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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3809/2020*,**,***

Communication submitted by:	Aykhan Elbai ogly Aliev (represented by his mother, Gulnaz Agadai kyzy Alieva)
Alleged victims:	The author
State party:	Ukraine
Date of communication:	25 May 2020 (initial submission)
Document references:	Special Rapporteur's rule 92 decision, transmitted to the State party on 26 August 2020 (not issued in document form)
Date of adoption of Views:	26 July 2022
Subject matter:	Impossibility to have life sentence reviewed; fair trial; discrimination
Procedural issues:	Substantiation of claims
Substantive issue:	Torture, inhuman and degrading treatment; fair trial, discrimination
Articles of the Covenant:	7, 14 (1), 26
Articles of the Optional Protocol:	2

1. The author of the communication is Aykhan Elbai ogly Aliev, a national of Azerbaijan born in 1979. The author is serving a life imprisonment sentence in Krivoy Rog, Ukraine. He claims that Ukraine has violated his rights under articles 7, 14 (1) and 26 of the Covenant. The Optional Protocol entered into force for the State party on 25 October 1991. The author is represented by his mother, Gulnaz Agadai kyzy Alieva.

* Adopted by the Committee at its 135th session (27 June-27 July 2022).

** The following members of the Committee participated in the examination of the communication: Tania Abdo Rocholl, Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Shuichi Furuya, Carlos Gómez Martínez, Marcia V. J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Kobauyah Kpatcha Tchamdja, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi.

*** Individual opinions by Committee members Shuichi Furuya (partly dissenting) and José Manuel Santos Pais (dissenting) are annexed to the present Views.

Factual background[1]

2.1 On 3 February 2005, the author was found guilty of having committed crimes under articles 115 (1), 115 (2) (13) and 358 (3) of the Criminal Code (murder, murder committed by a person who has previously committed another murder, as well as the use of a knowingly forged document)[2] and was sentenced to life imprisonment[3] by the Appeal Court of Dnepropetrovsk Region in Ukraine, acting as a first instance court. The author's sentence of life imprisonment was upheld by the Supreme Court of Ukraine on 31 May 2005 and became executory. On 12 March 2019, the European Court of Human Rights (hereinafter the ECtHR) issued a judgment with regard to application no. 41216/13, *Petukhov v. Ukraine (No. 2),*[4] concerning the sentencing of the applicant to life imprisonment. In that judgment, the ECtHR found a violation of the applicant's rights under article 3 of the European Convention on Human Rights (hereinafter the European Convention), because it was not possible for life-sentenced prisoners to request a reduction of their sentences in Ukraine. Given the nature of the violation found under article 3 of the European Convention, the ECtHR also required the State party to put in place a reform of the system of review of whole-life sentences. The mechanism of such a review should guarantee the examination in every particular case of whether continued detention is justified on legitimate penological grounds and should enable whole-life prisoners to foresee, with some degree of precision, what they must do to be considered for release and under what conditions, in accordance with the standards developed in the ECtHR's case-law.

2.2 On an unspecified date, the author became aware of the ECtHR's judgment with regard to the application submitted by Mr. Vladimir Petukhov. On 30 July 2019,[5] pursuant to article 539 of the Criminal Procedural Code, the author filed a motion to the Romny City-District Court in Sumy region with a request to commute the remaining term of his life sentence to a fixed-term sentence, in line with article 3 of the Convention and article 28 of the Constitution of Ukraine.[6] In support of his motion, he referred to the ECtHR's judgment with regard to the application *Petukhov v. Ukraine (No. 2).*

2.3 In his motion to the Romny City-District Court, the author specifically referred to article 87 (1) of the Criminal Code, providing for the right of the President of Ukraine to pardon an individual. Pursuant to article 87 (2) of the Criminal Code, a sentence of life imprisonment imposed by a court may be commuted by an act of Presidential pardon to a term of imprisonment of not less than 25 years. According to the Regulations on the Procedure for Pardon, approved by the Decree of the President of Ukraine of 21 April 2015 No. 223, an application for a Presidential pardon of a person sentenced to life imprisonment may be submitted after he has served at least 20 years of his sentence. At the time of

[1] The facts on which the present communication is based have been reconstructed on the basis of the author's own incomplete account, the author's motion to the Romny City-District Court, dated 30 July 2019; the decision of the Romny City-District Court, dated 3 September 2019, the author's appeals to the Sumy Court of Appeal, dated 13 September 2019, 20 February 2020, 21 February 2020 and 28 April 2020, the decision of the Sumy Court of Appeal, dated 4 may 2020, and other supporting documents available on file.

[2] According to the information available on file, in September 2002 and April 2004, the author murdered two young women. In addition, in July 2003, he illegally entered the territory of Ukraine on the basis of a national passport issued by the authorities of Azerbaijan in his name but with the pages bearing the notes about his deportation from Ukraine on 15 April 2003 replaced by the clean forged pages.

[3] Pursuant to article 64 (1) of the Criminal Code, "[the] punishment of life imprisonment is imposed for particularly serious crimes and shall apply only in cases specifically provided for by [the Criminal Code, where a court does not find it possible to impose a fixed-term imprisonment".

[4] ECtHR, Judgment of 12 March 2019 in *Petukhov v. Ukraine (No. 2),* (application No. 41216/13).

[5] The author's motion was received by the Romny City-District Court on 2 August 2019.

[6] Article 28 of the Constitution of Ukraine reads as follows:

"Everyone has the right to respect of his or her dignity.

No one shall be subjected to torture, cruel, inhuman or degrading treatment or punishment that violates his or her dignity.

No person shall be subjected to medical, scientific or other experiments without his or her free consent."

considering an application for a Presidential pardon, the following considerations shall be taken into account: the gravity of the crime committed, the length of the sentence served, the convicted person's personality, his behaviour and sincere remorse, the state of repairing the damage caused by the commission of crime, family and other personal circumstances, the opinion of the prison administration, public organisations and other entities on the advisability of pardon. The author argued that the procedure of a Presidential pardon established under the State party's current legal framework and providing persons sentenced to life imprisonment with the possibility of early release under certain conditions was incompatible with the ECtHR's interpretation of article 3 of the European Convention. According to the ECtHR Grand Chamber Judgment in *Vinter and Others v. the United Kingdom* of 9 July 2013, in the context of a life sentence, article 3 of the European Convention must be interpreted as requiring reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds.[7]

2.4 Furthermore, pursuant to the ECtHR's judgment of 20 May 2014 in *László Magyar v. Hungary*, the institution of Presidential pardon, taken alone (without being complemented by the eligibility for release on parole), would not allow any prisoner to know what he or she must do to be considered for release and under what conditions. In the ECtHR's view, the institution of Presidential pardon did not guarantee a proper consideration of the changes and the progress towards rehabilitation made by the prisoner, however significant they might be.[8] The author argued in that regard that the State party's domestic legislation does not require the President of Ukraine to justify the decision to refuse a pardon and it also does not specify what a life-sentenced prisoner must do in order to receive a pardon. Therefore, the existence of the possibility of releasing a person sentenced to life imprisonment on grounds of mercy is not sufficient to satisfy the requirements of article 3 of the European Convention. With reference to the ECtHR's case-law, the author also argued that a possibility of being granted a pardon or release on compassionate grounds did not correspond to the notion of "prospect of release",[9] that a life sentence should be reducible[10] and that in determining whether a life sentence in a given case can be regarded as (ir)reducible, the ECtHR has sought to ascertain whether a life prisoner can be said to have any prospect of release.[11]

2.5 In substantiation for his motion to commute the remaining term of his life sentence to a fixed-term sentence, the author submitted to the Romny City-District Court the following individual grounds: (1) from 25 April 2004 to 30 July 2019, i.e. during his time in custody and while serving his life sentence, he did not commit any new crimes; (2) starting from 14 April 2009, he participated in different educational and spiritual revival programs; (3) from31 May 2005 to 30 July 2019, it was not possible for him to be employed while serving his sentence, due to the restrictions placed by the State party's law on the employment of persons sentenced to life imprisonment; (4) from 31 May 2005 to 30 July 2019, he was unable to pay the civil claims in favor of the victims (see, para. 2.1 above), because he was unemployed for reasons beyond his control; (5) he sincerely repented of the crimes committed and, following his possible release from custody, wished to find employment, pay off civil claims in favor of the victims and court fees, start a family and be useful to people and society; (6) he had work experience in car repairs; and (7) in December 2018, he repented of his sins, realised

[7] ECtHR Grand Chamber Judgment in *Vinter and Others v. the United Kingdom* of 9 July 2013 (applications nos. 66069/09, 130/10 and 3896/10), para. 119.

[8] ECtHR Judgment of 20 May 2014 in *László Magyar v. Hungary* (application no. 73593/10), paras. 57 and 58.

[9] ECtHR Grand Chamber Judgment in *Murray v. the Netherlands* of 26 April 2016 (application No. 10511/10), para. 100.

[10] ECtHR Judgment of 12 February 2008 in Kafkaris v. Cyprus (application No. 21906/04), para. 98.

[11] ECtHR Judgment of 18 March 2014 in *Öcalan v. Turkey (no. 2)* (applications nos. 24069/03, 197/04, 6201/06 and 10464/07), para. 196. Analysis of the ECtHR case-law on this point shows that where national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, this will be sufficient to satisfy article 3 of the European Convention.

that his previous way of living in conflict with the law was wrong, renounced the Islamic religion and embraced Christianity.

2.6 On 3 September 2019, the Romny City-District Court rejected the author's request on the basis that the domestic law, i.e. the Criminal Code and the Criminal Procedure Code, did not provide for a possibility of commuting life imprisonment to a fixed-term imprisonment.

2.7 On 13 September 2019 and later on 20 February 2020, 21 February 2020 and 28 April 2020,[12] the author appealed the decision of the Romny City-District Court of 3 September 2019 to the Sumy Court of Appeal requesting the Court that his life sentence be commuted to a 15 years' imprisonment sentence. The author claimed that, contrary to the principle of the primacy of international treaties over the State party's domestic law, the Romny City-District Court violated its obligation to directly implement international norms and to restore his rights as spelled out in article 3 of the European Convention, which are similar to those of article 7 of the Covenant.

2.8 On 4 May 2020, the Sumy Appeal Court upheld the decision of the Romny City-District Court, stating that there was currently no implementation mechanism in the Criminal Code and Criminal Procedure Code of Ukraine, which would allow the court to commute the sentence of life imprisonment to a fixed-term sentence. The author claims to have exhausted all domestic remedies, since the decision of the Sumy Appeal Court is final and could not be appealed.

The complaint

3.1 The author argues that the fact that there is no realistic prospect for his life sentence to be commuted to a fixed-term imprisonment and for him to be released at some point in the future violates his rights under article 7 of the Covenant not to be subjected torture or to cruel, inhuman or degrading treatment or punishment. In support of his claim, the author refers to the ECtHR judgment in *Petukhov v. Ukraine (No. 2)*, concerning the sentencing of the applicant to life imprisonment, in which the ECtHR found a violation of the applicant's rights under article 3 of the European Convention, because it was not possible for life-sentenced prisoners to request a reduction of their sentences in Ukraine. The author submits that article 3 of the European Convention and article 7 of the Covenant are the same in substance. The author also recalls that the ECtHR required the State party to put in place a reform of the system of review of whole-life sentences and that the mechanism of such a review should guarantee the examination in every particular case of whether continued detention is justified on legitimate penological grounds and should enable whole-life prisoners to foresee, with some degree of precision, what they must do to be considered for release and under what conditions, in accordance with the standards developed in the ECtHR's case-law (see, para. 2.1 above).

3.2 With reference to the arguments made in his motion to the Romny City-District Court (see, paras. 2.3 - 2.5 above), the author submits that the lack of the implementation mechanism in the criminal and criminal procedure law of Ukraine, which would allow the court to commute the sentence of life imprisonment to a fixed-term sentence, should not be used by the State party as an excuse for its non-compliance with the obligations emanating from article 3 of the European Convention and article 7 of the Covenant.

3.3 He claims that by failing to comply with their obligations under article 7 of the Covenant in considering his request to commute his life sentence to a fixed-term imprisonment, the State party's domestic courts were not fair and impartial and thus violated his rights under article 14 (1) of the Covenant. The author also submits that, despite the *de jure* existence of the institution of Presidential pardon in Ukraine, resulting in the commutation of a limited number of individual life sentences to 25 years' imprisonment, such a mechanism is highly ineffective for the following reasons: (1) commutation of life imprisonment to a fixed-term imprisonment or exemption from serving the sentence on compassionate grounds does not meet the requirements of article 3 of the European Convention and, therefore, also of article 7 of the Covenant; (2) the State party's current legal

[12] The author submitted an initial appeal and three supplementary submissions.

framework does not offer a realistic prospect of conditional release to all sentenced prisoners, including life-sentence prisoners;[13] and (3) the State party's domestic legislation does not require the President of Ukraine to assess whether there continue to exist legitimate penological grounds for serving a sentence of life imprisonment, nor to justify the decision to refuse a pardon.

3.4 Finally, the author claims a violation of his rights under article 26 of the Covenant on the ground that he, as a person sentenced to life imprisonment, is discriminated against compared to those who are sentenced to fixed-term imprisonment. He refers to articles 81 and 82 of the Criminal Code, pursuant to which a possibility of being released on parole or to have the remaining part of one's sentence replaced with a less strict punishment applies to persons sentenced to all forms of punishment except life imprisonment.

3.5 In light of the foregoing, the author asks the Committee to conclude that the State party has violated his rights under articles 7, 14 (1) and 26 of the Covenant and to grant him early release from serving the sentence of life imprisonment.

State party's observations on the merits

4.1 By a note verbale of 30 December 2020, the State party submitted that in the case of *Petukhov v. Ukraine (No. 2)* the ECtHR found a violation of article 3 of the Convention, in particular due to the fact that the applicant's criminal punishment in the form of life imprisonment was not subject to reduction.

4.2 According to article 46 (1) of the Convention and article 2 of the Law of Ukraine "On the Execution of Judgement, the Application of the Case-Law of the European Court of Human Rights" the Court's judgments are binding. Under the Law, the implementation of the ECtHR's judgment is a payment of compensation and taking of additional individual and general measures.

4.3 According to article 10 of the Law "On the Execution of Judgement, the Application of the Case-Law of the European Court of Human Rights" additional individual measures include restoring, as much as possible, the status that the applicant had before his/her rights under the European Convention were breached (*restitution in integrum*), as well as any other measure envisaged in the Court's judgment. The previous status of the applicant should be restored, inter alia, by the reopening of proceedings in the case and a new examination of the claims by the relevant administrative body.

4.4 Additional individual measures shall be applied regarding a person in whose favour the ECtHR rendered its judgment. Taking into account that the author raises his claims on the basis of a judgement of the ECtHR in relation to another person, it is impossible for competent authorities to take individual measures for him. General measures are aimed at eliminating underlying systemic problems indicated in a judgment, as well as its origin through a) amendments to the current legislation and changes in the practice of its application; b) improvement of administrative and judicial practice; c) ensuring an appropriate level of professional training on the Convention, etc. General measures are comprehensive and envisage long-term efficiency, thus they take significant time to be implemented.

4.5 In the light of the fact that the systemic problem identified in the ECtHR judgment of *Petukhov v. Ukraine (No.2)* related to the issue that the life imprisonment is not subject to reduction, a series of draft laws were submitted to the Supreme Council of Ukraine (Verkhovna Rada). These draft laws, which envisage the introduction of a leniency mechanism of punishment in the form of life imprisonment, include the Law on Amendments to Certain Legislative Acts on the Execution of Judgments of the European Court of Human Rights (No. 4048 dated 3 September 2020), the Law on Amendments to the Code of Ukraine on Administrative Offences, the Criminal Code of Ukraine and the Criminal Procedural Code

[13] Reference is made to the Report to the Ukrainian Government on the visit to Ukraine carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 to 30 November 2016 (CPT/Inf (2017) 15), para. 40.

of Ukraine Concerning Implementation of Judgments of the European Court of Human Rights (No. 4049 dated 3 September 2020).

4.6 Draft Law No. 4049 envisages amendments to the Criminal Code and the Criminal Procedure Code, particularly through:

a) The introduction of the possibility for a person to apply for replacement of life imprisonment for a more lenient sentence, in cases where the person would have already served ten years as part of the life imprisonment sentence. If adopted, under this new procedure life imprisonment may be replaced by a sentence of imprisonment for a term of 15 to 20 years;

b) The mechanism of conditional early release may be applied after the prisoner has actually served at least three-quarters of the term of the sentence imposed by the court, in the case of replacement of the sentence of life imprisonment with imprisonment for a certain term;

c) The granting of the right to replace the punishment in the form of life imprisonment with imprisonment for a term of five to 10 years for persons sentenced to life imprisonment who on the day of entry into force of the Law of Ukraine on Amendments to Certain Legislative Acts on the Execution of Judgments of the European Court for Human Rights served more than ten years of the sentence imposed by the court. However, the total period of the sentence must not be less than 25 years;

d) Criminal proceedings in the first instance court regarding consideration of the issue of replacement of life imprisonment, under article 82 of the Criminal Code, shall be considered collectively by a court consisting of three judges;

e) During the execution of the judicial decision on sentences, the court shall have the right to make a decision, in particular, on replacing the sentence of life imprisonment with a more lenient one; consideration of this issue shall be carried out collectively by a court consisting of three judges.

4.7 The draft Decree of the President of Ukraine "On Amendments to the Regulations on the Procedure for Pardon, approved by the Decree of the President of Ukraine of 21 April 2015 No. 223", approved by the Government of Ukraine, was submitted to the President of Ukraine. The draft Decree proposes to improve the procedure for pardon provided by the Regulation on the Procedure for Pardon, approved by the Decree of the President of Ukraine of 21 April 2015 No. 223.

4.8 The draft Decree provides for amendments, in particular, to paragraph 4 of the Procedure, which clarifies the procedure for calculating a new sentence, which replaces life imprisonment. It is assumed that if such a request is satisfied, the term for which the sentence is commuted shall be calculated from the beginning of serving the sentence of life imprisonment and may not be less than 25 years.

4.9 It is also proposed to amend paragraph 5 of the Procedure and change the grounds for pardon of persons who have been convicted of serious or especially serious crimes or have two or more convictions for intentional crimes or have served a small part of their sentence.

4.10 The draft Decree establishes a one-month term for consideration of the Pardon Commission's proposals and issue of the Decree by the President. In addition, it proposes an obligation to inform the Pardon Commission of the decision. Paragraph 18 of the Procedure proposes to determine that information on the status of consideration of applications for pardon, the number of satisfied and rejected applications is published monthly on the official website of the Office of the President of Ukraine. Such changes will make the institution of pardon in Ukraine more transparent.

4.11 The State party submits that the author's rights to fair trial were not violated since domestic courts were guided, when taking their decision, by the national legislation, in particular, by provisions of the Criminal Code, which regulate the imposition of the criminal punishment in the form of life imprisonment and application of conditional early release from life imprisonment, as well as legal positions described in the Supreme Court Resolutions.

4.12 Domestic courts properly examined the author's reference to the ECtHR judgment of *Petukhov v. Ukraine (No.2)* and, while making relevant decisions, applied article 10 of the Law "On the Execution of Judgments and the Application of the Case-law of the European Court of Human Rights", which prescribes that the courts may restore the previous status of an applicant by, inter alia, repeat consideration of the case regarding a specific person in whose favor the ECtHR rendered its judgment.

4.13 The State party also submits that provisions of the Criminal Code that regulate the imposition of the criminal punishment in the form of life imprisonment and application of conditional early release from life imprisonment are legal norms. They do not have any signs of discrimination and shall be applied equally to all persons.

4.14 Furthermore, according to paragraph 2 (1) of the abovementioned Procedure, pardon of prisoners is carried out in the form of replacement of life imprisonment with imprisonment for a term of not less than 25 years. According to paragraph 4 (2) of the Procedure, if a person is sentenced to life imprisonment, a request for pardon may be submitted after serving at least 20 years of the sentence. The author was convicted in 2005; accordingly, he will acquire the right to apply for a pardon in 2025.

4.15 On the basis of all abovementioned observations, the State party asks the Committee to recognize that there was no violation of the author's rights under articles 7, 14 (1) and 26 of the Covenant.

Author's comments to the State party's observations on the merits

5.1 On 19 January 2021, the author submitted his comments on the State party's observations. He argued that the State party *de facto* acknowledged that life imprisonment as a form of punishment violated article 3 of the European Convention, due to the irreducibility of life sentences in Ukraine and a lack of realistic prospect of early release of persons serving such sentences. The State party, however, rejected his claim that life imprisonment in its current form also constituted a violation of article 7 of the Covenant, despite the fact both articles are essentially the same in substance.

5.2 The author argued that he had not requested the authorities to apply the ECtHR decision in *Petukhov v. Ukraine* (*No. 2)* in his case pursuant to article 10 of the Law "On the Execution of Judgments and the Application of the Case-law of the European Court of Human Rights" (see, paras. 4.3, 4.4 and 4.12 above), but rather to put an end to the continuing violation of article 3 of the European Convention and article 7 of the Covenant. Namely, he wished for domestic courts to apply the following findings of the ECtHR decision in *Petukhov v. Ukraine* (*No. 2)* in his case: (1) prisoners who receive a whole life sentence do not know from the outset what they must do in order to be considered for release and under what conditions;[14] (2) the existing regime for life prisoners in Ukraine is incompatible with the aim of rehabilitation;[15] and (3) in so far as it concerns the irreducibility of a life sentence, there exists a systemic problem in Ukraine requiring the implementation of measures of a general character.[16]

5.3 The author reiterated his initial argument that the lack of the implementation mechanism in the criminal and criminal procedure law of Ukraine, which would allow the court to commute the sentence of life imprisonment to a fixed-term sentence, should not be used by the State party as an excuse for its non-compliance with the jus cogens obligations emanating from article 3 of the European Convention and article 7 of the Covenant. In support of his claims, the author refers to the Resolution adopted by the UN General Assembly on 17 December 2015 (A/RES/70/146) "Torture and other cruel, inhuman or degrading treatment or punishment", which condemns: (1) all forms of torture and other cruel, inhuman or degrading treatment or punishment […] and calls upon all States to implement fully the absolute and non-derogable prohibition of torture and other cruel, inhuman or degrading treatment or punishment; and (2) any action or attempt by States or

[14] ECtHR,Judgment of 12 March 2019 in *Petukhov v. Ukraine (No. 2)*, (application No. 41216/13), para. 174.
[15] Ibid, at para. 184.
[16] Ibid, at para. 194.

public officials to legalize, authorize or acquiesce in torture and other cruel, inhuman or degrading treatment or punishment under any circumstances, including on grounds of national security and counter-terrorism or through judicial decisions […]. The author also refers to the Resolution adopted by the UN General Assembly on 12 December 2001 (A/RES/56/83) "Responsibility of States for internationally wrongful acts", according to which the responsible State may not rely on the provisions of its internal law as justification for failure to comply with its international obligations (article 32).

5.4 The author submitted that in spite of the ECtHR decision in *Petukhov v. Ukraine (No. 2)*, even then, in 2021 the State party did not implement a reform of the system of review of whole-life sentences. As of January 2021, the draft Laws No. 4048 and No. 4049 were not yet adopted and there was no guarantee that they would be adopted in the foreseeable future. In this context, the author submitted copies of two explanatory memorandums concerning the draft Laws No. 4048 and No. 4049 prepared by the then Minister of Justice, as well as a detailed analysis of the specific provisions of these draft Laws made by the legal department of the Supreme Council of Ukraine. According to the latter, there were serious shortcomings in the texts of the draft Laws, which effectively meant that they would not be able to get enough votes from the deputies to pass, thus significantly delaying the establishment of the implementation mechanism, allowing to commute the sentence of life imprisonment to a fixed-term sentence. The author recalled in this context that both he and Mr. Vladimir Petukhov, in whose favor the ECtHR rendered its judgment in March 2019, continued serving their life sentences in Ukraine.

5.5 The author provided information about the case of Mr. Igor Trubutsin,[17] as an example of the ineffectiveness of existing mechanism of Presidential pardon in Ukraine. The author also cited the paragraphs of the case *Petukhov v. Ukraine (No. 2)*, relating to the institution of Presidential pardon in Ukraine and its ineffectiveness.[18]

5.6 In light of the above considerations, the author requested the Committee to conclude that the State party has violated his rights under article 7 of the Covenant, on account of the irreducibility of life imprisonment as a form of punishment in Ukraine and a lack of realistic prospect of early release from serving his sentence of life imprisonment.

5.7 The author claimed that the State party has violated his rights under article 14 (1) of the Covenant, as the courts had failed to remedy a violation of his rights under article 7, while considering his request to commute his life sentence to a fixed-term imprisonment,[19] despite their obligations to do so under article 2 of the Covenant. Furthermore, the Sumy Appeal Court completely ignored his claims about the violation of articles 7 and 14 (1) of the Covenant and focused exclusively on the fact that the ECtHR has established a violation of article 3 of the European Convention in the case *Petukhov v. Ukraine (No. 2)*, determining that there was no implementation mechanism in the criminal and criminal procedure law of Ukraine, which would allow the court to commute the sentence of life imprisonment to a fixed-term sentence. The author further noted that in its observations on the merits of the present communication the State party did not make any specific comments with regard to his claims under articles 7 and 14 (1) of the Covenant.

5.8 As to the State party's assertion that provisions of the Criminal Code apply equally to all persons (see, para. 4.13 above), the author reiterated his initial argument that, pursuant to articles 81 and 82 of the Criminal Code, a possibility of being released on parole or to have the remaining part of one's sentence replaced with a less strict punishment applied to persons sentenced to to all forms of punishment except life imprisonment. He added that the draft Laws No. 4048 and No. 4049, which were meant to redress the imbalance in the scope of the rights of people sentenced to fixed-term imprisonment and people sentenced to life

[17] Reference is made to the article "First I was pardoned and then they changed their mind" that was published in an independent Christian newspaper "Prisoner" No. 4 (35) / October-November-December (in Ukrainian, accompanied by the author's unofficial translation into Russian).

[18] ECtHR, Judgment of 12 March 2019 in *Petukhov v. Ukraine (No. 2)*, (application No. 41216/13), paras. 92, 166, 175, 176 and 186.

[[19] Note by the Secretariat: the author clarified that he requested the commutation of his life sentence to a 15 years' imprisonment sentence and his subsequent release from prison, since by that time he would have already served 15 years' imprisonment.]

imprisonment, have not yet been adopted by the Supreme Council of Ukraine and signed by the President of Ukraine. Therefore, in violation of article 26 of the Covenant, as a person sentenced to life imprisonment, he continues to be discriminated against compared to those who are sentenced to fixed-term imprisonment.

5.9 In light of the foregoing, the author asks the Committee to conclude that the State party has violated his rights under articles 7, 14 (1) and 26 of the Covenant and to grant him early release from serving the sentence of life imprisonment.

Issues and proceedings before the Committee

Considerations of admissibility

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

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

6.3 The Committee notes that the State party has not contested that the domestic remedies have been exhausted. Accordingly, the Committee finds that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication.

6.4 The Committee notes the author's claim that his rights under article 14 (1) of the Covenant have been violated as the State party failed to take into account article 7 of the Covenant in considering his claim for commuting the life sentence to a fixed-term imprisonment, and thus domestic courts were not fair and impartial. In the light of the information available before it, the Committee considers that, in the present case, the author has failed to demonstrate that the alleged "unfairness" and "impartiality" amounted to arbitrariness or denial of justice. In the absence of any other pertinent information in that respect, the Committee considers the author has failed to sufficiently substantiate this claim for purposes of admissibility. Accordingly, it concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.5 The Committee notes the author's claim that his rights under article 26 of the Covenant have been violated because, as a person sentenced to life imprisonment, he has been discriminated against in comparison to persons sentenced to fixed-term imprisonment, because he cannot be released on parole nor have the remaining part of his term in prison replaced with a less strict punishment. In the absence of any other pertinent information on file, indicating that the author was treated differently from other persons sentenced to life imprisonment in Ukraine and that such a differentiation of treatment constituted discrimination,[20] the Committee considers the author has failed to sufficiently substantiate these claims for purposes of admissibility. Accordingly, it concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.6 The Committee considers that the author's remaining claims, raising issues under article 7 of the Covenant, have been sufficiently substantiated for the purposes of admissibility and proceeds to their examination on the merits.

Consideration of the merits

7.1 The Committee has considered the case in the light of all the information submitted to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

7.2 The Committee notes the author's claims that his sentence of life imprisonment in effect cannot be commuted to a fixed-term sentence, that the procedure of applying for a Presidential pardon is unreasonably prolonged, as currently one has to serve at least 20 years' imprisonment before being eligible to apply for a Presidential pardon, and that the President of Ukraine does not have an obligation to provide any reasons for refusing to grant a

[20] See, General Comment No. 18 (1989), Non-discrimination, para. 13.

Presidential pardon. Furthermore, the author claims that the mechanism for the review of life sentences should guarantee the examination in every particular case of whether continued detention is justified on legitimate penological grounds and should enable whole-life prisoners to foresee, with some degree of clarity, what they must do to be considered for release and under what conditions. Consequently, a lack of such a mechanism violates his right under article 7 of the Covenant not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (see, para. 3.1 above). The State party, on the other hand, asks the Committee to "recognize that there was no violation of the author's rights" under article 7 (see, para. 4.15), and explains that several draft laws were submitted to the Verkhovna Rada – the State party's Parliament, that were intended to introduce a possibility for a person to apply for a more lenient sentence, compared to life sentence, a mechanism of conditional early release for life prisoners, a mechanism of judicial review of life imprisonments, and the review of the current procedure of a Presidential pardon (see, paras. 4.5 – 4.10 above).[21]

7.3 The Committee recalls its long-standing jurisprudence in that the prohibition of torture in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim.[22] The Committee notes that it has found instances where humiliating treatment constituted treatment incompatible with article 7 of the Covenant.[23] The Committee further notes that the State parties to the Covenant have special obligations towards persons deprived of their liberty, who should be treated with dignity and respect, and should be protected as may be necessary against the treatment prohibited by article 7 of the Covenant, whether inflicted by individuals acting in their official capacity, outside their official capacity or in a private capacity.[24] The Committee also recalls that it has long accepted that individuals can be imprisoned for life, especially when life imprisonment is an alternative to the death penalty, including in those State parties to the Covenant that: (1) have not yet introduced a moratorium on the use of the death penalty; (2) have not yet abolished the death penalty; and (3) have not yet ratified the Second Optional Protocol thereto.[25] The question before the Committee in the present communication, however, is whether the author's sentence of life imprisonment, without a mechanism with clearly defined procedures for its review, is compatible with the State party's obligations under article 7 of the Covenant not to subject him to inhuman or degrading treatment or punishment. In this context, the Committee recalls that it has already established in one of the earlier communications before it that life imprisonment without a possibility of a review violated juveniles' rights under article 7 of the Covenant.[26]

7.4 The Committee starts by noting that in the present communication, according to the submissions of the author, the Presidential pardon procedure in its current form and despite the amendments to the Regulations on the Procedure for Pardon, approved by the Decree of the President of Ukraine of 21 April 2015 No. 223, still lacks sufficient clarity and predictability (see, paras. 2.3 – 2.4), and that there is no real prospect of his life sentence to be commuted to a fixed-term imprisonment. In this context, the Committee notes that among the considerations to be taken into account during the examination of an application for a Presidential pardon, the Regulations on the Procedure for Pardon refer to "the gravity of the crime committed, the length of the sentence served, the convicted person's personality, his behaviour and sincere remorse, the state of repairing the damage caused by the commission of crime, family and other personal circumstances, the opinion of the prison administration, public organisations and other entities on the advisability of pardon" (see, para. 2.3 above). It also notes, however, para. 5 of the Regulations on the Procedure for Pardon, which states that "persons convicted for serious or particularly serious crimes, or having two or more criminal records in respect of the commission of premeditated crimes [...] may be granted

[21] The Committee notes that at the time of the consideration of the present communication, these draft laws have not been yet adopted.

[22] See, the Committee's general comment No. 20 (1992) on the prohibition of torture, or other cruel, inhuman or degrading treatment or punishment, para. 5.

[23] See, *Zinsou v. Benin* (CCPR/C/111/D/2055/2011), para. 7.5.

[24] See, *Ernazarov v. Kyrgyzstan* (CCPR/C/113/D/2054/2011), para 9.5.

[25] See, *Butovenko v. Ukraine* (CCPR/C/102/D/1412/2005), para. 7.13.

[26] See, *Blessington et al. v. Australia* (CCPR/C/112/D1968/2010), 7.12.

pardon in exceptional cases and subject to extraordinary circumstances." It is unclear, however, what is meant by "exceptional cases" and "extraordinary circumstances", and there is nothing to suggest that the penological grounds for keeping someone in prison are of relevance for the interpretation of those notions under the State party's current legal framework.

7.5 As noted earlier by the Committee (see, para. 7.2 above), the State party does not challenge the author's arguments regarding the lack of a clear and predictable procedure for a review of sentences of life imprisonment, putting forward, instead, that a series of draft laws have been introduced to address these specific issues. The Committee notes the necessity for clarity and certainty of the existing procedures, which are not only a general requirement of the rule of law, but also underpin the process of rehabilitation.[27] Rehabilitation of prisoners must be understood as emphasizing not their exclusion from the community but their continuing part in it.[28] Therefore prisoners sentenced to life imprisonment, are entitled to know what steps they can take in order to be considered for rehabilitation and release.

7.6 The Committee also considers that the applications for review of life sentences and their commutation to a fixed-term imprisonment should be meaningfully considered and conclusively decided upon according to applicable procedures,[29] and that any decisions taken pursuant to such applications should be reasoned and subject to judicial review. It is up to the State party's authorities, however, to decide how and when such a review will occur, since they have the prerogative in the matters of criminal justice and sentencing. The Committee observes in the context of the present communication that the exercise by persons sentenced to life imprisonment, including the author, of their right to a review of their life sentence by way of Presidential pardon cannot be regarded as surrounded by sufficient clarity and predictability. Therefore, in the light of the above considerations, the Committee considers that, according to the State party's current legal framework, the procedure of a Presidential pardon is based on the principles of humanity and mercy, rather than on penological grounds, and that it lacks the necessary clarity and predictability, allowing to review the author's application for a Presidential pardon, in order to determine whether in his specific circumstances, the author's life sentence could be commuted to a fixed-term imprisonment.

7.7 In light of the above considerations and in the specific circumstances of the present communication, the Committee considers that the lack of a possibility of review and of a realistic prospect under the State party's current legal framework for the author's life sentence to be commuted to a fixed-term imprisonment causes him continued anguish and mental stress,[30] amounting to treatment contrary to article 7 of the Covenant.

8. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation of the author's rights under article 7 of the Covenant.

9. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, *inter alia*, to take appropriate steps to: a) provide the author with a meaningful review of his sentence of life imprisonment on the basis of a clear and predictable procedure; b) provide the author with adequate compensation. The State party is also under an obligation to take steps to prevent similar violations occurring 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

[27] ECtHR, Judgment of 12 March 2019 in *Petukhov v. Ukraine (No. 2)*, (application No. 41216/13), para. 168.

[28] Rule 88 of the UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).

[29] The Committee similarly considers that the States parties are required to allow individuals sentenced to death to seek a pardon or commutation, and that these requests should be "meaningfully considered and conclusively decided upon according to applicable procedures" (see, the Committee's general comment No. 36 on the right to life, para. 47).

[30] See, *Kulieva v. Tajikistan* (CCPR/C/128/D/2707/2015), para. 8.7.

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 remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them widely in the official languages of the State party.

Annex I

Individual opinion by Committee member Shuichi Furuya (partly dissenting)

1. I agree with the conclusion of the Views that the facts before the Committee disclose a violation of the author's rights under article 7 "in the specific circumstances of the present communication" (para. 7.7). However, I am unable to concur with its general remarks that the application for review of life sentences and their commutation to a fixed-term imprisonment should be meaningfully considered and conclusively decided upon according to applicable procedure and any decisions taken pursuant to such applications should be reasoned and subject to judicial review (para. 7.6).

2. As the Views touch upon (para. 7.3), the Committee has considered life imprisonment as being less severe than the death penalty and accepted as a replacement when a State party abolishes the latter.[31] This suggests that life imprisonment *per se* is not considered to be contrary to the prohibition of cruel, inhuman or degrading punishment under article 7 of the Covenant. The Committee has found that the imposition of life sentences on juveniles is not compatible with article 7 of the Covenant, unless there is a possibility of review and a prospect of release.[32] However, it has never held that article 7 requires in general the guarantee of a review procedure under which the commutation to a fixed-term imprisonment is meaningfully considered and conclusively decided.

3. In the context of Europe countries where the death penalty has been abolished, it is reasonable for the European Court of Human Rights (ECtHR) to step forward to find that life imprisonment without providing for the possibility of review and realistic prospect of release is not compatible with the prohibition of inhuman or degrading treatment or punishment. In contrast, the States parties of our Covenant still include many retentionist countries in which death penalty exists. For those countries, life imprisonment without any possibility of release may be the most conceivable (and probably only acceptable) penalty alternative to death penalty when they decide to abolish it. It is therefore undeniable that, if article 7 of the Covenant is interpreted to oblige States parties to set out the review procedure to consider the commutation in the case of life imprisonment (the present Views actually take this position), it would have certain negative impact on the movements to abolish the death penalty in the retentionist countries. I believe that acknowledging the obligation to set out the review procedure for life imprisonment is a correct direction to proceed to enhance the rights protected under article 7 of the Covenant. However, it is premature to admit it as a general rule at present. Rather, it is depending on the specific situation of a State party in question to decide whether the imposition of life imprisonment without such a review procedure would constitute a violation of article 7 of the Covenant.

4. In the present case, the State party has abolished the death penalty in 2000, and in March 2019 the ECtHR has decided in *Petukhov v. Ukraine (No.2)* that the current system of life imprisonment in the State party constitutes a violation of article 3 of the European Convention, and required a reform of the system. Nevertheless, the State party, while discussing a series of draft laws to reform it, has failed to adopt them for more than two years and to deal with the author's imprisonment individually in line with the judgment of the ECtHR. The Committee is not in a position of discussing the implementation of the judgment of the ECtHR in the State party, but it may evaluate the author's situation in the wake of the judgment. The author was in the situation where, while the judgment of the ECtHR has admitted the possibility for his sentence to be reviewed, he was still subject to life imprisonment without any prospect of release under the domestic law of the State party. It is imaginable therefore that his situation in limbo caused him severe anguish and mental stress which, in my view, amounts to treatment contrary to article 7 of the Covenant.

[31] See, *Tofanyuk v. Ukraine* (CCPR/C/100/D/1346/2005), para. 11.3; *Butovenko v. Ukraine* (CCPR/C/102/D/1412/2005), para. 7.13; and *Quliyev v. Azerbaijan* (CCPR/C/112/D/1972/2010), para. 9.4.

[32] See, *Blessington et al. v. Australia*, supra n. 26, para. 7.7.

5. Accordingly, I conclude that, while article 7 itself does not oblige the State party to create a review procedure under which the commutation to a fixed-term imprisonment is meaningfully considered, the author's *particular* situation which was caused by the State party's failure to swiftly respond to the judgement of *Petukhov v. Ukraine (No.2)* constitutes a violation of his rights under article 7 of the Covenant.

Annex II

Individual opinion by Committee member José Manuel Santos Pais (dissenting)

1. I regret not being able to concur with the Committee's Views in the present communication. In my view, the author's complaint should not have been admitted and if admitted, I would not have found a violation under article 7 of the Covenant.

2. The author, a national of Azerbaijan, was sentenced to life imprisonment in Ukraine, for having murdered two young women and for having used a tampered passport (para 2.1). The sentence was upheld by the Supreme Court of Ukraine in May 2005. The complaint was submitted to the Committee fifteen years after the sentence became executory. Under rule 99 (c) of the Committee's rules of procedure, the complaint should not have been admitted, for abuse of right of submission since it was submitted well beyond five years after the exhaustion of domestic remedies. Otherwise, long standing *res judicata* decisions may be reopened any time in the future, disrupting the desirable certainty of such decisions.

3. The basic argument that the author invokes for his complaint is ECtHR judgement in *Petukhov v. Ukraine (No. 2)*, of March 12, 2019, which concerns a Ukrainian national (paras 2.1-2.3). One wonders then why the author has not addressed himself to the ECtHR instead of the Committee, particularly in view of the carefully crafted reasoning of the Court (see paras 168-187 of the judgement), which notes "*European penal policy currently places emphasis on the rehabilitative aim of imprisonment, even in the case of life prisoners (…). Life prisoners are to be provided with an opportunity to rehabilitate themselves*" (para 181). The Court further adduces that the obligation to offer a possibility of rehabilitation "*entails a positive obligation to secure prison regimes to life prisoners which are compatible with the aim of rehabilitation and enable such prisoners to make progress towards their rehabilitation*" (*ibidem*). Finally, the Court notes that "*only one clemency request from a life prisoner has been granted in Ukraine to date*" (para 186).

4. The Author considers that lack of an implementation legal mechanism in Ukraine, allowing courts to commute sentence of life imprisonment to a fixed-term sentence, violates his rights under article 7 of the Covenant (paras 3.1-3.2). This, even though Ukraine has made considerable efforts to implement the ECtHR's judgement (paras 4.1-4.12). In this regard, present Views don't seem to sufficiently acknowledge these efforts.

5. There is no previous case law of the Committee, except one on juvenile's rights (para 7.3), on the possible violation of article 7 by a judgement imposing a life sentence. In the said Views, of November 2014, authors were minors at the time they committed their crimes (para 7.12 of the said Views), which may explain the reasoning adopted therein.

6. Committee's General Comment 36 recognizes that countries having not abolished death penalty and not ratified the Second Optional Protocol are not legally barred under the Covenant from applying death penalty to the most serious crimes, subject to a number of strict conditions (para 16). However, considerable progress may have been made towards establishing an agreement among States parties to consider death penalty as a cruel, inhuman or degrading form of punishment (para 51). No such statement has been made by the Committee so far as regards life sentences, probably because often State parties are requested to replace death penalties with life sentences (para 7.3).

7. Although personally advocating life sentences should benefit from a mechanism with clearly defined procedures for their review, eventually allowing for a fixed term imprisonment, for penological as well as humanitarian grounds, always keeping prisoners' rehabilitation in mind, I wonder whether the reasoning of the decision by the ECtHR, taken at the European level, should now simply be extended by the Committee to the different geographical regions it encompasses. In fact, the reasoning of the present Views closely follows the judgement of the ECtHR (see for instance paras 171-174, 177-179 of the judgement and paras 7.4-7.6 of the Views). It is true the present Views concerns the case at hand, namely the Presidential pardon procedure in Ukraine, but the door is now open to apply in the future article 7 of the Covenant to life sentences in other countries and regions as well.

8. I wholly agree that if a country admits life sentences to be reviewed, there should be predictable and clear procedures as to what steps prisoners must take to be considered for release and rehabilitation and that requests for release must be meaningfully considered and conclusively decided upon according to defined procedures (paras 7.5-7.6). However, any procedure, be it a judicial review or a Presidential pardon subject or not to review, namely a judicial one, always entails, due to the expectation it creates on the requesting convicted person, continued anguish and mental stress (para 7.7), since the result of the request remains unknown at the outset of the application. This anguish and mental stress may even be stronger in cases where the review of life sentences is established by law and in the end not allowed in the individual circumstances of the requesting prisoner.

9. I would therefore have not concluded for a violation of article 7 of the Covenant in the present communication. I also consider States should be able to establish a minimum term of imprisonment before considering any review of a life sentence (para 4.14).