



# International Covenant on Civil and Political Rights

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## Human Rights Committee

### Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 4170/2022\*, \*\*, \*\*\*

<i>Communication submitted by:</i>	Kyung Yup Kim (represented by counsel, Graeme Edgeler, Tony Ellis and Ben Keith)
<i>Alleged victim:</i>	The author
<i>State party:</i>	New Zealand
<i>Date of communication:</i>	3 June 2022 (initial submission)
<i>Document references:</i>	Decisions taken pursuant to rules 92 and 94 of the Committee's rules of procedure, transmitted to the State party on 20 June 2022 (not issued in document form)
<i>Date of adoption of Views:</i>	26 October 2023
<i>Subject matter:</i>	Detention and extradition of the author to China
<i>Procedural issues:</i>	<i>Ratione materiae</i> ; substantiation of claims
<i>Substantive issues:</i>	Arbitrary detention-arrest; cruel, inhuman or degrading treatment or punishment; deprivation of liberty; extradition; fair trial
<i>Articles of the Covenant:</i>	7, 9, 10 and 14
<i>Articles of the Optional Protocol:</i>	2 and 3

1.1 The author of the communication is Kyung Yup Kim, a national of the Republic of Korea born in 1975. He claims that the State party has violated his rights under articles 7, 9, 10 and 14 of the Covenant by detaining him and agreeing to extradite him to China. The Optional Protocol entered into force for the State party on 26 August 1989. The author is represented by counsel.

1.2 On 20 June 2022, pursuant to rule 94 of its rules of procedure, the Committee, acting through its Special Rapporteurs on new communications and interim measures, requested the

\* Adopted by the Committee at its 139th session (9 October–3 November 2023).

\*\* The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Farid Ahmadov, Wafaa Ashraf Moharram Bassim, Rodrigo A. Carazo, Yvonne Donders, Mahjoub El Haiba, Carlos Gómez Martínez, Laurence R. Helfer, Bacre Waly Ndiaye, Hernán Quezada Cabrera, José Manuel Santos Pais, Soh Changrok, Tijana Šurlan, Kobayyah Tchamdja Kpatcha, Teraya Koji, Hélène Tigroudja and Imeru Tamerat Yigezu.

\*\*\* A joint opinion by Committee members Rodrigo A. Carazo, Carlos Gómez Martínez and Imeru Tamerat Yigezu (partially dissenting) and an individual opinion by Committee member José Manuel Santos Pais (partially dissenting) are annexed to the present Views.



State party to refrain from removing the author to China while his case was being examined by the Committee. The author remains in New Zealand.

### **Factual background**

2.1 The author has the status of a permanent resident in New Zealand. In August 2009, the author arrived in Shanghai, where he rented an apartment. In December 2009, a 20-year-old woman named Peiyun Chen was murdered in Shanghai, and the author left Shanghai and flew to the Republic of Korea. Police investigations led the authorities in Shanghai to believe, based on forensic and circumstantial evidence, that the author had murdered Ms. Chen in his apartment. In March 2010, the Shanghai police issued a warrant for the author's arrest for the murder (intentional homicide) of Ms. Chen. In May 2010, the International Criminal Police Organization (INTERPOL) issued a request to law enforcement agencies worldwide to locate and provisionally arrest the author pending his extradition.

2.2 In October 2010, the author flew from the Republic of Korea to New Zealand. In June 2011, the State party's authorities arrested the author after receiving and reviewing a request for arrest and extradition from the Government of China, which provided supporting documentation including an arrest warrant issued in China, witness statements, a DNA analysis report, an autopsy report and an assurance that the author would not be subjected to the death penalty if extradited.

2.3 In the absence of a bilateral extradition treaty between the two States, the extradition proceedings in New Zealand were conducted under the Extradition Act 1999, which requires, prior to extradition, a judicial decision on eligibility followed by a ministerial decision on surrender. After several requests for postponement of the eligibility proceedings, in November 2013, the District Court found that the author was eligible for surrender under the terms of the Act. From November 2014 to July 2015, the Minister of Justice sought and obtained assurances with respect to the author from the Government of China, including through in-person high-level meetings in both New Zealand (in February 2015) and China (in April 2015). In November 2015, the Minister of Justice decided that the author was to be surrendered.

2.4 In December 2015, the author filed an application for judicial review against the decision of the Minister of Justice. After a hearing in February 2016, in July 2016 the High Court requested the Minister to review the decision to surrender the author. In August and September 2016, the Minister then sought and obtained further assurances from the Government of China.

2.5 In October 2016, the Minister of Justice issued another decision to surrender the author, and the same month, the author filed an application for judicial review against that decision. In August 2017, following a hearing in April 2017, the High Court denied the author's application for judicial review. In April 2018, the author filed an appeal against that decision with the Court of Appeal, which held the hearing in July 2018. In June 2019, the Court of Appeal granted the author's appeal and decided that the Minister of Justice was required to review her decision to surrender the author. In 2019, the Minister filed an appeal with the Supreme Court. In December 2019 and February 2020, respectively, the Supreme Court held procedural and substantive hearings and in June 2021, it decided that the author could be surrendered if additional information were provided to ensure the protection of his rights. In July and September 2021, the Minister of Justice sought and obtained additional assurances from the Government of China. In June, October and November 2021, the Minister of Justice sought and received advice from the Minister of Foreign Affairs. In November 2021, the Minister of Justice decided that the author could be surrendered. In April 2022, after resumption of the proceedings, the Supreme Court reviewed the additional information submitted by the parties and decided that the author could be surrendered.

2.6 Beginning in December 2021, the author submitted an additional request to the Minister to not surrender him, based on his health status. He argued that, owing to kidney and liver disease, a paraclinoid aneurysm, a pituitary tumour, severe depression and suicidal

ideation, he could not be surrendered.<sup>1</sup> In June 2022, after reviewing the author's submissions, the Minister of Justice decided that he could be surrendered.

2.7 Having initially been detained in June 2011, the author filed five applications for bail and related appeals, three applications for habeas corpus and related appeals and an application for discharge from extradition owing to unreasonable delay. In September 2016, the author's fifth application for bail was granted, and he was released from detention on bail with a 24-hour curfew and electronic monitoring. In July 2019, the bail conditions were relaxed.

2.8 According to the assurances obtained from the Government of China in 2014, 2015, 2016 and 2021, the author will not be subjected to torture or ill-treatment and will have various rights as an accused and a detained person. The assurances permit the State party's officials to monitor the author's detention and trial, to visit him every 48 hours during the investigation phase or more often upon the author's request, to be informed in a timely fashion of the place of his detention and any changes thereto and to visit him at his place of detention. They also permit the author, inter alia, to contact the State party at all reasonable times for the purpose of providing information about his treatment, to be provided with the facilities for doing so and to receive medical treatment and a variety of medication free of charge. The assurances also provide for the State party to be provided, within 48 hours, with full and unedited recordings of all pretrial interrogations and court proceedings relating to the author.<sup>2</sup>

### Complaint

3.1 The author submits that the State party has violated his rights under articles 7, 9, 10 and 14 of the Covenant in several respects. The State party's authorities declined to investigate or address the majority of the risks faced by the author. Instead, they ignored, dismissed, disregarded and misrepresented evidence, posited conjecture contrary to the evidence and accepted several non-binding diplomatic assurances.

3.2 The State party's authorities violated the author's rights under article 7, read alone and in conjunction with article 14 of the Covenant, by agreeing to extradite him despite the grave personal risk of torture that he would face in China. Criminal offenders are systematically tortured in China, where the authorities have used interrogation techniques, including restraining prisoners in highly restrictive chairs for long periods, that amount to torture or to inhuman and degrading treatment. The assurances provided will not protect the author, do not guarantee sufficient monitoring of his detention, and are highly likely to be circumvented by the Government of China.

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<sup>1</sup> The author provided the Committee with the submissions, including medical documentation, that he had submitted to the Minister of Justice regarding his state of health.

<sup>2</sup> With respect to the author's trial, the Government of China provided formal, written assurances, before and after meetings with high-level officials – including an assistant judge of the Supreme People's Court and the Ambassador of China – that the author would be guaranteed the lawful right to a fair trial under Chinese laws and regulations, that if the author's case were referred to a judicial committee, no one would be present at judicial committee meetings other than members of the collegial panel, that investigators would turn over any exculpatory material to the procuratorate, that the author and his lawyer would have the right to access all evidence disclosed to the courts by the authorities and would have the right to appeal, and that the author would be entitled to receive legal aid, retain a lawyer licensed to practise law in China to defend him, dismiss that lawyer and retain another of his choosing, and meet with his lawyer in private without being monitored. It also provided assurances that the State party's representatives would be informed of, and would be able to attend, any open court hearings relating to the author, that any hearings that were closed pursuant to the Criminal Procedure Law would be as short as possible, that the State party's representatives would be provided with information about the status of the author's case and with recordings of court proceedings relating to the author, including recordings during any period when the hearing was closed, that the Government of China would, in its dealings with the author, comply with applicable international legal obligations and domestic requirements regarding fair trial, and that, if any issue arose in relation to the interpretation or application of the assurances, the representatives of both States would immediately enter into consultations to resolve the issue in a manner satisfactory to both sides.

3.3 In violation of the author's rights under articles 7, 9 and 10, and article 14, read alone and in conjunction with article 7 of the Covenant, the domestic proceedings were characterized by unconscionable, prejudicial and harmful delay by the State party's authorities. The final decision to extradite the author was taken more than 12 years after the alleged offence and 11 years after the author's arrest. The author has been irreparably harmed during the proceedings, as he suffers from brain, liver and kidney diseases, as well as severe and suicidal depression.

3.4 The State party violated the author's right to the presumption of innocence under article 14 (2) of the Covenant by detaining him, first in prison and then under house arrest, for almost 10 years without a trial.

3.5 In violation of articles 9 (1) and 10 (3) of the Covenant, the State party refused to seek an agreement from the Government of China pursuant to which periods of detention before the author's extradition would be considered in sentencing.

3.6 The State party arbitrarily detained the author without a trial, in violation of his rights under article 9 (1) and (3) of the Covenant. He was held in a remand prison from June 2011 to September 2016, and then under house arrest until July 2019. He could not contest the fabricated allegations against him. His requests for bail and release were arbitrarily refused. His detention for over eight years was unreasonable, disproportionate and unnecessary. In addition, while article 9 (4) of the Covenant allows for review of detention, the author had no meaningful opportunity to challenge the substance of the extradition request.

3.7 By extraditing the author, the State party would violate his rights under article 9 of the Covenant by exposing him to a risk of further and lifelong detention in China. In China, the author would be subjected to a show trial, inevitable conviction and a life sentence.

3.8 By extraditing the author, the State party would violate his rights under article 14, read in conjunction with articles 7, 9 and 10 (3) of the Covenant, by subjecting him to a grave and personal risk of being convicted in China after a meaningless, high-profile show trial, the outcome of which is predetermined.

3.9 The State party violated the author's rights under articles 7, 9, 10 and 14 of the Covenant by condoning mass human rights violations by China. In relying on ineffective and objectionable diplomatic assurances, the Supreme Court ascribed good faith to a Government that systematically, deliberately and openly denies human rights.

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

4. In its observations of 20 December 2022, the State party considers that the author's claims are without merit. The extradition was carefully considered and the issue of its consistency with the Covenant was central to the State party and to its courts. The assurances are unprecedented in their comprehensiveness and sophistication and include both substantive provisions that the author will not be tortured, otherwise mistreated or subjected to the death penalty and will receive a fair trial, and a detailed monitoring regime to ensure compliance. The State party's authorities negotiated the assurances over time and in face-to-face negotiations involving high-level representatives. The State party has full confidence that the assurances will be honoured. The author had numerous opportunities to provide input and did so, and his submissions were duly considered. The author's detention has never been arbitrary because it has always been lawful and justified by various factors. The length of the proceedings is explained by the author's efforts to contest his extradition. The Committee does not function as a court of appeal, except where it considers that a State party's assessment was arbitrary or amounted to a manifest error or denial of justice.

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

5. In his comments of 21 February 2023, the author claims that the State party exhibits extraordinary effrontery and a shocking lack of good faith. No assurance could protect the author, and the State party did not diligently assess the risks that he faces.<sup>3</sup>

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

6. In its submission of 20 March 2023, the State party wholly rejects the author's claim of bad faith and reiterates that his Covenant rights have been at the very centre of the deliberations given to his case by the State party's authorities since the extradition request was made.

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

#### *Consideration of admissibility*

7.1 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.

7.2 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.

a. Exhaustion of domestic remedies

7.3 The author contested his detention and extradition through numerous proceedings in New Zealand and obtained a negative decision from the Supreme Court. The State party does not dispute that the author exhausted all available domestic remedies. Accordingly, the Committee considers that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the communication.

b. Claims under articles 7, 9, 10 and 14 regarding condoning human rights violations

7.4 The Committee notes the author's claims under articles 7, 9, 10 and 14 of the Covenant that, by relying on ineffective assurances, the State party condoned mass human rights violations by the Government of China. The Committee considers that those claims are inadmissible under article 2 of the Optional Protocol, owing to a lack of sufficient substantiation.

c. Claims under articles 7, 9 and 10 regarding death in custody in China and death row syndrome in New Zealand

7.5 The author claims that the State party detained him in conditions amounting to death row and subjected him to a risk of extrajudicial killing in China, in violation of his rights under articles 7, 9 and 10 of the Covenant. The author has not invoked article 6 of the Covenant. The Committee notes that by the author's admission, the Government of China provided an assurance at the beginning of the extradition proceedings that he would not face the death penalty. The documents provided with the extradition request included a decision of 28 January 2011 of the Supreme People's Court of China, which stated that the death penalty (including the death penalty with a two-year reprieve) would not be imposed if the author were extradited and convicted of a crime punishable by death. The domestic authorities deemed that the death penalty assurance was reliable, including because it was explicit and complied with the laws in China, and because a similar assurance in another recent case involving extradition of a person accused of murder had been respected. The Committee notes the detailed monitoring regime described in the assurances and considers that the State party has on numerous occasions examined the author's non-refoulement

<sup>3</sup> In his comments, the author recharacterized in several respects his claims under articles 7, 9, 10 and 14 of the Covenant. While noting that the presentation of the author's claims in the communication gives rise to some confusion, the Committee bases its findings on those claims as it understands them.

arguments. The Committee considers that these aspects of the communication are insufficiently substantiated and are therefore inadmissible under article 2 of the Optional Protocol.

d. Claim under article 7 regarding length of detention

7.6 Regarding the author's claim under article 7 of the Covenant that he suffered torture or ill-treatment because of undue delays that prolonged his detention, the Committee notes that during his detention and release on restrictive bail, the author was availing himself of judicial remedies. The Committee also notes the individualized and timely decisions taken on the author's applications and appeals for release from detention; the seriousness of the crime of which he is accused; and the evidence reviewed by the State party's authorities in support of the accusation. The Committee further notes that the author received medical treatment during his detention and has not raised concerns regarding his conditions of detention in New Zealand, but rather the fact that he was detained. Moreover, the Committee notes the various requests by the author for postponement and extension of the proceedings, and his additional submissions and applications during his detention and release on restrictive bail. Accordingly, notwithstanding its findings on the merits regarding article 9 (1) of the Covenant, the Committee considers that this claim is insufficiently substantiated and is inadmissible under article 2 of the Optional Protocol.

e. Claim under article 7 regarding health

7.7 With respect to the author's apparent claim that the State party would violate his rights under article 7 of the Covenant by extraditing him because he has liver disease, kidney disease, a pituitary tumour, a small paraclinoid aneurysm, severe depression and suicidal ideation, and that he would not have access to the required medical treatment in China, the Committee notes his allegations that his health has deteriorated since the decision of the Minister of Justice in 2016 and that the Minister failed to take his claims into account. The Committee also notes that the author raised the same claims at the domestic level in 2021 and 2022, in the context of a new request for non-extradition addressed to the Minister of Justice. The Committee observes that the Ministry of Justice weighed the author's arguments, taking into consideration the medical documentation regarding his physical and mental health conditions, sought additional information from the author's medical professionals and then prepared a detailed briefing to the Minister, who considered it along with the author's submissions. The Committee notes that: in 2021 and 2022, the author was not taking any medication, receiving any treatment or undergoing any surgery for his physical health issues and did not require any at that time, as he was managing his mental health at home with anti-depressants and sleep medication; that his doctors had not recommended further intervention or treatment at that time; that his claim of headaches was vague and unsubstantiated and had not prompted an urgent medical response; that, although his counsel had asserted that he was at a significant risk of suicide and required significant psychiatric care, that was not supported by the medical documentation that he had provided; and that his medical professionals had not deemed it necessary to refer him to a kidney specialist for his kidney condition. The Committee also notes the finding of the Minister of Justice that the author's health conditions could be adequately managed in China, where he would have access to health care while detained, and that the assurances provided additional protection by allowing the State party's officials to monitor his health and facilitate medical examinations where required. In view of the foregoing, the Committee considers that the author has not sufficiently substantiated that the State party erred or failed in assessing his claim that his state of health precludes his extradition. That claim is therefore inadmissible under article 2 of the Optional Protocol.

f. Claim under article 9 regarding the basis of the arrest warrant issued in China

7.8 The author claims that, when they reviewed his second application for bail and related appeals, the State party's courts ignored his argument that the provisional arrest warrant issued in New Zealand was invalid because the arrest warrant that had been issued in China did not comply with the laws of China. Having reviewed those decisions, the Committee considers that this claim is not sufficiently substantiated and is therefore inadmissible under article 2 of the Optional Protocol.

- g. Claim under article 9 (1) regarding consideration of time spent in detention and the risk of lifelong detention

7.9 The author claims that the State party violated his rights under article 9 (1) of the Covenant by failing to seek an agreement from the Government of China that, if he were convicted in China, the period of his detention in New Zealand would be considered during sentencing. The Committee considers that the author has not explained how the State party's failure to seek such an agreement could have rendered his detention in New Zealand arbitrary. That aspect of the claim is therefore inadmissible *ratione materiae* under article 3 of the Optional Protocol. Having reviewed the findings of the courts and the advice provided by the Government of China on its laws relating to sentencing,<sup>4</sup> the Committee also considers that the author has not sufficiently substantiated the extraterritorial aspect of his claim under article 9 of the Covenant. He has not indicated how the State party would violate his rights under that provision by removing him to China in a manner that would create substantial grounds for believing that there is a real risk of irreparable harm such as that contemplated in articles 6 and 7 of the Covenant. The Committee therefore declares this aspect of the communication inadmissible under article 2 of the Optional Protocol.

- h. Claim under article 9 (3) regarding pretrial detention in New Zealand

7.10 Recalling its jurisprudence in which it stated that article 9 (3) of the Covenant does not apply in extradition proceedings,<sup>5</sup> the Committee declares the author's claim under article 9 (3) of the Covenant inadmissible *ratione materiae*.

- i. Claim under article 9 (4) regarding the lack of review of the basis of the extradition request

7.11 The author claims that the State party violated article 9 (4) of the Covenant by failing to allow him to challenge the substance of the extradition request. The Committee recalls that, under that provision, persons who are deprived of their liberty by arrest or detention have the right to take proceedings before a court to challenge the lawfulness of their detention. The Committee observes that article 9 of the Covenant does not require an extraditing State to conduct full trial-like proceedings for the offence underlying the request for extradition. The author filed and received reasoned judicial decisions on five applications for bail, three applications for a writ of habeas corpus and an application for discharge from extradition. In addition, the Committee notes the review by various courts and successive Ministers of Justice of the evidence underlying the extradition request, and the conclusion of the District Court (which was reportedly acknowledged by the author's counsel) that prima facie evidence existed to support the charge of murder, for the purpose of section 24 (2) (d) (i) of the Extradition Act 1999. The Committee considers that the author's claim under article 9 (4) of the Covenant is insufficiently substantiated and is therefore inadmissible under article 2 of the Optional Protocol.

- j. Claim under article 10 and 10 (3) regarding conditions of detention and undue delay

7.12 The author claims that the State party violated his rights under article 10 (3) of the Covenant by, inter alia, unduly delaying the domestic proceedings. Noting that article 10 (3) of the Covenant concerns convicted persons,<sup>6</sup> the Committee considers that this claim is inadmissible *ratione materiae* under article 3 of the Optional Protocol. Recalling that article 10 of the Covenant addresses conditions of detention for persons deprived of their liberty, and that the fact of detention is addressed in article 9,<sup>7</sup> the Committee refers to its findings in paragraph 7.6 above and considers that the author has not substantiated any separate claim under article 10 of the Covenant, and therefore finds the claim inadmissible under article 2 of the Optional Protocol.

<sup>4</sup> High Court of New Zealand, *Kim v. Minister of Justice*, Judgment, 31 August 2017 ([2017] NZHC 2109), paras. 141–153; and Supreme Court of New Zealand, *Minister of Justice v. Kyung Yup Kim*, Judgment, 4 June 2021 ([2021] NZSC 57), para. 432.

<sup>5</sup> *Griffiths v. Australia* (CCPR/C/112/D/1973/2010), para. 6.8.

<sup>6</sup> General comment No. 21 (1992) on humane treatment of persons deprived of their liberty, para. 10.

<sup>7</sup> General comment No. 35 (2014) on liberty and security of person, para. 59.

## k. Claim under article 14 regarding fair trial

7.13 The Committee notes the author's claim that the State party violated his rights under article 14, read alone and in conjunction with articles 7, 9 and 10 (3), article 14 (2) and article 7, read alone and in conjunction with article 14 of the Covenant, by unduly prolonging the extradition proceedings, violating the presumption of innocence, detaining him without a trial and failing to adequately consider that he would face a risk of torture and an unfair trial in China. Observing that the author is not a national of New Zealand, the Committee refers to its jurisprudence according to which proceedings relating to the extradition, expulsion and deportation of aliens do not fall within the ambit of a determination of "rights and obligations in a suit at law" within the meaning of article 14, but are governed by article 13 of the Covenant,<sup>8</sup> which applies to all procedures aimed at the obligatory departure of an alien.<sup>9</sup> The author did not invoke article 13 of the Covenant in his submissions. The Committee recalls that, although aliens shall be equal before the courts and tribunals, and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge or of rights and obligations in a suit at law,<sup>10</sup> even when decided by a court, the consideration of an extradition request does not amount to the determination of a criminal charge within the meaning of article 14.<sup>11</sup> The Committee therefore considers that the author's various claims in relation to article 14 of the Covenant, insofar as those claims relate to alleged deficiencies in the proceedings in New Zealand relating to his extradition, are inadmissible *ratione materiae*. Moreover, the Committee considers that, had the author invoked article 13 – which regulates only the procedure, not the substantive grounds for expulsion, and which does not offer the right of appeal to judicial courts – that claim would also be inadmissible under article 2 of the Optional Protocol.<sup>12</sup>

7.14 To the extent that the author's claim under article 14 of the Covenant is based on an extraterritorial risk of facing an unfair trial in China, the Committee considers that the author has not sufficiently substantiated how his rights under that provision would be violated by the State party through his removal to China in a manner that would create substantial grounds for believing that there is a real risk of irreparable harm of the type contemplated by articles 6 and 7 of the Covenant.<sup>13</sup> The Committee therefore considers that this aspect of the author's claim under article 14 of the Covenant is inadmissible under article 2 of the Optional Protocol.

## l. Admissible claims

7.15 The Committee considers that the author has sufficiently substantiated his claims under article 7 (risk of torture in China) and article 9 (1) (arbitrary arrest and detention in New Zealand) for the purposes of admissibility. It therefore declares those claims admissible and proceeds to examine them on the merits.

<sup>8</sup> For example, *Lapshin v. Belarus* (CCPR/C/135/D/2945/2017), para. 8.4; *N.P.S.S. and M.K. v. Canada* (CCPR/C/125/D/2238/2013), para. 8.7; *P.K. v. Canada* (CCPR/C/89/D/1234/2003), paras. 7.4 and 7.5; *X v. Denmark* (CCPR/C/110/D/2007/2010), para. 8.5; and *Chadzjian et al. v. Netherlands* (CCPR/C/93/D/1494/2006), para. 8.4.

<sup>9</sup> General comment No. 15 (1986) on the position of aliens under the Covenant, para. 9.

<sup>10</sup> *Ibid.*, para. 7.

<sup>11</sup> For example, *I.A. v. Lithuania* (CCPR/C/126/D/2989/2017), para. 11.10.

<sup>12</sup> *Y v. Denmark* (CCPR/C/136/D/2774/2016), para. 6.5; *S.A.H. v. Denmark* (CCPR/C/121/D/2419/2014), paras. 10.4–10.6; *B.D.K. v. Canada* (CCPR/C/125/D/3041/2017), para. 6.6; *M.P., A.M.P. and A.N.P. v. Denmark* (CCPR/C/121/D/2643/2015), para. 7.4; *F.M. v. Denmark* (CCPR/C/115/D/2284/2013), para. 8.6; and *M.M. v. Denmark* (CCPR/C/125/D/2345/2014), para. 7.6.

<sup>13</sup> General comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 12; and *Z v. Denmark* (CCPR/C/137/D/2795/2016), para. 6.13. Furthermore, in its briefing to the Minister of Justice dated 23 November 2015, the Ministry of Justice noted the following: "Chinese officials have advised that the only likely reason why [the author's] hearing would be closed would be to protect the privacy of the deceased or her family. If this occurred, [New Zealand] diplomatic and consular representatives would be entitled to unedited recordings of the closed session(s) under paragraph 10 (ii) of the assurances" (para. 424). Also, *V.D. v. Russian Federation* (CCPR/C/116/D/2198/2012), para. 5.7.



*Consideration of the merits*

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

## a. Article 7

8.2 The Committee notes that the Government of China requested the extradition of the author in the context of criminal proceedings under article 232 of the Criminal Law of China, regarding the murder of Peiyun Chen. The State party obtained assurances from the Government of China and maintains that they suffice to protect the author's Covenant rights while giving effect to the rule of law by allowing the process of determining criminal responsibility for the killing of Ms. Chen to move forward. The Committee notes the author's position that no one should be extradited to China because of its human rights record and widespread and systematic use of torture in law enforcement, and because the assurances are ineffective. The Committee notes the various reports provided by the author to support his position that the assurances will not protect him.<sup>14</sup>

8.3 The Committee recalls its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, in which it referred to the obligation of States parties 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 (para. 12). The risk must be personal, and there is a high threshold for providing substantial grounds to establish the existence of a real risk of irreparable harm. In making such an assessment, all relevant facts and circumstances must be considered, including the general human rights situation in the country to which the author faces removal.<sup>15</sup> Considerable weight should be given to the assessment conducted by the State party, and it is generally for the organs of States parties to the Covenant to review or evaluate the facts and evidence in order to determine whether such a risk exists, unless it is found that the evaluation was clearly arbitrary or amounted to a manifest error or denial of justice.<sup>16</sup>

8.4 The Committee notes that the Covenant does not categorically prohibit sending States parties from relying on diplomatic assurances provided by requesting States in the context of expulsions or extraditions when non-refoulement claims are raised.<sup>17</sup> The Committee also notes its jurisprudence indicating that reports of torture and widespread human rights abuses in a receiving State do not in and of themselves suffice to demonstrate that a person would personally face torture upon extradition to that State, regardless of the existence of assurances.<sup>18</sup> Nonetheless, the existence of assurances, their content and the existence and implementation of enforcement mechanisms are relevant to the overall determination of whether, in fact, a real risk of torture exists.<sup>19</sup> Assurances should contain a monitoring mechanism and be safeguarded by practical arrangements as would provide for their effective implementation by the sending and the requesting States.<sup>20</sup> However, the absence of such a monitoring mechanism does not alone establish a violation of article 7 of the Covenant by the sending State in cases of extradition where non-refoulement claims have been raised, as all relevant circumstances must be considered.<sup>21</sup> The issue of whether the State party's authorities properly assessed the risk of torture faced by the author in the event of his

<sup>14</sup> Supreme Court of New Zealand, *Minister of Justice v. Kyung Yup Kim*, Judgment, 13 April 2022 ([2022] NZSC 44), paras. 27, 32, 33, 35 and 38.

<sup>15</sup> For example, *Z v. Denmark*, para. 6.5; and *A.B.H. v. Denmark* (CCPR/C/126/D/2603/2015), para. 9.4.

<sup>16</sup> For example, *Teitiota v. New Zealand* (CCPR/C/127/D/2728/2016), para. 9.3; and *Z.H. v. Denmark* (CCPR/C/119/D/2602/2015), para. 7.4.

<sup>17</sup> See, for example, *F.A. v. Russian Federation* (CCPR/C/123/D/2189/2012); *T.T. v. Ukraine* (CCPR/C/134/D/2985/2017); *K.B. v. Russian Federation* (CCPR/C/116/D/2193/2012); and *Israil v. Kazakhstan* (CCPR/C/103/D/2024/2011).

<sup>18</sup> See, for example, *V.D. v. Russian Federation*; and *A.L. v. Italy* (CCPR/C/126/D/2570/2015).

<sup>19</sup> *Alzery v. Sweden* (CCPR/C/88/D/1416/2005), para. 11.3; and *Valetov v. Kazakhstan* (CCPR/C/110/D/2104/2011), para. 14.5.

<sup>20</sup> *Alzery v. Sweden*, para. 11.5; *Valetov v. Kazakhstan*, para. 14.5; *Maksudov et al. v. Kyrgyzstan*, communications No. 1461/2006, No. 1462/2006, No. 1476/2006 and No. 1477/2006, para. 12.5.

<sup>21</sup> *Yusub v. Russian Federation* (CCPR/C/138/D/2947/2017), paras. 12.7 and 12.8.

extradition to China should be evaluated on the basis of the information that was available to the State party's authorities when they issued the decisions relating to his extradition.<sup>22</sup>

8.5 In the present case, the Committee notes that the Extradition Act 1999 provides for both mandatory restrictions on surrender upon a showing of a substantial risk of torture and discretionary restrictions on surrender in the case of extraordinary or compelling circumstances. The Committee also notes that the assurances provided state, *inter alia*, that as a State party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Government of China will comply with the Convention to ensure that the author will not be subjected to torture or other cruel, inhuman and degrading treatment or punishment, and will honour the assurances. The assurances are written and formal in nature, and were provided before, during and after in-person meetings in New Zealand and China with senior officials of the Government of China, including the Ambassador, an assistant judge of the Supreme People's Court and senior officials from the Ministry of Foreign Affairs, the Ministry of Public Security, the Supreme People's Procuratorate and the Ministry of Justice. The Committee considers that the assurances are sufficient and concrete.

8.6 The Committee notes that the State party made it clear during the in-person meetings between senior officials that the decision on surrender and the adequacy of any assurances would be determined by the Minister of Justice alone, and that the provision of assurances was no guarantee that the author would be surrendered. The successive Ministers of Justice and courts examined the author's arguments regarding both the mandatory and discretionary grounds for refusal to surrender, including his claim that the assurances and monitoring mechanism are ineffective. In assessing his claims, the authorities examined relevant human rights treaties and jurisprudence, including that of the Human Rights Committee. When so directed, the Minister of Justice sought and procured additional information and assurances from the Government of China, and then re-evaluated whether to surrender the author in the light of that new information, including by consulting the Ministry of Foreign Affairs and Trade regarding monitoring capacity and the assurances. The Ministry of Justice stated that officials would initiate arrangements for a first visit as soon as the date of the author's surrender was confirmed.

8.7 According to the assurances, if extradited, the author will be detained and will serve any sentence of imprisonment in Shanghai, where the State party's consular officials are based; during the investigation phase, the State party's diplomatic or consular representatives will be able to visit the author every 48 hours, or more often if the author requests an additional visit or visits; any additional visits requested by the author will be arranged as quickly as possible; during all periods of his detention, including pretrial detention, the State party's representatives will be informed in a timely fashion of the place of his detention and any changes thereto; during all periods of the author's detention, including pretrial detention, the author will be able to contact the State party's representatives at all reasonable times for the purpose of providing information on his treatment and will be provided with facilities to do so by facsimile, email or telephone; such contact will not be censored or edited in any way; during all periods of his detention, including pretrial detention, the State party's representatives may visit the author at his place of detention and may be accompanied by one or more of the following people chosen by the State party's diplomatic or consular representatives: an interpreter, a medical professional qualified to practise in China and a legal expert licensed to practise in China; such regular visits would be permitted every 15 days and additional visits would be arranged at the request of the State party's representatives; the visits will include the opportunity to interview the author in private, without monitoring, in safe facilities; the right of persons in custody to receive medical treatment is guaranteed; the author will have access to antidepressant medication and sleeping pills free of charge; the visits will allow for the author, upon his consent, to be examined by medical professionals chosen by the State party's representatives; such medical examinations will be in private, although, at the request of the authorities of the Government of China, a medical professional chosen by them may be present at such examinations; the visits would include access to the parts of the detention facility to which the author had access, including

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<sup>22</sup> For example, *Lapshin v. Belarus*, para. 9.3.

his living quarters; the State party's representatives will have the opportunity to meet with other persons in private, including prison staff, procuratorate, medical professionals and, with the author's consent, his lawyer; they will also have access to other information relevant to the author's treatment and conditions of detention; there will be no reprisals against individuals supplying information regarding the author's treatment to the State party's representatives if the information is provided in good faith; the State party's representatives will be provided with full and unedited recordings of all pretrial interrogations and court proceedings relating to the author within 48 hours; and if any issue arises in relation to the interpretation or application of the assurances, the representatives of both States will immediately enter into consultations to resolve the issue in a manner satisfactory to both sides.

8.8 The Committee notes the determination by the Ministry of Justice that the Ministry of Foreign Affairs and Trade would indeed be able to visit the author as stipulated in the assurances, would be able to follow up with the authorities in China regarding compliance with their undertakings, and would be able to disclose information to third parties in the unlikely event of non-compliance. The State party's Minister of Foreign Affairs instructed his officials to visit the author as frequently as needed to ensure his well-being during the investigation phase and stated that there would be a dedicated resource at the State party's consulate in Shanghai to guarantee that the visits would take place every 48 hours or even on a daily basis, if needed. The Committee also notes that the State party's consular officials have experience in conducting monitoring visits to detention facilities in China, including for its own nationals and for non-nationals.

8.9 The Committee observes that the State party's authorities did not dispute the author's allegations regarding a general risk of torture by law enforcement authorities in China and did not merely rely on legal provisions in China that, inter alia, prohibit torture to extract confessions and provide for videotaping or recording of pretrial interrogations for certain serious offences. Rather, the State party concluded after consideration of relevant reports that on the basis of those reports, assurances were needed, and that in the light of the assurances, the author would not face a personal risk of torture given his individual circumstances. The Committee notes that while the author contests the effectiveness of the assurances in his case, he does not allege that he has previously been tortured or ill-treated by the authorities in China and he does not provide information indicating that he could face such treatment owing to a particular vulnerability such as his ethnicity, nationality or activities.

8.10 The author claims that he faces a personal risk of being tortured because he is accused of committing murder and has resisted extradition, thus raising the political profile of his case. The Committee notes that the State party's courts examined those claims and that, while extradition may have a political dimension, the murder of Ms. Chen was, in the alleged circumstances, not political but criminal in nature. The Committee considers that given the assurances and monitoring regime, it has not been established that political considerations, including the raised profile of the author's case, prejudiced the investigation or aggravated the risk that he will be tortured in China.

8.11 With respect to the author's claim that he faces a risk of psychological or undetectable forms of torture, the Ministry of Justice also addressed whether it would be able to detect torture if it occurred and, before deciding to surrender him, sought additional information about the frequency of visits to the author and the timing of its access to recordings of pretrial investigations. During the final stage of court proceedings, the Supreme Court granted the author's request to submit new evidence, in the form of more recent reports concerning conditions for detainees in China. The reports were submitted in late 2021 by various professors and by a lawyer/consultant who had practised law in China until 2003 and indicated concerns, inter alia, about the normalized use of torture in China and the speculative nature of reliance on assurances. The Court responded to the concerns raised and, given the factors previously mentioned (see paras. 8.5–8.10 above), concluded that no substantial grounds existed for believing that the author would be at risk of torture.<sup>23</sup>

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<sup>23</sup> Supreme Court of New Zealand, *Minister of Justice v. Kyung Yup Kim*, Judgment, 13 April 2022 ([2022] NZSC 44), para. 79.

8.12 Having examined the content of the decisions of the domestic authorities and the assurances, the Committee considers that the State party sufficiently considered the author's specific arguments at various stages of the proceedings as to why he would face a risk of treatment contrary to article 7 of the Covenant in China. The Committee considers that the State party's authorities acted with due diligence and care in requesting diplomatic assurances. The Committee also considers that the authorities did not disregard the author's arguments or evidence regarding human rights conditions in China and the effectiveness of diplomatic assurances from China, but instead weighed those elements against a number of other elements, including expert advice sought by the domestic authorities, the jurisprudence of the Committee, courts and other human rights bodies, and the State party's own experience with China in similar cases.

8.13 The Committee considers that, while the author disagrees with the factual conclusions of the State party's authorities, the authorities considered the information available to them, including recent reports relating to the use of assurances in the author's case, jurisprudence of courts and other treaty bodies, and the specific arguments and submissions presented on behalf of the author. The Committee thus considers that the author has not demonstrated that the State party's decision to extradite him after finding that he would not face a substantial risk of torture in China was clearly arbitrary or amounted to a manifest error or denial of justice.

8.14 On the basis of the information above, the Committee concludes that the information before it does not disclose a violation of the author's rights under article 7 of the Covenant.

b. Article 9 (1)

8.15 Regarding the author's claim that he was arbitrarily arrested and detained in violation of article 9 of the Covenant, the Committee has noted the long timespan of the events.

8.16 The Committee notes the State party's observation that the length of the proceedings resulted from the author's exercise of his rights to contest his extradition and detention, and from the comprehensive nature of the reviews conducted by the State party's authorities. The Committee also notes that, because the State party does not have a bilateral extradition treaty with China, the proceedings were conducted under the Extradition Act 1999, which requires a bifurcated and sequential decision-making process (a judicial eligibility decision, followed by a ministerial surrender decision). The Committee further notes the information in the 2014 briefing of the Ministry of Justice to the effect that, as the author is a foreign national, the State party did not have an automatic right of access to him in China and would therefore need to negotiate with the Government of China to obtain such access in order to monitor his well-being in detention.

8.17 Article 9 (1) of the Covenant provides that no one may be subjected to arbitrary arrest or detention. The Committee refers to its general comment No. 35 (2014) on liberty and security of person, in which it stated that an arrest or detention may be authorized by domestic law and nonetheless be arbitrary (para. 12). The notion of "arbitrariness" is not to be equated with "against the law" but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.<sup>24</sup> The Committee considers that in an overall assessment regarding arbitrariness in the duration of extradition proceedings, it is relevant to consider whether the State party conducted the proceedings with due diligence, and the causes of any delays.

8.18 The Committee notes that the decisions to detain the author were based on the seriousness of the crime of which the author is accused (intentional homicide), the strength of the evidence against him and the flight risk he poses, which is based not only on his possession of a foreign passport but also on his departure from China shortly after the crime. In its judgments of 28 February 2012 and 1 March 2013,<sup>25</sup> when denying the author's appeals against the denial of his first and second applications for bail, the High Court assessed his arguments and noted that counsel had conceded the existence of a prima facie case and had

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<sup>24</sup> For example, *Cayzer v. Australia* (CCPR/C/135/D/2981/2017), para. 8.10.

<sup>25</sup> High Court of New Zealand, *Kim v. The People's Republic of China*, Judgment, 28 February 2012 ([2012] NZHC 294) and Judgment, 1 March 2013 ([2013] NZHC 388), respectively.

prolonged the eligibility proceedings by requesting numerous postponements. The Court considered that the author's history of offending, while relatively minor, indicated a disturbing willingness to disobey court orders; that he was a flight risk due to the seriousness of the offence and the strength of the evidence against him; and that that risk was too great to be adequately addressed by electronic monitoring and offers of sureties from family members, because electronic monitoring merely provided timely warning of an attempt to abscond but did not sufficiently reduce the risk of flight, and in the judge's view, the offer of sureties would not outweigh the family members' desire to assist a close family member in avoiding a prosecution process that appeared to carry a real risk of conviction. The Committee also notes that in its decision of 17 December 2015 on the author's fourth application for bail,<sup>26</sup> the High Court evaluated his claims regarding his mental health (relating to major depressive disorder, anxiety and a risk of suicide), which he had raised for the first time on 9 July 2015, and noted that the author had access to medical care and that his issues could be safely managed in the remand facility or in a designated clinic if necessary. The Committee further notes that the granting of bail upon the author's fifth request in 2016 was motivated by the reasoning that, although custodial detention had been justified until that point, the considerable time taken by the author's litigation challenges required his release on electronic bail.

8.19 The Committee considers that the author had the opportunity to challenge the lawfulness of his detention throughout the proceedings, both in law and in practice. However, the Committee notes the finding of the High Court on 3 December 2014 – in its decision on the author's second application for habeas corpus – regarding the warrant issued by the District Court on 29 November 2013 for the author's continued detention, under section 70 of the Extradition Act 1999.<sup>27</sup> The High Court considered that that warrant had expired when, on 12 September 2014, the author filed a notice of abandonment of his appeal against the eligibility decision of the District Court. While the High Court considered that the expiration of the warrant was moot because the District Court had issued a new warrant under section 26 (1) of the Act on 2 December 2014, the Committee notes that the State party has not commented on the finding of the High Court that the warrant issued on 29 November 2013 under section 70 of the Act had expired before the issuance of the new warrant. Accordingly, the Committee considers that, since the information before it indicates that the detention of the author from 12 September to 1 December 2014 had no lawful basis, it was arbitrary, in violation of article 9 (1) of the Covenant.

8.20 With the exception noted above and after reviewing the detailed timeline of events and the basis of the decisions that were provided to it, the Committee considers that the author's detention was lawful and justified by factors referred to above. The Committee also considers that the author's decision not to flee New Zealand since he was granted bail does not render his detention pending extradition arbitrary. The Committee considers that with the exception noted above, nothing suggests that the State party's authorities intentionally or negligently protracted the author's detention or otherwise acted without due diligence in advancing the extradition proceedings in conformity with domestic law while the author was detained. The Committee recalls that the author had several opportunities to contest his detention through processes that resulted in reasoned decisions by several courts justifying his continued detention.

8.21 The Committee concludes that the author's detention between 12 September and 1 December 2014, inclusive, was arbitrary and violated article 9 (1) of the Covenant, while the remaining periods of his detention and release on restrictive bail were not arbitrary and did not violate article 9 (1) of the Covenant.

<sup>26</sup> High Court of New Zealand, *Kim v. Attorney-General*, Judgment, 17 December 2015 ([2015] NZHC 3290).

<sup>27</sup> High Court of New Zealand, *Kim v. The Prison Manager, Mt. Eden Corrections Facility and Attorney-General*, Judgment, 3 December 2014 ([2014] NZHC 3051). The High Court also noted submissions as to whether the warrant should have been issued under section 70 or section 26 (1) of the Act. According to the Court, the author's counsel had previously proposed that section 70 of the Act applied, and the District Court judge had issued the warrant under that provision on 29 November 2013.

9. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it do not disclose a violation of the author's rights under article 7 of the Covenant, but do disclose a violation of the author's rights under article 9 (1) of the Covenant.

10. 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 to provide the author with adequate compensation. The State party is also under an obligation to take steps to prevent similar violations from 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 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 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

### **Joint opinion of Committee members Rodrigo A. Carazo, Carlos Gómez Martínez and Imeru Tamerat Yigezu (partially dissenting)**

1. In its Views, the Committee finds a violation of article 9 (1) of the Covenant on the grounds that the author's deprivation of liberty lacked legal cover during the period from 12 September to 1 December 2014, inclusive (para. 8.19 of the Views).
2. We consider that this decision is inconsistent *extra petita* in that it alters the terms in which the author of the communication raised it, which may have caused the State party to be defenceless.
3. As can be seen from paragraph 3.3 of the Views, the author complained about the excessive duration of his deprivation of liberty, which allegedly lasted 11 years and caused irreparable damage to his physical and mental health, but without specifying different periods of time during those years or singling out any particular period during which his deprivation of liberty was not covered by the law.
4. However, in its Views, the Committee makes a detailed analysis of the different periods during which the author was deprived of his liberty within the extradition proceedings. It concludes that in one period in particular – between 12 September and 1 December 2014 – the author's imprisonment lacked the relevant legal coverage, in the absence of the corresponding judicial authorization for his deprivation of liberty during that period of time, which was corroborated in the national jurisdiction by the judgment of the High Court of 3 December 2014.
5. Consistency requires a correlation between the motions in the complaint deduced in a timely manner and the decision of the Committee, in accordance with the motion and the cause of action. Lack of consistency affects the principle of contradiction since, if the terms in which the complaint was made are substantially modified, the State party is rendered defenceless, as it did not have the opportunity to argue what was in its interests because it was not aware of the specific issue that was ultimately taken into account by the Committee as the basis for its Views.
6. In the present case, there has been precisely such a change in the *causa petendi*, which would explain the State party's failure to provide an adequate basis for the author's deprivation of liberty during the period from 12 September to 1 December 2014, since the author, in formulating his complaint, did not expressly refer to that fact. That may explain why, as reflected in paragraph 8.19 of the Views, the State party did not comment on that issue.
7. Had a specific claim of lack of legal cover for the deprivation of liberty been made for a specific period, including the period from 12 September to 1 December 2014, the State party could have alleged that the complainant did not make any claim to the domestic authorities to compensate him for this unlawful deprivation of liberty by, for example, payment of appropriate compensation. That would perhaps have enabled the State party to invoke the non-exhaustion of domestic remedies as a basis for the inadmissibility of the present complaint.
8. In short, the alteration of the factual grounds on which the complaint is based may have prevented the State party from putting forward what it would have considered relevant to the defence of its interests. Therefore, we consider that the Committee should not have found the violation of article 9 (1) of the Covenant, as it ultimately concluded.

## Annex II

### **Individual opinion of José Manuel Santos Pais (partially dissenting)**

1. I fully agree with the Committee's findings of inadmissibility of most of the author's claims (paras. 7.1–7.14 of the Views) and that there is no violation of the author's rights under article 7 of the Covenant (paras. 8.2–8.14). However, I disagree with the finding of a violation of article 9 (1) regarding the detention of the author between 12 September and 1 December 2014.
2. The author is a national of the Republic of Korea (para. 1.1), with the status of a permanent resident in New Zealand (para. 2.1). He was arrested in June 2011 following a request from the Government of China for his arrest and extradition on suspicion of having murdered a young woman. The request was supported by forensic and circumstantial evidence (para. 2.2).
3. In the absence of a bilateral extradition treaty between the two States, the extradition proceedings in New Zealand were conducted under the Extradition Act 1999, entailing a judicial decision on eligibility followed by a ministerial decision on surrender (para. 2.3). Since the author is a foreign national, the State party had to negotiate with the Government of China to obtain diplomatic assurances, which were written, formal and unprecedented in their comprehensiveness and sophistication. The Committee acknowledged that the State party's authorities acted with due diligence and care in requesting such assurances and duly weighed the author's arguments regarding human rights conditions in China and the effectiveness of diplomatic assurances against expert advice, the jurisprudence of the Committee, courts and other human rights bodies, and the State party's own experience with China in similar cases (para. 8.12).
4. After several requests for postponement of eligibility proceedings, in November 2013, the District Court found the author eligible for surrender. Successive Ministers of Justice decided that the author was to be surrendered in 2015, 2016, 2021 and 2022 (paras. 2.3–2.6). Following applications for judicial review and appeals by the author, the domestic courts issued several decisions, concluding with the Supreme Court's decision of April 2022 allowing the surrender of the author. The Committee acknowledged in this regard that successive Ministers of Justice and different courts examined the author's arguments regarding both the mandatory and discretionary grounds for refusal to surrender, including his claim that the assurances and monitoring mechanism were ineffective (para. 8.6).
5. Having been placed in detention in June 2011, the author filed five applications for bail and related appeals, three applications for a writ of habeas corpus and related appeals and an application for discharge from extradition owing to unreasonable delay (para. 2.7).
6. The Committee noted, however: that the author availed himself of judicial remedies; that individualized and timely decisions were taken on the author's applications and appeals for release from detention; the seriousness of the crime of which he is accused; and the evidence reviewed by the State party's authorities in support of the accusation (para. 7.6). The Committee acknowledged the author's various requests for postponement and extension of the proceedings and his additional submissions and applications during his detention and release on restrictive bail.
7. The Committee concluded that part of the detention of the author was arbitrary (para. 8.21), while also acknowledging that the length of the proceedings resulted from the author's exercise of his rights to contest his extradition and detention, and from the comprehensive nature of the reviews conducted by the State party's authorities (para. 8.16). The Committee noted that the decisions to detain the author were based on the seriousness of the crime of which he is accused (intentional homicide), the strength of the evidence against him and the flight risk (para. 8.18). It also acknowledged that the warrant expired when the author abandoned his appeal against the eligibility decision of District Court, in



September 2014, and that the expiration was rendered moot when the District Court issued a new warrant (para. 8.19).

8. According to the Committee's case law, what constitutes a reasonable time (or undue delay) depends upon the circumstances and complexity of the case, the conduct of the accused and the manner in which the matter was dealt with by administrative and judicial authorities.<sup>1</sup> The present case was complex. The Committee acknowledged that the author's detention was lawful and justified, and with the exception noted (see para. 1 above), nothing suggests that the State party's authorities intentionally or negligently protracted the author's detention or otherwise acted without due diligence in advancing the extradition proceedings in conformity with domestic law while the author was detained. The Committee also recalled that the author had several opportunities to contest his detention through processes, which resulted in reasoned decisions by several courts justifying his continued detention (para. 8.20).

9. The length of the proceedings was in fact mainly due to the author's successive appeals, which were considered with great care by the State party's authorities. The delay in the proceedings must, moreover, be assessed based on their entire length, from the initial request to the final and conclusive judgment on appeal or dismissal of the proceedings.<sup>2</sup>

10. I concur with the argument expressed in the joint opinion in annex I above that the Committee's decision is inconsistent *extra petita* in that it alters the terms in which the author of the communication raised his claims under article 9 of the Covenant (paras. 3.3 and 3.6 of the Views). Furthermore, the State party could not comment on the argument used by the Committee to conclude for a violation. Lastly, the author did not seek compensation domestically for the alleged arbitrary detention resulting from the judicial lapse, thus failing to exhaust domestic remedies on this issue.

11. Therefore, I would not have concluded that the State party had violated article 9 (1) of the Covenant.

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<sup>1</sup> *Cedeño v. Bolivarian Republic of Venezuela* (CCPR/C/106/D/1940/2010), para. 7.7; *Peirano Basso v. Uruguay* (CCPR/C/99/D/1887/2009), para. 10.3; *Fa'afete v. New Zealand* (CCPR/C/114/D/1909/2009), para. 7.3; *Krasnov v. Kyrgyzstan* (CCPR/C/101/D/1402/2005), para. 8.7; and Human Rights Committee, general comment No. 32 (2007), para. 35.

<sup>2</sup> *Engo v. Cameroon* (CCPR/C/96/D/1397/2005), para. 7.9; *Lumanog and Santos v. Philippines* (CCPR/C/92/D/1466/2006), para. 8.4; *Rouse v. Philippines* (CCPR/C/84/D/1089/2002), para. 7.4; *Taright et al. v. Algeria* (CCPR/C/86/D/1085/2002), para. 8.5; and *Krasnov v. Kyrgyzstan* (CCPR/C/101/D/1402/2005), para. 8.7.