legally empowered to represent him as a tutor or curator, which from the outset caused a major legal problem. This issue was addressed by the Supreme Court of Canada, which agreed with the reasoning of the Superior Court. The latter could not have granted this request, as it would have placed Mr. Bibaud in a situation where his legal capacity would have been compromised if he did not comply with the "legal requirements regarding verification of the existence of the incapacity, the degree thereof and the choice of appropriate measures". The State party concludes that this too is an argument in favour of the inadmissibility of the communication.

### Issues and proceedings before the Committee

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee ascertained, as required by article 5, paragraph 2 (a), of the Optional Protocol, that the same matter was not already being examined under any other international procedure of investigation or settlement.

7.3 The Committee notes the argument of the State party whereby the author has not exhausted domestic remedies for the purposes of admissibility of the communication. It recalls its established case law, whereby, in addition to ordinary judicial and administrative appeals, the authors must also avail themselves of all other judicial remedies, including constitutional appeals, insofar as such remedies would appear to be useful in this case and are in fact available to the author.<sup>9</sup> The Committee notes that the author did not take the opportunity, in respect of the rules of procedure established in domestic law, to challenge the constitutionality of the legal provisions in question. This constitutional remedy would have provided an appropriate approach in this case to highlight possible inconsistencies in the law or non-compliance with the fundamental principles that the author wished to defend for herself and her husband. The Committee cannot pre-empt the outcome of such a constitutional procedure as, according to information supplied by the parties, there are no similar judgements of unconstitutionality on this issue. The Committee therefore concludes that the author has not exhausted all available domestic remedies. Having arrived at this conclusion, the Committee does not consider it necessary to rule on the other grounds for inadmissibility put forward by the State party.

8. The Human Rights Committee therefore decides:

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

(b) That this decision shall be communicated to the author and to the State party.

[Adopted in French, English and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

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<sup>9</sup> See communications No. 433/1990, *A.P.A. v. Spain*, decision on admissibility adopted on 25 March 1994, para. 6.2; No. 1003/2001, *P.L. v. Germany*, decision on admissibility adopted on 22 October 2003, para. 6.5; No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, decision on admissibility adopted on 2 November 2004, para. 7.2.

**R. Communication No. 1754/2008, *Loth v. Germany*  
(Decision adopted on 23 March 2010, ninety-eighth session)\***

<i>Submitted by:</i>	Edith Loth – and her heirs (represented by counsel, Thorsten Purps)
<i>Alleged victim:</i>	The author (s)
<i>State party:</i>	Germany
<i>Date of communication:</i>	29 May 2007 (initial submission)
<i>Subject matter:</i>	Obligation to surrender without compensation a plot of land to the local authorities, in the context of the German reunification
<i>Procedural issue:</i>	Scope and validity of the reservation made by the State party under article 5, paragraph 2 (a) of the Optional Protocol
<i>Substantive issue:</i>	Discrimination against certain categories of persons on the ground of their property
<i>Article of the Covenant:</i>	26
<i>Article of the Optional Protocol:</i>	5, paragraph 2 (a)

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

*Meeting on 23 March 2010,*

*Adopts the following:*

**Decision on admissibility**

1. The original author of the communication was Edith Loth, a German national, who died on 16 March 2008. The author's heirs, who are her three children, Ms. Suzanne Loth, Ms. Ingrid Loth and Mr. Andreas Loth, decided to pursue the communication before the Committee, since the alleged violation directly affects them. The authors claim to be victims of a violation by Germany<sup>1</sup> of article 26 of the International Covenant on Civil and Political Rights. They are represented by counsel.

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Ladhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

An individual opinion co-signed by Committee members Mr. Rafael Rivas Posada and Mr. Fabián Omar Salvioli is appended to the present decision.

<sup>1</sup> The Covenant and the Optional Protocol to the Covenant entered into force for Germany on 17 March 1974 and 25 November 1993, respectively. Upon ratification of the Optional Protocol, the State Party entered the following reservation: "The Federal Republic of Germany formulates a reservation

**Facts as presented by the author**

2.1 In 1946, the deceased's uncle received a plot of land under the land reform scheme initiated by the former German Democratic Republic. According to the 1945 Land Reform Decrees, the disposal of land acquired under this scheme could only be passed on to the new owner's heirs if they continued to use the land for agricultural purposes. Otherwise, the land was to be allocated to third parties or returned to the pool of State-owned land by the State authorities. On 29 March 1986, the deceased inherited the plot of land. During the period of the German Democratic Republic and afterwards, the deceased's land has not been used for agricultural purposes but as a recreational facility by a community of interests with whom the deceased had signed a contract.

2.2 On 6 March 1990, the German Democratic Republic Parliament passed a law on the rights of owners of land redistributed under the land reform scheme, which entered into force on 16 March 1990. The law removed all restrictions on the disposal of land acquired pursuant to the 1945 land reform. On 3 October 1990, upon German reunification, the Law of 6 March 1990 became an integral part of the law of Germany. On the same date, a new article 233, section 2, paragraph 1, of the Introductory Act to the Civil Code came into effect, confirming the status of ownership of land under the land reform scheme at that time.

2.3 On 14 July 1992, the Parliament of Germany enacted a further amendment to the same Act. The new article 233, section 12, paragraph 3, provides that the only persons who may inherit land acquired under the land reform scheme are those who on 15 March 1990 carried on agricultural activities, or worked in the forestry or food-industry sectors of the former German Democratic Republic, or had carried on an activity in one of the above sectors during the previous 10 years. If this was not the case, title to the land in question was to revert without compensation to the tax authorities of the German region ("Länder") in which the land was situated. The idea of the German authorities was to "reestablish" the situation as "it should have been" if the German Democratic Republic authorities had not failed to implement their own law prior to 15 March 1990.

2.4 On the basis of the amended Introductory Act to the Civil Code, on 28 July 1995, referring to the fact that the deceased had not used the land for agricultural purposes, the authorities requested the deceased to transfer the property without compensation. On 16 July 1997, the District Court of Frankfurt/Oder ordered the deceased to reassign her property. On 10 June 1998, the Brandenburg Court of Appeal dismissed the deceased's appeal against the decision of 16 July 1997. On 15 July 1999, the Federal Supreme Court dismissed her appeal against the decision of 10 June 1998. Finally, on 25 October 2000, the Federal Constitutional Court dismissed the deceased's appeal on the ground that there had been no breach of her fundamental rights.

2.5 The deceased brought the case to the European Court of Human Rights, claiming that the obligation to reassign her land to the tax authorities without compensation infringed her rights to the peaceful enjoyment of her possessions, guaranteed by article 1 of Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), as well as her rights not to be

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concerning article 5 paragraph 2 lit. (a) to the effect that the competence of the Committee shall not apply to communications (a) which have already been considered under another procedure of international investigation or settlement, or (b) by means of which a violation of rights is reprimanded having its origin in events occurring prior to the entry into force of the Optional Protocol for the Federal Republic of Germany, or (c) by means of which a violation of article 26 of the [said Covenant] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant."

discriminated against, under article 14 of the Convention, taken in conjunction with article 1 of the Protocol No. 1.

2.6 The deceased argued, in particular, that she had been discriminated against in comparison with three categories of persons: owners of land acquired under the land reform who had acquired their property as new farmers and were still alive on 15 March 1990; owners of land who had acquired it *inter vivos* before 15 March 1990; and, lastly, persons who had inherited the land between 16 March 1990 and 2 October 1990.

2.7 On 22 January 2004, the European Court of Human Rights delivered a judgment in which it held unanimously that there had been a violation of article 1 of Protocol No. 1 and that it was not necessary to examine the applicants' complaint under article 14 of the Convention taken in conjunction with article 1 of Protocol No. 1.<sup>2</sup>

2.8 On 14 June 2004, following the request by the Government of Germany and in accordance with article 43 of the Convention and rule 73 of the Court, the case was referred to the Grand Chamber. On 30 June 2005, the Grand Chamber held that there had not been a breach of article 1 of Protocol No. 1, or of article 14 of the Convention taken in conjunction with article 1 of Protocol No. 1. The Court concluded that in the unique context of German reunification, having taken into account both the uncertainty of the legal position of heirs in the Law of 6 March 1990, and the grounds of social justice relied on by the German authorities, the lack of any compensation did not upset the "fair balance", which had to be struck between the protection of property and the requirements of the general interest.

### The complaint

3.1 The authors allege a violation of the deceased's rights under article 26 of the Covenant, because along with 70,000 other persons, the so-called "new settlers' inheritors", her property was confiscated without any compensation by the State party. They claim that the deceased, as one of these "new settlers' inheritors", was discriminated against in comparison to persons belonging to a similar group, the so-called "Modrow purchasers".<sup>3</sup> They argue that while the deceased was forced to surrender her property without compensation, the right of the "Modrow purchasers" to their property was comprehensively protected by the various laws enacted during the same period of time. They base the comparability of the two groups of persons, the "new settlers' inheritors" and the "Modrow purchasers" on the fact that the laws affecting these two groups regarding their property rights were passed within one day of the other, i.e., 6 and 7 March 1990, respectively.

3.2 The authors claim that the German reservation to article 5, paragraph 2 (a), of the Optional Protocol does not apply in the present case, as the European Court of Human Rights, in its decision of 30 June 2005, did not examine the "same matter" within the meaning of the State party's reservation. They argue that the main focus of the case brought to the European Court was the violation of the deceased's right to property, in accordance with article 1 of Protocol No. 1. In addition, the deceased claimed to have been discriminated against under article 14 of the Convention, in conjunction with article 1, of Protocol No. 1, compared with three categories of new settlers inheritors mentioned in the

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<sup>2</sup> European Court of Human Rights, *Case of Jahn and others v. Germany*, (Applications No. 46720/99, 72203/01 and 72552/01).

<sup>3</sup> On 7 March 1990, the GDR parliament adopted the Law on the Sale of State-owned Buildings, which entered into force on 19 March 1990. The law allowed private persons, the "Modrow purchasers", to purchase both state-owned buildings and parcels of land at very low prices. The deceased was not such a purchaser. On 21 September 1994, the FRG Parliament adopted the Split Property Settlement Act, which allowed the "Modrow purchasers", to repurchase plots of land for half of their current market value, in the event that they had to retransfer them to the previous owners for various reasons.



article 233, section 12 of the Introductory Act to the Civil Code. However, in the present complaint to the Committee, the authors stress that they are not asserting a violation of the deceased's property rights but a breach of her right under article 26 of the Covenant. Unlike article 14 of the European Convention on Human Rights, article 26 is a free-standing provision, which can be invoked independently of the other Covenant rights and offers a broader scope of protection than article 14 of the Convention. The authors argue that the European Court only examined the deceased's alleged discriminatory treatment against other "new settlers' inheritors", and not the claim of discrimination compared with the "Modrow purchasers".

3.3 The authors also claim that the reservation made by Germany under article 5, paragraph 2 (a), regarding the Committee's competence *ratione temporis* is irrelevant, as the pertinent events occurred after 25 November 1993, date of the entry into force of the Optional Protocol for the State party. These events are the legal provisions contained in the Split Property Settlement Act of 21 September 1994 and the Law Preserving the Modernisation of Living Spaces of 23 June 1997, which are the basis of the preferential treatment granted to the "Modrow purchasers".

3.4 The authors further claim that the German reservation regarding article 26 of the Covenant is invalid as it is particularly extensive and limits the scope of the Committee to a disproportionate extent. This reservation is incompatible with the object and purpose of the Optional Protocol, if not the Covenant itself, as it seeks to limit the State party's obligations under article 26 in a manner inconsistent with the Committee's interpretation of that provision as a free-standing right. They argue that no reservation can be made to a substantive obligation under the Covenant through the vehicle of the Optional Protocol.<sup>4</sup> They recall that the Committee had expressed regrets about the State party's reservation in its concluding observations on the fourth periodic report of Germany. Further, they state that the State party has no legitimate interest in upholding its reservation, after having signed Protocol No. 12 to the European Convention on Human Rights,<sup>5</sup> which contains a general prohibition of discrimination. The authors conclude that the reservation being invalid, the Committee is not precluded from examining their claim under article 26.

#### **State party's observations on admissibility**

4.1 On 27 March 2008, the State party submitted its observations on the admissibility of the communication, arguing that, on the basis of the German reservation, it is inadmissible *ratione materiae* because of the prior consideration of the "same matter" by the European Court of Human Rights.

4.2 The State party notes that the European Court of Human Rights has considered the "same matter", as it concerned the same claim based on similar facts. As in the present communication, the deceased requested the Court to find that she had been a victim of discrimination because the group of persons to which she belongs was dispossessed of their property without compensation and for no objective reasons, unlike other groups of owners. It notes that the deceased's claim was thoroughly and comprehensively examined by the

<sup>4</sup> They refer to the Committee's general comment 24 (1994) on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40*, vol. I (A/50/40 (Vol. I)), annex V, para. 13, as well as its jurisprudence in communication No. 845/1998, *Kennedy v. Trinidad and Tobago*, Views adopted on 26 March 2002, para. 6, and arts. 2, para. 1 (d), and 19 of the Vienna Convention on the Law of Treaties.

<sup>5</sup> Germany signed Protocol No. 12 to the European Convention on Human Rights on 4 November 2000 but has not ratified it to date. See the Council of Europe's Treaty Office at <http://conventions.coe.int> (consulted on 22 December 2003).

European Court of Human Rights. It recalls the Court's conclusion that no discrimination occurred as the provisions of the law in question were in fact properly and reasonably based. The State party argued that the examination by the Committee under article 26 of the Covenant would lead to the same conclusion as on the basis of the German reservation, the extent of protection of article 26 goes no further than the protection under article 14 of the European Convention on Human Rights. In this regard, the State party, referring to the inadmissibility decision in *Rogl v. Germany*,<sup>6</sup> observes that the authors failed to substantiate their claim on the difference of the scope of protection between article 26 of the Covenant and article 14 of the Convention.

4.3 The State party submits that the German reservation aims to prevent duplication of international control procedures, conflicting decisions under such procedures and "forum shopping" by complainants.

4.4 It observes that the new comparison group of the "Modrow purchasers" referred to by the authors in the present claim has never been mentioned before. As the authors failed to litigate this argument at the national level, the State party considers that the submission is thus also inadmissible on the ground of non-exhaustion of domestic remedies.

4.5 The State party submits that the claim is inadmissible *ratione temporis* in accordance with its reservation under article 5, paragraph 2 (a), of the Optional protocol. The origin of the alleged violation is the Law of 14 July 1992, which introduced the new article 233, section 12, paragraph 3, to the Introductory Act to Civil Code of 1992. It argues that the authors' claim that discrimination resulted from the laws of 1994 and 1997 is ill founded and only serves the purpose of circumventing the reservation.

4.6 Lastly, the State party observes that its reservation regarding article 26 is valid and must be observed under international law, and that the Human Rights Committee recognized it as such.<sup>7</sup> Thus, the Committee is precluded from considering this claim, as it is based solely on article 26.

#### Comments by the author

5.1 On 14 May 2008, the authors reiterated their previous claims.

5.2 On the issue of the "same matter" having been examined by the European Court of Human Rights, the authors argue that the scope of protection between article 14 of the European Convention on Human Rights and article 26 of the Covenant are different, as is their jurisprudence. They emphasize that their free-standing claim of discrimination has not been, and could not have been, considered by the European Court of Human Rights, in accordance with the established case law of the Committee.<sup>8</sup> Therefore, the Committee is not precluded from examining these claims on the basis of the State party's reservation.

5.3 The authors argue that the issue of discrimination was brought before the domestic legal authorities, and thus remedies have been exhausted. The deceased's constitutional complaint included the allegation of a violation of article 14 (protection of property) and of article 3 (basic right to equality/non discrimination) of the Constitution of the State party, including with regard to the comparison group of the "Modrow purchasers".

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<sup>6</sup> Communication No. 808/1998, decision adopted on 25 October 2000.

<sup>7</sup> Final notes of 2004 to the 5th Governmental Report of the Federal Republic of Germany.

<sup>8</sup> The author refers to communication No. 965/2000, *Karakurt v. Austria*, Views adopted on 4 April 2002, para. 7.4.

5.4 Regarding the State party's argument that the origin of the alleged violation is the 1992 law, the authors argue that infringements of rights do not come into being until the general legal basis is substantiated and individualized for a person by an administrative or judicial legal act. They argue that it was only with the 1995 claim against the deceased, the subsequent court decisions and other legal acts forming the basis of the discriminatory treatment (1994 and 1997 laws) that their rights were infringed.

#### **Issues and proceedings before the Committee**

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the State party has invoked its reservation to article 5, paragraph 2 (a) of the Optional Protocol, precluding the Committee from examining communications, "which have already been considered under another procedure of international investigation or settlement". The Committee has to assess whether the "same matter" has indeed been considered during the proceedings before the European Court of Human Rights.

6.3 The Committee recalls its jurisprudence that the "same matter" within the meaning of article 5, paragraph 2 (a), must be understood as relating to the same author, the same facts and the same substantive rights.<sup>9</sup> It observes that application No. 72552/01 was submitted to the European Court of Human Rights by the same author, was based on the same facts and related to the right of non-discrimination on the same grounds.

6.4 The Committee also recalls that the independent right to equality and non-discrimination in article 26 of the Covenant provides greater protection than the accessory right to non-discrimination contained in article 14 of the European Convention on Human Rights,<sup>10</sup> which has to be claimed in conjunction with another right protected under the Convention or its relevant Protocols. However the Committee notes that the authors are claiming to have been broadly discriminated against on the basis of the deceased's property title. It also notes that the European Court of Human Rights has examined whether the deceased was discriminated against in connection with the enjoyment of her property. To do so, the Court examined and assessed the treatment made by the legislator with respect to her property title and compared it with treatment of other categories of "new settlers' inheritors". The fact that the Court did not consider whether the deceased was discriminated against in comparison to an entirely separate category of property owners, "the Modrow purchasers", who bore no relationship to the deceased, does not detract from the fact that the same substantive issue was considered by the Court. Consequently, the Committee concludes that the "same matter" has been considered by the European Court of Human Rights, within the meaning of the State party's reservation. It follows that the Committee is precluded by the State party's reservation to article 5, paragraph 2 (a), of the Optional Protocol from examining the present communication.

6.5 Under these circumstances the Committee does not need to address the permissibility and applicability of the other dispositions contained in the State party's reservation to the Optional Protocol.

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<sup>9</sup> See communication 998/2001, *Althammer v. Austria*, Views adopted on 8 August 2003, para. 8.4.

<sup>10</sup> *Ibid.*

7. The Human Rights Committee therefore decides:
- (a) That the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol;
  - (b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the present report.]

## Appendix

### Individual opinion of Committee members, Mr. Rafael Rivas Posada and Mr. Fabián Omar Salvioli (dissenting)

Having examined the communication *Loth v. Germany*, the Committee decided that it was inadmissible under article 5, paragraph 2 (a), of the Optional Protocol. It justified this decision by what we deem to be a misinterpretation of this provision, insofar as it recalled its jurisprudence that grounds for declaring a communication inadmissible exist when another international body has examined the same matter and found the same complaint to be inadmissible. In the instant case, in order to seek the application of its reservation to article 5, paragraph 2 (a), of the Optional Protocol, to the effect that the Committee shall not be competent when the same matter has been considered by another international body, the State party argued that the European Court of Human Rights had examined the same case and had concluded as to its inadmissibility.

We are of the opinion that the letter and spirit of the above-mentioned paragraph clearly establishes that these grounds of inadmissibility exist solely when the matter is being examined by another international body at the time when the Committee embarks on its consideration thereof. This means that the matter is currently under examination by the international body other than the Committee and not that it has been decided in the past. The wording of the English and French versions of article 5, paragraph 2 (a), of the Optional Protocol is sufficiently clear as to leave no room for any doubt. The English text lays down as grounds for admissibility that “the same matter is not being examined under another procedure of international investigation or settlement” (our underlining) and the French text states in this respect that “[l]a même question n’est pas déjà en cours d’examen devant une autre instance internationale d’enquête ou de règlement” (our underlining). An error of translation certainly occurred in the Spanish version, since it speaks of admissibility when “[e]l mismo asunto no ha sido sometido ya a otro procedimiento ... internacional” (when the same matter has not been subject to another international procedure) thus opening up the possibility, of which some States have availed themselves, of interpreting grounds of inadmissibility as solely referring to the submission in the past of the same matter to another international body and not, as is correct, to its contemporaneous consideration by that body. In view of this error of translation, the Committee has repeatedly decided that the English and French versions must take precedence over the erroneous Spanish text, but in requiring [as grounds for inadmissibility] examination of the matter by the other international body, it has accepted that this examination may have taken place in the past, in contradiction of the unequivocal text of article 5, paragraph 2 (a), of the Optional Protocol.

For the above reasons, we are of the opinion that the Committee should have declared the communication *Loth v. Germany* to be admissible, without prejudice to a decision on the alleged violation of article 26 of the Covenant by the State party.

(Signed) Mr. Rafael **Rivas Posada**

(Signed) Mr. Fabián Omar **Salvioli**

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the present report.]

**S. Communication No. 1778/2008, *Novotny v. Czech Republic*  
(Decision adopted on 19 March 2010, ninety-eighth session)\***

<i>Submitted by:</i>	Jaroslav Novotny (represented by counsel, David Strupek)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Czech Republic
<i>Date of communication:</i>	18 March 2008 (initial submission)
<i>Subject matter:</i>	Remuneration of the work performed by a prisoner
<i>Procedural issue:</i>	Insufficient substantiation of allegations
<i>Substantive issue:</i>	Discrimination against the author on the basis of his status
<i>Article of the Covenant:</i>	26
<i>Article of the Optional Protocol:</i>	2

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

*Meeting on 19 March 2010,*

*Adopts the following:*

**Decision on admissibility**

1. The author of the communication is Mr. Jaroslav Novotny, a Czech national, who at the time of the events that gave rise to his communication, was serving a sentence at the prison Jiřice in the Czech Republic. He claims to be a victim of a violation of article 26 of the International Covenant on Civil and Political Rights by the Czech Republic.<sup>1</sup> He is represented by counsel, Mr. David Strupek.

**Facts as presented by the author**

2.1 From 25 September to 10 November 2006, the author was employed at a private entity, pursuant to section 30 of the Act on the Execution of the Penalty of Imprisonment

\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Mrs. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Salvioli and Mr. Krister Thelin.

<sup>1</sup> The Covenant and the Optional Protocol to the Covenant entered into force for the Czech Republic, succeeding to Czechoslovakia as State party to the Covenant and its Optional Protocol, on 22 February 1993.

(AEPI).<sup>2</sup> His remuneration was CZK 4,500 monthly, as decided by the Prison's Director on 21 September 2006, in application of Government order No. 365/1999. At that time, the statutory minimum wage in the Czech Republic was CZK 7,995 monthly.

2.2 On unspecified dates, the author unsuccessfully complained to the General Directorate of the Prison Service and to the Public Defender about the inequality of being paid less than an employee earning the statutory minimum wage. On 3 January 2007, the author unsuccessfully filed a constitutional complaint with the Constitutional Court, on the ground that he had been discriminated against in his right to just remuneration for work. On 1 March 2007, the complaint was rejected by the Court as manifestly ill-founded since a convict employed under the AEPI is not in a comparable position to a person employed on the basis of a labour contract.

### **The complaint**

3.1 The author alleges a violation of his right not to be discriminated against under article 26 on the basis of his status as a convict, as his remuneration for the work performed while in prison was disproportionately low compared to the minimum standard wage. He claims that under section 32 of the APEI, prisoners' work conditions, working hours and overtime work are governed by the Czech Labour Code and other labour law regulations. Under section 33, taxes and payments of health insurance and social security are deducted from the convict's remuneration in the same manner as from the wages paid on the basis of a labour contract. The author alleges that he was performing comparable work to a regular employee and that his relationship with his employer was comparable to a general labour contract.

3.2 The author denies that employment was an integral part of the execution of his penalty as he was not sentenced to forced labour but just to a deprivation of liberty. He argues that he was working for a private entity and not for the prison authorities and that he was not ordered to work but was free to reject this assignment. He asserts that the alleged purpose of his employment, to prepare him to reintegrate into his community, cannot justify the differential treatment regarding his remuneration.

3.3 The author claims that employed convicts have to pay the same expenses relating to their imprisonment as unemployed convicts. The fact that the State party provides convicts' basic needs cannot justify the disproportionate remuneration as convicts also continue to pay rent and support their families.

### **State party's observations**

4.1 On 3 October 2008, the State party submitted its observations on the communication, arguing that it is inadmissible for a number of reasons. Firstly, the State party, referring to the Committee's jurisprudence,<sup>3</sup> argues that it constitutes an abuse of the right to submit a communication. It claims that the author approached the Committee more than one year after the last domestic decision and that such delay, which was not justified by the author, is unreasonable.

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<sup>2</sup> Under section 30 (1) prisons shall create conditions enabling prisoners to work either within the prison's own operation, production or business, or within a contractual relationship with another entity.

<sup>3</sup> Communications No. 1434/2005 *Fillacier v. France*, decision adopted on 27 March 2006, para. 4.3; No. 787/1997 *Gobin v. Mauritius*, decision adopted on 16 July 2001, para. 6.3; and No. 1452/2006, *Chytil v. the Czech Republic*, decision adopted on 24 July 2007, para. 6.2.

4.2 The State party further argues that the claim is insufficiently substantiated for purposes of admissibility. It refers to the communication *Radosevic v. Germany*,<sup>4</sup> also concerning the level of remuneration of work performed by a prisoner, in which the Committee held that the communication was inadmissible because, similarly to the present case, the author had not provided sufficient information on the work performed.

4.3 On the merits, the State party argues that the claim is ill-founded. It claims that the difference of treatment between prisoners and employees, when it comes to remuneration for work, is justified and based on objective and reasonable criteria. Referring to the Committee's jurisprudence on the interpretation of article 26,<sup>5</sup> the State party alleges that the author received a lower income than the minimum standard wage (around 60 per cent) because of the specific circumstances of the work undertaken by convicts. It notes that the difference between the legal position of convicted prisoners and regular employees is self-evident. Under Czech law, all prisoners sentenced to imprisonment are obliged to work as long as their health allows.<sup>6</sup> A prisoner assigned to work is not allowed to refuse to work for the State, public authorities or other public entities, but he may refuse to work for a private business. Work performed by convicts is part of the rehabilitation process which is the purpose of imprisonment. The purpose of their remuneration is not to secure their subsistence, as the State provides the convicts' basic needs.

4.4 The State party also claims that another main difference between employees and working convicts is the regulations governing the remuneration of their work. A prisoner and an employer are not allowed to agree freely on the amount of the prisoner's remuneration, which is governed by mandatory regulations. Further, a prisoner cannot freely dispose of his income, as the State assigns some of it to a number of other uses.

4.5 The State party also claims that the minimum wage is a social concept whereby employees are provided the security of a minimum subsistence level, but in the prisoners' case, it is the State that provides the minimum subsistence to prisoners, regardless of whether they work or not. Thus, the minimum wage concept does not apply to prisoners. Furthermore, the State party provides information to the effect that it appears that other categories of regular employees are similarly provided with remuneration below the minimum standard wage, on the basis of their social or health situations.<sup>7</sup>

4.6 The State party observes that international standards<sup>8</sup> provide for equitable remuneration of the work of prisoners, and not equal remuneration with the regular workforce, leaving a margin of appreciation to each State to determine the level of remuneration considered as equitable.

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<sup>4</sup> Communication No. 1292/2004, decision adopted on 22 July 2005, para. 7.2.

<sup>5</sup> Communication No. 182/1984, *Zwaan-de Vries v. the Netherlands*, Views adopted on 9 April 1987, paras. 12.1 to 13.

<sup>6</sup> Section 29 of the APEI.

<sup>7</sup> Section 2 of Government order No. 303/1995 on the minimum wage provides that employees between 18 and 21 years old receive 90 per cent of the minimum wage for their first job for six months; underage employees (between 15 and 18 years old) receive 80 per cent; beneficiaries of a partial disability pension receive 75 per cent and beneficiaries of a permanent disability pension or underage employees suffering from full disability and who are beneficiaries of a permanent disability pension receive 50 per cent of the minimum wage.

<sup>8</sup> The United Nations Standard Minimum Rules for the Treatment of Prisoners (see Economic and Social Council resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977), and the 2006 Recommendation of the Committee of Ministers of the Council of Europe to member States on the European Prison Rules (Rec (2006) 2).



### Comments by the author

5.1 On 18 December 2008, the author submits that the one-year delay in his submission to the Committee cannot be compared to the delays encountered in the communications referred to by the State party.<sup>9</sup> Furthermore, in some other instances, the Committee considered admissible communications filed more than three years after the latest domestic decision.<sup>10</sup>

5.2 The author refutes the analogy made by the State party between his case and the *Radosevic* case. He recalls that Mr. Radosevic did not compare his income to the statutory minimum wage but to the average amount of benefits payable under the German statutory pension insurance scheme, which refers, in the author's view, to the average wage rather than the minimum wage. This explains the Committee's decision that Mr. Radosevic should have submitted information on the type of work performed and wages paid for this work on the labour market. However, the author argues that he does not link his own claim to a specific type of work but compares his income to the minimum wage to be paid for any type of work.

### Issues and proceedings before the Committee

#### *On admissibility*

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 As to the State party's argument that the submission of the communication to the Committee amounts to an abuse of the right of submission under article 3 of the Optional Protocol, the Committee notes that there are no fixed time limits for submission of communications under the Optional Protocol and that a mere delay in submission does not of itself, except in exceptional circumstances, involve an abuse of the right to submit a communication.<sup>11</sup> The Committee does not regard the delay of one year to have been so unreasonable as to amount to an abuse of the right of submission.

6.3 The Committee notes the author's claim that the fact that he received less than the minimum standard wage for the work he undertook as a prisoner between 25 September and 10 November 2006, in similar conditions to those of regular employees, amounts to discrimination under article 26 of the Covenant. The Committee recalls its jurisprudence in *Radosevic v. Germany*<sup>12</sup> and notes that the author has not provided any information on the type of work he performed during his incarceration and whether it was of a kind that is available on the labour market. Neither has he provided information on the amount of subsistence provided by the State party to cover his "basic needs" in addition to his remuneration. The Committee observes the information provided by the State party regarding other regular workers who are not paid the minimum standard wage (para. 4.5 above), and notes that the author's mere reference to minimum standard wage does not suffice to substantiate the alleged discrimination. The Committee also notes that the author only worked under the scheme in question for one and a half months, to which he freely agreed, with full knowledge of the remuneration to be received. For all of these reasons, the

<sup>9</sup> Fifteen, eight and ten years, respectively.

<sup>10</sup> See communications No. 1353/2005 *Njaru v. Cameroon* and No. 1125/2002 *Quispe Roque v. Peru*.

<sup>11</sup> See *Gobin v. Mauritius*, (note 3 above), para. 6.3; *Fillacier v. France*, (note 3 above), para. 4.3; and communication No. 1101/2002, *Alba Cabriada v. Spain*, Views adopted on 1 November 2004, para. 6.3.

<sup>12</sup> *Radosevic v. Germany* (note 4 above), para. 7.2.

Committee considers that the author has not sufficiently substantiated, for purposes of admissibility, his claim that he was a victim of discrimination based on his status as a prisoner. It follows that the communication is inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the present report.]

**T. Communication No. 1793/2008, *Marin v. France*  
(Decision adopted on 27 July 2010, ninety-ninth session)\***

<i>Submitted by:</i>	Béatrice Marin (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	France
<i>Date of communication:</i>	5 May 2008 (initial submission)
<i>Subject matter:</i>	Legality of the procedure by which the author contested her results in a competitive examination for the recruitment of administrative judges
<i>Procedural issues:</i>	Examination of the same question before another international settlement body; inadmissibility <i>ratione materiae</i> ; inadmissibility due to insufficient substantiation of allegations
<i>Substantive issues:</i>	Right to a fair trial
<i>Article of the Covenant:</i>	14, paragraph 1
<i>Articles of the Optional Protocol:</i>	2; 3; 5, paragraph 2 (a)

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

*Meeting on 27 July 2010,*

*Adopts the following:*

**Decision on admissibility**

1.1 The author of the communication, dated 5 May 2008, is Ms. Béatrice Marin, a French national. She claims to have been the victim of a violation by France of article 14, paragraph 1, of the International Covenant on Civil and Political Rights. She is not represented by counsel. The Covenant and the relevant Optional Protocol entered into force for France on 4 February 1981 and 17 May 1984, respectively.

1.2 On 13 August 2008, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, decided that the admissibility of the communication should be examined separately from the merits.

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\* The following members of the Committee participated in the consideration of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Mr. Mahjoub El Haiba, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

The texts of individual opinions signed by Committee members, Mr. Michael O'Flaherty, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Zonke Zanele Majodina, Mr. Rafael Rivas Posada and Mr. Fabián Omar Salvioli are appended to the present decision.

**The facts as submitted by the author**

2.1 On 14 and 15 April 2005, the author sat two written tests in order to qualify for the competitive examination organized by the Council of State (Conseil d'État) for the recruitment of judges to the administrative court and the administrative court of appeal. On 3 June 2005, the results of the qualifying tests were communicated on the Council of State's website. The author saw that, as she had not attained the minimum score required, she had not qualified to sit the oral examination. Her marks were subsequently sent to her by mail.

2.2 Not understanding why she had done so poorly, on 8 June 2005 the author requested that she be sent copies of her two written tests as soon as possible. Upon receipt of the copies, she claims to have noticed a glaring irregularity in the marking procedure: her papers had not been marked twice as required in the regulations for the competitive examination, and the examiner of each of her two papers had not been authorized by the orders of the Ministry of Justice (orders of 26 January and 23 March 2005).

2.3 On 16 June 2005, the author filed an application with the Council of State for a temporary suspension injunction and an application on the merits, as well as an urgent application for the protection of a fundamental freedom (*référé liberté*). In the applications, she cited a serious and manifestly illegal violation of the equality of treatment of the candidates, and requested that the Council of State annul the marking of her two qualifying tests and order the administration to mark them again. She also requested that, depending on the results of the second marking, the Council of State order the administration to allow her to sit the oral examinations.

2.4 In two rulings dated 17 June 2005, the Council of State rejected the author's applications on the ground that none of the submissions was likely to bring to light a grave and manifestly illegal violation of a fundamental freedom. The author was informed of the rulings on 23 June 2005.

2.5 On 29 July 2005, the Council of State, being both judge and party, submitted a defence brief in response to the application on the merits filed by the author. Principally, it asked the Council of State (i.e., itself) to reject the application as inadmissible and, in the alternative, it argued that the examination papers had been marked by authorized examiners, although it did not submit any evidence to that effect. The Council of State was also said to have stated that the examiners never sign the examination papers, whereas the invigilator is required to do so. On 30 August 2005, the author submitted a statement of case with a view to showing that the marking procedure was illegal.

2.6 In a ruling dated 29 September 2005, the Council of State declared the application to be inadmissible on the ground that the contested act<sup>1</sup> constituted a preliminary act that was indivisible from the deliberation of the panel that decides on the results of the competitive examination and, as such, could not be appealed. The author stresses that the temporary suspension injunction and the urgent application for the protection of a fundamental freedom were found to be admissible but were rejected by the Council of State, whereas the application on the merits was found to be inadmissible, even though consistent jurisprudence has held that the stages of a competitive examination, such as the "qualification" stage, involve decisions and not preliminary acts and that it should therefore be possible to contest them at any time during the examination without it being necessary to await the publication of the final results on qualification.

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<sup>1</sup> Namely, the act of marking the written qualifying examinations.

2.7 The author adds that, pursuant to article R311-1-4 of the Administrative Code of Justice, the Council of State alone is competent for disputes concerning national competitive examinations. According to the author, this jurisdictional power is contrary to article 14, paragraph 1, of the Covenant, and the Council of State should be competent in all cases set out under article R311-1-4 of the Administrative Code of Justice except when it is itself the organizer of a national competitive examination. She adds that the decisions of the Council of State are not subject to appeal.

2.8 The author filed an application with the European Court of Human Rights that was rejected on 29 September 2006 as being incompatible *ratione materiae* with the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).<sup>2</sup>

### **The complaint**

3. The author contends that, by taking a decision on her three complaints in accordance with its powers under article R311-1-4 of the Administrative Code of Justice, although it was also the organizer of the contested examination that she had taken, the Council of State was both judge and party, and the State party therefore violated article 14, paragraph 1, of the Covenant in her regard. The only possible way of contesting that provision would be to bring the matter before the Council of State, but according to the author, such an appeal would inevitably be rejected, because the Council of State would again be both judge and party.

### **State party's comments on admissibility**

4.1 On 7 August 2008, the State party contested the admissibility of the communication. It invoked its reservation to article 5, paragraph 2 (a), of the Optional Protocol, which in its view was applicable in the present case because the same question had already been considered by the European Court of Human Rights, which had rejected the author's application as inadmissible on 29 September 2006.

4.2 The State party also argues that the author's allegations were not sufficiently substantiated and were even an abuse within the meaning of article 3 of the Optional Protocol to the Covenant. It notes that the author did not provide any evidence in support of her allegation with regard to the impartiality of the members of the Council of State. It adds that the service of the administrative courts and the administrative courts of appeal (STACAA), which organizes the competitive examination that the author sat for the additional recruitment of judges to the administrative court and the administrative court of appeal, forms part of the administrative activity of the Council of State.<sup>3</sup> The Litigation (Judicial) Division, which deals with the competitive examination in a judicial capacity, is totally independent of that service and performs its task of monitoring legality with complete impartiality.<sup>4</sup> There is a strict separation of the administrative activities and the judicial functions of the Council of State. For those two reasons, the Council of State considers the communication to be inadmissible.

<sup>2</sup> On the ground that "the procedure contested by the author did not concern either an appeal of her civil rights and obligations or the determination of any criminal charges against her, within the meaning of article 6 of the ECHR. Consequently, the appeal was incompatible *ratione materiae* with the provisions of the Convention within the meaning of article 35, paragraph 3".

<sup>3</sup> The State party cites communications No. 367/1989, *J.H.C. v. Canada*, decision of 5 November 1991, and No. 448/1991, *H.J.H. v. the Netherlands*, decision of 7 November 1991.

<sup>4</sup> The State party indicates in this connection that the Council of State, sitting in its judicial capacity, has already annulled decisions adopted by its administrative services.

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

5.1 On 1 September 2008, the author maintained that the State party's reservation to article 5, paragraph 2 (a), of the Optional Protocol was not an obstacle to the admissibility of her communication, because the European Court of Human Rights had not considered the application on the merits, having merely declared it to be inadmissible. Referring to the Committee's jurisprudence, she adds that, as the rights set out in the European Convention on Human Rights differ from the rights embodied in the Covenant and her application was declared inadmissible *ratione materiae* by the European Court of Human Rights, it has not been "considered" in the meaning of the reservation entered by the State party with regard to article 5, paragraph 2 (a), of the Optional Protocol.<sup>5</sup>

5.2 In response to the argument of the State party regarding the strict separation between the administrative and judicial functions of the Council of State and the resulting impartiality of the members of the Litigation (Judicial) Division, the author stresses that the Vice-President of the Council of State supervises not only the General Secretariat, the body responsible for the STACAA (which organizes the competitive examination that she sat), but also the Litigation (Judicial) Division.<sup>6</sup> According to her, the State party can therefore not maintain that those sections are independent. She adds that two of the members of the panel for the competitive examination that she sat in 2005 held office during the same period as members of the Council of State, one in the Jurisdiction Court of the Council of State, and the other in the Litigation (Judicial) Division.<sup>7</sup> She therefore concludes that the administrative litigation division, some of whose members were on the panel for the competitive examination on which they were called upon at the same time to take judicial decisions, cannot be deemed independent.

### Issues and proceedings before the Committee

6.1 Before considering a complaint contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 In conformity with article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that a similar complaint lodged by the author was declared inadmissible by the European Court of Human Rights on 29 September 2006 (application No. 29415/05) on the ground that the application was incompatible *ratione materiae* with the provisions of the European Convention on Human Rights, because the procedure contested by the author did not concern either a challenge to her civil rights and obligations in a suit at law or the determination of any criminal charge against her, within the meaning of article 6 of the European Convention. The Committee also recalls that, upon its accession to the Optional Protocol, the State party entered a reservation with regard to article 5, paragraph 2 (a), of the Optional Protocol indicating that the Committee "shall not have competence to consider a communication from an individual if the same matter is

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<sup>5</sup> The author cites communication No. 441/1990, *Casnovas v. France*, Views of 19 July 1994, para. 5.1.

<sup>6</sup> The author has submitted an organizational chart of the Council of State in support of her allegations.

<sup>7</sup> In support of her allegations, the author has included: (a) a copy of the text of the Official Gazette (18 February 2005) announcing the appointment, inter alia, of two members of the panel for the competitive examination in question who are both presented as members of the Council of State; (b) a copy of the list of members of the Jurisdiction Court for 2005, 2006 and 2007, containing the name of one of the above-mentioned members of the panel; and (c) a copy of a decision by the Council of State (sitting in its judicial capacity) of 7 October 2005, containing the name of the second member of the panel in question, who was said to have taken part in the decision.

being examined or has already been considered under another procedure of international investigation or settlement”.

6.3 The Committee recalls its jurisprudence that the “same matter” within the meaning of article 5, paragraph 2 (a), must be understood as relating to the same author, the same facts and the same substantive rights.<sup>8</sup> It observes that application No. 29415/05 was submitted to the European Court by the same author, was based on the same facts and related to the principle of equality before the courts and tribunals on the same grounds.

6.4 The Committee observes that the inadmissibility decision of the European Court was justified by the incompatibility *ratione materiae*, of the author’s application with the provisions of the European Convention, as the procedure, which the author contested, did not relate to the determination of her civil rights and obligations, nor a criminal charge against her, within the meaning of article 6 of the Convention. The Committee considers that such analysis of the nature of the right invoked by the author constitutes an examination of the communication, and concludes that the same matter has, for the purpose of the reservation entered by the State party, already been considered by the European Court. Consequently, the Committee is precluded by the State party’s reservation to article 5, paragraph 2 (a), of the Optional Protocol from examining the present communication.

7. The Committee therefore decides:

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

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

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

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<sup>8</sup> See communication No. 1754/2998, *Loth v. Germany*, decision on inadmissibility adopted on 23 March 2010, para. 6.3, and No. 998/2001, *Althammer v. Austria*, para. 8.4.

## Appendix

### **Individual opinion of Committee members, Mr. Michael O’Flaherty, Mr. Prafullachandra Natwarlal Bhagwati and Ms. Zonke Zanele Majodina (dissenting)**

We do not consider that the reservation entered by the State party to article 5, paragraph 2 (a) is applicable in the present circumstances. The reservation in the original language (French) excludes matters which are being examined or have already been examined under another procedure of international investigation or settlement:

*“La France fait une réserve à l’alinéa (a) du paragraphe 2 de l’article 5 en précisant que le Comité des Droits de l’Homme ne sera pas compétent pour examiner une communication émanant d’un particulier si la même question est en cours d’examen ou a déjà été examinée par une autre instance internationale d’enquête ou de règlement.”*

The declaration by the European Court of Human Rights that the author’s application to that court was incompatible *ratione materiae* with the European Convention on Human Rights does not constitute an “examination” of the matter.

Accordingly, we consider that the reservation does not serve to preclude the Committee from consideration of this communication.

(Signed) Mr. Michael **O’Flaherty**

(Signed) Mr. Prafullachandra Natwarlal **Bhagwati**

(Signed) Ms. Zonke Zanele **Majodina**

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]



## Individual opinion of Committee members Mr. Rafael Rivas Posada and Mr. Fabián Omar Salvioli (dissenting)

Having considered the communication *Marin v. France*, the Committee decided that it was inadmissible under article 5, paragraph 2 (a), of the Optional Protocol. It justified its decision by what we deem to be a misinterpretation of this provision, insofar as it recalled its settled jurisprudence that grounds for declaring a communication inadmissible exist when another international body has already considered the same matter and found the complaint to be inadmissible. In this case, the European Court of Human Rights had considered the same matter and declared it inadmissible. For this reason, the Committee decided to apply the reservation made by France, which does not recognize the competence of the Human Rights Committee if the same matter has already been considered by another international body.

It is very doubtful that the Court genuinely “considered” the matter, since it declared it inadmissible *ratione materiae*, leading to the conclusion that it did not undertake a consideration of the merits of the case. However, even if one is of the contrary opinion, it is not a question of determining whether another international body has already considered the matter, since this ground for inadmissibility is not set forth in the Optional Protocol. In our view, both the letter and spirit of the above paragraph of the Optional Protocol clearly establish that grounds for inadmissibility exist when the matter is being examined by another international body at the time that the Committee embarks on its consideration thereof, and not when it has been submitted and considered in the past.

The wording of the English and French versions of article 5, paragraph 2 (a), of the Optional Protocol is sufficiently clear as to leave no room for any doubt. The English text reads: “2. The Committee shall not consider any communication from an individual unless it has ascertained that: (a) The same matter *is not being examined* under another procedure of international investigation or settlement” (emphasis added). The corresponding French text reads: “2. Le Comité n’examinera aucune communication d’un particulier sans s’être assuré que: a) La même question *n’est pas déjà en cours d’examen* devant une autre instance internationale d’enquête ou de règlement” (emphasis added). The Spanish version contains a serious error of translation, since it speaks of inadmissibility when the same matter has already been submitted (“*ha sido sometido ya*”) to another international procedure. This has allowed some States parties to interpret this ground for inadmissibility as referring solely to submission in the past of the same matter and not, as is correct, to its concurrent consideration by the other international body. In view of this error of translation, the Committee has repeatedly stated that the English and French versions must take precedence over the erroneous Spanish text, and has decided that the mere submission of the matter is insufficient and that the matter must also have been examined by the other international body. However, the Committee has accepted — erroneously in our opinion — that this examination may have taken place in the past, in contradiction of the unequivocal text of article 5, paragraph 2 (a), of the Optional Protocol.

For the above reasons, without prejudging the alleged violation of the Covenant by the State party, we are of the opinion that the Committee should have declared the communication *Marin v. France* to be admissible.

(Signed) Mr. Rafael **Rivas Posada**

(Signed) Mr. Fabián Omar **Salvioli**

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**U. Communication No. 1794/2008, *Barrionuevo Álvarez and Bernabé Pérez v. Spain* (Decision adopted on 19 March 2010, ninety-eighth session)\***

<i>Submitted by:</i>	María Dolores Barrionuevo Álvarez and Francisco Bernabé Pérez (represented by counsel, José Luis Mazón Costa)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Spain
<i>Date of communication:</i>	20 February 2008 (initial submission)
<i>Subject matter:</i>	Cancellation of a ballot paper in municipal elections
<i>Procedural issue:</i>	Lack of substantiation
<i>Substantive issues:</i>	Right to equality before courts; right to be elected in periodic elections; right to effective remedy
<i>Articles of the Covenant:</i>	14, paragraph 1; 25 (a) and (b); 2, paragraph 3
<i>Article of the Optional Protocol:</i>	2

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

*Meeting on 19 March 2010,*

*Adopts the following:*

**Decision on admissibility**

1. The authors of the communication, dated 20 February 2008, are María Barrionuevo Álvarez and Francisco Bernabé Pérez, Spanish nationals residing in La Unión, Murcia. They allege they are victims of a violation by Spain<sup>1</sup> of articles 14 and 25 of the Covenant. The authors are represented by counsel, José Luis Mazón Costa.

**The facts as submitted by the authors**

2.1 The authors were standing as candidates for councillors for the Partido Popular (People's Party) (PP) in the local elections held on 27 May 2007 in the town council of La Unión (Murcia). Mr. Bernabé headed the list and was a candidate for mayor. Ms. Barrionuevo was ninth on the list of candidates for councillor.

\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

<sup>1</sup> The Optional Protocol entered into force for Spain on 25 April 1985.

2.2 According to the authors, the PP list obtained 4,055 votes, which entitled it to nine councillors and meant it would have an absolute majority on the town council, which has 17 seats in all.<sup>2</sup> During the ballot count, the representative of the Partido Socialista Obrero Español (Spanish Socialist Workers Party) (PSOE), which obtained 3,604 votes and seven councillors, disputed the validity of a ballot paper marked with a handwritten “X”. Despite the fact that electoral law stipulates that ballot papers must not be marked in any way, the polling officers declared the ballot paper valid and dismissed the claim. The validity of the ballot paper was important because, had it been considered void, the PP would have obtained eight seats instead of nine and would have lost their majority on the town council.

2.3 The PSOE and Izquierda Unida-Los Verdes (United Left-Greens) parties contested the ballot count before the Electoral Board for the Cartagena area on account of the ballot paper marked with an “X”. On 31 May 2007, the Board dismissed the claim and decided that the ballot paper was valid. It argued that the general principle of maintaining the result of an election, supported by electoral case law, should take precedence and that the constitutional right to cast a vote is overridden only if irregularities in the ballot paper clearly reflect an obvious desire to invalidate, spoil or amend it. The PSOE and Izquierda Unida-Los Verdes lodged an appeal against the decision before the Central Electoral Board. On 9 June 2007, the Central Electoral Board concurred with the decision of the Cartagena Electoral Board, considering that the irregularity did not invalidate the ballot paper.

2.4 The PSOE<sup>3</sup> then lodged an appeal with the Administrative Chamber of the Superior Court of Murcia. On 29 June 2007, this court dismissed the appeal, invoking constitutional case law on the matter, and declared that the ballot paper in question was valid.

2.5 On 2 July 2007, the PSOE submitted an application for *amparo* (enforcement of constitutional rights) before the Constitutional Court, invoking a violation of the right of access to public office on equal terms in compliance with the requirements laid down by the law. According to the authors, the application was accepted for consideration without the need to justify the “special constitutional role” of the case, as required by law, and despite the Prosecutor’s view to the contrary. In its decision of 18 July 2007, the Constitutional Court accepted the application for *amparo*, declared that the aforementioned right had been violated and cancelled the disputed ballot paper and the area Electoral Board’s decision on its validity. As a consequence, Ms. Barrionuevo’s mandate as elected councillor was revoked. As for Mr. Bernabé, he was adversely affected as a result of his party losing its absolute majority on the town council, which restricted his independence as mayor.

2.6 The authors provided the Committee with a copy of the Constitutional Court’s ruling. This refers back to a ruling of 2003, in which the Court decided that, from a fundamental rights perspective, the legal interpretation — whereby votes submitted on ballot papers that should have been declared void because they were flawed according to the electoral law could still be considered valid — was inadmissible, in cases where admitting validity would alter the final result of the election. Applying the same criteria to this case, the Court considered that the administrative and legal decisions allowing the ballot paper to be declared valid had not only violated the electoral law, by having a direct bearing on the final result of the election, but also contravened the right of access to public office on equal terms in compliance with the requirements of the law.

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<sup>2</sup> The town council of La Unión has a total of 17 seats.

<sup>3</sup> The Izquierda Unida-Los Verdes did not join this appeal.

**The complaint**

3.1 The authors contend that the Constitutional Court did not follow its own electoral case law and thus violated article 25, paragraphs (b) and (c), of the Covenant. They argue that the Court wrongly favoured the PSOE in its interpretation of the law, in violation of the guarantee of equality between candidates. This guarantee of equality was also violated on account of the fact that the PP did not at the time contest two similar ballots — in favour of the PSOE — found at other polling stations, because they had considered them valid pursuant to electoral case law. The Cartagena Electoral Board's decision was to refuse categorically to examine the matter because at the time the PP had not contested the ballot papers. According to the author, this is a violation of article 2, paragraph 3, of the Covenant (effective remedy).

3.2 The authors allege that the guarantee of equality, provided for in article 14, paragraph 1, of the Covenant, was violated on the grounds that current electoral case law was disregarded to the detriment of the authors; the reporting judge, elected by Congress on a proposal by the PSOE, should have withdrawn from the case because that political party was the plaintiff; and the PSOE was exempted from having to justify the “special constitutional role” of the case in *amparo*, as required by law.

**State party's observations on admissibility and merits**

4. The State party contested the admissibility of the communication through notes verbales dated 29 August and 30 December 2008. It pointed out that the issue of the validity of the ballot paper had been dealt with by electoral management bodies and the relevant courts. The final decision should in no way be branded as arbitrary, unreasonable, inadmissible or not in line with the objectives of the Covenant. It also requires an appreciation of the facts and an interpretation of electoral law that must be beyond reproach. The State party therefore considers that the communication must be considered inadmissible since it fails to address any issue relating to strict compliance with the Covenant and constitutes a use of the Covenant that amounts to clear abuse of its purpose according to the provisions of article 3 of the Optional Protocol. The State party also contends that the communication manifestly lacks substantiation and requests the Committee, failing inadmissibility, to consider that there has been no violation of the Covenant.

**Authors' comments on the State party's observations**

5. In their comments of 5 March 2009, the authors reiterate their initial complaints and the fact that the Constitutional Court acted arbitrarily by not following case law on ballot papers with marks or signs. They allege that the Court's ruling is contradictory, since, on the one hand, it states that it is strictly a matter of electoral legality, which it is not competent to review, and, on the other hand, it annuls decisions made by electoral bodies and the Superior Court of Justice.

**Committee's decision on admissibility**

6.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether or not the communication is admissible under the Optional Protocol to the Covenant.

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

6.3 The authors contend that the Constitutional Court's ruling declaring that the controversial ballot paper was void violated their rights to equality before the courts, to an

effective remedy and to be elected, as provided for respectively in article 14, paragraph 1; article 2, paragraph 3; and article 25 (b) and (c) of the Covenant. The Committee observes that these complaints refer to a review of the facts and evidence by the courts of the State party. The Committee recalls its jurisprudence in this respect and reiterates that, generally speaking, it is for the relevant domestic courts to review or evaluate facts and evidence, unless their evaluation is manifestly arbitrary or amounts to a denial of justice.<sup>4</sup> After examining the decisions handed down by the domestic courts, the Committee considers that the authors have not shown sufficient grounds to support their argument that there was such arbitrariness or denial of justice, and it therefore concludes that the communication must be declared inadmissible pursuant to article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under article 2 of the Optional Protocol;
- (b) That this decision shall be communicated to the State party and to the authors and their counsel.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

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<sup>4</sup> See communication No. 1212/2003, *Lanzarote v. Spain*, decision on inadmissibility adopted on 25 July 2006, para. 6.3.

**V. Communication No. 1868/2009, *Andersen v. Denmark*  
(Decision adopted on 26 July 2010, ninety-ninth session)\***

<i>Submitted by:</i>	Fatima Andersen (represented by Mr. Niels-Erik Hansen of the Documentation and Advisory Centre on Racial Discrimination (DACoRD))
<i>Alleged victim:</i>	The author
<i>State party:</i>	Denmark
<i>Date of communication:</i>	13 January 2009 (initial submission)
<i>Subject matter:</i>	Hate speech against the Muslim community in Denmark
<i>Procedural issues:</i>	Non-substantiation, non-exhaustion of domestic remedies, victim status
<i>Substantive issues:</i>	Hate speech, discrimination based on religious belief and minority rights
<i>Articles of the Covenant:</i>	2, paragraph 3; 20, paragraph 2; and 27
<i>Articles of the Optional Protocol:</i>	1, 2 and 5, paragraph 2 (b)

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

*Meeting* on 26 July 2010,

*Adopts* the following:

**Decision on admissibility**

1. The author of the communication is Ms. Fatima Andersen, a Danish citizen, born in Denmark on 2 September 1960. She claims to be a victim by Denmark of her rights under articles 2; 20, paragraph 2; and 27 of the Covenant. She is represented by Mr. Niels-Erik Hansen of the Documentation and Advisory Centre on Racial Discrimination (DACoRD). The Optional Protocol entered into force for the State Party on 6 April 1972.

**The facts as presented by the author**

2.1 On 29 April 2007, the leader of the Danish People's Party (DPP), Member of Parliament Ms. Pia Kjærsgaard, made a statement on the National Danish Television comparing the Muslim headscarves with the Nazi symbol of the swastika. Another member of the Danish People's Party, Member of Parliament Mr. Søren Krarup, had recently made a similar comparison. The author adheres to the Muslim faith and wears a headscarf for

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

religious reasons. She considers that this statement comparing the use of headscarf with the Nazi swastika is a personal insult to her. Moreover, it creates a hostile environment and concrete discrimination against her. For example, it is difficult for her to find a job because of a double discrimination based on her gender and the fact that she wears a headscarf.

2.2 On 30 April 2007, the author's counsel reported the statement to the Copenhagen Metropolitan police, alleging a violation of section 266 (b) of the Danish Criminal Code. On 20 September 2007, the Copenhagen Metropolitan police notified the counsel that on 7 September 2007 the Public Prosecutor for Copenhagen and Bornholm decided, under section 749, paragraph 2, of the Administration of Justice Act, not to prosecute Ms. Kjærsgaard. The letter also advised about the possibility to appeal this decision to the Public Prosecutor General. On 16 October 2007, the author's counsel appealed the decision to the Public Prosecutor General who, on 28 August 2008, upheld the decision of the Public Prosecutor for Copenhagen and Bornholm, stating that neither the author nor her counsel could be considered legitimate complainants in the case. He added that statements covered by 266 (b) of the Criminal Code are usually of such a general nature that there would be no individuals who are legitimate complainants. There did not seem to be any information that would prove that Fatima Andersen, the author, could be regarded as an injured person under section 749, paragraph 3, of the Administration of Justice Act, because she could not be said to have such a substantial, direct, personal and legal interest in the outcome of the case. As a result, the counsel, as the author's representative, could not be considered as a legitimate complainant either.

2.3 Under section 99, paragraph 3, subsection 2, of the Administration of Justice Act, this decision is final and can not be appealed. According to the author, there are no other administrative remedies available as the public prosecuting authority has a monopoly to bring cases to the courts in relation to section 266 (b) of the Criminal Code.

### **The complaint**

3.1 The author claims that the State party violated articles 2; 20, paragraph 2; and 27 of the Covenant. The author contends that her case is based on a clear pattern of Islamophobic statements amounting to hate propaganda against Muslims in Denmark carried out by a number of leading members of the DPP. The statements made by Kjærsgaard are only an illustration of a long lasting pattern of crimes committed against Muslims in Denmark. As violations of section 266 (b) of the Criminal Code can be raised only by public prosecutors and because freedom of speech is always favoured over the right not to be subject to hate speech, none of the accusations based on article 20, paragraph 2 of the Covenant make it to court.

3.2 The types of statements such as those of some members of the DPP form part of the overall ongoing campaign stirring up hatred against Danish Muslims. In the author's opinion, those politicians influence the public opinion, and some of them then take action in the form of hate crimes against innocent Muslims living in Denmark. According to section 266 (b) (2) of the Criminal Code, hate speech, which is part of a systematic propaganda by political parties against racial, ethnic or religious groups, is an aggravated factor. The author compares such campaigns to the ones which led to the Holocaust or the genocide in Rwanda. By authorizing such speeches, the Danish authorities allegedly failed to acknowledge the need to protect Muslims against hate speech and thus prevent future hate crimes against members of this religious group. The State party has therefore allegedly violated both articles 20, paragraph 2; and 27 of the Covenant.

3.3 With regard to the exhaustion of domestic remedies, the author refers to the Opinion of the Committee on the Elimination Racial Discrimination in its communication No. 34/2004, *Gelle v. Denmark*, stressing that in matters related to violations of section 266 (b) of the Criminal Code, the prosecution in Denmark has the final word and can obstruct any

attempt of exhaustion of domestic remedies against racist propaganda. By denying the author the right to appeal the case, the State party has further denied her the possibility to exhaust domestic remedies. The author claims, therefore, that all available domestic remedies have been exhausted.

3.4 With regard to her status as a victim, the author quotes the Committee on the Elimination of Racial Discrimination's communication No. 30/2003, *The Jewish community of Oslo et al. v. Norway*, whereby the State party argued that the authors (including the Jewish community) did not have a victim status. The Committee on the Elimination of Racial Discrimination adopted an approach to the concept of "victim" status similar to the one taken by the Human Rights Committee in the case of *Toonen v. Australia* and by the European Court of Human Rights in *Open Door and Dublin Well Women v. Ireland*. In the latter, the Court found certain authors to be "victims" because they belonged to a class/group of persons which might in the future be adversely affected by the acts complained of. The author argues, therefore, that as a member of such a group, she is also a victim. As a Muslim, the ongoing statements against her community directly affect her daily life in Denmark. These statements not only hurt her but put her at risk of attacks by some Danes who believe that Muslims are responsible for crimes they have in fact not committed. Finally, those statements directly reduce her chances to find employment because of the stereotypes related to Muslims.

3.5 Contrary to the prosecutor general's opinion, DACoRD has a right, as the author's legal representative, to file a petition against hate speech on her behalf. By trying to undermine the protection guaranteed by the Covenant, leaving victims of Islamophobic hate speech without effective remedy, the State party has also allegedly violated article 2 of the Covenant.

#### **The State party's observations on the admissibility and merits of the communication**

4.1 On 23 April 2009, the State party submitted its observations on the admissibility and merits of the communication.

4.2 The State party contests the admissibility of the communication on the ground that article 2 can be invoked only by individuals in conjunction with other articles of the Covenant as confirmed by the Human Rights Committee.<sup>1</sup> Furthermore, article 2, paragraph 3 (b), obliges States parties to ensure determination of the right to such remedy "by a competent judicial, administrative or legislative authority", but a State Party cannot reasonably be required, on the basis of that article, to make such procedures available no matter how unmeritorious the claims may be. Article 2, paragraph 3, only provides protection to alleged victims if their claims are sufficiently well-founded to be arguable under the Covenant.<sup>2</sup>

4.3 The State party further submits that the incriminated statement cannot be considered as falling within the scope of application of article 20, paragraph 2, of the Covenant. For statements to be comprised by article 20, paragraph 2, the wording of the provision requires them to imply advocacy of national, racial or religious hatred. In addition, such advocacy must constitute incitement to discrimination, hostility or violence. Advocacy of national, racial or religious hatred is not sufficient. The advocacy must be particularly qualified as it must have the intention of inciting to discrimination, hostility or violence. The State party

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<sup>1</sup> The State party cites communications No. 268/1987, *H.G.B. and S.P. v. Trinidad and Tobago*, decision on inadmissibility adopted on 3 November 1989, para. 6.2; and No. 275/1988 *S.E. v. Argentina*, decision on inadmissibility adopted on 26 March 1990, para. 5.3.

<sup>2</sup> The State party cites communication No. 972/2001, *Kazantzis v. Cyprus*, decision on inadmissibility adopted on 7 August 2003, para. 6.6.



rejects that the relevant statement by some members of the DPP in any way advocated religious hatred. The statement in which they compared the scarf with the swastika had its background in a public debate on how Members of Parliament should appear when speaking from the rostrum of Parliament. In that connection, one of the members of the DPP stated that in his view it would be comparable to allowing obvious Nazi symbols in the Chamber of Parliament to allow a member of Parliament to wear a Muslim scarf on the rostrum of Parliament. According to the *travaux préparatoires* of section 266 (b) of the Criminal Code, it was never intended to lay down narrow limits on the topics that can become the subject of political debate, nor details on the way in which the topics are discussed. It is particularly during a political debate that statements that may appear offending to some occur, but in such situations importance should be attached to the fact that they occur during a debate in which, by tradition, there are quite wide limits to the use of simplified allegations. The State party therefore contends that it must be considered incompatible with the founding principles of the Covenant if the Covenant were to be interpreted as imposing a positive duty of action on the State to intervene in a debate on a current topic which has been raised by Parliament and the press unless it advocates national, racial or religious hatred or constitutes an incitement to discrimination, hostility or violence.

4.4 The State party further claims that the author has not exhausted all domestic remedies. The State party opposes section 266 (b) of the Criminal Code on racially discriminating statements,<sup>3</sup> which is subject to public prosecution and for which only persons with a personal interest can appeal the Prosecutor's decision to discontinue the investigation, to sections 267 and 268<sup>4</sup> on defamatory statements which are applicable to racist statements. Contrary to the former provision, section 267 allows for private prosecution. This implies that the victim or offended party has to institute proceedings. Under sections 267 and 275(1) of the Criminal Code, the author could have instituted criminal proceedings against Ms. Kjærsgaard. By choosing not to do so, she has failed to exhaust all available domestic remedies. The State party refers to the Human Rights Committee's jurisprudence, where it declared a communication inadmissible as the authors who had filed a criminal complaint for defamation under section 267 had submitted the communication to the Committee before the High Court had issued its final decision on the

<sup>3</sup> The provision of the Criminal Code on racially discriminating statements is worded as follows:

“Section 266b.

(1) Any person who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a group of people are threatened, insulted or degraded on account of their race, colour, national or ethnic origin, religion, or sexual inclination shall be liable to a fine or to imprisonment for any term not exceeding two years.

(2) When the sentence is meted out, the fact that the offence is in the nature of propaganda activities shall be considered an aggravating circumstance.”

<sup>4</sup> The provision of the Criminal Code on defamatory statement is worded as follows:

“Section 267.

Any person who violates the personal honour of another by offensive words or conduct, or by making or spreading allegations of an act likely to disparage him in the esteem of his fellow citizens, shall be liable to a fine or to imprisonment for any term not exceeding four months.” This provision is furthermore supplemented by section 268, which provides:

“Section 268.

If an allegation has been made or disseminated in bad faith, or if the author has had no reasonable ground to regard it as true, he shall be guilty of defamation, and the punishment mentioned in section 267 may then be increased to imprisonment for two years.”

matter.<sup>5</sup> In the State party's opinion, such jurisprudence implies that criminal proceedings under section 267 are required to exhaust domestic remedies in issues related to allegations of incitement to religious hatred. It cannot be considered to be contrary to the Covenant to require the author to exhaust the remedy according to section 267, even after the public prosecutors have refused to institute proceedings under section 266 (b), as the requirements for prosecution under the former provision are not identical to those for prosecution under the latter one.

4.5 On the merits, the State party contends that the requirement of access to an effective remedy has been fully complied with in the present case, as the Danish authorities, i.e. the Prosecution Service, handled the author's complaint of alleged racial discrimination in a prompt, thorough and effective manner, fully consistent with the requirements of the Covenant. According to article 2, paragraph 3 (a) and (b), of the Covenant, access to an effective remedy implies that any victim of a violation of the Covenant must have the possibility of having a claim determined by, inter alia, a competent "administrative authority" provided for by the legal system of the State. This provision of the Covenant does not require access to the courts if a victim has had access to a competent administrative authority. Otherwise, the courts would be overburdened with cases where persons allege that something is a violation of the Covenant and must be determined by the courts regardless of how thoroughly the competent administrative authority provided for by the legal system of the State Party has investigated their allegations. Under such circumstances there would be no point in having an administrative authority assessing allegations at all. The fact that the author's criminal complaint did not lead to the result desired by the author, namely prosecution of Ms. Kjærsgaard, is irrelevant as the Covenant does not guarantee a specific outcome of cases on allegedly racially insulting statements. Hence, State parties are under no obligation to bring charges against a person when no violations of Covenant rights have been revealed. In this connection, it should be emphasized that the issue in the present case was solely whether there was a basis for presuming that the statement of Ms. Kjærsgaard would fall within the scope of application of section 266 (b) of the Criminal Code. The assessment to be made by the Prosecution Service was therefore a strictly legal test, which did not require the assessment of evidence (the statement in question was made on national television).

4.6 The State party refers to the jurisprudence of the European Court of Human Rights, which clearly confirms that the right to freedom of expression is especially important for an elected representative of the people.<sup>6</sup> The Court has considered that interferences with the freedom of expression of an opposition member of Parliament call for the closest scrutiny. In the present case, the State party considers that the national authorities' handling of the author's complaint fully satisfied the requirements that can be inferred from article 2, paragraph 3 (a) and (b), of the Covenant.

4.7 Concerning the possibility of appealing the decision, the Commissioner of the Copenhagen Police referred to an enclosed copy of the Danish Prosecution Service's guidelines on appeal, which state, inter alia, that any person who considers himself the victim of a criminal offence can appeal. Others can appeal only if they have a special interest in the outcome of the case other than having a sentence imposed on the offender. In determining whether a person is a party to a case and thereby entitled to appeal, the questions of particular relevance are how essential the person's interest in the case is, and

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<sup>5</sup> Communication No. 1487/2006, *Ahmad and Abdol-Hamid v. Denmark*, decision on inadmissibility adopted on 18 April 2009.

<sup>6</sup> The State party refers to the cases submitted to the European Court of Human Rights: *Roseiro Bento v. Portugal*, judgement of 18 April 2006, *Mamere v. France*, judgement of 7 November 2006, and *Jerusalem v. Austria*, judgement of 27 February 2001.

how closely such interest is related to the outcome of the case. Hence, persons reporting a violation, witnesses and similar persons only have a position as parties to a criminal case if they have *locus standi*, i.e. an essential, direct, individual and legal interest in the outcome of the case. The statements comprised by section 266 (b) are usually of such general nature that no individuals will ordinarily be entitled to appeal. The Commissioner therefore noted that there was no indication of circumstances showing that the author or her legal representative, DACoRD, was entitled to appeal. The State party finds that the decision of the Director of Public Prosecutions, which was well reasoned and in accordance with the Danish rules, cannot be considered contrary to the Covenant.

4.8 The State party adds that the Commissioners of Police must notify the Director of Public Prosecutions of all cases in which a report concerning violation of section 266 (b) is dismissed. This reporting scheme builds on the ability of the Director of Public Prosecutions, as part of his general power of supervision, to take a matter up for re-consideration to ensure proper and uniform enforcement of section 266 (b). In that connection, reference is also made to the case mentioned above concerning publication of the article “The Face of Muhammad” and the accompanying 12 drawings of Muhammad,<sup>7</sup> in which the Director of Public Prosecutions decided, due to the public interest about the matter, to consider the appeal without determining whether the organizations and persons who had appealed the decision of the Regional Public Prosecutor could be considered entitled to appeal. In the present case, however, the Director of Public Prosecutions found no basis for exceptionally disregarding the fact that neither the DACoRD nor the author was entitled to appeal the decision.

4.9 The State party strongly rejects the author’s claim that, by not prosecuting Ms. Kjærsgaard for her statement, the Danish authorities have given the Danish People’s Party a *carte blanche* to conduct a “systematic Islamophobic and racist campaign against Muslims and other minority groups living in Denmark” and thereby failed its positive obligations under the Covenant. There have been several prosecutions for violation of section 266 (b) of the Criminal Code in connection with politicians’ statements relating to Muslims and/or Islam, including for propaganda activities under section 266 (b) (2) of the Criminal Code. The author’s evidence proving the risk of attacks consists solely in a reference to a study from 1999 from which it appears that people from Turkey, Lebanon and Somalia living in Denmark suffer from racist attacks in the streets. In the State party’s view, such study cannot be considered sufficient evidence to prove that the author has a real reason to fear attacks or assaults, and in fact she has not stated anything about any actual attacks — whether verbal or physical — to which she has been subjected due to Ms. Kjærsgaard’s statement even though almost two years had passed after the television broadcast containing the statement when the communication was filed with the Committee.

4.10 The State party therefore requests the Committee to declare the communication inadmissible for failing to establish a *prima facie* case under article 20, paragraph 2, of the Covenant and for failing to exhaust domestic remedies. Should the Committee declare the communication admissible, it is requested to conclude that no violation of the Covenant has occurred.

#### **Author’s comments on the State party’s observations**

5.1 On 29 June 2009, the author noted that in the response of the State party, no reference had been made to article 27 of the Covenant. She therefore presumed that it must be taken for granted that the author had not been protected in her right to the peaceful enjoyment of her culture and religion and its symbols. According to article 27, members of

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<sup>7</sup> *Ahmad and Abdol-Hamid v. Denmark* (see note 5 above).

minority groups have a right to their identity, and should not be forced to “disappear” or to submit to forced assimilation. This right should be absolute. As to the State party’s observations that the incriminated statements fall outside article 20, paragraph 2, of the Covenant, the State party has not addressed the question whether limits on statements fall within the positive duty of State parties under article 27 of the Covenant to protect the right of minorities in their enjoyment of their culture and its symbols and the right to profess and practice their religion.

5.2 With regard to accessible and effective remedies, the author pointed out that it took the authorities more than 16 months not to conduct the investigation thoroughly. The principle of objectiveness seems here to have been violated as well. Given the repeated pattern of degrading and offensive statements from the political grouping of Ms. Kjærsgaard, it would have been appropriate to examine the question whether her statements did fit into a propaganda type activity, which has been deemed an aggravating circumstance in section 266 (b) (2) of the Criminal Code. In the Glistrup case,<sup>8</sup> the Prosecution did document and argue that the statements in that case were put forward as a part of a systematic and continuing activity, and that the conditions for the use of section 266 (b) (2) on propaganda were met. However, in the present case, the Prosecution did not deem it necessary to make an investigation and interview the concerned politician. Accordingly, the requirements of a prompt, thorough and effective investigation have not been met. This behaviour is particularly unjustified since the perpetrator was identified. The author recalls that statements fall outside the functional area of parliamentary immunity. By protecting those statements without conducting an investigation, the Prosecution failed to make an equal application of the ordinary “strictly legal test” mentioned by the State party. The author also recalls that according to the Committee’s general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, failure to bring perpetrators to justice could give rise to a separate breach of the Covenant.<sup>9</sup> Referring specifically to gross violations of human rights, the Committee has considered that impunity may be an important contributing element in the recurrence of the violations. No official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility. The author further considers that for such violations, purely administrative remedies without the possibility to go to court are inadequate and do not satisfy the requirements of article 2 of the Covenant.

5.3 The author refers to the *travaux préparatoires* of section 266 (b) of the Criminal Code as well as to the Glistrup case to affirm that there has been an intention to include acts of politicians or political statements in the scope of section 266 (b) contrary to what the State party argued in its observations. A legislative amendment of 1996 inserted paragraph 2 of section 266 (b) to counteract propaganda activities. The background of the bill was to be seen in “the ever more prominent tendencies towards intolerance, xenophobia and racism both in Denmark and abroad”.<sup>10</sup> Propaganda acts, understood as a systematic dissemination of discriminatory statements with a view to influencing public opinion, were seen as an aggravating circumstance, allowing only for a penalty of imprisonment and not a simple fine. The explanatory report further contained a directive for the prosecution authorities that it should not show the same restraints as in the past in bringing charges if the acts were in the nature of propaganda. In the Glistrup case, the Supreme Court found that section 266 (b) was applicable as the defendant, who was a politician, “had subjected a

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<sup>8</sup> Judgement of the Danish Supreme Court on 23 August 2000 (*Danish Weekly Law Reports*, cited as UfR 2000. 2234), also known as the Glistrup case.

<sup>9</sup> *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI, para. 18.

<sup>10</sup> The Glistrup case (note 8 above).

population group to hate on account of its creed or origin". The Court further noted that freedom of expression must be exercised "with necessary respect for other human rights, including the right to protection against insulting and degrading discrimination on the basis of religious belief".

5.4 On the legal test the Prosecutor should have carried out, the author contends that the balance between all elements at stake was not performed. The incriminated statement did not take place during a debate involving an exchange between contending parties but emanated from a unilateral attack against a vulnerable group with no possibility to defend itself. By not carrying out an investigation, despite the existence of the Supreme Court's jurisprudence which has recognized limitations to the freedom of expression of politicians, the prosecuting authorities have given no opportunity for the author, and the minority group she belongs to, to have her case adjudicated by a court of law. The author recalls that the Danish Prosecution authorities made a series of similar decisions not to investigate and prosecute complaints regarding statements made by politicians using a similar approach of misrepresenting the Supreme Court judgement in the Glistrup case. Some of these have reached the international level, such as communication No. 34/2004, *Gelle v. Denmark*, where the Committee on the Elimination of Racial Discrimination found a violation of article 6 of the Convention on the Elimination of All Forms of Racial Discrimination.

5.5 The author maintains that she should be considered a victim of the incriminated statement since she has been directly affected by being singled out as a member of a minority group, distinguished by a cultural and religious symbol. She was exposed to the effects of the dissemination of ideas encouraging cultural and religious hatred, without being afforded adequate protection due to an unwarranted change in investigation and prosecution practice. To support her argumentation, the author quotes the jurisprudence of the Human Rights Committee, which recognized in a particular case that the author had made reasonable efforts to demonstrate that the threat of enforcement and the pervasive impact of the continued existence of administrative practices and the public opinion had affected the author and continued to affect him personally.<sup>11</sup> The author also refers to the position of the Committee on the Elimination of Racial Discrimination that potential victims of a violation are to be considered victims.<sup>12</sup> The author further points out the incoherence of the argument of the State party, which denies her the right to appeal the prosecutor's decision to discontinue the investigation while at the same time it recognizes her right to file a complaint about a violation of human rights to the Danish Police (which she did), and to receive information about the outcome of the proceedings. The author wonders how, at one stage of the proceeding she can be considered a victim and at a later stage be barred from exercising her rights.

5.6 As for the exhaustion of domestic remedies, the author reiterates that in Denmark, the administrative decision of the Director of the Public Prosecution is final and cannot be challenged before the Court. The author strongly rejects the argument of the State party whereby she should have instituted proceedings under section 267 for defamation. Section 266 refers to a public or general societal interest and is protective of a group (collective aspect) whereas sections 267 and 268 derive from a traditional concept of injury to personal honour or reputation and refers to an individual person's moral act or qualities (individual aspect). Contrary to the requirement of section 267, an insulting or degrading statement under section 266 needs not be false to fall within the scope of that provision. According to the author, private litigation is therefore not by definition a remedy to secure the implementation by the State party of its international obligations. In the case *Gelle v.*

<sup>11</sup> Communication No. 488/1992, *Toonen v. Australia*, Views adopted on 31 March 1994, para. 5.1.

<sup>12</sup> Communication No. 30/2003, *The Jewish community of Oslo et al. v. Norway*, Views adopted on 15 August 2005, para. 7.3.

*Denmark*, the Committee on the Elimination of Racial Discrimination considered it unreasonable to expect the petitioner to initiate separate proceedings under the general provisions of section 267, after having unsuccessfully invoked section 266 (b) of the Criminal Code in respect of circumstances directly implicating the language and object of that provision.<sup>13</sup> As for the inadmissibility decision of the Human Rights Committee in *Ahmad and Abdol-Hamid v. Denmark*, the author notes that the facts in that case were different from the present one, since it involved two different sets of proceedings, one with the second applicant under section 266 (b) and the other with the first applicant under section 267. Since the communication was submitted jointly and one of the two procedures was still pending at the time of examination by the Committee, the Committee declared the whole communication inadmissible. The State party can therefore not use this example as a reason to reject the admissibility of the present communication on that ground.

5.7 Basing its argument mainly on the extensive jurisprudence of the European Court of Human Rights, the author relates to the balance between the freedom of expression that public persons, including politicians and civil servants, enjoy and the duty of the State to limit this freedom when it contravenes other fundamental rights.

### Issues and proceedings before the Committee

#### *Consideration of admissibility*

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes, as required by article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under any other international procedure of investigation or settlement.

6.3 The Committee notes the State party's argument that the author did not exhaust domestic remedies, by failing to institute proceedings for defamatory statements, which are applicable to racist statements (sections 267 and 275(1) of the Criminal Code). The Committee also notes that according to the author, both provisions (section 266 (b) on the one hand and sections 267 and 268 on the other) do not protect the same interests (collective interest vs. private interest) and that contrary to the requirement of section 267, an insulting or degrading statement under section 266 needs not to be false to fall within the scope of that provision. It takes note of the author's argument that private litigation is not by definition a remedy to secure the implementation by the State party of its international obligations. The Committee considers that it would be unreasonable to expect the author to initiate separate proceedings under the general provisions of section 267, after having unsuccessfully invoked section 266 (b) of the Criminal Code in respect of circumstances directly implicating the language and object of that provision.<sup>14</sup> Accordingly, the Committee concludes that domestic remedies have been exhausted.

6.4 With regard to the author's allegations under articles 20, paragraph 2, and 27 of the Covenant, the Committee observes that no person may, in theoretical terms and by *actio popularis*, object to a law or practice which he holds to be at variance with the Covenant.<sup>15</sup>

<sup>13</sup> Communication No. 34/2004, *Gelle v. Denmark*, Opinion adopted on 6 March 2006, para. 6.5.

<sup>14</sup> *Ibid.*; Committee on the Elimination of Racial Discrimination, communication No. 41/2008, *Jama v. Denmark*, Opinion adopted on 21 August 2009, para. 6.5.

<sup>15</sup> Communications No. 318/1988, *E.P. et al. v. Colombia*, decision on inadmissibility adopted on 25 July 1990, para. 8.2; and No. 1453/2006, *Brun v. France*, decision on inadmissibility adopted on 18 October 2006, para. 6.3.

Any person claiming to be a victim of a violation of a right protected by the Covenant must demonstrate either that a State party has by an act or omission already impaired the exercise of his right or that such impairment is imminent, basing his argument for example on legislation in force or on a judicial or administrative decision or practice.<sup>16</sup> In the Committee's decision regarding *Toonen v. Australia*, the Committee had considered that the author had made reasonable efforts to demonstrate that the threat of enforcement and the pervasive impact of the continued existence of the incriminated facts on administrative practices and public opinion had affected him and continued to affect him personally.<sup>17</sup> In the present case, the Committee considers that the author has failed to establish that the statement made by Ms. Kjærsgaard had specific consequence for her or that the specific consequences of the statements were imminent and would personally affect the author. The Committee therefore considers that the author has failed to demonstrate that she was a victim for purposes of the Covenant. This part of the communication is therefore inadmissible under article 1 of the Optional Protocol.

6.5 The Committee points out that article 2 may be invoked by individuals only in relation to other provisions of the Covenant.<sup>18</sup> A State party cannot reasonably be required, on the basis of article 2, paragraph 3 (b), to make such procedures available in respect of complaints which are insufficiently founded and where the author has not been able to prove that she was a direct victim of such violations. Since the author has failed to demonstrate that she was a victim for purposes of admissibility in relation to articles 20, paragraph 2, and 27 of the Covenant, her allegation of a violation of article 2 of the Covenant is also inadmissible under article 2 of the Optional Protocol.

7. The Committee therefore decides that:

(a) The communication is inadmissible pursuant to articles 1 and 2 of the Optional Protocol;

(b) This decision will be transmitted to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

<sup>16</sup> Communications No. 1400/2005, *Beydon et al. v. France*, decision on inadmissibility adopted on 31 October 2005, para. 4.3; No. 1440/005, *Aalbersberg et al. v. The Netherlands*, decision on inadmissibility adopted on 12 July 2006, para. 6.3; and *Brun v. France* (note 15 above), para. 6.3.

<sup>17</sup> *Toonen v. Australia* (note 11 above), para. 5.1.

<sup>18</sup> Communications No. 972/2001, *Kazantzis v. Cyprus*, decision on inadmissibility adopted on 7 August 2003, para. 6.6; No. 1036/2001, *Faure v. Australia*, Views adopted on 31 October 2005, para. 7.2; and *S.E. v. Argentina* (note 1 above), para. 5.3.

**W. Communication No. 1869/2009, *Sanjuán v. Spain*  
(Decision adopted on 26 July 2010, ninety-ninth session)\***

<i>Submitted by:</i>	Mario Alfonso Sanjuán (represented by counsel, Joaquín Ruíz-Giménez Aguilar and Máximo-Rafael Blázquez Aldana)
<i>Alleged victims:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	13 January 2009 (initial submission)
<i>Subject matter:</i>	Evaluation of evidence and scope of the review of criminal cases on appeal by Spanish courts
<i>Procedural issue:</i>	Failure to substantiate claims
<i>Substantive issue:</i>	Right to have the conviction and sentence reviewed by a higher tribunal according to law
<i>Article of the Covenant:</i>	14, paragraph 5
<i>Article of the Optional Protocol:</i>	2

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

*Meeting on 26 July 2010,*

*Adopts the following:*

**Decision on admissibility**

1.1 The author of the communication, dated 13 January 2009, is Mario Alfonso Sanjuán, a Spanish national, who claims to be a victim of a violation by Spain of article 14, paragraph 5, of the Covenant. The Optional Protocol entered into force for Spain on 25 April 1985. The author is represented by counsel, Joaquín Ruíz-Giménez Aguilar and Máximo-Rafael Blázquez Aldana.

1.2 On 7 May 2009, the Rapporteur on New Communications and Interim Measures, acting on behalf of the Committee, decided that the admissibility of the communication should be considered separately from the merits.

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\* The following members of the Committee participated in the consideration of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sánchez-Cerro, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.



### Factual background

2.1 On 30 April 2004, the Provincial High Court of Zaragoza sentenced the author to four years' imprisonment, a fine and disqualification for the offence of fraud related to the sale of works of art.

2.2 The author filed an appeal in cassation against the decision with the Second Division of the Supreme Court on the following grounds: refusal to admit documentary evidence, violation of the right to be presumed innocent, errors of fact in the evaluation of the evidence and improper application of articles 248, 250 and 74 of the Spanish Criminal Code. In a judgement issued on 20 February 2006, the Supreme Court rejected the appeal and upheld the sentence in its entirety.<sup>1</sup>

2.3 On 3 May 2006, the author submitted an application for *amparo* to the Constitutional Court, citing the right to an effective legal remedy and the right to have the conviction and sentence reviewed by a higher tribunal as established in article 14, paragraph 5, of the Covenant. The Constitutional Court rejected the application on 21 July 2008.

### The complaint

3. The author alleges a violation of his right to have the conviction and sentence submitted to and reviewed by a higher tribunal, in accordance with article 14, paragraph 5, of the Covenant. The author argues that the Supreme Court did not conduct a full and effective review of the facts that had been declared proven by the Provincial High Court.

### State party's observations on admissibility

4.1 In its observations issued on 3 May 2009, the State party indicates that the scope of the Spanish remedy of cassation has been expanded, and is not therefore limited to a review of the law applied. The State party refers to the Committee's case law,<sup>2</sup> in which the remedy of cassation is considered sufficient for the purposes of article 14, paragraph 5, of the Covenant.

4.2 The State party further maintains that the sentence handed down by the Supreme Court addresses all the grounds of appeal raised by the author, in particular those relating to the dismissal of evidence in the first instance proceedings. It points out that the Supreme Court provided a specific and substantiated explanation of the reasons why the evidence submitted was ruled to be unnecessary and to serve no exculpatory purpose. It adds that the Supreme Court conducted a thorough review of the sufficiency of the evidence for prosecution and gave a detailed and reasoned response to the author's objections. The State party asks for the communication to be declared inadmissible on the grounds that it is not sufficiently substantiated and constitutes an abuse of the purpose of the Covenant.

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<sup>1</sup> With regard to the violation of the presumption of innocence (second ground of appeal), the Supreme Court indicated that: "The review in cassation performed by this Court covers: (a) whether there is sufficient evidence obtained and submitted to the proceedings without violating constitutional or ordinary law; (b) whether or not, in its explanation, which must be presented in a reasoned and substantiated manner, as to how it arrived at its decision, the lower court diverged from the guidelines derived from general experience, rules of logic or principles or rules of any other nature."

<sup>2</sup> Including communications No. 1389/2005, *Bertelli Gálvez v. Spain*, decision of 25 July 2005; No. 1399/2005, *Cuartero Casado v. Spain*, decision of 25 July 2005; and No. 1323/2004, *Lozano Araez et al. v. Spain*, decision of 28 October 2005.

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

5. The author submitted his comments on the State party's observations on admissibility on 26 June 2009. He provides a summary of Spanish case law concerning the scope of the review of criminal cases on appeal and reiterates that, in his case, there was no proper second hearing allowing for a review of the facts and of his conviction. He adds that, had a second hearing actually taken place, either the Supreme Court or the Constitutional Court would have been able to examine all the evidence submitted by the author's counsel and unduly dismissed by the trial court, and to review and modify the facts erroneously declared proven.

**Issues and proceedings before the Committee**

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

6.2 The Committee notes that the State party has not submitted any information suggesting the non-exhaustion of domestic remedies, and therefore considers there to be no impediment to examining the communication under article 5, paragraph 2 (b), of the Optional Protocol.

6.3 The Committee takes note of the author's arguments in support of his assertion that the remedy of cassation does not constitute a full review as required under article 14, paragraph 5, of the Covenant. It also notes the State party's claims that the Supreme Court conducted a full review of the Provincial High Court's ruling. The Committee observes that the Supreme Court's decision of 20 February 2006 indicates that the Court considered each of the author's grounds of appeal, and reviewed the Provincial High Court's assessment of the sufficiency of the evidence. Consequently, the Committee considers that the author's complaint has not been sufficiently substantiated for purposes of admissibility, and must therefore be declared inadmissible in accordance with article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

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

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

**X. Communication No. 1872/2009, *D.J.D.G. et al v. Canada*  
(Decision adopted on 26 July 2010, ninety-ninth session)\***

<i>Submitted by:</i>	D.J.D.G. et al (The authors are represented by counsel, Lina Anani)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Canada
<i>Date of communication:</i>	8 April 2009 (initial submission)
<i>Subject matter:</i>	Deportation from Canada to Colombia; access to Pre-removal Risk Assessment (PRRA)
<i>Procedural issues:</i>	Failure to exhaust domestic remedies; mootness of the complaint
<i>Substantive issues:</i>	Risk of arbitrary deprivation of the right to life; non-refoulement; arbitrary detention; detention conditions; fair proceedings; family life and best interest of the child
<i>Articles of the Covenant:</i>	2, paragraphs 2 and 3; 6, paragraph 1; 7; 9, paragraph 1; 10, paragraph 1; 14, paragraph 1; 23, paragraph 1; and 24, paragraph 1
<i>Articles of the Optional Protocol:</i>	1; 5, paragraph 2 (b)

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

*Meeting on 26 July 2010,*

*Adopts the following:*

**Decision on admissibility**

1.1 The authors of the communication, dated 8 April 2009, are D.J.D.G. (first author), her partner, E.G.A. (second author) and two minor children, D.A.A.D. and L.S.A.D., all Colombian citizens. They claim that their deportation from Canada to Colombia would constitute a violation of article 2, paragraph 3; article 6, paragraph 1; article 7; article 23, paragraph 1; and article 24, paragraph 1, of the Covenant. The authors are represented by counsel, Ms. Lina Anani.

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvio and Mr. Krister Thelin.

1.2 On 9 April 2009, the Special Rapporteur on new communications and interim measures decided to issue a request for interim measures pursuant to rule 92 of the Committee's rules of procedure.

1.3 On 22 October 2009, the Special Rapporteur on new communications and interim measures decided that the admissibility of the communication should be considered separately from the merits.

#### **The facts as presented by the authors**

2.1 The first author's grandmother and mother owned a rural farm in Chiquinquirá, Boyacá, Colombia. They were allegedly targeted by the Revolutionary Armed Forces of Colombia (FARC), had to pay an extortion tax (*vacuna*) and the FARC used the first author's family to store chemicals for the use in the production of illegal drugs. When the family could not pay the extortion tax anymore, they fled to Bogotá.

2.2 In 1997, when the first author was 13 years old, the FARC kidnapped her mother and four-year-old brother in Bogotá. They demanded ransom and sent the first author's mother's fingertips to the family as a warning that they would kill her if ransom was not paid. The first author's brother was subjected to beatings; his face was slashed with the lid of a can and scarred with brass knuckles. After the payment of part of the ransom, the first author's mother and brother were released. A complaint was filed with the Colombian authorities. The first author's mother then fled alone to the United States of America.

2.3 In 2002, when the first author's mother visited Colombia from the United States, she was again kidnapped by the FARC and held for 10 days. She was mistreated and stabbed several times in her hands and legs. When she tried to escape, she was shot in the leg and then left on the road. She again filed a complaint about the kidnapping and fled the country a second time.

2.4 A few months later, the first author was kidnapped by the FARC in reprisal for the complaint filed by her mother. During her detention, she was subject to repeated rape and other forms of sexual assault. Her legs were cut with a broken bottle and her hands burned with cigarette butts. As a result of the repeated rape, the first author became pregnant, depressed, suicidal, and developed HPV,<sup>1</sup> which caused cervical cancer. During her pregnancy she met her common-law partner, and a daughter was born from this union in 2007.

2.5 In October 2008, the authors fled Colombia to the United States after an incident in which a man, who was leaning against the second author's car, was shot and killed. The family believes that the man was mistaken for the second author. At the same time, the first author's uncle received a death threat telephone call, after which he and his family fled to Argentina, where they remain in hiding under an assumed identity. The authors believe that attempts by some of the first author's family members living outside Colombia to reclaim the family farm led to further targeting by the FARC.

2.6 The authors travelled overland to Canada with the first author's two younger siblings, whom they left with their mother in the United States. The authors however continued their journey to Canada where the second author's godfather lives. They filed a refugee claim at the border in January 2009. On 26 January 2009, they were found to be ineligible under s.101(e) of the Immigration and Refugee Protection Act (IRPA)<sup>2</sup> due to the

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<sup>1</sup> Human papillomavirus (HPV) is a sexually transmitted infection, which may be at the origin of cervical cancer.

<sup>2</sup> Immigration and Refugee Protection Act: s.101(1) A claim is ineligible to be referred to the Refugee Protection Division if ... (e) the claimant came directly or indirectly to Canada from a country

Safe Third Country Agreement with the United States and were returned to the United States, where the second author was detained. They were also issued with an exclusion order, barring them from re-entry to Canada for one year.

2.7 On 16 February 2009, they again sought to file a refugee claim in Canada after crossing the border on foot. Based on the decision of 26 January 2009, they were found to be ineligible under s.101(c) of IRPA<sup>3</sup> and were detained. On 1 April 2009, the authors submitted their application for a Pre-Removal Risk Assessment (PRRA). On 3 April 2009, they were advised that their PRRA had been suspended pursuant to s.112(2)(d) of IRPA,<sup>4</sup> which provides that persons who have been outside of Canada for less than six months, and have since re-entered, are not eligible for a Pre-Removal Risk Assessment (PRRA). The authors maintain that, even if they had been outside of Canada for longer than six months they would have still been ineligible for a PRRA due to s.112(2)(b),<sup>5</sup> which states that they are ineligible to apply for a PRRA if they have been found ineligible under s.101(1)(e) of IRPA, as the authors entered from the United States, where they could receive an assessment of their claim for protection.

2.8 On 6 April 2009, the authors were served with a Notice of Removal indicating that they would be removed to Colombia on 9 April 2009. On 7 April 2009, the authors requested the Minister of Citizenship and Immigration to exempt them under s.25 of IRPA (humanitarian and compassionate considerations)<sup>6</sup> from the operation of ss. 101(1)(c)<sup>7</sup> and 112(2)(d)<sup>8</sup> and allow them to make a refugee claim or have their PRRA re-instated. In addition to that, they also filed an emergency motion to stay their removal. On 8 April 2009, the Government of Canada advised the authors that their deportation was temporarily cancelled and that a new deportation date could be set any time. The authors explain that the State party created an administrative stay of the deportation in contrast to a judicial stay granted by a court. In creating an administrative stay, the State party maintains control of when it will next take steps to remove the authors and it limits the authors' ability to argue for their release from detention.

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designated by the regulations, other than a country of their nationality or their former habitual residence.

<sup>3</sup> Immigration and Refugee Protection Act: s.101 (1) A claim is ineligible to be referred to the Refugee Protection Division if ... (c) a prior claim by the claimant was determined to be ineligible to be referred to the Refugee Protection Division, or to have been withdrawn or abandoned.

<sup>4</sup> Immigration and Refugee Protection Act: s.112 (2) Despite subsection (1), a person may not apply for protection if (b) they have made a claim to refugee protection that has been determined under paragraph 101 (1) (e) to be ineligible; (d) in the case of a person who has left Canada since the removal order came into force, less than six months have passed since they left Canada after their claim to refugee protection was determined to be ineligible, abandoned, withdrawn or rejected, or their application for protection was rejected.

<sup>5</sup> See previous.

<sup>6</sup> Immigration and Refugee Protection Act: 25 (1): The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.

<sup>7</sup> See note 3 above.

<sup>8</sup> See note 4 above.

### The complaint

3.1 The authors submit that there are serious grounds to believe that their rights under article 2, paragraph 3; article 6, paragraph 1; article 7; article 23, paragraph 1; and article 24, paragraph 1, of the Covenant would be violated and they would face irreparable harm if returned to Colombia.

3.2 The authors submit that under the provisions of the State party's legislation, they are not entitled to any assessment of their claim of persecution having made a claim at the United States-Canada border, which had been rejected on the basis of the Safe Third Country Agreement and then having made a second attempt from within Canada. They argue that the intent of the conflicting provisions is to ensure that the Safe Third Country Agreement is strictly enforced and that persons entering from the United States land port of entry are compelled to make their claims in that country. However, the authors being destitute without access to legal advice on this very technical area of law made decisions without understanding their very serious consequences. As the authors entered Canada on foot and not through a formal land port of entry, the legislation does not allow their return to the United States. As a result and in violation of the non-refoulement principle, they are being returned directly to Colombia without any risk assessment and without the possibility to seek for protection elsewhere. They submit that, in violation of article 2, paragraph 3, of the Covenant, they are deprived of an effective remedy for a substantive examination of their claims under articles 6, paragraph 1, 7, 23, paragraph 1 and 24, paragraph 1, of the Covenant.<sup>9</sup> In addition to that, the authors cannot challenge the State party's legislation before the Federal Court, as there has not been any "error of law" by the authorities.

3.3 The authors argue that they have submitted credible evidence that their removal to Colombia would expose them to a serious risk of arbitrary deprivation of their lives, in violation of article 6, paragraph 1, of the Covenant and being subjected to torture or other cruel, inhuman or degrading treatment or punishment, in violation of article 7, paragraph 1, of the Covenant.

3.4 The authors further argue that the legislation barring them from a risk assessment ignores the interest of the two minor children, as the threats, to which they would be exposed on their return to Colombia, are not assessed. In addition to that, the Minister has not taken any decision under s.25 of the IRPA, and therefore ignored the best interest of the two children.<sup>10</sup> They submit that this would violate the children's rights under article 24, paragraph 1, of the Covenant. To the extent that the removal of the children's parents to Colombia would endanger their well-being, such a removal would also violate the children's rights under article 23, paragraph 1, of the Covenant.

### State party's submission on admissibility

4.1 On 20 August and 22 December 2009, the State party submitted its comments on admissibility and requested that the interim measures be lifted or that the Committee take a decision on admissibility at its next session. It explains that a new application for a Pre-Removal Risk Assessment (PRRA) was submitted on 11 August 2009 and that the authors' removal was stayed. On 3 November 2009, the authors' PRRA application was rejected and their application for judicial review remains pending before the Federal Court.

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<sup>9</sup> Amnesty International, Canadian Section has issued an opinion according to which removal of the authors without risk assessment would constitute a violation of the non-refoulement principle.

<sup>10</sup> See communication No. 1069/2002, *Bakhtiyara v. Australia*, Views adopted on 29 October 2003, para. 9.7.

4.2 The State party recalls the facts and explains that the authors entered the United States from Mexico without border inspection in November 2008. On 21 January 2009, they arrived at the Canada-United States land border post and applied for refugee status. They were found illegible under s.101(1)(e) of the IRPA and the Canada-United States Safe Third Country Agreement (STCA) and were returned to the United States. The authors made an asylum claim in the United States and their hearing was scheduled for 30 April 2009. At an unknown date, the authors re-entered the State party's territory and submitted a second application for asylum on 16 February 2009. Pursuant to s.101(1)(c), the authors were found to be ineligible, having been found ineligible previously. On 1 April 2009, the authors submitted an application for Pre-Removal Risk Assessment, which was suspended pursuant to s.112(2)(d) of the IRPA, given that less than six months passed after the authors' claim for refugee protection was determined to be ineligible. On 7 April 2009, the authors applied to the Minister of Citizenship and Immigration for an exemption of the ineligibility provisions and to be allowed to present a PRRA. On 8 April 2009, the authors were advised that their deportation was cancelled.

4.3 During the examination of the authors' second PRRA application, the authorities examined, in addition to the facts as submitted by the authors, "unbiased and trustworthy sources", such as the Immigration and Refugee Board's Country of Origin Research and the United States Department of State Country Report on Human Rights Practices in 2008. The authorities concluded that the human rights and security situation in Colombia has considerably improved and that there has been a significant decrease in massacres and kidnappings, and the total number of FARC members has been reduced since the authors' departure in October 2008. They further noted that there was no substantial evidence that the police would be unwilling or unable to provide protection to the authors. They also observed that the authors first went to the place of residence of the first author's mother in New York but did not make any attempt to seek asylum in the United States, while it would be reasonable to expect such an application in the first safe country of opportunity.

4.4 The State party submits that due to the pending judicial review by the Federal Court, the communication has become inadmissible for failure to exhaust domestic remedies, pursuant to article 5, paragraph 2 (b), of the Optional Protocol.

4.5 In the alternative, the State party argues that the communication should be declared inadmissible on the grounds that it is moot. Considering that the authors' complaint is that they are subject to deportation without access to any form of consideration of their claim for protection and given that they have been able to apply for a PRRA, the facts supporting the complaint have ceased to exist. Recalling the Committee's jurisprudence, the State party submits that the authors can no longer complain of being victims of a violation of the Covenant, the alleged inconsistency having been remedied by the State party.<sup>11</sup> The communication should therefore be declared inadmissible under article 1, of the Optional Protocol.

4.6 The State party further submits that the evidence was insufficient to establish the authors' allegations on a prima facie basis. It argues that even if the facts as submitted by the authors were true, the alleged agent of persecution is a non-State actor, the FARC. The authors have not reported their mistreatment to the Colombian authorities and have not established that these would be unable to protect them. It underlines that the allegations concerning police inaction with respect to the first author's mother's complaints in 1997

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<sup>11</sup> See communications No. 478/1991, *A.P.L.-v.d.M. v. the Netherlands*, decision on inadmissibility adopted on 26 July 1993, paras. 6.3 and 7(a); No. 501/1992, *J.H.W. v. the Netherlands*, decision on inadmissibility adopted on 16 July 1993, paras. 5.2 and 6 (a); No. 1291/2004, *Dranichnikov v. Australia*, Views adopted on 20 October 2006, para. 6.3.

and 2002 are not evidence that the authors could not receive police protection in present-day Colombia. The State party recalls the Committee's jurisprudence with regard to *Khan v. Canada*, in which the Committee concluded that the author had not demonstrated that the State authorities were unable or unwilling to protect him and found the communication inadmissible for lack of substantiation.<sup>12</sup> The State party argues that this was consistent with the approach taken by the Office of the United Nations High Commissioner for Refugees, which considers that acts by non-State actors amount to persecution within the meaning of the Refugee Convention if the acts are knowingly tolerated or if the authorities refuse, or prove unable to offer effective protection.<sup>13</sup> In addition to sources consulted by the PRRA officer, the State party cites reports by Amnesty International and Human Rights Watch, which account for significant weakening of the FARC in Colombia, supporting the conclusion that the authors would not face a real risk of a violation of articles 6 and 7 of the Covenant.

4.7 With regard to the authors' allegation of a violation of articles 23, paragraph 1, and 24, paragraph 1, of the Covenant, the State party submits that the authors would be deported in unity and therefore it would not have any effect on the family's or children's interest.

4.8 Finally, the State party recalls the Committee's constant jurisprudence that it is not for the Committee to re-evaluate findings of facts or evidence by domestic authorities, unless the evaluation is arbitrary or amounts to a denial of justice.<sup>14</sup> It submits that the evaluation made by the PRRA officer was reasonable and fully supported by evidence and that it is therefore not in the competence of the Committee to re-evaluate the findings.

#### **Authors' comments**

5.1 On 30 January 2010 and 24 May 2010, the authors submitted their comments on the admissibility of their communication. In addition to the claims raised in their initial submission, the authors further claim violations of articles 2, paragraph 2, 9, paragraph 1, 10, paragraph 1, and 14, paragraph 1, of the Covenant.

5.2 The authors refute the State party's argument that they had made an asylum claim in the United States and explain that they were placed in deportation proceedings and were given a hearing on 30 April 2009 with respect to their deportation from the United States to Colombia.

5.3 The authors add to the facts as submitted and state that in June 2009, the State party's authorities released them from detention and in July 2009 served them with a PRRA with a stay. On 7 October 2009, their PRRA application was rejected and their application for leave and judicial review before the Federal Court remains pending. On 24 February 2010, the Federal Court heard the authors on the mootness of their application to re-instate the first PRRA. The decision on the issue of mootness and on whether the Federal Court has jurisdiction to hear the case remains pending. The authors explain that there has not been any hearing on the merits.

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<sup>12</sup> See communication No. 1302/2004, *Khan v. Canada*, decision on inadmissibility adopted on 25 July 2006, para. 5.6.

<sup>13</sup> See Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, document HCR/IP/4/Eng/REV.1, para. 65.

<sup>14</sup> See for example communications No. 1551/2007, *Tarlue v. Canada*, decision on inadmissibility adopted on 27 March 2009, para. 7.4; No. 1455/2006, *Kaur v. Canada*, decision on inadmissibility adopted on 30 October 2008, para. 7.3.



5.4 With regard to the State party's argument that the communication should be declared inadmissible for failure to exhaust domestic remedies, the authors maintain that the legal provisions of the State party are prima facie in violation of the Covenant, and therefore the case should be examined on the merits. They further argue that due to the exceptional circumstances of the case, the Committee should remain seized of the communication pending the outcome of the domestic proceedings, in particular due to the fact that their removal to Colombia would constitute a violation of the Covenant.

5.5 The authors submit that the laws, as applied to the authors, are in contravention with the Covenant and as such in violation of article 2, paragraph 2. They further submit that their prolonged detention for over four months due to alleged flight risk was in contravention to article 9, paragraph 1. They submit that in particular the administrative cancellation of their removal, it being not binding, prevented them from litigating the allegation of arbitrary detention. After their release, the authors' application for review of the detention became moot and therefore prevented any review by domestic courts. They further argue that the conditions of detention resulted in harm for the authors' older child. The child was separated from his father and his psychological condition deteriorated considerably. He became aggressive, incontinent and expressed suicidal ideas when he wanted to join his great-grandmother in heaven even though understanding that she was deceased. Furthermore, the child was not enrolled in school and only sporadic educational activities were provided by volunteers. The rest of the family also suffered from being separated from each other, which resulted in a violation of article 10, paragraph 1, in particular with regard to the elder child. Finally, the authors submit that the decision in their PRRA application was not rendered on an independent and impartial basis and based itself on litigation concerns by the Government. As such, it violated the authors' right to a fair hearing by a competent, independent and impartial court, in violation of article 14, paragraph 1.

5.6 The authors maintain that the State party's legislation applied to the authors, preventing them from making a refugee claim due to their arrival on the State party's territory from the United States, as well as barring them from making a PRRA application due to the previous removal under the Safe Third Country Agreement and their re-entry in less than six months, is in contravention to the State party's obligation to prevent violations of the Covenant, specifically the principle of non-refoulement.<sup>15</sup> The authors recall the Committee's jurisprudence, according to which automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life,<sup>16</sup> and maintain that the application of the State party's legislation results in automatic violation of the principle of non-refoulement and thereby constitutes a violation of articles 6, paragraph 1, and 7.

5.7 The authors submit that their complaint has not become moot, as there continues to be a live issue between the parties with regard to their PRRA. Referring to an e-mail exchange between the Department of Justice, the Citizenship and Immigration (CIC) manager and the PRRA Unit, in which the Justice Liaison officer of the CIC highlights their litigation concerns to the PRRA coordinator, the authors maintain that their PRRA decision was marked by government interference and not based on the merits of the risk application. They further submit that their PRRA was rushed and a decision was rendered in an unusual short period without allowing them to submit further evidence, including an assessment by Amnesty International on their situation. They further explain that their

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<sup>15</sup> See general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III, paras. 12, 13 and 17.

<sup>16</sup> See communication No. 1421/2005, *Larrañaga v. Philippines*, adoption of views on 24 July 2006, para. 7.2.

request for exemption under s.25 still has not been decided and therefore a live issue remains for consideration.

#### **Further submission by the State party**

6.1 On 22 June 2010, the State party provided an update of the domestic proceedings and reiterated that it requests the Committee to lift the interim measures. It further highlighted that it has not yet had the opportunity to reply to the authors' new allegations invoking articles 2, paragraph 2, 9, paragraph 1, 10, paragraph 1, and 14, paragraph 1.

6.2 The State party submits that the authors' application for judicial review before the Federal Court of their first PRRA application was rejected on 1 June 2010. The Court held that the application was moot, since the authors had already received a PRRA assessment. It further noted that it was reasonable to expect from the authors that they would make a refugee claim in the first safe country and not stay in the United States visiting the first author's mother for three months before travelling to Canada to make their refugee claim. The State party underlines that the Federal Court decision demonstrates that its system for refugee protection is effective to prevent removal to a country where a person may face a violation of article 6, paragraph 1, or article 7 of the Covenant. The State party submits that the authors' communication should be declared moot under article 1, of the Optional Protocol, as the remedy sought — a risk assessment prior to removal — had already been carried out.

6.3 With regard to the authors' second request for judicial review of their negative PRRA decision before the Federal Court, the State party advises that leave has been granted and a hearing has been scheduled on 13 July 2010. The State party submits that the ongoing litigation underscores the authors' failure to exhaust domestic remedies and the communication should therefore be declared inadmissible pursuant to article 5, paragraph 2 (b), of the Optional Protocol.

#### **Issues and proceedings before the Committee**

##### *Consideration of admissibility*

7.1 Before considering any claim contained in a communication, the Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

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

7.3 The Committee notes that the authors' application for Pre-Removal Risk Assessment had been rejected on 7 October 2009 and that their application for leave and judicial review before the Federal Court remained pending, with a hearing having been scheduled for 13 July 2010. It further notes that on 1 June 2010, the Federal Court has rejected the authors' application, as moot, as they had already received what they had been seeking on the judicial review – a PRRA assessment. It has also noted the State party's argument that the communication should be declared inadmissible pursuant to article 5, paragraph 2 (b), of the Optional Protocol.

7.4 The Committee notes the authors' argument that despite pending domestic procedures, the Committee should remain seized of the matter due their pending removal to Colombia and due to a prima facie violation of the Covenant of the legal provisions in the State party. The Committee observes that, at the time of consideration of the communication, domestic remedies remain pending before the Federal Court of the State party. It further observes that a favourable decision by the Federal Court could effectively

stop the authors' deportation to Colombia and therefore their communication before the Committee would become moot. In light of this, the Committee considers that the authors have failed to exhaust domestic remedies and declares the communication inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

8. The Human Rights Committee therefore decides:

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

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

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

## Annex VII

### Follow-up activities under the Optional Protocol

1. In July 1990, the Committee established a procedure for the monitoring of follow-up to its Views under article 5, paragraph 4, of the Optional Protocol, and created the mandate of the Special Rapporteur for follow-up on Views to this effect. Ms. Ruth Wedgewood has been the Special Rapporteur since July 2009 (ninety-sixth session).
2. In 1991, the Special Rapporteur began to request follow-up information from States parties. Such information had been systematically requested in respect of all Views with a finding of a violation of Covenant rights; 574 Views out of the 716 Views adopted since 1979 concluded that there had been a violation of the Covenant.
3. All attempts to categorize follow-up replies by States parties are inherently imprecise and subjective: it accordingly is not possible to provide a neat statistical breakdown of follow-up replies. Many follow-up replies received may be considered satisfactory, in that they display the willingness of the State party to implement the Committee's recommendations or to offer the complainant an appropriate remedy. Other replies cannot be considered satisfactory because they either do not address the Committee's Views at all or relate only to certain aspects of them. Some replies simply note that the victim has filed a claim for compensation outside statutory deadlines and that no compensation can therefore be paid. Still other replies indicate that there is no legal obligation on the State party to provide a remedy, but that a remedy will be afforded to the complainant on an *ex gratia* basis.
4. The remaining follow-up replies challenge the Committee's Views and findings on factual or legal grounds, constitute much-belated submissions on the merits of the complaint, promise an investigation of the matter considered by the Committee or indicate that the State party will not, for one reason or another, give effect to the Committee's recommendations.
5. In many cases, the Secretariat has also received information from complainants to the effect that the Committee's Views have not been implemented. Conversely, in rare instances, the petitioner has informed the Committee that the State party had in fact given effect to the Committee's recommendations, even though the State party had not itself provided that information.
6. The present annual report adopts the same format for the presentation of follow-up information as the last annual report. The table below displays a complete picture of follow-up replies from States parties received up to the ninety-ninth session (12 to 30 July 2010), in relation to Views in which the Committee found violations of the Covenant. Wherever possible, it indicates whether follow-up replies are or have been considered as satisfactory or unsatisfactory, in terms of their compliance with the Committee's Views, or whether the dialogue between the State party and the Special Rapporteur for follow-up on Views continues. The notes following a number of case entries convey an idea of the difficulties in categorizing follow-up replies.
7. Follow-up information provided by States parties and by petitioners or their representatives subsequent to the last annual report (A/64/40) is set out in chapter VI to volume I of the present annual report.

<i>State party and number of cases with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Algeria (10)	992/2001, <i>Bousroual</i> A/61/40				X	X
	1172/2003, <i>Madani</i> A/62/40				X	X
	1085/2002, <i>Taright</i> A/61/40				X	X
	1173/2003, <i>Benhadj</i> A/62/40				X	X
	1196/2003, <i>Boucherf</i> A/61/40				X A/64/40	X
	1297/2004, <i>Medjnoune</i> A/61/40				X A/63/40	X
	1327/2004, <i>Grioua</i> A/62/40				X	X
	1328/2004, <i>Kimouche</i> A/62/40				X	X
	1439/2005, <i>Aber</i> A/62/40				X	X
	1495/2006, <i>Madoui</i> A/64/40				X	X
Angola (2)	711/1996, <i>Dias</i> A/55/40	X A/61/40		X A/61/40		X
	1128/2002, <i>Marques</i> A/60/40	X A/61/40		X A/61/40		X
Argentina (1)	400/1990, <i>Mónaco de Gallichio</i> A/50/40	X A/51/40				X
Australia (21)	560/1993, <i>A.</i> A/52/40	X A/53/40, A/55/40, A/56/40		X		X

<i>State party and number of cases with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Australia ( <i>cont'd</i> )	900/1999, C. A/58/40	X A/58/40, CCPR/C/80/FU/1, A/60/40, A/62/40				X
	930/2000, Winata et al. A/56/40	X CCPR/C/80/FU/1, A/57/40, A/60/40 A/62/40 and A/63/40				X
	941/2000, Young A/58/40	X A/58/40, A/60/40, A/62/40 and A/63/40		X		X
	1014/2001, Baban et al. A/58/40	X A/60/40, A/62/40		X		X
	1020/2001, Cabal and Pasini A/58/40	X A/58/40, CCPR/C/80/FU/1		X*		X
<p>*Note: The State party's response is set out in CCPR/C/80/FU/1. The State party submits that it is unusual for two persons to share cells and that it has asked the Victoria police to take the necessary steps to ensure that a similar situation does not arise again. It does not accept that the authors are entitled to compensation. The Committee considered that this case should not be considered any further under the follow-up procedure.</p>						
	1036/2001, Faure A/61/40	X A/61/40				X
	1050/2002, Rafie and Safdel A/61/40	X A/62/40 and A/63/40				X
	1157/2003, Coleman A/61/40	X A/62/40				X A/62/40
	1069/2002, Bakhitiyari A/59/40	X A/60/40, A/62/40		X		X
	1184/2003, Brough A/61/40	X A/62/40				X A/62/40

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Australia ( <i>cont'd</i> )	1255, 1256, 1259, 1260, 1266, 1268, 1270, and 1288/2004, <i>Shams, Atvan, Shahrooei, Saadat, Ramezani, Boostani, Behrooz and Sefed, A/62/40</i>	X A/63/40				X
	1324/2004, <i>Shafiq A/62/40</i>	X A/62/40 and A/63/40				X A/62/40
	1347/2005, <i>Dudko A/62/40</i>	X A/63/40, A/64/40				X A/63/40
Austria (5)	415/1990, <i>Pauger A/57/40</i>	X A/47/40, A/52/40		X		X
	716/1996, <i>Pauger A/54/40</i>	X A/54/40, A/55/40, A/57/40 CCPR/C/80/FU/1		X*		X
*Note: Although the State party has made amendments to its legislation as a result of the Committee's findings, the legislation is not retroactive and the author himself has not been provided with a remedy.						
	965/2001, <i>Karakurt A/57/40</i>	X A/58/40, CCPR/C/80/FU/1, A/61/40				X
	1086/2002, <i>Weiss A/58/40</i>	X A/58/40, A/59/40, CCPR/C/80/FU/1, A/60/40, A/61/40				X
	1454/2006, <i>Lederbauer A/62/40</i>	X A/63/40				X
Belarus (17)	780/1997, <i>Laptsevich A/55/40</i>				X A/56/40, A/57/40	X
	814/1998, <i>Pastukhov A/58/40</i>				X A/59/40	X

<i>State party and number of cases with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Belarus ( <i>cont'd</i> )	886/1999, <i>Bondarenko</i> A/58/40	X A/59/40, A/62/40 and A/63/40				X
	887/1999, <i>Lyashkevich</i> A/58/40	X A/59/40, A/62/40 and A/63/40				X
	921/2000, <i>Dergachev</i> A/57/40				X	X
	927/2000, <i>Svetik</i> A/59/40	X A/60/40, A/61/40 and A/62/40				X A/62/40
	1009/2001, <i>Shchetko</i> A/61/40				X	X
	1022/2001, <i>Velichkin</i> A/61/40				X A/61/40	X
	1039/2001, <i>Boris et al.</i> A/62/40	X A/62/40				X
	1047/2002, <i>Sinitsin, Leonid</i> A/62/40				X	X
	1100/2002, <i>Bandazhewsky</i> A/61/40	X A/62/40				X
	1178/2003, <i>Smantser</i> A/64/40	X A/65/40		X A/65/40		X
	1207/2003, <i>Malakhovsky</i> A/60/40	X A/61/40		X		X
	1274/2004, <i>Korneenko</i> A/62/40	X A/62/40				X A/62/40
	1296/2004, <i>Belyatsky</i> A/62/40	A/63/40				X
	1311/2004, <i>Osiyuk</i> A/64/40					X
	1553/2007, <i>Korneenko;</i> <i>Milinkevich, A/64/40</i>	X A/65/40		X A/65/40		X



<i>State party and number of cases with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Belgium (1)	1472/2006, <i>Sayadi</i> , A/64/40				X	X
Bolivia (Plurinational State of) (1)	176/1984, <i>Peñarrieta</i> A/43/40	X A/52/40				X
Cameroon (5)	458/1991, <i>Mukong</i> A/49/40				X A/52/40	X
	1134/2002, <i>Gorji-Dinka</i> A/60/40	X A/65/40			X	X
	1186/2003, <i>Titiahongo</i> A/63/40				X	X
	1353/2005, <i>Afuson</i> A/62/40	X A/65/40			X	X
	1397/2005, <i>Engo</i> A/64/40					X
Canada (6)	27/1978, <i>Pinkney</i> Fourteenth session Selected Decisions, vol. 1				X	X
	167/1984, <i>Ominayak et al.</i> A/45/50	X A/59/40,* A/61/40, A/62/40				X A/62/40
	694/1996, <i>Waldman</i> A/55/40	X A/55/40, A/56/40, A/57/40, A/59/40, A/61/40		X		X
829/1998, <i>Judge</i> A/58/40	X A/59/40, A/60/40	X A/60/40, A/61/40			X* A/60/40	

\*Note: The Committee decided that it should monitor the outcome of the author's situation and take any appropriate action.

<i>State party and number of cases with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Canada ( <i>cont'd</i> )	1051/2002, <i>Ahani</i> A/59/40	X A/60/40, A/61/40		X		X* A/60/40
	*Note: The State party went some way to implementing the Views: the Committee has not specifically said implementation is satisfactory.					
	1792/2008 <i>Dauphin</i> A/64/40	X A/65/40		X A/65/40		X
Central African Republic (1)	1587/2007 <i>Mamour</i> A/64/40					X
Colombia (14)	45/1979, <i>Suárez de Guerrero</i> Fifteenth session Selected Decisions, vol. 1	X A/52/40*				X
	*Note: In this case, the Committee recommended that the State party should take the necessary measures to compensate the husband of Ms. Maria Fanny Suárez de Guerrero for the death of his wife and to ensure that the right to life is duly protected by amending the law. The State party replied that the Ministerial Committee set up pursuant to enabling legislation No. 288/1996 had recommended that compensation be paid to the author.					
	46/1979, <i>Fals Borda</i> Sixteenth session Selected Decisions, vol. 1	X A/52/40*		X		X
	*Note: In this case, the Committee recommended adequate remedies and for the State party to adjust its laws in order to give effect to the right set forth in article 9, paragraph 4, of the Covenant. The State party responded that, given the absence of a specific remedy recommended by the Committee, the Ministerial Committee set up pursuant to enabling legislation No. 288/1996 did not recommend that compensation should be paid to the victim.					
	64/1979, <i>Salgar de Montejo</i> Fifteenth session Selected Decisions, vol. 1	X A/52/40*		X		X
	*Note: In this case, the Committee recommended adequate remedies and for the State party to adjust its laws in order to give effect to the right set forth in article 14, paragraph 5, of the Covenant. Given the absence of a specific remedy recommended by the Committee, the Ministerial Committee set up pursuant to Act No. 288/1996 did not recommend that compensation be paid to the victim.					

<i>State party and number of cases with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Colombia ( <i>cont'd</i> )	161/1983, <i>Herrera Rubio</i> Thirty-first session Selected Decisions, vol. 2	X A/52/40*				X
	<i>*Note:</i> The Committee recommended effective measures to remedy the violations that Mr. Herrera Rubio has suffered and further to investigate said violations, to take action thereon as appropriate and to take steps to ensure that similar violations do not occur in the future. The State party provided compensation to the victim.					
	181/1984, <i>Sanjuán Arévalo brothers</i> A/45/40	X, A/64/40 A/52/40*		X		X
	<i>*Note:</i> The Committee takes this opportunity to affirm that it would welcome information on any relevant measures taken by the State party in respect of the Committee's Views and, in particular, invites the State party to inform the Committee of further developments in the investigation of the disappearance of the Sanjuán brothers. Given the absence of a specific remedy recommended by the Committee, the Ministerial Committee set up pursuant to Act No. 288/1996 did not recommend that compensation be paid to the victim.					
	195/1985, <i>Delgado Paez</i> A/45/40	X A/52/40*				X
	<i>*Note:</i> In accordance with the provisions of article 2 of the Covenant, the State party is under an obligation to take effective measures to remedy the violations suffered by the author, including the granting of appropriate compensation, and to ensure that similar violations do not occur in the future. The State party provided compensation.					
	514/1992, <i>Fei</i> A/50/40	X A/51/40*		X		X
	<i>*Note:</i> The Committee recommended that the State party provide the author with an effective remedy. In the Committee's opinion, this entails guaranteeing the author regular access to her daughters, and that the State party ensure that the terms of the judgements in the author's favour are complied with. Given the absence of a specific remedy recommended by the Committee, the Ministerial Committee set up pursuant to Act No. 288/1996 did not recommend that compensation be paid to the victim.					
	612/1995, <i>Arhuacos</i> A/52/40				X	X
	687/1996, <i>Rojas García</i> A/56/40	X A/58/40, A/59/40				X
	778/1997, <i>Coronel et al.</i> A/58/40	X A/59/40				X
	848/1999, <i>Rodríguez Orejuela,</i> A/57/40	X A/58/40, A/59/40		X		X

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Colombia ( <i>cont'd</i> )	859/1999, <i>Jiménez Vaca</i> A/57/40	X A/58/40, A/59/40, A/61/40		X		X
	1298/2004, <i>Becerra</i> A/61/40	X A/62/40				X A/62/40
	1361/2005, <i>Casadiago</i> A/62/40	X A/63/40				X
Croatia (2)	727/1996, <i>Paraga</i> A/56/40	X A/56/40, A/58/40				X
	1510/2006, <i>Vojnović</i> , A/64/40	X A/65/40			X	X
Czech Republic (20)*	<i>*Note:</i> For all of these property cases, see also follow-up to concluding observations for the State party's reply in A/59/40.					
	516/1992, <i>Simunek et al.</i> A/50/40	X A/51/40,* A/57/40, A/58/40, A/61/40, A/62/40				X
	<i>*Note:</i> One author confirmed that the Views were partially implemented. The others claimed that their property was not restored to them or that they were not compensated.					
	586/1994, <i>Adam</i> A/51/40	X A/51/40, A/53/40, A/54/40, A/57/40, A/61/40, A/62/40				X
	765/1997, <i>Fábryová</i> A/57/40	X A/57/40, A/58/40, A/61/40, A/62/40				X
	747/1997, <i>Des Fours Walderode</i> A/57/40	X A/57/40, A/58/40, A/61/40, A/62/40				X
	757/1997, <i>Pezoldova</i> A/58/40	X A/60/40, A/61/40 and A/62/40				X
	823/1998, <i>Czernin</i> A/60/40	X A/62/40				X

<i>State party and number of cases with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Czech Republic ( <i>cont'd</i> )	857/1999, <i>Blazek et al.</i> A/56/40	X A/62/40				X
	945/2000, <i>Marik</i> A/60/40	X A/62/40				X
	946/2000, <i>Patera</i> A/57/40	X A/62/40				X
	1054/2002, <i>Kriz</i> A/61/40	X A/62/40				X
	1445/2006, <i>Polacek</i> A/62/40				X	X
	1448/2006, <i>Kohoutek</i> A/63/40				X	X
	1463/2006, <i>Gratzinger</i> A/63/40				X	X
	1479/2006, <i>Persan</i> A/64/40				X	X
	1484/2006, <i>Lnenicka</i> A/63/40				X	X
	1485/2006, <i>Vlcek</i> A/63/40				X	X
	1488/2006, <i>Süsser</i> A/63/40				X	X
	1497/2006, <i>Preiss</i> A/63/40				X	X
	1508/2006, <i>Amundson</i> A/64/40				X	X
	1533/2006, <i>Ondracka</i> A/63/40				X	X

<i>State party and number of cases with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Democratic Republic of the Congo (14)*	<i>*Note: See A/59/40 for details of follow-up consultations.</i>					
	16/1977, <i>Mbenge</i> Eighteenth session Selected Decisions, vol. 2				X	X
	90/1981, <i>Luyeye</i> Nineteenth session Selected Decisions, vol. 2				X A/61/40	X
	124/1982, <i>Muteba</i> Twenty-second session Selected Decisions, vol. 2				X A/61/40	X
	138/1983, <i>Mpandanjila et al.</i> Twenty-seventh session Selected Decisions, vol. 2				X A/61/40	X
	157/1983, <i>Mpaka Nsusu</i> Twenty-seventh session Selected Decisions, vol. 2				X A/61/40	X
	194/1985, <i>Miango</i> Thirty-first session Selected Decisions, vol. 2				X A/61/40	X
	241/1987, <i>Birindwa</i> A/45/40				X A/61/40	X
	242/1987, <i>Tshisekedi</i> A/45/40				X A/61/40	X
	366/1989, <i>Kanana</i> A/49/40				X A/61/40	X
	542/1993, <i>Tshishimbi</i> A/51/40				X A/61/40	X
	641/1995, <i>Gedumbe</i> A/57/40				X A/61/40	X

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Democratic Republic of the Congo ( <i>cont'd</i> )	933/2000, <i>Adrien Mundy Bisyo et al.</i> (68 judges) A/58/40				X A/61/40	X
	962/2001, <i>Marcel Mulezi</i> A/59/40				X A/61/40	X
	1177/2003, <i>Wenga and Shandwe</i> A/61/40				X	X
Dominican Republic (2)	193/1985, <i>Giry</i> A/45/40	X A/52/40, A/59/40		X		X
	449/1991, <i>Mojica</i> A/49/40	X A/52/40, A/59/40		X		X
Ecuador (2)	277/1988, <i>Terán Jijón</i> A/47/40	X A/59/40*		X		X
	319/1988, <i>Cañón García</i> A/47/40			X		X
Equatorial Guinea (3)	414/1990, <i>Primo Essono</i> A/49/40	A/62/40*			X	X
	468/1991, <i>Oló Bahamonde</i> A/49/40	A/62/40*			X	X
	1152 and 1190/2003, <i>Ndong et al. and Mic Abogo</i> A/61/40	A/62/40*			X	X
	* <i>Note:</i> According to this report, information was provided on 11 June 1992, but was not published. It appears from the follow-up file that in this response, the State party merely forwarded copies of two reports of the national police on the investigation of the crimes in which Mr. Terán Jijón was involved, including the statements he made on 12 March 1986 concerning his participation in such crimes.					
	* The State party has not replied but it has met several times with the Rapporteur.					
Finland (1)	779/1997, <i>Äärelä et al.</i> A/57/40	X A/57/40, A/59/40				X
Georgia (3)	626/1995, <i>Gelbekhiani</i> A/53/40	X A/54/40		X		X

<i>State party and number of cases with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Georgia ( <i>cont'd</i> )	627/1995, <i>Dokvadze</i> A/53/40	X A/54/40		X		X
	975/2001, <i>Ratiani</i> A/60/40	X A/61/40				X
Germany (1)	1482/2006, <i>Gerlach</i> A/63/40	X A/64/40				X
Greece (2)	1070/2002, <i>Kouldis</i> A/61/40	X A/61/40				X
	1486/2006, <i>Kalamiotis</i> A/63/40	X A/64/40				X
Guyana (9)	676/1996, <i>Yasseen and Thomas</i> A/53/40	A/60/40* A/62/40			X A/60/40	X
	728/1996, <i>Sahadeo</i> A/57/40	A/60/40* A/62/40			X A/60/40	X
	838/1998, <i>Hendriks</i> A/58/40	A/60/40* A/62/40			X A/60/40	X
	811/1998, <i>Mulai</i> , A/59/40	A/60/40* A/62/40			X A/60/40	X
	812/1998, <i>Persaud</i> A/61/40	A/60/40* A/62/40			X	X
	862/1999, <i>Hussain and Hussain</i> A/61/40	A/60/40* A/62/40			X	X
	867/1999, <i>Smartt</i> A/59/40	A/60/40* A/62/40			X A/60/40	X
	912/2000, <i>Ganga</i> A/60/40	A/60/40* A/62/40			X A/60/40	X
	913/2000, <i>Chan</i> A/61/40	A/60/40* A/62/40			X	X

\* The State party has not replied but it has met several times with the Rapporteur.



<i>State party and number of cases with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Hungary (3)	410/1990, <i>Párkányi</i> A/47/40	X*		X		X
	*Note: Follow-up information referred to in the State party's reply, dated February 1993 (unpublished), indicates that compensation cannot be paid to the author due to lack of specific enabling legislation.					
	521/1992, <i>Kulomin</i> A/51/40	X A/52/40				X
	852/1999, <i>Borisenko</i> A/58/40	X A/58/40, A/59/40		X		X
Iceland (1)	1306/2004, <i>Haraldsson and Sveinsson</i> , A/62/40	X A/63/40, A/64/40				X
Italy (1)	699/1996, <i>Maleki</i> A/54/40	X A/55/40		X		X
Jamaica (98)	92 cases*					X
	*Note: See A/59/40. Twenty-five detailed replies were received, of which 19 indicated that the State party would not implement the Committee's recommendations; in 2, it promises to investigate; in 1, it announces the author's release (592/1994 — Clive Johnson — see A/54/40). There were 36 general replies indicating that death sentences have been commuted. No follow-up replies in 31 cases.					
	695/1996, <i>Simpson</i> A/57/40	X A/57/40, A/58/40, A/59/40, A/63/40, A/64/40				X
	792/1998, <i>Higginson</i> A/57/40				X	X
	793/1998, <i>Pryce</i> A/59/40				X	X
	796/1998, <i>Reece</i> A/58/40				X	X
	797/1998, <i>Lobban</i> A/59/40				X	X

<i>State party and number of cases with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>	
Jamaica ( <i>cont'd</i> )	798/1998, <i>Howell</i> A/59/40	X A/61/40				X	
Kyrgyzstan (5)	1461, 1462, 1476 and 1477/2006, <i>Maksudov, Rahimov, Tashbaev,</i> <i>Pirmatov</i> A/63/40	X A/65/40				X	
	1275/2004, <i>Umetaliev</i> A/64/40	X A/65/40			X	X	
Libyan Arab Jamahiriya (5)	440/1990, <i>El-Megreisi</i> A/49/40				X	X	
	1107/2002, <i>El Ghar</i> A/60/40	X A/61/40, A/62/40				X A/62/40	
	1143/2002, <i>Dernawi</i> A/62/40				X	X	
	1295/2004, <i>El Awani</i> A/62/40				X	X	
	1422/2005, <i>El Hassy</i> A/63/40				X	X	
Madagascar (4)	49/1979, <i>Marais</i> Eighteenth session Selected Decisions, vol. 2	A/52/40			X*	X	
	<i>*Note:</i> According to the annual report (A/52/40), the author indicated that he had been released. No further information provided.						
	115/1982, <i>Wight</i> Twenty-fourth session Selected Decisions, vol. 2	A/52/40			X*	X	
<i>*Note:</i> According to the annual report (A/52/40), the author indicated that he had been released. No further information provided.							
	132/1982, <i>Jaona</i> Twenty-fourth session Selected Decisions, vol. 2	A/52/40			X	X	

<i>State party and number of cases with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Madagascar ( <i>cont'd</i> )	155/1983, <i>Hammel</i> A/42/40 Selected Decisions, vol. 2	A/52/40			X	X
Nepal (1)	1469/2006, <i>Sharma</i> A/64/40	X A/64/40				X
Netherlands (3)	786/1997, <i>Vos</i> A/54/40	X A/55/40		X		X
	976/2001, <i>Derksen</i> A/59/40	X A/60/40				X
	1238/2003, <i>Jongenburger Veerman</i> A/61/40				X	X
New Zealand (2)	1368/2005, <i>Britton</i> A/62/40	X A/63/40				X
	1512/2006, <i>Dean</i> , A/64/40	X A/65/40			X	X
Nicaragua (1)	328/1988, <i>Zelaya Blanco</i> A/49/40	X (incomplete) A/56/40, A/57/40, A/59/40				X
Norway (2)	1155/2003, <i>Leirvag</i> A/60/40	X A/61/40	X* (A/61/40)			X
	<i>*Note: Additional follow-up information expected.</i>					
	1542/2007, <i>Aboushanif</i> A/63/40	X A/65/40				X
Panama (2)	289/1988, <i>Wolf</i> A/47/40	X A/53/40				X
	473/1991, <i>Barroso</i> A/50/40	X A/53/40				X
Paraguay (1)	1407/2005, <i>Asensi</i> , A/64/40	X A/65/40			X	X

<i>State party and number of cases with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Peru (14)	202/1986, <i>Ato del Avellanal</i> A/44/40	X A/52/40, A/59/40, A/62/40 and A/63/40				X
	203/1986, <i>Muñoz Hermosa</i> A/44/40	X A/52/40, A/59/40				X
	263/1987, <i>González del Río</i> A/48/40	X A/52/40, A/59/40				X
	309/1988, <i>Orihuela Valenzuela</i> A/48/40	X A/52/40, A/59/40				X
	540/1993, <i>Celis Laureano</i> A/51/40	X A/59/40				X
	577/1994, <i>Polay Campos</i> A/53/40	X A/53/40, A/59/40				X
	678/1996, <i>Gutiérrez Vivanco</i> A/57/40	X A/58/40, A/59/40, A/64/40				X
	906/1999, <i>Vargas-Machuca</i> A/57/40				X A/58/40, A/59/40	X
	981/2001, <i>Gómez Casafranca</i> A/58/40	X A/59/40				X
	1125/2002, <i>Quispe</i> A/61/40	X A/61/40				X
	1126/2002, <i>Carranza</i> A/61/40	X A/61/40, A/62/40				X
	1153/2003, <i>K.N.L.H.</i> A/61/40	X A/61/40, A/62/40 and A/63/40				X
	1058/2002, <i>Vargas</i> A/61/40	X A/61/40 and A/62/40				X

<i>State party and number of cases with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Peru ( <i>cont'd</i> )	1457/2006, <i>Poma</i> A/64/40	X A/65/40			X	X
Philippines (8)	788/1997, <i>Cagas</i> A/57/40	X A/59/40, A/60/40, A/61/40				X
	868/1999, <i>Wilson</i> A/59/40	X A/60/40, A/61/40, A/62/40		X A/62/40		X A/62/40
	869/1999, <i>Piandiong et al.</i> A/56/40	X N/A				X
	1089/2002, <i>Rouse</i> A/60/40				X	X
	1320/2004, <i>Pimentel et al.</i> A/62/40	X A/63/40, A/64/40				X
	1421/2005, <i>Larrañaga</i> A/61/40				X	X
	1466/2006, <i>Lumanog</i> A/63/40	X A/65/40				X
	1560/2007, <i>Marcellana and Gumanoy</i> , A/64/40				X	X
Portugal (1)	1123/2002, <i>Correia de Matos</i> A/61/40	X A/62/40			X	X A/62/40
Republic of Korea (8)	518/1992, <i>Sohn</i> A/50/40	X A/60/40, A/62/40				X
	574/1994, <i>Kim</i> A/54/40	X A/60/40, A/62/40, A/64/40				X
	628/1995, <i>Park</i> A/54/40	X A/54/40, A/64/40				X
	878/1999, <i>Kang</i> A/58/40	X A/59/40, A/64/40				X
	926/2000, <i>Shin</i> A/59/40	X A/60/40, A/62/40, A/64/40				X

<i>State party and number of cases with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Republic of Korea (cont'd)	1119/2002, <i>Lee</i> A/60/40	X A/61/40, A/64/40				X
	1321-1322/2004, <i>Yoon, Yeo-Bzum and Choi, Myung-Jin</i> A/62/40	X A/62/40 and A/63/40 A/64/40				X
Romania (1)	1158/2003, <i>Blaga</i> A/60/40				X	X
Russian Federation (10)	770/1997, <i>Gridin</i> A/55/40	A/57/40, A/60/40		X		X
	763/1997, <i>Lantsova</i> A/57/40	A/58/40, A/60/40		X		X
	888/1999, <i>Telitsin</i> A/59/40	X A/60/40				X
	712/1996, <i>Smirnova</i> A/59/40	X A/60/40				X
	815/1997, <i>Dugin</i> A/59/40	X A/60/40				X
	889/1999, <i>Zheikov</i> A/61/40	X A/62/40				X A/62/40
	1218/2003, <i>Platanov</i> A/61/40	X A/61/40				X
	1278/2004, <i>Reshnetnikov</i> A/64/40				X	X
	1310/2004, <i>Babkin</i> A/63/40	X, A/64/40				X
	1447/2006, <i>Amirov</i> A/64/40	X A/65/40			X	X
Saint Vincent and the Grenadines (1)	806/1998, <i>Thompson</i> A/56/40				X A/61/40	X

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Sierra Leone (3)	839/1998, <i>Mansaraj et al.</i> A/56/40	X A/57/40, A/59/40				X
	840/1998, <i>Gborie et al.</i> A/56/40	X A/57/40, A/59/40				X
	841/1998, <i>Sesay et al.</i> A/56/40	X A/57/40, A/59/40				X
Spain (21)	493/1992, <i>Griffin</i> A/50/40	X A/59/40,* A/58/40				X
	<i>*Note:</i> According to this report, information was provided in 1995, but was not published. It appears from the follow-up file that, in this response, dated 30 June 1995, the State party challenged the Committee's Views.					
	526/1993, <i>Hill</i> A/52/40	X A/53/40, A/56/40, A/58/40, A/59/40, A/60/40, A/61/40, A/64/40				X
	701/1996, <i>Gómez Vásquez</i> A/55/40	X A/56/40, A/57/40, A/58/40, A/60/40, A/61/40				X
	864/1999, <i>Ruiz Agudo</i> A/58/40				X A/61/40	X
	986/2001, <i>Semey</i> A/58/40	X A/59/40, A/60/40, A/61/40				X
	1006/2001, <i>Muñoz</i> A/59/40				X A/61/40	X
	1007/2001, <i>Sineiro Fernando</i> A/58/40	X A/59/40, A/60/40, A/61/40				X
1073/2002, <i>Terón Jesús</i> A/60/40				X A/61/40	X	

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Spain ( <i>cont'd</i> )	1095/2002, <i>Gomariz</i> A/60/40				X A/61/40	X
	1101/2002, <i>Alba Cabriada</i> A/60/40				X A/61/40	X
	1104/2002, <i>Martínez Fernández</i> A/60/40				X A/61/40	X
	1122/2002, <i>Lagunas Castedo</i> , A/64/40				X	X
	1211/2003, <i>Oliveró</i> A/61/40				X	X
	1325/2004, <i>Conde</i> A/62/40				X	X
	1332/2004, <i>Garcia and others</i> A/62/40				X	X
	1351 and 1352/2005, <i>Hens and Corujo</i> A/63/40				X	X
	1364/2005, <i>Carpintero</i> A/64/40					X
	1381/2005, <i>Hachuel</i> A/62/40				X	X
	1473/2006, <i>Morales Tornel</i> , A/64/40				X (Not due)	X
	1493/2006, <i>Lecraft</i> A/64/40	X A/65/40				X
	Sri Lanka (13)	916/2000, <i>Jayawardena</i> A/57/40	X A/58/40, A/59/40, A/60/40, A/61/40			
950/2000, <i>Sarma</i> A/58/40		X A/59/40, A/60/40, A/63/40				X



<i>State party and number of cases with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>	
Sri Lanka ( <i>cont'd</i> )	909/2000, <i>Kankanamge A/59/40</i>	X A/60/40				X	
	1033/2001, <i>Nallaratnam A/59/40</i>	X A/60/40, A/64/40				X	
	1189/2003, <i>Fernando A/60/40</i>	X A/61/40		X (A/61/40)		X	
	1249/2004, <i>Immaculate Joseph et al. A/61/40</i>	X A/61/40				X	
	1250/2004, <i>Rajapakse A/61/40</i>				X	X	
	1373/2005, <i>Dissanakye A/63/40</i>	Not due				X	
	1376/2005, <i>Bandaranayake A/63/40</i>	Not due				X	
	1406/2005, <i>Weerawanza, A/64/40</i>				X	X	
	1426/2005, <i>Dingiri Banda A/63/40</i>				X	X	
	1432/2005, <i>Gunaratna, A/64/40</i>				X	X	
	1436/2005, <i>Sathasivam A/63/40</i>	Not due			X A/65/40	X	
	Suriname (8)	146/1983, <i>Baboeram</i> Twenty-fourth session Selected Decisions, vol. 2	X A/51/40, A/52/40, A/53/40, A/55/40, A/61/40				X

<i>State party and number of cases with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Suriname ( <i>cont'd</i> )	148 to 154/1983, <i>Kamperveen, Riedewald, Leckie, Demrawsingh, Sohansingh, Rahman, Hoost</i> Twenty-fourth session Selected Decisions, vol. 2	X A/51/40, A/52/40, A/53/40, A/55/40, A/61/40				X
Sweden (1)	1416/2005, <i>Al Zery</i> A/62/40	X A/62/40				X
Tajikistan (20)	964/2001, <i>Saidov</i> A/59/40	X A/60/40, A/62/40*				X
	973/2001, <i>Khalilov</i> A/60/40	X A/60/40, A/62/40*				X
	985/2001, <i>Aliboeva</i> A/61/40	A/62/40*			X A/61/40	X
	1096/2002, <i>Kurbanov</i> A/59/40	X A/59/40, A/60/40				X
	1108 and 1121/2002, <i>Karimov and Nursatov</i> A/62/40	X A/63/40				X
	1117/2002, <i>Khomidov</i> A/59/40	X A/60/40				X
	1195/2003, <i>Dunaev</i> , A/64/40				X	
	1042/2002, <i>Boymurudov</i> A/61/40	X A/62/40, A/63/40				X
	1044/2002, <i>Nazriev</i> A/61/40	X A/62/40, A/63/40				X
	1096/2002, <i>Abdulali Ismatovich Kurbanov</i>	A/62/40*				X
	* The State party has not replied but it has met several times with the Rapporteur.					
	1208/2003, <i>Kurbanov</i> A/61/40	X A/62/40		X A/62/40		X

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Tajikistan ( <i>cont'd</i> )	1348/2005, <i>Ashurov</i> A/62/40				X	X
	1200/2003, <i>Sattorev</i> A/64/40	X A/65/40				X
	1209/2003, 1231/2003 and 1241/2004, <i>Rakhmatov, Safarovs, and Mukhammadiev</i> A/63/40	Not due				X
	1263/2004 and 1264/2004, <i>Khuseynov, Butaev</i> A/64/40	X A/65/40				X
	1276/2004, <i>Idiev</i> A/64/40	X A/65/40			X	X
Togo (4)	422 to 424/1990, <i>Aduayom et al.</i> A/51/40	X A/56/40, A/57/40		X A/59/40		X
	505/1992, <i>Ackla</i> A/51/40	X A/56/40, A/57/40		X A/59/40		X
Trinidad and Tobago (23)	232/1987, <i>Pinto</i> A/45/40 and 512/1992, <i>Pinto</i> A/51/40	X A/51/40, A/52/40, A/53/40		X		X
	362/1989, <i>Soogrim</i> A/48/40	X A/51/40, A/52/40 A/53/40, A/58/40			X	X
	434/1990, <i>Seerattan</i> A/51/40	X A/51/40, A/52/40, A/53/40		X		X
	523/1992, <i>Neptune</i> A/51/40	X A/51/40, A/52/40 A/53/40, A/58/40		X		X

<i>State party and number of cases with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Trinidad and Tobago (cont'd)	533/1993, <i>Elahie</i> A/52/40				X	X
	554/1993, <i>La Vende</i> A/53/40				X	X
	555/1993, <i>Bickaroo</i> A/53/40				X	X
	569/1996, <i>Mathews</i> A/43/40				X	X
	580/1994, <i>Ashby</i> A/57/40				X	X
	594/1992, <i>Phillip</i> A/54/40				X	X
	672/1995, <i>Smart</i> A/53/40				X	X
	677/1996, <i>Teesdale</i> A/57/40				X	X
	683/1996, <i>Wanza</i> A/57/40				X	X
	684/1996, <i>Sahadath</i> A/57/40				X	X
	721/1996, <i>Boodoo</i> A/57/40				X	X
	752/1997, <i>Henry</i> A/54/40				X	X
	818/1998, <i>Sextus</i> A/56/40				X	X
	845/1998, <i>Kennedy</i> A/57/40				X A/58/40	X
	899/1999, <i>Francis et al.</i> A/57/40				X A/58/40	X

<i>State party and number of cases with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Trinidad & Tobago (cont'd)	908/2000, <i>Evans</i> A/58/40				X	X
	928/2000, <i>Sooklal</i> A/57/40				X	X
	938/2000, <i>Girjadat Siewpers et al.</i> A/59/40				X A/51/40, A/53/40	X
Turkmenistan (2)	1450/2006, <i>Komarovsky</i> A/63/40				X	X
	1460/2006, <i>Yklymova</i> A/64/40					X
Ukraine (1)	781/1997, <i>Aliev</i> A/58/40	X A/60/40		X A/60/40		X
Uruguay (43)	A. [5/1977, <i>Massera</i> Seventh session 43/1979, <i>Caldas</i> Nineteenth session 63/1979, <i>Antonaccio</i> Fourteenth session 73/1980, <i>Izquierdo</i> Fifteenth session 80/1980, <i>Vasiliskis</i> Eighteenth session 83/1981, <i>Machado</i> Twentieth session 84/1981, <i>Dermis</i> Seventeenth session	X 43 follow-up replies received in A/59/40*		X		X

<i>State party and number of cases with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Uruguay ( <i>cont'd</i> )	85/1981, <i>Romero</i> Twenty-first session 88/1981, <i>Bequio</i> Eighteenth session 92/1981, <i>Nieto</i> Nineteenth session 103/1981, <i>Scarone</i> Twentieth session 105/1981, <i>Cabreira</i> Nineteenth session 109/1981, <i>Voituret</i> Twenty-first session 123/1982, <i>Luberas</i> Twenty-first session]					
	<b>B.</b> [103/1981, <i>Scarone</i> 73/1980, <i>Izquierdo</i> 92/1981, <i>Nieto</i> 85/1981, <i>Romero</i> ]					
	<b>C.</b> [63/1979, <i>Antonaccio</i> 80/1980, <i>Vasiliskis</i> 123/1982, <i>Luberas</i> ]					
	<b>D.</b> [4/1977, <i>Ramirez</i> Fourth session 6/1977, <i>Sequeiro</i> Sixth session 25/1978, <i>Massiotti</i> Sixteenth session 28/1978, <i>Weisz</i> Eleventh session 32/1978, <i>Touron</i> Twelfth session 33/1978, <i>Carballal</i> Twelfth session 37/1978, <i>De Boston</i>					

<i>State party and number of cases with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Uruguay ( <i>cont'd</i> )	Twelfth session 44/1979, <i>Pietrarroia</i> Twelfth session 52/1979, <i>Lopez Burgos</i> Thirteenth session 56/1979, <i>Celiberti</i> Thirteenth session 66/1980, <i>Schweizer</i> Seventeenth session 70/1980, <i>Simones</i> Fifteenth session 74/1980, <i>Estrella</i> Eighteenth session 110/1981, <i>Viana</i> Twenty-first session 139/1983, <i>Conteris</i> Twenty-fifth session 147/1983, <i>Gilboa</i> Twenty-sixth session 162/1983, <i>Acosta</i> Thirty-fourth session] <b>E.</b> [30/1978, <i>Bleier</i> Fifteenth session 84/1981, <i>Barbato</i> Seventeenth session 107/1981, <i>Quinteros</i> Nineteenth session]					

\**Note:* Follow-up information was provided on 17 October 1991 (unpublished). The list of cases under **A:** the State party submitted that on 1 March 1985, the competence of the civil courts was re-established. The amnesty law of 8 March 1985 benefited all the individuals who had been involved as authors, accomplices or accessory participants in political crimes or crimes committed for political purposes, from 1 January 1962 to 1 March 1985. The law allowed those individuals held responsible of intentional murder to have either their conviction reviewed or their sentence reduced. Pursuant to article 10 of the Act on National Pacification all the individuals imprisoned under “measures of security” were released. In cases subjected to review, appellate courts either acquitted or condemned the individuals. By virtue of Act 15.783 of 20 November all the individuals who had previously held a public office were

State party and number of cases with violation	Communication number, author and relevant Committee report	Follow-up response received from State party	Satisfactory response	Unsatisfactory response	No response	Follow-up dialogue ongoing
Uruguay ( <i>cont'd</i> )	entitled to return to their jobs. On cases under <b>B</b> : the State party indicates that these individuals were pardoned by virtue of Act 15.737 and released on 10 March 1985. On cases under <b>C</b> : these individuals were released on 14 March 1985; their cases were included under Act 15.737. On cases under <b>D</b> : from 1 March 1985, the possibility to file an action for damages was open to all of the victims of human rights violations which occurred during the de facto government. Since 1985, 36 suits for damages have been filed, 22 of them for arbitrary detention and 12 for the return of property. The Government settled Mr. Lopez's case on 21 November 1990, by paying him US\$ 200,000. The suit filed by Ms. Lilian Celiberti is still pending. Besides the aforementioned cases, no other victim has filed a lawsuit against the State claiming compensation. On cases under <b>E</b> : on 22 December 1986, the Congress passed Act 15.848, known as "termination of public prosecutions". Under the Act, the State can no longer prosecute crimes committed before 1 March 1985 by the military or the police for political ends or on orders received from their superiors. All pending proceedings were discontinued. On 16 April 1989, the Act was confirmed by referendum. The Act required investigating judges to send reports submitted to the judiciary about victims of disappearances to the Government, for the latter to initiate inquiries.					
	159/1983, <i>Cariboni</i> A/43/40 Selected Decisions, vol. 2				X	X
	322/1988, <i>Rodríguez</i> A/51/40, A/49/40				X	X
Uzbekistan (22)	907/2000, <i>Sirageva</i> A/61/40	X				X
	911/2000, <i>Nazarov</i> A/59/40	X		X		X
	915/2000, <i>Ruzmetov</i> A/61/40				X	X
	917/2000, <i>Arutyunyan</i> A/59/40	X		X		X
	931/2000, <i>Hudoyberganova</i> A/60/40	X		X		X
	971/2001, <i>Arutyuniantz</i> A/60/40	X				X
	959/2000, <i>Bazarov</i> A/61/40	X				X
		A/62/40				A/62/40



<i>State party and number of cases with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Uzbekistan ( <i>cont'd</i> )	1017/2001, Maxim Strakhov and 1066/2002, V. Fayzulaev A/62/40				X	X
	1041/2002, Refat Tulayganov A/62/40				X	X
	1043/2002, Chikiunov A/62/40				X	X
	1382/2005, Salikh, A/64/40	X A/65/40			X	X
	1057/2002, Korvetov A/62/40	X A/62/40				X A/62/40
	1071/2002, Agabekov A/62/40				X	X
	1150/2002, Azamat Uteev A/63/40	X A/64/40		X		X
	1140/2002, Iskandar Khudayberganov A/62/40				X	X
	1163/2003, Isaev and Karimov A/64/40	X A/65/40			X	X
	1280/2004, Tolipkhudzaev A/64/40					X
	1334/2004, Mavlonov and Sa'di A/64/40				X	X
	1378/2005, Kasimov A/64/40					X
	1418/2005, Yuri Iskiyaev, A/64/40	X A/65/40			X	X
	1585/2007, Batyrov					X

<i>State party and number of cases with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Venezuela (Bolivarian Republic of) (1)	156/1983, <i>Solórzano</i> A/41/40 Selected Decisions, vol. 2	X A/59/40*		X		X
<p><i>*Note:</i> According to this report, information was provided in 1995 (unpublished). In its response, the State party stated that it had failed to contact the author's sister and that the author had not initiated proceedings for compensation from the State party. It made no reference to any investigation carried out by the State, as requested by the Committee.</p>						
Zambia (4)	390/1990, <i>Lubuto</i> A/51/40	X A/62/40			X	X
	821/1998, <i>Chongwe</i> A/56/40	X A/56/40, A/57/40, A/59/40, A/61/40, A/64/40				X
	856/1999, <i>Chambala</i> A/58/40	X A/62/40			X	X
	1132/2002, <i>Chisanga</i> A/61/40	X A/61/40, A/63/40, A/64/40, A/65/40				X