



United Nations

Report of the Human Rights Committee

Volume II (Part Two)

**105th session
(9–27 July 2012)**

**106th session
(15 October–2 November 2012)**

**107th session
(11–28 March 2013)**

**General Assembly
Official Records
Sixty-eighth session
Supplement No. 40 (A/68/40)**

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United Nations • New York, 2013

Note

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Contents

Paragraphs Page

Volume I

- I. Jurisdiction and activities
 - A. States parties to the International Covenant on Civil and Political Rights and to the Optional Protocols
 - B. Sessions of the Committee
 - C. Election of officers
 - D. Special rapporteurs
 - E. Working group and country report task forces
 - F. Related United Nations human rights activities
 - G. Derogations pursuant to article 4 of the Covenant
 - H. General comments under article 40, paragraph 4, of the Covenant
 - I. Staff resources and translation of official documents
 - J. Publicity for the work of the Committee
 - K. Publications relating to the work of the Committee
 - L. Future meetings of the Committee
 - M. Submission of the Committee's Annual Report to the General Assembly
 - N. Adoption of the report
- II. Methods of work of the Committee under article 40 of the Covenant and cooperation with other United Nations bodies
 - A. Recent developments and decisions on procedures
 - B. Follow-up to concluding observations
 - C. Links to other human rights treaties and treaty bodies
 - D. Cooperation with other United Nations bodies
- III. Submission of reports by States parties under article 40 of the Covenant
 - A. Reports submitted to the Secretary-General from April 2012 to March 2013
 - B. Overdue reports and non-compliance by States parties with their obligations under article 40
 - C. Periodicity with respect to States parties' reports examined during the period under review
- IV. Consideration of reports submitted by States parties under article 40 of the Covenant and examinations of the situation in States parties in the absence of reports under rule 70 of the rules of procedure
 - Armenia
 - Iceland
 - Kenya
 - Lithuania

Maldives
Bosnia and Herzegovina
Germany
Philippines
Portugal
Turkey
Angola
Macao, China
Hong Kong, China
Paraguay
Peru
Belize

- V. Consideration of communications under the Optional Protocol
 - A. Progress of work
 - B. Committee's caseload under the Optional Protocol
 - C. Approaches to considering communications under the Optional Protocol
 - D. Individual opinions
 - E. Cooperation by the States parties in the examination of communications
 - F. Issues considered by the Committee
 - G. Remedies called for under the Committee's Views
- VI. Follow-up on individual communications under the Optional Protocol
 - A. Follow-up information received since the previous annual report
 - B. Meetings of the Special Rapporteur for follow-up on Views with States parties' representatives
- VII. Follow-up to concluding observations
 - A. Follow-up report adopted by the Committee during its 105th session
 - B. Follow-up report adopted by the Committee during its 106th session
 - C. Follow-up report adopted by the Committee during its 107th session

Annexes

- I. States parties to the International Covenant on Civil and Political Rights and to the Optional Protocols, and States which have made the declaration under article 41 of the Covenant as at 28 March 2013
 - A. States parties to the International Covenant on Civil and Political Rights
 - B. States parties to the Optional Protocol
 - C. States parties to the Second Optional Protocol, aiming at the abolition of the death penalty
 - D. States which have made the declaration under article 41 of the Covenant

- II. Membership and officers of the Human Rights Committee, 2012–2013
 - A. Membership of the Human Rights Committee
 - B. Officers
- III. Submission of reports and additional information by States parties under article 40 of the Covenant (as at 28 March 2013)
- IV. Status of reports and situations considered during the period under review, and of reports still pending before the Committee
 - A. Initial reports
 - B. Second periodic reports
 - C. Third periodic reports
 - D. Fourth periodic reports
 - E. Fifth periodic reports
 - F. Sixth periodic reports
 - G. Seventh periodic reports
- V. Table on follow-up to concluding observations
- VI. Decision of the Human Rights Committee to request approval from the General Assembly for additional resources in 2014 and 2015
- VII. Programme budget implications of the Committee's decision
- VIII. Paper on the relationship of the Human Rights Committee with national human rights institutions, adopted by the Committee at its 106th session (15 October–2 November 2012)

Volume II (Part One)

- IX. Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights
 - A. Communication No. 1226/2003, *Korneenko v. Belarus*
(Views adopted on 20 July 2012, 105th session)
Appendix
 - B. Communication No. 1303/2004, *Chiti v. Zambia*
(Views adopted on 26 July 2012, 105th session)
 - C. Communication No. 1548/2007, *Kholodova v. Russian Federation*
(Views adopted on 1 November 2012, 106th session)
 - D. Communication No. 1558/2007, *Katsaris v. Greece*
(Views adopted on 19 July 2012, 105th session)
 - E. Communication No. 1628/2007, *Pavlyuchenkov v. Russian Federation*
(Views adopted on 20 July 2012, 105th session)
 - F. Communication No. 1744/2007, *Narrain et al. v. Mauritius*
(Views adopted on 27 July 2012, 105th session)

- G. Communication No. 1753/2008, *Guezout et al. v. Algeria*
(Views adopted on 19 July 2012, 105th session)
Appendix
- H. Communication No. 1779/2008, *Mezine v. Algeria*
(Views adopted on 25 October 2012, 106th session)
- I. Communication No. 1784/2008, *Schumilin v. Belarus*
(Views adopted on 23 July 2012, 105th session)
- J. Communication No. 1785/2008, *Olechkevitch v. Belarus*
(Views adopted on 18 March 2013, 107th session)
Appendix
- K. Communication No. 1786/2008, *Kim et al. v. Republic of Korea*
(Views adopted on 25 October 2012, 106th session)
Appendices
- L. Communication No. 1787/2008, *Kovsh (Abramova) v. Belarus*
(Views adopted on 27 March 2013, 107th session)
Appendix
- M. Communication No. 1790/2008, *Govsha et al. v. Belarus*
(Views adopted on 27 July 2012, 105th session)
- N. Communication No. 1791/2008, *Boudjemai v. Algeria*
(Views adopted on 22 March 2013, 107th session)
Appendix
- O. Communication No. 1803/2008, *Bulgakov v. Ukraine*
(Views adopted on 29 October 2012, 106th session)
- P. Communication No. 1804/2008, *Il Khwildy v. Libya*
(Views adopted on 1 November 2012, 106th session)
Appendix
- Q. Communication No. 1805/2008, *Benali v. Libya*
(Views adopted on 1 November 2012, 106th session)
Appendix
- R. Communication No. 1806/2008, *Saadoun et al. v. Algeria*
(Views adopted on 22 March 2013, 107th session)
Appendix
- S. Communication No. 1807/2008, *Mechani v. Algeria*
(Views adopted on 22 March 2013, 107th session)
Appendix
- T. Communication No. 1821/2008, *Weiss v. Austria*
(Views adopted on 24 October 2012, 106th session)
- U. Communication No. 1830/2008, *Pivonos v. Belarus*
(Views adopted on 29 October 2012, 106th session)

- V. Communication No. 1835/2008, *Yasinovich v. Belarus*
Communication No. 1837/2008, *Shevchenko v. Belarus*
(Views adopted on 20 March 2013, 107th session)
- W. Communication No. 1836/2008, *Katsora v. Belarus*
(Views adopted on 24 October 2012, 106th session)
- X. Communication No. 1852/2008, *Singh v. France*
(Views adopted on 1 November 2012, 106th session)
- Y. Communication No. 1861/2009, *Bakurov v. Russian Federation*
(Views adopted on 25 March 2013, 107th session)
- Z. Communication No. 1863/2009, *Maharjan v. Nepal*
(Views adopted on 19 July 2012, 105th session)
- AA. Communication No. 1867/2009, *Levinov v. Belarus*
Communication No. 1936/2010, *Levinov v. Belarus*
Communication No. 1975/2010, *Levinov v. Belarus*
Communication No. 1977/2010, *Levinov v. Belarus*
Communication No. 1978/2010, *Levinov v. Belarus*
Communication No. 1979/2010, *Levinov v. Belarus*
Communication No. 1980/2010, *Levinov v. Belarus*
Communication No. 1981/2010, *Levinov v. Belarus*
Communication No. 2010/2010, *Levinov v. Belarus*
(Views adopted on 19 July 2012, 105th session)
- BB. Communication No. 1912/2009, *Thuraisamy v. Canada*
(Views adopted on 31 October 2012, 106th session)
- Appendix
- CC. Communication No. 1913/2009, *Abushaala v. Libya*
(Views adopted on 18 March 2013, 107th session)
- DD. Communication No. 1917/2009, *Prutina et al. v. Bosnia and Herzegovina*
Communication No. 1918/2009, *Zlatarac et al. v. Bosnia and Herzegovina*
Communication No. 1925/2009, *Kozica et al. v. Bosnia and Herzegovina*
Communication No. 1953/2010, *Čekić et al. v. Bosnia and Herzegovina*
(Views adopted on 28 March 2013, 107th session)
- Appendix
- EE. Communication No. 1932/2010, *Fedotova v. Russian Federation*
(Views adopted on 31 October 2012, 106th session)
- FF. Communication No. 1940/2010, *Cedeño v. Bolivarian Republic of Venezuela*
(Views adopted on 29 October 2012, 106th session)
- GG. Communication No. 1945/2010, *Achabal Puertas v. Spain*
(Views adopted on 27 March 2013, 107th session)
- Appendix
- HH. Communication No. 1957/2010, *Lin v. Australia*
(Views adopted on 21 March 2013, 107th session)
- II. Communication No. 2073/2011, *Naidenova et al. v. Bulgaria*
(Views adopted on 30 October 2012, 106th session)
- JJ. Communication No. 2120/2011, *Kovaleva and Kozyar v. Belarus*
(Views adopted on 29 October 2012, 106th session)

Volume II (Part Two)

X.	Decision of the Human Rights Committee declaring communications inadmissible under the Optional Protocol to the International Covenant on Civil and Political Rights.....	1
A.	Communication No. 1500/2006, <i>M.N. et al. v. Tajikistan</i> (Decision adopted on 29 October 2012, 106th session)	1
B.	Communication No. 1526/2006, <i>V.A. v. Russian Federation</i> (Decision adopted on 23 July 2012, 105th session).....	12
C.	Communication No. 1788/2008, <i>B.W.M.Z. v. the Netherlands</i> (Decision adopted on 25 March 2013, 107th session)	17
D.	Communication No. 1822/2008, <i>J.B.R., L.M.O.C., A.M.A.R., G.E.O.S. and B.E.L. v. Colombia</i> Communication No. 1823/2008, <i>S.M.R.M. v. Colombia</i> Communication No. 1824/2008, <i>A.D.O., E.S.C., F.O.Q. and G.G.R. v. Colombia</i> Communication No. 1825/2008, <i>E.M.C.B., M.C.P.J. and R.S.S.N. v. Colombia</i> Communication No. 1826/2008, <i>G.M.V. and N.C.P. v. Colombia</i> (Decision adopted on 23 July 2012, 105th session).....	23
E.	Communication No. 1827/2008, <i>S.V. v. Canada</i> (Decision adopted on 23 July 2012, 105th session).....	33
F.	Communication No. 1834/2008, <i>A.P. v. Ukraine</i> (Decision adopted on 23 July 2012, 105th session).....	46
G.	Communication No. 1840/2008, <i>X.J. v. the Netherlands</i> (Decision adopted on 23 July 2012, 105th session).....	62
H.	Communication No. 1844/2008, <i>B.K. v. Czech Republic</i> (Decision adopted on 23 July 2012, 105th session).....	69
I.	Communication No. 1848/2008, <i>D.V. and H.V. v. Czech Republic</i> (Decision adopted on 23 July 2012, 105th session).....	74
J.	Communication No. 1849/2008, <i>M.B. v. Czech Republic</i> (Decision adopted on 29 October 2012, 106th session)	80
K.	Communication No. 1857/2008, <i>A.P. v. Russian Federation</i> (Decision adopted on 25 March 2013, 107th session)	87
	Appendix	99
L.	Communication No. 1886/2009, <i>X. v. the Netherlands</i> (Decision adopted on 28 March 2013, 107th session)	101
M.	Communication No. 1891/2009, <i>J.A.B.G. v. Spain</i> (Decision adopted on 29 October 2012, 106th session)	105
N.	Communication No. 1892/2009, <i>J.J.U.B. v. Spain</i> (Decision adopted on 29 October 2012, 106th session)	112
O.	Communication No. 1904/2009, <i>D.T.T. v. Colombia</i> (Decision adopted on 25 March 2013, 107th session)	118
P.	Communication No. 1911/2009, <i>T.J. v. Lithuania</i> (Decision adopted on 25 March 2013, 107th session)	129
Q.	Communication No. 1921/2009, <i>K.S. v. Australia</i> (Decision adopted on 25 March 2013, 107th session)	137

R.	Communication No. 1938/2010, <i>Q.H.L. v. Australia</i> (Decision adopted on 25 March 2013, 107th session)	141
S.	Communication No. 1943/2010, <i>H.P.N v. Spain</i> (Decision adopted on 25 March 2013, 107th session)	149
T.	Communication No. 1962/2010, <i>S.N.A. v. Cameroon</i> (Decision adopted on 25 March 2013, 107th session)	160
U.	Communication No. 2027/2011, <i>Kusherbaev v. Kazakhstan</i> (Decision adopted on 25 March 2013, 107th session)	166
V.	Communication No. 2169/2012, <i>S.K. v. Belarus</i> (Decision adopted on 31 October 2012, 106th session)	178
XI.	Follow-up activities under the Optional Protocol	181

X. Decisions of the Human Rights Committee declaring communications inadmissible under the Optional Protocol to the International Covenant on Civil and Political Rights

A. Communication No. 1500/2006, *M.N. et al. v. Tajikistan* (Decision adopted on 29 October 2012, 106th session)*

<i>Submitted by:</i>	M.N. et al. (not represented by counsel)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Tajikistan
<i>Date of communication:</i>	18 November 2005 (initial submission)
<i>Subject matter:</i>	Persecution and discrimination on grounds of political opinion; freedom of opinion and freedom of association; right to be elected
<i>Procedural issue:</i>	Insufficient substantiation of claims
<i>Substantive issues:</i>	Recognition everywhere as a person before law; unlawful interference with privacy and family life; freedom of opinion; freedom of association; right to be elected; prohibition of discrimination
<i>Articles of the Covenant:</i>	5, 16, 17, 19, 22, 25 (b) and 26
<i>Article of the Optional Protocol:</i>	2
<i>The Human Rights Committee</i> , established under article 28 of the International Covenant on Civil and Political Rights,	
<i>Meeting on 29 October 2012,</i>	
<i>Adopts the following:</i>	

Decision on admissibility

1. The authors of the communication, dated 18 November 2005 (initial submission), are four Tajik nationals: M.N., S.K., A.U. and S.S. They claim to be victims of a violation by Tajikistan¹ of their rights under articles 5, 16, 17, 19, 22, 25 (b), and 26 of the International Covenant on Civil and Political Rights. The authors are not represented by counsel.

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev and Mr. Krister Thelin.

¹ The Optional Protocol entered into force for Tajikistan on 4 April 1999.

Factual background

2.1 The authors are members of the Socialist Party of Tajikistan (SPT): Mr. N. presents himself as the president of the SPT; Mr. K., as the son of the former president of the party (killed in March 1999); Mr. U., as the Khatlonsk regional representative of the party; and Ms. S., as the deputy president of the party. They claim to be victims of constant persecution on political grounds by the regime in place in Tajikistan. The SPT was created on 15 June 1996 in Khudzhand city. M.K. was elected as the first president of the party, but was subsequently illegally removed from her position with the participation of the State apparatus. Then Sa.K. (father of Mr. K.) was elected as the party's president. He was murdered, allegedly in a "terrorist attack", on 30 March 1999, while preparing for the presidential election of 1999. After that, Mr. K. became the acting president of the party, and was also subjected to persecution as a result. At the time of submission of the communication, the other three authors had assumed the party's leadership. According to the authors, they are all persecuted and intimidated by the authorities.

2.2 The authors affirm that the SPT was created as an opposition party headed by the former Chairman of the Majlisi Oli (Parliament), Mr. Sa.K., who was a prominent opposition leader and one of the activists for the restoration of the constitutional order in the country after the civil war. Mr. Sa.K. was also one of the prospective candidates for the presidential election of 1999. The authors claim that the authorities did not take any steps to ensure his protection against possible attacks. Furthermore, authorities took measures aimed at preventing the party's participation in the presidential election of 1999, and generating internal destabilization of the party, leading to its dissolution. Following the murder of Mr. Sa.K., the party's leaders and regional representatives appealed to the authorities, requesting them to bring the perpetrators to justice. However, at the time of submission of the communication, those responsible were still at large and no one had been prosecuted for the murder. According to the authors, faced with the authorities' failure to investigate and bring to justice those responsible, more than half of the party's members left the SPT, in fear of political persecution. As a result, the authors claim that the SPT was excluded from participation in the presidential election of 1999 and therefore they are victims of violation of their rights to be elected, together with 500 other members of the leadership of the party.

2.3 The authors further affirm that before and during the parliamentary election of 2000, the party's leadership, as well as the parliamentary candidates, were subjected to pressure by members of the Municipal Council of Dushanbe city and law enforcement authorities. Before the election, Mr. N., who was a Member of Parliament candidate for the single-mandate district No. 2 (Oktyabrsky district² of Dushanbe city), was forced by a representative of the Ministry of Security (now the State National Security Committee (SNSC)) and by the deputy president of the Municipal Council of Oktyabrsky district to withdraw from the election. When he initially refused to withdraw, the SNSC representative threatened to put opium in his pockets, arrest him and have him held at least until the end of the election. Mr. N. thus had no choice but to sign a declaration withdrawing his candidacy.

2.4 Mr. U. was designated as a Member of Parliament candidate for the single-mandate district No. 8. During the preliminary election campaign, he was also subjected to persecution. For instance, in January 2000, when he was on his way home after a meeting with electors, he was attacked by armed men wearing masks. Despite this incident, he did not withdraw his candidature and obtained 58 per cent of the votes in the election. However, the results were falsified and the brother of the then president of the Municipal

² Now referred to as Ismoili Somoni district.

Council of Lenin district³ was designated as the winner. The same year, Mr. U., while driving his car, was stopped by masked men who threatened him and stole the car. Mr. U. reported this incident to the Department of Internal Affairs of the Lenin district, but nothing was done to investigate the facts.

2.5 Mr. K., who was a Member of Parliament candidate for the single-mandate district No. 13, obtained the majority of votes in the first round of the election (out of four candidates) despite the pressure exerted by certain groups of former Members of Parliament during the election and the manipulation of election results. However, due to ballot fraud, he was not admitted to the second round of the election. Similar abuses occurred in respect to other candidates. Thus, Ms. S., who was designated as a Member of Parliament candidate for a certain district, was unlawfully registered by the Central Commission on Elections and Referenda (hereinafter the Electoral Commission) as a candidate for a different district. According to the authors, 20 Member of Parliament candidates of the SPT were not even registered by the Electoral Commission. Despite this, the representatives of the SPT obtained the vast majority of votes in at least three single-mandate districts. However, as a result of fraud and falsification of votes, the party's representatives were not admitted to the Parliament.

2.6 In relation to the above incidents, and given the unstable and dangerous situation in Tajikistan in 2000, the death threats addressed to the Member of Parliament candidates by armed groups, and the ineffectiveness of any complaints submitted to court at that time, the authors were frightened and decided not to complain. They claim that as a result of the numerous acts of falsification and intimidation, the SPT, which was the second political party in terms of popularity, lost a significant number of its supporters.

2.7 In April 2004, the SPT, together with other parties, entered into a coalition "for honest and transparent elections". Then, the Minister of Justice, Mr. Kh., together with a senior counsellor of the President, one Mr. V., an official from the Ministry of Education, Mr. G., and representatives of several local municipal councils, abusing their authority, started to interfere in the internal affairs of the party. Mr. Kh., in breach of national legislation, provided Mr. G., who was not a member of the SPT, with a copy of the certificate of registration of the SPT authenticated by the Ministry, with Mr. Kh.'s signature and dated 3 March 1999. The authors claim that in March 1999 the Minister of Justice was another person, not Mr. Kh. Mr. G., using the registration certificate, obtained the letterhead and the seal of the Dushanbe Executive Committee of the SPT. Using the seal, Mr. V. and Mr. G., who had been expelled from the party in March 2000, organized a number of "pseudo"-SPT meetings and even one party congress on 20 June 2004, in spite of the reactions from the elected SPT local representatives.

2.8 In view of the situation, the Executive Committee of the SPT decided to convene an extraordinary congress on 14 August 2004. Despite the difficulties, such as pressure by certain officials of municipal councils to prevent the participation of certain delegates and interference in the work of the congress by a representative of the Ministry of Justice, the congress was a success. Notwithstanding the fact that before the congress pro-Government newspapers and other political party-run newspapers published provocative articles aimed at discrediting Mr. N., he was elected as the president of the SPT for a five-year term. The authors claim that the congress was attended by leaders and representatives of all political parties, international organizations, a representative of the Ministry of Justice and by local and foreign mass media.

³ Now referred to as Rudaki district.

2.9 The authors claim that, in accordance with the requirements of the Act on Political Parties, the SPT leaders have sent more than 45 notes to different municipal councils, informing them about decisions taken during party's conferences. However, before the 2005 election for the Majlisi Oli, the Ministry of Justice, by a letter of 16 December 2004, provided the Electoral Commission with the list of all political parties registered with the Ministry of Justice and the names of their leaders. According to the letter, the SPT registered with the Ministry of Justice was the SPT headed by Mr. G. The authors maintain that, ignoring their interest and that of other "genuine" leaders of the SPT,⁴ the Ministry of Justice unlawfully created an "artificial SPT" headed by Mr. G. On 19 December 2004, Mr. G. organized an unlawful party congress in order to elect the party candidates for the parliamentary election.⁵ On 14 January 2005, based on the letter of the Ministry of Justice, this party was further registered by the Electoral Commission for participation in the election of the Majlisi Namoyandagon (House of Representatives) of the Majlisi Oli. As a result, the lawful SPT was de facto barred from participating in the 2005 election.

2.10 The authors claim to have exhausted domestic remedies in connection with the facts they describe. Thus, in relation to the murder of Mr. Sa.K. in an alleged terrorist attack, they state that several petitions (including a petition of the Central Executive Committee of the SPT and a joint petition of Tajik political parties) were submitted to authorities and law enforcement bodies on 31 March 1999, with a request to investigate, prosecute and punish those responsible. All these appeals remain unanswered.

2.11 In relation to intimidation by political opponents, ballot fraud and falsification of votes, the authors submit that, due to the climate of insecurity in Tajikistan in 2000, the threats to Member of Parliament candidates' lives by armed groups and the ineffectiveness of any complaints to court at that time, they were frightened and decided not to file complaints.

2.12 With regard to the interference in the internal affairs of the party, the authors appealed to several institutions. On 14 May 2004, they addressed a complaint to the head of the Interior Department of the Sino city district in Dushanbe regarding the unlawful use of the seal of the SPT Executive Committee by a non-member of the political party, Mr. G. No response was received. The complaint submitted to the Prosecutor's Office of Dushanbe city on 1 November 2004 was rejected. On 5 September and 9 December 2004, the authors sent letters to the President of Tajikistan. On 23 October 2004, a complaint was lodged with the General Prosecutor's Office of Tajikistan. All these complaints remain unanswered. On 13 January 2005, the authors filed another complaint with the General Prosecutor's Office, which advised them to resort to the courts for consideration of their claims.

2.13 On 23 December 2004, the authors appealed to the Supreme Court, requesting the annulment of the Minister of Justice's letter of 16 December 2004 (by which the Minister, Mr. Kh., illegally recognized Mr. G. as the president of the SPT) and protection of their

⁴ The authors affirm that in May 2002, Mr. U. was elected as SPT representative for Khatlon region. His election took place in the presence of representatives of different political parties, representatives of the Organization for Security and Co-operation in Europe, the press and TV journalists. However, after a letter from the Minister of Justice was sent to the Electoral Commission on 16 December 2004, the Khukumat (Municipal Council) of Khatlon region unlawfully recognized one Mr. S., who has never been an SPT member, as the SPT regional leader.

⁵ Mr. N. claims that the congress was unlawful, for the following reasons: (a) there were only 15 to 20 participants; (b) there was no quorum, therefore the nomination of candidates for the parliamentary election was in breach of the Act on Political Parties and the party's charter; (c) the representative of the Electoral Commission was not present during the party's congress; (d) the Electoral Commission registered candidates for the parliamentary election other than the ones nominated by the party's congress.

constitutionally protected electoral rights. The Supreme Court refused to examine the complaint, indicating that the authors could submit it to the local court. On 4 January 2005, the authors appealed to the Somoni District Court (the party was registered in that district), the Shohmansur District Court (where the Ministry of Justice is located), and the Dushanbe City Court, complaining against the allegedly unlawful letter of the Minister of Justice, and requesting the protection of their constitutional rights. All three courts refused to examine the complaints, claiming that they did not fall under their respective jurisdiction.

2.14 The authors also appealed against the decision of the Electoral Commission of 14 January 2005 regarding the registration of SPT candidates for the election. On an unspecified date, a complaint was lodged with the Supreme Court of Tajikistan, requesting the Court to annul the decision in question and to interrupt the activity of the unlawful, “artificially created” Socialist Party of Tajikistan.⁶ On 20 January 2005, the Court rejected the complaint, finding the decision of the Electoral Commission in conformity with national legislation and rejecting the author’s request for its annulment. The Court indicated that, during the proceedings, Mr. Sh., the representative of the Electoral Commission, explained that Mr. G. provided to the Commission the list of SPT candidates for the parliamentary election and all documents required by law for their registration. After the Ministry of Justice confirmed that the SPT was a registered party presided by Mr. G., the Electoral Commission examined the presented materials, in accordance with the electoral legislation, and found no impediments to the registration of SPT election candidates presented by Mr. G. The Commission did not receive any documents for the registration of candidates from the author, Mr. N. The representative of the Ministry of Justice confirmed to the Commission that he was present during the party congress organized by Mr. N., and noticed that half of those present and having the mandate to vote were in reality not members of the SPT. He reported this to Mr. N. and recommended that he resolve all disputes regarding the party leadership within the party. The Supreme Court also stated that such questions as the election of the president of a political party, including of the SPT, fall under the competence of the party itself and all disputes as to who is the legally elected president of the party should be settled within the party by its members, in accordance with the charter of the political party. The court also rejected the author’s request to interrupt the activity of the unlawful, “artificially created” Socialist Party of Tajikistan, indicating that they could file a complaint to competent authorities (without specifying which authority).

2.15 The authors submitted a cassation appeal to the Civil College of the Supreme Court on 28 January 2005, which on 4 February 2005 upheld the previous decision. The authors also submitted an application for supervisory review with the Plenum of the Supreme Court. The Court examined the case and declared that the previous decisions were correct and well founded, indicating that it can only decide on the lawfulness of the Electoral Commission’s decision; the other problems are internal to the party and have to be resolved by the party members in conformity with the charter of the party. A further application for supervisory review was lodged with the President of the Supreme Court on 13 June 2005. In a resolution dated 29 June 2005, the President of the Supreme Court confirmed the legality of the Electoral Commission’s decision of 14 January 2005. As to the interruption of the activity of the unlawfully and “artificially created” SPT headed by Mr. G., he indicated that the claims related to an internal dispute and should be resolved within the

⁶ The author requested the annulment of the decision on the following grounds: (a) the legal SPT is the one with him (Mr. N.) as president, whereas the Minister of Justice, Mr. Kh. in his letter of 16 December 2004 “recognized” as president of the party Mr. G., who was excluded from the party in March 2000; (b) in accordance with the Act on Political Parties, the existence of two parties having the same name is prohibited (the legal SPT headed by the author, Mr. N., as opposed to the pseudo-SPT headed by Mr. G.).

party in accordance with the party's charter, the courts having no competence to decide whether the leader of the SPT is the author (Mr. N.) or Mr. G. He further invoked article 25, paragraph 1, of the Act on Political Parties, which states that such issues are resolved through reorganization (unification, joining, division) or liquidation. The President of the Supreme Court recommended that the author convene the congress of the party (both political platforms) and settle the dispute.

2.16 On 29 September 2005, the authors filed an application with the Constitutional Court reiterating the claims that had been rejected by the Supreme Court, and adding that they had suffered a denial of justice. They requested the Court to issue a legal opinion on the following four questions:

- (a) Whether the Supreme Court violated their right to judicial protection;
- (b) Whether the issue of the coexistence of two Socialist parties falls under the competence of the Supreme Court;
- (c) Whether the Supreme Court is obliged to examine their request in relation to the coexistence of the two parties and to terminate the activity of the illegal one;
- (d) Which court or institution has jurisdiction to consider the legality of the Minister of Justice's letter in which he confirms Mr. G. as the president of the SPT and whether the Supreme Court is obliged to examine the issue on the unlawful acts of the Minister in this respect.

2.17 On 5 October 2005, the Constitutional Court rejected the case without examination of the respective claims, stating that all matters related to the organization and the functioning of political parties fall under the competence of the Supreme Court.

2.18 The authors claim that they have exhausted all available domestic remedies and that the same matter has not been examined under another procedure of international investigation or settlement.

The complaint

3.1 The authors claim that they are victims of violation of their rights under article 5 of the Covenant, as the authorities, and in particular the Senior President's counsellor (Mr. V.), the Minister of Justice (Mr. Kh.) and the Chief of the Electoral Commission (Mr. B.), have restricted "by all means" their and the other party members' electoral rights and right to freedom of association.

3.2 They claim also a violation of article 16 of the Covenant, in particular in relation to Mr. N., Mr. U. and Ms. S. (who was portrayed as a mentally ill person), since their right to recognition as persons before the law has been violated. As a result, they could not exercise their right to judicial protection.

3.3 The authors further claim a violation of article 17, as an official of the President's administration, as well as members of the security forces and other State organs, have openly interfered in their private and family life by ordering the preparation and publication of articles and other materials that have affected their reputation.

3.4 The authors maintain that article 19 has been violated, as the members of the SPT have been deprived of their right to hold opinions through the use of intimidating measures against them, such as the murder of the SPT leader, their persecution, and dismissal from work.

3.5 The authors claim to have been deprived of their right to freedom of association, including through the arbitrary revoking of their membership in the party and recognition of the "pseudo"-socialist party as lawful, in violation of article 22 of the Covenant.

3.6 According to the authors, their right to be elected without unreasonable restrictions and without distinction under article 25 (b) of the Covenant has also been violated, as they were prevented from taking part in elections. They claim that their names were not included in the electoral lists and the secrecy of the ballot was not respected.

3.7 Finally, they claim a violation of article 26, because they were victims of discrimination on grounds of political opinion.

State party's observations on admissibility and merits

4.1 By note verbale dated 8 June 2011, the State party contests the authors' allegations and submits that all their complaints have been duly registered and examined by national competent authorities in accordance with the law. Following the murder of Mr. Sa.K. (Member of Parliament) on 30 March 1999, a criminal case was initiated by the Investigative Department of the Ministry of Security. A search warrant was issued against two suspects, Mr. Y. and Mr. S. Subsequently, the fact that one of the suspects still had not been apprehended resulted in the suspension of the criminal case. The criminal investigation was conducted in accordance with the law and the authors' allegations that no measures were taken in respect of the murder of Mr. Sa.K. are unfounded.

4.2 With regard to the authors' claims that they were subjected to pressure before and during the parliamentary election of 2000, that Mr. U. was attacked by unidentified masked armed men who stole his car and that no measures to investigate the incident were taken by the Department of Internal Affairs, the State party submits that these claims are unfounded. Mr. U. at that time was using his private car as a cab service and, on 11 August 1999, he agreed, for 3,000 Russian roubles, to drive three unidentified persons to the indicated address. On the way, those persons threatened him with a gun and stole his car. On the same day, based on the Mr. U.'s complaint, a criminal case was initiated under article 249, para. 4, of the Criminal Code (banditry). The case was closed on 1 October 1999 on the ground that the perpetrators could not be identified. The State party submits that the criminal offence is not linked to Mr. U.'s standing as candidate for the parliamentary election, since the election took place on 28 February 2000 and the registration of electoral candidates, as well as the meetings with the electors, began on 13 December 1999.

4.3 The State party further contests the authors' claims about Mr. G.'s unlawful election as president of the SPT. On 6 August 1996, the SPT was registered with the Ministry of Justice. On 21 December 1996, Mr. Sa.K. was elected as president of the party. The party was re-registered with the Ministry of Justice on 10 March 1999. Mr. R. was elected as president of the party during the fourth extraordinary congress of 23 July 2000, and following the extraordinary congress of 20 July 2004 Mr. G. became president of the party. This decision was not recognized by Mr. N. and his allies, who submitted a number of complaints with the Ministry of Justice, claiming that the party congress was held unlawfully.

4.4 As to the authors' claims that on 14 May 2004, the leadership of the SPT complained to the Interior Department of Sino district in Dushanbe regarding the unlawful use by Mr. G of the seal of the SPT Executive Committee and that their complaints remained unanswered, the State party is not in a position to assess these allegations because all the documents of the Interior Department of Sino district were destroyed on 21 January 2008 at the expiration of their retention period.

4.5 The authors' allegation that their complaints were not accepted by courts without any legal grounds is also unfounded. Mr. N. lodged a complaint with the Supreme Court on 16 January 2005, requesting the Court to annul the decision of the Electoral Commission of 14 January 2005 on the registration of five SPT candidates for the parliamentary election, as well as to interrupt the activity of the respective party. The Supreme Court rejected the

complaint on 20 January 2005 and this decision was upheld on cassation by the Civil College of the Supreme Court. All the authors' supervisory review applications were duly considered and answered. The court found that the SPT was operating according to the law and that the registration of candidates for the parliamentary election had been done in compliance with the law. For the sake of a thorough examination of the case, the court questioned the representative of the Ministry of Justice. He stated in court that he had officially met with the president of the SPT, Mr. G., and the plaintiff, Mr. N., and had explained to them the requirements of the law in respect of the powers, rights and duties of political party members.

4.6 On 25 September 2006, Mr. N. lodged a complaint with the Supreme Court, requesting the annulment of the Electoral Commission's decision of 11 October 2006 by which Mr. G. was registered as the SPT candidate for president of Tajikistan. The Court, after having examined the materials of the case file, the arguments of the parties and witness testimonies, concluded that the election of Mr. G. as president of the SPT was legal, and rejected the complaint on 31 October 2006. This decision was upheld by the Civil College of the Supreme Court on 22 November 2006. The SPT is currently headed by Mr. G. and operates on the basis of the Constitution and the Act on Political Parties.

Authors' comments on admissibility and merits

5.1 In their comments dated 27 April 2012, the authors contest the State party's assertion that all their complaints have been duly registered and examined in accordance with the law. They claim that, out of 29 various complaints, only 18 were registered. Since the SPT was an opposition party, none of their complaints were examined in accordance with the law and they were ignored or dismissed on political grounds.

5.2 The authors find illogical the information presented by the State party in respect of the investigation into the death of Mr. Sa.K. They claim that, each time, the State party invents new names for the alleged perpetrators, since the names referred to in its observations are different from the ones presented by the investigative bodies to the family in 1999. The authors are convinced that the terrorist act against Mr. Sa.K. was politically motivated. As the 1999 presidential election approached, men using vehicles with dark-tinted windows, and armed with machine guns and grenades, had constantly "chased" him. On one occasion his bodyguards surrounded and interrogated them, and discovered that they were agents of the SNSC. Mr. Sa.K. reported this to the head of the SNSC and requested an investigation. The head of the SNSC confirmed that the armed individuals were SNSC agents. Although the SPT leadership addressed the President of Tajikistan with a complaint, indicating the plate numbers of the cars which had followed Mr. Sa.K. everywhere, no measures were taken to protect him against possible attacks.

5.3 The authors reject the State party's arguments that the car incident of Mr. U. was not linked to his political activity and that the election of Mr. G. as president of the SPT was lawful. They claim that the "pseudo" congress of 20 June 2004 at which Mr. G. was allegedly "elected" as president of the SPT was organized, through abuse of authority, under the direction of employees of the presidential apparatus, namely Mr. V., senior counsellor of the President of the Republic, Mr. O., former presidential counsellor, and the leadership of the People's Democratic Party of Tajikistan. The minutes of the pseudo-congress clearly demonstrate that it was organized by persons having no connection with the SPT, and the leadership of the "party" was constituted by persons who had been expelled from the SPT in 2000, in particular Mr. G. and Mr. V. They were expelled from the party for gross breaches of its charter, theft of its funds and moral and material damage to the party. From 2000 to 2004 they had no connections with any of the organizational units of the SPT, as reflected in the SPT annual reports presented to the Ministry of Justice. The report presented after the fourth congress of the party lists neither Mr. G., nor Mr. V. as

leaders of the party. The authors further refer to a number of breaches committed during the organization of the pseudo-congress of 20 June 2004⁷ in order to substantiate their arguments that materials of the so-called congress were forged, and that its organization was unlawful and contrary to the SPT charter. Based on the minutes of the pseudo-congress, the Ministry of Justice in December 2004 registered the SPT headed by Mr. G., and before the parliamentary election this party was further registered by the Electoral Commission for participation in the election. In addition, in August 2006 (before the presidential election), Mr. G. was registered as the SPT candidate for president of Tajikistan.

5.4 In the light of the above, the authors request the Committee to do justice to the members and sympathizers of the SPT and to compensate them for the damage suffered as a result of the actions of the current regime.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

6.3 The authors claim to have been subjected to persecution by Government officials for being leaders of the SPT. They submit that the former president of the party died in a terrorist attack in 1999 and that State party's authorities failed to conduct an investigation into his death. Mr. N. was forced to withdraw as a Member of Parliament candidate in the 2000 parliamentary election. Mr. U. was also subjected to harassment in connection with the same election by, for instance, being attacked by armed men, and later on had his car stolen. The results of the election in connection with both Mr. U. and Mr. K. were falsified, while Ms. S. was registered as a candidate for the wrong district. Many other Member of Parliament candidates received death threats by armed groups. The authors claim that they did not complain in relation to the intimidation incidents and falsification of votes for fear of reprisals.

⁷ They point, inter alia, to the following breaches: (a) the congress was organized in violation of the legislation of Tajikistan and the party's charter because the procedure for the organization of ordinary and extraordinary congresses was not respected; (b) there is no reference to the number of the congress in the minutes; (c) the minutes do not refer to the number of participants and invited persons, however, Mr. G. mentioned during the congress that "out of 100 delegates, 92 are present", at the same time the list of delegates includes 73 persons only (list provided by the authors); (d) a member of the People's Democratic Party of Tajikistan appears in the minutes as a member of the SPT presidium; (e) out of the 73 delegates appearing on the list, only four are in fact members of the SPT; (f) with the exception of Kh.K., all persons confirmed as members of the party's Central Executive Committee were residents of Dushanbe city, while according to the charter the members of the Central Executive Committee of SPT are elected from the representatives of the regional organizations of SPT present at the congress as delegates – none of the regional representatives participated in the congress; (g) the minutes of the congress at no point refer to the alleged election of Mr. G. as president of the party or to that of his deputy; (h) the minutes of the congress do not refer to the number of delegates participating in the voting, including the number of persons who voted for, against or abstained.

6.4 Furthermore, the Ministry of Justice refused to recognize Mr. N. as head of the party, despite the fact that he had been elected at the congress of the party and, as a result, the SPT was barred from participating in the 2005 election. In that respect, the Committee observes that the authors submitted various complaints and appeals to the Prosecutor's Office and national courts, including the Supreme Court and the Constitutional Court, challenging the registration of the pseudo-SPT headed by Mr. G. and claiming a violation of their constitutionally protected electoral rights and right to freedom of association. However, all their claims were rejected. A cassation appeal and two applications for supervisory review by the Supreme Court were also dismissed on grounds that courts have no competence to decide on the legality of a political party or on who is the lawfully elected president of a party. The Constitutional Court did not examine the merits of their complaint, indicating that issues relating to the organization and functioning of political parties fall under the competence of the Supreme Court.

6.5 The Committee notes that the authors invoked articles 5, 16, 17, 19 and 26 of the Covenant, claiming, *inter alia*, that their right to be recognized as persons before the law has been violated and that State authorities have openly interfered in their private and family life by publishing articles damaging their reputation, that the members of the SPT have been deprived of the right to hold opinions and have been discriminated against on grounds of political opinion and have not been protected against acts of violence. However, the Committee observes that the information provided by the authors in support of their claims under these provisions is very general. Based on the materials before it, the Committee is unable to conclude that the authors have sufficiently substantiated these claims, for purposes of admissibility, and therefore declares them inadmissible under article 2 of the Optional Protocol.

6.6 Concerning the authors' claims under articles 22 and 25 (b) of the Covenant, that the arbitrary revocation of their membership in the party and the recognition of the "artificially created" Socialist Party of Tajikistan violated their freedom of association and prevented them from taking part in the elections, the Committee notes that their allegations relate primarily to a dispute between two organizations, each presenting itself as the continuation of the earlier SPT. The authors have not alleged that they have been prevented from founding a new party with a different name. The Committee further notes the decision of the Supreme Court according to which it has no competence to decide on the legality of a political party or on who is the lawfully elected president of a party, but rather internal party disputes should be decided by internal party procedures. With respect to the authors' allegation that they were prevented from participating in the parliamentary election as a result of the Electoral Commission's decision on registration of SPT election candidates presented by Mr. G., the Committee observes that the Supreme Court, when examining the authors' complaint on the annulment of the said decision, held oral hearings during which the representative of the Electoral Commission explained that Mr. G. had provided the list of SPT candidates and all documents required by law for their registration, and that no such documents for registration of SPT candidates had been received from Mr. N. (see para. 2.14 above). This latter point has not been refuted by the authors.

6.7 The Committee also observes that the authors' claims under articles 22 and 25 are intimately linked to the evaluation of facts and evidence by the State party's electoral authorities and courts. It recalls that it is generally not for itself, but for the courts of States parties, to review or to evaluate facts and evidence in a particular case, unless it can be ascertained that the conduct of the trial or the evaluation of facts and evidence was clearly

arbitrary or amounted to a denial of justice.⁸ Based on the materials made available to it, in particular the decision of the Electoral Commission on registration of SPT candidates, as referred to in the ruling of the Supreme Court, the Committee is unable to conclude that the State party's authorities acted arbitrarily in evaluating the facts and evidence of the case. Therefore, the Committee finds the authors' claims under articles 22 and 25 (b) of the Covenant inadmissible under article 2 of the Optional Protocol, for insufficient substantiation.

7. The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under article 2 of the Optional Protocol;
- (b) That this decision shall be communicated to the State party and to the authors.

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

⁸ Human Rights Committee general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 26. See also, inter alia, communications No. 1210/2003, *Damianos v. Cyprus*, decision of inadmissibility of 25 July 2005, para. 6.3; No. 1212/2003, *Lanzarote Sánchez et al. v. Spain*, decision of inadmissibility of 25 July 2006, para. 6.3; No. 1358/2005, *Korneenko v. Belarus*, decision of inadmissibility of 1 April 2008, para. 6.3; No. 1758/2008, *Jessop v. New Zealand*, Views adopted on 29 March 2011, paras. 7.11–7.12.

**B. Communication No. 1526/2006, V.A. v. Russian Federation
(Decision adopted on 23 July 2012, 105th session)***

<i>Submitted by:</i>	V.A. (not represented by counsel)
<i>Alleged victim:</i>	The author's son, D.A.
<i>State party:</i>	The Russian Federation
<i>Date of communication:</i>	3 March 2006 (initial submission)
<i>Subject matter:</i>	Refusal by the authorities to grant citizenship and issue identity documents
<i>Procedural issue:</i>	Exhaustion of the domestic remedies
<i>Substantive issue:</i>	-
<i>Articles of the Covenant:</i>	2; 8, para. 2; 9, para. 1; 12, paras. 1, 2 and 3; 14, para. 1; 16; 17; 23, paras. 1 and 2; 24, para. 3; 25 and 26
<i>Articles of the Optional Protocol:</i>	2, 3, 5, paras. 2 (a) and (b)
<i>The Human Rights Committee</i> , established under article 28 of the International Covenant on Civil and Political Rights,	
<i>Meeting on 23 July 2012,</i>	
<i>Adopts the following:</i>	

Decision on admissibility

1. The author of the communication is V. A., a Russian Federation national, born in 1951. He submits the communication on behalf of his son, D.A., born in 1977, and who was stateless at the time of the communication.¹ He claims that his son is a victim of violations by the Russian Federation of his rights under article 2, article 8, paragraph 2, article 9, paragraph 1, article 12, paragraphs 1, 2 and 3, article 14, paragraph 1, article 16, article 17, article 23, paragraphs 1 and 2, article 24, paragraph 3, article 25 and article 26 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 1 January 1992. The author is unrepresented.

The facts as presented by the author

2.1 The author's son was born in 1977 in the former Uzbek Soviet Socialist Republic, and was, at birth, a citizen of the Soviet Union. He has never left the territory of the former Soviet Union (USSR). Both his parents are of Russian origin.

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvio, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

¹ The author has enclosed a signed authorization from his son.

2.2 On an unspecified date, the author moved to Russia. According to him, his son has lived with him in Borisoglebsk City (Russian Federation) since November 1992, when he was 15 years old. In support of his case, the author submits copies of numerous documents, inter alia, copies of his son's high school and university diplomas, copy of a certificate issued by the Federal Migration Service of Russia stating that the author's son had the status of a forcibly displaced person, and an address registration slip.

2.3 The author claims that since 1992, as his son's legal representative, he has filed numerous applications with the Russian authorities for his son to be issued an identity document, and in particular a USSR passport. Without an identity document, his son cannot independently access the Russian courts, does not have freedom of movement within the Russian Federation, cannot work or receive medical assistance, and is deprived of a range of other rights afforded to Russian citizens and those with identity documents.

2.4 The author claims that he has filed numerous applications with the Russian authorities for his son to be granted Russian citizenship. All have been rejected. The author states that, under article 15 of the Russian Federation Law on Citizenship of 1991, his son should have been able to acquire Russian citizenship, on the basis that his parents were born in the Russian Soviet Federative Socialist Republic (RSFSR) of the former USSR.

2.5 The author explains that as he had no registered address in the RSFSR on 6 February 1992, the Law on Citizenship did not at that time recognize him as a citizen of the newly independent Russian Federation. This situation changed, following a judgment of the Constitutional Court of the Russian Federation of 1996, which found this restriction to be unconstitutional. The author's Russian citizenship was confirmed, a fact which, according to him, should also entitle his son to Russian citizenship.

2.6 A new Law on Citizenship was enacted on 31 May 2002. The author states that the provisions of the new law allowed his son to apply for Russian citizenship. In violation of the law, however, the administrative authorities have rejected his applications in this connection.

2.7 On 25 July 2002, another law was enacted relating to the legal status of foreign citizens in the Russian Federation. Article 2 of that law deems citizens of the former USSR to be "foreign citizens". The author considers this to be discriminatory and degrading for his son.

2.8 On 14 February 2005, the author's son complained to the Borisoglebsk City Court, asking it to confirm that he had been a permanent resident in the Russian Federation since November 1992. He stated as the motive for his request, his intention to apply for a USSR passport with the indication that he was not a Russian national. On 11 May 2005, the court rejected his application and informed him that USSR passports were no longer issued by the Russian authorities and that he had failed to prove that he has been residing in the Russian Federation since 1992. The Court explained, however, that according to the legislation in force, he could apply and obtain a Russian passport, but prior to this, he had to have a "residence permit" and Russian citizenship. A cassation appeal against that decision before the Voronezh Regional Court was rejected on 5 July 2005.

2.9 On an unspecified date, the author's son applied for a Russian Federation passport to the Passport and Visa Department. His application was rejected, and on 14 July 2005, the author filed an appeal to the Borisoglebsk Regional Court against the refusal of the administrative authorities to grant his son Russian citizenship and issue him an identity document. On 6 October 2005, the Court rejected his appeal. The Court found that in order to acquire a Russian citizenship, an applicant had to provide sufficient documentation to establish his or her identity, such as a passport or a residence permit and that the author's son had not complied with the above requirement. The Court concluded that the authorities had duly explained to the author and his son the processes for obtaining a residence permit.

2.10 The author filed a cassation appeal against the decision in the Voronezh Regional Court. On 15 December 2005, the Court rejected the appeal on the basis that it was not filed with due authorization from the author's son. A further cassation appeal was dismissed because it was filed after the expiration of the statutory filing deadline.

2.11 The author's petition to the Voronezh Regional Court for a supervisory review of the decision of the Borisoglebsk City Court was dismissed on 21 June 2006, because the Court found no basis to doubt the accuracy of the decision. The author's two appeals to the Supreme Court of the Russian Federation for further supervisory review remained, according to him, unanswered.

2.12 The author submits that on 20 January 2003, he filed an application to the European Court of Human Rights on behalf of his son. The application was registered as No. 1889/03 and rejected on an unspecified date as being incompatible with the requirements of articles 34 and 35 of the European Convention on Human Rights.

The complaint

3. The author claims that the Russian authorities' refusal to provide his son with an identity document violates his son's rights under the Covenant, in particular under article 16, but also under article 2, article 8, paragraph 2, article 9, paragraph 1, article 12, paragraphs 1, 2 and 3, article 14, paragraph 1, article 17, article 23, paragraphs 1 and 2, article 24, paragraph 3, article 25 and article 26.

State party's observations on admissibility

4. On 15 July 2011, the State party submits that according to the Federal Migration Service of the Russian Federation, the author's son was granted Russian Federation citizenship on 26 June 2008 and that he was issued a passport (Series 2008 No. 980470). Accordingly the State party maintains that the author's communication is inadmissible since the situation that he claims violated his son's rights has been resolved.

Author's comments on the State party's observations

5.1 On 17 September 2011, the author submits that the State party's assertion that by issuing a passport to his son his rights had been restored contradicts the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.² He submits that, even though his son was eventually granted citizenship and issued a passport, it occurred after a delay of 14 years and following an additional "illegal requirement" to present a certificate stating that he did not hold Uzbekistan citizenship. The author maintains that by imposing such a requirement on his son, he was treated not as a "full subject", but as "an object of the activity" of two "illegally formed states", namely Russia and Uzbekistan. He further submits that by issuing a passport to his son, the State party recognized that the court judgement that failed to recognize the legal personality of the applicant was "obviously unjust". The author further submits that the decisions of the cassation and the supervisory instances "involuntarily define the fact that the complainant is a victim". He maintains that the courts have established "the prejudice to the complainant", since he did not have an identity document and therefore could not personally address the courts or appoint a representative, and accordingly his rights under article 14, paragraph 1, of the Covenant were violated.

² General Assembly resolution 60/147, annex.

5.2 The author further submits that the State party failed to comply with several of the principles regarding the right to a remedy and reparation for victims of human rights violations.

5.3 The author maintains that “the official statements of high-level State officials regarding their want of jurisdiction”, without taking into consideration article 19 of the Constitution of the Russian Federation, are null and void.

5.4 The author reiterates that his son’s rights under article 8, paragraph 2, article 12, paragraphs 1, 2 and 3, article 14, paragraph 1, article 16, paragraph 2, article 23, paragraphs 1 and 2, article 24, paragraph 3, article 25 and article 26 of the Covenant were violated, and provides a detailed calculation of the monetary value of the material and moral damages that, according to him, were inflicted on him and his son as a result of the failure to issue his son a passport.

Further submissions from the State party

6.1 On 19 December 2011, the State party reiterates the facts regarding the author’s son’s application for Russian citizenship, the refusal of the Passport and Visa Department to issue one, since he had failed to present the documents required by law with his application, and the subsequent confirmation of that decision by the Borisoglebsk City Court, on 6 October 2005. The State party notes that the author’s son did not put forward any reasons as to why he did not or could not obtain a residence permit, which was a precondition for his application for citizenship. The State party refers to articles 2 and 3 of the Covenant and notes in that context that, the court decision rejecting his appeal against the refusal of the Passport and Visa Department to issue a passport to the author’s son, did not preclude him from applying again and including the necessary documents.

6.2 The State party submits that the author’s son preferred instead to file further appeals before higher courts. It notes that on 15 December 2005, the Voronezh District Court issued a ruling dismissing the court case initiated following the cassation appeal filed by the author, because the latter had failed to enclose a power of attorney (letter of authorization) from his son. On 12 January 2006, the Borisoglebsk City Court issued a ruling stating that it would not hear the author’s cassation appeal, which was filed on behalf of his son, also because no power of attorney was enclosed. On 25 January 2006, the Borisoglebsk City Court issued a ruling, refusing to hear the author’s cassation appeal, because it was filed after the statutory deadline for appeal and it did not contain an application for the restoration of the deadline. The Presidium of the Voronezh Regional Court heard the author’s cassation appeal against the Borisoglebsk City Court’s decision of 6 October 2005 and, by a ruling dated 21 March 2006, rejected it.

6.3 The State party maintains that the communication should be declared inadmissible on two grounds: first, in accordance with article 2 of the Optional Protocol, because the author’s son had failed to exhaust available domestic remedies; and second, in accordance with article 3 of the Optional Protocol, because the information put forward by the author regarding the exhaustion of the domestic remedies did not correspond to the reality and therefore the communication constitutes an abuse of the right of submission.

6.4 The State party further notes that in his applications, the author’s son pointed out that obtaining Russian Federation citizenship in itself was not necessary for him, but rather that he needed identification documents, such as a USSR passport with the indication that he was not a Russian Federation citizen.

6.5 Lastly, the State party submits that the claims related to rights violations resulting from a geopolitical process — namely the disintegration of the USSR, which had some negative consequences for the author’s son — are incompatible with the provisions of the Covenant and therefore are inadmissible under article 3 of the Optional Protocol.

Issues and proceedings before the Committee

Consideration of admissibility

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

7.2 The Committee must first establish whether the same matter is not being examined under another procedure of international investigation or settlement, as required by article 5, paragraph 2 (a), of the Covenant. The Committee notes that the author submitted a similar complaint to the European Court of Human Rights, which was registered on 20 January 2003 as Application No. 1889/03, and declared inadmissible on 20 February 2004. The Committee also notes that upon accession to the Optional Protocol, the State party made a declaration,³ which, however, does not preclude the Committee from considering communications where the same matter has been the subject of another international procedure. Accordingly, the Committee considers that it is not precluded, for purposes of admissibility, by article 5, paragraph 2 (a), of the Optional Protocol from examining the communication.

7.3 The Committee takes note of the State party's challenge of the admissibility of the communication on the grounds of non-exhaustion of domestic remedies, namely the author's failure to first provide proper authorization from his son, then to file within the statutory deadlines a cassation appeal against the 6 October 2005 decision of the Borisoglebsk Regional Court with regard to the refusal of the administrative authorities to grant his son Russian citizenship. The Committee observes that the author has not advanced reasons for his failure to pursue this remedy in respect to his claims. In the circumstances, the Committee considers that the author has failed to exhaust the available domestic remedies and declares the communication inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

8. Therefore, the Human Rights Committee decides that:

(a) The communication is inadmissible pursuant to article 5, paragraph 2 (b), of the Optional Protocol; and

(b) The present decision shall be communicated to the author and to the State party, for information.

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

³ The declaration reads as follows: "The Soviet Union also proceeds from the understanding that the Committee shall not consider any communications unless it has been ascertained that the same matter is not being examined under another procedure of international investigation or settlement and that the individual in question has exhausted all available domestic remedies."

**C. Communication No. 1788/2008, *B.W.M.Z. v. the Netherlands*
(Decision adopted on 25 March 2013, 107th session)***

<i>Submitted by:</i>	B.W.M.Z. (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	The Netherlands
<i>Date of communication:</i>	26 June 2007 (initial submissions)
<i>Subject matter:</i>	Conduct of disciplinary proceedings
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; lack of substantiation
<i>Substantive issues:</i>	Independence and impartiality of the tribunal; right to be heard
<i>Article of the Covenant:</i>	14
<i>Articles of the Optional Protocol:</i>	2; 5, para. 2 (b)
<i>The Human Rights Committee</i> , established under article 28 of the International Covenant on Civil and Political Rights,	
<i>Meeting on 25 March 2013,</i>	
<i>Adopts the following:</i>	

Decision on admissibility

1. The author of the communication is B.W.M.Z., a Dutch national. He claims to be a victim of a violation by the Netherlands of his rights under article 14 of the Covenant.¹ The author is not represented.

The facts as submitted by the author

2.1 The author is a lawyer practising in the Netherlands. In March 2003, Mr. and Mrs. L.H. filed two complaints against the author with the Disciplinary Council of the Amsterdam jurisdiction. In complaint 03-354H they claimed that the author had acted in violation of section 46 of the Legal Profession Act by: (a) letting them enter into an agreement for legal assistance by exerting undue influence, error and deceit; (b) hardly doing any work on the case submitted to him; and (c) stipulating a flat fee of 10,000 euros exclusive of value added tax (VAT) to be paid in advance and in addition 25 per cent of the amount potentially to be received in due time. Complaint 03-055H concerned a violation of

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Cornelis Flinterman did not participate in the adoption of the present decision.

¹ The Optional Protocol entered into force for the Netherlands on 11 December 1978.

section 46 of the Legal Profession Act owing to the author's refusal to return the advanced fee after having merely summarily dealt with the case for a period of nine weeks.

2.2 In a decision of 29 September 2003, the Disciplinary Council dismissed the claim under section (a) of the first complaint, as it considered that it was beyond its competence to decide on the legal validity of a contract between a lawyer and his client, unless the invalidity would be absolutely evident. However, the Council upheld sections (b) and (c) of complaint 03-054H as well as complaint 03-055H and imposed a disciplinary sanction of reprimand on the author. Mr. and Mrs. L.H. appealed the decision before the Disciplinary Appeals Tribunal, which in a decision of 4 June 2004, dismissed the decision of the Disciplinary Council as regards complaint 3-054H (a) and suspended the author from practising for three months, ordering him to return to the complainants the amount of 11,900 euros.

2.3 In the meantime, a new complaint against the author was filed with the Disciplinary Council. On 20 October 2003, Mr. and Mrs P. claimed violations by the author of the Legal Profession Act, as he had allegedly breached an agreement regarding the manner in which he would operate and wrongfully retained files belonging to the complainants. The Disciplinary Council upheld the complaint and imposed on the author a conditional one-month suspension. On appeal by the author dated 19 November 2003, the Disciplinary Appeals Tribunal upheld the Council's decision on 10 June 2004.

2.4 According to the author, under the Legal Profession Act, the Disciplinary Appeals Tribunal is the highest instance on disciplinary matters. Accordingly, domestic remedies have been exhausted in the present communication. Furthermore, the author brought the case before the European Court of Human Rights. On 23 March 2005 the author was informed that the Court, sitting as a committee of three judges, had decided to declare the application inadmissible because it did not disclose any appearance of a violation of the rights and freedoms set out in the Convention or the Protocols thereto.

The complaint

3.1 The author claims that the proceedings before the Disciplinary Appeals Tribunal violated article 14 of the Covenant. First of all, on 22 March 2004, he informed the Tribunal by phone that he would not be able to attend the hearings on 4 June 2004 because his father's health had suddenly deteriorated. The Court should have postponed the consideration of the case and given the author the opportunity to be heard, but it did not. Thus, the author was not able to invoke article 14 of the Covenant before the Court. As a result, the Court imposed a heavy penalty on him, based on the sole statement of the complainant. Furthermore, the punishment, compared to other cases, was disproportionate.

3.2 Secondly, the Court suspended the author from practising his profession for three months, of which one month would be conditional to the author paying 10,000 euros to Mr. and Mrs. L.H. However, the decision about the payment was unlawful, as the appropriate jurisdiction to deal with claims regarding payments is a civil court, not a disciplinary court.

3.3 Thirdly, one of the members of the Court deciding his case was Mr. V.B., who was at that time involved in civil proceedings against the author. Mr. V.B. was the legal representative of a person who had filed a complaint against the author because he had refused to represent her in court and, as a result, she had attempted suicide. This complaint had been rejected by the Amsterdam Court of Appeal. The author claims that Mr. V.B.'s law firm harbours animosity against him for this reason. In addition to that, Mr. V.B. may have been prejudiced against the author because of action taken in the past by the author against a judge of The Hague Regional Court and Court of Appeal who had family ties with Mr. V.B. Furthermore, three members of the Disciplinary Appeals Tribunal who decided his case work not only as lawyers but also as substitute judges. In the past, the author had

criticized the system of substitute judges and, as a result, a bill was introduced in Parliament to abolish that system. Despite the Bill, the system has not disappeared completely. For all these reasons the author claims that the Court was not impartial in his case.

3.4 The author also claims that the fact that a lawyer is judged by his own colleagues in disciplinary proceeding is in violation of article 14 of the Covenant. The fact that they all compete as professionals is in itself an impediment to an impartial and independent judgement. The Legal Profession Act is thus in defiance of article 14 in this respect.

State party's observations on admissibility and merits

4.1 On 10 December 2008, the State party submitted observations on admissibility and merits. The State party recalls the decision of inadmissibility adopted by the European Court of Human Rights and asks the Committee, for reasons of legal certainty, to take a similar approach, i.e., to declare that the communication is inadmissible or that it does not constitute a violation of the Covenant. Otherwise, the State party would be confronted with contradictory rulings by two international supervisory bodies on an identical issue.

4.2 The State party explains that both the Disciplinary Board and the Tribunal are composed of judges and practising lawyers. Appeals at the Tribunal must be heard and decided by a panel of five members of the Tribunal, consisting of three judges and two lawyers. The judges who serve at the Tribunal are appointed for a term of five years from among members of the judiciary charged with the administration of justice, while the lawyers are elected for five years by the Board of Delegates of the District Bars.

4.3 By letter of 28 November 2003, the Tribunal notified the author of the date of the hearing on the appeal. At the same time the author was informed that within the next few days he could request the registrar to set another hearing date. However, he did not make use of this opportunity. The author was also requested to respond in writing no later than six weeks before the hearing, to Mr. and Mrs L.H.'s statement of grounds for appeal. On 20 February 2004, the author was sent a definitive summons by registered letter with confirmation of receipt. This summons confirmed that the hearing would take place on 22 March 2004 and informed the author that his presence was expected at the hearing. A list of the documents included in the case file was enclosed with the summons and the author was informed of the possibility of requesting copies of the documents or of examining the case file if he chose. He was also requested once more to submit a written response to the statement of the grounds for appeal. Finally, the summons informed the author of the composition of the Tribunal that would hear the appeal. On 19 March 2004, the Tribunal informed the author that the composition of the Tribunal had changed. On 22 March 2004, the date of the hearing of the appeal, the author informed the registry of the Tribunal by telephone that he would not appear at the hearing. The author did not submit any written response to the statement of the grounds for appeal.

4.4 The author did not exhaust domestic remedies. In the national proceedings, he did not invoke article 14 of the Covenant or the substance of the complaints in this communication, thereby denying the Disciplinary Board and the Tribunal the opportunity to respond to these complaints. The author was present at the hearing before the Disciplinary Board and could also have put forward the substance of his complaints in connection with article 14 in a written response to the statement of grounds for appeal. He did not do so. Furthermore, he lodged the appeal in the proceedings concerning Mr. and Mrs. P's complaint. Yet, in his statement of the grounds for appeal he failed to put forward the substance of his arguments before the Committee.

4.5 While the exhaustion of domestic remedies does not require a resort to extraordinary remedies, the State party remarks that the author has not submitted any request for review

of the decision. According to established case law of the Tribunal, the possibility of review exists in exceptional circumstances, when and in so far as a fundamental legal principle has been violated.

4.6 The author could have challenged the members' impartiality in proceedings before the Tribunal. Under section 56, subsection 6, of the Counsel Act in conjunction with articles 512–518 of the Code of Criminal Procedure, any of the members hearing a case can be challenged at the request of a party on the grounds of facts or circumstances that could be prejudicial to the impartiality of the court. The fact that the author was not present at the hearing before the Tribunal does not mean that he could not have challenged the members during the national proceedings. The author was informed twice of the composition of the Tribunal. He was therefore aware of the composition and could have submitted a challenge for bias as soon as any relevant facts or circumstances came to his attention. He has never claimed that he was not aware earlier of the reasons that he now puts forward to doubt the impartiality of the members of the Tribunal.

4.7 The allegations made by the author are highly speculative and the links he puts forward to substantiate his claim are not sufficiently relevant to the adjudication of his case to raise issues under article 14 of the Covenant. The State party therefore concludes that the author has also failed to substantiate his claims for the purposes of admissibility.

4.8 Regarding the merits of the communication, the State party takes the position that the communication is ill-founded. It observes that the author has not provided any evidence to substantiate his claim that the lawyer members of the Tribunal cannot be expected to be impartial in view of their professional background. The mere fact that members of the author's profession sit on the Tribunal neither objectively justifies fears of bias nor constitutes sufficient grounds for concluding that there is an appearance of bias. The manner in which the members of these bodies are appointed, combined with the rules on incompatibility of office under the Counsel Act, provide sufficient safeguards for their independence. The fact that the majority of the Tribunal's members are judges provides an additional safeguard for an independent and impartial consideration of appeals. The State party therefore believes that this part of the communication is not only inadmissible, since the author is not a victim within the meaning of article 1 of the Optional Protocol and has not exhausted domestic remedies, but also ill-founded.

4.9 With respect to the author's claim that he was not heard by the Tribunal, the State party observes that although the case file contains the author's notification that he would not attend the hearing, it gives no indication that he actually requested the Tribunal to adjourn the hearing. Nor — assuming that he did make such a request — does it indicate that he supported such a request with the reason he now adduces: his father's sudden illness. In any event, this reason is not substantiated either by anything in the Tribunal's records or by any aspect of the present communication. Accordingly, the State party concludes that the Tribunal had no reason to adjourn the scheduled hearing and that there are no grounds for finding a violation of article 14.

4.10 There is no factual basis for the author's assertion that the Tribunal took its decision purely on the basis of the statements by the opposing party. The Tribunal bases its examination on the decision of the Disciplinary Board and the Board's case file. The fact that the author did not avail himself of the opportunity to submit a written response to the statement of grounds for appeal is entirely his own responsibility. Accordingly, this part of the communication is not only inadmissible for non-exhaustion of domestic remedies but also ill-founded.

4.11 With regard to the allegation that the Tribunal exceeded its competence, the State party observes that it has no factual basis. By decision of 4 June 2004, the Tribunal, in addition to ordering the suspension of the author's legal practice, imposed the obligation

that the author pay the opposing party the sum of 11,900 euros within a month of the decision being sent to him. The Counsel Act does in fact provide a statutory basis for this specific obligation. Section 48b, subsection 1, in conjunction with section 57a of the Act provides that, in ordering the suspension of a lawyer's practice, the Tribunal may impose a specific obligation on the lawyer concerned to pay compensation for the damage caused by his or her actions, either in full or to an extent determined by the Tribunal's decision, within a period of time determined by the Tribunal. Accordingly, the Tribunal's decision fell within the limits of its statutory competence. This part of the communication is therefore not only inadmissible for non-exhaustion of domestic remedies but also ill-founded.

Author's comments on the State party's observations

5.1 On 13 February 2009 the author provided comments on the State party's observations. Regarding the decision of the European Court of Human Rights on his case he recalls that it is only when the same matter is being examined under another procedure of international investigation or settlement that the Committee has no competence to deal with a communication under article 5, paragraph 2 (a), of the Optional Protocol. Furthermore, the Committee has its own autonomous authority to judge a case independently of the outcome of the same case before the Court. The Committee is not obliged morally or judicially to present compatible views with decisions of the Court.

5.2 The author reiterates his allegations regarding his right to be heard and states that there was no reason for the Tribunal not to postpone the hearings. Furthermore, there was no legal obligation for the author to put forward to the Tribunal the substance of his complaints in a written response. If he had been heard he would have been able to do so orally and the Tribunal would have had the opportunity to respond.

5.3 As the State party admits, the Counsel Act does not provide for the possibility of review. Such possibility exists in exceptional circumstances, according to the case law of the Tribunal. It is incumbent on the State party to prove the effectiveness of the remedies the non-exhaustion of which it claims, and the availability of the alleged remedy must be reasonably evident. In the present case, the State party gives no reasonable prospect that such review would be effective and evident.

5.4 The author reiterates his previous claims regarding the lack of independence and impartiality of the Tribunal and the fact that the Tribunal exceeded his authority. He was informed of the composition of the Tribunal on 20 February 2004 and of the modified composition on 19 March 2004, i.e., just two days before the hearing. Thus, the author would have had a short time to investigate the background and possible inappropriate links of the new members. In any case, Mr. V.B. knew the author and must have realized that he lacked the appearance of impartiality and independence to deal with the case. In spite of that, he did not withdraw as a member of the Tribunal. The fact that Disciplinary Boards and the Tribunal are established by statute, that their powers are regulated by statute and that the majority of its members are judges are formal guarantees, but in practice they do not function.

Issues and proceeding before the Committee

Consideration of admissibility

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

6.2 The Committee notes that the matter in the present communication was considered by the European Court of Human Rights before being brought to the attention of the

Committee. However, it is only when the same matter is being examined under another procedure of international investigation or settlement that the Committee has no competence to deal with a communication under article 5, paragraph 2 (a), of the Optional Protocol. Thus, this provision does not bar the Committee from considering the present communication.

6.3 The author claims that the Disciplinary Appeals Tribunal did not provide him with the possibility to be heard in proceedings against him and that some of its members were prejudiced against him and did not act in an impartial manner. The State party observes that the author was requested to respond in writing no later than six weeks before the hearing, on the grounds for appeal, but he never submitted a response and did not present evidence that he actually requested a postponement of the hearing; furthermore, he never initiated proceedings under section 56, subsection 6, of the Counsel Act, in conjunction with articles 512–518 of the Code of Criminal Procedures, to challenge the impartiality of the Court. As the author has not submitted convincing arguments to refute the State party's observations the Committee considers that the author has failed to substantiate his claims regarding his right to be heard. This claim is therefore inadmissible under article 2 of the Optional Protocol. As to the claim regarding the impartiality of the Court, the Committee considers that the author's arguments are speculative and notes that he did not avail himself of any procedure for the protection of his rights in this respect. Accordingly, the Committee considers that this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol for non exhaustion of domestic remedies. All other claims raised by the author are also unsubstantiated and thus inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under articles 2 and 5, paragraph 2 (b), of the Optional Protocol;
- (b) That this decision shall be communicated to the State party and to the author.

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

- D. Communication No. 1822/2008, *J.B.R., L.M.O.C., A.M.A.R., G.E.O.S. and B.E.L. v. Colombia***
Communication No. 1823/2008, *S.M.R.M. v. Colombia*
Communication No. 1824/2008, *A.D.O., E.S.C., F.O.Q. and G.G.R. v. Colombia*
Communication No. 1825/2008, *E.M.C.B., M.C.P.J. and R.S.S.N. v. Colombia*
Communication No. 1826/2008, *G.M.V. and N.C.P. v. Colombia*
(Decision adopted on 23 July 2012, 105th session)*

Submitted by: J.B.R., L.M.O.C., A.M.A.R., G.E.O.S. and B.E.L. (1822); S.M.R.M. (1823); A.D.O., E.S.C., F.O.Q. and G.G.R. (1824); E.M.C.B., M.C.P.J. and R.S.S.N. (1825); G.M.V. and N.C.P. (1826); (represented by counsel, Mr. Alberto León Gómez Zuluaga)

Alleged victims: The authors

State party: Colombia

Date of communication: 11 June 2008 (initial submissions)

Subject matter: Refusal to authorize the establishment of a trade union

Procedural issue: Exhaustion of domestic remedies

Substantive issue: Freedom of association

Articles of the Covenant: Article 2, paragraphs 2 and 3; article 14, paragraph 1; article 22, paragraph 1; article 26

Article of the Optional Protocol: Article 5, paragraph 2 (b)

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

Meeting on 23 July 2012,

Adopts the following:

Decision on admissibility

1.1 The authors of the communications are J.B.R., L.M.O.C., A.M.A.R., G.E.O.S. and B.E.L. (1822); S.M.R.M. (1823); A.D.O., E.S.C., F.O.Q. and G.G.R. (1824); E.M.C.B.,

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Rafael Rivas Posada did not participate in the adoption of the present decision.

M.C.P.J. and R.S.S.N. (1825); G.M.V. and N.C.P. (1826), all of whom are Colombian nationals of full age. They claim to be victims of a violation by the State party of the rights established in article 2, paragraphs 2 and 3; article 14, paragraph 1; article 22, paragraph 1; and article 26 of the Covenant. The Covenant and the Optional Protocol entered into force for the State party on 23 March 1976.

1.2 On 23 July 2012, pursuant to rule 94, paragraph 2, of the Committee's rules of procedure, the Committee decided to join the five communications for decision in view of their substantial factual and legal similarity.

The facts as submitted by the authors

2.1 The authors were all employees of the National Training Service (SENA), which is part of the Ministry of Social Protection, and were working in different centres and regional offices around the country. As career public servants, their tenure was guaranteed except in the event of unsatisfactory performance, misconduct or other legally established grounds.

2.2 Decrees Nos. 248, 249 and 250, issued on 28 January 2004, made changes to the structure of SENA that entailed the abolition of the authors' posts and the adoption of a new staffing structure. The decrees established that the posts available within the new structure would be assigned by the Director General of SENA on the basis of internal organizational considerations, service requirements and the organization's plans and programmes.

2.3 On 28 February 2004, 70 public servants, including a number of the authors, resolved to establish the Union of Employees and Workers of SENA (SINDETRASENA). Several other authors joined the union in the days that followed. On 1 and 4 March 2004, the Cundinamarca Regional Directorate of Collective Labour Issues of the Ministry of Social Protection and the Human Resources Division of the Directorate General of SENA were informed of the union's establishment and approval was sought for the union's registration in the trade union register. Between 3 March and 23 April 2004, the union provided the Ministry of Social Protection with a list of its members. According to the authors, under Colombian law the union's founders and members benefited from trade union privileges (*fuero sindical*) until the union was registered, for a maximum period of six months. For this reason, they could not be dismissed, demoted or transferred without prior court approval.

2.4 On 19 March 2004, the Inspectorate of the Labour, Employment and Social Security Unit of the Cundinamarca Regional Labour Directorate of the Ministry of Social Protection ("the Inspectorate") issued a statement of objections to the registration application submitted by the union, accompanied by a list of clarifications and corrections that needed to be made to its internal rules. These included a request to amend one of the internal rules to provide that the national assembly of delegates should meet at least once every six months, as established by law. Also included was a reminder that the registration application must be accompanied by a copy of the internal rules authenticated by the secretary of the executive board. The trade union was given two months to make the corresponding corrections.

2.5 On 26 April 2004, the Director General of SENA informed the authors that their posts had been abolished and that they had not been allocated positions within the new staffing structure. Also on 26 April 2004, the Ministry of Social Protection rejected the application for the union's registration in the trade union register, stating, in its decision, that the union's registration had been requested after the date of the decrees announcing the reorganization of SENA and its new staffing structure and that, by introducing administrative restrictions and future obligations for the organization, it would cause unjustified harm to the organization. The decision also stated that the right to freedom of

association was not absolute and that it should not be safeguarded in this case, especially since its purpose was being distorted with the sole aim of securing job stability and impeding the reorganization.

2.6 On 17 May 2004, the union filed a request for review of, and in the alternative an appeal against, the decision to refuse registration issued on 26 April 2004. On 29 June 2004, the Ministry of Social Protection upheld the contested decision.

2.7 In an injunction (*tutela*) issued on 8 July 2004, Bogotá Circuit Criminal Court No. 13 ordered the annulment of the decision to refuse the union's registration.

2.8 On 22 July 2004, in accordance with the injunction ruling, the Inspectorate issued a further statement regarding the registration application and again denied the union's registration.

2.9 On 12 August 2004, a request for review and, in the alternative, an appeal against the decision to refuse registration issued on 22 July 2004 were filed with the Ministry of Social Protection. On 16 September 2004, the Ministry granted the appeal request and referred the case to the Coordinating Council of the Ministry's Labour, Employment and Social Security Unit ("the Coordinating Council").

2.10 On 25 November 2004, the Coordinating Council upheld the decision to refuse registration, indicating that the relevant authority had rejected the application for union registration on 26 April 2004 because the union's internal rules contained provisions contrary to those of the Substantive Labour Code.

Communication No. 1822/2008

2.11 The authors — J.B.R., L.M.O.C., A.M.A.R., G.E.O.S. and B.E.L. — worked as secretaries at the regional office of SENA in the city of Cali in Valle del Cauca department.

2.12 On 3 May 2004, they submitted to the Directorate General of SENA a request for review of the administrative act abolishing the posts they occupied within the organization. They claimed that their dismissal was arbitrary, was not based on any technical studies, failed to respect their right to equal treatment and their status as career public servants, and arbitrarily favoured other persons in similar situations who were assigned to other posts. Furthermore, since, as founders or members of the union, they benefited from trade union privileges, their dismissal without prior court approval was in direct violation of their right to freedom of association and their right to exercise the corresponding activities. On 22 June 2004, the Directorate General of SENA ruled that, in accordance with its Decree No. 250, requests for review through government channels were not permissible since the contested act was established by peremptory decree of the President of the Republic in exercise of his powers.

2.13 On 22 and 23 June 2004, the authors filed administrative complaints with the Directorate General of SENA, citing a violation of trade union privileges and seeking reinstatement to their posts and the payment of back wages. On 14 July 2004, the Directorate General of SENA informed Ms. O.S. that since the trade union was established on 28 February 2004, after the decrees announcing the reorganization of SENA had been issued, "it can be concluded that the goal sought in establishing a new trade union was not to exercise the constitutional right to freedom of association, but to secure job stability in the reorganization process, in clear abuse of this right. This was the Ministry of Social Protection's understanding and for this reason ... it decided: Not to enter the trade union organization named ... 'SINDETRASENA' in the trade union register."

2.14 In the meantime, the authors petitioned the labour courts for reinstatement on the grounds of trade union privileges; their petition was found to be admissible on 23 August 2004. On 21 June 2005, Bogotá Circuit Labour Court No. 5 dismissed the request on the

grounds that the Ministry of Social Protection had refused to register the union on 22 July 2004, that the refusal had subsequently been upheld by all the administrative authorities, and that it was not proven that the employer had been notified of the union's establishment and provided with a comprehensive list of founders and members. The authors appealed against the ruling. On 15 September 2005, Bogotá High Court upheld the lower court's ruling. While acknowledging that the employer was notified of the union's establishment and had received a list of founders and members, the High Court ruled that, since the union's registration had been refused on the grounds that the prerequisites established for such purpose were not met, the union could not function or exercise any of its rights and the authors were not therefore protected by trade union privileges.

Communication No. 1823/2008

2.15 Ms. S.M.R.M. worked as an assistant in the Guajira regional office of SENA until 29 April 2004.

2.16 On 5 May 2004, she filed with the Directorate General of SENA a request for review of the administrative act that abolished the post she occupied on the grounds that her dismissal was arbitrary, was not based on any technical studies, failed to respect her right to equal treatment and her status as a career public servant, and arbitrarily favoured other persons in similar situations who were assigned to other posts. Furthermore, since, as a member of the union, she was protected by trade union privileges, her dismissal without prior court approval was in direct violation of her right to freedom of association and her right to exercise the corresponding activities. On 21 July 2004, she lodged an administrative complaint with SENA.

2.17 On 20 August 2004, the author, together with three other SENA employees, applied for reinstatement on the grounds of trade union privileges. On 25 September 2006, Bogotá Circuit Labour Court No. 10 dismissed the author's application, stating that the action was time-barred since the law established a maximum period of two months for filing claims invoking trade union privileges. The author appealed against the ruling. On 30 April 2007, Bogotá High Court ruled that the action was not time-barred but dismissed the application nonetheless. The High Court found that since the complainants were well informed about the SENA reorganization and other trade unions were active at the time the new union was formed, the establishment of SINDETRASENA had to be viewed as an attempt to secure job stability and protect its members from any redundancies that might result from the reorganization, and that this constituted an abuse of the right to freedom of association.

Communication No. 1824/2008

2.18 The authors — A.D.O., E.S.C., F.O.Q. and G.G.R. — worked as secretaries in the SENA regional office in the city of Cali in Valle del Cauca department.

2.19 On 3 May 2004, they filed with the Directorate General of SENA a request for review of the administrative act abolishing the posts that they occupied on the grounds that their dismissal was arbitrary, was not based on any technical studies, failed to respect their right to equal treatment and their status as career public servants, and arbitrarily favoured other persons in similar situations who were assigned to other posts. Furthermore, since, as founders or members of SINDETRASENA they were protected by trade union privileges, their dismissal without prior court approval was in direct violation of their right to freedom of association and their right to exercise the corresponding activities. On 22 and 28 June 2004, the Directorate General of SENA ruled that, in accordance with its Decree No. 250, requests for review through government channels were not permissible since the contested act was established by peremptory decree of the President of the Republic in exercise of his powers.

2.20 On 22, 23 and 25 June 2004, the authors filed administrative complaints with the Directorate General of SENA citing a violation of trade union privileges and seeking reinstatement to their posts and the payment of back wages. On 14 July 2004, the Directorate General of SENA informed Ms. D.O. that since the trade union was established on 28 February 2004, after the decrees concerning the reorganization of SENA had been issued, “it can be concluded that the goal sought in establishing a new trade union was not to exercise the constitutional right to freedom of association, but to secure job stability in the institutional reorganization, in clear abuse of this right. This was the Ministry of Social Protection’s understanding and for this reason ... [the Directorate General of SENA] resolved: Not to enter the trade union organization named ... ‘SINDETRASENA’ in the trade union register.”

2.21 On 20 August 2004, the authors’ request for reinstatement on the grounds of trade union privileges was accepted. On 19 January 2005, Bogotá Circuit Labour Court No. 3 granted protection (*amparo*) on the grounds of trade union privileges and ordered the authors’ reinstatement to their posts and the payment of back wages, since they had been dismissed without prior court approval, as required in application of legal provisions concerning workers protected by trade union privileges. SENA appealed against the ruling. On 31 May 2005, Bogotá High Court overturned the lower court’s ruling and dismissed the authors’ application. The High Court found that since the trade union was formed after the promulgation of the decree announcing the abolition of posts in the reorganization of SENA and therefore after the authors became aware of this fact, the sole goal pursued in establishing the new union was to secure job stability for its members and prevent the employer from implementing the decision taken previously, and that this constituted an abuse of the right to freedom of association.

Communication No. 1825/2008

2.22 The authors — E.M.C.B., M.C.P.J. and R.S.S.N. — worked as a clerk, assistant and secretary, respectively, in the Nariño regional office of SENA.

2.23 On 24 June 2004, they filed administrative complaints with the Directorate General of SENA citing a violation of trade union privileges and seeking reinstatement to their posts and the payment of back wages.

2.24 On 24 August 2004, the authors filed a request for reinstatement on the grounds of trade union privileges since they had been dismissed without prior court approval. On 12 July 2005, Pasto-Nariño Circuit Labour Court No. 1 dismissed the request on the grounds that the Ministry of Social Protection had refused the union’s registration on 22 July 2004, that the refusal had subsequently been upheld by all the administrative authorities and that, since the union did not therefore exist, it could not be invoked as a source of trade union privileges. The authors filed an appeal against the ruling with Pasto High Court. On 24 August 2005, the High Court ruled that the action was time-barred.

Communication No. 1826/2008

2.25 Mr. G.M.V. and Ms. N.C.P. worked as a clerk and assistant, respectively, in the SENA regional office in Cali in Valle del Cauca department.

2.26 On 3 May 2004, they filed with the Directorate General of SENA a request for review of the administrative act abolishing the posts they occupied on the grounds that their dismissal was arbitrary, was not based on any technical studies, failed to respect their right to equal treatment and their status as career public servants, and arbitrarily favoured other persons in similar situations who were assigned to other posts. Furthermore, since, as members of SINDETRASENA, they were protected by trade union privileges, their dismissal without prior court approval was in direct violation of their right to freedom of

association and their right to exercise the corresponding activities. On 28 June 2004, the Directorate General of SENA ruled that, in accordance with its Decree No. 250, requests for review through government channels were not permissible since the contested act was established by peremptory decree of the President of the Republic in exercise of his powers. On 25 June 2004, they filed administrative complaints with the Directorate General of SENA, citing a violation of trade union privileges and seeking reinstatement to their posts and the payment of back wages. However, both claims were dismissed.

2.27 The authors then submitted a request for reinstatement on the grounds of trade union privileges. On 7 October 2005, Bogotá Circuit Labour Court No. 8 dismissed the request on the grounds that the Ministry of Social Protection had refused the union's registration on 22 July 2004, that the refusal had subsequently been upheld by all the administrative authorities and that, since the union did not therefore exist, trade union privileges could not be granted to its founders and members. Moreover, the purpose of privileges was to safeguard the existence of trade unions and the right to freedom of association and not under any circumstances to preserve workers' job stability. On 11 October 2005, the authors appealed against the ruling. On 31 January 2006, Bogotá High Court upheld the lower court's ruling.

2.28 The authors maintain that their communications comply with the admissibility criteria established under the Optional Protocol.

The complaint

3.1 The authors claim that the facts described constitute a violation of article 2, paragraphs 2 and 3; article 14, paragraph 1; article 22, paragraph 1; and article 26 of the Covenant.

3.2 With regard to the right to freedom of association recognized in article 22, paragraph 1, of the Covenant, the authors maintain that the refusal by the Ministry of Social Protection to enter the union in the trade union register was arbitrary and in violation of their right to form and/or join the organization or organizations of their choice. The margin of discretion accorded to the State party cannot be extended so far as to prevent the authors from choosing which trade union or unions to join or from establishing or becoming members of a new union. Furthermore, it assumes compliance with legally established safeguards such as the trade union privileges of founders and members of new trade unions – precisely the safeguard that was violated when SENA decided to dismiss the authors without prior court approval. The authors further maintain that the purpose of the trade union is to safeguard members' interests and that preserving members' jobs is a legitimate interest. They assert that, according to the Constitutional Court, trade union privileges are established by the simple fact of the organization's foundation and must be respected by the employer while the registration process is under way, beginning from the date of notification of establishment and submission of the list of founders and members. Lastly, they contend that the legally established restrictions authorized in article 22, paragraph 2, of the Covenant are not applicable in this case, especially since paragraph 3 of the same article, invoking the relevant International Labour Organization (ILO) Convention, establishes heightened protection for freedom of association.

3.3 The authors maintain that the State party violated the right to equality before the courts and the right to a fair and public hearing by an independent and impartial tribunal, as established in article 14, paragraph 1, read in conjunction with article 2, paragraphs 1, 2 and 3. The court decisions that denied privileges in the context of the requests for reinstatement on the grounds of trade union privileges run counter to the law and previous Constitutional Court decisions, amount to a denial of justice and implicitly constitute a manifest violation of due process, judicial safeguards and equality before the law. The Ministry of Social Protection's erroneous interpretation of the injunction (*tutela*) issued on 8 July 2004,

resulting in its refusal to register the union, was applied in violation of the right to due process, since it was based on a non-existent inconsistency between certain provisions of the union's internal rules, the Constitution and the law. It failed to take account of the fact that an injunction could have the effect of preventing the union from complying with requirements, extemporaneously reinstated a decision overturned by the court that issued the injunction, and allowed the employer to oppose the union's registration and act as judge and party in the proceedings even though, since SENA was affiliated to the Ministry of Social Protection, the Ministry should not have been permitted to take decisions concerning the registration of a union composed of SENA employees.

3.4 In relation to the allegations of a violation of article 26 of the Covenant, the authors contend that the refusal by the Ministry of Social Protection to register the trade union cannot be justified under any of the specific grounds for refusal of registration established in Act No. 584. It therefore constituted a violation of the authors' right to join the union of their choice and, by extension, of the State party's obligations under article 26 of the Covenant, since the authors were not granted the protection that the Constitution and the law afford workers for the establishment of trade unions. They add that the Constitutional Court has ruled in similar cases that actions of this kind on the part of an administrative authority constitute a violation of the right to equality and non-discrimination.

3.5 The authors maintain that freedom of association is a human right that should be interpreted in light of the principles underlying the guarantee of fundamental rights and a restrictive interpretation of any limitation or prohibition. The ILO Governing Body's Committee on Freedom of Association and Committee of Experts on the Application of Conventions and Recommendations indicate that responsibility for the resolution of legal disputes concerning a restriction of the right to freedom of association lies with an independent authority – meaning, in the authors' opinion, the judiciary.

State party's observations on admissibility

4.1 The State party submitted its observations on the admissibility of the communications in notes verbales dated 3 February 2009.

4.2 The termination of the authors' employment was a consequence of the reorganization of SENA which, as SENA is a State institution operating at the national level, was authorized by Act No. 790 of 2002. The posts occupied by the authors were abolished in the reorganization, in accordance with legal procedures and respecting the acquired rights established by law. The State party maintains that the constitutionality of Act No. 790 was verified by the Constitutional Court, which declared the Act enforceable in a ruling dated 1 October 2003. The Act, together with Act No. 489 of 1998, authorizes the abolition or merger of non-essential posts, in accordance with official labour regulations.

4.3 Decree No. 248 amending the nomenclature and classification of public service jobs within SENA, Decree No. 249 amending the organizational structure of SENA, and Decree No. 250 on workforce rationalization at SENA, were issued on 28 January 2004 following technical studies and after completion of the relevant legal processes. Subsequently, as required by law, the Director General of SENA issued decisions Nos. 647, 658 and 677 of 22, 23 and 26 April 2004, respectively, allocating posts to SENA staff. In deciding which SENA public servants should be given posts in the new organizational structure and which should be made redundant because their posts had been abolished, the Directorate General took into account objective, legally established criteria, such as the requirement to give priority to staff close to retirement, pregnant women and mothers and fathers who are heads of household. Any positions subsequently still available were assigned to career public servants who did not meet any of the aforementioned criteria.

4.4 The State party maintains that on 28 February 2004, after the publication of Decrees Nos. 248, 249 and 250 on the reorganization of SENA, a group of public servants who believed their posts to be among those due to be abolished formed the new trade union SINDETRASENA with the sole aim of securing the job stability afforded by trade union privileges, and that this constitutes an abuse of the right to form a trade union. It is incorrect to maintain that unionized workers were dismissed, since on the date on which the decrees concerning the reorganization and the abolition of jobs were issued, neither SENA nor any other public body was aware that this trade union was going to be established. If the intent of the public servants concerned had been simply to join a trade union in order to exercise trade union rights, they could have joined one of three unions already active in SENA that were duly registered with the Ministry of Social Protection – the Union of Public Employees of SENA (SINDESENA), the Union of Public Sector Workers (SINTRASENA), and the Union of Employees and Workers of SENA (SETRASENA).

4.5 In addition, the trade union formed by these workers did not meet the legal prerequisites for registration in the trade union register of its constituent instrument, internal rules and executive board, as was established by the Ministry of Social Protection in its decision to deny trade union registration dated 22 July 2004. In similar cases the Constitutional Court has found that forming trade unions for purposes other than to guarantee the right to freedom of association, including for the purpose of obtaining trade union privileges and preventing termination of employment, is unconstitutional.¹

4.6 The communication is inadmissible due to a failure to exhaust domestic remedies, as provided for in article 2, paragraph 2 (b), of the Optional Protocol. In the action for reinstatement on the grounds of trade union privileges in which the authors claimed to have been unilaterally dismissed without prior court approval, in rulings issued on 31 May 2005 (1824/2008), 15 September 2005 (1822/2008), 31 January 2006 (1826/2008) and 30 April 2007 (1823/2008), Bogotá Judicial District High Court ordered their reinstatement either to their previous post or to a similar one and the payment of all back wages due since their dismissal. However, in a ruling on appeal issued on 24 August 2005 (1825/2008), Pasto High Court dismissed the applications in accordance with the law and without violating any of the authors' rights. Subsequently, J.B.R. and B.E.L. (1822/2008) and A.D.O., E.S.C., F.O.Q. and G.G.R. (1824/2008) applied to the Administrative Court for restitution of their rights and annulment of the decision that removed them from their posts, seeking their reinstatement within the workforce. These applications were under consideration at the time the State party submitted its observations. E.M.C.B. and R.S.S.N. (1825/2008) filed similar applications, which were dismissed by the Administrative Court on 18 May and 13 November 2007 respectively. Subsequently, in September 2008, the latter application was upheld on appeal.

4.7 If the authors considered the decisions issued by the high courts of Bogotá and Pasto judicial districts to be in violation of their right of access to justice, due process and equality before the law and their right to freedom of association, they could have applied for an injunction (*tutela*) or for protection of their constitutional rights (*amparo*).²

¹ The State party refers to Constitutional Court ruling T-077 of 5 February 2003.

² Constitution, article 86: "Any person may apply for an injunction (*tutela*) to claim before the courts, at any time and in any place, through a preferential and summary proceeding instituted by themselves or another party acting on their behalf, immediate protection for their fundamental constitutional rights whenever any of those rights are violated or threatened by the action or omission of any public authority ...".

Injunction proceedings are an appropriate and effective remedy for seeking protection of the aforementioned rights.³

4.8 The communication is inadmissible even if the authors are considered to have exhausted all domestic remedies since it is an attempt to use an international body as a level of jurisdiction (“court of fourth instance”) in addition to those available under the domestic legal system. The State party recalls that the Committee cannot substitute its views for decisions issued by the domestic courts after evaluating the facts and the evidence of a given case unless it is proven that the conduct of the courts was manifestly arbitrary or amounted to a denial of justice.

5. The Committee asked the authors to submit their comments regarding the State party’s observations on the admissibility of the communication on 9 February 2009, 11 February 2010, 20 December 2010 and 4 August 2011 but has received no information in this connection.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

6.3 With regard to the requirement to exhaust domestic remedies, the Committee notes the State party’s contention that the communications do not meet the requirements of article 5, paragraph 2 (b), of the Optional Protocol and should therefore be declared inadmissible. The Committee notes the information provided by the State party in relation to the applications for annulment and restitution of rights that some of the authors filed with the Administrative Court to challenge the decision that removed them from their posts and which were under consideration when the State party submitted its observations on 9 February 2009. The Committee also notes the State party’s contention that the communications should be declared inadmissible on the grounds of failure to exhaust domestic remedies since, after the High Courts of Bogotá and Pasto judicial districts issued rulings dismissing the applications for reinstatement on the grounds of trade union privileges, the authors could have initiated either injunction (*tutela*) or *amparo* proceedings. According to the State party, injunction proceedings are an appropriate and effective remedy for seeking protection for the rights of access to justice, due process and equality before the law and the right to freedom of association. The Committee notes that the authors did not contest the State party’s observations regarding the suitability and efficacy of injunction proceedings in their case.

6.4 The Committee recalls that for the purposes of article 5, paragraph 2 (b), of the Optional Protocol, in addition to ordinary judicial and administrative appeals, the authors should also avail themselves of all other judicial remedies, in order to meet the requirement of exhaustion of all available domestic remedies, insofar as such remedies appear to be

³ The State party refers to Constitutional Court rulings T-31 of 2001, T-029 of 2004, and T-1108 of 2005, which involved applications for *amparo* in relation to the right to freedom of association and the right to trade union protections.

effective in the given case and are de facto available to them.⁴ Therefore, in the absence of an explanation from the authors to demonstrate that, in their case, this remedy was not available or was not effective, the Committee concludes that the authors have not exhausted all domestic remedies.

7. The Committee therefore decides:

(a) That the communications are inadmissible under article 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be transmitted to the State party and to the authors.

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

⁴ See communication No. 433/1990, *A.P. v. Spain*, decision on admissibility adopted on 25 March 1994, para. 6.2; communication No. 1003/2001, *P.L. v. Germany*, decision on admissibility adopted on 22 October 2003, para. 6.5; communication No. 1188/2003, *Riedl-Riedenstein v. Germany*, decision on admissibility adopted on 2 November 2004, para. 7.2; communication No. 1747/2008, *Marielle Boisvert v. Germany*, decision on admissibility adopted on 19 March 2010, para. 7.3.

**E. Communication No. 1827/2008, *S.V. v. Canada*
(Decision adopted on 23 July 2012, 105th session)***

<i>Submitted by:</i>	S.V. (not represented by counsel)
<i>Alleged victims:</i>	The author, his wife T.G. and their three children
<i>State party:</i>	Canada
<i>Date of communication:</i>	26 September 2008 (initial submission)
<i>Subject matter:</i>	Deportation from Canada to Romania
<i>Procedural issues:</i>	Failure to sufficiently substantiate allegations; incompatibility with the Covenant
<i>Substantive issues:</i>	Right to life; prohibition of torture or cruel, inhuman or degrading treatment; right to an effective remedy; right to privacy; liberty and security of the person; protection of the family
<i>Articles of the Covenant:</i>	2, para. 3; 6, para. 1; 7; 9, para. 1; 14; 17; 23, para. 1
<i>Articles of the Optional Protocol:</i>	2; 3 and 5, para. 2 (b)
<i>The Human Rights Committee</i> , established under article 28 of the International Covenant on Civil and Political Rights,	
<i>Meeting on 23 July 2012,</i>	
<i>Adopts the following:</i>	

Decision on admissibility

1.1 The author of the complaint is Mr. S.V., Moldovan by birth but since 1995 also a citizen of Romania. He resided in Canada and sought protection as a refugee before his eventual deportation with his family to Romania on 25 April 2009. He submits the communication on his behalf and on behalf of his wife, T.G., and their three children. The author complains that his return to Romania would constitute a violation of his human rights as he and his family would face torture in the Republic of Moldova, whence Romania would eventually deport him. The author is not represented by counsel.

1.2 The author requests the Committee to invite the State party not to proceed with the forced removal, which he alleged was imminent at the time of the submission of the complaint, pending the examination of the case. On 3 December 2008, the Committee

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

refused to grant interim measures. On 6 March 2009, the author submitted a new request for interim measures which was again refused by the Committee on 10 March 2009.

The facts as submitted by the author

2.1 The author is a scientist who was involved in anti-communist and human rights activities in the former Soviet Union. He claims that from 1994 to 2001 he was on several occasions illegally arrested, tortured¹ and persecuted. In 2001, the Moldovan secret service confiscated his house and his property and he was deported together with his family to Romania. From 2001 to 2005 he had temporary study visas for Portugal and Spain. He and his family arrived in Canada on 8 November 2005 on a one-year professorship visa. They filed for refugee status in 2006 when the communist party won the elections in the Republic of Moldova.

2.2 On 26 April 2007, the author's claim for protection was rejected by the Refugee Protection Division of the Canadian Immigration and Refugee Board (IRB). The Canadian immigration authorities found the author's testimony credible with respect to his persecution in the Republic of Moldova and the former Soviet Union, but found that he lacked credibility with respect to his inability to establish residence in Romania and with respect to being deported to the Republic of Moldova. They concluded that his removal to Romania would not put the author at risk of torture.² The author states that the decision did not take into account the fact that, if deported to Romania, he and his family would eventually be expelled to the Republic of Moldova, as Romania usually re-deports persons to their country of first citizenship.

2.3 The author applied for an order staying the deportation, which was granted on 19 March 2008, and for an application for judicial review, which was granted on 27 June 2008, claiming that the Canadian immigration authorities did not consider new evidence provided by him (i.e. Romanian extradition laws). The author contended that the pre-removal risk assessment (PRRA) officer who rejected his application did not properly assess the newly submitted evidence with respect to the risk he would face in the Republic of Moldova if he was required to return to Romania. The Federal Court, in a decision dated 18 September 2008, dismissed the author's application and considered that PRRA did not err in determining that the evidence about Romanian extradition laws was not admissible since the author did not provide a justification as to why these laws were not reasonably made available for presentation to IRB.

The complaint

3.1 The author makes several complaints in his lengthy submission to the Committee, but does not invoke any articles of the Covenant although he invokes the Universal Declaration of Human Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The author also complains in general terms of corruption among immigration authorities in Canada and about the fact that he was allegedly being discriminated against in obtaining legal aid for his immigration case.

3.2 First, the author submits that he will be subjected to torture if deported to Romania, as this country will later deport him to the Republic of Moldova, his country of first citizenship pursuant to Romanian extradition laws. It must be noted that on 25 April 2009, the author and his family were deported to Romania.

¹ Medical certificates from 1999 are attached to the complaint.

² Pre-removal risk assessment of 11 January 2008, section 4, second and third paragraphs.

3.3 Second, the author alleges that in June 2008 Canada refused to grant him and T.G. work permits even when the Federal Court ordered a stay of their removal from Canada on 18 March 2008. The author, therefore, argues that his family of five persons had to survive on a welfare grant of less than 100 dollars a month after paying rent. He alleges that these living conditions are equivalent to starvation and amount to torture by Canada. He further argues that restrictions on access to job opportunities on the basis of immigration and education status, and country of origin are discriminatory.

3.4 Third, the author also alleges that his personal data including home address and telephone numbers were uploaded on websites belonging to the Canadian Society of Immigration Consultants (CSIC) and a company called "Rogers" without his consent. Furthermore, he alleges that the University of Toronto contacted the Moldovan Embassy in Toronto and sent his personal data to the embassy. This he alleges is a breach of his right to liberty and security of the person.

3.5 Fourth, the author alleges breach of the right to an effective remedy. He alleges that since he and T.G. did not have work permits, they could not have access to justice because they could not afford to pay court filing fees. As such, the author submits that they were unlawfully prevented from accessing the courts.

3.6 Fifth, the author alleges breach of the right to a fair and public hearing in the conduct of immigration matters. He alleges that IRB was not impartial and falsified his passport data and other documents thereby jeopardizing the prospects of success on appeal of any of his applications. He further alleges that, following the decisions of IRB and the Federal Court, their application for refugee status was denied because of the unfair processes that amount to a violation of principles of natural justice. On this point, he submits that, during the hearing of his application by IRB, he and T.G. were not allowed to provide explanations and evidence particularly on Romanian Law No. 302/2004 on extradition of citizens with double citizenship to their countries of domicile. The author further alleges that they were not professionally represented by the legal aid lawyers during the IRB hearing and during the application for leave to apply for judicial review, as these lawyers were incompetent and distorted material facts. The author further alleges that the legal aid lawyers falsified their documents and "cleaned" their affidavits. The author complains that the judges in the Federal Court would not allow the author to present explanations in relation to the effect of Romanian Law No. 302/2004. The author also submits that, during the applications for PRRA and consideration of protection on the basis of humanitarian and compassionate grounds (H&C application), a member of the CSIC, Stela Coldea, who was assigned to assist them with these applications, falsified the H&C application and did not submit the necessary forms and documents. The author alleges that when the PRRA application failed, Ms. Coldea lied to them and tried to extort 10,000 dollars for an appeal before the Federal Court when in fact she did not have a right appear before the Federal Court.

3.7 Lastly, the author submits that Canadian authorities refused to give T.G. medical assistance when she was six months pregnant. The author alleges that she was discriminated against on the basis of her immigration status and because she was not under the Interim Federal Health Program (IFHP). The author submits that they had applied for an extension of the IFHP which was not granted even when the doctor that attended to her confirmed that she was pregnant and needed urgent medical assistance. The author further alleges that he was refused medical assistance for his high blood pressure, heart problems and medical care for cancer analysis. Finally on this point, the author submits that their underage children were refused medical assistance in winter when they suffered flu and a cold.

State party's observations on the admissibility and the merits

4.1 On 3 June 2009, the State party submitted its observations on the admissibility and the merits of the complaint. The State party submits that the author's claim for refugee protection was heard by IRB, which rendered its decision on 26 April 2007, finding that the author and his family were not Convention refugees and, therefore, not in need of protection. The State party states that IRB considered the fact that the author had lived and worked in Spain, Portugal and the United States of America from 2001 and 2005 without making a refugee claim in any of those countries as indicative of a true lack of fear. The State party further submits that the author admitted in oral testimony under oath that he did not seek refugee protection in Portugal because he could have a better salary in Canada. For this reason, IRB determined that the author was "country shopping".

4.2 The State party further states that, on 16 August 2007, the author's leave to apply for a judicial review of the IRB decision was refused by the Federal Court. Later in October 2007, the author made an application for a PRRA, which was turned down on 11 January 2008. The author then filed an application for leave to apply to the Federal Court to review the negative decision of PRRA, which was granted on 18 March 2008. This order effectively stayed the family's removal from Canada until the final disposition of the judicial review.

4.3 The State party submits that, on 18 September 2008, the Federal Court threw out the judicial review application on the ground that the new evidence which the author had alleged was not properly assessed by the PRRA officer, namely article 24 of Romania Law No. 302/2004, was not new as it would have been reasonably available for presentation to IRB. The Federal Court, therefore, considered that the PRRA officer did not commit a reviewable error by not admitting this document in evidence. On 12 March 2008, the author applied to IRB to have his claim for refugee protection reopened on the ground that his hearing before IRB had been a breach of justice. On 17 April 2008, IRB dismissed this application on the ground that the author had not established a breach of natural justice. The author then applied for leave to the Federal Court to review the decision by IRB not to reopen his refugee claim. On 15 August 2008, the Federal Court refused to grant leave.

4.4 In January 2008, the author made an H&C application for permanent residence. In the H&C application, the author argued that Romania Law No. 302/2004 on extradition had the effect that if he and his family were to be sent to Romania, they would automatically be extradited to the Republic of Moldova because the family's Romanian citizenship was not effective without establishing domicile in that country. On 9 January 2009, the H&C application was turned down. On 20 April 2009, the author filed an application for leave to apply for judicial review before the Federal Court. The removal of the author and his family from Canada was scheduled for 22 April 2009 and their application to stay this removal was dismissed on 20 April 2009 because the author did not attend the court hearing. The author and his family were deported to Romania on 25 April 2009.

4.5 With regard to the alleged starvation and insufficient financial support, the State party notes that the author has not provided any evidence that he was denied financial assistance but that he merely was dissatisfied with the amount that he and his family were receiving, and with the requirement to periodically prove their continued eligibility for assistance.

4.6 In respect to the author's allegation of refusal of health coverage and refusal for the prolongation of IFHP, the State party submits that IFHP provides essential health-care coverage to eligible persons who can demonstrate financial need. The State party states that refugee claimants in financial need are given basic and supplemental IFHP coverage during their refugee determination process and while waiting for a decision on a PRRA application. The State party submits that the author has not provided any evidence that his

family's medical coverage was refused. The State party has no record of refusing the family's application for IFHP. On the contrary, the State party submits that its records indicate that the family's coverage was renewed on 5 January 2009 and was valid until 4 January 2010.

4.7 With regard to the author's allegation that he and his wife paid the necessary fees to extend their work permits in January 2008 but their applications were refused because at the time they were under a removal order, the State party submits that, under regulation 299 of the Immigration and Refugee Protection Regulations, a claimant of refugee protection is exempted from payment of fees that are normally required for such an application. The State party submits that on 21 January 2008 when the author and his wife made applications for work permits, their claim for refugee status had already been denied and all recourses had been exhausted. The author and his family, therefore, became subject to an enforceable removal order and thus he and his wife were no longer entitled to a work permit pursuant to regulations 206 and 209 of the Immigration and Refugee Protection Regulations. The State party, therefore, submits that their application for work permits was rejected in accordance with the law. The State party also submits that, in June 2008, when the authors were under a temporary judicial stay of removal and made a new application, their application could not be processed without the payment of fees.

4.8 As regards the claim of refusal of free legal assistance and the failure to access justice, the State party states that free legal assistance in the State party for persons in financial need is provided for in the province of Ontario by the Ontario Legal Aid Plan, which covers refugee hearings. However, in the event that legal aid coverage through the plan is not available for a particular legal proceeding, the State party states that there exist legal clinics and student legal aid clinics which may be able to offer assistance. The State party submits that, on 6 April 2009, the author brought an application to the Federal Court for leave and for judicial review of the refusal by the Prime Minister of Canada, the Minister of Citizenship and Immigration, the Minister of Public Safety, the Minister of Health, the Minister of Justice and the Attorney General to give answers and provide solutions for his various complaints, but that he did not pay the requisite court filing fees for this application.

4.9 On admissibility, the State party submits that the whole communication should be declared inadmissible *ratione materiae* as the author does not allege violations of the Covenant but instruments in relation to which the Committee does not have supervisory competence, such as the Universal Declaration of Human Rights and the Convention against Torture. In the alternative, to the extent that some allegations seem to raise issues under the Covenant, the State party submits that the allegations have not been sufficiently substantiated for the purpose of admissibility. In the further alternative, the State party submits that the allegations have not been established to the degree of proof required to found a determination of a violation of the Covenant.

4.10 With regard to allegations appearing to raise issues under the Covenant, the State party provides a detailed response to each one of them. The State party considers that the alleged risk of death or torture or inhuman treatment or punishment in the Republic of Moldova raises issues under articles 6 and 7. However, the State party submits that the author's allegations that if deported to Romania he and his family will in turn be deported to the Republic of Moldova, where they risk death or torture or inhuman treatment or punishment, have not sufficiently been substantiated. The State party, therefore, submits that those aspects of the author's communication are inadmissible pursuant to article 2 of

the Optional Protocol.³ On this point, the State party underscores the fact that while authors of a communication need not prove their case “[they] must submit sufficient evidence in substantiation of [their] allegations as will constitute a prima facie case”.⁴

4.11 The State party further submits that, since the allegations concerning risks in Romania are based on substantially the same facts and evidence as was presented to IRB, PRRA and during the H&C application, it is not the role of the Committee to re-evaluate the facts and evidence unless it is manifest that the domestic tribunal’s evaluation was arbitrary or amounted to a denial of justice.⁵ In the alternative, the State party argues that, in the event that the Committee wishes to re-examine the findings of fact and credibility of domestic tribunals, the State party recalls that IRB determined that the author and his family did not have a credible fear of return to Romania: firstly, based on their failure to claim refugee protection in Spain, Portugal and the United States of America where they lived between 2001 and 2005. Secondly, that the author and his family were country shopping based on the author’s admission in oral testimony under oath that he did not seek refugee protection in Portugal because he would not have the salary in Portugal that he would have in Canada. Thirdly, the author was not credible in asserting that he could not obtain domicile in 2001 since, in fact, evidence indicated that he did not obtain Romanian domicile in 2001 because he left for teaching positions in Western Europe. Lastly, on a balance of probabilities, the author and his family would have the rights of all citizens in Romania and that they would not be deported to the Republic of Moldova after three months of their residence.⁶ The State party submits that IRB based this finding on the documentary evidence before it such as the Romanian Constitution and other reports which stipulated, inter alia, the equality of citizens; the right of citizens to return to Romania; and that citizens cannot be expelled.

4.12 With regard to the Romanian Law No. 302/2004, the State party submits that the law does not allow for the expulsion of its citizens outside the extradition context. Therefore, in the absence of evidence that the author will be wanted for any criminal charges in the Republic of Moldova that may potentially put him at risk of an extradition request, the State party submits that the author has not established that he and his family would be directly or indirectly at risk of any treatment in violation of article 6 or 7 of the Covenant upon their return to Romania. The State party recalls that the Committee has held that in cases of extradition or deportation, the removing State is responsible for ensuring that the individual will not be exposed to a real risk of a violation of his rights under article 6 in the receiving State.⁷ It recalls that a real risk of a violation of an individual’s rights means that it must be

³ In this context, the State party refers to the Committee’s communications No. 970/2001, *Fabrikant v. Canada*, decision of inadmissibility adopted on 6 November 2003, para. 9.3; No. 1234/2003, *P.K. v. Canada*, decision of inadmissibility, para. 7.3; No. 1562/2007, *Kibale v. Canada*, decision of inadmissibility adopted on 22 July 2008, para. 6.4; No. 1534/2006, *Pham v. Canada*, decision of inadmissibility adopted on 22 July 2008, para. 7.4; No. 1481/2006, *Tadman and Prentice v. Canada*, decision of inadmissibility adopted on 22 July 2008, para. 7.3; No. 1455/2006, *Kaur v. Canada*, decision of inadmissibility adopted on 30 October 2008, para. 7.3; No. 1638/2007, *Wilfred v. Canada*, decision of inadmissibility adopted on 30 October 2008, para. 4.3; No. 1766/2008, *Anani v. Canada*, decision of inadmissibility adopted on 30 October 2008, para. 4.2.

⁴ *Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 40 (A/39/40)*, para. 588.

⁵ See communications No. 1234/2003, para. 7.3; No. 1481/2006, para. 7.3; No. 1534/2006, para. 7.4; No. 1562/2007, para. 6.4.

⁶ See State party’s comments on the admissibility and the merits, dated 3 June 2009, p. 16.

⁷ See communications No. 539/1993, *Cox v. Canada*, decision of inadmissibility adopted on 3 November 1993, paras. 10.1–10.5; No. 470/1991, *Kindler v. Canada*, Views adopted on 30 July 1993,

“the necessary and foreseeable consequence of the deportation”, which the material submitted does not support such a conclusion. The State party further submits that the material does not, even on a *prima facie* basis, establish the fact that “the necessary and foreseeable consequence of the deportation”⁸ would be that they would be deported by Romania to the Republic of Moldova where they would be persecuted. With respect to allegations under article 7, the State party recalls that “State parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement”.⁹ The State party submits that the author’s allegations do not establish a risk at a level beyond mere “theory or suspicion” and certainly do not establish a real and personal risk of torture or cruel, inhuman or degrading treatment or punishment. The State party, therefore, submits that their claims in this regard are inadmissible pursuant to article 2 of the Optional Protocol on the grounds of non-substantiation.

4.13 In respect to the alleged denial of free legal aid, to assist the author with his immigration and court proceedings and other various complaints to State authorities, the State party notes that during the IRB hearing, the author was represented by a barrister and solicitor, and he therefore cannot complain of lack of legal representation at his refugee determination hearing. The State party also recalls that the author alleges that the lawyers that the author consulted asked for additional money (which he terms “extortion”) due to the additional time required to review the large volume of documents he sought to present as evidence. The State party submits that there is no requirement under the Covenant for the State to provide free legal aid to litigants wishing to bring innumerable complaints and proceedings. The State party recalls the Committee’s Views in *J.O. et al. v. Belgium*¹⁰ in which the Committee noted that article 14 of the Covenant obliges States parties to provide legal aid only within the framework of criminal proceedings. Accordingly, the authors’ complaints in that case about the competence of their counsels in various civil proceedings, and their inability to pay for continued legal representation, were determined to be incompatible *ratione materiae* with the provisions of the Covenant, under article 3 of the Optional Protocol.

4.14. With regard to allegations concerning the insufficient provision of financial assistance, inadequate free health care and refusal of work permits, the State party submits that these are substantially economic rights and as such, are inadmissible *ratione materiae* under article 3 of the Optional Protocol. In the alternative, the State party submits that these aspects of the communication are inadmissible on the grounds of non-substantiation pursuant to article 2 of the Optional Protocol. On this point, the State party relies on the Committee’s Views in *Wilfred v. Canada*¹¹ in which an author’s communication based on “general denunciations”, without any information to substantiate the alleged violations, was held to be inadmissible under article 2 of the Optional Protocol.

para. 14.3; No. 469/1991, *Ng v. Canada*, Views adopted on 5 November 1993, paras. 14.1–14.2; No. 829/1998, *Judge v. Canada*, Views adopted on 5 August 2002, para. 10.2.

⁸ See communications No. 692/1996, *A.R.J. v. Australia*, Views adopted on 28 July 1997, paras. 6.11–6.13; No. 706/1996, *G.T. v. Australia*, Views adopted on 4 November 1997, paras. 8.1–8.2.

⁹ General comment No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A, para. 9. More recently, see general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40, vol. I (A/59/40 (Vol. I))*, annex III, para. 12.

¹⁰ Communication No. 1417/2005, decision of inadmissibility adopted on 28 October 2005, para. 4.4.

¹¹ Communication No. 1638/2007, para. 4.3.

4.15 The State party submits that on the basis of the foregoing considerations, the entire communication should be declared inadmissible on grounds of incompatibility with the provisions of the Covenant pursuant to article 3 of the Optional Protocol or in the alternative, on grounds of non-substantiation pursuant to article 2 of the Optional Protocol. The State party submits that should the communication be declared admissible, the Committee should on the basis of State party's submissions made herein determine that it is wholly without merit.

The author's comments

5.1 On 14 September 2009, the author submitted his comments and reiterates his claims. He adds, however, a further claim under article 7 of the Covenant.

5.2 The author alleges that, on 25 April 2009, during his family's deportation to Romania, officers of the Canada Border Services Agency (CBSA) tortured and abused him and his family, and that they also confiscated and destroyed his documents and fax machine that the author used to transmit documents to the Committee. The author further alleges that on 24 April 2009, three people in civilian clothes, who claimed to have been officers from the Canadian Immigration Office, assaulted the author and attempted to sexually abuse their 10-year-old daughter. The author alleges that it took the intervention of their neighbours and friends for the officers to stop their "criminal actions".

5.3 The author further alleges that, during the enforcement of their deportation order, officials of the State party ordered an obstetric doctor in Toronto, who attended to T.G. during her pregnancy, not to issue medical certificates. The author alleges that the doctor insisted on receiving a fee of 35 dollars for any type of medical certificate. The author further alleges that, on 22 April 2009, T.G., while seven months pregnant, was forced to move over 250 kg of their luggage when the author was arrested by CBSA officers. The author further alleges that the family was put under arrest in a special hotel and were only given food sometime around 2.00 a.m. after "20 hours of torture".

5.4 The author also alleges that, on 23 April 2009, he was interrogated at the enforcement centre of Toronto airport when he complained and requested a lawyer and to have their confiscated goods released, which was refused. The author alleges that they were arrested and moved to Econolodge hotel and, whilst there, an enforcement officer came and took humiliating photos of him and his wife and threatened to kill them if they complained to officials.

5.5 The author states that, upon arrival in Romania on 27 April 2009, the Romanian Boundary Police told them that they would have to leave Romania for Moldova after three months if they did not obtain permanent domicile in Romania. The author alleges his children are not admitted to school and they do not have social and medical assistance. The author further alleges that the family has to evade arrest and deportation as they are at a risk of re-deportation to the Republic of Moldova.

5.6 In response to the specific issues raised by the State party, the author disputes that he had admitted to "country shopping" and to testifying that the reason he did not apply for refugee status in Portugal was because he would receive a better salary in Canada.

5.7 With regard to the State party's argument to declare the communication inadmissible *ratione materiae* on the grounds that the Committee does not have competence over alleged violations of the Universal Declaration of Human Rights and the Convention against Torture, the author submits that it is ridiculous to state that the Committee does not have competence over alleged violations of these instruments. In this regard, the author quotes the preamble of the Covenant, which refers to the recognition that, in accordance with the Universal Declaration of Human Rights, human beings enjoy civil and political freedom as well as economic, social and cultural rights.

5.8 In response to the State party's argument that allegations of refusal of work permits and health coverage, starvation and insufficient financial support are squarely economic complaints and, therefore, they are outside the scope of the Covenant, the author argues that these are not economic complaints. The author submits that the illegal refusal of work permits, medical assistance and starvation and the denial of prenatal care must be viewed in the light of the prohibition against torture and discrimination on the basis of immigration status. The author therefore submits that the Committee has competence to deal with these allegations in the light of the corresponding provisions of the Covenant.

Additional observations by the State party on admissibility and merits

6.1 On 2 November 2010, the State party submitted additional observations on the admissibility and merits of the communication.

6.2 With regard to allegations of illegal arrest before and during deportation and the subjection to torture, assault and sexual violations, the State party submits a summary of statements of CBSA officers who were charged with the task of facilitating the removal and deportation of the author and his family.¹² In these statements, the officers deny any ill-treatment and assault. The State party further submits that, on 21 April 2009, Officers Andrea Duncan and John Hawley attended the family's apartment and found the author, who stated that he and his family would make arrangements with a friend to drive them to the airport the following day. When T.G. arrived at the apartment, she confirmed the family's travel arrangements. Furthermore, the State party states that an official from the children's school who had come to the apartment with T.G. confirmed that the children would no longer be attending school. The State party submits that on the basis of this information, the officers determined that the family would appear at the airport for removal and did not have to be detained. The State party therefore denies that the author and his family members were arrested and assaulted, and that their belongings were seized.

6.3 In respect to allegations that, on 22 April 2009, T.G., who was seven months pregnant, was made to carry 250 kg of luggage and that the family was put under hotel arrest and tortured with hunger after they were not allowed on the plane, the State party submits that the family missed their plane because they had excess luggage. As such, the family was moved to Econolodge hotel. The State party submits that, although at the time of arrival at the hotel, the kitchen was closed, hotel management agreed to open the kitchen and bring the family a meal to their room at around 10:30 p.m. and not 2.00 a.m. as alleged by the author. The State party states that the officers' conversation and interaction with the family was minimal, kept to pleasantries and was professional throughout the process.

6.4 The State party denies the allegations that, on 23 April 2009, the author was interrogated at Toronto Airport at 10.00 a.m. and that, notwithstanding a complaint to Officer David Sullivan of the Enforcement Centre and a request for a lawyer, nothing was done to assist them. The State party submits that the author reported to Officer David Sullivan to finalize arrangements for the family's rescheduled deportation on 25 April 2009. The Officer determined that the author and his family still had access to their apartment and could stay there until their date of their deportation. As such, two officers, Carlson and Stager, were asked to take the author's luggage that the family was unable to take to the apartment (nine pieces in total) to a storage facility at the airport until the family's deportation. The State party denies the author's allegations that the author was arrested and refused access to a lawyer and that his family had their documents and books confiscated on this day.

¹² See statements attached to the supplemental submission by the State party to the Committee dated 1 November 2010.

6.5 The State party also denies allegations that on the night of 23–24 April 2009, three people in civilian clothes who stated that they were officers of the Canadian Immigration Office assaulted the author and attempted to “violate sexually” his 10-year-old daughter until they were rescued through the intervention of neighbours and friends. The State party submits that these allegations are libellous and inflammatory as no evidence from the neighbours and friends has been adduced by the author. The State party submits that it has no records indicating that any of its officials had any interaction with the family on this particular day. The State party argues that considering that the author’s deportation had been rescheduled for 25 April 2009, there would have been no reason for its officers to visit the family on these days.

6.6 With regard to the author’s status in Romania, the State party submits that the fact that the author and his family have been in Romania for a year after their arrival in April 2009 constitutes strong evidence that they will not be deported in the future. Furthermore, the State party submits that Romania became a member of the European Union in January 2007 and as such its citizens, including the author and his family, can travel without restriction throughout other European Union countries. The State party therefore argues that if the author and his family are dissatisfied with their life in Romania, they can freely take up residence and look for employment in any of these European Union countries. The State party submits, therefore, that the new complaints regarding the manner of their removal and their status in Romania should be declared inadmissible on the grounds of non-substantiation, pursuant to article 2 of the Optional Protocol. In the alternative, the State party requests that the author’s allegations be declared to be wholly without merit.

Author’s comments on State party’s additional observations

7.1 On 14 December 2010, the author submitted comments on the State party’s additional observations on admissibility and merits. In these comments, the author largely reiterates the comments contained in his previous submission. However, the author also raises a number of issues that were not previously addressed therein.

7.2 With regard to their status in Romania, the author reiterates that T.G. is a dual national of Romania and Ukraine. He alleges that the latter country does not recognize dual citizenship, and as such this has substantial consequences on her and the status of their children. The author submits that Ukrainians and Moldovans are treated differently in Romania. The author also claims that they do not have a legal status in Romania, and without a source of income they survive on support from some ethnic Romanians and other people. The author alleges that he and his wife cannot obtain work permits. The author also submits that, based on his fellowship experience in some of the European Union countries, in order to be eligible to apply for positions, it is necessary to present, among other things, “criminal certificates” from all countries of citizenship and countries where they have lived for more than six months. The author submits that, since Ukraine and the Republic of Moldova did not provide such documents to his family when they requested for them in 2005, they could not be eligible to be considered for employment opportunities.

7.3 In respect to the statements attached to the State party’s additional observations on admissibility and merits, the author argues that, in this submission, the State party made further falsifications protecting abuse and criminal actions of Canadian officials.

7.4 As regards the State party’s comments that on 21 April 2009 CBSA officers attended the author’s apartment, where the author stated that he has made arrangements to be driven to the airport by a friend, the author alleges that the officers were not allowed in his apartment. The author alleges that, instead, the officers forced his apartment door open and arrested him before allegedly making an unauthorized search. One police officer and a member of CSIC who extorted money from them and organized their illegal arrest, torture and attempt(s) to violate their daughter. He further alleges that the three people in civilian

clothes that came to their apartment on 24 April 2009 indirectly told them that they acted in collusion with the police officer and CSIC member.

7.5 The author also alleges that not only did the State party's officials take humiliating photos of their children, but they also put them on the Internet.

7.6 With regard to the State party's response that no official interacted with the family on 24 April 2009 and the complaints of assault and the intervention by neighbours and friends to stop the assault are unsubstantiated, the author submits that one can ask for witness depositions from their neighbours who can confirm these allegations. The author further states that the principal and teachers from their daughters' school could be asked to lodge witness depositions.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

8.3 The Committee notes the State party's arguments that the communication should be considered inadmissible on grounds of incompatibility with the provisions of the Covenant pursuant to article 3 of the Optional Protocol, or in the alternative, on grounds of non-substantiation, pursuant to article 2 of the Optional Protocol. In this regard, the State party submits that the communication is inadmissible *ratione materiae* as it alleges violations of the Universal Declaration of Human Rights and the Convention against Torture. However, the author submits that the Committee has competence to consider violations under these instruments. In the alternative, the author argues that his claims must be viewed to allege violations of rights under the Covenant.

8.4 The Committee observes that the author's submissions are voluminous and might present difficulties in ascertaining the specific claims that are brought. In this regard, it is prudent that the author's claims are identified for purposes of considering the question of admissibility. The Committee notes that the author's claims emanate from the author's pre-removal period from Canada and the actual removal. They can be said to fall under six heads. First, the author's claim relates to Canada's refusal to recognize him and his family as refugees and their eventual deportation to Romania where they claim they are at a risk of being re-deported to the Republic of Moldova where they are likely to be tortured. Second, the author claims that he and his wife were refused work permits in Canada and as such were made to survive on insufficient welfare grant which amounted to starvation and torture. The author submits that the refusal to grant them work permits and, therefore, access to employment opportunities is discriminatory on the basis of, inter alia, their immigration and education status. Third, the author alleges that their rights to liberty and security of the person were violated when the State party's agents put up their personal data on the website without their consent. Fourth, the author alleges a violation of his rights to an effective remedy and access to justice. Under this head, the author alleges that the requirement to pay court and application fees barred them from pursuing justice because they could not afford to pay for court filing fees. He also alleges that the court process was fraught in that the legal officers who were assigned to them falsified affidavits and that during hearings they were not allowed to provide crucial evidence that affected the outcome of the proceedings. Fifth, the author alleges that the State party refused to give him and his

family access to medical assistance. Lastly, the author alleges that during their removal from the State party, they were arrested, harassed and starved. The author alleges that he was assaulted and that his daughter was threatened with sexual abuse.

8.5 The Committee observes that under article 1 of the Optional Protocol, it is only competent to consider communications that allege violations of rights set forth in the Covenant. The Committee is, therefore, incompetent to consider communications that allege violations of other instruments. However, the Committee notes that the author's claims above may also raise issues under articles 6, 7, 9, 14, 17 and 23 the Covenant.

8.6 With regard to the author's claim that his removal from Canada to Romania would expose him and his family to re-deportation to the Republic of Moldova where he was previously persecuted and tortured because of his anti-communist and human rights activities, the Committee notes that the author argues that article 24 of Romania Law No. 302/2004 on international judicial cooperation in criminal matters, allows Romania to deport people with dual nationality to countries of their permanent residence in the event that there is an extradition request from that country for purposes of prosecuting criminal charges. The author also submits that, although a Romanian citizen, his citizenship in Romania is not effective as he and his family have not been able to establish domicile and that this effectively puts him and his family at a risk of re-deportation as they, allegedly, can only lawfully live in Romania for no more than three months. The Committee also notes the observations of the State party that the material submitted by the author does not support the conclusion, even on a *prima facie* basis, that the necessary and foreseeable consequence of the deportation would be that the author and his family would be deported by Romania to the Republic of Moldova where they would be persecuted.

8.7 The Committee recalls that an author of communication must, for purposes of admissibility, sufficiently substantiate that he is a victim of an alleged violation of the Covenant. The Committee observes that in order to be re-deported to the Republic of Moldova under the provisions of article 24 of Romania Law No. 302/2004, there must be an extradition request from the Republic of Moldova that the author is wanted for criminal proceedings. The author has not provided any indication that he is wanted or might be wanted on any criminal charges in the Republic of Moldova. The Committee, therefore, concludes that the author has not substantiated, for purposes of admissibility, that there is a real risk that he and his family will be deported from Romania to the Republic of Moldova. The claim is, therefore, inadmissible for non-substantiation under article 2 of the Optional Protocol.

8.8 With regard to the remaining claims, the Committee recalls its jurisprudence that an author must provide sufficient information in order to substantiate the claims and not just base the communication on general denunciations.¹³ The Committee notes that the author in the present case has made several allegations of violations of his rights that might fall under articles 6, 7, 9, 14, 17 and 23 of the Covenant. However, the author does not adduce any meaningful evidence to substantiate his claims of violation of these rights. In the circumstances, the Committee finds that the author has failed to sufficiently substantiate, for purposes of admissibility, that he and his family are victims of alleged violations of rights under the Covenant. The claim is, therefore, inadmissible under article 2 of the Optional Protocol.

¹³ Communication No. 1638/2007, para. 4.3.

9. The Human Rights Committee therefore decides:
- (a) That the communication is inadmissible under article 2 of the Optional Protocol; and,
 - (b) That the decision should be transmitted to the State party and to the author.

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

**F. Communication No. 1834/2008, *A.P. v. Ukraine*
(Decision adopted on 23 July 2012, 105th session)***

<i>Submitted by:</i>	A.P. (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Ukraine
<i>Date of communication:</i>	1 November 2007 (initial submission)
<i>Subject matter:</i>	Alleged arbitrary arrest and detention; imposition of a life-imprisonment sentence, based on a confession of guilt extracted under torture and following an unfair trial with no adequate remedy
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; insufficient substantiation of claims
<i>Substantive issues:</i>	Torture; arbitrary arrest and detention; inhumane treatment and respect for dignity; unfair trial; adequate time and facilities to prepare for the defence and to communicate with counsel of one's own choice; right to legal assistance; right to examine witnesses and obtain the attendance of witnesses on one's behalf; <i>ne bis in idem</i> ; right to adequate remedy; measures derogating from obligations under the Covenant
<i>Articles of the Covenant:</i>	2, paras. 1 and 3 (a) and (c); 4, para. 2; 7; 9, para. 1; 10, paras. 1 and 3; 14, paras. 1, 3 (b), (d) and (e) and 7; 19, para. 2
<i>Articles of the Optional Protocol:</i>	2 and 5, para. 2 (b)
<i>The Human Rights Committee</i> , established under article 28 of the International Covenant on Civil and Political Rights,	
<i>Meeting on 23 July 2012,</i>	
<i>Adopts the following:</i>	

Decision on admissibility

1. The author of the communication is Mr. A.P., a national of Ukraine born in 1975. He claims to be a victim of a violation by Ukraine of his rights under article 2, paragraphs 1, 3 (a) and (c); article 4, paragraph 2; article 7; article 9, paragraph 1; article 10,

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

paragraphs 1 and 3; article 14, paragraphs 1, 3 (b), (d) and (e), and 7; article 19, paragraph 2, of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Ukraine on 25 October 1991. The author is unrepresented.

The facts as presented by the author

2.1 On 17 January 2002, the author was arrested in Gorlovka city on suspicion of having committed several crimes. He claims that he was “picked out”, because he knew the victims and had already been convicted in the past. From the moment of his arrest and until his transfer to the investigation detention facility (SIZO) No. 6 in Artemovsk city, the author was subjected to torture and beatings by police officers for the purpose of securing a confession of guilt. They, *inter alia*, pumped ammonia into the gas mask put over the author’s head and inserted either a knitting needle or a bradawl into his urethra. Unable to withstand the torture, the author admitted that he was guilty and also falsely implicated one R. in having committed the crimes. He further claims that R. was subjected to similar methods of torture and was in turn forced to falsely implicate him in having committed the crimes in question.

2.2 In February 2002, the author claims that he lodged a complaint with the Ministry of Interior about the use of torture by police officers, and requested that a medical examination be carried out in order to document the injuries he had sustained.¹ On an unspecified date, an investigating officer orally denied this request in the presence of the author’s *ex officio* lawyer assigned by the investigating team. Allegedly, the lawyer did not challenge this decision. In addition, the author claims that the lawyer was actively cooperating with the investigators in “helping” them to fabricate evidence against him.² He also alleges that the crime scene reconstruction experiment was carried out in the investigation detention facility (SIZO) of Gorlovka city, and not at the crime scene. Investigating officers familiarized him with the circumstances of the crime, including the position of the victims’ bodies and the timeframe within which the crimes had been committed. Thereafter, he was forced to repeat all this on videotape under threat of further torture. Since he did not commit the crimes, his statements were sometimes inaccurate and therefore he was corrected and instructed by the investigative officers and his *ex officio* lawyer on “how everything had happened”. Although these episodes were subsequently deleted, the videotape allegedly presents signs of editing proving that this piece of evidence was tampered with. The author claims that his numerous complaints about the above facts remained unanswered.

2.3 The author submits that he was not allowed to retain a lawyer of his choice and that, in any case, he would not have been able to pay for the services of a private lawyer. He was not allowed to familiarize himself with the case file, but had to sign a report that he had actually done so under threat of further torture. His *ex officio* lawyer allegedly signed the respective report in the author’s absence.

2.4 On 6 December 2002, the Donetsk Regional Appeal Court found the author guilty of two premeditated murders for mercenary motives (article 115, part 2, of the Criminal Code) and robbery, and sentenced him to life imprisonment. The author claims that the court based its sentence on the forced confessions, although he and R. retracted them in court, claiming that police officers had used unlawful methods of investigation to force them to

¹ There are no materials on file to confirm that such complaint was indeed filed by the author.

² There are no materials on file to confirm that the author filed any complaints about the lawyer’s unprofessionalism or improper behaviour or that he had refused his services. It appears that no such claims were raised during the trial or in his cassation appeal.

testify against themselves.³ He stated in court that he and R. were in Moscow at the time of commission of the crimes and that their alibi could have been verified through the customs and border service's records of persons⁴ who had crossed the border between Ukraine and the Russian Federation, as well as by the hotel registries in Moscow.⁵ The court, however, failed to do so and to give due consideration to their alibi.⁶ The court also refused to hear witnesses S., K., and T. who could have confirmed their alibi.⁷ The author also claims that his national passport, which was seized during his arrest and subsequently "lost" at the

³ The court stated that the accused changed their statements during the pretrial investigation, claiming that police officers used unlawful methods of investigation to force them confess guilt. The court considered these claims unfounded, since the author and the co-accused were interrogated in the presence of their lawyers, made voluntary statements about the circumstances of the crimes during the crime scene reconstruction (which was conducted in the presence of lay witnesses and a forensic expert) and did not make any complaints against police officers. In addition, the author was examined by a forensic medical expert (no date indicated and no copy of it provided) who attested that there were no bodily injuries on the day of his arrest, nor did the author complain about ill-treatment. The cassation court, with reference to case file materials, stated that the accused were informed about their rights under article 63 of the Constitution not to testify against themselves and made no complaints about evidence being obtained under duress during the interrogations, including the confrontation between the author and the co-accused (recorded on videotape) which took place in the presence of their lawyers or during the crime scene reconstruction conducted in the presence of their lawyers, the forensic expert, the head of the investigative department of the Prosecutor's Office of Gorlovka city and lay witnesses. No such complaints were filed by the accused or their lawyers at the time of the pretrial investigation. The author did not submit any such complaints at the time of familiarization with the case file or during the hearing of 20 January 2002 when the court decided on the measure of restraint (detention). The court also invoked the findings of a forensic medical examination (no date indicated or copy of it provided) which identified no bodily injuries on the day of the author's arrest nor as of 4 February 2002. Moreover, the co-accused declared that he did not know, and was not able to identify, any police officer that allegedly tortured him, while the author declared that he does not remember them.

⁴ The author provides a copy of a letter dated 31 March 2008 received from the Border Service of Ukraine, informing him that, as of 31 March 2008, no records existed about his alleged border crossing. The author was also informed that the database registration of border-crossing of Ukrainian nationals was possible only after the creation of the Border Service of Ukraine, that is, after 1 August 2003. Another letter from the Border Service, dated 30 May 2008, advised the author that in the period 1991–2003, no registration of Ukrainian nationals crossing the border was made. The author however maintains that this is a lie and that authorities consistently prevent him from proving his alibi.

⁵ The author maintains that the court should not have used the fact that they could not remember the name of the hotel where they stayed in Moscow as evidence of their guilt. Since they were not preoccupied with creating an alibi, they did not remember all the details.

⁶ During court proceedings, the author and the co-accused were unable to indicate the exact date of their travel to and length of their stay in Moscow. The author first stated that they went to Moscow on 22–23 December 2001 and spent two or three days. Thereafter, he referred to 21–22 December as their date of travel, claiming that they returned to Ukraine on 24–25 December 2001. In his third version of facts, the author indicated that they had spent two days in Moscow and returned to Ukraine on 29 or 30 December 2001. In the light of the contradictory statements about the details of their travel to Moscow, the court rejected their arguments as unfounded.

⁷ The author enclosed written statements, dated 19, 20 and 21 September 2007, respectively, addressed to "human rights organization/NGO" (without specification). In her statement, S. writes that she witnessed the author and co-accused's departure to Moscow on 24 December 2001 and confirms that they were out of the country until 29 December 2001 inclusive, therefore they could have not committed the crimes (for inconsistency regarding the dates, see also footnote 6 above). The other two witnesses in their statements simply confirm these declarations. It is not clear from the materials on file if these statements have ever been presented to the attention of court.

pretrial stage of the investigation, contained the stamps of the Ukrainian Border Service bearing the dates of his departure to and return from the Russian Federation.

2.5 The author claims that the sum of US\$900 which, according to the prosecution, served as a motive for committing the murders, was not found in his or the co-accused's possession. He claims that the main witness of the prosecution, one P., who identified him as being the person leaving the crime scene, is frequently used by police for obtaining statements favourable to the prosecution. In view of her antisocial behaviour, the said witness often has problems with the police, and they "disregard" petty offences committed by her exchange for statements confirming the version of the events promoted by the investigation – a widespread practice in Ukraine. The witness described in detail the clothes worn by the person who left the crime scene, mentioning that he had blond hair. However, the court ignored the fact that the author is dark-haired and that the clothes taken from him did not match the description given by the main witness.⁸ His motion to have the main witness summoned and examined in court was rejected.⁹ His motions to have three other witnesses, who could have confirmed his alibi, summoned and examined in court, as well as to order expert examination of the prosecution evidence, which he claims has been tampered with by the investigators, were also rejected by the court and omitted from the trial transcript.

2.6 The author claims that the forensic examinations used as evidence of his guilt cannot be regarded as conclusive evidence, since the degree of proof is reflected by such words as "may", "it is not excluded," etc. One of these forensic examinations concluded that the footprint at the crime scene was most probably left by footwear whose impression coincided with the footwear impression of his right-side footwear. However, he claims that, at the time, he was wearing boots made in China which were worn by every second person in the city, due to their low price. If the footprint identified at the crime scene had indeed been left by his boots, the conclusion of the forensic examination would have stated that it was "identical to", and not "most probably left by", his right-side footwear. In this context he claims that the sentence cannot rest on assumptions, and any doubts should be interpreted in favour of the accused. The rejection by the court of his motions to conduct further forensic examinations and summon important witnesses for testimony deprived him of the opportunity to effectively defend himself.

2.7 The author further claims that in deciding the level of punishment, the court took into account his prior conviction, which he had already served before the sentence was handed down (6 December 2002). In other words, the court tried and punished him again for an offence for which he has already been convicted.

2.8 On 8 January 2003, the author lodged a cassation appeal with the Supreme Court, which upheld the decision of the first instance court on 3 June 2004. The author filed a motion for the examination of the evidence produced during the crime scene reconstruction (the videotape) which could have proven that he had been tortured to make him admit his guilt.¹⁰ This motion was dismissed by the court. He challenges the court's assertion that he

⁸ According to materials on file, witness P. identified the author from photographs. There is no information on file to verify the author's statements regarding the clothes and his hair colour.

⁹ This claim is not supported by materials available on file. According to the Supreme Court's decision, the absence of the witness during proceedings was motivated. The court consulted the parties to the proceeding on the possibility of continuing the trial in her absence and neither the accused nor their lawyers objected to this. The author did not avail himself of the right to question the witness, and did not object to having her testimony made at the time of pretrial investigation read out in court.

¹⁰ The author claims that torture marks (signs of beatings, broken arms) are easy identifiable on a picture of him taken during the pretrial investigation and available in his criminal case file (photograph not provided to the Committee).

did not complain about torture either to his lawyer¹¹ or during the hearing of 20 January 2002 when the court decided on the measure of restraint (detention).¹² He further challenges the court's contention that the conducted forensic medical examination did not attest any injuries, claiming that no such examination ever took place. The author also submits that the Supreme Court referred to the testimony of one Z., according to which he and R. (the co-defendant) visited her on 25 December 2001 and they left for Moscow on 27 or 28 December 2001. The author claims that she was not present during the first instance court hearings and her testimony was not referred to in the decision of the court of first instance which, in his opinion, confirms that the court attempted to fabricate incriminating evidence against him.

2.9 The author's applications for supervisory reviews (including for reconsideration of his case, based on newly discovered facts) to the Prosecutor's Office of Donetsk Region, the General Prosecutor's Office, and the Supreme Court were all rejected. His application to the Constitutional Court was also rejected for lack of jurisdiction.

2.10 In September 2004 and on 10 May 2005, the author requested the Donetsk Regional Appeal Court to provide him with a copy of the criminal case file in order to corroborate the claims made under the Covenant before the Committee. This request was denied by the judge and a Deputy Chair of the Donetsk Regional Appeal Court on 5 October 2004 and 1 June 2005, respectively, on the grounds that the criminal procedure law does not provide for such practice. On 14 April 2008, the author filed a complaint against the above refusal with the Sokalsky District Court. His complaint was rejected on 23 May 2008, on the grounds that such matters are dealt with under criminal, not civil proceedings. His further appeal of 24 June 2008 was rejected by the Appeal Court of Lvov Region on 1 August 2008, for failure to file the appeal within the legal deadline. On 11 September 2008, the author lodged a cassation appeal with the Supreme Court, claiming that he had respected the legal deadline, but that the court did not correctly apply the civil procedure norms regarding such submissions.¹³ On 30 October 2008, the Supreme Court upheld the previous decisions. The author claims therefore that failure of the State party to provide him with a copy of his criminal case file constitutes a violation of his right to receive information under article 19, paragraph 2, of the Covenant. The author also claims that the administration of the investigation detention facility (SIZO) No. 6 in Artemevka city, as well as that of No. 5 in Donetsk city, consistently hindered his right to petition human rights NGOs by forwarding such complaints to national courts or by returning them for failure to properly indicate the address of the intended recipients.

2.11 On an unspecified date, the author was transferred to the investigation detention facility (SIZO) No. 5 in Donetsk city. He claims that all inmates sentenced to life imprisonment and serving their sentence in this facility were regularly and deliberately subjected to beatings and deprived of food by the administration. Food served to this category of inmates was always cooked in conditions lacking hygiene and from rotten ingredients. Mice corpses, cigarette stubs, glass, asphalt and stones were regularly found in the food served to these inmates. The bread, which was baked in the facility, was made of flour used for feeding animals. Money sent to inmates by their relatives was automatically confiscated by the prison administration for payment of utility bills, without inmates' consent. The hunger strike by inmates in 2003, which was prompted by inhuman conditions of detention, was severely put down by the administration. Inmates who tried to complain

¹¹ The author claims that his complaints to his lawyer were all ignored.

¹² On the contrary, the author maintains that he drew the attention of the judge to this fact, but his claims were ignored.

¹³ He also maintained that he was hospitalized at the time that the decision of 23 May 2008 reached the prison; it was communicated to him only upon his return from hospital.

about the administration were subjected to a specific disciplinary action involving the use of straitjackets: the inmate would be knocked down by officers of the special unit, hit by truncheons, beaten with fists and kicked, then forced into a straitjacket with his elbows half bent behind his back, then he would be dropped onto the concrete floor with his elbows down and again hit, beaten and kicked. A medical doctor present during this disciplinary action would splash liquid ammonia on the faces of inmates who lost consciousness to make them come to their senses. The author claims that he himself was subjected to the above disciplinary action on 25 June 2003, then placed in a punishment cell. He was transferred to a normal cell on 27 June 2003 due to health problems¹⁴ which he claims were the result of the ill-treatment.

2.12 On 31 July 2004, the author was transferred to the Enakievskaya correctional facility No. 52 where he and other inmates were subjected to daily beatings and humiliating treatment. When he complained of ill-treatment to the prosecution department in charge of penitentiary facilities, he was “disciplined” by the administration by being forced into a straitjacket, handcuffed, dropped onto the concrete floor and jumped on his stomach by officers. On a number of occasions, the author was placed into the punishment cell, where he was put to sit on a metal bed with his stretched hands “hanging in the air” handcuffed to the opposite sides of the bedposts and his legs put into irons and attached to the opposite sides of the bed frame. He was left in this position motionless for days, with 5-minute toilet breaks three times a day during the daytime, and with his hands and legs attached to the metal bed frame during the night. Irrespective of the time of the year, the temperature in the punishment cell was the same as outside, and he was deprived of the right to seek medical assistance even in critical condition. As a result of this treatment and lack of medical care, he developed many life-threatening and chronic diseases while serving his sentence.¹⁵ His complaint regarding the conditions of detention lodged with the Prosecution Office of Donetsk Region was rejected in July 2007.¹⁶ The author also claims that the prison administration forced him to remove from his initial submission of 1 November 2007 all information about alleged violation of article 10 of the Covenant, under threat that his submission would not leave the facility.

The complaint

3. The author claims that his arrest, trial and ill-treatment whilst in custody constitute violations of article 2, paragraphs 1, 3(a) and (c); article 4, paragraph 2; article 7;¹⁷ article 9,

¹⁴ To substantiate this claim, the author provides a copy of the decision ordering his incarceration in the punishment cell for 10 days for breach of prison regulations. According to the decision, he was transferred to his cell after two days (27 June 2003) due to health reasons (reactive psychosis and schizophrenia). The same document notes that, upon incarceration in the punishment cell on 25 June 2003, a medical examination concluded that the author was fit for incarceration and did not complain about any health problems. The author also provides a letter written by a fellow inmate who confirms that they were subjected to frequent beatings, incarceration in the punishment cell and other forms of inhuman treatment.

¹⁵ The author provided several medical certificates (some of which are illegible). Most of them document health conditions such as chronic haemorrhoids, emotionally unstable personality disorder, chronic bronchitis, chronic gastritis, eczema, high blood pressure. Based on the certificates, medical treatment was prescribed to the author following each medical examination.

¹⁶ No copy provided, nor is there any information on file to confirm that the author appealed this refusal to the hierarchically superior prosecutor or in court.

¹⁷ The author submits that he is aware of the lack of factual evidence concerning the violation of his rights under article 7 of the Covenant. However, he requests the Committee to conclude a violation of this provision in his case, on the basis of the widespread use of torture in Ukraine in order to extract confessions. He also refers to precedents from the European Court of Human Rights, which found a

paragraph 1; article 10, paragraphs 1 and 3; article 14, paragraphs 1, 3(b), (d), (e) and 7; article 19, paragraph 2, of the Covenant.

State party's observations on admissibility and merits

4.1 On 9 June 2009, the State party submitted its observations on the admissibility and merits of the complaint. It submits that on 6 December 2002 the Appeal Court of the Donetsk Region found the author guilty of premeditated murder of two persons and robbery, and sentenced him to life imprisonment with confiscation of property. On 3 June 2004, this decision was upheld by the Supreme Court. The author's guilt was duly established by his own statements made as a suspect, statements made by the other co-suspect, the confrontation between them, testimonies of the victims' relatives and of witnesses, the crime scene reconstruction report, the conclusions of forensic expert examinations, as well as by other evidence.

4.2 With regard to the author's allegation of the use of unlawful methods of investigation, the State party submits that the author and the other co-accused were interrogated during the pretrial investigation in the presence of their lawyers. During the crime scene reconstruction (which was conducted in the presence of lay witnesses and a forensic expert), they did not make any complaints against police officers and made voluntary statements about the circumstances of the crimes, that could only have been known to the persons who committed them. The author changed his testimony several times, first indicating that he had committed both murders with the assistance of the other co-accused, then arguing that he had committed only one of the murders in the heat of passion. The author was examined by a forensic medical expert on the day of arrest, no bodily injuries were attested to, and he made no complaints about ill-treatment. A verification conducted by the General Prosecutor's Office into the author's claims about the fabrication of materials of his criminal case found his allegations groundless.

4.3 The alleged presence of the author and other co-accused in Moscow at the time of commission of the crimes was also not confirmed. During the court hearings, they were unable to indicate the exact date of their departure to Moscow or the name of the hotel where they allegedly stayed, and they made contradictory statements about their travel: the co-accused first mentioned that they had spent the night at the railway station, then, following the author's statements, claimed that they had spent the night in a hotel. In addition, one witness, Ms. P., said that she had seen the author on the day of the commission of the crimes (24 December 2001) near the crime scene.

4.4 The State party further states that the database containing information about persons who cross the border of Ukraine contains no relevant information in respect of the author. In 2001, no records were made concerning Ukrainian nationals who crossed the State border at Ukrainian-Russian border-crossing checkpoints. According to the Resolution No. 57 of the Cabinet of Ministers of Ukraine of 27 January 1995 (On approving the rules for crossing the State border by Ukrainian nationals), which was in force at the time of the alleged border crossing by the author, the registration of nationals crossing the border was made by exit and entry stamps in their passports.

4.5 As to the written testimonies of S., K., and T., the State party submits that they should have been sent to the Prosecutor's Office. Should the testimonies be deemed credible after their verification, they may serve as grounds for reconsideration of the author's case under the extraordinary proceedings pursuant to Chapter 32 of the Criminal

violation of article 3 of the European Convention on Human Rights, based on general information about widespread use of torture in countries where the applicants risked being deported.

Procedure Code (Reopening of criminal cases based on newly discovered facts). The State party also draws the Committee's attention to the fact that those statements were written in 2007, almost six years after the commission of the crimes.

4.6 The author was given the opportunity to familiarize himself with the materials of the case file and to take notes therefrom. He may file a request for familiarization with his case file, however, domestic legislation does not provide for giving away case file materials or copying them. The author may also avail himself of the services of a lawyer who may request to be acquainted with the case file materials on his behalf and take the required notes therefrom. If the author cannot afford a lawyer due to financial difficulties, he can seek free legal assistance from NGOs.

4.7 With regard to the conditions of detention, the State party submits that the author was transferred from the investigation detention facility (SIZO) in Artemsk city to the one in Donetsk city on 6 December 2002. On 31 July 2004, he was transferred to the Enakievskaya correctional facility No. 52. The verification conducted by the State Department for the Execution of Sentences did not establish any breaches of national legislation, unlawful actions or biased or unfair treatment of the author by prison staff at Donetsk SIZO or Enakievskaya correctional facility. During his detention, the author committed nine breaches of prison regulations, for which he was disciplined, including by detention (six times) in the punishment cell. He never appealed against these disciplinary actions according to the established procedure. According to the materials of the internal investigation, staff at Donetsk SIZO made use of special means of restraint in respect of the author on 25 June (rubber truncheon, straitjacket) and on 24 December 2003 (straitjacket) in response to breaches of prison regulations committed by him. The use of special means of restraint was duly recorded and was proportional to the gravity of the breaches committed by the author. Following their use, the author was subject to a medical examination which concluded that he did not require any medical aid. The State party also submits that no unit of Special Forces or other law enforcement bodies were introduced on the territory of Donetsk SIZO in order to counter the unlawful actions committed by inmates.

4.8 The State party further states that the disinfection of the premises of the Donetsk SIZO and Enakievskaya correctional facility is done on a daily basis in order to prevent tuberculosis and other diseases. The sanitary-epidemiological situation is satisfactory and there has been no outbreak of infectious, viral and parasitic diseases. The author was subject to preventive medical examinations repeatedly and received adequate treatment for his health conditions (chronic haemorrhoids, bronchitis, chronic gastritis and emotionally unstable personality disorder).

4.9 All the author's letters were dispatched to the recipients and he received all the answers to his petitions under signature. The State party also submits that persons sentenced to life imprisonment and detained in the Enakievskaya correctional facility have the possibility of using the books, journals and newspapers provided by the facility's library or brought by their relatives and other persons. They may also watch television and go for a one-hour walk daily.

4.10 On 5 October 2005 the Prosecutor's Office of Donetsk Region received a complaint from the author's mother about her son's conditions of detention in the Enakievskaya correctional facility, the threats of physical abuse he had received and the psychological pressure exerted on him. These allegations were not confirmed in the course of the verification conducted by the Prosecutor's Office of Gorlovka city, which decided on 18 October 2005 not to open a criminal case. The author's mother was informed about this decision, which was not appealed in accordance with the established procedure.

4.11 On 6 October 2005, the author's mother filed another complaint to the Prosecutor's Office of Donetsk Region regarding her son's unlawful conviction and the need to ensure his security in the Enakievskaya correctional facility. Following the verification of her allegations, the Prosecutor's Office concluded that they were unfounded and informed her accordingly on 20 October 2005.

4.12 On 25 September 2007, the Prosecutor's Office of Donetsk Region received the author's complaint about the living and medico-sanitary conditions of detention in the Enakievskaya correctional facility. The verification carried out jointly with specialists of the State Department for the Execution of Sentences did not identify any violations of the author's constitutional rights as alleged in his complaint. The author was informed accordingly on 25 October 2007.¹⁸

4.13 The State party also submits that the author had lodged an application with the European Court of Human Rights. As of 29 May 2009, the author's application had not been communicated to the State party.

Author's comments on the State party's observations

5.1 In his comments dated 1 September 2009, the author rejects the State party's observations, arguing that they are false and that they refer to facts and evidence fabricated by the authorities. He reiterates his previous claims and submits that the State party did not provide any information refuting his well-substantiated allegations under article 14 of the Covenant.

¹⁸ According to the decision (copy available on file), the Prosecutor's Office of Donetsk Region carried out a verification of the author's allegations jointly with specialized bodies of the State Department for the Execution of Sentences, including safety and security, health care and epidemiological control and jail facilities maintenance. In the course of the verification, it was established that the author had been disciplined for violations of prison regulations. The measures of restraint employed were lawful and in conformity with article 134 of the Criminal Procedure Code. The verification concluded that the living conditions of inmates were in conformity with hygiene and sanitary regulations. According to article 115 of the Criminal Procedure Code, not less than 3 m² of living space shall be allotted to each inmate: the cell in which the author was detained was built to hold four people (14,56 m² in size). The cell was furnished in compliance with the regulations in force and the ventilation system was functioning. The author's allegations of ill-treatment and psychological pressure were not confirmed during the course of the verification. The verification also established that showers were available on a weekly basis, the building being equipped with two showers and two mirrors; availability of cold and hot water was in conformity with sanitary norms, and the quality of potable water also complied with sanitary and hygienic standards; the prison facility was connected to the urban water supply and sewage systems; the author availed himself of his right to receive visits. With regard to medical assistance, the author was registered at the medical unit of the prison facility with the following diagnosis: rectal mucosal prolapse and chronic haemorrhoids, eczema, emotionally unstable personality disorder. He underwent inpatient medical treatment from 9 to 23 February 2007 in the Surgery Department of the Inter-Regional Hospital of Donetsk Region; no surgical intervention was recommended by the doctor. His state of health was deemed satisfactory. The verification further found that there is a medical unit in the prison facility, and the following specialists provide medical assistance: therapist, dentist, psychiatrist, psychologist-narcologist and radiologist. The unit also has 12 beds for inpatient treatment. For any other specialized treatment, inmates are hospitalized in the medical institutions of the State Department for the Execution of Sentences. In the light of the above, the specialists who carried out the verification identified no violations with regard to the medical or sanitary conditions of detention, therefore the Prosecutor's Office found the author's allegations groundless. The author was notified about the decision and advised about his right to appeal it to the hierarchically superior prosecutor or in court, as provided for in article 12 of the law "On the Prosecutor's Office". It appears that no such appeals were filed by the author.

5.2 He claims that the information provided by the State party regarding the use of unlawful methods of investigation was invented. The presence of State-appointed lawyers during interrogations cannot be regarded as a guarantee of respect for the rights of the accused, since they do not fulfil their responsibilities. This “caste” is formed exclusively by “loser lawyers” and most of them are former employees of the Prosecutor’s Office or former policemen.

5.3 He challenges the State party’s argument that he testified about the circumstances of the crimes that could have been known only by the persons who committed said crimes, claiming that the circumstances were known by police officers present at the crime scene, who forced him and the co-accused to write down “reliable” statements based on their dictation. They were also taken to the crime scene¹⁹ where they were forced to follow police’s instructions and read out their “confession”. He made no voluntary statements, since he did not commit those crimes and he had an alibi which could have been easily verified. The confession of guilt was extracted under torture. The author challenges the findings of the forensic medical examination that attested to no injuries, claiming that the medical expert refused to listen to him and did not asked him to take off his clothes in order to perform a thorough examination. He submits that he was held in pretrial detention for 30 days and was subjected to beatings and torture daily. Since the medical examination was conducted only once, it cannot be deemed conclusive.

5.4 The author further claims that the systematic and widespread use of torture in Ukraine is documented by numerous print publications, judgements of the European Court of Human Rights and reports of human rights organizations,²⁰ and that this information confirms indirectly his allegations of torture. He rejects the State party’s contention that his allegations were verified by the Prosecutor’s Office and were not confirmed, claiming that his complaints were dismissed without being duly examined.

5.5 As to the alibi, he could not remember the exact number of the train nor the exact date of departure to Moscow because of the length of time that had passed since the event. Since only two trains per week depart to Moscow, this could have been easily verified by the investigation. Moreover, their stay in the Russian Federation was registered by immigration authorities and also recorded in the register of the hotel, the description of which he provided to the investigation team.

5.6 The author claims that witness P. is a false witness (see para. 2.5 above) who made contradictory statements and invented facts that do not correspond with reality, for example that she had seen him at the crime scene.

5.7 The author notes the State party’s information that at the time of his departure to Moscow (2001), the registration of nationals crossing the border was made by exit and entry stamps in their passports. However, the State party is silent about the presence or absence of such stamps in his passport. He also recalls that his passport “disappeared” from his case file during the pretrial investigation.

5.8 The author claims that he sent the statements of S., K., and T. to the investigative bodies and Prosecutor’s Office repeatedly. He forwarded them to the Prosecution Office in 2004, but received no response.

5.9 He submits that he is not interested at all in consulting the materials of his criminal case in order to get acquainted with them. He requested to have a copy of his criminal case,

¹⁹ This contradicts his statement in para. 2.2 above, that the crime scene reconstruction was carried out in the investigation detention facility (SIZO) at Gorlovka city, and not at the crime scene.

²⁰ The author provided copies of materials purporting to support this contention.

to which he is entitled according to article 32 of the Constitution,²¹ articles 23–32 of the law “On Information”, as well as article 19, paragraph 2, of the Covenant. The State party’s refusal to provide him with a copy of the case file represents an attempt to impede the establishment of truth in his case and amounts to a violation of article 19, paragraph 2, and article 2, paragraph 1, of the Covenant.

5.10 The author reiterates his claims under article 10 of the Covenant regarding inhuman conditions of detention and ill-treatment that, in his opinion, are uncontested by the State party. He further acknowledges that he lodged an application with the European Court of Human Rights in 2004 on a different matter. His application was declared inadmissible by a three-judge panel in 2006 for non-compliance with procedural requirements.

5.11 In conclusion, the author requests the Committee not to take into account the State party’s observations, which are unfounded, fabricated and false.

5.12 On 30 September 2009, the author provided a copy of a newspaper article on ill-treatment of inmates in the detention facility at Vinnitsa city as indirect evidence of systematic and widespread use of torture in places of detention in Ukraine.

5.13 On 10 August 2011, the author provided additional comments, claiming that the forensic psychiatric examination of 27 February 2002 is fabricated as such examination had never been conducted. The examination in question refers to his alleged mental condition and anti-social behaviour as established by the psychiatric hospital in Gorlovka city in 1993. He explains that in 1993 he was beaten by police officers because of his refusal to write a confession of guilt for another crime. In order to cover up the beatings, police officers interned him in the psychiatric hospital, stating that he had self-inflicted injuries in a fit of madness. He was discharged from hospital after refusing any treatment, but doctors illegally recorded his alleged mental illness in his medical book. The author further claims that the forensic psychiatric examination of 2002 was fabricated (he never signed it) in order to create a negative image of himself before the court; he submits a letter from a fellow inmate, as well as the latter’s forensic psychiatric examination report, to substantiate his argument. The author claims that the conclusions of their examinations are identical, as is the language used in both documents, which confirms that they were fabricated.

Further submissions by the State party

6.1 On 28 November 2011, the State party submitted further observations, stating that the author and the co-accused never complained about unlawful methods of interrogation during the pretrial investigation, the interrogations conducted in the presence of the lawyer, the confrontation between them, the crime scene reconstruction nor the court hearing of 20 January 2002. Such complaints were never received from the lawyer either.

6.2 Although the author claims that he has exhausted all domestic remedies in respect of the alleged violation of article 7, the State party states that he never appealed the Prosecutor’s Office’s refusal to initiate criminal proceedings, as provided for under article 12 of the law “On the Prosecutor’s Office” and article 99 of the Criminal Procedure Code. Therefore, his allegations under article 7 should be declared inadmissible for failure to exhaust domestic remedies, as required by article 5, paragraph 2 (b), of the Optional Protocol.

6.3 As to the author’s claim under article 14, paragraph 1, of the Covenant, that the evaluation of evidence by national courts in his case was arbitrary and constituted a denial

²¹ One of the paragraphs of this article reads: “Every citizen has the right to examine information about himself or herself, that is not a state secret or other secret protected by law, at the bodies of state power, bodies of local self-government, institutions and organisations.”

of justice, that the court established his guilt exclusively on the basis of imprecise conclusions of forensic examinations, the State party submits that, according to article 323 of the Criminal Procedure Code, the court assesses evidence in accordance with its inner conviction based on thorough, complete and objective examination of all circumstances in the case and guided by law. The accused's statements, including those in which he pleads guilty, are subject to verification. A confession of guilt may be used as a basis for conviction only if it is corroborated by cumulative evidence. The State party submits that based on the content of the criminal file as well as the court decisions adopted in the author's case, the courts complied with the above norms and assessed all evidence and circumstances of the case in their entirety. Thus, the author's guilt was fully established by the Appeal Court of Donetsk Region (sentence of 6 December 2002) and confirmed by the Supreme Court (judgement of 3 June 2004) not only on the basis of his own testimony, but also based on the confrontation with the co-accused, the statements made by the latter, the witness testimonies, the crime scene reconstruction report, the conclusions of forensic expert examinations, as well as other evidence. Therefore, the author's allegations under article 14, paragraph 1, are unfounded.

6.4 In response to the author's claim that the forensic psychiatric examination of 27 February 2002 is fabricated, the State party submits that the respective examination was carried out in accordance with the "Procedure of conducting the forensic psychiatric examination" approved by the Order No. 397 of the Ministry of Health of 9 October 2001. According to national legislation, the signature of the person subjected to the examination is not required. Therefore, the absence of the author's signature on the document is not an evidence of its fabrication.

Further comments by the author

7.1 In a letter dated 3 January 2012,²² the author challenges the arguments advanced by the State party in its observations. He claims that he complained repeatedly about the use of unlawful methods of interrogation and pressure by police officers to the courts, as well as during the pretrial investigation. However, his complaints were "thrown out" by the investigative officers. He and the co-accused also raised this issue during their confrontation, but their complaints were not duly registered. The author also claims that he had exhausted all domestic remedies and submits that any further appeals would have been ineffective, taking into account the absence of information from the State party that such appeals filed in court against the decision of the Prosecutor's Office by a person convicted for murder in fact led to the reversal of the sentence and release of the convicted person. The refusal of the Prosecutor's Office and of the Supreme Court to review the unlawful decisions adopted by national courts confirms that such applications are unreasonably prolonged, therefore his communication is admissible under article 5, paragraph 2 (b), of the Optional Protocol.

7.2 With regard to the State party's arguments in respect of article 14, paragraph 1, the author claims that article 62 of the Constitution stipulates that a sentence shall not be based on illegally obtained evidence or on assumptions. Therefore, any reference to article 323 of the Criminal Procedure Code and the court's "inner conviction" is unlawful. The principle laid down in article 62 of the Constitution had been confirmed in the Constitutional Court decision No. 1-31/2011 of 20 October 2011. Also, the Pechersk District Court in Kiev city confirmed in a judgement handed down on 11 October 2011 that only those forensic examinations that take the form of categorical conclusions may be used as evidence.

²² On 6 December 2011, the author provided a copy of the ruling of the Constitutional Court No. 1-31/2011 of 20 October 2011, in which the Court delivered its opinion on the interpretation of article 62 of the Constitution to which he refers in his comments (see para. 7.2).

7.3 The author recalls that the statements made by the co-accused to which the State party refers were extracted under torture, as a result of which the co-accused incriminated himself and also implicated the author himself in the commission of the crimes.²³

7.4 As to the forensic psychiatric examination, the author reiterates his previous claims and refers to a judgement of the European Court of Human Rights that, according to him, confirms the authorities' practice of subjecting persons to psychiatric evaluation unlawfully.²⁴ He recalls that he did not consent to it, a fact proven by the absence of his signature on the document.

7.5 The author requests the Committee to disregard the State party's observations, since they are untrue, anonymous and represent an abuse of the right of submission of such observations. Instead, due weight must be given to his allegations and all the documentary evidence provided.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

8.3 The Committee takes note of the author's claims under articles 7 and 10, paragraph 1, of the Covenant about inhuman conditions of detention and the physical abuse and psychological pressure to which he was allegedly subjected while serving his conviction in the Enakievskaya correctional facility. The Committee notes in this respect the State party's arguments that the investigation carried out by the Prosecutor's Office in Gorlovka city found the author's allegations of ill-treatment groundless and on 18 October 2005 refused to open a criminal case for lack of evidence, and that this decision was never contested by the author. Another verification conducted by the Prosecutor's Office in 2005 and 2007 following the author's complaints about inhuman conditions of detention also established that his allegations were without merits, and the author failed to appeal any of these decisions in accordance with the procedure established by domestic law. The State party therefore challenges the admissibility of these claims on the grounds of non-exhaustion of domestic remedies. In the light of the State party's arguments and noting that the author has not argued the ineffectiveness of the remedies in question, the Committee declares this part of the communication inadmissible for failure to exhaust domestic remedies, in accordance with article 5, paragraph 2 (b) of the Optional Protocol.

8.4 The Committee notes the author's claim under article 14, paragraph 3 (b) and (d), of the Covenant, that he was not allowed to retain a lawyer of his choice, that the lawyer did not provide him with adequate legal assistance and acted contrary to his interests by assisting the prosecution in the fabrication of evidence against him, and that he was not allowed to familiarize himself with the case file, but signed a report that he had actually

²³ The author submits that the co-accused died of internal organ failure, a consequence of the torture endured.

²⁴ The author refers to the judgement of the European Court of Human Rights of 7 July 2011, in the case *Fyodorov and Fyodorova v. Ukraine* (application No. 39229/03), concerning the applicants' forced and arbitrary internment in a mental institution without the review of such decisions.

done so, under threat of torture. Based on the materials before it, the Committee observes that the author does not appear to have raised at any point during the domestic proceedings the alleged lack of adequate legal representation, nor the lawyer's inappropriate behaviour or that he had ever requested a change of his lawyer or complained about not being acquainted with the case file. Therefore, the Committee declares this part of the communication inadmissible under article 5, paragraph 2 (b), of the Optional Protocol for failure to exhaust domestic remedies.

8.5 With regard to the author's claim under article 2, paragraphs 1 and 3 (a) and (c), the Committee recalls its jurisprudence in this connection, according to which the provisions of article 2 of the Covenant, which lay down general obligations for States parties, cannot, in and of themselves, give rise to a claim in a communication under the Optional Protocol. The Committee therefore considers that the author's contentions in this regard are inadmissible under article 2 of the Optional Protocol.²⁵

8.6 Since the author failed to provide any information in substantiation of his claims under article 4, paragraph 2, and article 9, paragraph 1, of the Covenant, the Committee finds these claims insufficiently substantiated, for purposes of admissibility, and declares them inadmissible under article 2 of the Optional Protocol.

8.7 The Committee takes note of the author's claim under article 7, that following his arrest he was tortured for the purpose of eliciting a confession of guilt. The State party rejects the allegations, arguing that the author was interrogated in the presence of his lawyer and made voluntary statements about the circumstances of the crime, that several investigative actions were conducted in the presence of his lawyer, forensic expert and lay witnesses, and that neither the author nor his lawyer ever complained about ill-treatment during the pretrial investigation. These arguments are disputed by the author who claims that his complaints in this regard were "thrown out" by investigative officers and were ignored by his lawyer.

8.8 The Committee notes that the author's claim under article 7 is intimately linked to the quality of the legal assistance he received from his *ex officio* lawyer, that is, the lawyer's alleged cooperation with the prosecution and failure to lodge any complaints on his behalf, including about ill-treatment during the pretrial investigation. In this respect, the Committee has already determined that nothing in the material before it reveals that the author complained about the alleged lack of adequate legal representation or the lawyer's inappropriate behaviour or that he ever requested a change of lawyer at any point during the domestic proceedings (see para. 8.4). The Committee notes the author's failure to raise these claims during domestic proceedings, especially in view of his argument that the presence of State-appointed lawyers during the interrogations cannot be regarded as a guarantee of respect for the rights of the accused (see para. 5.2).

8.9 The Committee further notes the State party's argument that a forensic medical examination did not reveal any bodily injuries on the author at the time of arrest and as of 4 February 2002 (i.e., 18 days following his arrest). It observes that the author gave contradictory information about the medical examination in question, claiming initially that no such examination ever took place (see para. 2.8 above), and later stating that the medical expert did not ask him to take off his clothes in order to perform a thorough examination and refused to listen to his complaint (see para. 5.3 above). The Committee also notes that the author's allegations were examined by both the trial and cassation court and were found to be groundless (see footnote 5 above). In light of these inconsistencies and in the absence

²⁵ See, for example, communications No. 802/1998, *Rogerson v. Australia*, Views adopted on 3 April 2002, para. 7.9; No. 1887/2009, *Basso v. Uruguay*, Views adopted on 19 October 2010, para. 9.4.

of any factual evidence in support of his allegations under article 7, the Committee is unable to find that the author has sufficiently substantiated this claim for purposes of admissibility, and therefore declares it inadmissible under article 2 of the Optional Protocol.

8.10 The Committee further notes the author's claims under article 14, paragraphs 1 and 3 (e), of the Covenant that the court based his conviction on his confession made during the pretrial investigation, which he subsequently retracted in court, that his alibi was not duly considered and verified, that the findings of forensic examinations were not conclusive, that his requests to order expert examination of the fabricated evidence were rejected and that the court refused to summon and examine the main witness of the prosecution in court and failed to address the contradictions arising out of her testimony.

8.11 With regard to the author's claim that the court based his conviction on his confession, the Committee notes that the court did not establish the author's guilt solely on the basis of his own testimony, but also based on the confrontation with the co-accused, statements made by the latter, witness testimonies, the crime scene reconstruction report, conclusions of forensic expert examinations, as well as other evidence (see paras. 4.1, 4.2 and 6.3). Thus, the Committee therefore considers the author's claim to be insufficiently substantiated and therefore inadmissible under article 2 of the Optional Protocol.

8.12 As to the rest of the author's claims under article 14, paragraphs 1 and 3(e), the Committee observes that they relate primarily to the evaluation of facts and evidence by the State party's courts, and recalls its jurisprudence in this respect that it is generally for the relevant domestic courts to evaluate facts and evidence in a particular case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice.²⁶ The Committee considers that the materials made available to it do not suggest that the courts acted arbitrarily in evaluating the facts and evidence in the author's case or that the proceedings were flawed and amounted to a denial of justice. The Committee therefore finds that the author has not sufficiently substantiated his claims under article 14, paragraphs 1 and 3(e), of the Covenant and that this part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

8.13 With regard to the author's claim under article 14, paragraph 7, of the Covenant, that the court, by taking into account his prior conviction, tried and punished him again for an offence for which he had already been convicted, the Committee observes that the author has not provided any information about his previous conviction or explanations as to how it affected the level of his punishment. Accordingly, the Committee considers this claim to be insufficiently substantiated and therefore inadmissible under article 2 of the Optional Protocol.

8.14 The author also claims a violation of his rights under article 19, paragraph 2, of the Covenant in view of the authorities' refusal to provide him with a copy of his criminal file. The Committee notes in this respect the State party's argument that domestic legislation does not provide for such practice. It further notes the State party's argument that the author had the opportunity to request to be acquainted with the materials of his case file or to authorize a lawyer to do so on his behalf. The Committee also notes that the author never claimed in court that his right to be acquainted with the materials of his case file was violated (see para. 8.4 above). In the circumstances, the Committee considers that the author has failed to substantiate his claim that his right to obtain information was affected,

²⁶ See, for example, communications No. 1212/2003, *Lanzarote v. Spain*, decision of inadmissibility of 25 July 2006, para. 6.3; No. 1616/2007, *Manzano et al. v. Colombia*, decision of inadmissibility of 19 March 2010, para. 6.4; No. 1771/2008, *Gbondo Sama v. Germany*, decision of inadmissibility of 28 July 2009, para. 6.4; No. 1758/2008, *Jessop v. New Zealand*, Views adopted on 29 March 2011, para. 7.11; No. 1532/2006, *Sedljar and Lavrov v. Estonia*, Views adopted on 29 March 2011, para. 7.3.

and thus declares it inadmissible under article 2 of the Optional Protocol, for insufficient substantiation.

9. The Human Rights Committee therefore decides that:

- (a) The communication is inadmissible under article 2 of the Optional Protocol;
- (b) This decision shall be communicated to the State party and to the author.

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

**G. Communication No. 1840/2008, *X.J. v. the Netherlands*
(Decision adopted on 23 July 2012, 105th session)***

<i>Submitted by:</i>	X.J. (represented by counsel, M.A. Collet)
<i>Alleged victim:</i>	The author
<i>State party:</i>	The Netherlands
<i>Date of communication:</i>	8 September 2008 (initial submission)
<i>Subject matter:</i>	Unaccompanied minor claiming asylum
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; non-substantiation; and inadmissibility <i>ratione materiae</i>
<i>Substantive issues:</i>	Arbitrary interference with the family; protection as a child
<i>Articles of the Covenant:</i>	17 and 24
<i>Articles of the Optional Protocol:</i>	1; 2; and 5, para. 2 (b)
<i>The Human Rights Committee</i> , established under article 28 of the International Covenant on Civil and Political Rights,	
<i>Meeting on 23 July 2012,</i>	
<i>Adopts the following:</i>	

Decision on admissibility

1.1 The author of the communication, dated 8 September 2008, is X.J., a Chinese national, born on 2 October 1986. She claims to be a victim of violations by the Netherlands of articles 17 and 24 of the Covenant. She is represented by counsel, M.A. Collet.¹

1.2 On 1 April 2009, the Committee, acting through its Special Rapporteur on new communications and interim measures denied the State party's request for the Committee to examine the admissibility of the communication separately from the merits.

The facts as presented by the author

2.1 When the author was 3 years old, her parents died. She then lived with her grandmother. After her grandmother died, one of the author's uncles took care of her. Before they passed away, both the author's grandmother and parents were politically active.

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

Pursuant to rule 92 of the Committee's rules of procedure, Committee member Mr. Cornelis Flinterman, did not participate in the adoption of the present decision.

¹ The Optional Protocol entered into force for the State party on 11 December 1978.

After their death, the author received warnings from the local authorities not to engage in similar activities. She also was under pressure from inhabitants of her village. In 1999, the author's uncle made arrangements for her to be brought to the Netherlands.

2.2 The author arrived in the territory of the Netherlands in 1999 when she was 13 years old. She lived with a man for two years whom she managed to escape from in 2001. It is at that time that she submitted her asylum application.

2.3 In November 2001, the author applied for asylum. Her application was rejected on 12 December 2001. Her appeal was rejected by the district court in The Hague on 24 January 2002 as far as her asylum request was concerned; at the same time, the court referred the part of her appeal requesting a residence permit as an unaccompanied minor to the immigration authorities for decision, on the understanding that she would not be required to leave the Netherlands while this request was pending. Her request for a residence permit as unaccompanied minor was rejected on 27 February 2007. In a decision of 21 November 2007, the District Court of The Hague, sitting in 's-Hertogenbosch, dismissed her appeal. The author appealed against the Court's judgment on 11 December 2007. On 11 March 2008, the Administrative Jurisdiction Division of the Council of State confirmed the Court's judgment, therefore concluding the domestic remedies.

The complaint

3.1 The author claims that the State party has violated her rights under article 17 of the Covenant in that she lived in the Netherlands since the age of 13 and did her best to integrate in the Dutch society. She has been taken care of by a Dutch guardian institute (Nidos)² and, at the time of submission of the communication, lived in a supervised home. She has learnt Dutch and has built a network of friends with whom she gets along well. Referring to the Committee's jurisprudence in *Winata v. Australia*,³ she states that, as she has been living in the Netherlands since she was 13, she has built all her life there, where she feels safe. Therefore, expelling her to China would constitute a violation of her right to private and family life.

3.2 The author also states that she has been a victim of violations of article 24 of the Covenant. She claims that the Immigration Office did not take into account that she was 15 years old when she filed her asylum application and therefore treated her like any adult asylum seeker. The author considers that the State party has not respected the principle of the best interest of the child, in connection with the Committee's jurisprudence⁴ as well as under articles 3 and 20 of the Convention on the Rights of the Child.

State party's observations on admissibility and merits

4.1 On 10 February 2009, the State party challenged the admissibility of the communication on grounds of non-exhaustion of domestic remedies, non-substantiation and inadmissibility *ratione materiae*. The State party argues that the author has not raised her allegations under article 17 before national courts, thereby denying them the opportunity to respond to these complaints. The State party therefore contends that this part of the communication is inadmissible under article 5, paragraph 2 (b) of the Optional Protocol.

² The NIDOS Foundation is a national guardianship agency for unaccompanied minor refugees and asylum seekers.

³ The author refers to communication No. 930/2000, Views adopted on 26 July 2001, para. 7.3.

⁴ The author refers to communication No. 1069/2002, *Bakhtiyari v. Australia*, Views adopted on 29 October 2003, para. 9.7.

4.2 The author followed the national procedure for applying for an asylum residence permit. Given the author's age at the time, the Government considered whether she was also eligible for a regular residence permit entitled "residence as unaccompanied minor asylum seeker". The domestic proceedings therefore concentrated on whether the author required protection under the asylum law or rather on the grounds of her status as a minor. If, however, the author believed that she was eligible for a residence permit on the basis of the family life she had built in the Netherlands, she could have applied for a regular residence permit on special grounds as referred to in article 3.4, paragraph 3, of the 2000 Aliens Decree. Since she failed to do so, she has not exhausted domestic remedies.⁵

4.3 With regard to the author's reference to the Committee's jurisprudence in *Winata v. Australia*, the State party considers the situations incomparable. In that case, which concerned a child whose entire childhood had been spent in Australia and who had little or no connection with the parents' country of origin, the expulsion of the parents would have constituted an unlawful interference in the right to family life. In the present case, the author lived in China, her country of origin until the age of 13. She therefore speaks Chinese and is familiar with Chinese culture and society.

4.4 Given the author's failure to substantiate the nature of her family life in the Netherlands, this part of the communication should also be considered insufficiently substantiated pursuant to article 2 of the Optional Protocol. It is clear that the author has no family in the Netherlands. She describes the family life she has built in terms of wide network of friends with whom she gets along well but offers no further details than this.

4.5 The State party also considers that the author's allegations under article 24 of the Covenant should be deemed inadmissible for failure to exhaust domestic remedies since the legal action taken by the author was limited to challenging the assessment of whether she was eligible for a regular residence permit entitled "residence as unaccompanied minor asylum seeker". She did not take legal action against the rejection of the asylum application itself. The State party also notes that first mention of the alleged violation of article 24 was made in the grounds for the application for judicial review of 18 April 2007. The author was 20 years old at that time. Given the author's age and in the light of the fact that the author was an adult when domestic remedies were concluded, invoking this provision is without merit.

4.6 The State party claims that the author's allegations under articles 3 and 20 of the Convention on the Rights of the Child are inadmissible under article 1 of the Optional Protocol in so far as they refer to violations of rights enshrined in the Convention on the Rights of the Child and not in the Covenant.

4.7 On 10 June 2009, the State party submitted its observations on the merits insisting that its observations on admissibility stood and prevailed. It submits that asylum applications from unaccompanied minors are assessed carefully. There are, however, additional safeguards during the interviews due to the minor's age. As a rule, the best interests of the child require restoration of their relationship with their parents, family and/or surroundings. The State party adds that, following the denial of an unaccompanied minor's asylum application, the State Secretary investigates as a matter of course whether return to the minor's country of origin or another country would be possible and responsible. If it is established that neither option is possible, the minor asylum seeker may be granted a regular residence permit entitled "residence as unaccompanied minor alien".

4.8 With regard to the notion of adequate care and protection of the minor in the country of return, the State party defines it as care under conditions that do not differ fundamentally

⁵ The State party further develops this argument in paragraph 4.12 below.

from the conditions in which care and protection are provided to the asylum seeker's peers who are in a comparable situation. Care in a private or public facility may be regarded as adequate if the care provided there is regarded as acceptable by local standards.

4.9 Unless the purpose for which an alien wishes to remain in the Netherlands is connected in such a way to the situation in the country of origin that, in the State Secretary's opinion, a proper assessment requires the submission of an asylum application, a residence permit may be issued to the alien pursuant to article 3.4, paragraph 3, of the Aliens Decree, but subject to a restriction other than those listed in that article. In other words, the residence permit will be granted on the grounds of exceptional, individual circumstances. If an alien believes that the right to family life in an exceptional, individual situation makes him/her eligible for residence rights, he/she may apply for a residence permit. Such a permit can only be issued following an application pursuant to article 3.4 in conjunction with article 3.6 of the Aliens Decree.

4.10 With regard to the present case, the State party first points out that the statements made by the author to the Committee on the circumstances under which she left China as well as the date of her arrival in the Netherlands do not tally with the version the author presented to the State party's authorities. The author had not mentioned that she arrived in the Netherlands in 1999 and that she was held by a man for two years before she managed to escape and submit her asylum application.

4.11 The State party recalls that, in the framework of the asylum procedure, the first interview took place on 11 December 2001. On 12 December, the author was given an opportunity to comment on her asylum application. A written report was made of both interviews, during which she was assisted by a Mandarin-speaking interpreter. By letter of 12 December 2001, the author took the opportunity to make written changes and/or additions to the contents of the reports. On 12 December 2001, written notification was given of the intent to dismiss the application for an asylum residence permit and to deny the application for the issuance of a regular residence permit entitled "residence as unaccompanied minor alien". The author was given the opportunity to express her view on the notification, which she did on 12 December 2001. By decision of 12 December 2001, the author's application was denied and it was decided not to issue her with a residence permit entitled "residence as an unaccompanied minor alien".

4.12 The author lodged an application for review of this decision with the district court, which was forwarded to the State Secretary by letter of 24 January 2002 with the request that it be processed as an objection, a request under administrative law that the decision be reconsidered. The district court declared that it was not competent to take cognizance of the application for review because the author had submitted no grounds disputing the refusal to issue her with a temporary residence permit.⁶ The author's objection was subsequently declared unfounded by decision of 27 February 2007. As for the author's application for judicial review, it was declared unfounded by judgement of the District Court of The Hague, sitting in 's-Hertogenbosch on 21 November 2007. On 11 December 2007, the author lodged an appeal against the judgement of the district court with the Administrative

⁶ Pursuant to section 29, subsection 1 of the Aliens Act, a temporary asylum residence permit may be granted to an alien who is a refugee under the terms of the Refugee Convention; who makes a plausible case that he has good grounds for believing that if he is expelled he will run a real risk of being subjected to torture or to inhuman or degrading treatment or punishment; who cannot, for compelling reasons of humanitarian nature connected with the reasons for his departure from the country of origin, reasonably be expected to return to his country of origin; or for whom return to the country of origin would constitute an exceptional hardship in connection with the overall situation there.

Jurisdiction Division of the Council of State, which was declared unfounded by judgment of 11 March 2008. At the time of the State party's observations, the author had submitted no application for the issuance of a residence permit on the grounds of exceptional, individual circumstances. Nor had she applied for any other regular residence permit.

4.13 With regard to the author's allegations under article 17 of the Covenant, the State party notes that any determination of what kind of interpersonal relationships come under the term "family" is based on cultural traditions of the countries that are party to the Covenant as mentioned by the Committee in its general comment No. 16 on article 17 of the Covenant.⁷ A close friendship involving no blood ties or cohabitation cannot according to Dutch norms be considered a family tie, nor can it be according to Chinese norms, where the concept of family is much broader than it is in Europe. The State party takes the view that there is no family life in the present case and, as a result, no interference with the right to family life.

4.14 The author lived in China until she was at least 13 years old and there is therefore no reason why she could not return to China, especially since she has no family in the Netherlands and, on the other hand, she speaks Chinese and is familiar with Chinese culture and society. In no way has she demonstrated that her return would lead to her social exclusion or economic hardship. The State party therefore considers that the author's claims under article 17 should be declared manifestly unfounded. Should the Committee conclude that the State party has interfered with the author's family life the State party considers that such interference was neither arbitrary nor unlawful. Indeed, given the author's familiarity with the Chinese language, culture and customs, a reasonable balance was struck in this case between the author's right to family life on the one hand and the public interest served by pursuing a restrictive admissions policy on the other.

4.15 With regard to the author's allegations under article 24 of the Covenant, the State party contends that the interests of the child did take precedence when the Dutch policy on unaccompanied minor aliens whose asylum applications are denied was formulated. The rule that unaccompanied minor aliens are returned to their country of origin is in the best interests of the minors themselves. As a rule, the best interests of the child require restoration of their relationship with their parents, family and, of paramount importance in the present case, social surroundings. If there is no care and protection according to local standards available for minor asylum seekers and they cannot support themselves, they may be granted a residence permit entitled "residence as unaccompanied minor alien". In addition, account is taken of the age of the applicant in that unaccompanied minors are assigned a guardian by Nidos. Similarly, their age is taken into account during the interviews and the assessment of their applications. Sufficient safeguards in this respect have therefore been built in the national procedures.

4.16 The State party finally notes that the author had sufficient time to demonstrate that, in her case in particular, there would be no adequate care and protection available in China on account of exceptional, individual circumstances. The author had a legal representative assigned by Nidos and a lawyer who represented her in the proceedings under Aliens Law. Nevertheless, the author failed to submit documents to establish convincing arguments as to why adequate care and protection for her was not available in China. The State party adds that the author's reference to *Bakhtiyari v. Australia* is irrelevant as, in that case, the parents had to leave the country although the children were permitted to stay. In the present case on

⁷ The State party refers to its understanding of the Committee's general comment No. 16 (1988) on the right to respect of privacy, family, home and correspondence, and protection of honour and reputation, *Official Records of the General Assembly, Forty-third Session, Supplement No. 40* (A/43/40), annex VI, para. 5.

the other hand, the author does not have any family in the Netherlands, which makes those two cases incomparable.

Author's comments

5.1 On 8 October 2009, the author replies that she invoked the substance of article 17 before the national court by reference to the parallel article 8 of the European Convention on Human Rights. The author further notes that the applicable Dutch immigration law is organized in a manner which allows a strict division between asylum procedures and other immigration procedures. According to that law, the Immigration Office can disregard a claim on the right to privacy or family life, when the claim is made in an asylum procedure. The author made a claim in relation to article 8 of the European Convention in her asylum procedure. The Immigration Office and the district court disregarded her claim based on the national immigration law; however, on the basis of the Dutch Constitution under which the State party is bound by international treaties such as the European Convention and the Covenant, they should have considered the claim.

5.2 On the admissibility of article 24, the author claims that she invoked its substance before the national courts. The author arrived in the Netherlands when she was 13. However she was never treated as a minor during the asylum procedure which in addition was unreasonably delayed. In the meantime, the author integrated into the Dutch society. The fact that at the time of appeal she had reached 20 years old does not matter, since the breach of her rights occurred when she was under 18 years old.

5.3 With regard to her claims under articles 3 and 20 of the Convention on the Rights of the Child, although it may fall outside the scope of the Committee's competence, the applicability of those provisions is undisputed. The essence of these articles interrelates with the essence of the articles of the Covenant.

5.4 On the merits, the author insists that during the asylum procedure, she did not dare to mention that she had been held by a man for two years as she was afraid of the consequences on her asylum procedure. However, she revealed it later as mentioned in her grounds of appeal dated 18 April 2007. With regard to the State party's contention that she could already know at an early stage of the procedure that the residence permit would be denied, she replies that it is her right to appeal such a decision and she cannot be reproached for doing so.

5.5 With regard to article 17, the author is of the opinion that the question whether the author would theoretically be able to establish roots in China is not relevant to the current communication. The relevant question is whether sending her to China when she has built a life in the Netherlands constitutes a breach of article 17 of the Covenant. In addition, she has lived in the Netherlands since she was 13 years old which is the most important period of her life. Although she is still able to speak Chinese, the author is not used to living in China and is not familiar with its customs anymore. Given that there is interference in her family life, the author considers that such interference is not in conformity with article 17.

5.6 As for article 24, the author considers that the burden of proof imposed on her was as high as for any adult asylum seeker. The hearings were the same as any other hearing before the Immigration Office and the way the judgment was passed was no different. The only difference was related to her being taken care of by a guardian from Nidos. The author agrees that the best interest of the child is to stay with his/her parents. However she has no parents or family to stay with in China. It is therefore in her best interest to stay in the Netherlands where she has close ties and a social network to rely on. The author finally notes that her reference to *Winata v. Australia* was meant to draw attention to the fact that a State party's discretion in its immigration policy may come to be exercised arbitrarily in

certain circumstances.⁸ The author mentioned *Bakhtiyari v. Australia* in so far as it emphasizes the principles laid down in article 24, paragraph 1, of the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

6.3 With regard to the exhaustion of domestic remedies, as required under article 5, paragraph 2 (b), of the Optional Protocol, the Committee notes the arguments by the State party that the author failed to make an application for a regular residence permit on special grounds as referred to in article 3.4, paragraph 3, of the 2000 Aliens Decree and that such a permit can only be issued following an application pursuant to that provision in conjunction with article 3.6 of the same decree. The Committee notes that the author has invoked her rights in her appeal after having been denied a residence permit as an unaccompanied minor alien but that she did not invoke these rights through the application for a regular residence permit on grounds of exceptional personal circumstances, according to the relevant domestic legislation.⁹ In the present case, the author had a legal representative assigned by Nidos and a lawyer who represented her in the proceedings under Aliens Law. Therefore, she was in a position to be sufficiently advised on the remedies she was expected to exhaust to claim her rights under the Covenant, which included the application for a residence permit on grounds of exceptional personal circumstances. For this reason, the Committee considers that the communication is inadmissible for non-exhaustion of domestic remedies, under article 5, paragraph 2 (b), of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (b) of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

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

⁸ The author refers to para. 7.3 of the Committee's Views.

⁹ See communication No. 1564/2007, *X.H.L v. the Netherlands*, Views adopted on 22 July 2011, para. 9.

**H. Communication No. 1844/2008, *B.K. v. Czech Republic*
(Decision adopted on 23 July 2012, 105th session)***

<i>Submitted by:</i>	B.K. (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	The Czech Republic
<i>Date of communication:</i>	30 April 2008
<i>Subject matter:</i>	Discrimination on the basis of citizenship with respect to restitution of property
<i>Procedural issue:</i>	Abuse of the right to submit a communication
<i>Substantive issues:</i>	Equality before the law; equal protection of the law
<i>Article of the Covenant:</i>	26
<i>Article of the Optional Protocol:</i>	3
<i>The Human Rights Committee</i> , established under article 28 of the International Covenant on Civil and Political Rights,	
<i>Meeting on 23 July 2012,</i>	
<i>Adopts the following:</i>	

Decision on admissibility

1. The author of the communication, dated 30 April 2008, is Ms. B. K., a naturalized American citizen residing in the United States of America and born on 9 November 1928 in the city of Prague in former Czechoslovakia. She claims to be a victim of a violation by the Czech Republic of article 26 of the International Covenant on Civil and Political Rights.¹ She is not represented by counsel.

The facts as submitted by the author

2.1 The author submits that she left Czechoslovakia in May 1950 with her mother and arrived in New Zealand, where her brother was residing at a time. She moved to the United States of America in 1954 and became a naturalized citizen in 1960.

2.2 The author submits that on her family's departure, their property was confiscated by the State party because they left the country without permission.

2.3 The author claims that her mother died in the United States on 12 February 1973 and that she is an heir to her mother's property. She submits that in accordance with her

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

Pursuant to rule 91 of the Committee's rules of procedure, Committee member Mr. Gerald L. Neuman did not participate in the adoption of the present decision.

¹ The Optional Protocol entered into force for the State party on 22 February 1993.

inheritance, she has a claim to two-thirds of each of three properties: a building at 8 Bozdechova Street, a building at 4 Bozdechova Street, and a building at 23 Nadrazni Street in Prague.

2.4 The author submits that her brother, K.S., who lives in New Zealand and never lost his Czech citizenship, received 5.5 million Czech crowns from the State party for his third of the properties owned by her family.

2.5 The author claims that on 17 August 1999, her application for compensation was rejected by the Prague District Court No. 5. The court stated in its decision that according to Act No. 87/1991, she was not entitled to compensation, because she was not a Czech citizen when the said law became effective.²

2.6 The author also submits that by a decision dated 16 January 2002, the Prague Municipal Court separated her claim into an independent matter from her brother's court proceedings.

2.7 The author contends that no domestic remedies are available for the restitution of her property, referring to a decision of the Constitutional Court 33/96-41, which upheld the constitutionality of Act No. 87/1991.³

The complaint

3. The author claims that the Czech Republic violated her rights under article 26 of the Covenant in its application of Act No. 87/1991, which requires Czech citizenship for property compensation.

State party's observations on the admissibility and merits of the communication

4.1 On 21 May 2009, the State party submits its observations on the admissibility and merits. It refers to the applicable law, namely Act No. 119/1990 on Judicial Rehabilitation, and Law No. 87/1991 on Extra-Judicial Rehabilitation. The relevant section of Act No. 87/1991 gives a definition for persons entitled to compensation if property has been transferred to the State. It states that such person must be a citizen of the Czech Republic or the Slovak Federal Republic.

4.2 The State party submits that the author's complaint is inadmissible and ill-founded. The State party argues that the author has failed to exhaust domestic remedies, as required by article 5, paragraph 2 (b) of the Optional Protocol to the Covenant. The State party submits that the author did not appeal the decision of the District Court. The decision of the Prague Municipal Court concerns only the claim filed by the author's brother, and has no bearings on the author herself.

4.3 The State party further submits that the communication should be found inadmissible for abuse of the right of submission under article 3 of the Optional Protocol. The State party recalls the Committee's jurisprudence according to which the Optional Protocol does not set forth any fixed time limits and that a mere delay in submitting a communication in itself does not constitute an abuse of the right of submission. The State party submits that the final decision of the domestic court became final on 18 December 1999. The State party argues that the author has not presented any reasonable justification

² The law became effective on 1 April 1991.

³ Constitutional Court of the Czech Republic, Pl. ÚS. 33/96-41, 4 June 1997.

for the delay and therefore considers that the communication should be declared inadmissible by the Committee.⁴

4.4 The State party further submits that the property was confiscated in 1957, long before the Czechoslovak Socialist Republic ratified the Optional Protocol, and therefore the complaint should be considered inadmissible *ratione temporis*.

4.5 On the merits, the State party argues that the Committee's jurisprudence demonstrates that not all differences of treatment are discriminatory, and that differentiation based on reasonable and objective criteria does not amount to prohibited discrimination.⁵ The State party argues that the text of article 26 of the Covenant in no way suggests any obligation on the part of the State party to compensate any injustice that occurred under the previous regime, and that it is at the discretion of the legislator to decide whether or not to provide such compensation or restitution. The State party argues that the author failed to comply with the legal citizenship requirement and recalls its earlier submissions in similar cases which clarify the rationale and historic reasons for the legal scheme adopted with regard to property restitution. In conclusion, it states that the Committee should declare the communication inadmissible under article 3 of the Optional Protocol, or, in the alternative, find it ill-founded under article 26 of the Covenant.

Author's comments on the State party's observations

5.1 On 3 August 2009, the author submits her comments on the State party's observations on the admissibility and merits. The author argues that she did not receive any compensation for the demolished property only because of the discriminatory nature of the Czech law which requires Czech citizenship.

5.2 With regard to her belated submission of the present communication, the author submits that she was told by her lawyer that the decision of the Prague Municipal Court was final and that there was no way of appealing it. The author also submits that she became aware of the possibility of filing a complaint with the Committee only after she had seen an advertisement by "Czech Coordinating Office" in Canada.

5.3 Concerning the merits, the author reiterates the discriminatory nature of the citizenship requirement contained in Act No. 87/1991, in breach of her rights under article 26 of the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

⁴ The State party refers to communications No. 1434/2005, *Fillacier v. France*, decision of inadmissibility of 27 March 2006, para. 4.3; No. 787/1997, *Gobin v. Mauritius*, decision of inadmissibility of 16 July 2001, para. 6.3; and No. 1452/2006, *Chytil v. Czech Republic*, decision of inadmissibility of 24 July 2007, para. 6.2.

⁵ The State party refers to communication No. 182/1984, *Zwaan-de Vries v. the Netherlands*, Views adopted on 9 April 1987, paras. 12.1 to 13.

6.3 The Committee observes that the author has not exhausted all available domestic remedies, as she could have appealed the decision of the Prague District Court No. 5 dated 17 August 1999. The Committee nevertheless recalls that the author of a communication need not exhaust domestic remedies when these remedies are known to be ineffective. It observes that other claimants have unsuccessfully challenged the constitutionality of the law in question; earlier Views in similar cases remain unimplemented and the Constitutional Court has upheld the constitutionality of the Restitution Law⁶ despite the Committee's Views. Recalling its previous jurisprudence,⁷ the Committee is of the view that any further appeal by the author would have been futile, and that no further effective remedies were available to her.

6.4 The Committee further notes the State party's objection to the admissibility of the present communication *ratione temporis*. The Committee recalls its previous jurisprudence and considers that although the confiscations took place before the entry into force of the Covenant and the Optional Protocol for the Czech Republic, the legislation that excludes claimants who are not Czech citizens has continuing consequences subsequent to the entry into force of the Optional Protocol for the State party, which could entail discrimination in violation of article 26 of the Covenant.⁸

6.5 As to the State party's argument that the submission of the communication to the Committee amounts to an abuse of the right of submission under article 3 of the Optional Protocol, the Committee notes that the most recent and only decision referred to by the author is the one delivered by the Prague District Court No. 5, dated 17 August 1999, which rejected the authors' application as manifestly ill-founded. The Committee further notes that contrary to the author's claim, the decision by the Prague Municipal Court dated 16 January 2002, only deals with the merits of a similar complaint by her brother, K. S.. The same decision separates Ms. K.'s claim into an independent matter, which the author has not pursued. Therefore, a period of 8 years and 256 days passed before the author submitted her communication to the Committee for consideration on 30 April 2008.

6.6 In the consideration of the present communication, the Committee applies its jurisprudence which allows for an abuse to be found where an exceptionally long period of time has elapsed before the submission of a communication without sufficient justification.⁹ In this regard, the Committee observes that the author submitted her communication to the Committee for consideration on 30 April 2008, that is, 8 years and 256 days after the date of the decision by the Prague District Court No. 5. The Committee observes that it is up to the author to diligently pursue her claim. The Committee notes the author's argument regarding the delay in submission and considers that, in the present case, the author has not provided any reasonable justification for the delay in submitting her communication to the Committee. The Committee, therefore, regards the delay as being unreasonable and excessive, amounting to an abuse of the right of submission, which renders the communication inadmissible under article 3 of the Optional Protocol.

7. The Human Rights Committee therefore decides that:

- (a) The communication is inadmissible under article 3 of the Optional Protocol;

⁶ See communication No. 1497/2006, *Preiss v. Czech Republic*, Views adopted on 17 July 2008, para. 6.5.

⁷ See, inter alia, communication No. 1742/2007, *Gschwind v. Czech Republic*, Views adopted on 27 July 2010, para. 6.4.

⁸ See communication No. 1615/2007, *Zavrel v. Czech Republic*, Views adopted on 27 July 2010, para. 8.6.

⁹ Ibid.

(b) This decision shall be communicated to the State party and to the author.

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

**I. Communication No. 1848/2008, *D.V. and H.V. v. Czech Republic*
(Decision adopted on 23 July 2012, 105th session)***

<i>Submitted by:</i>	D.V. and H.V. (not represented by counsel)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	The Czech Republic
<i>Date of communication:</i>	7 September 2006 (initial submission)
<i>Subject matter:</i>	Discrimination on the basis of citizenship
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; abuse of the right of submission
<i>Substantive issue:</i>	Equality before the law
<i>Article of the Covenant:</i>	26
<i>Article of the Optional Protocol:</i>	3

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

Meeting on 23 July 2012,

Adopts the following:

Decision on admissibility

1. The authors of the communication are Mr. D.V and Ms. H.V., both naturalized American citizens born in Modrany, former Czechoslovakia, on 31 October 1933 and 8 December 1938, respectively. They claim to be victims of a violation by the Czech Republic of their rights under article 26 of the International Covenant on Civil and Political Rights.¹ They are not represented.

The facts as presented by the authors

2.1 The authors fled Czechoslovakia for political reasons, in 1964, and emigrated to the United States of America, where they have since lived. In 1970, they obtained American citizenship and lost their Czechoslovak citizenship.²

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

Pursuant to rule 91 of the Committee's rules of procedure, Committee member Mr. Gerald Neuman did not participate in the adoption of the present decision.

¹ The Optional Protocol entered into force for the Czech Republic on 1 January 1993, as a consequence of the notification by the Czech Republic of succession of the international obligation of Czechoslovakia, which had ratified the Optional Protocol in March 1991.

² On the basis of the United States – Czechoslovakia bilateral Naturalization Treaty of 16 July 1928, art. I.

2.2 As they left Czechoslovakia without permission,³ the authors were sentenced in abstentia⁴ to a prison term of two years and of one year and six months, respectively, with confiscation of their property, including their family home located in Modrany.

2.3 Following the enactment of Act No. 119/1990,⁵ the authors were rehabilitated and their sentences annulled. Thereafter, the authors applied for the renewal of their Czech citizenship, which they were granted on 5 June 2001, i.e., after the deadline for submitting applications for restitution of properties pursuant to Act No. 87/1991, which required claimants to be Czech citizens, and to have permanent residence in the Czech Republic in order to be eligible to regain properties.

2.4 When they attempted to regain ownership of their property,⁶ in 2006, the authors were informed by the Department of Property Relationships of the Ministry of Finance, in a letter of 10 August 2006, that they did not qualify for the restitution since they had not been Czech citizens between April 1 and 31 October 1993. The authors submit that they did not appeal the above decision before the national courts, because they considered that the appeal would be futile, taking into account a judgment of the Czech Constitutional Court of 4 June 1997, whereby the Court refused the request to strike out the condition of citizenship in the restitution laws in a case similar to theirs.

2.5 The authors contend that in any event, no effective remedies are available to them and that they do not have to exhaust ineffective domestic remedies.

The complaint

3. The authors claim that they are victims of discrimination, and argue that the requirement of citizenship for restitution of their property under Act No. 87/1991 is in violation of article 26 of the Covenant.

State party's observations on admissibility and merits

4.1 By note verbale of 21 May 2009, the State party presented its observations on the admissibility and the merits of the communication. It notes that the authors emigrated from Czechoslovakia and settled abroad. The authors acquired the citizenship of the United States of America on 17 July 1970 and, as a consequence, lost their Czechoslovak citizenship under the Naturalization Treaty of 16 July 1928 between the Czechoslovak Republic and the United States of America. They acquired the Czech citizenship again on 5 June 2001.

4.2 The State party requested information from the Czech Office for Survey, Mapping and Cadastre on the authors' former property — a house with a building plot at Cholupicka 105, Prague 4 — Modrany. However, the Office explained that there was no house with a No. 105 or registered under No. 105 in the said street.

4.3 The State party further notes that the authors did not exhaust domestic remedies with regard to the restitution proceedings, as they have never initiated court proceedings for the

³ Reports indicate that in the former Czechoslovakia, those attempting to leave the country without authorization were subject, inter alia, to imprisonment.

⁴ The authors do not specify by which court they were sentenced.

⁵ Act No. 119/1990 Coll. on Judicial Rehabilitation rendered null and void all sentences handed down by Communist courts for political reasons. Persons whose property had been confiscated were, under section 23.2 of the Act, eligible to recover their property, subject to conditions to be spelled out in a separate restitution law.

⁶ It should be noted that the proceedings before the Ministry of Finance permitted the gaining of monetary compensation for lost property.

purpose of reinstating their ownership of the property in question. It recalls that under article 5, paragraph 2 (b), of the Optional Protocol to the Covenant, the Committee is precluded from considering any individual communications unless it has ascertained that available domestic remedies have been exhausted.

4.4 In this regard, the State party submits that a court system exists in the Czech Republic composed of several levels, the Constitutional Court being on the top of this system. The State party notes that the authors of the present communication mention only the absolute minimum information about the allegedly confiscated property. Consequently, since the authors did not resort to domestic remedies available within the national court system, including by submitting a complaint with the Constitutional Court, some significant facts related to the circumstances of their communication could not have been verified at the national level and the Czech courts were not given an opportunity to examine the merits of the authors' discrimination claims, within the meaning of article 26 of the Covenant.⁷

4.5 The State party further contends that the communication should be declared inadmissible as constituting an abuse of the right of submission under article 3 of the Optional Protocol. It notes that the Optional Protocol does not set forth any fixed time limits for submitting a communication and that a mere delay in submitting a communication in itself does not present abuse of the right of its submission. In the present case, however, the authors submitted their case to the Committee with a delay of more than 10 years, without providing any reasonable justification for such a delay and, thus, the communication can be considered as constituting an abuse of the right of submission.⁸

4.6 The State party further maintains that, in the absence of any domestic courts' decisions in the authors' case, it should be concluded that the latest legally relevant fact is the moment of expiry of the time limit granted under Act No. 87/1991 (i.e. 1 April 1995) for delivering the request to the liable person who owned the property in dispute. Moreover, at the moment when the above time limit elapsed, restitution law ceased to be usable for the authors, and if the law had discriminated against them, as they allege, the situation of discrimination ceased to exist therefrom. Consequently, the State party maintains that the time limit for delivering the request to the liable person to surrender the contested property expired under Act No. 87/1991 on 1 April 1995. The authors, however, approached the Committee only on 16 September 2006, i.e., more than 10 years after the expiry of the deadline established by the restitution law, which constitutes an unreasonable delay.

4.7 In the light of the above, the State party suggests that the Committee adopts the approach of the European Court of Human Rights, which rejects any application if it has been submitted outside the six-month time limit following the final domestic courts' decision in accordance with article 35, paragraph 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

4.8 In the State party's opinion, it is appropriate to require the authors to provide, in respect of the delay, a reasonable explanation that has an objective basis and is sustainable. The lack of abuse of the right of submission, in other words, the observance of the obligation to attend one's rights, known in a number of legal orders, cannot be dependent

⁷ In the latter's regard the State party refers to the Committee's jurisprudence in the communication No. 1515/2006, *Schmidl v. the Czech Republic*, decision of inadmissibility adopted on 1 April 2008, para. 6.2.

⁸ The State party makes reference, inter alia, to the Committee's decisions in communications No. 1434/2005, *Fillacier v. France*, decision of inadmissibility adopted on 27 March 2006; No. 787/1997, *Gobin v. Mauritius*, decision of inadmissibility adopted on 16 July 2001; and No. 1452/2006, *Chytil v. the Czech Republic*, decision of inadmissibility adopted on 24 July 2007.

only on the extent to which the author, ex post facto, succeeds in believing subjectively of having an opportunity to approach the Committee only after a long period of time.⁹

4.9 The State party further submits that the Committee's conclusions on the admissibility of various communications as regards the length of the time period seem to be rather inconsistent and far from the legal certainty.

4.10 In the light of the above, the State party maintains that, by approaching the Committee many years after 1 April 1995 (see para. 4.6 above) without providing any objective and reasonable explanation, the authors have abused their right to submit a communication to the Committee.

4.11 On the merits, the State party notes that the authors have failed to demonstrate, both at the domestic level and in the present communication, that they were owners of the property which was passed to the State's ownership under the conditions stipulated in the Act No. 87/1991 on Extrajudicial Rehabilitations. The State party reiterates that, according to the information provided by its competent authorities in cadastral matters, the property specified by the authors is not in the registry. According to the State party, if the authors cannot demonstrate that they owned the specific property that had been passed to the State's ownership and that the only reason for the decision not to transfer the property back to them was the fact that at the material time they were not Czech citizens, then it cannot be concluded that they were not subjected to equal protection of the national law and that they were discriminated against. Consequently, the State party maintains that the authors' communication should be declared unsubstantiated.

4.12 The State party notes that the right protected by article 26 of the Covenant, invoked by the authors, is an autonomous one, independent of any other right guaranteed by the Covenant. It recalls that, in its jurisprudence, the Committee has reiterated that not all differences of treatment are discriminatory and that a differentiation based on reasonable and objective criteria does not amount to a violation of article 26.¹⁰

4.13 Article 26 does not imply that a State would be obliged to set right injustices of the past, especially considering the fact that the Covenant was not applicable at the time of the former communist Czechoslovakia. By referring to its previous observations in similar cases, the State party reiterates that it was not feasible to remedy all injustices of the past and that, as part of its legitimate prerogatives, the legislator, using its margin of appreciation, had to decide over which factual areas and in which way it would legislate, so as to mitigate damages. The State party concludes that no violation of article 26 occurred in the present case.

Authors' comments on the State party's observations

5.1 On 5 August 2011, the authors explain that they were not pursuing their claim in civil courts in the Czech Republic because, based on the publicly available information and the experience of other Czech emigrants, they believed they had no prospect of success. They acknowledge that they could have initiated further proceedings under the pertinent act No. 87/1991 to regain their property, but that law required Czech citizenship at the time when it was impossible for the authors to obtain it to be eligible for restoration of the ownership of the confiscated property. The authors were not "eligible persons" under that

⁹ In this regard, the State party makes reference to the Committee's jurisprudence in communication No. 1533/2006, *Ondracka and Ondrackova v. the Czech Republic*, Views adopted on 31 October 2007.

¹⁰ The State party refers to the Committee's Views adopted on 9 April 1987 in the communication No. 182/1984, *Zwaan de Vries v. the Netherlands*, paras. 12.1–12.3.

Act, as they did not have Czech citizenship during the relevant period. Accordingly, their claim would have been futile.

5.2 As to the State party's submission that their property is not in the cadastral registry, the authors argue that their house with a building plot at Choluticka 105, Prague 4 – Modrany, indeed does not exist anymore, since it was demolished at around 1973, after having been confiscated and probably sold by the authorities, together with other houses, in order to gain additional space for a new street and apartment buildings. However, one of the authors was born in that house and lived there for 31 years. Moreover, the address Choluticka 105, Prague 4 – Modrany is mentioned in the respective author's birth certificate, marriage licence, driving licence, etc.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The Committee has noted the State party's argument that the communication should be considered inadmissible on the ground of non-exhaustion of domestic remedies. The Committee refers to its established jurisprudence that, for purposes of the Optional Protocol, the author of a communication needs not to exhaust domestic remedies when these remedies are known to be ineffective. The Committee notes that because of the preconditions of Act No. 87/1991, the authors could not claim restitution at the time because at the time concerned they did not have Czech citizenship. In this context, the Committee notes that other claimants have unsuccessfully challenged the constitutionality of the law in question; that earlier views of the Committee in similar cases remain unimplemented and that, despite those complaints, the Constitutional Court upheld the constitutionality of Act No. 87/1991. The Committee therefore concludes that the authors were not obliged to exhaust any remedies at the national level.¹¹

6.3 As to the State party's argument that the communication amounts to an abuse of the right of submission under article 3 of the Optional Protocol, the Committee notes that the authors approached the Committee with the present communication almost 15 years after the contested Act No. 87/1991 entered into force. In this connection, the Committee observes that the authors have not provided any explanation for such a delay other than the mere explanation that, at that time, they were unable to regain their Czech citizenship. The Committee further notes that the authors have affirmed that they were aware of the Act No. 87/1991 and its requirements, but provided no explanation as to why they approached the Committee 15 years after the Act entered into force and almost 11 years after the said Act stopped operating.

6.4 In the consideration of the present communication, the Committee applies its jurisprudence which allows for finding an abuse where an exceptionally long period of time has elapsed before the presentation of the communication, without sufficient justification.¹²

¹¹ The Committee reached a similar conclusion in communication No. 1497/2006, *Preiss v. the Czech Republic*, Views adopted on 17 July 2008, para. 6.5.

¹² See communication No. 1615/2007, *Bohuslav Zavrel v. the Czech Republic*, Views adopted on 27 July 2010, para. 8.6.

In this connection the Committee reiterates that the authors approached the Committee with the present communication almost 15 years after the contested Act No. 87/1991 entered into force and almost 11 years after the said Act stopped operating. The Committee observes that the authors have not provided any explanation for such a delay other than the mere explanation that at that time, they were unable to regain their Czech citizenship. In this instance, although the State party raised the issue that the delay amounts to an abuse of the right of petition, the authors have not explained or justified why they waited for nearly almost 15 years before bringing their claims to the Committee. In the light of these elements, read as a whole, and taking into account the fact that the *Simunek* decision of this Committee¹³ was rendered in 1995, the Committee thus regards the delay to be so unreasonable and excessive as to amount to an abuse of the right of submission, and declares in particular circumstances of the present case the communication inadmissible pursuant to article 3 of the Optional Protocol.

6.5 The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under article 3 of the Optional Protocol;
- (b) That this decision shall be communicated to the State party and to the authors.

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

¹³ Communication No. 516/1992, *Simunek et al. v. the Czech Republic*, Views adopted on 19 July 1995.

**J. Communication No. 1849/2008, *M.B. v. Czech Republic*
(Decision adopted on 29 October 2012, 106th session)***

<i>Submitted by:</i>	M.B. (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	The Czech Republic
<i>Date of communication:</i>	24 April 2006 (initial submission)
<i>Subject matter:</i>	Discrimination on the basis of citizenship
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; abuse of the right of submission
<i>Substantive issue:</i>	Equality before the law
<i>Article of the Covenant:</i>	26
<i>Article of the Optional Protocol:</i>	3

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

Meeting on 29 October 2012,

Adopts the following:

Decision on admissibility

1. The author of the communication is M.B., a naturalized American citizen born in the former Czechoslovakia in 1933. She claims to be victim of a violation by the Czech Republic of her rights under article 26 of the International Covenant on Civil and Political Rights.¹ She is not represented.

The facts as presented by the author

2.1 The author left Czechoslovakia for political reasons in 1976 and emigrated to the United States of America, where she has since lived. In 1987, she obtained American citizenship and lost her Czechoslovakian citizenship.²

2.2 The author submits that at the time of her departure, she left behind a brick cottage in the Petrov cadastral area, with a loft and a basement. It was built with all the required comforts and plumbing, because the author's family intended to use it as their principal

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev and Mr. Krister Thelin. Pursuant to rule 91 of the Committee's rules of procedure, Mr. Gerald Neuman did not participate in the consideration of this communication.

¹ The Optional Protocol entered into force for the Czech Republic on 1 January 1993, as a consequence of the notification by the Czech Republic of its succession to the international obligation of the Czech and Slovak Federal Republic, which had ratified the Optional Protocol in March 1991.

² On the basis of article I of the bilateral Naturalization Treaty of 16 July 1928 between the United States and Czechoslovakia.

retirement place. Due to the author's unauthorized departure, her property was confiscated by a court's decision on an unspecified date. The author estimates that the said property is currently worth about 2.5 million Czech koruny.³

2.3 On an unspecified date, pursuant to Act No. 119/1990 on Judicial Rehabilitation, the author and her husband were rehabilitated and the court decision whereby the author's property was confiscated has been abrogated.

2.4 The author took several steps to reclaim the property. First, she contacted a lawyer, and on 28 February 1991 was informed that the Federal Assembly of the Czech and Slovak Federal Republic on 21 February 1991 had passed an Act on Judicial Rehabilitation (entered into force on 1 April 1991). According to article 3 of the Act, an entitled person whose property passed to the ownership of the State was someone who was a citizen of the Czech and Slovak Federal Republic and had permanent residency on its territory. Consequently, if the author wished the return of her property, she had to meet aforementioned requirements.

2.5 Second, the author contacted the Office of the President of the Czech and Slovak Federal Republic and, on 31 October 1991, she was informed that the Federal Assembly, in an attempt to mitigate wrongs done between 1948 and 1989, had passed a number of restitution Acts, inter alia, Act No. 119/1990 on Judicial Rehabilitation, Act No. 87/1991 on Extrajudicial Rehabilitation, and Act No. 92/1991 on Transfer of State Property to Other Persons. The author was further informed that in the preambles of these restitution acts it was stated that these acts were mitigating only some wrongs and that various injustices, by which all decent citizens of the respective State were more or less affected, could never be entirely rectified and that the initiated legal proceedings were meant to rectify at least the worst injustices and to prevent the occurrence of similar wrong-doings in the future. Finally, the author was informed that Act No. 87/1991, article 3, provided that citizens of the Czech and Slovak Federal Republic who had permanent residency in the country were entitled to the restitution of their property.

2.6 On an unspecified date, the author requested the Czech Office for Survey, Mapping and Cadastre in Prague-West to transfer the respective property ownership to her. However, on 10 October 1995 she was informed that in order to regain her property rights, she had to comply with the preconditions set by Act No. 87/1991.

2.7 On an unspecified date, the author applied for the renewal of her Czech citizenship, which she was granted on 22 January 2002, i.e. after the deadline for submitting applications for restitution of properties pursuant to Act No. 87/1991.

2.8 The author contends that in any event, no effective remedies were available to her and, referring to the decision of the Constitutional Court of 4 June 1997 approving the nationality requirement encompassed under Act No. 87/1991 as compatible with the Czech Constitution, contends that she has no effective remedies to exhaust.

The complaint

3. The author claims that she is a victim of discrimination, and argues that the requirement of citizenship for restitution of her property under Act No. 87/1991 is in violation of article 26 of the Covenant.

³ About 100,000 euros.

State party's observations on admissibility and merits

4.1 By note verbale of 21 May 2009, the State party presented its observations on the admissibility and the merits of the communication. It notes that the author emigrated from Czechoslovakia and settled abroad. The author became a citizen of the United States on 10 July 1987 and, as a consequence, lost her Czechoslovakian citizenship under the Naturalization Treaty of 16 July 1928 between Czechoslovakia and the United States. She reacquired Czech citizenship on 22 January 2002.

4.2 The State party requested information from the Czech Office for Survey, Mapping and Cadastre in Prague-West on the author's former property – recreational chalet No. 1167 in the Petrov cadastral area. However, the Office explained that the respective property was not registered in the Land Register of the Petrov cadastral area.

4.3 The State party further notes that the author did not exhaust domestic remedies with regard to the restitution proceedings, as she has never initiated court proceedings for the purpose of reinstating her ownership of the property in question. It recalls that under article 5, paragraph 2 (b), of the Optional Protocol to the Covenant, the Committee is precluded from considering any individual communications unless it has ascertained that available domestic remedies have been exhausted.

4.4 In this regard, the State party submits that there exists in the Czech Republic a court system composed of several levels, with the Constitutional Court at the top. The State party notes that the author of the present communication mentions only the absolute minimum information about the allegedly confiscated property. Consequently, since the author did not resort to domestic remedies available within the national court system, including by submitting a complaint to the Constitutional Court, some significant facts relating to the circumstances of her communication were not verified at the national level and the Czech courts were not given an opportunity to examine the merits of the author's discrimination claims within the meaning of article 26 of the Covenant.⁴

4.5 The State party emphasizes that a letter to a counsel, to the President of the Republic or to the cadastral office cannot be considered as a use of a remedy; only an action for the surrender of a thing brought with a competent court may be considered as such. Accordingly, the State party believes that the author's communication therefore should be regarded as inadmissible pursuant to article 5, paragraph 2 (b), of the Optional Protocol to the Covenant.

4.6 The State party further contends that the communication should be declared inadmissible as constituting an abuse of the right of submission under article 3 of the Optional Protocol. It notes that the Optional Protocol does not set forth any fixed time limits for submitting a communication and that a mere delay in submitting a communication in itself does not present an abuse of the right of its submission. At the same time, however, the State party believes that when authors approach the Committee after a time period that is clearly unreasonable and without any reasonable justification for such a delay it can constitute an abuse of the right of submission of a communication to the Committee.⁵

⁴ The State party refers to the Committee's jurisprudence in communication No. 1515/2006, *Schmidl v. Czech Republic*, decision of inadmissibility adopted on 1 April 2008, para. 6.2.

⁵ The State party makes reference, inter alia, to the Committee's decisions in communications No. 1434/2005, *Fillacier v. France*, decision of inadmissibility adopted on 27 March 2006, para. 4.3; No. 787/1997, *Gobin v. Mauritius*, decision of inadmissibility adopted on 16 July 2001, para. 6.3; and No. 1452/2006, *Chytil v. Czech Republic*, decision of inadmissibility adopted on 24 July 2007, para. 6.2.

4.7 The State party notes that the Covenant provides neither for the right to peaceful enjoyment of property nor for the right to compensation for past injustices, but the author directs her criticism towards the restitution law. The State party believes that in the absence of any decision of domestic courts in the author's case, it should be concluded that the latest legally relevant fact is, in this respect, the moment of expiry of the time limit granted by the restitution laws for delivering the request to the liable person currently possessing the object in dispute. In fact, at the moment when such time limit elapsed, restitution laws ceased to be applicable, and if these laws discriminated against her, as she alleges, the situation of discrimination ended. The State party further notes that it is scarcely possible to base one's thinking on a hope that the laws will be changed; such hope is not an expectation protected by law.

4.8 In the present case, the time limit for delivering the request to the liable person to surrender the contested property expired under Act No. 87/1991 on 1 April 1995. However, the author submitted her case to the Committee only on 24 April 2006, with a delay of more than 11 years after the expiry of the normal time limits for steps to be taken when using restitution laws.

4.9 In the light of the above, the State party suggests that the Committee adopt the approach of the European Court of Human Rights, which rejects any application if it has been submitted outside the six-month time limit following the final domestic courts' decision, in accordance with article 35, paragraph 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

4.10 Further, in the State party's opinion it is appropriate to require the author to provide, in respect of the delay, a reasonable explanation that has an objective basis and that is also sustainable. The lack of abuse of the right of submission, in other words, the observance of the obligation to attend to one's rights, known in a number of legal orders, cannot be dependent only on the extent to which the author, ex post facto, believes subjectively that he/she had an opportunity to approach the Committee only after a long period of time.⁶

4.11 The State party further submits that the Committee's conclusions on the admissibility of various communications as regards the length of the time period seem to be rather inconsistent and far from legal certainty.

4.12 In the light of the above, the State party reiterates that, by approaching the Committee many years after 1 April 1995 (see para. 4.8 above) without providing any objective and reasonable explanation, the author has abused her right to submit a communication to the Committee.

4.13 On the merits, the State party notes that the author has failed to demonstrate, both at the domestic level and in the present communication, that she was the owner of the property which was passed to the State's ownership under the conditions stipulated in the Act on Extrajudicial Rehabilitation. The State party reiterates that, according to the information provided by its competent authorities in cadastral matters, the property specified by the author is not in the registry. According to the State party, if the author cannot demonstrate that she owned the specific property that had been passed to the State's ownership, then it cannot be concluded that she was not given equal protection by the national law and that she was discriminated against because of the impossibility to get the alleged property back. Consequently, the State party maintains that the author's communication should be declared unsubstantiated and manifestly ill-founded.

⁶ In this regard, the State party makes reference to the Committee's jurisprudence in communication No. 1533/2006, *Ondracka and Ondracka v. Czech Republic*, Views adopted on 31 October 2007.

4.14 In any case, the State party notes that the right protected by article 26 of the Covenant, invoked by the author, is an autonomous one, independent of any other right guaranteed by the Covenant. It recalls that in its jurisprudence, the Committee has reiterated that not all differences of treatment are discriminatory, and that a differentiation based on reasonable and objective grounds does not amount to a violation of article 26.⁷

4.15 According to the State party, article 26 does not imply that a State would be obliged to set right injustices of the past, especially considering the fact that the Covenant was not applicable at the time in the former Czechoslovakia. Referring to its previous observations in similar cases, the State party reiterates that it was not feasible to remedy all injustices of the past, and that as part of its legitimate prerogatives, the legislator, using its margin of appreciation, had to decide over which factual areas and in which way it would legislate, so as to mitigate damages. The State party concludes that no violation of article 26 occurred in the present case.

4.16 Despite the Committee's decision-making practice, the State party still believes that in stipulating the conditions under which certain injustices committed in the past would be partially redressed or mitigated, the legislator possessed a margin of appreciation within which it could also lay down the citizenship requirement on the part of the applicants requesting the surrender of property. However, it does not wish to reiterate all the arguments in support of this assertion, contained in a number of its previous observations on the admissibility and merits of the communications submitted to the Committee, as well as in the constructive dialogue with the Committee that has taken place when discussing the State party's periodic reports on the fulfilment of its obligations under the Covenant.

Author's comments on the State party's observations

5.1 On 6 September 2009, the author enclosed a number of documents certifying that the contested property on Stepanska Street 1 – 11000, Prague, belonged to her husband, Mr. B., or to both of them, Mr. and Ms. B. Ms B. explains that Mr. B. died on 3 May 1993 and ever since she had been trying to regain the ownership of their property on her own.

5.2 The author further explains that following the political changes in 1989, the author and her husband travelled a number of times to Prague in an effort to regain their ownership of the contested property; however, they were informed by several counsels that they did not have the right to regain ownership of the respective property. They then sought advice from the Chancellor in Prague and from the Office of the President of the Czech and Slovak Federal Republic, in vain.

5.3 In 1992 the author and her husband again travelled to Prague to apply for Czech citizenship in order to be eligible to reclaim their property. However, they were told that they had to wait, as at the material time the authorities were reinstituting citizenship only to those who were moving back to Czechoslovakia.

5.4 After the author regained her Czech citizenship on 22 January 2002, she was told by the legal counsels and State authorities that it was too late to regain her property in accordance with Act No. 87/1991, as all the deadlines had passed.

⁷ The State party refers to the Committee's jurisprudence in communication No. 182/1984, *Zwaan-de Vries v. Netherlands*, Views adopted on 9 April 1987, para. 13.

Additional submissions by the State party

6.1 On 7 January 2010, on the basis of additional information presented by the author, the State party acknowledges that before her emigration from Czechoslovakia the author had owned with her husband recreational chalet No. 1167 in the Petrov cadastral area.

6.2 The State party submits that the author's allegations that she was not able to acquire Czech citizenship in 1991 (or even before) are unfounded. On the contrary, despite the Naturalization Treaty concluded between Czechoslovakia and the United States, *inter alia*, applicants for recovery of property could acquire Czech citizenship from 1990 on the basis of an application and also within the time limit for submitting restitution claims. The Ministry of the Interior of the former Czech and Slovak Federal Republic granted all the applications for Czech citizenship, which were submitted in 1990 to 1992 by former Czech (or Czechoslovakian) citizens who had acquired American citizenship. The State party notes, as an example, that in 1991 72 persons became Czech citizens this way.

6.3 Finally, the State party reiterates that the present communication should be declared inadmissible due to the non-exhaustion of domestic remedies or/and due to the abuse of the right of submission and partially inadmissible *ratione temporis*. Or, in any event, the Committee should declare that in the instant case the Czech Republic has not violated article 26 of the Covenant.

Issues and proceedings before the Committee

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

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

7.3 The Committee has noted the State party's argument that the communication should be considered inadmissible on the ground of non-exhaustion of domestic remedies. The Committee refers to its established jurisprudence that, for purposes of the Optional Protocol, the author of a communication need not exhaust domestic remedies when these remedies are known to be ineffective. The Committee notes that because of the preconditions of Act No. 87/1991, the author could not claim restitution because at the time concerned she did not have Czech citizenship. In this context, the Committee notes that other claimants have unsuccessfully challenged the constitutionality of the law in question; that earlier Views of the Committee in similar cases remain unimplemented and that despite those complaints, the Constitutional Court upheld the constitutionality of the Act on Extrajudicial Rehabilitation. The Committee therefore concludes that the author was not obliged to exhaust any remedies at the national level.⁸

7.4 The Committee has also noted the State party's argument that the communication amounts to an abuse of the right of submission under article 3 of the Optional Protocol. In the consideration of the present communication, the Committee applies its jurisprudence which allows for finding an abuse where an exceptionally long period of time has elapsed before the presentation of the communication, without sufficient justification.⁹ In this connection the Committee notes that the author approached the Committee with the present

⁸ The Committee reached a similar conclusion in communication No. 1497/2006, *Preiss v. Czech Republic*, Views adopted on 17 July 2008, para. 6.5.

⁹ See communication No. 1615/2007, *Zavrel v. Czech Republic*, Views adopted on 27 July 2010, para. 8.6.

communication almost 15 years after the contested Act No. 87/1991 entered into force and almost 11 years after the said Act expired. The Committee observes that the author has not provided any explanation for such a delay other than the mere statement that at that time she was unable to regain her Czech citizenship. In this instance, although the State party raised the issue that the delay amounts to an abuse of the right of petition, the author has not explained or justified why she waited for nearly 15 years before submitting her communication to the Committee. In the light of these elements, read as a whole, and taking into account the fact that the *Simunek* decision of this Committee¹⁰ was rendered in 1995 (the first communication decided by the Committee with regard to property matters in the Czech Republic), the Committee thus regards the delay to be so unreasonable and excessive as to amount to an abuse of the right of submission. Accordingly, it declares, in the particular circumstances of the present case, the communication inadmissible pursuant to article 3 of the Optional Protocol.

7.5 The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under article 3 of the Optional Protocol;
- (b) That this decision shall be communicated to the State party and to the author.

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

¹⁰ Communication No. 516/1992, *Simunek et al. v. Czech Republic*, Views adopted on 19 July 1995.

**K. Communication No. 1857/2008, *A.P. v. Russian Federation*
(Decision adopted on 25 March 2013, 107th session)***

<i>Submitted by:</i>	A.P. (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Russian Federation
<i>Date of communication:</i>	20 May 2008 (initial submission)
<i>Subject matter:</i>	Restrictions on being able to register as a candidate for elections individually; coercion to accept ideology; limitation of legal personality; denial to determine rights in a suit at law by a competent, independent and impartial tribunal established by law
<i>Procedural issue:</i>	Level of substantiation of claims
<i>Substantive issue:</i>	Right to be elected
<i>Articles of the Covenant:</i>	14, paragraph 1, read in conjunction with articles 2; 16; 18, paragraph 2; 25, paragraphs (a) and (b)
<i>Article of the Optional Protocol:</i>	2

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

Meeting on 28 March 2013,

Adopts the following:

Decision on admissibility

1. The author is A.P., a Russian national born in 1969. He claims to be a victim of violations by the Russian Federation of his rights under article 14, paragraph 1, read in conjunction with articles 2, 16, 18, paragraph 2, and 25 (a) and (b), of the International Covenant on Civil and Political Rights.¹ The author is not represented by counsel.

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Víctor Manuel Rodríguez Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

The text of an individual (dissenting) opinion by Committee members Mr. Yuval Shany and Mr. Konstantine Vardzelashvili is appended to the present decision.

¹ The Optional Protocol entered into force for the State party on 1 January 1992.

The facts as presented by the author

2.1 On 12 September 2007, the author submitted an application to the Chairperson of the Central Election Commission of the Russian Federation (CEC) with a request to register him as a candidate in the forthcoming elections to the State Duma (lower house) of the Federal Assembly of the Russian Federation.

2.2 On 18 September 2007, the author received a reply from a member of the CEC, explaining that in accordance with article 37, part 1, of the Federal Law on the Election of Deputies of the State Duma of the Federal Assembly of the Russian Federation (the federal law on the election of deputies of the State Duma), not later than three days after the day of the official publication of the decision to call the election of deputies of the State Duma, each citizen of the Russian Federation who is entitled to a passive electoral right and is not a member of any political party may apply to any regional branch of any political party for his inclusion in the federal list of candidates to be nominated by that political party. The CEC does not have the authority to decide on the inclusion of citizens of the Russian Federation in the federal list of candidates.

2.3 On 4 October 2007, the author appealed the refusal of the CEC to register him as a candidate for the Supreme Court, claiming that it breached a number of constitutional provisions.²

2.4 On 8 October 2007, the Supreme Court rejected the author's appeal under article 28 of the Federal Law on Basic Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum (the federal law on the right to participate in a referendum), pursuant to which the Supreme Court may only examine complaints challenging the CEC decisions that have been taken collegially and signed by the Commission's Chairperson and its Secretary. The CEC reply sent to the author on 18 September 2007 and signed by a single official did not constitute such a "decision" and cannot be appealed to the Supreme Court.

2.5 On 8 October 2007, the author complained to the Constitutional Court of the Russian Federation, requesting to have assessed whether articles 3, 4, 7 and 37 of the federal law on the election of deputies of the State Duma are compatible with the provisions of articles 3, 13, 19 and 30 of the Constitution. On the same day, the author sent an open e-letter to the President of the Russian Federation, asking him to refer to the Constitutional Court a request to assess the constitutionality of the federal law on the election of deputies of the State Duma.

2.6 On 10 October 2007, the author's open letter to the President was posted on a number of mass media and civil society information websites.

2.7 On 18 October 2007, the author appealed the CEC refusal to register him as a candidate to the Tversk District Court of Moscow and requested it to order the CEC to register him as a candidate. On 19 October 2007, the Tversk District Court rejected the

² Article 3: (1) The multinational people of the Russian Federation is the vehicle of sovereignty and the only source of power in the Russian Federation. (2) The people of the Russian Federation exercise their power directly, and also through organs of state power and local self-government. (3) The referendum and free elections are the supreme direct manifestation of the power of the people ... Article 13: (1) Ideological plurality is recognized in the Russian Federation. (2) No ideology may be instituted as a state-sponsored or mandatory ideology ... Article 19: ... (2) The state guarantees the equality of rights and liberties regardless of sex, race, nationality, language, origin, property or employment status, residence, attitude to religion, convictions, membership of public associations or any other circumstance ... Article 30: ... (2) No one may be coerced into joining any association or into membership thereof ...

author's appeal, explaining that the CEC did not have the authority to decide on the inclusion of citizens of the Russian Federation in the federal list of candidates (under the federal law on the election of deputies of the State Duma). On 25 October 2007, the author appealed the ruling of the Tversk District Court to the Moscow City Court.

2.8 On 19 October 2007, the author again requested the Chairperson of the CEC to examine his application of 12 September 2007 at the regular session of the CEC. On 26 October 2007, the Secretary of the CEC, in a letter, explained to the author the procedure for registration of the candidates to the Duma, as established by the federal law on the election of deputies of the State Duma. The Secretary stated explicitly that the inclusion in the federal list of candidates has to be made through a political party, but the candidate did not have to be a member of that party. In order to be a candidate, the author should have applied to any regional branch of any political party for his inclusion in the federal list of candidates before the deadline of 8 October 2007.

2.9 On 25 October 2007, the author received a reply from the Chief Consultant of the Department of Constitutional Basis of Public Authority and Federative Structure of the Constitutional Court of the Russian Federation, stating that the author's complaint of 8 October 2007 did not fulfil the requirements set out in article 125, part 4, of the Constitution and articles 3, part 1, paragraph 3; 96 and 97 of the Federal Constitutional Law on the Constitutional Court of the Russian Federation, according to which the Constitutional Court reviews the constitutionality of the law applied or due to be applied in a specific case in accordance with procedures established by federal law. The Chief Consultant concluded that the reply of a member of the CEC dated 18 September 2007 was of an informative nature and that it did not transpire from the author's complaint of 8 October 2007 that articles 3, 4, 7 and 37 of the federal law on the election of deputies of the State Duma were applied in his specific case. On 30 October 2007, the author submitted his written arguments to the Chairperson of the Constitutional Court, challenging the reply of 25 October 2007.

2.10 On 31 October and 1 November 2007, the author wrote to the President, the Chairpersons of both houses of the Federal Assembly, the Head of the Government, and the Chairperson of the Supreme Court, requesting them to request the Constitutional Court to have the constitutionality of the federal law on the election of deputies of the State Duma assessed.

2.11 On an unspecified date, the author received a phone call from an official of the Government Administration, informing him that a referral to the Constitutional Court falls outside the scope of the Government's authority. On 3 November 2007, the author was informed by the Head of the Department of Information and Documentation of the Federation Council (upper chamber of the Parliament) that his letter of 31 October 2007 had been forwarded to the Committee on Constitutional Legislation.

2.12 On 11 December 2007, the author received a reply from the Supreme Court, explaining that it could refer to the Constitutional Court a request to assess the constitutionality of a federal law applied in a specific case, but at that time no such case was pending before the Supreme Court. The author argues, however, that at the time in question, he had a complaint of 13 November 2007 pending before the Supreme Court (see para. 2.15 below).

2.13 On 2 November 2007, the author received a reply dated 26 October 2007 (see para. 2.6 above) from the Presidential Administration, stating that there were no grounds to refer a request to assess the constitutionality of the federal law on the election of deputies of the State Duma to the Constitutional Court. On 6 November 2007, the author submitted his written arguments to the attention of the President, challenging the reply of 26 October 2007.

2.14 On 6 November 2007, the author appealed the reply of the CEC of 26 October 2007 (see para. 2.8 above) to the Supreme Court. On 9 November 2007, a judge of the Supreme Court returned his complaint given that the CEC had no authority to include candidates in the federal lists and that, therefore, according to article 134, part 1, of the Civil Procedure Code, his complaint may not be examined through the civil proceedings.

2.15 On 13 November 2007, the author complained to the Supreme Court against the Supreme Court ruling of 9 November 2007. On 27 December 2007, the Cassation College of the Supreme Court upheld the ruling of 9 November 2007. On 5 February 2008, the author requested the Presidium of the Supreme Court to initiate a supervisory review of the ruling of 9 November 2007. On 24 March 2008, his request was rejected.

2.16 By letter of 1 November 2007, the Chief Adviser of the Citizens' Petitions Department of the Presidential Administration replied to the author's letter of 31 October 2007 (see para. 2.10 above). The author was informed that neither the President nor the Administration could interfere with the work of the judiciary. On 13 November 2007, the author made a request to the Head of the Presidential Administration that his written arguments, challenging the reply of 1 November 2007, be transmitted directly to the President. On 23 November 2007, the author received a reply from the Presidential Administration, reiterating that there were no grounds to refer to the Constitutional Court a request to assess the constitutionality of the proportionate electoral system in the Russian Federation.

2.17 On 20 November 2007, the author requested the Chairperson of the CEC to postpone the elections to the State Duma of the Federal Assembly until such time when the Constitutional Court examined his complaint of 8 October 2007 (see para. 2.5 above).³ In December, the author received a reply from the Secretary of the CEC dated 27 November 2007, informing him that there were no grounds to postpone the elections.

2.18 On 20 November 2007, the Moscow City Court examined the author's complaint of 25 October 2007 (see para. 2.7 above), quashed the ruling of a judge of the Tversk District Court of Moscow of 19 October 2007 and ordered a new examination of the author's case. On 30 November 2007, the Tversk District Court of Moscow dismissed the author's case on the ground of articles 21 and 28 of the federal law on the right to participate in a referendum, and article 25 of the federal law on the election of deputies of the State Duma.

2.19 On 3 December 2007, the author appealed the decision of the Tversk District Court of Moscow of 30 November 2007 to the Moscow City Court, pointing out that under article 25, parts 9 and 12; and article 44, parts 1, 8 and 9, of the federal law on the election of deputies of the State Duma, the CEC, rather than political parties, takes a decision to register or not register a federal list of candidates. The author submitted a supplementary appeal on 5 December 2007. On 13 December 2007, the Moscow City Court dismissed the author's appeal pursuant to article 75 of the federal law on the right to participate in a referendum, and article 28 of the federal law on the election of deputies of the State Duma. On an unspecified date, the author requested the Tversk District Court of Moscow and, on 13 December 2007, the Moscow City Court, to request the Constitutional Court to have the constitutionality of the federal law on the election of deputies of the State Duma assessed. According to him, however, neither gave suit to his request.

2.20 On 6 February 2008, the author requested the Presidium of the Moscow City Court to initiate a supervisory review of the decision of 30 November 2007 of the Tversk District

³ Reference is made to article 98 of the Federal Constitutional Law on the Constitutional Court of the Russian Federation.

Court and of the ruling of the Moscow City Court of 13 December 2007. No reply was received.

2.21 At the end of February 2008, the author received a decision of the Constitutional Court of 18 December 2007, on the inadmissibility of his complaint. The Constitutional Court decided that the author was primarily challenging a transition from the majoritarian-proportional electoral system to a proportional electoral system that does not envisage elections of members (deputies) to the State Duma from single-member constituencies, nor self-nomination of candidates. At the same time, the federal law on the election of deputies of the State Duma does not exclude the right of a citizen who is not a member of a political party to be elected as a member (deputy) of the State Duma – he or she could be included in the federal list of candidates from a political party either upon his or her own initiative or upon the party's nomination. Therefore, none of the provisions challenged by the author (arts. 3, 4, 7 and 37 of the federal law on the election of deputies of the State Duma) violated any of the rights guaranteed by the Constitution.

The complaint

3.1 The author claims that the State party has violated his right under article 25 (a) and (b) of the Covenant to take part in the conduct of public affairs and to be elected at genuine periodic elections, because by virtue of articles 7 and 37 of the federal law on the election of deputies of the State Duma, the exercise of a passive electoral right is made conditional upon political parties.

3.2 He further claims a violation of his right under article 18, paragraph 2, of the Covenant, as no one should be coerced to accept an ideology of any political party to be eligible to be included in the federal list of candidates to the State Duma of the Federal Assembly of the Russian Federation.

3.3 In addition, all Russian citizens who are not members of any political party, including the author himself, are limited in their legal personality, in breach of their rights under article 16 of the Covenant.

3.4 The author maintains that, in violation of his rights under article 14, paragraph 1, read in conjunction with article 2 of the Covenant, the courts incorrectly denied him the right to have his rights and obligations determined in a suit at law by a competent, independent and impartial tribunal, established by law.

State party's observations on admissibility

4.1 On 31 March 2009, the State party challenged the admissibility of the communication. It notes that election procedures vary in different countries of the world and usually they are established not by the Constitution, but by law. It depends on the legislative body whether the election system is a majoritarian, proportional or semi-proportional one. The choice of a particular system depends on the sociopolitical environment. In the Russian Federation, the system is determined by the Federal Assembly.

4.2 The State party further clarifies, *inter alia*, that the guarantees for the realization of passive electoral rights of citizens are enshrined in article 37 of the federal law on the election of deputies of the State Duma. Pursuant to this article, every citizen of the Russian Federation having passive electoral rights and not being a member of a political party is entitled to approach any regional political party and request to have his/her name included in the federal list of candidates proposed by that party. Moreover, upon obtaining a written consent from the person in question, a political party may list him/her as a candidate in the federal list of candidates even if the individual in question is not a member of the party.

4.3 In this connection, the State party notes that the Constitutional Court of the Russian Federation has ascertained that the federal law on the election of deputies of the State Duma does not exclude the right of a citizen who is not a member of any political party to be elected as a Deputy of the State Duma – he/she could be included in the federal list of candidates from a political party either upon his/her own initiative or upon the party's nomination. However, in the present case, in the light of the case-file materials, it transpires that the author has never requested any regional department of a political party to list him in the federal list of candidates. The State party explains that in a case of a refusal by the respective political party to include him in the federal list of candidates, the author could have challenged such a refusal before the national courts. The author, however, has challenged through administrative and civil proceedings the actions of the CEC, which was not the appropriate institution in such situations. For these reasons, the courts of the State party were unable to examine the author's claims on the merits and could not have applied the law which subsequently could have been submitted to the Constitutional Court with the aim to assess its compatibility with the Constitution.

4.4 Hence, the State party notes that the author has never expressed a willingness to employ the rights to entertain his passive electoral rights in line with the procedure set out in the federal law on the election of deputies of the State Duma. The State party clarifies that the author was informed on a number of occasions by different domestic authorities, including by the CEC, of the proceedings he had to undertake in order to be included in the list of candidates, on 18 September 2007 and on 27 November 2007, respectively.

4.5 Moreover, the federal law on the election of deputies of the State Duma was officially published in May 2005 in an official journal and the electoral campaign concerning the deputies of the State Duma commenced in September 2007. Consequently, the author had at his disposal opportunity to take the necessary steps in order to implement his passive electoral rights.

4.6 The State party reiterates that the author challenged the lawfulness of the CEC decisions within the administrative and civil proceedings. However, complaints regarding the refusal to register the author as a candidate did not fall within the jurisdiction of administrative or civil courts. Had he been refused registration as a candidate by any party, the author could have challenged such a refusal within the court proceedings. But, according to the case-file materials, the author did not even attempt to seek registration within any party.

4.7 In the light of the above, the State party submits that the present communication should be declared inadmissible as constituting an abuse of the right of submission. Moreover, the author has not exhausted all the available domestic remedies. Consequently, the State party submits that the present communication does not meet all the admissibility criteria in line with the Optional Protocol to the Convention.

Author's comments on the State party's observations

5.1 By letter of 11 May 2009, the author noted that it was unclear from the State party's observations on what grounds it considered his communication to be an abuse of the right of submission.

5.2 The Supreme Court and the Constitutional Court of the Russian Federation have already adjudicated his case and there were no further available domestic remedies to exhaust. The author challenges the State party's argument that he did not apply to any regional branch of any political party for his inclusion in the federal list of candidates to be nominated by such political party and submits that in fact all his complaints at the domestic level and the communication to the Committee are based on his inability to exercise a passive electoral right (right to be elected) through the "organs of State power". He refers to

article 3 of the Constitution of the Russian Federation, according to which: “(1) The multinational people of the Russian Federation is the vehicle of sovereignty and the only source of power in the Russian Federation. (2) The people of the Russian Federation exercise their power directly, and also through organs of state power and local self-government.” In addition, the author recalls that he challenged in the Constitutional Court the compatibility with the Constitution of articles 3, 4, 7 and 37 of the federal law on the election of deputies of the State Duma. The author contends that the State party has misrepresented the subject matter of his complaint to the Committee.

5.3 The author admits that it is up to the legislative power to choose what type of electoral system (majority rule, proportional representation or semi-proportional) to retain. Whatever type of electoral system is chosen, however, it should not infringe upon citizens’ exercise of their passive electoral right. The author describes the cumbersome procedures⁴ for the nomination of a non-party individual as a candidate to the State Duma by a political party and for the distribution of parliamentary mandates among the candidates. He argues that the exercise of a passive electoral right in the Russian Federation by non-party individuals (97.5 per cent of all voters who took part in the 2007 elections) depends on the will of members and leaders of political parties. In support of his argument, he points out that there is not a single non-party member in the current composition of the State Duma.

5.4 As to the State party’s argument that its courts could not have examined his claim on the merits and could not have applied the law which subsequently could have been submitted to the Constitutional Court, the author questions the compatibility of the State party’s judiciary with the requirements of independence and impartiality set out in article 14, paragraph 1, of the Covenant. According to article 128 of the Constitution, the judges of the Constitutional Court, the Supreme Court and the Higher Arbitration Court shall be appointed by the Council of the Federation upon the proposals of the President of the Russian Federation. Judges of other federal courts shall be appointed by the President of the Russian Federation according to the rules set out by the federal law. At the same time, the Council of the Federation includes two representatives from each entity of the Russian Federation: one from the legislative branch and one from the executive branch. The Legislative Assembly of an entity of the Russian Federation is formed through a procedure similar to the one for the State Duma, whereas a representative from the executive branch is appointed by a governor, mayor or president of the constituent entity of the Russian Federation, who, in turn, is appointed by the President of the Russian Federation. The author submits that although *de jure* the judiciary in the State is formed by the President of the Russian Federation and the Council of the Federation, *de facto* the initiative emanates from the President of the Russian Federation and leaders of the dominating political parties.

5.5 For these reasons, the author believes that courts of all instances are not independent and cannot be impartial in the examination of his case.

⁴ For example, pursuant to article 36, paragraph 8, of the federal law on the election of deputies of the State Duma, the federal list of the candidates, as well as the inclusion of candidates, is approved by the respective political party. Thus, the author concludes that the decision to list or not to list a person as a candidate is dependent on the decision of the respective party. Further, an independent candidate may request the regional branch of a political party to list him as a candidate. However, when requesting his/her inclusion on the list of candidates, he/she must obtain support from at least 10 members of that political party. The final decision concerning the inclusion of a person on the list of candidates is adopted during the conference of the regional branch of the respective political party. One of the reasons for the refusal to list a person may be the fact of the limitations on the number of candidates at the regional level. In addition, even if an individual obtains approval during the regional conference, his/her candidature must be further approved during the general conference of the respective political party, in order to be listed as a candidate for the federal elections.

Additional observations by the State party

6.1 On 21 July 2009, the State party reiterated that the author's allegations are unfounded. According to the federal law on the election of deputies of the State Duma, deputies of the State Duma are elected from the federal election district proportionally to the number of votes given for the lists of candidates who have been nominated and included in that list by the respective political party in line with the Federal Law on Political Parties. However, the right to exercise one's passive election rights, as well as the procedure for how it may be exercised, if that person does not belong to any political party, is prescribed under article 37 of the federal law on the election of deputies of the State Duma.

6.2 The State party observes that the author did not follow the procedure under article 37 of the above-mentioned federal law, in order to exercise his passive election rights. Contrary to the prescribed procedure, the author approached the CEC with a request to register him as a candidate in the list of deputies of the State Duma. Hence, his request could not have been satisfied.

6.3 The State party further noted that, according to the case-file materials, the author is not satisfied with the election procedure of the State Duma deputies of the Federal Assembly of the Russian Federation, the procedure established by the legislature of the Russian Federation. In addition, on 26 October and 23 November 2007, the Presidential Administration informed the author that the Constitutional Court of the Russian Federation did not find the proportional election system unconstitutional. In its judgement of 18 December 2007 in case No. 921-O-O, which was initiated by the author, the Constitutional Court noted that election procedures are regulated, as a rule, not by a constitution, but through the legislative process. It is in the domain of the legislature, taking into account the sociopolitical environment and political practicability, to establish whether the election system will be majoritarian, proportional or semi-proportional. Further, in line with the amendments of 16 July 2007 to the federal law on the election of deputies of the State Duma, the election system was reformed, whereby the majoritarian-proportional system was replaced with a proportional system. The Court pointed out that in accordance with the national legal regulation, political parties, being the owners of specific public functions, are single subjects of the election process.

6.4 The State party reiterates that according to the above-mentioned judgement of the Constitutional Court, the federal law on the election of deputies of the State Duma does not exclude the right of a citizen who is not a member of any political party to be elected as a deputy of the State Duma. Such individuals may be included on the federal list of candidates from a political party on their own initiative or on the party's initiative. In this connection, the State party notes that the author has never availed himself of the mentioned opportunity. The federal law on the election of deputies of the State Duma was officially published in May 2005. The election campaigns for the fifth call-up of the State Duma commenced in September 2007. Consequently, irrespective of his political opinions, the author had enough time to exercise his right to passive elections within the existing procedure as set out in article 37 of the federal law on the election of deputies of the State Duma.

6.5 Furthermore, the State party reiterates that the author has not exhausted all available domestic remedies prior to submitting his communication to the Committee. In addition, it was clearly explained to him by the courts that in the context of his claim to be registered as a candidate, the respondent party should not have been the CEC, but rather a political party. Consequently, since he has never been registered in any political party, his right to passive elections was not violated.

6.6 The State party reiterates its view that the communication should be declared inadmissible, as the author has not exhausted all the available domestic remedies.

Moreover, the present communication constitutes an abuse of the right of submission. Consequently, the State party submits that the present communication does not meet all the admissibility criteria set out in article 3 and article 5, paragraph 2 (b), of the Optional Protocol to the Covenant.

Author's further submission

7.1 By letter of 13 October 2009, the author reiterated that according to article 3 of the Constitution, "the people" is the only source of power in the Russian Federation. The people of the Russian Federation exercise their power directly, and also through organs of State power and local self-government. In line with that democratic principle, the author submitted to a State institution a request to be registered on the list of candidates of deputies of the State Duma. He explains that he approached the CEC because it is the State institution authorized to register candidates of deputies. Political parties do not register candidates. They merely make lists of candidates which then are submitted to the CEC for registration. Consequently, the author appealed against the negative decision of the CEC to different national institutions and courts. Hence, he has exhausted all the available domestic remedies.

7.2 As to the Constitutional Court's judgement of 18 December 2007, he submits that the Constitutional Court, in fact, did not examine his claims regarding incompatibility of articles 3, 4, 7 and 37 of the federal law on the election of deputies of the State Duma with the Constitution. Consequently, the author maintains that the Constitutional Court has not affirmed the constitutionality of the mentioned articles of the federal law. In this connection, the author notes that regardless of whether he does or does not support the election process of deputies of the State Duma, the national court should have examined his claims and not disregarded them. In the author's opinion, such an attitude on the part of the Constitutional Court demonstrates that the judicial branch in the State party is not independent.

7.3 Finally, the author points out that the State party has not addressed his claim of a violation of article 14, paragraph 1, of the Covenant.

State party's further submission

8.1 On 19 August 2010, the State party reiterated that the present communication is inadmissible as the author has not exhausted all the available remedies, and because it constitutes abuse of the right to submission.

8.2 It rejects the author's argument that the State party has not commented on the alleged violation of article 14, paragraph 1, of the Covenant, and notes that its two previous submissions on the inadmissibility of the case concern the author's communication as a whole, as well as all the mentioned alleged violations of the Covenant.

8.3 The State party explains that all the domestic proceedings by the competent national institutions were carried out with due diligence. The fact that the author is not satisfied with the results of the proceedings per se does not indicate that the judiciary in the State party lacks independence or is incompetent. In this connection, the State party argues that such speculations demonstrate the author's abuse of the right to submission within the meaning of article 3 of the Optional Protocol to the Covenant.

8.4 The State party reiterates that the author has not exhausted all the available domestic remedies. The State party notes that the author challenged the lawfulness of the CEC decisions within the administrative and civil proceedings. However, the examination of the author's complaints, that is, the refusal to register him as a candidate, did not fall within the jurisdiction of administrative or civil courts. The national court clearly explained to the

author that in the context of his claim to be registered as a candidate, the respondent party should have been not the CEC, but a political party.

8.5 As to the alleged violation of the author's right to passive election, the State party reiterates that he could have exercised his right to passive election pursuant to article 37 of the federal law on the election of deputies of the State Duma. However, the author has never tried to exercise this right.

8.6 The State party also notes that the author challenges the constitutionality of the provisions regulating the election process of the deputies of the State Duma of the Federal Assembly of the Russian Federation. In this regard, the State party recalls that this issue has already been examined by the Constitutional Court on 20 November 1995, whereby the Court found the challenged provisions regulating election process to be compatible with the Constitution of the Russian Federation.

Author's additional submissions

9.1 On 19 September 2010, with regard to article 14 of the Covenant, the author explained that he is not alleging that the judicial branch in the State party is incompetent or that he is not satisfied with the results of the proceedings before the national courts. He claims that the judiciary is not independent, and as a consequence, his claims before the national courts were not examined objectively or fairly. The author recalls that judges are appointed by the President of the Russian Federation and the Federal Council of the Federal Assembly. Consequently, the judiciary could not examine independently and objectively his claims, which were of a political nature.

9.2 The author further disagrees with the State party's argument that the CEC was not the appropriate respondent party concerning an individual's registration, as the deputy candidate falls outside the sphere of competence of the CEC. He points out that, inter alia, pursuant to article 44 of the federal law on the election of deputies of the State Duma, the CEC "no later than within 10 days after it has received all the documents necessary for registration of the federal list of candidates, adopts a decision concerning registration of the list of candidates or issues a reasoned refusal".

9.3 Finally, the author points out that, by its decision of 20 November 1995, the Constitutional Court rejected the request submitted, inter alia, by a group of deputies of the State Duma, to examine the compatibility of the federal law on the election of deputies of the State Duma with the Constitution.

9.4 On 18 September 2011, the author presented a brief analysis of the judgement of 7 July 2011 of the Constitutional Court on the constitutionality of article 23, paragraph 3, of the Federal Law on General Principles of Organization of Local Self-government of the Russian Federation and article 9, paragraphs 2 and 3, of the Law of the Chelyabinsk Region on Municipal Elections in the Chelyabinsk Region. He pointed out that the Court concluded, inter alia, that the fact that an individual may approach a particular party in order to be listed as a candidate may not result in his/her inclusion on the list of candidates, as such a decision is subject to the collective view of the political party.

9.5 In the light of above, the author reiterates that it is clear that his right to passive elections under article 25 of the Covenant was violated in 2007 and that the Constitutional Court, by its judgement of 18 December 2007, had not duly examined his claims, in violation of article 14, paragraph 1, of the Covenant.

9.6 On 5 October 2012, the author submitted a report, dated 15 July 2012, entitled "How to ensure independence of judges in Russia", prepared by the Institute on the Rule of Law, which according to the author demonstrates that the judiciary in the Russian Federation is not independent.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

10.3 The Committee has noted the State party's observations that the author has failed to exhaust available domestic remedies in the present case. The Committee notes that the State party has not provided any explanation as to the remedies available to the author, in particular, regarding his claims under article 25 of the Covenant. In this respect, the Committee considers that the State party has not shown that its laws offer the author a remedy capable of addressing his claims under article 25 of the Covenant. Accordingly and in the absence of any other pertinent information on the file, the Committee considers that, in this particular case, it is not precluded by article 5, paragraph 2 (b), of the Optional Protocol from examining the present communication for purposes of admissibility.

10.4 As concerns the alleged violation of article 14, paragraph 1, read in conjunction with article 2, of the Covenant, the Committee notes that the author has merely claimed general lack of independence of the judiciary. In the absence of other pertinent information on the file, the Committee considers that this claim is insufficiently substantiated and, therefore, declares it inadmissible under article 2 of the Optional Protocol.

10.5 Further, with regard to the alleged violations of article 16 and article 18, paragraph 2, of the Covenant, the Committee notes that the author has not provided detailed information concerning these alleged violations. Accordingly and based on the information available in the case file, the Committee considers that the author's allegations under article 16 and article 18, paragraph 2, of the Covenant are insufficiently substantiated and are therefore inadmissible under article 2 of the Optional Protocol.

10.6 The Committee has noted the author's claims under article 25, paragraphs (a) and (b), of the Covenant to the effect that he could not take part in the conduct of public affairs or to be elected at genuine periodic elections, because the State party's federal electoral system, at the time, did not allow him to stand as an independent candidate in the Duma elections other than by passing through a list of a political party registered for the elections in question. In this connection, the author claims that he did not want his name to be associated with any of the existing parties as he did not subscribe to any of their ideologies, without, however, providing further details thereon. The Committee further notes that the State party explained that for independent candidates, it was possible to be listed for the federal elections through one of the lists of parties registered for such elections. The State party also explained that if one of the registered parties refused to place an independent candidate on its list, the individual concerned could have complained about this in court. In this connection, the State party notes, however, that the author could not apply to court, as he had not made any attempt whatsoever to try to have his name placed as an independent candidate through the existing parties' lists. Significantly, the case file contains no information as to why the author could not create his own political party together with individuals sharing similar political opinions and stand for elections through it.

10.7 The Committee considers that the information before it does not permit it to verify whether the restrictions imposed on the author, as an independent candidate, in federal parliamentary elections through the requirements of the electoral system in place at the time, were in compliance with the provisions contained in article 25 of the Covenant. In this

connection, the Committee notes that authors must provide sufficiently detailed information to allow the Committee to make a well-founded decision on the merits of the claim. Accordingly, the Committee considers that the present communication is inadmissible under article 2, of the Optional Protocol.

11. The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under article 2 of the Optional Protocol;
- (b) That this decision shall be communicated to the State party and to the author.

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

Appendix

Individual opinion by Committee members Mr. Yuval Shany and Mr. Konstantine Vardzelashvili (dissenting)

1. The Committee found the author's communication inadmissible for failure to substantiate a violation under article 25 of the Covenant. This conclusion is based on the premise that the author carries the burden of proving that the federal law on the election of deputies of the State Duma, as it stood at the time and as was applied to him, placed unreasonable restrictions on his right to be elected.

2. We respectfully disagree with the majority opinion, as we are of the view that the information before the Committee is sufficient to reverse the burden of proof so as to require the State party to justify the restrictions found in the legal framework of the federal law on the election of deputies of the State Duma, as applied to the author. Such information includes the following items:

- The text of the federal law on the election of deputies of the State Duma (as it stood at the time), which requires candidates to stand for election through existing parties.
- The unchallenged claim of the author that the process of listing non-party members on party lists is cumbersome, and that not a single non-party member was represented at the State Duma when the events described in the communication took place.
- The position of the European Court of Human Rights, in its judgement of 12 April 2011, which was reiterated by the European Commission for Democracy Through Law (Venice Commission) in its opinion of 19 March 2012, that the conditions for registering new political parties in the Russian Federation (and for maintaining the registered status of existing ones) are unduly excessive.^a
- The Parliamentary Assembly of the Council of Europe report on the observation of the 2011 parliamentary elections in the Russian Federation, detailing the high numbers of members and amount of support required to register new parties in the Russian Federation. According to the report, "several attempts to register political parties were made since the elections of 2007 and only one, the 'Right Cause' (Pravoe Delo), managed to get registered for the 2011 elections. All other formations were denied registration."^b

3. In the present case, the author complains about his inability to stand for election as an independent candidate. The State party retorted by noting that the author may request an existing party to list him as a candidate on their behalf even if he is not a member of the party. The State party did not provide, however, sufficient information on whether such a course of action was practicable, in the light of the power held by political parties to

^a European Court of Human Rights, *Republican Party of Russia v. Russia*, application No. 12976/07, judgement of 12 April 2011, para. 58; opinion of the European Commission for Democracy Through Law on the Federal Law on the Election of the Deputies of the State Duma of the Russian Federation, adopted by the Council for Democratic Elections at its 40th meeting (15 March 2012) and by the Venice Commission at its 90th plenary session (16–17 March 2012).

^b Parliamentary Assembly of the Council of Europe, "Observation of the parliamentary elections in the Russian Federation (4 December 2011)", 23 January 2012, Doc. 12833, para. 19. ("The Law on Political Parties requires all political parties to have at least 45,000 members and regional branches with at least 450 members in more than half of the subjects of the Federation", *ibid.*).

determine their own list of candidates and in view of the absence of any non-party members at the State Duma at the relevant time. It also did not provide sufficient information as to whether another course of action for running in the election, such as establishing a new party, was open before the author. The information before the Committee raises serious doubts about the feasibility of both of these options and the State party provided no sufficient information to dispel such doubts.

4. Furthermore, the State party failed to explain whether requiring individuals to stand for election through existing parties is not tantamount to requiring them to join such parties. Clearly, the latter requirement would stand in conflict with the language of paragraph 17 of the Committee's general comment No. 25 (1996) on the right to participate in public affairs, voting rights and the right of equal access to public service, which provides that "the right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties". The distinction between formal membership and inclusion in a party-sponsored list of candidates, on which the State party appears to rely, seems to us to be nominal in nature. It may be reasonably assumed that candidates running on a party platform identify with that party's ideology and political programme, and have associated themselves with the party in a way that is even stronger than formal party membership.

5. The combination of factors in the present case — that is, domestic legislation which requires standing for election through existing parties and which appears to render the creation of new parties extremely difficult — leads us to conclude that the federal law on the election of deputies of the State Duma (as it stood at the time) and its application to the author were *prima facie* incompatible with article 25 of the Covenant. While States enjoy broad discretion in designing the electoral system, their relevant legislation should always be aimed at facilitating the rights guaranteed by the Covenant rather than unreasonably limiting them. Still, the law and practice on registration of individual candidates and political parties in the State party, as applied to the author, feature far-reaching legal and practical limitations,^c which seem to fall below the standards prescribed by the Covenant.

6. We are therefore of the view that a system which, in effect, requires candidates to stand for election through existing parties, whether or not they are members of the said parties, runs contrary to the object and purpose of article 25 of the Covenant, which aims to protect the individual's right to seek election and to facilitate a healthy degree of democracy and political pluralism. It also fails to comport to the principle that association with political parties must be voluntary in nature and that no individual should be forced to join or belong to any association against their will.^d

7. Since the State party did not provide the information necessary to remove the existing concerns about the *prima facie* incompatibility of its laws and practices with the Covenant, we believe the Committee should have found a violation of article 25, and should have requested the State party to provide the author with an effective remedy by taking all necessary measures to bring its elections laws into conformity with the Covenant.

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

^c See also the opinion of the European Commission for Democracy Through Law on the Federal Law on the Election of the Deputies of the State Duma of the Russian Federation; *Republican Party of Russia v. Russia*, paras. 61–62.

^d See, for example, European Court of Human Rights, *Young, James and Webster v. United Kingdom*, application No. 7601/76; 7806/77, judgement of 13 August 1981, para. 52.

**L. Communication No. 1886/2009, X. v. the Netherlands
(Decision adopted on 28 March 2013, 107th session)***

<i>Submitted by:</i>	X (represented by counsel, Marcel Schuckink Kool)
<i>Alleged victim:</i>	The author
<i>State party:</i>	The Netherlands
<i>Date of communication:</i>	22 October 2005 (initial submission)
<i>Subject matter:</i>	Anonymity
<i>Procedural issue:</i>	Insufficient substantiation
<i>Substantive issue:</i>	Inability of a higher tribunal to review a sentence for reasons of anonymity
<i>Article of the Covenant:</i>	14, paragraph 5
<i>Article of the Optional Protocol:</i>	2

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

Meeting on 28 March 2013,

Adopts the following:

Decision on admissibility

1. The author of the communication is Ms. X,¹ a Dutch national born in 1968. She claims to be a victim of a violation by the Netherlands of her rights under article 14, paragraph 5, of the International Covenant on Civil and Political Rights.² She is represented by counsel, Mr. Marcel Schuckink Kool.³

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Mr. Yuji Iwasawa, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Cornelis Flinterman did not participate in the adoption of the present decision.

¹ The author claims that she was sentenced in criminal proceedings Nr. 13/410898-05; she refuses to disclose her identity in the present communication, as, in her opinion, the criminal case file reference number is sufficient for the authorities to identify her. She subsequently provided the Committee with her name, on a strictly confidential basis (see also paras. 2.4 and 2.5 below).

² The Optional Protocol entered into force for the Netherlands on 11 March 1979.

³ The author presented her initial submission on 22 October 2005, and provided additional submissions on 28 October, 8 and 17 November and 2 December 2005, 16 February and 9 June 2006, 30 January 2007 and 12 April 2009.

The facts as submitted by the author

2.1 The author contends, without further explanation, that she was found guilty of committing an offence on 22 April 2005.⁴ She claims that she had not attempted to appeal her sentence, as she refused to disclose her identity in an appeal. She refers to a decision of the Supreme Court dated 24 June 2003 in case No. 01948/02, according to which “it must be inferred from articles 449–452 of the Code of Criminal Procedure, which specify the way in which legal remedies are to be applied, that a suspect who is the subject of a court ruling, in which he has been identified in another way than by name, cannot apply a legal remedy against a final verdict any other way than by disclosing his personal identifying information.” The author notes, however, that her refusal to disclose her identity within the criminal proceedings before the court of first instance did not preclude the authorities from finding her guilty of an offence. She adds that, until recently, it was possible to appeal without disclosing one’s identity. However, the legislation was amended, excluding this possibility, although not definitively.

2.2 Since she wished to remain anonymous in the context of her criminal proceedings and given that she considers the State party to be able to identify her through the reference numbers she provides, the author decided not to disclose her identity to the Committee either.

2.3 On 28 October, 8 November and 2 December 2005, the author reiterated her request not to have her identity disclosed. In particular, on 2 December 2005, she recalled that she was precluded from appealing her sentence as she would not reveal her identity, which amounted, in her opinion, to a violation of her rights under article 14, paragraph 5, of the Covenant. She adds that in her view, the right to remain anonymous is directly linked to the right to a fair trial, which includes the right not to incriminate oneself.

2.4 The author reiterates that her wish to remain anonymous does not preclude the State party from identifying her, as she had submitted the relevant identification numbers and thus could be easily identified.

2.5 On 9 June 2006, the author disclosed her name to the Committee, on the strict condition that it would be kept confidential and would not be disclosed to the State party.

The complaint

3. The author claims to be the victim of a violation of her rights under article 14, paragraph 5, of the Covenant, as she was unable to appeal her sentence because she would not disclose her name.

State party’s observations on admissibility

4. By note verbale of 27 August 2009, the State party challenged the admissibility of the communication. It points out that the communication is anonymous, although article 3 of the Optional Protocol explicitly precludes the Committee from considering anonymous communications. It further notes that it finds no explanation as to why this communication was brought to its attention notwithstanding the requirements of article 3 of the Optional Protocol. In addition, according to the State party, the communication itself does not provide any reasons for the need to keep the author’s identity undisclosed.

⁴ The author provides no information on the charges brought against her or on the court which convicted and sentenced her; she merely specifies that the judgement was delivered orally.

Author's comments on the State party's observations

5.1 On 26 July 2011, the author rejected the State party's observations. With regard to the issue of her anonymity, she explains that the communication is not anonymous, as the State party would be able to identify her. She adds that in, any case, her anonymity had not prevented the State party from pursuing criminal proceedings against her.

5.2 The author reiterates her comments of 2 December 2005,⁵ and refers to the conclusions of the European Court of Human Rights in Application No. 36378/02, *Shamayev v. Georgia and Russia*,⁶ in which, according to the author, the Court had concluded that behind the strategy of concealing their true identities, for understandable reasons, were real people, sufficiently identifiable from a number of indications other than their names.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The Committee has noted the State party's objections to the admissibility of the communication under article 3 of the Optional Protocol to the Covenant. It further notes that, pursuant to article 3 of the Optional Protocol, as well as to rule 96, paragraph (a), of the Committee's rules of procedure "the Committee shall consider inadmissible any communication under the present Protocol which is anonymous (...)."

6.3 The Committee notes that the author wished to remain anonymous, both to the Committee and the State party. On 9 June 2006, the author disclosed her identity to the Committee; however she insisted on preserving her anonymity to the State party, as, according to her, she could be easily identified by the authorities.⁷ In this connection, the Committee notes that neither in her initial submission, nor in subsequent submissions, had the author provided substantiation for the reasons as to why she wished not to have her name disclosed in the context of the present communication and the appeal proceedings in the State party. The Committee notes that article 14, paragraph 5, of the Covenant does not protect the right of parties to litigation to remain anonymous. On the contrary, under article 14 of the Covenant, in the absence of special circumstances a trial and an appeal must be held in public.

⁵ See para. 2.3 above.

⁶ The author refers to *Shamayev and Others v. Georgia and Russia* (application No.36378/02), judgement of 16 September 2003. It appears that she is referring to paragraph 275 of the judgement: "The Court notes at the outset that it has already dismissed the Russian Government's preliminary objections that the application was anonymous and amounted to an abuse of process (see *Shamayev and Others v. Georgia and Russia* (dec.), no. 36378/02, 16 September 2003). In particular, it found that the present application concerned real, specific and identifiable individuals and that their complaints, relating to alleged violations of the rights guaranteed to them under the Convention, were based on actual events, including some that were not contested by either of the two respondent Governments. The Court does not perceive any "special circumstance" at this stage which would entail a fresh examination of the arguments that the present case was abstract in nature and amounted to an abuse of process (see *Stankov and United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, §§ 55 and 57, ECHR 2001-IX)".

⁷ See Note 1 above.

6.4 In light of the above, and in the absence of any further pertinent information on file, the Committee concludes that the author has failed to sufficiently substantiate her claim, for purposes of admissibility, and therefore declares it inadmissible under article 2, of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2, of the Optional Protocol;

(b) That the decision be transmitted to the State party and to the author.

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

**M. Communication No. 1891/2009, J.A.B.G. v. Spain
(Decision adopted on 29 October 2012, 106th session)***

<i>Submitted by:</i>	J.A.B.G. (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	9 March 2009 (initial submission)
<i>Subject matter:</i>	Scope of the review in cassation by the Spanish Supreme Court
<i>Procedural issue:</i>	Non-exhaustion of domestic remedies, failure to substantiate claims
<i>Substantive issue:</i>	Right to have the conviction and sentence reviewed by a higher tribunal
<i>Article of the Covenant:</i>	14, paragraphs 3 (c) and 5
<i>Articles of the Optional Protocol:</i>	2; and 5, paragraph 2 (b)

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

Meeting on 29 October 2012,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. J.A.B.G., a Spanish national, born on 21 September 1944. He claims that he is a victim of a violation by Spain of his right under article 14, paragraph 5, of the Covenant. The author is not represented by counsel. At the time of submission of the communication, he was being held in the Madrid VI prison.

The facts as presented by the author

2.1 In 1998, Central Investigating Court No. 3 of the National High Court opened case No. 313/1998 against the author, on charges of involvement, along with others, in banking transactions and the transfer of money to and from the State party's territory in order to launder the proceeds of drug trafficking.

2.2 In 2001, Central Investigating Court No. 5 brought a second case against the author. The Court contended that in the mid-1990s the author, along with others, attempted to smuggle a large quantity of cocaine from South America, undertaking to find suppliers and a vessel to transport it to the State party's territory. The author was accused of contacting the shipowner and making a number of payments to secure the transport of the drugs.

* The following members of the Committee participated in the consideration of the present communication: Mr. Yadh Ben Achour, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev and Mr. Krister Thelin.

2.3 On 28 January 2004, the National High Court found the author guilty of an offence against public health, sentencing him to a prison term of 4 years and a fine of €600,000. The author filed an appeal in cassation, claiming that there were errors of fact in the assessment of the evidence and that certain facts portrayed as having been proven in the judgement were in reality never proven during the proceedings.

2.4 On 27 April 2006, the Supreme Court upheld the author's appeal, overturned the judgement handed down by the National High Court on 28 January 2004 and acquitted the author of the offence against public health. The Supreme Court examined the National High Court's assessment of the evidence in detail and ruled that the conviction was based largely on evidence from traffickers who had turned informers five years after the events in question and that there was no firm evidence or factual basis to corroborate or back up their statements.

2.5 On 27 July 2005, the National High Court issued a judgement in case No. 313/1998 and sentenced the author to 3 years and 3 months of imprisonment and a fine of €1.8 million for laundering the proceeds of drug trafficking. In September 2005, the author submitted an appeal in cassation to the Supreme Court for violation of the right to the confidentiality of telephone communications and the right to the presumption of innocence and for improper application of articles 301 and 302 of the Criminal Code on the offence of money-laundering and receiving. The author contended that no grounds had been given for the decision authorizing his telephone to be tapped, that neither the telephone account holder nor the persons who set up the tap had been identified, and that he had not been able to question the informer. He claimed that there was no evidence, even circumstantial, of the commission of any drug trafficking offence or that he was aware of any laundering of the proceeds of criminal offences. The Public Prosecution Service also appealed against the sentence, citing the aggravating circumstance of membership in a criminal organization.

2.6 On 25 April 2007, the Supreme Court dismissed the author's appeal in cassation relating to case No. 313/1998. As for the sentence, the Court upheld the Public Prosecution Service's appeal, which claimed that the National High Court had miscalculated the number of years of imprisonment applicable to an offence committed with aggravating circumstances, including membership in a criminal organization. As a result, the Court increased the prison sentence to 4 years and 7 months for the laundering of the proceeds of drug trafficking. The author attaches a copy of the judgement, in which the Supreme Court states that the monitoring of telephone conversations was clearly and objectively justified in view of information received from the Guardia Civil and, in particular, the statement made by the informer who had been involved in the money-laundering operation and that the non-disclosure of the informer's identity and the fact that the author was unable to question the informer did not affect any of his rights, given that the information was not considered as evidence but merely used by the Guardia Civil and the investigating judge as grounds for the phone tap. With regard to the existence of the alleged offence, the right to the presumption of innocence and the improper invocation of the offence of money-laundering and membership in a criminal organization under articles 301 and 302 of the Criminal Code, the Supreme Court stated that, in accordance with its case law, the standard of proof in respect of a money-laundering offence under article 301 of the Criminal Code does not require a previous conviction for drug trafficking or even the identification of such an offence. It is enough to establish a link between the author and drug-trafficking activities to which the money may be traced, and for the facts, or at least some of the facts, to make it reasonable to deduce that the money came from an illicit source, but the person involved cannot hide behind ignorance when he made no attempt to overcome that ignorance. In this context, the Court observed that the proven facts showed that the author, along with others, took part in currency exchanges and banking transactions under a false or assumed identity and in secret transfers of large sums of money. This approach revealed a minimum amount of information, but enough to deduce that the money came from an illicit source.

2.7 In June 2007, the author filed an application for *amparo* against the National High Court and Supreme Court judgements of 27 July 2005 and 25 April 2007 respectively, claiming that the right to the presumption of innocence, to privacy and to a fair trial had been violated, and that the judgements were arbitrary and violated the principle of legality, since the 10-year criminal proceedings in which he was sentenced had been unduly protracted, despite being an abridged procedure. On 29 September 2008, the Constitutional Court found the application inadmissible on the grounds that the author had failed to show that the case had particular constitutional significance, and dismissed it.

2.8 The author claims that he has exhausted all domestic remedies and thus meets the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

The complaint

3.1 The author asserts that Spain violated its obligation under article 14, paragraph 5, of the Covenant. The author requests the Committee itself to ascertain whether the facts set out in his communication reveal a violation of any other rights contained in the Covenant.

3.2 The author claims that he has been denied the right to appeal and to have his conviction and sentence reviewed by a higher tribunal. In both the cassation appeal and the application for *amparo*, the author challenged all aspects of the judgement rather than only claiming the existence of defects of form. However, the author claims that he was in practice denied the right to appeal against the sentence imposed by the National High Court.

3.3 The author complains about the unreasonable length of the proceedings in which he was convicted, which began in 1998 and ended on 27 September 2008 with the dismissal of the application for *amparo* filed against the National High Court's ruling. Despite being abridged proceedings, they lasted approximately 10 years: 5 years at the preliminary investigation stage, 2 years before the National High Court and 2 years before the Supreme Court, and the Constitutional Court took a year to dismiss the application for *amparo*. He adds that there was no justifiable reason for such dilatoriness.

State party's submissions on admissibility

4.1 On 15 October 2009, the State party submitted its observations on the admissibility of the communication and requested that the communication should be declared inadmissible on grounds of abuse of rights, non-exhaustion of domestic remedies and failure to substantiate claims under articles 3; 5, paragraph 2 (b); and 2 of the Optional Protocol respectively.

4.2 The State party notes that it is an abuse of rights to submit a communication that, in addition to the violations referred to explicitly, requests the Committee to identify any other violation it may observe in the account of the facts. In the procedure for submitting individual communications to the Committee, it is the author's responsibility to identify, in general terms at least, any violations they believe they have suffered, without recourse to generic forms that prevent the State party from conducting its defence.

4.3 Domestic remedies were not exhausted within the meaning of article 14, paragraph 5, of the Covenant, since no violation of the right to a second hearing was invoked either in cassation or in the application for *amparo*. The application for *amparo* was based solely on the alleged violation of the right to the presumption of innocence and the right to privacy. Likewise, no mention was made in either appeal of the alleged undue delays in the proceedings. The application for *amparo* was declared inadmissible because of counsel's incompetence in submitting an application that was irremediably flawed inasmuch as it failed to demonstrate its constitutional significance, as required under the State party's legislation.

4.4 The author has failed to fully substantiate the rights violations of which he claims to be a victim. The mere length of proceedings does not in itself imply undue delay, in violation of article 14, paragraph 3 (c), of the Covenant, since other elements must be taken into account such as the complexity of the case, a common feature of cases involving money-laundering. Besides, the Supreme Court took into account the length of the proceedings and used it as a mitigating factor in this regard.

4.5 Concerning the author's claims that the right to presumption of innocence has been violated, as provided under article 14, paragraph 2, of the Covenant, the State party notes that, in the appeal in cassation against the National High Court ruling of 28 January 2004, recognizing that the prosecution evidence was insufficient, the Supreme Court acquitted the author of an offence against public health. This case was taken up by the Supreme Court itself, in relation to case No. 313/1998, solely for the purpose of determining whether the author was involved or connected with the drugs world, but that had no bearing on the establishment of criminal liability.

4.6 With regard to the right to a second hearing provided for in article 14, paragraph 5, of the Covenant, the State party notes that the Supreme Court judgement reviewing the National High Court's conviction dated 28 January 2004 and acquitting the author of an offence against public health shows that Spain's remedy of cassation allows for an extensive review of the evidence presented in the lower court, guaranteeing the right to a second hearing and to the presumption of innocence. The Supreme Court therefore has broad powers to review the facts, the evidence and the application of the law in lower court rulings through the remedy of cassation.

Author's comments on the State party's submissions on admissibility

5.1 On 3 February 2010, the author submitted his comments on the State party's observations on admissibility.

5.2 The author states that his communication is based solely on the violation of article 14, paragraph 5, of the Covenant. However, the sentence for money-laundering was increased by the Supreme Court and the delay in the proceedings was never taken into account as a mitigating factor. He therefore argues that the length of the proceedings must be assessed in accordance with article 14, paragraph 3 (c), of the Covenant.

5.3 He reiterates his allegations concerning the use made by the Supreme Court of the information relating to the second set of proceedings in which he was accused of an offence against public health, and in which he was eventually acquitted. The author maintains that this information was used to establish his criminal liability. The Court thus considered a judgement of acquittal as evidence, and he therefore requests the Committee to ascertain whether this could be a violation of article 14, paragraph 2, of the Covenant.

5.4 With regard to article 14, paragraph 5, of the Covenant, he claims that, in respect of the National High Court conviction, he had been able to submit only a cassation appeal and that cannot be considered a remedy of appeal.

5.5 Lastly, the author reiterates that he has exhausted domestic remedies, even though in his opinion they are ineffective.

State party's submissions on the merits

6.1 On 11 February 2010, the State party submitted its comments on the merits of the communication and requested the Committee to declare the communication inadmissible or, alternatively, that there was no violation of the Covenant.

6.2 Regarding the claims in connection with article 14, paragraph 5, of the Covenant, the State party notes that the author merely makes general references to alleged limitations on the Supreme Court review in cassation, without establishing which facts or arguments were not taken into account or considered by the Supreme Court in dealing with his cassation appeals.

6.3 The individual communications submitted to the Committee cannot rest on abstract or general opinions on the system of judicial remedies. In the present case, the communication lacks specific indications as to which details or proven facts the Court claimed to have reviewed when it had not. The Committee's case law on the subject has accepted that the system of cassation is robust enough to ensure, in a given case, a complete review of the conviction and sentence for the purposes of article 14, paragraph 5, of the Covenant.¹

Author's comments on the State party's submissions on the merits

7.1 On 26 January 2011, the author submitted his comments on the State party's submissions on the merits of the communication.

7.2 The author gives a detailed review of the origin of the remedies of appeal and cassation, and the differences between them as established in legal doctrine, how they were regulated in the State party's legal order and what he sees as the shortcomings in the system of appeal and cassation. He argues that the remedy of appeal is an ordinary remedy whereby a higher court is asked to modify a lower court ruling, in accordance with the law, in respect of any point of fact or law discussed in the proceedings. The remedy to which the author had access cannot be considered an appeal, which means he was denied the right to apply to a higher court for a review of the conviction and sentence imposed.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

8.3 With regard to the exhaustion of domestic remedies, the Committee takes note of the State party's arguments that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol on grounds of the author's non-exhaustion of domestic remedies, as his application for *amparo* was declared inadmissible by the Constitutional Court on the grounds that it was irremediably flawed because he had failed to demonstrate its particular constitutional significance. The State party also notes that the author did not allege a violation of the right to a second hearing either in his cassation appeal or in his

¹ The State party refers to the Committee's case law in communications Nos. 1389/2005, *Bertelli Gálvez v. Spain*, decision on admissibility adopted on 25 July 2005; 1399/2005, *Cuartero Casado v. Spain*, decision on admissibility adopted on 25 July 2005; 1323/2004, *Lozano Aráez et al. v. Spain*, decision on admissibility adopted on 28 October 2005; 1059/2002, *Carvallo Villar v. Spain*, decision on admissibility adopted on 28 October 2005; 1156/2003, *Pérez Escobar v. Spain*, Views adopted on 28 March 2006; and 1094/2002, *Herrera Sousa v. Spain*, decision on admissibility adopted on 27 March 2006.

application for *amparo*. The Committee recalls its settled jurisprudence, according to which it is necessary to exhaust only those remedies that have a reasonable prospect of success. The author's application for *amparo* did not have a reasonable prospect of success in respect of a possible violation of article 14.5, given the Constitutional Court's case law, according to which *amparo* is not a remedy that allows for a complete review of convictions and sentences handed down by criminal courts.² In addition, the Committee observes that the author challenged the judgements of the National High Court on the two criminal proceedings against him through two appeals in cassation, which were ultimately dismissed by the Supreme Court on 27 April 2006 and 25 April 2007, and that he subsequently submitted an application for *amparo* against these judgements, which was found inadmissible by the Constitutional Court on 29 October 2008. The Committee therefore finds that there is no impediment under article 5, paragraph 2 (b), of the Optional Protocol to consideration of the communication.

8.4 The Committee notes the author's claims that he was denied the right to appeal and to have his conviction and sentence reviewed by a higher tribunal, since he had access only to the remedy of cassation before the Supreme Court, which in practice implied a denial of the right to appeal against the National High Court's conviction. The Committee further notes the State party's arguments that the remedy of cassation permits an extensive review of the evidence considered by the lower court, since it is possible to review judgements with regard to the facts, the evidence and points of law.

8.5 The Committee observes that in its judgement of 25 April 2007, relating to case No. 313/1998, the Supreme Court examined very closely the grounds for cassation argued by the author, including the right to the confidentiality of communications, the presumption of innocence and the proper characterization of criminal offences, and not restricted solely to the formal aspects of the National High Court judgement.³ The Supreme Court increased the sentence because of a miscalculation by the High Court and it did not change the essential characterization of the offence but merely reflected the Supreme Court's assessment that the seriousness of the circumstances of the offence merited a higher penalty.⁴ Thus, the Committee considers that the claims under article 14, paragraph 5, of the Covenant have been insufficiently substantiated for the purposes of admissibility and it concludes that they are inadmissible under article 2 of the Optional Protocol.

8.6 The Committee takes note of the author's claim that the unreasonable length — almost 10 years — of the judicial proceedings that established his criminal liability, contravenes article 14, paragraph 3 (c), of the Covenant. Taking into account the State party's arguments on the complexity of the case, which were not refuted by the author, the Committee considers that the author's claim is insufficiently substantiated for the purposes of admissibility and deems it to be inadmissible under article 2 of the Optional Protocol.

8.7 In light of the above, the Committee considers that the author's contentions concerning the possibility of a violation of article 14, paragraph 2, of the Covenant are also insufficiently substantiated and are inadmissible under article 2 of the Optional Protocol.

9. Therefore, the Human Rights Committee decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

² See communications Nos. 701/1996, *Gómez Vázquez v. Spain*, Views adopted on 20 July 2000, paras. 6.2 and 10.1; 1366/2005, *Rocco Piscioneri v. Spain*, Views adopted on 22 July 2009, para. 6.3; and 1073/2002, *Terrón v. Spain*, Views adopted on 5 November 2004, para. 6.5.

³ See communications Nos. 1399/2005, para. 4.4; and 1059/2002, para. 9.5.

⁴ See communication No. 1156/2003, para. 9.2.

(b) That the decision shall be transmitted to the State party and to the author.

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

**N. Communication No. 1892/2009, J.J.U.B. v. Spain
(Decision adopted on 29 October 2012, 106th session)***

<i>Submitted by:</i>	J.J.U.B. (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	3 February 2009 (initial submission)
<i>Subject matter:</i>	Scope of reviews in cassation by the Spanish Supreme Court
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; non-substantiation of claims
<i>Substantive issue:</i>	Right to have the conviction and sentence reviewed by a higher tribunal
<i>Article of the Covenant:</i>	14, paragraph 5
<i>Articles of the Optional Protocol:</i>	2; and 5, paragraph 2 (b)

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

Meeting on 29 October 2012,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. J.J.U.B., a Spanish national. He claims to be a victim of a violation by Spain of his right under article 14, paragraph 5, of the Covenant. The author is a lawyer and is representing himself before the Committee.

The facts as submitted by the author

2.1 Mr. J.J.U.B. had been providing legal advisory services to various companies including Mercantil Sima Construcciones Deportivas S.A. since 1 January 1996. As part of these services, the author had filed a civil claim against another company for a total amount of €36,000. A court of first instance in Alicante ruled on the case and ordered the respondent company to pay €42,176.36 to Mercantil Sima Construcciones Deportivas S.A. Subsequently Mercantil Sima Construcciones Deportivas S.A. accused the author of appropriating this amount for himself by crediting it to his personal account and filed a suit against him. Madrid Investigating Court No. 20 initiated proceedings against the author on charges of misappropriation and referred the case to the Provincial High Court of Madrid for a decision.

* The following members of the Working Group participated in the consideration of the present communication: Mr. Yadh Ben Achour, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Marat Sarsembayev and Mr. Krister Thelin.

2.2 In the proceedings before the Provincial High Court of Madrid, the author asked, as a preliminary question, for the hearing to be postponed until the State party established a system of appeal or second hearings in criminal cases for offences that, as in the case in question, are heard at first instance by a provincial high court. The request was dismissed by the Provincial High Court of Madrid on the grounds that the alleged lack of a second hearing in the Spanish criminal system was not relevant to the proceedings before it and should instead be raised in an appeal before the Supreme Court.

2.3 On 24 January 2007, the Provincial High Court of Madrid sentenced the author to 2 years' imprisonment for misappropriation, specifically disqualified him from standing for election to public office during the term of imprisonment and ordered him to pay a fine and cover the cost of the proceedings. It also ruled that the author should pay Mercantil Sima Construcciones Deportivas S.A. €12,176.36 in civil damages. In addition, the Court confirmed its position on the preliminary question regarding the lack of access to a second hearing in criminal cases which the author had raised during the proceedings and pointed out that the author had the option of filing an appeal in cassation to challenge the lower court's decision.

2.4 On 9 May 2007, the author filed an appeal in cassation before the Supreme Court, in which he questioned the lack of access to a higher tribunal empowered to examine convictions and sentences handed down and to thoroughly review them through an appeal process, as required under article 14 of the Covenant. He maintained that the expanded scope of appeals in cassation in criminal cases heard by the Supreme Court, which extended the review of the evidence in respect of sentences handed down in provincial high courts, did not satisfy the obligations established in article 14, paragraph 5, of the Covenant. The author also claimed that his right to be presumed innocent had been violated, that the assessment of evidence had been arbitrary and contained errors of fact, that the criminal charges of embezzlement and misappropriation and the legal provisions relating to civil damages had been improperly applied, and that the proceedings had been unduly lengthy.

2.5 On 26 December 2007, the Supreme Court dismissed the appeal in cassation. The author provided the Committee with a copy of the judgement. In it the Supreme Court indicated that, although in some of its past decisions the Human Rights Committee had found that in criminal proceedings an appeal in cassation did not guarantee the right to a second hearing, its more recent decisions recognized that an appeal in cassation did in fact offer the possibility of a conviction and sentence being reviewed by a higher tribunal. Accordingly, an appeal in cassation was indeed an effective remedy that allowed for a second examination of the conviction and sentence handed down. This was the case even before the amendment of the Organic Act on the Judiciary, via Act No. 19/2003 of 22 December, which guarantees a second hearing in criminal cases but is not being applied pending adjustment of the corresponding procedural laws.

2.6 The Supreme Court also examined each of the allegations on which the author based his appeal, including those relating to the probative value accorded to certain items of evidence and the application of criminal law to the case in question. The Court found that there was sufficient evidence to uphold the assessment of the facts made by the Provincial High Court of Madrid, that the sentence was duly reasoned, including with regard to the arguments that disputed or lent credence to certain testimonies, and also that it was supported by specific empirical evidence.¹ The Supreme Court also upheld the application

¹ With regard to the author's allegations of errors in the assessment of evidence, the Supreme Court examined the documents submitted by the author in the first instance as well as his arguments, recalled its case law on similar offences of misappropriation and concluded that the author's intention to appropriate the amount in dispute for himself was evident, since, despite the passage of several

of the aggravated form of embezzlement defined in article 250, paragraph 6, of the Criminal Code, which establishes that aggravating circumstances apply when the amount embezzled exceeds €36,000. It noted, however, that the Provincial High Court of Madrid had not specifically explained the grounds for the sentence handed down, for which reason it proceeded to rectify this omission, detailing the criteria that justified the author's sentence and concluding that the sentence was correct and proportionate to the seriousness of the offence. With regard to the allegations of undue delay in the proceedings, the Supreme Court observed that the complaint had been submitted on 12 February 2004, that the order which had concluded the investigation and had signalled the switch to a summary procedure had been issued on 22 June 2005, and that the first instance judgement had been served on 24 January 2007. Thus, there had been no period of procedural inactivity and for this reason it could not be considered that the proceedings were unduly prolonged.

2.7 The author submitted an application for *amparo* to the Constitutional Court on 10 March 2008. The application questioned the probative value accorded to the evidence presented in the criminal proceedings before the Provincial High Court of Madrid and subsequently before the Supreme Court, and maintained that the proceedings were in violation of the right to be presumed innocent and the right to a duly reasoned court judgement established in article 24, paragraph 2, of the Constitution. As part of his allegations, the author observed that the criminal proceedings did not guarantee his right to have his conviction and sentence reviewed by a higher tribunal, in accordance with the obligations established in the Covenant. He added that he was not unfamiliar with recent case law but that, in his opinion, it should not be applied until the necessary legislative reforms had been adopted to ensure that the legal system provided for the right to a second criminal hearing.

2.8 In a ruling issued on 15 December 2008, the Constitutional Court decided not to admit the application for *amparo* on the grounds that the author had not satisfied the requirement to demonstrate the constitutional significance of the case, as established in article 41, paragraph 1, of Organic Act No. 6/2007 of 24 May on the Constitutional Court.

2.9 The author claims that he has exhausted all domestic remedies as required to satisfy the provisions of article 5, paragraph 2 (b), of the Optional Protocol.

The complaint

3.1 The author maintains that the State party violated its obligation under article 14, paragraph 5, of the Covenant, in that it denied him the right to appeal and to have his conviction and sentence reviewed by a higher tribunal. In the Spanish legal system, provincial courts are first instance courts that hear criminal cases seeking a prison sentence exceeding 6 years and 1 day. A sentence handed down in a provincial court can only be appealed in cassation before the Supreme Court. However, appeals to the Supreme Court are restricted in their scope, as the Court is not empowered to review the entire proceedings that gave rise to the provincial court's judgement. Thus, there being no means to appeal against the first instance judgement, the State party violated the requirement established under article 14, paragraph 5, of the Covenant.

3.2 The author adds that the preamble to Organic Act No. 19/2003 of 23 December, amending the Organic Act on the Judiciary, admitted the need to guarantee a second hearing in criminal cases, and proposes that the criminal divisions of the High Courts of Justice should review the first instance decisions reached in provincial courts, and that the

years, it was only on being taken to court that the author produced the series of documents that would serve as his defence.

National High Court should be endowed with an appeals division. This amendment was intended to settle the debate that had arisen as a result of the Human Rights Committee's position on the State party's system of review in cassation. However, at the time of the communication's submission, the Act had yet to be implemented because of the lack of implementing regulations.

State party's observations on admissibility and on the merits

4.1 On 5 October 2009, the State party submitted its observations on admissibility to the Committee and asked for the communication to be declared inadmissible under article 2 and article 5, paragraph 2 (b), of the Optional Protocol on the grounds of non-substantiation and non-exhaustion of domestic remedies, respectively.

4.2 Domestic remedies were not exhausted in relation to article 14, paragraph 5, of the Covenant, as the application for *amparo* filed with the Constitutional Court was dismissed owing to an inexcusable error attributable to a lack of procedural expertise on the part of the author, in that he failed to explain in his petition the special constitutional significance of the application.

4.3 The author's claims in relation to article 14, paragraph 5, of the Covenant are insufficiently substantiated since, in response to the author's appeal in cassation, the Supreme Court examined the assessment of the evidence conducted by the Provincial High Court of Madrid, considering, in particular, whether it had interpreted any of the facts erroneously or had failed to take any of them into account. In its judgement, the Supreme Court indicated that "this court of cassation reviews not only the legitimacy of the evidence on which the judgement is based but also whether it is sufficient to satisfy the requirements associated with the right to be presumed innocent, as well as the reasonableness of the conclusions reached and the term of the sentence served". It adds that, in the past, the Committee had declared communications relating to violations of article 14, paragraph 5, of the Covenant inadmissible on the grounds of insufficient substantiation.²

5.1 On 11 February 2010, the State party submitted its observations on the merits of the communication and asked the Committee to declare the communication inadmissible or, alternatively, to declare that there has been no violation of the Covenant.

5.2 The State party reiterates the arguments put forward with regard to the admissibility of the communication. It adds that in the judgement issued on 26 December 2006, the Supreme Court partially dismissed the appeal in cassation because, after assessing the facts on which the Provincial High Court's ruling was based, it had concluded that the factum, on which the author's criminal responsibility was established, should be accepted. This demonstrates the thoroughness of the Supreme Court's review in cassation of convictions and sentences handed down by a lower court. In similar cases, the Committee ruled that the review in cassation was, in the specific case, sufficient to satisfy the requirements of article 14, paragraph 5, of the Covenant.³

² The State party refers to the Committee's case law in relation to communication No. 1305/2004, *Villamón Ventura v. Spain*, decision on admissibility adopted on 31 October 2006; communication No. 1489/2006, *Rodríguez Rodríguez v. Spain*, decision on admissibility adopted on 30 October 2008; and communication No. 1490/2006, *Pindado Martínez v. Spain*, decision on admissibility adopted on 30 October 2008.

³ The State party refers to the Committee's case law in relation to communication No. 1389/2005, *Bertelli Gálvez v. Spain*, decision on admissibility adopted on 25 July 2005; communication No. 1399/2005, *Cuartero Casado v. Spain*, decision on admissibility adopted on 25 July 2005; communication No. 1323/2004, *Lozano Aráez et al. v. Spain*, decision on admissibility adopted on 28 October 2005; communication No. 1059/2002, *Carvallo Villar v. Spain*, decision on admissibility

Author's comments on the State party's submission

6.1 The author submitted his comments on the State party's observations on the admissibility of the communication on 15 March 2010.

6.2 The author reiterates that the violation by the State party of the right to a second hearing in criminal cases was clearly demonstrated in 2000, when the Committee ruled that appeals in cassation did not satisfy the obligation established in article 14, paragraph 5, of the Covenant. Subsequently, on 29 March 2005, the Committee upheld its position and ruled that the Spanish legal system did not guarantee a second hearing in criminal cases in military courts.⁴

6.3 The author claims that he has exhausted all domestic remedies. He maintains that an application for *amparo* is not a remedy that must be exhausted since it is not an effective remedy. Although the applicant has not previously made any application for *amparo*, the Committee has considered the merits of similar communications and the case law of the Constitutional Court is consistent in maintaining that an appeal in cassation satisfies the requirements of the Covenant in relation to the right to a second hearing in criminal cases.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

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

7.3 The Committee notes the State party's argument that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol because the author did not exhaust domestic remedies, as his application for *amparo* was dismissed by the Constitutional Court owing to an inexcusable error attributable to the author, in that he failed to explain in his petition the special constitutional significance of the application. The Committee recalls that it has consistently held that only those remedies that have a reasonable prospect of success need to be exhausted. In the specific circumstances, the application for *amparo* had no reasonable prospect of succeeding with regard to a possible violation of article 14, paragraph 5, given the Constitutional Court's case law on appeals in cassation. The Committee therefore considers that there is nothing to prevent it from considering the present communication under article 5, paragraph 2 (b), of the Optional Protocol.⁵

7.4 The Committee notes the author's allegations that he was denied the right to have his conviction and sentence reviewed by a higher tribunal, since he had access only to an

adopted on 28 October 2005; communication No. 1156/2003, *Pérez Escobar v. Spain*, decision on admissibility adopted on 28 March 2006; and communication No. 1094/2002, *Herrera Sousa v. Spain*, decision on admissibility adopted on 27 March 2006.

⁴ The author refers to the Committee's case law in relation to communication No. 1104/2002, *Martínez Fernández v. Spain*, Views adopted on 29 March 2005.

⁵ See communication No. 1101/2002, *Alba Cabriada v. Spain*, Views adopted on 1 November 2004, para. 6.5; communication No. 1555/2007, *Suils Ramonet v. Spain*, decision on admissibility adopted on 27 October 2009, para. 6.3; and communication No. 1617/2007, *L.G.M. v. Spain*, decision on admissibility adopted on 26 July 2011, para. 6.3.

appeal on cassation before the Supreme Court, which effectively denied him the right to appeal against the sentence handed down by the Provincial High Court of Madrid. The Committee further notes the State party's arguments that, as the Supreme Court indicated in its ruling of 26 December 2007, appeals in cassation provide for an extensive review of the evidence submitted in the lower court, allowing for the revision of judgements in relation to the facts, the evidence and the law.

7.5 The Committee notes that, in its judgement of 26 December 2007, the Supreme Court reviewed the conviction and sentence handed down by the Provincial High Court of Madrid and concluded that there was sufficient evidence to uphold the assessment of the facts made in the lower court. It also concluded that the aggravated form of embezzlement defined in article 250, paragraph 6, of the Criminal Code had been properly applied and that the judgement issued by the Provincial High Court of Madrid did not specifically explain the grounds for the sentence handed down, for which reason the Supreme Court had proceeded to detail the criteria justifying the sentence, confirming that it was correct and proportionate to the seriousness of the offence. Thus, the Committee considers that the allegations concerning article 14, paragraph 5, of the Covenant have been insufficiently substantiated for the purposes of admissibility and concludes that they are inadmissible under article 2 of the Optional Protocol.

8. The Committee therefore decides:

- (a) That the communication is inadmissible under article 2 of the Optional Protocol;
- (b) That this decision shall be transmitted to the State party and to the authors.

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

**O. Communication No. 1904/2009, *D.T.T. v. Colombia*
(Decision adopted on 25 March 2013, 107th session)***

<i>Submitted by:</i>	D.T.T. (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Colombia
<i>Date of communication:</i>	18 February 2009 (initial submission)
<i>Subject matter:</i>	The author's conviction for the offence of illicit enrichment
<i>Procedural issues:</i>	Exhaustion of domestic remedies; substantiation of claims
<i>Substantive issues:</i>	Right to a fair and public hearing by a competent and impartial tribunal; prohibition of retroactive application of criminal law
<i>Articles of the Covenant:</i>	Articles 14 and 15
<i>Articles of the Optional Protocol:</i>	Article 2 and article 5 (para. 2 (b))
<i>The Human Rights Committee</i> , established under article 28 of the International Covenant on Civil and Political Rights,	
<i>Meeting on 25 March 2013,</i>	
<i>Adopts the following:</i>	

Decision on admissibility

1.1 The author of the communication is Mr. D.T.T., a Colombian national born on 6 June 1952. He claims to be the victim of a violation by Colombia of his rights under articles 14 and 15 of the Covenant. The author is a lawyer and is representing himself before the Committee.

Factual background

2.1 The author held several senior posts in the State party. He was a potential candidate for the Presidency of the Republic until 13 March 1994, representing the Liberal Party. On 31 August 1994, he was appointed Comptroller-General of the Republic. Following the presidential election held in that year, information was disclosed indicating that some of the election campaigns had been funded by known drug traffickers, which led to the opening of the legal investigation known as the "*Proceso 8000*".

* The following members of the Committee participated in the consideration of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

2.2 On 5 February 1998, the Attorney General (*Fiscal General de la Nación*) ordered an investigation into the author, on suspicion that he had been the ultimate beneficiary of sums of money derived from drug trafficking, which he had received through the company Export Café Ltd.

2.3 On 26 February 1998, the Attorney General ordered that the author be taken into custody and on 15 July of that year the author was charged with the offence of illicit personal enrichment¹ before the Supreme Court of Justice, because, in view of his position, this was the court that had jurisdiction to hear the case. The Attorney General's Office maintained that the author could not substantiate the increase in his assets by 43.6 million Colombian pesos; that the transactions he cited to substantiate the increase, such as the sale of a plot of land, could not, in fact, have realized such a sum; and that the money he had received had derived from illicit drug trafficking, paid with a cheque drawn on the account of Export Café Ltd. It was established that this company did not engage in any activity corresponding to its stated purpose but operated as a front organization for the Cali cartel. In framing the indictment, the Attorney General's Office took into consideration the statement made by a witness, Mr. G.A.P.G., while he was in detention in the United States of America in the context of the trial of an uncle of the author's for activities that were also related to the financing of election campaigns with money derived from drug trafficking. This witness testified that Export Café Ltd. was a front for the Cali cartel, that the cartel had financed the campaign of a presidential candidate and various congressmen and that the author was in frequent contact with a drug trafficker, Mr. M.A.R.O. According to the information submitted by the author, the Attorney General's Office considered that the testimony of Mr. G.A.P.G. was valid and that, since he was testifying in the United States under the protected witness scheme, his interrogation must have conformed to the regulations of the State in which the testimony was taken. Moreover, the worth of the evidence could not be questioned merely because the statement had been made in the context of another criminal trial. Furthermore, the statement had been openly transferred to the case file in the author's trial in accordance with the requirements of the law.

2.4 On 19 August 1998, Congress accepted the author's resignation from his post of Comptroller-General of the Republic. Owing to the loss of his special privileges, the Supreme Court transferred the trial on 27 August 1998 to the Bogotá Regional Court, which was made up of "faceless" judges.

2.5 The author asked the Regional Court to declare null and void the proceedings that followed the inquiry by the Attorney General's Office, claiming that he could not be detained unless he had previously been suspended from his post by Congress; that his detention had been unduly prolonged; that the prosecutor who questioned Mr. G.A.P.G. about the author did not have the authority to do so; and that the prosecutor assigned to the Supreme Court who took his statement also lacked such authority. The Regional Court declined to make such a declaration and ordered, among other measures, that a sworn statement should be taken from Mr. G.A.P.G. to clarify his previous statement and that the author should be allowed to cross-examine the witness, as was his right. On 5 March 1999, a letter of request was sent to the competent United States authorities.

2.6 On 30 June 1999, the regional courts ceased functioning and Act No. 504 of 1999 came into force, establishing special circuit criminal courts within the ordinary system of

¹ Article 10, endorsed in Decree No. 1895 of 1989 and enshrined in law by Decree No. 2266 of 1991: "Any person who, directly or through another person, obtains for himself or for another person, an unsubstantiated increase in assets deriving in one way or another from criminal activities shall, by that act alone, be liable to a term of imprisonment of between 5 and 10 years and a fine equivalent to the value of the illicit increase in assets."

justice. These courts have jurisdiction to try cases of illicit personal enrichment, among other things. The author's trial was assigned to the Fifth Criminal Court of the Bogotá Special Circuit ("the Fifth Court"). The Court continued to gather evidence and took steps to ensure that a statement could be taken from Mr. G.A.P.G. in the United States.

2.7 On 29 December 1999, the Fifth Court convicted the author and sentenced him to 70 months' imprisonment, a fine of 43,579,952.70 Colombian pesos and an accessory penalty prohibiting him from exercising his civic rights or public duties during the same period. In its judgement, which has been made available by the author, the Court stated that the offence of illicit personal enrichment should be interpreted in accordance with the 1996 case law of the Constitutional Court, which ruled that it was a separate offence, but that this did not affect the principle of legality and the most-favourable-law principle. With regard to the testimony of Mr. G.A.P.G., it concluded, *inter alia*, that it had been obtained in accordance with the law and that it was only one piece of evidence in the case and that his statements matched the other evidence; the evidence as a whole left no doubt about the author's criminal liability. In the light of all the evidence collected, the judgement also set out the reasons why it was considered unnecessary to order the examination of further evidence, as requested by the author.

2.8 The author appealed to the High Court of the Bogotá Judicial District ("the High Court"), which dismissed his appeal on 14 February 2001. According to the judgement, which has been made available by the author, the High Court confirmed the evidentiary effect of the evidence provided and ruled that the author's applications for annulment had been resolved previously and that his right to be tried by a duly appointed judge (*juez natural*) had not been breached.

2.9 The author lodged an appeal in cassation before the Supreme Court of Justice. On 19 June 2003, the Court decided not to annul the sentence and said, *inter alia*, that the decisions of the courts of first and second instance complied with statutory requirements and fulfilled the conditions for validity in terms of the reasoning behind them and the penalty imposed.

2.10 The author applied for legal protection (*tutela*) to the Cundinamarca Council of the Judiciary, on the grounds that he had been deprived of his fundamental rights to due process — to be tried by an impartial and independent court — to a defence, to effective access to the administration of justice and to his honour and good reputation, as the Attorney General's Office had applied an inappropriate procedure in dealing with his case; that the Regional Court, by applying rules from other kinds of proceedings, had extended the deadline for the submission of evidence, which had enabled the Attorney General's Office to submit evidence that could not otherwise have been brought; that he had been convicted without a proper or reasoned evaluation of the evidence; that material evidence had not been presented; and that officials who had previously made decisions and issued opinions, such as the judges of the Supreme Court, had not disqualified themselves from hearing the case. On 26 April 2004, the Cundinamarca Council of the Judiciary dismissed his application for legal protection.

2.11 The author then lodged an appeal with the Higher Council of the Judiciary. On 2 June 2004, the Higher Council upheld the ruling on the author's application for legal protection by the Cundinamarca Council of the Judiciary, which had dismissed the application. He then applied to the Constitutional Court for judicial review. On 2 February 2006, the Court ruled that parts of his appeal were inadmissible, including the part relating to the impartiality of the Supreme Court judges, given that the author had not objected to those judges hearing his case, although the law allowed him to do so. According to the ruling, a copy of which has been made available by the author, the Court stated that a conviction for the crime of illicit enrichment was not dependent on a previous ruling that the activities from which an increase in assets was derived were illicit; that the transfer of

the criminal proceedings from the Supreme Court to the Regional Court and subsequently to the Fifth Court had been conducted in the normal way and in conformity with the law; that the Supreme Court had given all parties to the proceedings due notice of the public hearing; and that, although the Supreme Court Prosecutor's assignment to the trial meant that the representative of the Attorney General's Office did not appear before the special judges of the Bogotá Circuit, this procedural irregularity was not significant from a constitutional point of view as regards the right to be tried by a predetermined, impartial judge. The Court also concurred with the conclusion of the lower courts regarding the validity of the evidence, the rejection of some of it, and the weight given to it. The author lodged an appeal for annulment on the grounds that his rights to due process and equality had been violated. On 25 July 2006, the Constitutional Court, sitting in plenary, rejected this appeal, since the author was effectively seeking a review of the judgement of the Eighth Review Chamber of the Constitutional Court of 2 February 2006 as though it were an ordinary court.

The complaint

3.1 The author claims to have been the victim of a violation of articles 14 and 15 of the Covenant.

3.2 With regard to article 14 of the Covenant, the author claims that there were serious irregularities in the criminal proceedings brought against him, to the detriment of his rights to a defence, to effective access to justice, to a trial by an impartial and independent court and to the presumption of innocence.

3.3 The author's right to a defence was violated in that he had no opportunity to refute the evidence. His conviction was based essentially on the testimony of Mr. G.A.P.G. The author, however, was unable to challenge this evidence, despite his requests to question the witness. Moreover, the testimony had been taken in an irregular manner from another criminal trial in which he had not been involved. Also, in his own trial, evidence had been admitted that had not been produced in the course of the proceedings, while other evidence that was crucial to determining his criminal liability, and which he had asked to have admitted, had not been heard, in breach of the Covenant. Furthermore, according to the author, the Regional Court was composed of faceless judges and when it was in charge of the supplementary investigations the identity of the judge ordering, accepting or rejecting evidence was not known to the author, which restricted his right to a defence.

3.4 The author maintains that he was not tried by a competent, independent and impartial court. The Fifth Court and the High Court did not have the territorial jurisdiction to hear the case against him, which should have been brought before a court in the circuit where the cheque and the unconditional payment order that were under investigation were issued, that is, the Cali Criminal Circuit Court. He claims that, in a criminal trial similar to his own, the Supreme Court had ruled the entire proceedings null and void and ordered that the case be transferred to the Cali courts; his right to equal treatment by the courts had therefore been violated.

3.5 The courts had applied procedural rules from different proceedings rather than restricting themselves to complying with the compulsory requirements, in violation of his right to due process. For example, when his trial was transferred to the Regional Court, the latter had continued to apply the deadline for taking the case to trial set out in the Supreme Court rules, whereas it ought to have adhered to the procedural rules governing regional courts. This had enabled the Attorney General's Office to submit evidence against the author.

3.6 With regard to article 15 of the Covenant, the author claims that, in order to convict him, the court retroactively applied the interpretation issued by the Constitutional Court on

18 July 1996, establishing the offence of illicit enrichment as a separate offence.² The events for which he was on trial, however, dated back to 1 May 1994, when the Constitutional Court's ruling on the meaning of the article defining the offence was that it was connected with or derived from other offences and was therefore subject to a judicial ruling on the illegality of the activities in which the enrichment had originated.³ Moreover, in considering a petition for a review of the constitutionality of the article on 19 October 1995, the Constitutional Court had ruled that the matter was *res judicata*. Thus, at the time that the cheque was issued, the author had no means of knowing that he was committing an offence. The prohibition against making criminal law valid retroactively could not therefore be interpreted strictly, but should be extended to courts' interpretations of the definitions of offences that were detrimental to the accused.

3.7 The author asks the Committee to find that his rights under articles 14 and 15 of the Covenant have been violated, and requests the State party to provide an effective remedy and financial compensation for the economic and moral damages suffered by himself and his family.

State party's observations on admissibility

4.1 On 12 February 2009, the State party submitted its observations on the admissibility of the communication and asked the Committee to declare it inadmissible owing to its lack of competence to consider a communication whose purpose was to bring about an evaluation of facts and evidence previously submitted to the national authorities and also because of the author's failure to exhaust domestic remedies, under articles 3 and 5, paragraph 2 (b), of the Optional Protocol.

4.2 The author's communication sets out his disagreement with the judgements of the Fifth Court, the High Court and the Supreme Court, of 29 December 1999, 14 February 2001 and 19 June 2003, respectively, in which he was convicted for the offence of illicit personal enrichment, and seeks to persuade the Committee to act as an appeal court. The State party notes that it is not for the Committee to replace the decisions of domestic courts on the evaluation of the facts or the evidence in a particular case with its own opinions. There is no evidence to suggest that the action of the courts in the author's trial was arbitrary or constituted a denial of justice. The issues raised by the author were evaluated and decided in accordance with the law. The author had access to various legal remedies and obtained substantive decisions in accordance with the law. The State party therefore asked the Committee to declare the communication inadmissible under article 3 of the Optional Protocol.

4.3 As regards the author's claim under article 14, paragraph 1, of the Covenant, that the courts lacked impartiality, the State party requested that the claim be declared inadmissible owing to the author's failure to exhaust domestic remedies, in accordance with article 5, paragraph 2 (b), of the Optional Protocol. If the author considers that some of the Supreme Court judges who heard the appeal for cassation were lacking in impartiality, he should have applied for their disqualification, as permitted by law, at the appropriate time. His failure to do so explained why that part of his application for legal protection had been ruled inadmissible.

² The communication refers to Constitutional Court Judgement No. C-319 of 1996.

³ The communication refers to Constitutional Court Judgement No. C-127 of 1993.

State party's observations on the merits

5.1 On 6 April 2010, the State party submitted its observations on the merits of the communication to the Committee.

5.2 The State party submitted a detailed account of every stage of the criminal proceedings, the appeals lodged, the body of evidence obtained and examined by the authorities, and the application for legal protection. It states that the principal and accessory penalties imposed on the author were declared to have been extinguished on 20 May 2004 and he was set free.

5.3 The State party says that the criminal proceedings against the author did not breach article 14 of the Covenant and that the evidence submitted during the trial showed beyond any reasonable doubt that he was guilty of the offence. His conviction and sentence therefore cannot be considered arbitrary or a denial of justice. Even if the author considers that the courts' decisions were unjust, the State party reiterates its view that the Committee cannot act as a court of appeal to consider alleged errors of law or fact.

5.4 The State party denies that rules of procedure that were applicable in other cases were used to the author's detriment or breached the mandatory rules that guarantee due process. The deadline of 20 working days set by the Regional Court for supplying or requesting evidence when the case was transferred from the Supreme Court did not affect the author's right to due process. On the contrary, the Regional Court applied the deadline that was in force when the case was being heard by the Supreme Court, since that was more favourable to the author. If the procedure applicable to regional courts had been applied strictly, the author would have had only 10 additional calendar days. As it was, during the open period for evidence, the author's representative submitted 6 pieces of evidence and requested that 24 more be examined. Moreover, the deadline applied to all the parties, without prejudice to any of them.

5.5 The transfer of the trial to the Fifth Court, once the regional courts had ceased to exist, did not affect his right to be tried by a duly appointed judge. Judges specialized in criminal law, like the judge presiding over the Fifth Court, are judicial officials who form part of the ordinary system of justice. The fact that they are assigned to certain cases because of their speciality or the nature of the case does not mean that they are special judges. Moreover, the author was not tried by faceless judges. Although at the trial stage the Regional Court conducted the first examination of the accused and extended it without disclosing the identity of the judges, it was not the Regional Court that weighed up the evidence obtained or presided over the author's trial. Furthermore, at the examination and indictment stage, the author knew that the Attorney General was in charge of the investigation, examination and indictment in his case. Also, once the case had been transferred from the Regional Court to the Fifth Court, the order was given to hold the hearing in public and the authorities, the author and his representative participated in the hearing, in accordance with the rules set out in the Code of Criminal Procedure. The author thus knew the identity of the judge who heard his case and convicted him in the court of first instance and also the identity of the officials in the higher courts.

5.6 With regard to the claims that his right to a defence was violated, the State party points out that, at the request of the Regional Court, a letter of request was sent to the authorities in the United States, where the witness, Mr. G.A.P.G., was being held, with a view to questioning him for the author's defence. The Fifth Court subsequently took various steps with a view to obtaining a statement. However, there was no reply to the letter of request and the State party had no means of insisting on a reply, since it is the prerogative of the requested State to grant or refuse a request for legal assistance. The State party claims it was not in a position to question the evidentiary value of the statement made previously by G.A.P.G. in another case simply on the grounds that the author had been

unable to question him, particularly since, in the author's trial, the statement had been considered to be documentary evidence carried over to his trial, and not simply as testimony. Moreover, the statement was treated merely as one piece of evidence among many that demonstrated the author's criminal liability. Furthermore, at the trial at which the statement was made, procedures were followed in accordance with the guidelines set out in the Criminal Code and the Code of Criminal Procedure. It was not the purpose of the proceedings to obtain information against the author; rather, such information arose spontaneously during the questioning. There was thus no violation of the special privileges that the author enjoyed at that time as Comptroller-General.

5.7 The author was able to conduct his defence properly and challenge every piece of evidence put forward. The evidence that had been ordered and examined was produced in accordance with the law and with the author's knowledge. Among those involved in this process were the representatives of the Attorney General's Office, the prosecuting attorney assigned by the Public Legal Service (*Ministerio Público*) and the author's representative. At every point, the author had access to the evidence against him; he was provided with a copy of every document used in the investigation and his representative was able to participate in the questioning. All the evidence was comprehensively evaluated. The judicial authorities responded to applications from everyone involved in the proceedings and ordered that any evidence that might provide certainty and clarity on the case before the court should be examined. The author was able to request and submit evidence at every stage of the proceedings. However, following a review of the evidence as a whole, pieces of evidence that were of no use, that related to blatantly irrelevant facts or that were manifestly superfluous were rejected.

5.8 With regard to the author's claim that he was tried by judges who did not have territorial jurisdiction, in violation of article 14, paragraph 1, of the Covenant, the State party asserts that the courts with the jurisdiction to hear the author's case were those in Bogotá, not in Cali, since what was relevant in determining the jurisdiction in which the criminal trial should be held was not the place where the cheque was issued but the destination of the money concerned in the criminal act. In this case, the cheque was undoubtedly issued in Cali, but the increase in the author's assets occurred in Bogotá.

5.9 With regard to the claims concerning article 15 of the Covenant, the State party says that no criminal law was applied to the author retroactively. The previous interpretations by the Constitutional Court concerning the criminal offence of illicit enrichment could not be construed as establishing a law or a rule of law. For that reason, the Fifth Court deemed inadmissible the defence proposal to consider the actions attributed to the author in accordance with the interpretative parameters established in Constitutional Court Judgement No. C-127 of 1993, without taking into account the points made in Judgement No. C-319 of 1996, in application of the principles of legality and the most favourable law. Under the State party's Constitution, only the law can define criminal offences. In the author's case, the courts applied the definition of the offence that was in force at the time that the acts for which he was on trial were committed. The interpretations of the Constitutional Court did not change the definition of the offence. The application of the criteria established by the Constitutional Court in 1996 did not, therefore, constitute a violation of article 15 of the Covenant. The offence of illicit personal enrichment is deemed a separate offence, that is, it is not dependent on a previous conviction for the illicit activity that gave rise to the illicit enrichment.

Author's comments on the State party's submission

6.1 On 24 September 2010, the author submitted his comments on the State party's observations.

6.2 The author reiterates the arguments submitted in his communication and maintains that the purpose of his communication is not that the Committee should act as a “fourth level of jurisdiction” and assess the evaluation of the facts or the evidence in the domestic proceedings. He asserts that he exhausted all the available domestic remedies, lodging every possible appeal in the course of the criminal proceedings against him and applying for legal protection.

6.3 In the testimony given by Mr. G.A.P.G. at another trial, his identity was not clearly indicated, since it was accompanied only by a photocopy of a photograph. When the testimony was used in the author’s own trial, not even a copy of the photograph in question was attached. He reiterates that the judgement against him was based essentially on that testimony and that the judicial authorities did not carry out any investigation to determine the origin of the money in the accounts of Export Café Ltd.

6.4 He reiterates that the right enshrined in article 15 of the Covenant was violated, since the alleged illicit conduct attributed to him was committed on 1 May 1994. Notwithstanding that, the Court retroactively applied the less favourable interpretation of the offence of illicit personal enrichment set out in Constitutional Court Judgement No. C-319 of 18 July 1996.

6.5 The supplementary investigation carried out by the Bogotá Regional Court was conducted before faceless judges. It was in that context that some evidence was admitted and other evidence rejected. Because of these irregularities, the whole investigative stage of the proceedings should have been declared null and void.

6.6 The author claims that the judgement handed down in the criminal trial of his brother, Mr. J.F.T., was used against him in his own trial, even though it had not been transferred to the case file or brought to his attention. This had affected his right to mount a defence and to challenge the evidence.

6.7 During his trial, the procedures adopted were those governing two different criminal proceedings, to the detriment of his right to due process. The author maintains that it was not relevant to determine which procedure was the more favourable in order to apply a more advantageous rule, since in principle all procedures provided equal safeguards. The author was thus not tried in accordance with the criminal procedure explicitly laid down by Colombian law.

6.8 His right to a defence was affected by the fact that he had no opportunity to question Mr. G.A.P.G., owing to the negative reply from the Government of the United States. That fact undermined the principle of equality of arms, whereby he should have been able to question a crucial witness on an equal footing with a view to determining the origin of the money in the accounts of Export Café Ltd.

6.9 The author reiterates that the cheque in question was endorsed with the name of another person. That person has not, however, been investigated. Moreover, no account was taken of the fact that, when the cheque was cashed, the bank account of Export Café Ltd. was overdrawn, which meant that the cash payment was made with the bank’s money and not out of the company’s account. The author further states that, although he did not have title *stricto sensu* to the plot of land he had transferred to his uncle, Mr. A.F.T.S., a number of people had testified that he and Mr. A.C. had been the owners since 1986. He also asserts that, even though an order had been issued to take the testimony of Mr. J.B. and Mr. F.M., who had acted as witnesses to the option to buy signed by the author’s wife and Mr. A.F.T.S., that had not been done. Furthermore, important expert appraisals and evidence requested by the defence had not been ordered.

6.10 The author maintains that, although he has been released, he is still suffering from the effects of his sentence, since constitutional rules mean that he cannot run for any elected office.

7. On 8 October 2010, the author submitted additional information to the Committee. He maintains that, since the State party could not demand a response from the United States to the letter of request sent by the judicial authorities to ask for the testimony of Mr. G.A.P.G. to be taken, the witness's statements incriminating the author in the context of another trial could not be used. He asserts that, apart from that statement, the criminal investigation police had no means of determining whether the assets of Export Café Ltd. derived from criminal activity; without such confirmation, the criminal definition of the offence illicit enrichment could not be applied.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

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

8.3 With regard to the requirement that domestic remedies must have been exhausted, the Committee notes the statement by the State party that the author did not challenge the impartiality of the court in a timely manner, since he at no time sought the disqualification of the Supreme Court judges who heard his application for judicial review or any of the other authorities who took part in the previous stages of the proceedings against him, although he was permitted to take such action by law. The Committee observes that the impartiality of the courts involved in the criminal trial was challenged only during the action for legal protection brought by the author and that this part of his request was not admitted because he had not challenged these authorities in a timely manner during the criminal proceedings. In the absence of any explanation by the author of the reasons that might have prevented him from challenging the judges in his trial, the Committee considers that this part of his communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

8.4 The Committee notes the author's claims that he was not tried by a competent court established by law; that the criminal trial should have been held in the Cali courts; that the initial trial was held in the Supreme Court, the Bogotá Regional Court and the Fifth Court, and that the Fifth Court finally heard the case; and that, when the trial was transferred to Bogotá Regional Court, the latter decided to keep the deadline for submission of evidence previously set by the Supreme Court rather than apply the procedural rules governing proceedings before the Regional Court. The Committee observes that both the Supreme Court and the Constitutional Court ruled that, under the law of the State party, the Bogotá courts were competent to conduct the criminal proceedings for the offence of illicit personal enrichment, since the offence was allegedly committed in the city of Bogotá. The Committee also observes that the criminal trial was transferred from the Supreme Court to the Regional Court as a consequence of the author's resignation from the post of Comptroller-General and the loss of his special privileges, and finally transferred to the Fifth Court when the regional courts ceased functioning, and that it was the criminal judges from the special circuit assigned to ordinary courts who had the jurisdiction to try the offence with which the author was charged. The Committee also notes the comments by the State party that the rules governing trials before the Supreme Court were temporarily

applied by the Regional Court only at the time that the trial was transferred; that the same deadline was applied to all the parties to the proceedings; and that, if the rules applying to regional courts had been applied immediately, the deadline for the submission of evidence would have been shorter. As the author has not disproved these arguments, the Committee considers that the claims under article 14, paragraph 1, of the Covenant have not been sufficiently substantiated for the purposes of admissibility and concludes that they are inadmissible under article 2 of the Optional Protocol.

8.5 The Committee notes the author's claims that proceedings in the Bogotá Regional Court were conducted before faceless judges. The Committee also notes the State party's arguments that the prosecutor assigned to the Supreme Court, the prosecuting attorney representing the Public Legal Service and the author's representative all participated in the first examination of the accused and in the proceedings before the Regional Court; that it was not the Regional Court that assessed the evidence or convicted the author; that at every other stage of the proceedings the author's right to a public hearing and to know the identity of the persons hearing his case was assured; and that, with these guarantees the author had the opportunity to have his conviction and sentence reviewed by a higher court and, ultimately, in cassation. The Committee recalls that in order to satisfy the requirements of the right to a defence enshrined in article 14, paragraph 3, of the Covenant, and particularly in subparagraphs (d) and (e), all criminal proceedings must allow a person charged with a criminal offence an oral hearing, at which he or she may appear in person or be represented by counsel and may present evidence and examine witnesses.⁴ In this case, the Committee notes that the first examination of the accused before the Regional Court was conducted by a faceless judge. However, the trial was subsequently transferred to the Fifth Court, and it was this court that finally assessed the evidence, convicted the author and imposed a punishment; both in this court and in the appeal and cassation courts, the author had the opportunity to be heard in public, to submit or challenge the evidence submitted in the course of the trial and to conduct his defence. The author also knew the identity of the authorities in charge of the previous stages of the proceedings at the Attorney General's Office and the Supreme Court. Moreover, the Committee considers that the information before it does not demonstrate that the actions of the Regional Court were a determining factor in the author's conviction or that any possible irregularities that might have occurred owing to the nature of the regional courts were not subsequently rectified during the course of the trial. In these circumstances, the Committee is of the view that the author's claims have not been sufficiently substantiated for the purposes of admissibility and concludes that they are inadmissible under article 2 of the Optional Protocol.

8.6 The Committee notes the author's claims that he was unable to conduct a proper defence, since he was unable to challenge material evidence, such as the statement by Mr. G.A.P.G.; that the judicial authorities refused to take the evidence requested by him, which he believed was of crucial importance, and did not give due weight to the evidence submitted by the defence; and that he was effectively convicted in the absence of conclusive proof of guilt, and that this, when taken together with other violations of due process, was clearly arbitrary and a denial of justice. The Committee notes that these claims refer to the evaluation of the facts and the evidence by the courts of the State party. The Committee recalls its jurisprudence, according to which it is incumbent on the courts of States parties to evaluate the facts and the evidence in each case, or the application of domestic legislation, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice.⁵ The Committee has examined

⁴ Committee's general comment No. 32 on the right to equality before courts and tribunals and to a fair trial (CCPR/C/GC/32), para. 23.

⁵ See communication No. 1616/2007, *Manzano et al. v. Colombia*, decision adopted on 19 March 2010,

the materials submitted by the author, including the judgement of the Fifth Court and the judgements on the remedies of appeal and cassation. The Committee considers that these materials do not show that the criminal proceedings against the author suffered from such defects. Accordingly, the Committee considers that the author has failed to provide sufficient substantiation of his claim of a violation of his right to a defence as enshrined in article 14 of the Covenant and that the communication is therefore inadmissible under article 2 of the Optional Protocol.

8.7 The Committee notes the author's claim under article 15, paragraph 1, of the Covenant that, in convicting him of the offence of illicit personal enrichment, the courts retroactively applied the interpretation issued by the Constitutional Court on 18 July 1996, ruling that it was a separate offence, whereas the events in question occurred on 1 May 1994 and at that time the Constitutional Court had ruled that the offence was of a related or derivative nature. The Committee notes that the creation of the offence of illicit personal enrichment was endorsed in Decree No. 1895 of 1989 and enshrined in law by Decree No. 2266 of 1991. The Committee also notes that the interpretation issued by the Constitutional Court in 1996 did not change the definition of the offence, was limited to an interpretation of the aforementioned Decree and of previous case law relating to the constituent elements of the offence, and established that application of the Decree was not dependent on a previous conviction for the illicit activity that gave rise to the enrichment; it was sufficient that the evidence put forward persuaded the judge of an unjustified increase in assets and their origin. The Committee thus considers that the claims under article 15, paragraph 1, of the Covenant have not been sufficiently substantiated for the purposes of admissibility and concludes that they are inadmissible under article 2 of the Optional Protocol.

9. Therefore, the Human Rights Committee decides:

(a) That the communication is inadmissible under article 2 and article 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be transmitted to the State party and to the author.

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

para. 6.4, and communication No. 1622/2007, *L.D.L.P. v. Spain*, decision adopted on 26 July 2011, para. 6.3.

**P. Communication No. 1911/2009, *T.J. v. Lithuania*
(Decision adopted on 25 March 2013, 107th session)***

<i>Submitted by:</i>	T.J. (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Lithuania
<i>Date of communication:</i>	12 September 2009 (initial submission)
<i>Subject matter:</i>	Undue delay
<i>Procedural issue:</i>	Non-exhaustion of domestic remedies
<i>Substantive issue:</i>	Length of proceedings during pretrial investigation stages and court proceedings
<i>Article of the Covenant:</i>	14, paragraph 3 (c)
<i>Article of the Optional Protocol:</i>	5, paragraph 2 (b)

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

Meeting on 25 March 2013,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. T.J., a Lithuanian national, born in 1963, who claims to be a victim of a violation, by Lithuania, of his rights under article 14, paragraph 3 (c), of the International Covenant on Civil and Political Rights. He is not represented by counsel.¹

The facts as submitted by the author

2.1 On 12 April 1995, the activities of the author's limited liability company, Skiedra JSC, were suspended by the authorities and an official pretrial investigation was opened against the author on counts of fraud. The authorities seized the company's documentation.

2.2 On 10 April 1996, the Police Commissariat of Alytus Town and District initiated additional criminal proceedings against the author regarding the inappropriate use of a bank loan contracted in the name of the company. During that year, several contradictory decisions were adopted regarding the continuation or closure of the criminal case, and the closing or resuming of the investigation proceedings. On 27 November 1996, three criminal

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

¹ The Optional Protocol entered into force for the State party on 20 February 1992.

cases against the author were merged into a single one. In this context, on 28 November 1996, the author was arrested and two days later he was released.

2.3 On 5 August 1997, the author was informed that the pretrial investigation was completed. On 18 August 1997, his criminal case under article 275(3) of the Criminal Code² was brought to court.

2.4 Between 1999 and 2001 the criminal case was several times referred back to have additional investigation acts carried out.

2.5 On 26 February 2003, the County Court of Alytus District found the author guilty under articles 35 and 275(3) of the Criminal Code and sentenced him to three and a half years' imprisonment, with a prohibition to engage in materially responsible work for a period of four years, and a fine of 5,000 Lithuanian litas (equivalent to some 1,450 euros at the time), with confiscation of his property.

2.6 On 17 March 2003, the author appealed the judgment of 26 February 2003. He requested to have the criminal case against him closed, claiming that his rights both under the Criminal Code and the Criminal Procedure Code had been violated. By decision of 2 March 2004, the Kaunas Regional Court partially satisfied the author's appeal, re-qualifying his acts under article 1845(2) of the Criminal Code (2000) instead of article 275(3) of the Criminal Code of 1961, and sentenced him to two and a half years' imprisonment. Pursuant to article 3 (2) (2) of a general amnesty law, this sentence was decreased by 20 per cent.

2.7 On 1 June 2004, the author submitted a cassation complaint to the Supreme Court, claiming that he was never notified of the date and place of the court hearing of his appeal proceedings as at the material time he was serving his sentence, whereas the summons was sent to his home address. On 12 April 2005,³ the Supreme Court rejected his appeal. The author, who at the time was serving his sentence in a penitentiary facility, was not present when his appeal was examined by the court. The author was released on 12 April 2005. He received a copy the above-mentioned judgment of the Supreme Court on 13 April 2005.

The complaint

3.1 The author claims that the State party has violated his rights under article 14, paragraph 3 (c), of the Covenant, as the criminal proceedings against him lasted for nine and a half years. The pretrial investigation lasted for two years and four months; and the adjudication of his criminal case in court at the first instance stage lasted five years and 10 months, whereas the proceedings before the court of appeal lasted for almost a year. The proceedings before the Supreme Court lasted for more than four months.

3.2 The author claims that his criminal case cannot be classified as a complex one because the activities for which he was sentenced were carried out within a very limited period of time (from 10 October 1994 to 29 June 1995); they were not carried out in an organized group, and their nature and contents were quite clear. He further states that all the significant information was known at an early stage of the pretrial investigation. The inactivity and malpractice of the pretrial investigation and courts caused the unreasonably long investigation and court proceedings in his case.

² Appropriation or dissipation of high-value property which was entrusted to a person.

³ It appears from the materials on file that the judgment was adopted on 12 October 2004 and not on 12 April 2005.

State party's observations on admissibility

4.1 By note verbale of 12 January 2010, the State party challenged the admissibility of the communication under both articles 2 and 5, paragraph 2 (b), of the Optional Protocol to the Covenant as, according to it, the author's allegations are non-substantiated and in addition the author's allegations raised in the present communication were never brought to the State party's authorities and thus domestic remedies have not been exhausted.

4.2 The State party recalls the facts of the case: the author — the director of a company named Skiedra Ltd. — was suspected of various offences, including financial fraud. On 25 August 1995, a criminal case concerning fraudulent book-keeping under article 323 of the Criminal Code applicable at that time was opened. Another criminal case was opened on 10 April 1996, concerning an inadequate use of a company loan, under article 314 of the Criminal Code. On 14 November 1996, a third criminal case was initiated, concerning the appropriation and embezzlement of the company's property, under article 275 of the Criminal Code. All three cases were merged into one on 27 November 1996. On 26 February 2003, the author was found guilty by Alytus District Court; this decision was upheld, on 2 March 2004, by the Kaunas Regional Court. The author was sentenced to two and a half years' imprisonment and this penalty in accordance with an amnesty law was reduced by 20 per cent. On 12 November 2004, the Supreme Court rejected the author's cassation appeal.⁴

4.3 The State party observes that, in accordance with the well-established principle of international law, reflected in the Optional Protocol to the Covenant, before resorting to international mechanisms one must first seek justice at home, but this principle was not respected in the present case. According to the State party, the author never complained in court regarding the length of the criminal proceedings, nor did he draw this claim to the attention of the court of appeal or of the Supreme Court. In these circumstances, the Committee should reject the communication for failure to exhaust domestic remedies.

4.4 The State party adds in this context that that the author was able to complain against the State in respect of allegedly prolonged criminal proceedings in accordance with the common grounds of liability for damages. Article 30 of the Lithuanian Constitution provides that "a person whose rights or freedoms are violated shall have the right to apply to court. Compensation for material and moral damage inflicted upon a person shall be established by law".

4.5 Further, in accordance with articles 483 and 484 of the Civil Code effective until 1 July 2001 and/or directly relying on the provisions of the European Convention on Human Rights or on the Covenant, as these international treaties have been part of Lithuanian domestic law since 20 June 1995 and 20 February 1992, respectively, when they came into force with regard to Lithuania, the author could have claimed compensation for damages caused by the unlawful acts of the court in a case. Under article 138, paragraph 2, of the Constitution, international treaties which are ratified by the parliament are constituent parts of the legal system.

4.6 In this regard the State party refers to a case against the national authorities for compensation of damages *inter alia* for undue delay, where the Supreme Court, on 22 November 2000, case No. 3K-3-1231/2000, applied directly the provisions concerning the "reasonable time" requirement of the European Convention on Human Rights, namely article 6, paragraph 1, in this regard. In the said civil case, the plaintiff had referred to article 6, paragraph 1, of the European Convention on Human Rights and claimed that his case for compensation of damages for his allegedly unlawful criminal prosecution and

⁴ According to the case-file materials, the correct date is 12 October 2004.

unlawful detention was not heard within a reasonable time; he asked a compensation for a non-pecuniary damage. The Supreme Court, upon assessing all particular circumstances of the case in the light of the criteria established in the case law of the European Court of Human Rights, rejected the plaintiff's claim.

4.7 The State party further stresses that, as of 1 July 2001, a new Civil Code is in force and it allows complainants to obtain redress for illegal acts of the State authorities in accordance with its articles 6.246 and 6.272. In this context, the State party refers to a ruling of the Constitutional Court of 19 August 2006 on the compliance of paragraph 3 of article 3 (wording of 13 March 2001) and paragraph 7 of article 7 (wording of 13 March 2001) of the Law on Compensation for Damage Inflicted by the Unlawful Actions of Interrogatory, Investigatory Bodies, the Prosecutor's Office and Court, with the Constitution of Lithuania. In this ruling, the Constitutional Court has held that the absence of redress for damage inflicted by an unlawful action of State institutions or officials (even if such redress for damage is not specified in any law) would be incompatible with the Constitution of the Republic of Lithuania.

4.8 The case law of the Constitutional Court cited above has been followed by the domestic courts when dealing with compensation issues, inter alia, for prolonged proceedings. The Court of Appeal of Lithuania, for example, in a decision of 28 September 2006 (case No. 2-495/2006) had quashed the decision of a first instance court, which had not admitted the plaintiff's claim. The Court of Appeal had noted in particular that the claim for compensation regarding the alleged delay in the plaintiff's proceedings rose out of both the Constitution and the European Convention on Human Rights, which are both directly applicable acts. Consequently the plaintiff's claim for compensation of damages for prolonged proceedings was accepted.

4.9 In this context, the State party also notes that it is clear from the State party's courts' case law that lengthy criminal proceedings obviously constitute an unlawful action caused by the State institutions and officials for which the State must compensate those injured either under article 6.272 of the Civil Code together with article 30 of the Constitution and/or by directly applying article 6, paragraph 1, of the European Convention on Human Rights or article 14, paragraph 3 (c), of the Covenant.⁵

4.10 The State party submits that its Supreme Court had held on 6 February 2007 that article 6.272 of the new Civil Code was applicable retroactively to delays which occurred prior to its entry into force (in the case before the Supreme Court, the civil claimant was awarded compensation for damage caused by the unreasoned procedural delays in the criminal proceedings against her lasting for almost six years). The State party further provides numerous other examples of domestic case law whereby the national courts had awarded compensation for prolonged proceedings. In conclusion, the State party reiterates that the author had an opportunity, but failed, to avail himself of an effective domestic remedy offering reasonable prospects of success in line with the practice of the Human Rights Committee,⁶ and he had thus failed to exhaust domestic remedies, in violation of the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

4.11 The State party adds that the author's claims under article 14, paragraph 3 (c), of the Covenant are unsubstantiated, and the communication must be also declared inadmissible under article 2 of the Optional Protocol.

⁵ See, para 4.5 above.

⁶ In this regard, the State party refers to, e.g., *Lukyanchik v. Belarus*, communication No. 1392/2005, Views adopted on 21 October 2009, para. 7.4.

4.12 The State party admits that the criminal proceedings lasted relatively long at the stage of the judicial proceedings, but this was conditioned by the complexity of the case, the specific nature of the criminal acts, the author's conduct and other objective reasons, but it was not due to any ineffectiveness or lack of diligence of the domestic authorities whatsoever.

4.13 According to the State party, the requirement to respect the time limit in putting into practice the right to trial without undue delay is of a key importance in criminal cases and, in particular, when the person is in detention.

4.14 In substantiation, the State party points out that the period to be taken into consideration started on 24 October 1995 — when the author was first questioned — and ended on 12 October 2004, when the Supreme Court rejected the author's cassation appeal. The period to be taken into consideration thus encompasses around 8 years (excluding the period of approximately 11 months which are imputable to the author himself).

4.15 The State party adds that the Committee assesses the reasonableness of the length of the proceedings in the light of the particular circumstances of each case, its complexity and according to further criteria laid down in its case law.⁷ It emphasizes the following considerations: the complexity of the case, the author's own conduct, the conduct and initiatives of authorities dealing with the case as well as endangered interests of the author and impact of the judicial proceedings on the author's situation during the examination of the case.

4.16 According to the State party, only delays caused by illegal acts or acts lacking diligence by the authorities breach article 14, paragraph 3 (c), of the Covenant. Delays caused by a private person party to the proceedings, cannot be directly imputed to the authorities. Further, the justification of the length of the proceedings depends on the analysis of the individual circumstances of each case.

4.17 In connection to the length of pretrial investigation, the State party notes that the relevant time period started to run on 24 October 1995, when the author was questioned and ended on 18 August 1997, when the indictment act was completed.

4.18 The State party next notes that the duration of the pretrial investigation in the case was reasonable given the complexity of the case. Together with the author, the two accountants of the company were also investigated. The State party also notes that three separate sets of proceedings concerned the author regarding finance-related criminal acts constituting serious crimes under the law (article 8 of the Criminal Code). In addition, investigation and examination of cases of economic/financial nature objectively requires much more time. The State party notes that a number of actions were carried out during the preliminary investigation, such as review of all the economic/financial activities of the company, questioning of 44 witnesses, financial audit, etc. The State party thus insists that the investigation was effective and prompt. Additional investigation acts were needed only in order to ensure the objective and thorough investigation of all circumstances of the case. In addition, the new pretrial investigations were carried out within reasonable time frame, i.e. in six or four months (from 3 June to 4 December 1999 and 4 September 2001 to 3 January 2002), which cannot be seen as breaching the requirements of article 14, paragraph 3 (c), of the Covenant.

4.19 In addition, in the present case, the author's arrest lasted only two days (from 28 November 1996 to 30 November 1996), and only on 1 July 1997 was the author asked to sign a written undertaking that he would not leave the country.

⁷ *Hill v. Spain*, communication No. 526/1993, Views adopted on 2 April 1997, para. 12.4.

4.20 As to the length of the proceedings in court, the State party reiterates that the case was brought to court on 18 August 1997, ending on 12 October 2004, when the final decision in the case was adopted, thus totalling a period of 5 years and 4 months (excluding the period of approximately 11 months imputable to the author himself and another 10 months when the case was returned for additional pretrial investigation).

4.21 In addition, the examination of the case was adjourned on a number of occasions as the author or his lawyer had failed to appear in court. The resulting delay, attributable to the author was, according to the State party, equal to some 11 months.

4.22 Regarding the conduct of the authorities, the State party maintains that the court of first instance acted in an effective, diligent and prompt manner for the purposes of fair and thorough examination of the criminal case. While attempting to conduct the judicial proceedings within the reasonable time and observing the provisions of the Code of Criminal Procedure, the courts are also obliged to respect the rights of the parties, including the defence rights, in accordance with article 14, paragraph 1, of the Covenant. In this case, there were 11 witnesses. A number of adjournments of the trial were related to failure of the defendant and his representative to appear in court, while others were due to objective reasons, such as failure of a witnesses or a witnesses' or accused's representatives to appear, judge's and experts' sickness, etc. Nevertheless, the court of first instance used all possible available means to prevent further delays, e.g. on 4 December 2000 the court adopted the decision to bring witnesses who failed to arrive to the court's hearing; on 9 May 2001 the court adopted decision to fine witnesses who did not arrive and to bring them to the next court's hearing; on 16 September 2002 the court again adopted the decision to fine witnesses who failed to appear in court.

4.23 With regard to the examination of the case on appeal, the State party notes that the proceedings lasted for a year, however this period was due to objective reasons, i.e. the repeated failure of a witness to appear in court or sickness of the author representative.

4.24 The State party concludes that the criminal proceedings complied with the requirement of the "reasonable time" established in article 14, paragraph 3 (c), of the Covenant. According to it, the author failed to submit sufficient factual and legal argumentation to demonstrate the contrary, and his allegations under article 14, paragraph 3 (c), of the Covenant are non-substantiated. In addition, the author has failed to exhaust available domestic remedies. Thus, the communication must be declared inadmissible under articles 2 and 5, paragraph 2 (b), of the Optional Protocol.

Author's comments on the State party's observations

5.1 On 9 April 2010, the author rejected the State party's observations. As to the domestic remedies he notes that the availability, adequacy and effectiveness of remedies are to be evaluated not only in the light of the facts regarding the law and procedures related to the remedies as such, but in the context of the specific case. The adequacy of a remedy is, thus, to be determined with reference to its suitability for redressing the type of violation to which it applies, and with reference to the prospect to provide the relief. If in the circumstances of a given case, an individual is unable to meet the substantive requirements necessary for using a particular remedy or that a person lacks legal standing, that remedy is de facto unavailable.

5.2 The author further lists a number of exceptions excluding the necessity to exhaust a particular remedy and provides a general description of these exceptions. Thus, a remedy should not be exhausted if it is unduly prolonged or it is unlikely to bring effective relief. In this connection, the author refers to the notion of "existence of a 'reasonable prospect of

success”,⁸ as developed in the Committee’s case law. He further notes that effectiveness of a remedy is to be assessed in the light of the circumstances in advance of resorting to the remedy (ex ante), rather than in the light of the actual outcome of the case.⁹ He submits that the effectiveness of a remedy depends on the nature of the violation;¹⁰ the correlation between a remedy and the nature of the violation may be assessed by reference to the nature of the right violated, the gravity of violation, the suitability of the remedy to provide relief and the specific circumstances of the case. Facts that may indicate the ineffectiveness of a remedy include defects in the functioning of the judicial system, the existence of widespread or severe human rights violations, the remedy’s unsuitability to redress a specific type of violation and other factors indicating ineffectiveness of a remedy in general.¹¹

5.3 The author further refers to the case law of the European Court of Human Rights,¹² noting that only available and effective remedies should be exhausted¹³ and that it is incumbent on the States parties invoking non-exhaustion to demonstrate that the remedy in question was effective, available, and accessible.

5.4 The author further submits that article 6.272 of the Civil Code prescribes that damages arising from the mishandling of the criminal case are compensated only in case of unlawful conviction, or unlawful arrest as a measure of restraint, or unlawful detention, or in case of unlawful procedural measures of restraint or unlawful administrative arrest.

5.5 Further, the author explains that according to the Code of Criminal Procedure,¹⁴ a criminal case may be re-examined only in three situations – if new evidence or circumstances have emerged; if a person is convicted under an incorrect article, and in case the European Court of Human Rights or the United Nations Human Rights Committee has established that the respective criminal proceedings violated international human rights treaties. The author further elaborates extensively on the scope of these three situations.

5.6 The author further mentions that, according to article 228 of the Code of Criminal Procedure, a civil servant or other person in official capacity maybe held criminally liable for abusing his/her official authority or exceeding official powers if such acts cause serious damage to the State, an international public organization or a legal or a natural person. In this connection, the author maintains that if a victim proves that the pretrial investigation and the court proceedings were unreasonably prolonged, but fails to prove that judges and/or pretrial investigators committed a deliberate offence, a criminal case may not be re-examined.

5.7 In the light of the above, the author contends that, in the present case, exhaustion of domestic remedies as indicated by the State party, would unlikely bring effective relief to him, as recourse to such remedies would not result in the possibility to have the criminal case re-examined. The eventual finding of a violation, by the Committee, in this case would serve as grounds to have the criminal case re-examined.¹⁵

⁸ See, e.g., *De Dios Prieto v. Spain*, communication No. 1293/2004, decision on admissibility adopted on 25 July 2006, para. 6.3.

⁹ The author refers to *Gilberg v. Germany*, communication No. 1403/2005, decision on admissibility adopted on 25 July 2006, para. 6.5.

¹⁰ See, e.g., *Sankara v. Burkina Faso*, communication No. 1159/2003, Views adopted on 28 March 2006, para. 6.4.

¹¹ The author refers to communication No. 1403/2005, para. 6.5.

¹² *Handyside v. United Kingdom*, judgement of 7 December 1976, para. 27, Series A No. 24, p. 22.

¹³ See, e.g., *Vernillo v. France*, judgement of 20 February 1991, para. 45, Series A No. 198, pp. 11–12.

¹⁴ The author refers to article 444 of the Code of Criminal Procedure.

¹⁵ The author refers to article 456 of the Code of Criminal Procedure.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

6.3 The Committee notes the author's claim of a violation of his rights under article 14, paragraph 3 (c) as, according to him, his criminal case suffered from undue delay both at the stages of pretrial investigation and regarding the court proceedings. It also notes that the State party has challenged the admissibility of the communication for non-exhaustion of domestic remedies, given the author's failure to complain about the length of proceedings during the pretrial investigation or during the court trial and, subsequently, his failure to file a claim for compensation of damages incurred as a result of length of criminal proceedings before the courts of general jurisdiction within the statutory deadlines. The Committee further notes the author's objections as to the remedies to be exhausted, but also notes the numerous examples of domestic case law demonstrating an opportunity to submit such a claim before national courts as provided by the State party.¹⁶ It finally notes that the author has not advanced any reasons as to why he did not complain about the length of proceedings during his criminal proceedings, including at the appeal and cassation appeal stages, as well as for his failure to pursue the remedy in respect to these claims later on, before the ordinary courts. In the circumstances, the Committee considers that the author has failed to exhaust the available domestic remedies and declares the communication inadmissible under articles 2 and 5, paragraph 2 (b), of the Optional Protocol.

7. Therefore, the Human Rights Committee decides that:

(a) The communication is inadmissible pursuant to articles 2 and 5, paragraph 2 (b), of the Optional Protocol; and

(b) The present decision shall be communicated to the author and to the State party, for information.

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

¹⁶ See paragraphs 4.8–4.9.

**Q. Communication No. 1921/2009, *K.S. v. Australia*
(Decision adopted on 25 March 2013, 107th session)***

<i>Submitted by:</i>	K.S. (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Australia
<i>Date of communication:</i>	16 April 2009 (initial submission)
<i>Subject matter:</i>	Changes in legislation imposing penalties after commission of a crime
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issue:</i>	Alleged violation of article 15 (1) of the Covenant
<i>Article of the Covenant:</i>	15 (1)
<i>Article of the Optional Protocol:</i>	5, paragraph 2 (b)

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

Meeting on 25 March 2013,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 16 April 2009, is Mr. K.S., an Australian national born on 30 June 1966. He complains of a violation by Australia of article 15(1) of the Covenant. The Covenant and its Optional Protocol entered into force for Australia on 13 August 1980 and 25 September 1991 respectively. The author is not represented by counsel.

The facts as presented by the author

2.1 The author committed an offence on 8 November 1994 and was subsequently charged with wilful murder on 10 November 1994. He was convicted on 27 September 1995 and sentenced on 21 November 1995 to life imprisonment with a minimum of 17 years before being eligible for parole.¹ The Court ordered the sentence under section 40D2(d) of the Criminal Law Amendment Act 1994, which reads:

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

¹ Under section 282 of the Criminal Code and section 40D2(d) of the Criminal Law Amendment Act 1994.

The court that sentences a person to life imprisonment for wilful murder must set a minimum term of at least 15 years and not more than 19 years that the person must serve before being released on parole.

2.2 Section 40D2(f) of the Criminal Law Amendment Act required a court imposing a life sentence to set a parole eligibility date according to this formula irrespective of whether the offence occurred on, before or after the entry into force of the provisions of that Act. The Criminal Law Amendment Act 1994 entered into force only on 20 January 1995, before the sentencing of the author but after the commission of the offence.

2.3 Prior to 20 January 1995, the applicable law related to sentencing was the Offenders Community Corrections Act 1963, which established a minimum non-parole period of 12 years. Section 34 of that Act stipulates that a prisoner undergoing a sentence of life imprisonment imposed on or after the commencement date under section 282(a)(ii) or (c)(ii) of the Criminal Code, as was the case for the author, would be eligible to have a report on the prisoner's eligibility for parole furnished on the date of expiration of a period of 12 years after the prisoner was sentenced.

2.4 The author highlighted the fact that section 10 of the Sentencing Act 1995 reads:

If a statutory penalty for an offence changes between the time when the offender committed it and the time when the offender is sentenced for it, the lesser statutory penalty applies for the purposes of sentencing the offender.

2.5 In 2005, the author was informed of the possibility of challenging his past sentence on the basis of an incorrect application of the law. He sent a letter to the Department of Public Prosecutions (DPP) to challenge the sentence and the DPP agreed that there might have been an inconsistency. In March 2006, the author made an application to the Supreme Court of Western Australia for administrative re-sentencing under section 37 of the Sentencing Act 1995. Article 37 of the Sentencing Act 1995 reads:

If a court sentences an offender in a manner that is not in accordance with this Act or the written law under which the offence is committed, the court may recall the order imposing the sentence and impose a sentence that is.

2.6 On 17 March 2006, the Supreme Court, taking into account section 10 of the Sentencing Act 1995, altered the author's sentence from a 17-year to a 12-year minimum non-parole period. The DPP did not oppose the application at that time. As a result, the author was eligible for release on 20 November 2007.

2.7 The DPP later became aware of the provisions of section 40 D(2)(f) of the Criminal Law Amendment Act 1994. On 25 October 2007, the DPP sought leave before the Court of Appeal of Western Australia to set aside the decision of the Supreme Court.²

2.8 On 4 December 2007, the Court of Appeal of the Supreme Court of Western Australia set aside the Supreme Court's judgement and confirmed the original sentence of life imprisonment with a minimum 17-year non-parole period. The Court of Appeal concluded that there was no contention by either party that the original sentence was deficient or inappropriate, noting that "section 37(1) of the Sentencing Act empowers a court to recall an order imposing a sentence only in a case in which the offender was sentenced in a manner that was not in accordance with the Sentencing Act or the written law under which the offence was committed. The section had no application in this case in which the offender was properly sentenced under the then applicable legislation."³

² *The State of Western Australia v. Seel* [2007] WASCA 271.

³ *Ibid.*, p. 6.

The complaint

3. The author claims that the State party has violated his rights under article 15(1) of the Covenant by applying legislation that entered into force after the commission of the offence and that had the effect of extending the minimum years of imprisonment prior to being eligible for parole from 12 to 17 years.

State party's observations on admissibility

4.1 In a note verbale dated 14 October 2011 submitted after several reminders, the State party argues that the communication is not admissible on two grounds: the failure to substantiate that the author is a victim of a violation of article 15(1) of the Covenant; and the failure to exhaust domestic remedies.

4.2 In relation to the first claim, the State party argues that the author has not demonstrated that he has been a victim of any change in any of the terms — parole period or otherwise — of his sentence. The State party argues that the two parole regimes create different systems for assessing parole eligibility. The previous parole regime did not require the sentencing judge to give an indicative non-parole period but instead required a report to be furnished after 12 years to assess the prisoner's parole eligibility for parole, which might or might not then be granted. On the other hand, the second parole regime required the sentencing judge to indicate the non-parole period, which could not be before 15 years and which, in the present case, was 17 years.

4.3 The State party highlights the fact that the substantive change between the two parole regimes was that the first regime set the minimum period of imprisonment before consideration of parole at 12 years while the second regime set the minimum period at 15 years. However, in setting the minimum parole period at 12 years, this did not mean that the prisoner would be eligible for parole after 12 years, only that a report would be furnished to make an assessment of eligibility. To assess eligibility, the parole board must take into account a series of considerations, including such factors as the seriousness of the offence, the risk to the community and the prisoner's behaviour in custody.

4.4 The State party concludes that any possible difference in the duration of the author's custodial imprisonment under the first and second parole regimes is purely hypothetical. In referring to the comments of the original sentencing judge in 1995 as well as the re-sentencing judge in 2006, both of which underline the very serious nature of the author's offence, the State party argues that there is no evidence that the author's period prior to being granted parole would have been any shorter had the original sentencing judge applied the first parole regime. The author therefore cannot claim to be a victim of a violation of article 15(1).

4.5 Second, the State party submits that the author has not exhausted the appeal system in Australia. The State party argues that the author could have sought special leave to appeal to the High Court as a means to pursue his claim and, in not doing so, has not exhausted domestic remedies.

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

5.1 By letter of 22 May 2012, the author argues that at the end of both 12 and 17 years, the reality of parole existed and that to begin an assessment for parole after 12 or after 17 years is vastly different and not hypothetical. He concludes that the State party's submission that the two systems simply create two means of determining parole eligibility is inaccurate: the only difference between the two regimes is the time factor. By implication, the author has therefore substantiated that he is a victim of a violation of article 15(1) of the Covenant.

5.2 In relation to the second claim of inadmissibility, the author denies that there has been a failure to exhaust domestic remedies, due to the fact that the High Court of Australia is financially out of reach for him. However, he does not provide any further details in this regard.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

6.3 With regard to the requirement laid down in article 5, paragraph 2 (b), of the Optional Protocol, the Committee takes note of the State party's argument that the author has failed to exhaust domestic remedies as he did not seek special leave to appeal to the High Court of Australia against the decision of the Court of Appeal of Western Australia. The Committee notes the author's statement that that he did not have the finances to exhaust domestic remedies. The Committee recalls its jurisprudence according to which financial considerations do not, in general, absolve the author from exhausting domestic remedies.⁴ Accordingly, the Committee concludes that the requirements of article 5, paragraph 2(b), of the Optional Protocol have not been met.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

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

⁴ See: communication No. 397/1990, *P.S. v. Denmark*, decision of inadmissibility adopted on 22 July 1992, para. 5.4; communication No. 550/1993, *Faurisson v. France*, views adopted on 8 November 1996, para. 6.1; communication No. 1576/2000, *Yussuf N. Kly v. Canada*, decision of inadmissibility adopted on 27 March 2009, para. 6.4; communication No. 978/2001, *Dixit v. Australia*, decision of inadmissibility adopted on 28 March 2003, para. 8.3; communication No. 1012/2001, *Burgess v. Australia*, inadmissibility decision of 18 November 2005, para. 6.4; communication No. 1635/2007, *Tillman v. Australia*, views adopted on 18 March 2010.

**R. Communication No. 1938/2010, *Q.H.L. v. Australia*
(Decision adopted on 25 March 2013, 107th session)***

<i>Submitted by:</i>	Q.H.L. (represented by counsel, Kon Karapanagiotidis, Asylum Seeker Resource Centre)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Australia
<i>Date of communication:</i>	19 April 2010 (initial submission)
<i>Subject matter:</i>	Deportation to China
<i>Procedural issues:</i>	Insufficient substantiation; inadmissible <i>ratione materiae</i> ; non-exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to life, right to protection from cruel, inhuman or degrading treatment or punishment; right to be free from arbitrary detention; right to a fair trial; right to protection from interference with the family and home
<i>Articles of the Covenant:</i>	6, 7, 9, 14, (3 g); 17 alone and read in conjunction with 2 (1)
<i>Articles of the Optional Protocol:</i>	1; 2; 3; 5, paragraph 2 (b)

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

Meeting on 25 March 2013,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Q.H.L., a Chinese citizen, born on 21 May 1963. He alleges that he is a victim of a violation by Australia of articles 6, paragraph 1; 7; 9; paragraph 1; 14, paragraph 3 (g); and 17, all read in conjunction with article 2, paragraph 1, of the Covenant. He is represented by counsel, Kon Karapanagiotidis, of the Asylum Seeker Resource Centre.

1.2 On 21 April 2010, the Chair, acting on behalf of the Committee, requested the State party not to deport the author to China while his communication is under consideration by

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

the Committee. He noted that the request for interim measures may be reviewed once the State party's observations have been received.

Factual background¹

2.1 On 17 September 1999, the author arrived in Australia with a tour group and found employment in a restaurant. On 6 September 2005, he applied for a protection visa claiming that he had a well-founded fear of persecution on account of his political opinion supporting China's pro-democracy movement and his attempts to halt corruption.

2.2 The author submits that he had expressed his pro-democracy views in China and continues to be involved in pro-democracy activities in Australia. While working in Foshan, China, the author states that he publicly supported the 1989 pro-democracy movement in China and accused the managers of his work unit of corruption. He also encouraged colleagues to report corruption in the workplace. Because of these activities, the author was allegedly persecuted by government officials, who were also the managers at his workplace, who restricted his wages and ability to obtain housing and did not allow him to take an examination for the level 1 chef rating. The author was also demoted from his position as chef in the hotel restaurant to one in the staff canteen at a lower wage. After his arrival in Australia, the author was allegedly informed that his former employers wanted to put him to death because of his corruption allegations. The author nevertheless continued on a regular basis to send money and anti-government publications back to his family in China. The author submits that the money he sent was confiscated by the authorities, his telephone conversations with his family were monitored and members of the Public Security Bureau (PSB) visited his wife and warned her about the author's mailings of anti-government literature. Since December 2005, the author has attended monthly seminars during which participants discuss the Chinese Communist Party and listen to guest speakers who are party dissidents.

2.3 On 23 September 2005, the Department of Immigration and Citizenship (DIAC) refused to grant the author a Protection visa.² On 24 January 2006, the Refugee Review Tribunal (RRT) affirmed the Department's decision. The RRT did not accept that the author's fear of harm due to his support for the 1989 pro-democracy movement was well-founded. The Tribunal's refusal was based on several reasons, including that the author's anti-communist beliefs lacked credibility, in particular as he was not aware of the content of the anti-communist information he allegedly read or sent to his family, as he had only started to display interest in political activities in Australia after applying for a protection visa and as his application for a protection visa was delayed for six years. While accepting the author's claims that he supported the 1989 pro-democracy movement, had reported corruption in his workplace and was discriminated against by his work unit, it observed that this does not amount to persecution, as his political opinion was not a matter of interest to the Chinese authorities when he left China and due to the fact that even though the author's fear of harm from his former managers amounted to discrimination, it was not of such a nature or extent as to constitute persecution and that the author could seek protection from the State if his former manager sought to harm him. With regard to the author's difficulties finding government or government-sponsored employment, the Tribunal found that this did not amount to persecution as other employment opportunities were available in the private sector. The Tribunal stated that the author: "[...] may be briefly reprimanded or [...] detained and questioned by authorities in China because he sought asylum in Australia but not subjected to persecution solely for that reason." On 22 May 2006, the Federal

¹ The factual background has been established on the basis of the author's account and court documents.

² The author has not provided a copy of the DIAC decision refusing to grant him a Protection visa.

Magistrate's Court found that the RRT decision was free of jurisdictional error and summarily dismissed the case. On 21 November 2006, the Minister for Immigration and Citizenship refused to intervene in the author's case and did not allow him to put in a second Protection visa application. On 2 April and 14 August 2007, the Minister for Immigration and Citizenship reiterated his refusal to intervene in the author's case.

2.4 On 19 September 2007, the author attended the Chinese Consulate together with a representative of the International Organization for Migration (IOM) and presented his previous travel document issued by the Chinese Consulate in August 2005. The Chinese Consulate sought an explanation as to the delay in departure. In the course of providing an explanation, the IOM representative disclosed her own identity and that allegedly made the Chinese authorities aware of the author's attempts to seek asylum. On 20 September 2007, the DIAC sent a letter to the Chinese Consulate setting out support for the author's application for a travel document. On 10 October 2007, the author and an IOM representative attended the Chinese Consulate with a copy of the letter from the DIAC. Later the author received a call from the Consulate requiring him to provide a written declaration of his business in Australia for the last few years. On 11 October 2007, the author was advised by a case officer at the DIAC to tell the Chinese Consulate that he was awaiting a decision in respect of a skilled migration application. The IOM representative had suggested that he advise the Consulate that he had been seeking a spouse visa; both suggestions involved providing a fabricated story to the Chinese Consulate. On 26 October 2007, the author and counsel of the present communication attended the Chinese embassy explaining that he had been trying to obtain residency on employer sponsored grounds, but that he had been unable to do so and was anxious to return home. The Chinese officials told him that they did not believe his explanation and that he would not receive any travel documents until they were given an "honest explanation" of his activities in Australia.

2.5 On 17 August 2009, upon the instructions by the DIAC, the author returned to the Chinese embassy to request the issuance of travel documents to return to China. However, he was informed that no further travel documents would be issued to him. On 18 March 2010, the author received a letter from the DIAC transmitting a request from the Chinese Consulate to answer a series of questions, together with a written statement explaining to the Chinese Consulate his activities in Australia and why he had lodged an appeal with the Federal Magistrate's Court.

2.6 On 29 March 2010, the Minister for Immigration and Citizenship again refused to intervene in his case, and informed the applicant that his Bridging E Visa was set to expire on 18 April 2010.

The complaint

3.1 The author submits that despite the persecution he suffered in China due to his anti-communist and anti-corruption beliefs, and the fact that the DIAC appears to have alerted the Chinese Consulate of his asylum bid, the Australian Government has denied him asylum. He claims that he will come to harm at the hands of the authorities in China, because of his political beliefs and his status as a failed asylum seeker, which would lead to torture and imprisonment upon return to China. The author further claims that he would have difficulties finding employment in China because he did not leave the country with the permission of his employer and that this would amount to persecution.

3.2 The author further submits that he believes the actions of the DIAC have created an additional claim for him (sur place claim), unintentionally placing him at risk due to their

dealings with the Chinese Consulate.³ The author claims that this clearly demonstrates that he is a person of interest to the Chinese authorities and that they are suspicious of his activities in Australia. The author never answered the questions, as he believes that this would put him in even further danger. The author also submits that the Chinese Consulate will not issue him with travel documents, which leaves him technically stateless.

3.3 The author claims that if he were deported to China, he would be a victim of a violation of articles 6, paragraph 1; 7; 9, paragraph 1; and 17 all read in conjunction with article 2, paragraph 1, of the Covenant.

The State party's observations on admissibility and merits

4.1 On 24 November 2010, the State party submitted its observations on admissibility and merits. The State party adds to the facts as presented by the author and notes that the author was detained on 12 July 2005 and signed a voluntary removal request to return to China, which included his Chinese passport application. On 10 August 2005, the Chinese Consulate issued an Entry Permit which was valid for a period of three months. This travel document subsequently expired, after the author applied for a Protection Visa on 6 September 2005, which was refused. On 22 May 2006, the Federal Magistrates Court upheld the RRT decision. On 16 August 2007, the author indicated to an immigration official that he wished to voluntarily return to China but did not have the financial means to do so. He was assisted by an IOM representative in his application for a new passport. On 31 October 2007, an immigration official met with an officer of the Chinese Consulate. The Chinese Consulate advised that it required a statement from the author regarding the type of visa the author had applied for in Australia; the process undertaken, a statement as to why the author wanted to remain in Australia and the reasons why he did not use the travel document issued in 2005. The author was informed accordingly and was also advised that the immigration officer would not release any information to the Chinese Consulate without his consent. Between 2007 and 2010, with the author's consent, immigration officials liaised with the Chinese Consulate regarding the author's travel documents, and delays resulted from staffing changes in the Chinese Consulate and limits on processing of passports due to the Beijing Olympics. In January 2010, a written copy of questions from the Chinese consulate was provided to the author, in which he was required to explain what he had been doing in Australia for the past 10 years, why he had not departed Australia in 2005 and why he had lodged an appeal to the Federal Court. The author has not provided any answers to these questions.

4.2 The State party submits that the author failed to exhaust domestic remedies as he did not appeal the Federal Magistrates Court's decision of 22 May 2006 to the Federal Court and has not provided reasons as to why he did not pursue this remedy.

4.3 With regard to the author's allegation of a violation under article 6, paragraph 1, of the Covenant, the State party recalls that for purposes of article 2 of the Optional Protocol, a claim is an allegation supported by substantiating material and the author must establish a *prima facie* case. The State party notes that the author's communication relies on a brief chronology of events and does not claim that there is a real risk of death if he was returned to China. The State party submits that its interactions with the Chinese Consulate to obtain

³ The DIAC has written a letter (undated) to the author asking that the following questions be answered and sent to the DIAC, which will then pass them onto the Chinese Consulate: (a) You are required to write a statement explaining to the Chinese Consulate General what you have been doing in Australia during the past 10 years. (b) You are required to explain why you did not depart Australia in 2005, after the Chinese Government issued you with a temporary travel document. (c) The Chinese Consul General has requested that you explain why you lodged an appeal to the Federal Court.

travel documents are typical and there is no substantial evidence to suggest that there would be a sur place claim⁴ with a real risk that the author would be arbitrarily deprived of his life contrary to article 6. The State party therefore submits that the author has failed to provide sufficient evidence to substantiate his allegations under article 6.

4.4 The State party submits that, in the alternative, if the Committee finds the author's allegations admissible, they should be declared without merit. Country information provided to the domestic authorities attests that the Chinese authorities consider seeking to remain in Australia through a temporary protection application as commonplace behaviour rather than an expression of political dissent. It further indicates that the likely treatment of a failed Chinese asylum seeker would be an interview on arrival and possibly surveillance or detention for a short period. The State party submits that there is no substantial evidence that the author is of interest to the Chinese authorities as a result of his political activities in Australia. Furthermore, the domestic authorities found that the author's involvement in political activities was for the purpose of enhancing his Protection visa application. The State party further notes that the author's claim that his previous employer wanted to put him to death is not sufficient ground for him to fear for his life, in particular as the author could seek protection from the State if he had any difficulties with his former manager. The State party notes the findings of the RRT that although the behaviour of his previous employer may have been discriminatory, it did not constitute harm serious enough to amount to persecution under the 1951 Refugees Convention.

4.5 With regard to the author's allegation of a violation of article 7, the State party submits that the author has failed to sufficiently substantiate his allegation, as he did not establish a prima facie case with regard to his fears of persecution due to his pro-democracy activities in Australia and to his fear that the Chinese authorities may discover that he is a failed asylum seeker and will therefore be subject to imprisonment and torture.

4.6 In the alternative, the State party maintains that the author has not provided any new and pertinent information with respect to his political activities which has not already been considered by the domestic authorities and that there is no substantial evidence that the author is regarded as active or outspoken against the Chinese Government. The author therefore failed to establish a real risk that he would be subject to torture or cruel, inhuman or degrading treatment if returned to China.

4.7 With regard to the author's claim that he fears detention if the Chinese authorities discover that he sought asylum in Australia, the State party argues that its non-refoulement obligations under the Covenant only apply to situations where there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7.⁵ It therefore submits that the author's claim under article 9 should be declared inadmissible *ratione materiae* and insufficiently substantiated.

4.8 On the merits of the author's allegation under article 9, the State party recalls that the arbitrariness of the detention was defined as not merely being against the law but as including elements of inappropriateness, injustice and lack of predictability.⁶ The State party recalls the country information that was considered by the Refugee Review Tribunal,

⁴ See High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (HCR/IP/4/Eng/Rev.2).

⁵ See general comment No. 31 on the nature of the general legal obligation imposed on States parties to the Covenant, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III, para. 12.

⁶ See communication No. 305/1988, *Van Alphen v. the Netherlands*, Views adopted on 23 July 1990, para. 5.8.

in which it was noted that the author may be questioned, reprimanded or briefly detained by the Chinese authorities regarding his protection visa application; however such actions would not amount to persecution.

4.9 Concerning the author's claim under article 17, the State party notes that its non-refoulement obligations do not extend to breaches of article 17⁷ and therefore this part of the author's claim is inadmissible *ratione materiae*. It also notes that the Refugee Review Tribunal questioned the credibility of the author's political opinions and activities and was not satisfied that the author had sent dissident information to his family. On the merits, the State party submits that, during the hearings before the Refugee Review Tribunal, the author did not respond to the questions regarding why he believed that he was being monitored by the Chinese authorities and that there was insufficient evidence to substantiate his claim that the money he sent to his family was stolen by government officials.

4.10 The State party submits that the author's claims under articles 6, 7, 9 and 17 are inadmissible due to failure to exhaust domestic remedies and because they are not sufficiently substantiated. His claims under articles 9 and 17 do not engage non-refoulement obligations and are therefore inadmissible *ratione materiae*. In the alternative, the State party submits that the author's claims lack merit.

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

5.1 On 1 April 2011, the author submitted his comment on the State party observations on admissibility and merits. The author adds to the facts as presented and explains that on 10 June 2005, he received a Chinese travel document; however the travel document expired while he was awaiting the outcome of his Protection visa application from the Refugee Review Tribunal. With regard to the exhaustion of domestic remedies, the author reiterates that he has exhausted all available domestic remedies.

5.2 With regard to his claim under article 6, the author submits that his support for the 1989 pro-democracy movement and his endeavours to reduce corruption within the workplace resulted in official persecution in the form of wage restrictions and exclusion from housing programmes. While in Australia, the author continued to participate in pro-democracy seminars and rallies and he claims that there are multiple factors to suggest that these activities have come to the attention of the Chinese Government, as his mail and telephone calls were monitored. He notes that a Chinese official who defected to Australia in 2005 claimed that China had an extensive network of informants monitoring Falun Gong and other anti-Chinese activities. The author therefore claims that the request by the DIAC that the author provide the Chinese Consulate with a statement of his activities for the last 10 years implies that his pro-democracy activities have been noted by the Chinese authorities. The author also notes that the DIAC advised him to provide the Chinese Consulate with an explanation as to why he had lodged an appeal to the Federal Magistrates' Court, which shows that the Chinese Consulate suspects that he had filed an application for a Protection visa.

5.3 The author cites reports by human rights organizations on the broad application of the death penalty,⁸ as well as evidence suggesting that political dissidents face persecution

⁷ See general comment No. 31 on the nature of the general legal obligation imposed on States parties to the Covenant (see Note 10 above), para. 12.

⁸ See Amnesty International, <http://www.amnesty.org.au/adp/comments/25190>; and Guangze Wang, "The Mystery of China's Death Penalty Figures", available from www.hrichina.org.

upon return to China after failing to obtain asylum in Australia.⁹ The author notes that the country information on which the State party relies is outdated (1995) and a more recent report noted that it was not possible to comment definitely on how Chinese authorities would treat returnees to China who are failed asylum seekers. In addition to that, the author maintains that the actions of the IOM representative and the DIAC have disclosed his status as a failed asylum seeker to the Chinese Consulate, which has now requested details about his appeal to the Federal Magistrates' Court. In this regard, the author claims that the court procedures ensure the confidentiality of appeals relating to asylum applications and the instruction to provide information on this is in conflict with the Committee's general comment regarding the right to privacy.¹⁰ The author submits that the disclosure demanded by the Chinese Consulate demonstrates that he is a person of interest to them. The author claims that the country information, combined with the lack of transparency regarding the country's record of capital punishment, together with the disclosure by the DIAC of the author's migration history to the Chinese Consulate put him at risk of a violation of article 6 if he was deported to China.

5.4 With regard to his claim under article 7, the author refers to his arguments under article 6 and claims that his deportation to China would put him at real risk of torture, in breach of article 7.

5.5 With regard to article 9, the author submits that, as a necessary consequence of a breach to his rights under articles 6 and 7, he would also experience harm in the form of arbitrary arrest or detention. He notes that the RRT accepted that he may be detained upon his return to China. Referring to the Committee's general comment No. 31,¹¹ the author claims that references to articles 6 and 7 serve as examples of irreparable harm. He claims that, as the examples of other failed asylum seekers show,¹² it is probable that he would be detained indefinitely and in secret.

5.6 Concerning his claim under article 14, the author cites the State party's obligations under article 14, paragraph 3, in particular paragraph 3 (g), and submits that an honest answer to the questions put by the DIAC would require disclosure of his involvement in political activities which are deemed illegal under Chinese law. He therefore submits that his answers to the questions would form a confession of the crime under article 105 of the Chinese Criminal Code.¹³

⁹ Australian Refugee Rights Alliance, Draft Discussion Paper – Summary: Deportations to China: Australian RSD processes that return people to persecution, 2007.

¹⁰ General comment No. 16 (1988) on the right to respect of privacy, family, home and correspondence, and protection of honour and reputation (article 17), *Official Records of the General Assembly, Forty-third Session, Supplement No. 40 (A/43/40)*, annex VI, para. 10; HR1/GEN/1/Rev.1, p. 23.

¹¹ See general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant (see Note 10 above), para. 12.

¹² Australian Refugee Rights Alliance, Draft Discussion Paper: Deportations to China: Australian RSD processes that return people to persecution (see Note 15 above).

¹³ Article 105, of the Chinese Criminal Code: Ringleaders who organize, scheme for or carry out subverting the State's political power and overthrowing the socialist system and those whose crimes are severe shall be sentenced to life imprisonment or fixed-term imprisonment of not less than ten years. Active participants shall be sentenced to fixed-term imprisonment of not less than three years and not more than ten years. Other participants shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention, public surveillance or deprivation of political rights. Whoever incites subverting the State's political power and overthrowing the socialist system through starting a rumour or slander or by other means shall be sentenced to fixed-term imprisonment of not more than five years, criminal detention, public surveillance or deprivation of political rights.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

6.3 The Committee notes the State party's argument that the author failed to exhaust domestic remedies pursuant to article 5, paragraph 2 (b), of the Optional Protocol, as he did not appeal the Federal Magistrates' Court's decision to the Federal Court and has not provided any reasons as to why he did not pursue this remedy. The Committee notes that the author has not provided any information contesting this argument. In the absence of any information by the author on the reason why he did not appeal to the Federal Court, the Committee considers that he failed to exhaust all available and effective domestic remedies pursuant to article 5, paragraph 2 (b), of the Optional Protocol and therefore declares the communication inadmissible.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (b) of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

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

Ringleaders or those whose crimes are severe shall be sentenced to fixed-term imprisonment of not less than five years.

**S. Communication No. 1943/2010, *H.P.N. v. Spain*
(Decision adopted on 25 March 2013, 107th session)***

<i>Submitted by:</i>	H.P.N. (represented by counsel, Didier Rouget)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	3 February 2010 (initial submission)
<i>Subject matter:</i>	The author's conviction for the same offence for which he had allegedly already been convicted in the past
<i>Procedural issues:</i>	Failure to exhaust domestic remedies; failure to substantiate allegations
<i>Substantive issues:</i>	Prohibition of cruel treatment; rehabilitative aim of sentencing; right to have a conviction and sentence reviewed by a higher tribunal; prohibition of double jeopardy
<i>Articles of the Covenant:</i>	Articles 7, 10 and 14 (paras. 5 and 7)
<i>Articles of the Optional Protocol:</i>	Articles 2 and 5 (para. 2 (b))

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

Meeting on 25 March 2013,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. H.P.N., a French national born on 6 January 1948. He claims to be the victim of a violation by Spain of his rights under articles 7, 10 and 14 (paras. 5 and 7) of the Covenant. He is represented by counsel, Mr. Didier Rouget. At the time of the communication's submission, the author was being detained in Puerto III Prison in Cádiz.

The facts as submitted by the author

2.1 The author is a member of Euskadi Ta Askatasuna (ETA). He was arrested by the Spanish authorities on 2 April 1990 in Santiponce (Seville) and charged with involvement in numerous attacks connected to the ETA organization. He was subsequently tried and

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kaelin, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabian Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

convicted, on different dates, on 26 charges for which he received prison sentences totalling 5,145 years. Among these was an 11-year sentence handed down on 18 December 1990 by the National High Court (*Audiencia Nacional*) on the charge of membership of an armed group. Under the 1973 Criminal Code in force at the time the offences were committed, the maximum term of sentence execution could not exceed 30 years. This limit, combined with the sentence-reducing credits provided for by law, meant that the author should have been freed at the end of 2009.

2.2 A total of 64 ETA members serving prison sentences in excess of 30 years were freed between 1996 and 2004 in application of the aforementioned legal provision, generating a huge public outcry. Faced with this situation, the executive and judicial branches of Government announced that they would use all possible means to prevent the release of prisoners sentenced in similar circumstances. The author alleges that the Minister of Justice stated that he would do everything in his power to bring new charges against these persons and thus prevent their release, in view of their continuing ties with the ETA organization.

2.3 On 26 November 2002, the French authorities searched a house in Bergerac (Dordogne, France), which had been occupied by Mr. J.A.O.G. and Mr. A.M.G. These persons had been arrested and charged with planning acts of terrorism and other offences connected to ETA. During the search, the authorities found a letter apparently written by the author from prison and addressed to these two members of the ETA cell in France. As a result, Madrid Investigating Court No. 5 instituted proceedings against the author on charges of “membership of an armed group” and “conspiracy or intent to commit terrorist offences”.

2.4 On 2 February 2007, the National High Court acquitted the author on the charge of “conspiracy or intent to commit terrorist offences” but ruled that the author had re-established links with the ETA leadership. It therefore found him guilty of the offence of “membership of an armed group”, with the aggravating circumstance of recidivism, and sentenced him to an additional prison term of 11 years. The National High Court ruled that, even if against his will, the author’s detention in 1990 had interrupted his active involvement with ETA. However, he had managed to re-establish his links with the organization in 2001. According to the judgement, the seized letter showed that the author had resumed his active involvement with ETA, playing an active part in the organization and inciting acts of terrorism using car bombs in 2001 and 2002.

2.5 The author filed an appeal in cassation with the Supreme Court, citing a violation of criminal law and constitutional provisions and claiming that the National High Court’s judgement violated the fundamental principles of legality in criminal proceedings in connection with the *non bis in idem* rule, as the Supreme Court’s case law established that membership of an armed group was an offence of a continuing nature that was not limited in time. Consequently, in order for the same offence to have been committed again, the period of membership of the armed group would need to have been ended and a new decision to join the organization subsequently taken. This did not apply in his case since he had not ceased to be a member of ETA. The letter seized in France on which the new charge was based could be viewed only as material evidence of the associative links for which he had already been convicted. The author also claimed that the main purpose of the new charge was to prevent his release, and that his right to be presumed innocent, his right to a defence and his right to a fair trial had been violated as he had been convicted without sufficient evidence.

2.6 On 2 November 2007, the Supreme Court dismissed the appeal in cassation. According to the judgement, which the author provided, the Supreme Court observed that the offence of membership of an armed group might be considered to consist of three strata: a primary stratum, requiring the existence of an armed group or terrorist organization; a

subjective stratum, requiring the intent to belong to or join this group on a permanent basis or for an indefinite period, during which the militant agrees to contribute to the ends pursued by the illegal group; and a material or objective stratum, entailing carrying out or being able to carry out collaborative activities which help the group to achieve these ends. On this basis, in line with the National High Court's reasoning, the Supreme Court found that upon the author's admission to prison there had been a physical rupture of his association with ETA and that this rupture was evident for some time. This "physical" or material rupture was followed by the judicial rupture associated with the conviction for membership of an armed group which interrupted a period of association with ETA for the author. From the legal point of view, this meant the end of a period of criminal activity within the group. The Supreme Court adds that the author's intent, as manifested in acts of cooperation and collaboration, to maintain his association with the terrorist organization after being convicted of membership constituted an additional transgression and did not involve a violation of the *non bis in idem* principle. Rather, the author committed another offence of the same nature through different acts or activities that had not until then been prosecuted. The Supreme Court also found that the author had had the opportunity to defend himself on all the charges, which were based on objective facts, not on personal considerations or considerations underpinned by political reasons, and that the evidence was valid and proved that he was a member of ETA. According to the Supreme Court, the letter seized in France made reference to other earlier correspondence, demonstrating that the author's contact with ETA was not isolated and that he had managed to re-establish a stable channel of active communication with the organization. It therefore upheld the author's conviction on the charge of membership of an armed group.

2.7 On 2 January 2008, the author applied to the Constitutional Court for *amparo* against the judgements issued by the National High Court and the Supreme Court on 2 February and 2 November 2007, respectively, alleging violations of his right to effective judicial protection, his right to a defence, his right to be informed of the charges against him, his right to a public hearing subject to all legal safeguards and his right to equality before the law and also of the principles of legality and legal certainty. The application made an opening reference to violations of the latter two principles, on the basis that the aim of custodial sentences and security measures should be rehabilitation and social reintegration.¹

2.8 On 18 February 2009, the Constitutional Court dismissed the author's application for *amparo* as it failed to discern in his case the special constitutional significance that is a condition of admissibility pursuant to article 50.1 (b) of the Organic Act on the Constitutional Court.

2.9 The author claims that he has exhausted all domestic remedies and adds that there is no specific domestic remedy for challenging the cumulative sentencing system and the violations of articles 7 and 10 of the Covenant to which this system gives rise.

The complaint

3.1 The author claims that the State party breached its obligations under articles 7, 10 and 14 (paras. 5 and 7) of the Covenant.

3.2 The State party's cumulative sentencing system allows for persons to be sentenced notionally to hundreds of years' imprisonment, although in practice the maximum term of imprisonment permitted under the Criminal Code in force in 1995 was 40 years. This

¹ However, the Committee notes that these allegations were not substantiated subsequently in the course of the *amparo* appeal.

system constitutes inhuman treatment and is in breach of articles 7 and 10 of the Covenant. In accordance with the Covenant, no one should be subjected to cruel, inhuman or degrading treatment or punishment and the essential aim of the penitentiary system should in all cases be the reformation and social rehabilitation of offenders. Although in the final analysis cumulative sentences are purely notional, a total sentence that exceeds a person's life expectancy has a serious impact on a detainee's psychological health and keeps them in a state of mental despondency devoid of future prospects, this being at odds with a system that should be seeking to achieve offenders' effective social reintegration.

3.3 The author maintains that the State party violated article 14, paragraph 5, of the Covenant, in that it denied him the right to appeal and to have a higher tribunal review the conviction and sentence handed down by the National High Court in 2007. Organic Act No. 19/2003, amending Organic Act No. 6/1985 on the judiciary, does not fully guarantee access to a second hearing in criminal cases. Sentences imposed by the National High Court can be appealed in cassation before the Supreme Court. However, access to the Supreme Court is restricted as the Court is not able to review every element considered in the proceedings that resulted in the first instance judgement. Thus, since there was no possibility of appealing against the first instance judgement, the State party violated article 14, paragraph 5, of the Covenant.

3.4 In relation to article 14, paragraph 7, the author claims that after his arrest in 1990, as a member of ETA he was convicted for the offence of "membership of an armed group". However, in 2005, while in prison, the author was again charged with the same offence and on 2 February 2007 he was convicted by the National High Court. The author maintains that he could not be convicted a second time for belonging to ETA and that the National High Court's 2007 judgement constitutes double punishment in violation of the *non bis in idem* principle established in article 14, paragraph 7, of the Covenant. In accordance with the Supreme Court's case law,² membership of an armed group does not cease with the commission of an offence but is maintained by the author's criminal intent for as long as the unlawful situation created continues, the offence being of a continuing nature that is not limited in time. The offence ends either when the perpetrator decides to put an end to the unlawful situation by leaving the armed group or upon his expulsion from it. Thus, for a new offence to be found without violating the *non bis in idem* principle, the period of membership of an armed group would need to have been ended and a new decision to rejoin the group subsequently taken. The author further alleges that the aim of the new charge against him was to prevent his release. This explains why the judicial proceedings were initiated in 2005, whereas the events on which the new criminal trial was based, that is, the seizure of the letter in France, occurred at the end of 2002. The author denies being the writer of the letter dated 1 June 2001 that had allegedly been addressed to ETA members. He points out, moreover, that for a new offence to have been committed, specific concrete activities, which in his case did not exist, would have to have been carried out. A simple expression of ideological support for an organization such as ETA, from within a prison cannot constitute the basis for a charge of membership of the organization, and does not in itself provide evidence of this offence.

State party's observations on admissibility

4.1 On 14 July 2010, the State party submitted its observations on admissibility to the Committee and asked for the communication to be declared inadmissible under articles 5,

² The author refers to Supreme Court judgements No. 1117/2003 of 19 July and No. 149/2007 of 12 February.

paragraph 2 (b), 3 and 2 of the Optional Protocol on the grounds of failure to exhaust domestic remedies and manifest lack of substantiation, respectively.

4.2 Domestic judicial remedies were not exhausted, as the application for *amparo* lodged with the Constitutional Court was dismissed owing to an inexcusable omission attributable to a lack of procedural expertise on the part of the author, in that he failed to explain in his petition the special constitutional significance of the application.

4.3 In relation to articles 7 and 10 of the Covenant, the State party likewise argues that the author did not exhaust domestic remedies. In neither the appeal in cassation nor the application for *amparo* was any reference made to the cumulative sentencing system, nor did the author state that the system constitutes cruel, inhuman or degrading treatment. Furthermore, these allegations are not sufficiently substantiated, as the author limits himself to making a general reference to the cumulative sentencing system without specifying which facts allegedly constituted violations. The 1973 Criminal Code, under which the author was tried for the offences committed prior to his arrest and imprisonment in 1991, established a cumulative sentencing system, although in practice the maximum term of imprisonment allowed was 30 years. Subsequently, the 1995 Criminal Code maintained this system but raised the maximum prison term allowed to 40 years. The State party further adds that, in another procedure initiated by the author, the Supreme Court issued a ruling on the execution of cumulative sentences and the criterion for determining the date of definitive sentence completion, taking account of ordinary and extraordinary sentence reductions earned through work.³ The application of this ruling was being queried before the Constitutional Court by the author, as well as by others, at the time of submission of the State party's observations.⁴ However, these issues were addressed neither in the judgement issued by the National High Court nor in the Supreme Court's 2007 judgement, both of which are relevant to the facts of this communication. The author's attempt to challenge the term of imprisonment to which he had previously been sentenced by various final judgements of the National High Court handed down between 1991 and 1996 is therefore unjustified. These sentences are cumulative in accordance with the 1973 Criminal Code and their execution is unconnected to the trials at the origin of this communication.

4.4 In relation to the allegations concerning article 14, paragraph 5, of the Covenant, the State party likewise observes that domestic remedies were not exhausted, since none of the appeals filed by the author challenged the fact that the conviction and sentence handed down by the National High Court could not be reviewed by a higher tribunal, as provided in article 14, paragraph 5, of the Covenant. In addition, this allegation is not sufficiently substantiated and is limited to generic references to alleged restrictions on the Supreme Court's powers of review in appeals in cassation, without specifying which facts or allegations were not taken into consideration and reviewed by the Supreme Court when it heard the appeal in cassation brought before it. In fact, in the appeal in cassation filed by the author the Supreme Court was able to review the National High Court's judgement on the basis of the facts, evidence and law. The State party recalls that the Committee has declared communications relating to violations of article 14, paragraph 5, of the Covenant inadmissible on grounds of insufficient substantiation.⁵

³ The State party refers to judgement No. 197/2006 of 28 February.

⁴ The State party refers to applications for *amparo* Nos. 893/2006, 5560/2006, 7325/2006, 7991/2006, and 10112/2006.

⁵ The State party refers to the Committee's case law in relation to communications No. 1305/2004, *Villamon Ventura v. Spain*, decision on admissibility adopted on 31 October 2006; No. 1489/2006, *Rodríguez Rodríguez v. Spain*, decision on admissibility adopted on 30 October 2008; and No. 1490/2006, *Pindado Martínez v. Spain*, decision on admissibility adopted on 30 October 2008.

State party's observations on the merits

5.1 On 16 November 2010, the State party submitted its observations on the merits of the communication and asked the Committee to declare the communication inadmissible or, alternatively, that there has been no violation of the Covenant.

5.2 The State party reiterates the arguments put forward with regard to the admissibility of the communication. It also observes that the author was arrested on 2 April 1990 in a car laden with 300 kilograms of explosives with which he was planning to blow up the central police station in Seville and, furthermore, that he was arrested on suspicion of being responsible for the commission of serious offences, including attacks that killed 82 people and injured more than 200 others. He was convicted of offences including murder, attempted murder, attempted homicide, serious injury, injury, terrorism, mayhem, attack, attack resulting in death, weapons storage, membership of an armed group, falsification of identification documents, falsification of official documents, replacement and falsification of car licence plates, unlawful use of a motor vehicle and public use of an assumed name. The seizure of the letter in Bergerac was carried out by the French police in the presence of a French investigating judge and in compliance with all procedural safeguards. Although the author denied having written and sent this letter, expert tests carried out and the details it contained, which included a description of the prison, plans and diagrams, left no doubt as to its authorship.

5.3 In relation to articles 7 and 10 of the Covenant, the National High Court judgement that gave rise to this communication sentenced the author to 11 years' imprisonment for the offence of membership of an armed group, without addressing any issue connected to the sum of his previous convictions. Neither the 1973 Criminal Code, under which the author was tried initially, nor the 1995 Criminal Code allow for life imprisonment. In the case of multiple convictions for a range of offences, various rules have been established to limit the maximum period of sentence execution. For example, article 70.2 of the 1973 Criminal Code stated that the maximum period of sentence execution could be no more than three times the length of the longest sentence handed down and subject to an absolute limit of 30 years' imprisonment. Thus, any person in the author's situation knows from the outset that, at most, they will have to serve 30 years in prison, irrespective of the number of offences committed. The Supreme Court's interpretation of this article is very broad, excluding the possibility of cumulating sentences only for acts committed after a guilty verdict has been returned for prior offences. Furthermore, as established in the Constitution and the General Prisons Act, the prison system is designed to achieve the rehabilitation and reintegration of offenders.

5.4 With regard to the author's claims in relation to article 14, paragraph 5, the State party points out that the rules governing appeals in cassation were subject to interpretation by the Constitutional Court in part on the basis of views previously issued by the Committee. As a result, appeals in cassation against convictions satisfy the requirements of article 14, paragraph 5, of the Covenant. The higher tribunal is able to verify whether the first instance proceedings were conducted correctly, with regard not only to the application of the law but also to the assessment of the evidence. In the author's case, the Supreme Court reviewed the conviction handed down by the National High Court on 2 February 2007 in great depth, with regard both to the facts and evidence and the application of the law. The author's allegations on this point are generic. They challenge the State party's legal system in the abstract but make no specific mention of any question of fact or evidence that could not have been raised before the higher tribunal.

5.5 With regard to the author's claims in relation to article 14, paragraph 7, the State party observes that its legal system prohibits in criminal matters both substantive double jeopardy, which prohibits the prosecution of the same person on more than one occasion on the same grounds for the same acts, and procedural double jeopardy, which prohibits

duplication of criminal proceedings where the “triple identity” criteria (i.e. same parties, same facts, same grounds) are met. The author was convicted of criminal acts carried out between the date on which he joined ETA in 1978 and the date of his arrest in 1990. After his imprisonment in 1990, he became disassociated from ETA and was assigned to the prison rehabilitation programme. From that date until 2002 no sign that the author had any contact with ETA was detected. The National High Court’s judgement of 2 February 2007, which was upheld by the Supreme Court on appeal, convicted the author on the grounds that he managed to re-establish contact with the ETA leadership, issuing instructions and recommendations about its criminal strategy from inside the prison in which he was being held. More specifically, the State party’s judicial bodies deduced from the letter seized by the French authorities on 26 November 2002 that the author had reactivated his membership of ETA, that he was advising the ETA leadership on strategic lines of action, potential targets for terrorist attacks and weapons to be used, and that ETA leaders were receiving this advice and even indicating that they planned to follow the lines of action he was proposing. Thus, the existence of acts completely separate to those tried between 1991 and 1996 was proven in the trial, with the author being convicted on a new offence of membership of an armed group.

Author’s comments on the State party’s submission

6.1 On 18 April 2011, the author submitted his comments on the State party’s observations on the admissibility of the communication.

6.2 The author reiterates that he exhausted domestic remedies in relation to all his allegations with the submission of the application for *amparo* that was dismissed by the Constitutional Court on 18 February 2009. The application’s dismissal cannot be invoked as grounds to claim that he did not exhaust domestic remedies. The fact that the Court failed to appreciate the special constitutional significance of the *amparo* application and the substantiation he provided regarding the violation of his fundamental rights cannot be a ground of inadmissibility for the Committee, since the Court’s decision exhausts all domestic remedies, and, furthermore, provides evidence of a violation of his right to an effective judicial remedy. The author adds that the State party’s legal framework lacks a system of specific appeals in accordance with articles 7 and 10 of the Covenant, and that the violation of these rights is a consequence of a violation of the system of guarantees for litigants, the right to a defence, the principle of equality before the law and, in particular, the right to freedom. In his case, the violation of these rights resulted in unequal treatment, which in turn constituted cruel, inhuman and degrading treatment. Lastly, he maintains that all his allegations in relation to articles 7, 10 and 14 (paras. 5 and 7) of the Covenant were invoked at the domestic level and/or were the basis of both the appeal in cassation filed with the Supreme Court and the application for *amparo* filed with the Constitutional Court.

6.3 The author reiterates that the proceedings that gave rise to the second criminal trial on the charge of membership of an armed group were not a response to an assumed criminal offence but a bid to prevent his release; that it was proven in the trial neither that he was the author of the letter seized by the French authorities nor that the letter had come into the hands of ETA’s leaders; that the procedural safeguards established in the French legal system were not fully respected when this document was seized or impounded; and, in addition, that evidence gathered in foreign countries should be evaluated in accordance with prevailing legal principles in the State party and for this reason the evidence submitted should be declared invalid. Perusal of the records kept by the French police officers involved in the seizure formalities was not sufficient to substantiate the facts on which the charge was based or to give the documents evidentiary value. On the other hand, the court’s refusal to allow these officers to give direct evidence constituted a violation of the right to defence and the principles of adversarial procedure and immediacy. The author also maintains that the State party took other arbitrary measures to prolong his detention.

6.4 The author reiterates his allegations in relation to articles 7 and 10 of the Covenant. He affirms that the complaint and prosecution brought against him by the National High Court were part of a series of measures taken by the State party in an attempt to transform a criminal law system predicated on offender rehabilitation and reintegration into one based on the “victim satisfaction” model, particularly in cases considered to be terrorist cases. To this end, the new Criminal Code of 1995 extended the maximum sentence from 30 to 40 years’ imprisonment, established that sentences must be served in full, and eliminated sentence-reducing incentives in the form of prison credits. As these provisions could not be applied to prisoners who, like the author, were tried under the 1973 Criminal Code, the authorities sought to justify prolonged prison terms by refusing requests to have all prior convictions consolidated or combined and thus extending the maximum prison term served, reinterpreting in a manner contrary to practice at that time the rules for the application of prison credits in place for the past 12 years, and instigating new criminal proceedings in order to prevent the release of those under investigation. He maintains that in another procedure he initiated in relation to the execution of sentences previously handed down for other offences, the National High Court and the Supreme Court denied his request that two sentences, each for 30 years, should be consolidated so that he would have to serve only the maximum term of 30 years established under the 1973 Criminal Code. The Supreme Court also ruled that sentence-reducing prison credits should be calculated on each individual conviction and not on the maximum term of sentence execution of 30 years.⁶ This situation, coupled with the author’s classification as a category I prisoner and inclusion in the FIES list of prisoners placed under special observation, the fact that his sentence had been served in solitary confinement since his admission to prison in 1990, the constant transfers between prisons with the aim of making stability impossible and his separation and estrangement from his family and social environment, constituted cruel treatment and impeded his social rehabilitation, in violation of articles 7 and 10 of the Covenant.

6.5 The author reiterates that there is no second instance tribunal competent to review or challenge facts considered proven in the National High Court’s judgement in application of the principles of objectivity, equality between the parties and neutrality, and thus capable of assessing whether the sentence applied was fair and commensurate. Therefore, the State party’s legal system does not respect the right recognized in article 14, paragraph 5, of the Covenant.

6.6 The criminal proceedings brought against the author and the sentence handed down by the National High Court and upheld by the Supreme Court on 2 February and 2 November 2007, respectively, constituted a violation of article 14, paragraph 7, of the Covenant. The author reiterates that he had already been convicted of the offence of membership of an armed group, that he was serving his sentence and his term had not been discharged, and that for this reason a new conviction for the same act constituted criminal double jeopardy. It was demonstrated in the criminal trial that his membership of ETA was continuous and permanent from before his arrest and throughout his time in prison. For this reason, a new charge for a “new membership” of ETA was not possible. Although the Central Intelligence Unit’s report simply notes that the author was linked to ETA between 1999 and 2004 while in prison, the author contends that it should be borne in mind that the same report also states that ETA members do not stop being ETA militants, or considering themselves as such, simply because they have been arrested and admitted to prison. The prison regime and prisoner category to which he was assigned upon admission to prison were based on his membership of an armed group. Furthermore, the State party’s observations state that the author was convicted for “collaborating with the terrorist group

⁶ The communication refers to the National High Court’s decision of 26 April 2005 and Supreme Court judgement No. 197/2006 of 28 February.

in acts completely separate to those for which he was sentenced in the 1990 and 1996 judgements". However, he was convicted not for collaborating but for membership, for which there is no legal justification.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

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

7.3 The Committee notes the State party's arguments that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol because the author did not exhaust domestic remedies since his application for *amparo* was dismissed by the Constitutional Court owing to an inexcusable omission attributable to the author, in that he failed to explain in his petition the special constitutional significance of the application. The Committee also notes the author's claims that the fact that the Constitutional Court did not appreciate the special constitutional significance of his application for *amparo* and the substantiation he provided regarding the violation of his fundamental rights cannot be invoked before the Committee as a failure to exhaust domestic remedies. The Committee considers that the Constitutional Court's dismissal of the application for *amparo* for the reasons stated does not mean that the author failed to satisfy the formal requirements established by law for the submission of such applications and does not, therefore, constitute an obstacle to admissibility with regard to article 5, paragraph 2 (b), of the Optional Protocol.

7.4 The Committee notes the author's arguments that, because of the cumulative sentencing system established in the 1973 Criminal Code, he was sentenced on various charges to a total of 5,145 years in prison and that, although this cumulative sentence is notional and in practice the maximum prison term was 30 years (40 years under the current Criminal Code), a total sentence that exceeds a person's life expectancy has a serious impact on a detainee's psychological health, is at odds with a system that should be seeking to achieve the prisoner's effective social rehabilitation and, coupled with the conditions of the author's detention and the criminal proceedings brought against him in 2007, constitutes discriminatory treatment with respect to the law and a violation of articles 7 and 10 of the Covenant. The Committee also notes the author's assertion that these arguments formed the basis of his legal argument when he complained to the judicial authorities of violations of the system of guarantees for litigants, his right to a defence, the principle of equality before the law and, in particular, the right to freedom.

7.5 The Committee notes that in the criminal proceedings against the author which resulted in the Supreme Court judgement of 2 November 2012, the Supreme Court limited itself to establishing criminal liability with regard to the offences of membership of an armed group and conspiracy or intent to commit terrorist offences. Since no copy of the appeal in cassation is included in the case file, the Committee cannot ascertain whether the allegations related to articles 7 and 10 of the Covenant were raised by the author. The Committee also notes that the statement of grounds for the *amparo* application filed with the Constitutional Court did not include the allegations that the author presented to the Committee in relation to articles 7 and 10 of the Covenant and contained only a simple opening reference to possible violations arising from the fact that custodial sentences and security measures should be predicated on offender rehabilitation and social reintegration

which was not developed in the course of the appeal. Furthermore, according to the information contained in the case file, some of these allegations relate to judicial proceedings initiated by the author which are separate to those at the origin of this communication. Therefore, the Committee considers that domestic remedies were not exhausted and declares the allegations submitted in relation to articles 7 and 10 of the Covenant inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

7.6 The Committee notes the author's claims that the State party's legal system does not guarantee access to a second criminal hearing and does not guarantee that convictions and sentences handed down by the National High Court are submitted to and reviewed fully by a higher tribunal, since in appeals in cassation the Supreme Court is not vested with full powers to review every element considered in the proceedings and set forth in the first instance judgement with regard to both the facts and the application of the law.

7.7 The Committee notes that the Supreme Court considered the conviction and sentence handed down by the National High Court in depth in its judgement of 2 November 2007 and concluded that there was sufficient evidence to uphold the assessment of the facts made at first instance; that the evidence submitted was valid and that the author's right to a defence was not impaired; and that his conviction on the charge of membership of an armed group was properly obtained. The Committee also notes that the author has not indicated which specific aspects of his appeal were not subject to review because of the limitations of the appeal in cassation. Thus, the Committee considers that the claims under article 14, paragraph 5, of the Covenant have been insufficiently substantiated for purposes of admissibility and concludes that they are inadmissible under article 2 of the Optional Protocol.

7.8 The Committee notes the author's arguments that the conviction and sentence handed down by the National High Court on 2 February 2007 on the charge of membership of an armed group constitute a violation of article 14, paragraph 7, of the Covenant, since the National High Court had already sentenced the author to 11 years' imprisonment for this offence on 18 December 1990 and the author was still serving this sentence when he was sentenced again; that a new conviction for this offence would be possible only if the author had terminated his ETA membership and subsequently taken a new decision to rejoin the group on an active basis; and that this was never proven in the trial since, contrary to the contention of the Spanish authorities, before being arrested and throughout his time in prison the author was at all times actively associated with ETA. The Committee also notes the State party's argument that, after his admission to prison in 1990, the author became disassociated from ETA; that until 2002 no sign that the author had any contact with this organization was detected; that in the criminal trial heard before the National High Court in 2007, it was proven that the author had re-established his active membership of ETA; and that, therefore, in the sentence handed down by the National High Court on 2 February 2007 on the charge of membership of an armed group, the author was tried for new offences distinct to those tried in 1990.

7.9 The Committee notes that the allegations made under article 14, paragraph 7, relate mainly to the evaluation of the facts and evidence made by the National High Court and the Supreme Court. The Committee recalls its case law, according to which it is incumbent on the courts of States parties to evaluate the facts and evidence in each specific case, or the application of domestic legislation, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice.⁷ The

⁷ See communications No. 1616/2007, *Manzano and others v. Colombia*, decision adopted on 19 March 2010, para. 6.4, and No. 1622/2007, *L.D.L.P. v. Spain*, decision adopted on 26 July 2011, para. 6.3.

Committee has studied the materials submitted by the parties, including the Supreme Court's ruling on the author's appeal in cassation. The Committee is of the opinion that these materials do not show that the criminal proceedings against the author were flawed. The Committee considers, therefore, that the author has failed to sufficiently substantiate his claim of a violation of article 14, paragraph 7 (a), and that the communication is therefore inadmissible under article 2 of the Optional Protocol.

8. The Committee therefore decides:

(a) That the communication is inadmissible under article 2 and article 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be transmitted to the State party and to the authors.

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

**T. Communication No. 1962/2010, S.N.A. v. Cameroon
(Decision adopted on 25 March 2013, 107th session)***

<i>Submitted by:</i>	S.N.A. (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Cameroon
<i>Date of communication:</i>	7 February 2008 (initial submission)
<i>Subject matter:</i>	Arbitrary arrest and detention of a person accused of belonging to a separatist movement
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Right of self-determination, prohibition of torture and cruel and inhuman treatment, right to liberty and security of person, respect for the inherent dignity of the human person, prohibition of arbitrary or unlawful interference with privacy, freedom of expression
<i>Articles of the Covenant:</i>	Articles 1, 7, 9, 10, 17 and 19
<i>Article of the Optional Protocol:</i>	Article 5, paragraph 2 (b)

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

Meeting on 25 May 2013,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is S.N.A., a Cameroonian citizen born on 23 September 1938 in Grand Babanki, North Province, Cameroon. He considers himself to be a victim of violations by Cameroon of articles 1, 7, 9, 10, 17 and 19 of the International Covenant on Civil and Political Rights.¹ The author is not represented by counsel.

1.2 On 18 October 2010, at the State party's request, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided to consider the admissibility of the communication separately from its merits.

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabian Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili et Ms. Margo Waterval.

¹ The Optional Protocol entered into force for the State party on 27 September 1984.

The facts as submitted by the author

2.1 As a journalist working for the newspaper *The Grass Landa*, the author was assigned to cover the celebration of the fortieth anniversary of the establishment of the Southern Cameroons National Council (SCNC), an English-speaking separatist organization, on 1 October 2001. While performing his duties in Bamenda, the author was arrested without a warrant by gendarmes, who then tortured him and held him in a cell located on Bamenda's main shopping street.² The tools of his trade, including his recording equipment, were confiscated by the authorities, who suspected that they could be used as transmitters to communicate with the outside world. He was denied the right to communicate with his family or friends. He was stripped and thrown into an unventilated cell, where he remained for more than 24 hours without food or access to a lawyer. At about 2 p.m. the next day he was transferred to the Gendarmerie, where he was interrogated. After the author's wife interceded, verifying that he was a journalist, he was released. The author was severely traumatized by the arrest and interrogation.

2.2 On 21 September 2005, as the author was accompanying a group of SCNC associates on a fact-finding mission to Fundong in Boyo Department, he stopped along the Bello road to visit a friend. He had just sat down in the friend's home when a black Government car drove onto the property. Mr. Chili Abdou, Subprefect of Belo, accompanied by two gendarmes, a civilian and the Brigade Commander of the Gendarmerie of Belo, asked the author and his friends to hand over their identity documents. They were then taken to the Gendarmerie station, where they were held for six days. They slept on a cold cement floor that smelled strongly of faeces and urine because detainees urinated and defecated directly on the floor. On the sixth day, they were brought before the Public Prosecutor of Fundong, legal proceedings were initiated, and they were formally charged with engaging in separatist activities, but were released on bail. The charges were later dropped for lack of evidence. The judge did not, however, order any redress for their arbitrary arrest and torture.

2.3 On 29 December 2006, as the author was having a drink with a friend in a café near the hospital roundabout in Bamenda, about six police officers addressed him in French and pointed at him, saying he was a wanted man. They ordered him to follow them. He was taken to the station of Mobile Intervention Group (GMI) No. 6 of Bamenda,³ where he was ordered to reveal the contents of the bag he was carrying with him. The papers he was carrying included historical documents on the SCNC separatist movement's demands for self-determination. The police officers told him that he was in possession of documents issued by an illegal organization, which constituted a violation of the territorial integrity of the Republic of Cameroon. The author argued that he was a journalist with the right to seek, receive and convey information. His mobile phone was seized. He was thrown into a cell and was not given any food until the next day. However, his family and lawyer were immediately notified of his arrest, and he was able to see his family the next day. On 30 December 2006, he was transferred to the criminal investigation service, where he was held with a dozen other detainees. He was held in prison, in conditions that he characterizes as inhumane, until 3 January 2007. During his detention he was not given any blankets or sheets and slept directly on the floor. His family brought him clothes so he could cover himself. On 3 January 2007, he was brought before the Bamenda Public Prosecutor, who signed his pretrial detention order. The author was then transferred to Bamenda central prison. The judge dismissed the case on 2 October 2007 but did not grant the author any compensation.

² The author does not specify in which building he was held or whether the cells were managed by the Gendarmerie or were private places of detention.

³ In its submission the State party refers to GMI No. 1, not No. 6.

2.4 The author reported these violations of his rights to the National Commission on Human Rights and Freedoms, which was unable to obtain compensation. As he considered that the judiciary was merely an extension of the executive branch and was therefore not independent of it, the author did not bring the matter before the courts. The Cameroonian courts considered the author's allegations when he was brought before the judge at the time of his detention, but no redress was granted.

The complaint

3.1 The author considers that he has exhausted the available domestic remedies since, as a member of SCNC, a liberation movement fighting for independence for Southern Cameroons, he has been prevented from obtaining compensation through the competent judicial bodies.

3.2 The author considers that the State party has violated his rights under articles 1, 7, 9, 10, 17 and 23 of the Covenant.⁴

State party's observations on admissibility

4.1 On 4 October 2010, the State party contested the admissibility of the communication. Following a brief review of the facts, the State party emphasizes that the author has not exhausted domestic remedies as provided for under article 5, paragraph 2 (b), of the Optional Protocol.

4.2 In fact, the only step taken by the author was to petition the National Commission on Human Rights and Freedoms. He did not make use of any judicial appeal procedure to seek compensation for the harm he allegedly suffered, and he simply presumes that the judicial authorities lack independence. The State party considers that the author's argument that legal remedies are not available to him is merely a pretext for not fulfilling his obligation to exhaust domestic remedies, even though he did provide a copy of the order to dismiss the case, dated 2 October 2007, to support his claim. In that decision, the judge clearly stated that there was no basis on which to prosecute the author for the offence of separatism under articles 74 and 111 of the Criminal Code. This is not an isolated case. Other cases against SCNC activists charged with the same offence have also been dismissed.⁵ If the accusation of a lack of independence on the part of the Cameroonian judiciary were well founded, then one could expect that all alleged secessionist acts would be punished rather than resulting in dismissals. In the case at hand, the judges demonstrated their independence by dismissing the actions brought by the prosecution.

4.3 The State party adds that the Cameroonian courts have repeatedly upheld charges against police officers accused of committing acts of torture and other types of violence against members of the public. The State party cites two such cases.⁶ The author cannot legitimately invoke general assumptions about the independence of the judiciary as a

⁴ The author does not provide any argument to support the individual allegations.

⁵ The State party cites the case of *The Prosecution v. Nfor Ngala and nine others*, dismissed on 6 December 2007.

⁶ The State party cites the case of a police inspector named Stephen Ngu, who was sentenced on 24 October 2005, with immediate effect, to 5 years' imprisonment for torture and 3 years' imprisonment for inflicting serious injuries, and the case of Police Commissioner Miagougoudom Bello and Mr. Boubaki Modibo, who were found guilty of murder on 27 October 2006 and sentenced, with immediate effect, to 10 years' and 15 years' imprisonment, respectively. However, the charges were then reduced to manslaughter and complicity, and the penalty for Miagougoudom Bello was lowered to 5 years' imprisonment, 2 of which were to be served immediately. Mr. Boubaki Modibo was acquitted.

justification for failing to exhaust domestic remedies.⁷ The State party therefore asks the Committee to declare the communication inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

Author's comments on the State party's submission

5.1 On 10 December 2010, the author submitted his comments on the admissibility of the communication.

5.2 The author briefly recalls the history of the SCNC movement and explains that since the movement's celebration of the fortieth anniversary of the independence of Southern Cameroons, its members and sympathizers have seen the number of acts of harassment, arbitrary detention and torture targeting them increase time and again. The author cites several examples of members who have suffered such violations of their rights.

5.3 In his view, the central issue addressed in his communication is whether the Cameroonian judiciary is free from Government interference in matters concerning SCNC members suspected of committing or attempting to commit secessionist acts. The author considers that domestic remedies are not available to such suspects, and thus to him, and never will be, as such persons have been denied the right of self-determination. The courts established by the central State, which serve as both judge and prosecutor, cannot be regarded as independent courts qualified to dispense justice to Southern Cameroonians. It would be suicidal for Southern Cameroonians to have recourse to that justice system while they struggle to restore the territorial integrity of Southern Cameroons.

5.4 Contrary to the State party's claims, the dismissal of charges of 2 October 2007 does not testify to the independence of the judiciary, but rather highlights the negligence of the prosecution in its preparations for the legal proceedings against the author. In this regard, the author quotes a letter sent by the Prefect of Mezam to the Bamenda Public Prosecutor on 23 July 2007 in which he acknowledged that the author had been arrested without a warrant and stated that the gendarmes had acted on the orders of the Mezam Division, but pointed out that such arrests would no longer take place, as the Prefect would not fail to ask the Prosecutor for instructions before proceeding. The author believes that this letter constitutes a recognition of the lack of an independent judiciary.

5.5 The author adds that relations between the separatist movement and the State party have broken down and that SCNC members therefore need special safeguards and guarantees that they will be able to exercise their rights freely. The author believes that the justice system is corrupt and closely tied to the executive branch and that it therefore cannot be considered to be a system that provides access to justice. The author mentions that he unsuccessfully lodged a complaint of a violation of his rights with the National Commission on Human Rights and Freedoms.

5.6 On 10 December 2010, at the author's request, the non-governmental organization ALL for Cameroon expressed its views on the question of the exhaustion of domestic remedies in the case at hand. It states that the Cameroonian judiciary is not independent, given that the Head of State is the president of the Supreme Council of Justice and the Minister of Justice serves as a deputy prime minister.

5.7 This NGO added that, although a judge may dismiss a case, it would be very difficult for a judge to take a decision against the central State without a fear of reprisal. Furthermore, the fact that proceedings are initiated against SCNC members for secessionist

⁷ The State party cites the Committee's jurisprudence in communication No. 397/1990, *P.S. v. Denmark*, inadmissibility decision of 22 July 1992, para. 5.4, and communication No. 1374/2005, *Kurbogaj v. Spain*, inadmissibility decision of 14 July 2006, para. 6.3.

acts attests to the tension that prevails owing to this issue. Even if in some cases the courts might decide that citizens have been victims of human rights violations, enforcement of these decisions is problematic and generally non-existent.

5.8 Although the judge dismissed the charges against the author on 2 October 2007, the case has not been removed from the docket, and the prosecutor can resume prosecution of the author at any time. He therefore cannot be considered to be a man at liberty who is free from pressure. Any proceedings initiated against the State party would take years to complete and would saddle the author with enormous attorney and court fees.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The Committee notes that, according to the State party, the author has not exhausted the available domestic remedies, since the only step that he has taken is to lodge a complaint before the National Commission on Human Rights and Freedoms and he has not availed himself of any legal remedy to seek compensation for the harm he claims to have sustained. The Committee further notes that, according to the State party, the author simply presumes that the judicial authorities lack independence, even though those same authorities dismissed the charges against the author on 2 October 2007. The State party also asserts that this was not an isolated case, as charges against other SCNC members have also been dismissed. The Committee notes the author's argument that the courts established by the central State, which act as both judge and jury, cannot be considered to be independent courts capable of dispensing justice for Southern Cameroonians and that any proceedings initiated against the State party would take years to complete and would involve enormous attorney and court fees for the author.

6.3 The Committee notes that the author rejects the State party's judicial system outright on the grounds that it cannot be competent to deal with the claims and aspirations of Southern Cameroonians who wish to secede from the central State. The author therefore presumed that the judiciary lacked independence without providing evidence of a lack of such independence or impartiality on the part of the judicial authorities in his own case.

6.4 The Committee recalls that, although it has recognized in its jurisprudence that it is not necessary to exhaust domestic remedies when they have no chance of being successful, merely doubting their effectiveness does not absolve the author of a communication from the obligation to exhaust those remedies.⁸ In the case at hand, the author has not provided the Committee with sufficient information to enable it to conclude that the domestic remedies are ineffective. In addition, the Committee recalls that the reference made in article 5, paragraph 2 (b), of the Optional Protocol to "all available domestic remedies" primarily concerns judicial remedies.⁹ Under these circumstances, it follows that the author of the communication has not fulfilled his obligation to exhaust domestic remedies. The communication is therefore inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

⁸ See communication No. 1511/2006, *García Perea v. Spain*, inadmissibility decision of 27 March 2009, para. 6.2.

⁹ See communication No. 1159/2003, *Mariam Sankara et al. v. Burkina Faso*, Views adopted on 28 March 2006, para. 6.4.

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be transmitted to the State party and to the author of the communication.

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

**U. Communication No. 2027/2011, *Kusherbaev v. Kazakhstan*
(Decision adopted on 25 March 2013, 107th session)***

<i>Submitted by:</i>	Almas Kusherbaev (represented by Nani Jansen, Media Legal Defence Initiative)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Kazakhstan
<i>Date of communication:</i>	6 September 2010 (initial submission)
<i>Subject matter:</i>	Journalist found guilty of defamation against a politician and ordered to pay an important defamation award
<i>Procedural issue:</i>	Admissibility <i>ratione temporis</i>
<i>Substantive issues:</i>	Right to a fair hearing by an independent and impartial tribunal; restriction of the right to freedom of expression and opinion
<i>Articles of the Covenant:</i>	14, para. 1, and 19
<i>Article of the Optional Protocol:</i>	1

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

Meeting on 25 March 2013,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Mr. Almas Kusherbaev, a national of Kazakhstan born in 1981. He claims to be a victim of a violation by Kazakhstan of his rights under article 14, paragraph 1, and article 19, of the Covenant. He is represented by Ms. Nani Jansen of the Media Legal Defence Initiative.

1.2 The Optional Protocol entered into force for the State party on 30 September 2009.¹

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

¹ At the time of ratification of the Optional Protocol, the State party made the following declaration: "The Republic of Kazakhstan, in accordance with article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights, recognizes the competence of the Human Rights Committee to receive and consider communications from individuals subject to the jurisdiction of the Republic of Kazakhstan concerning actions and omissions by the State authorities or acts or decisions adopted by them following the entry into force of this Optional Protocol in the Republic of Kazakhstan."

The facts as presented by the author

2.1 The author worked as a journalist at the independent Almaty weekly newspaper *Taszhargan*. On 24 April 2008, he published an article there entitled “The ‘Poor’ Landowner Madinov” («Бедный» Латифундист Мадinov» in Russian). In the article, the author provided an assessment of the situation in the agrarian sector following the decision of the Government to ban the export of grain from Kazakhstan, and his view regarding various issues of public interest at the time, such as the global economy and the place of Kazakhstan in it, the financial crisis, the price of basic foodstuffs, and grain in particular, the ban on the export of grain and the business interests of a member of parliament, Romin Madinov. The article was critical of Mr. Madinov and suggested the existence of a conflict of interests between his businesses on the one hand and his duties as a member of parliament on the other.

2.2 In August 2008, in response to this article, Mr. Madinov filed a civil suit both against DAT-X Media Ltd. and the author, seeking damages for defamation, restoration of property rights and payment of damages for moral harm. He accused the author of damaging his image because the article focuses on how his business interests benefited from his legislative work, and demanded damages totalling 300 million Kazakh tenge (about USD 2 million).²

2.3 On 16 January 2009, the Medeus District Court of Almaty found the author guilty of defamation and awarded Mr. Madinov 3 million tenge (EUR 18,420) to be paid jointly by the author and the owner of the DAT-X Media Ltd.³ It noted that the author had drawn a parallel between Mr. Madinov and “corporate raiding” (i.e., the seizure by one party of an asset from and against the will of another party by means of threat, pressure or violence, etc.), and went further, likening the political party of which Mr. Madinov is leader to a public vehicle for protecting the spoils of privatization. The court also indicated that, despite the presumption of innocence, the author had accused Mr. Madinov of committing crimes related to “corporate raiding” and acquisition of “the grain industry”, casting doubt upon the legality of his actions. It further referred to Mr. Madinov’s failed attempt to obtain a retraction from the newspaper, and considered the article as not corresponding to the truth. The court also noted that the author had indicated that Mr. Madinov is putting his powers as a member of parliament to personal use as an agricultural speculator, and had concluded that the groundless remarks in the article were defamatory to the good name and reputation of Mr. Madinov and violated personal non-property rights guaranteed by articles 17 and 18 of the Constitution.

2.4 The author appealed to the Almaty City Court, claiming a violation of his right to freedom of expression. Mr. Madinov also appealed, asking for a higher award. On 26 February 2009, the Court dismissed the author’s appeal and upheld in part Mr. Madinov’s appeal, increasing the damage award to be paid jointly by the author and the owner of the DAT-X Media Ltd. to 30 million tenge (approximately USD 200,000). The Court dismissed the findings of the linguistic analysis of the author’s article on the grounds that it

² Mr. Madinov requested that the defamation award be paid as follows: 100,000,000 tenge in favour of the State Children’s Home No. 3 for Orphans and Children without Parents (Sandyktau district, Akmola region); 100,000,000 tenge in favour of the Malotimofeyevskoye State Medical and Social Care Home for the Elderly and General Disabled (Tselinograd district, Akmola region); and 100,000,000 tenge in favour of the Shortandinskoye State Medical and Social Care Home for the Elderly and General Disabled of the Akmola Region Directorate for Coordinating Employment and Social Programmes (Shortanda district, Akmola region).

³ The court satisfied Mr. Madinov’s request and ruled that the compensation awarded to Mr. Madinov would be paid jointly by the author and the owner of the DAT-X Media Ltd. in favour of the three institutions referred to in the footnote above.

had been conducted by a freedom of speech organization which also employed the author's lawyer in the domestic proceedings, and was therefore not objective, and refused to have any other analysis conducted. The author further lodged a supervisory review application with the Supreme Court on 20 August 2009, claiming, inter alia, a violation of his right to freedom of expression. On 21 August 2009, the Supreme Court upheld the decision of the Almaty City Court. Following the Supreme Court's judgment, the police ordered the author to pay off the damage award by making payments of 7,200 tenge (approximately USD 50 per month). The author has been making monthly payments since then. At this rate, he claims, he will be paying off the damage award for the rest of his life and he faces possible imprisonment if he stops making these payments.

The complaint

Alleged violations of article 19 of the Covenant

3.1 The author claims that his article published in the weekly newspaper *Taszhargan* was protected under article 19 of the Covenant, and that the defamation award against him, the payment agreement with police and the enforced ongoing payment of damages under pain of imprisonment constitutes an ongoing violation of his rights under article 19 of the Covenant.

3.2 The author submits that freedom of expression is universally recognized as a key human right, in particular because of its fundamental role in underpinning democracy. As the Committee has held, "the right to freedom of expression is of paramount importance in any democratic society".⁴ The guarantee of freedom of expression applies with particular force to the media. The European Court of Human Rights⁵ has consistently emphasized the "pre-eminent role of the press in a State governed by the rule of law".⁶ The Committee also stressed that a free media is essential in the political process: the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.⁷

3.3 According to the author, media have not only the right to comment and report on matters of public interest, they have a duty to do so. International courts have emphasized that the duty of the press goes beyond mere reporting of facts; its duty is to interpret facts and events in order to inform the public and contribute to the discussion of matters of public importance.⁸ There is very little scope for restrictions on political debate and discussion on matters that are of general importance.⁹

3.4 The author also recalls that the right to freedom of expression protects offensive and insulting speech, as well as that which is received positively. It has become a fundamental tenet of freedom of expression jurisprudence that the right to freedom of expression "is

⁴ Communication No. 628/1995, *Park v. Republic of Korea*, Views adopted on 20 October 1998, para. 10.3.

⁵ The author submits that the considerations of the European Court of Human Rights in article 10 cases are therefore relevant in the consideration of his communication.

⁶ *Thorgeirson v. Iceland* (application No. 13778/88), judgement of 25 June 1992, para. 63.

⁷ See general comment No. 25 (1996) on the right to participate in public affairs, voting rights and the right of equal access to public service, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40*, vol. I (A/51/40 (Vol. I)), annex V.

⁸ European Court of Human Rights, *The Sunday Times v. The United Kingdom (No. 1)* (application No. 6538/74), judgement of 26 April 1979, para. 65.

⁹ European Court of Human Rights, *Sürek v. Turkey (No. 2)* (application No. 24122/94), judgement of 8 July 1999, para. 34.

applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.”¹⁰

3.5 He submits that international human rights courts recognized that politicians and public figures should be open to criticism of their public functioning. This means that the threshold as regards permissible criticism of a politician is higher than that of a private individual. As the European Court of Human Rights has said, the limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.¹¹ This principle is not limited to criticism of politicians acting in their public capacity. Matters relating to private or business interests can be equally relevant. For example, the European Court has held that the “fact that a politician is in a situation where his business and political activities overlap may give rise to public discussion, even where, strictly speaking, no problem of incompatibility of office under domestic law arises”.¹²

3.6 The author also submits that international human rights law requires that, in defamation cases, a clear distinction is made between statements of fact and value judgments. This is because the existence of facts can be demonstrated, whereas the truth of a value judgment is not susceptible of proof. In the case of *Dichand and others v. Austria*,¹³ the European Court of Human Rights held that the requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right to freedom of expression. The Court also stated in the case of *Dalban v. Romania*¹⁴ that it would be unacceptable for a journalist to be debarred from expressing critical value judgments unless he or she could prove their truth. The author claims that domestic courts failed to take into account — or even mention — any of these fundamental principles and failed to take account of the fact that his article concerned a matter of great public interest, and regarded the business activities of a politician.

3.7 Furthermore, the author claims that his article explores the complex economic problems associated with the increase in grain prices and the Government’s efforts to resolve the issue. In the context thereof, he refers to Mr. Madinov’s role as a politician and businessman. The article concerned a matter of great public concern, on which he, as a journalist, has not only the freedom but a duty to report. Kazakhstan is a major grain-producing country and there was public interest surrounding this topic; the courts however failed to take into account any of these considerations.

3.8 The author submits that he was criticized by the domestic courts for not having any evidence to support statements made in his article. He claims that the courts wrongly classified the impugned statements as statements of fact which are susceptible of proof, whereas they should have been classified as statements of opinion, not susceptible to proof and that all the four statements on which the courts focused their attention are classic example of statements of opinion. The courts, however, found that the statements were not supported by evidence and concluded that they were defamatory. Although some statements are strongly worded, the author submits that journalists are allowed a degree of

¹⁰ Ibid., para. 33.

¹¹ *Lingens v. Austria* (application No. 9815/82), judgement of 8 July 1986, para. 42.

¹² *Dichand and others v. Austria* (application No. 29271/95), judgement of 26 February 2002, para. 51.

¹³ Ibid., para. 42.

¹⁴ Application No. 28114/95, judgement of 28 September 1999, para. 49.

exaggeration and that politicians must tolerate criticism of their functioning, even when it is harshly worded.

3.9 The author recalls that any restriction on the right to freedom of expression must be justified as strictly “necessary” in the sense of article 19, paragraph 3, of the Covenant. The term “necessary” implies proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect, and this requirement extends to damages imposed in defamation cases. In this context, the author refers to the case of *Tolstoy Miloslavsky v. the United Kingdom*, where the European Court of Human Rights ruled that excessive damages in defamation cases violate the “necessary” requirement for justifying a restriction on expression. The Court explained that under the Convention, an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered.¹⁵ In the case of *Steel and Morris v. the United Kingdom*,¹⁶ the Court held that in the imposition of damages, regard must be had to the likely impact on the defendant, and noted that the damages were very substantial when compared to the modest incomes and resources of the two applicants, and thus found a violation of the right to freedom of expression.

3.10 In this respect, the author claims that the damages awarded against him are highly disproportionate and therefore violate his right to freedom of expression. He contends that Mr. Madinov has not shown what exact damages he had suffered as a consequence of the article, and notes that he remained a member of the parliament. He claims that the award of 30 million tenge was about 200 times his monthly salary at the time and 300 times the average income in the communications industry in Kazakhstan.¹⁷ The author also objects to the taking into account by the Almaty Court of Mr. Madinov’s “subjective assessment” of the stress he suffered. This is not only wholly unverifiable, but if accepted, this would open the floodgates to any subjective assessment of damages, no matter how excessive. The author claims that upholding the excessive award against him would surely deter others from criticizing public officials and limit the free flow of information and ideas.¹⁸

3.11 With regard to the admissibility *ratione temporis*, the author submits that the Optional Protocol to the Covenant entered into force for Kazakhstan on 30 September 2009; the Committee has jurisdiction to consider communications concerning actions and omissions by the State authorities or acts or decisions adopted by them following this date. He further submits that, according to the established jurisprudence of the Committee, it has jurisdiction to consider violations that continue after the entry into force of the Optional Protocol. Specifically, the Committee has held that a continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of the previous violations of the State party.¹⁹ Furthermore, the Committee has stated that it has jurisdiction to hear communications about alleged violations that have effects which themselves constitute violations, after the date of entry into force.²⁰ The author submits that the Committee held in the case of *Paraga v. Croatia* that proceedings for slander that were initiated prior to entry into force of the Optional

¹⁵ Application No. 18139/91, judgement of 13 July 1995, para. 49.

¹⁶ Application No. 68416/01, judgement of 15 February 2005, para. 96.

¹⁷ The author submits that, as reported by the Kazakhstan Agency of Statistics, the annual income in the communications industry in August 2009 was 97,512 tenge: www.eng.stat.kz/digital/Labour/Pages/Arch_Labour_2009.aspx.

¹⁸ See European Court of Human Rights, *Öztürk v. Turkey* (application No. 17095/03), judgement of 9 June 2009.

¹⁹ Communication No. 520/1992, *E. and A.K. v. Hungary*, inadmissibility decision adopted on 7 April 1994, para. 6.4.

²⁰ Communication No. 24/1977, *Lovelace v. Canada*, Views adopted on 30 July 1981, para. 11.

Protocol and kept pending until several years after, were to be seen as an incident that has continuing effects, which in themselves may constitute a violation of the Covenant.²¹ He therefore claims that the Committee has jurisdiction to consider his communication because the authorities actively enforce payment of damages after 30 September 2009, i.e., after the entry into force of the Optional Protocol for the State party. Following the Supreme Court judgment, he was called into the police station and a monthly payment arrangement was enforced upon him which is actively monitored. He submits that this constitutes affirmation of the judgment by a State institution and a continuing violation by act and implication. Furthermore, since his payments have been received by three different State institutions, receipt of payments by these State institutions after 30 September 2009 constitutes clear affirmation of the judgment by a State institution and therefore a continuing violation.

3.12 The author submits that the defamation conviction has serious effects that continue beyond the entry into force of the Optional Protocol and which themselves constitute a violation of his rights. First, as a result of the conviction, he has become unemployable in the media and is therefore unable to exercise his right to freedom of expression through the medium of his choice, i.e., the mass media. This is an effect of his conviction which itself constitutes a violation of article 19. Second, he continues to suffer financially. The payment of damages is ongoing and will, given the huge size of the award and his very modest means, continue until he dies. This is an ongoing effect of the original conviction which itself constitutes a violation.

Alleged violations of article 14, paragraph 1, of the Covenant

3.13 The author claims that the proceedings against him were biased, in violation of article 14, paragraph 1, of the Covenant. He submits that none of the domestic courts referred to the fact that his article concerned the activities of a politician on matter of public concern, which the media should be allowed to write on. He submits that the Committee has explained that the concept of impartiality has two aspects: first, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other; second, the tribunal must also appear to a reasonable observer to be impartial.²² He claims that the domestic courts violated both these requirements.

3.14 The author also claims that the expert opinion (linguistic analysis of his article) prepared on his behalf was disregarded by the courts, despite the Medeus District Court (first instance court) first admitting it as evidence; throughout the proceedings there was clear deference towards plaintiff's representatives.

3.15 The author submits that he has exhausted domestic remedies. He claims that it would be futile for him to also appeal the enforced payment of damages, and explains that this matter has not been submitted to any other international organ of investigation or settlement.

3.16 The author requests the Committee to declare a violation of his rights under articles 14, paragraph 1, and 19 of the Covenant, finding that the content of his article was protected under article 19 of the Covenant and that the amount of damages awarded against him was disproportionate. He also calls on the Committee to request the State party to amend its law so as to bring its defamation laws in line with the Covenant as regards the

²¹ Communication No. 727/1996, Views adopted on 4 April 2001, para. 5.3.

²² General comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI, para. 21.

need for the domestic law to recognize the expression of honest opinion on matters of public interest and the need to impose a cap on the amount of damages that may be awarded in civil defamation suits, as well as to award him compensation for the violations of his rights under the Covenant.

State party's observations on admissibility

4. By note verbale of 25 February 2012, the State party confirms that the author has exhausted all domestic remedies and submits that the judgment against him entered into force on 26 February 2009. It further recalls that, upon ratification of the Optional Protocol to the Covenant, it made a declaration restricting the Committee's competence *ratione temporis*.²³ The Optional Protocol entered into force for the State party on 30 September 2009, whereas the actions complained of by the author in his communication, as well as the decisions adopted on his case, preceded its entry into force. Accordingly, the State party claims that the author's communication is inadmissible *ratione temporis*.

Author's comments on admissibility

5.1 On 25 April 2012, the author reiterates his claims and notes that the State party's objection to the admissibility of the communication fails to address the continuing nature of the violation against him. In this respect, he reiterates the arguments put forward in his initial communication (paras. 3.11 and 3.12 above) and maintains that the Committee has jurisdiction to examine his communication since (a) the State party has affirmed the earlier violation by act and implication; (b) the violation has continued and still continues after the date the Optional Protocol entered into force; and (c) the violation generates effects which in and of themselves violate the Covenant.

5.2 The author submits that in *Gueye et al. v. France*, the Committee found a violation of the authors' rights under the Covenant in so far as the law produced effects after the date of entry into force of the Optional Protocol for the State party.²⁴ It confirmed in *E. and A. K. v. Hungary* that a continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or clear implication, of the previous violations of the State party.²⁵ In *J.L. v. Australia*, the Committee considered the continuing nature of a violation of the Covenant resulting from court hearings which had taken place before the Optional Protocol entered into force for Australia, and noted that the effects of the decisions taken continued after the entry into force of the Protocol.²⁶

5.3 The author claims that, as in the above-mentioned cases, the violation of his rights under the Covenant has continued after the Optional Protocol entered into force. As a result of his conviction, he has been unable to find a work as a journalist and has been unable to find any gainful employment. The payment obligations made him suffer financially, a violation which continued until after the entry into force of the Optional Protocol. Not meeting these payment obligations, which he is unable to do, means that he is faced with the constant threat of imprisonment, therefore his rights continue to be violated. The author further submits that the Committee has jurisdiction to examine violations under the

²³ See footnote 1 above.

²⁴ Communication No. 196/1985, *Gueye et al. v. France*, Views adopted on 3 April 1989, para. 10.

²⁵ Communication No. 520/1992, para. 6.4.

²⁶ Communication No. 491/1992, *J.L. v. Australia*, inadmissibility decision adopted on 28 July 1992, para. 4.2.

Covenant which generate effects that in themselves constitute a violation of the Covenant after the entry into force of the Optional Protocol.²⁷

5.4 The author reiterates his claim that the judgement rendered against him by the Supreme Court of Kazakhstan on 20 August 2009 has generated effects that lasted, and continue to last, after the entry into force of the Optional Protocol for the Kazakhstan. These continuing effects each in and of themselves violate the Covenant, since he cannot find gainful employment as a result of his conviction and has to pay off an enormous sum in damages and his inability to meet his payment obligation due to his inability to earn a salary leaves him under a constant threat of imprisonment. The fact that the payments he has made are received by State institutions constitutes both a renewed violation and an affirmation of his earlier conviction.

State party's observations on the merits

6.1 On 17 July 2012, the State party submitted its observations on the merits and provided a summary of the facts and the proceedings in the author's case. The State party submits that the author in his published article indicated that Mr. Madinov was using his official position to promote his personal interests in the agricultural business. Further, he stated that Mr. Madinov "managed to privatize, or more accurately lay his hands on (some might say through "corporate raiding") a vast swathe of a grain industry". The State party submits that the concept of corporate raiding refers to the seizure by one party of an asset from and against the will of another party by means of threat, pressure or violence, etc. These remarks are defamatory to the good name and business reputation of Mr. Madinov, since these represent an accusation of criminal behaviour linked to speculation, "corporate raiding" and acquisition of the "grain industry".

6.2 Pursuant to article 77, paragraph 3 (1), of the Constitution of Kazakhstan, a person is presumed innocent until found guilty by a court verdict that has entered into force. Article 65 of the Civil Procedure Code requires all parties to provide supporting evidence for circumstances that they cite in objections and claims. The author did not produce any evidence that Mr. Madinov had acquired his assets unlawfully. During the civil proceedings, the author submitted in his defence an opinion prepared by philologists of the Public Centre for Expert Analysis on Information and Documentation Issues, according to which the remarks made in his article were not defamatory to the good name and business reputation of Mr. Madinov. These findings were dismissed on the grounds that the linguistic analysis had been conducted by a freedom of speech organization which also employed the author's lawyer in the domestic proceedings, and was therefore not objective.

6.3 The State party also notes that the author also states in his article that "the single-chamber parliament is devoid of personalities of note or value to society or capable of upholding the interests of the state. It consists solely of opportunists, wheeler-dealers, sycophants, time-servers, the privileged class and business types who need a parliament only to advance their own interests and protect their own business while occasionally feigning concern for what is best for the state", and continues "Mr. Madinov might have some perfectly reasonable objections to this, such as 'Why the hell did I set up this party to join the bandwagon and back the regime and, then when the time comes, not reap the benefits?'" This, according to the State party, presents Mr. Madinov to the public as a man who uses unseemly language, as if he were a man of insufficient manners, which is also defamatory to him.

²⁷ Reference to communication No. 24/1977, *Lovelace v. Canada*, Views adopted on 30 July 1981, para. 11.

6.4 Article 21 of the Law of the Republic of Kazakhstan on the Mass Media prohibits journalists from issuing untrue information and requires them to respect the lawful rights and interests of persons and legal entities and to discharge other duties placed upon them by the legislation of Kazakhstan. According to article 143, paragraph 1, of the Civil Code, a citizen is entitled to demand through the courts the retraction of information which is defamatory to his good name and professional reputation if the person issuing such information does not provide evidence that such information corresponds to the truth. Therefore, pursuant to this provision of the law, the duty to demonstrate that the published information is true rests with the defendant. The plaintiff must demonstrate only that the defamatory information was published by the defendant, and is also entitled to supply evidence that the defamatory information is untrue. The author did not present evidence that the information contained in his article was correct and did not verify the accuracy of those remarks (fact not refuted by him in court). Thus, the information contained in the article “The ‘Poor’ Landowner Madinov” was defamatory to the good name and reputation of Mr. Madinov and violated his personal non-property rights guaranteed under articles 17 and 18 of the Constitution.

6.5 According to article 143, paragraph 4, of the Civil Code, a claim by a person or a legal entity for publication of a retraction or a rebuttal by the media outlet is examined by courts if the media outlet in question refuses to publish the retraction or rebuttal or failed to publish it within a month, or in case of its liquidation. On 6 August 2008, Mr. Madinov requested the *Taszhargan* newspaper to publish a retraction; however his demand was ignored. Pursuant to article 143, paragraph 6, of the Civil Code, a person or legal entity whose good name or business reputation has been defamed is entitled not only to a retraction but also to claim reparation for loss and payment of damages for moral harm. In this respect, the Medeus District Court of Almaty (16 January 2009) and the Almaty City Court (26 February 2009) ordered the author and the DAT-X Media Ltd. to publish a retraction and pay an award of 30 million tenge. The courts’ decisions are lawful and are in full compliance with article 19, paragraph 3, of the Covenant, according to which the right to freedom of expression may be subject to certain restrictions as are provided by law and are necessary for respect of the rights or reputations of others.

6.6 The State party also submits that the author’s allegations under article 14 of the Covenant are unfounded, since he had appealed against the decisions adopted on his case to the higher courts. The State party finds equally unfounded the author’s allegation that the domestic law is not in compliance with the Covenant since the author does not indicate which specific norms of the law contravene the Covenant.

6.7 The State party further explains that its current legislation does not provide for any restrictions on the amount of compensation that can be awarded for moral damages. Article 951, paragraph 1, of the Civil Code defines moral harm as a violation, denigration or deprivation of the personal non-property benefits and rights of individuals, including moral or physical suffering resulting from an unlawful act committed against them. Article 952 of the Civil Code provides for monetary compensation for the moral harm suffered and the amount of the awarded compensation is decided by the court. When determining the amount of compensation for moral harm in pecuniary terms, the court is guided by the decision No. 6 of the Plenum of the Supreme Court of 18 December 1992 “On the application by courts of legislation on defamation of the good name and business reputation of natural and legal persons”, the regulatory decision of the Supreme Court “On application by courts of legislation on damages for moral harm” of 21 June 2001, and the principles of fairness and sufficiency, taking into account the subjective assessment by the injured party of the severity of the moral or physical suffering endured and also objective data testifying to the same, in particular: the critical importance of the personal non-property rights (life, health, liberty, inviolability of the home, personal and family privacy, honour and reputation, etc.); the extent of the moral and physical distress endured; and the nature of the

perpetrator's guilt (malice, negligence) when this needs to be established for reparation of the harm.

6.8 With regard to the author's allegation that he is unable to find gainful employment as a result of his conviction, the State party submits that the courts did not deprive him of the right to act as journalist. Therefore, there are no grounds stemming from the courts' decisions that would prevent the author from exercising journalistic activity or any other gainful employment.

6.9 As to the author's allegation about the continuous threat of imprisonment for non-execution of the judgment, the State party submits that no criminal case has been initiated against the author for non-execution of the court's judgement, and the question of the author's prosecution is not currently under discussion. Thus, his claim about the continuous threat of imprisonment in connection with his inability to make monthly payment is unfounded. Furthermore, pursuant to article 233 of the Civil Procedure Code, the author can file a request to the court to stay or defer the execution of the judgment.

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

7.1 On 11 September 2012, the author reiterates his previous claims and notes that the State party failed to properly address the facts and legal arguments contained in his communication. He maintains that the defamation award against him and the threat of enforcement of the award on pain of imprisonment in case of non-payment constitute an ongoing violation of article 19 of the Covenant because domestic courts had failed to take into account the fundamental principles relating to the right to freedom of expression by not properly acknowledging that his article concerned a matter of great public interest, wrongly classifying the article as stating facts while it stated opinion, and by imposing a disproportionate sentence upon him. None of these arguments are addressed or disputed by the State party in its observations.

7.2 The author further notes that the State party failed to address his arguments regarding the violation of his rights under article 14 of the Covenant, claiming that his allegations are unfounded without presenting any reasons other than the fact that he had had the right to appeal against the judgment and in fact did so.

7.3 As to the State party's arguments that he did not indicate which specific norms of the Kazakh law contravene the Covenant, the author submits that in his communication he clearly requested that the Committee direct Kazakhstan to amend its legislation on two points: (a) to recognize the expression of honest opinion on matters of public interest, and (b) to impose a maximum amount of damages that may be awarded in civil defamation suits.

7.4 The author further notes that the State party acknowledges that its current legislation does not provide for any restrictions on the amount of compensation that can be awarded for moral damages. He claims that the enormous amount in damages he was sentenced to pay shows that the Supreme Court guidance to which the State party refers does not serve as an effective means to prevent such excessive awards to be granted by the courts. This means that either the guidance itself is erroneous, or that it was misinterpreted or misapplied by the courts in his case.

7.5 The author also finds confusing the State party's argument about his inability to find gainful employment as a result of his conviction. The State party argues that it cannot understand why the judgement against him would prevent him from obtaining other paid work. The author reiterates that it is impossible for him to find gainful employment "since part of his salary will have to be paid off to the State party". He is not only restricted in finding work in his own profession, but in finding any type of gainful employment. Preventing him from working as a journalist therefore not only prevents him from

exercising his fundamental right to freedom of expression, it has a wider impact on the respect for the democratic principles enshrined in the Covenant as a whole.

7.6 As to the State party's contention that its law enforcement agencies are not currently pursuing enforcement of the court judgement against him, the author claims that it supports his allegation that, while the judgment against him may not be currently enforced, he is under the continuous threat that such execution proceedings may be instigated. While the enforcement is not currently being pursued (as indicated by the State party), the enforcement is continuously pending against him. With regard to the State party's assertion that he can request the courts to suspend the execution of his sentence, the author does not see how the same courts that have shown such bias against him during the proceedings that led to his conviction could be expected to impartially judge such a request if he was to submit it.

7.7 In the light of the above, and taking also into account his initial submissions, the author asks the Committee to examine the merits of his communication, to find that the State party has violated articles 14, paragraph 1, and 19, of the Covenant, and to request the State party to amend its defamation laws and to award damages to him for the violation of his rights.

Issues and proceedings before the Committee

Consideration of admissibility

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

8.2 The Committee takes note of the State party's objection that the communication is inadmissible *ratione temporis* since the actions complained of by the author, as well as the decisions adopted on his case, relate to events which occurred prior to the entry into force of the Optional Protocol for Kazakhstan on 30 September 2009. In this respect, the State party invokes its declaration²⁸ restricting the Committee's competence to events following the entry into force of the Optional Protocol. The Committee recalls that it cannot consider alleged violations of the Covenant which occurred before the entry into force of the Optional Protocol for a State party, unless these violations continue after that date or continue to have effects which in themselves constitute a violation of the Covenant.²⁹ In this respect, the author claims that the Committee has jurisdiction to examine his communication because the ongoing payments of damages after the entry of the Optional Protocol into force constitutes a recognition, by act or implication, of the previous violation, and because the defamation conviction has serious effects that continue beyond the entry into force of the Protocol which themselves constitute violations of his Covenant rights, since he has become unemployable in the media and is unable to exercise his freedom of expression through the medium of his choice, he continues to suffer financially and is under constant threat of imprisonment for non-execution of the judgment (see paras. 3.11, 3.12 and 5.1–5.4 above).

²⁸ See footnote 1 above.

²⁹ See, inter alia, communications No. 24/1977, *Lovelace v. Canada*, para. 7.3; No. 1060/2002, *Deisl v. Austria*, Views adopted on 27 July 2004, para. 10.3; No. 1367/2005, *Anderson v. Australia*, inadmissibility decision adopted on 31 October 2006, para. 7.3; No. 1424/2005, *Anton v. Algeria*, inadmissibility decision adopted on 1 November 2006, para. 8.3; No. 1633/2007, *Avadanov v. Azerbaijan*, Views adopted on 25 October 2010, para. 6.2.

8.3 The Committee observes that the publication of the author's article, the institution of a civil action against him for defamation, as well as the court's judgment ordering him to pay damages to the aggrieved party were completed prior to the entry into force of the Optional Protocol for the State party. The case at issue is therefore different from the circumstances in *Paranga v. Croatia*,³⁰ communication relied upon by the author, where the proceedings for slander had not been terminated before the entry into force of the Optional Protocol for the State party there and continued after that date. The Committee considers that the mere fact that the author continues to pay off the defamation award after the entry into force of the Optional Protocol for the State party and continues to suffer financially after that date neither constitutes an affirmation of a prior violation nor does it amount per se to continuing effects which themselves constitute a violation of any of the author's rights under the Covenant. Furthermore, the materials before the Committee show that the author was in no way deprived of his right to practise journalism. The Committee therefore considers that the original judgment has no continuing effects that in themselves constitute a violation of the author's rights under the Covenant. In the light of the above conclusion, the Committee will not examine whether the declaration made by Kazakhstan upon ratification of the Optional Protocol has to be regarded as a reservation or a mere declaration.

8.4 The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible *ratione temporis* under article 1 of the Optional Protocol;
- (b) That this decision shall be communicated to the State party and to the author.

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

³⁰ Communication No. 727/1996, Views adopted on 4 April 2001, para. 5.3.

**V. Communication No. 2169/2012, S.K. v. Belarus
(Decision adopted on 31 October 2012, 106th session)***

<i>Submitted by:</i>	S.K. (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	5 December 2011 (initial submission)
<i>Subject matter:</i>	Author's conviction for violation of public order
<i>Procedural issue:</i>	Inadmissibility due to non-substantiation
<i>Substantive issues:</i>	Right to a fair hearing by an impartial tribunal, freedom of expression
<i>Articles of the Covenant:</i>	14, 19 and 26
<i>Article of the Optional Protocol:</i>	2

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

Meeting on 31 October 2012,

Adopts the following:

Decision on admissibility

1. The author of the communication dated 5 December 2011 is S.K., a Belarus national born in 1975. He claims to be the victim of violations by Belarus of his rights under articles 2, paragraph 1; article 14, paragraph 1; article 19, paragraph 2; and article 26 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Belarus on 30 December 1992. The author is unrepresented.

The facts as presented by the author

2.1 On 7 January 2010, the day when Orthodox Christians celebrate Christmas, at around noon, the author climbed to the top of a Christmas tree located in Pobeda ("Victory") Square in the city of Vitebsk and placed a white-red-white flag, that used to be the national flag, there. He was subsequently arrested and charged with violations of articles 339 and 363 of the Criminal Code of Belarus.

2.2 The author submits that he is a member of the Conservative Christian Party of the Belarus National Front, which is in opposition to the current regime in Belarus. The white-red-white flag was used as the national flag of Belarus from 1991 to 1994, and currently is considered as a historic symbol of the country. The author submits that the flag is not

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev and Mr. Krister Thelin.

prohibited and has a holy meaning for him. By hanging placing it on the tree, the author wanted to express his political opinion.

2.3 The author further claims that by placing the flag on the tree, he did not break any laws. Such expression of political opinion cannot be restricted, because it does not infringe on national security, public order, public health, morals or the reputation of others.

2.4 The author submits that on 14 May 2010, the Oktyabrsky District Court convicted him of carrying out “acts, dangerous to the general public,” as proscribed by articles 339 and 363 of the Criminal Code, and fined him the amount of 3 500 000 Belarusian roubles¹ to compensate for damage to the Christmas tree and the lighting. During the court hearing, the court did not allow the author to summon witnesses in his defence.²

2.5 The Vitebsk Regional Court rejected the author’s appeal in its decision of 25 June 2010. The Supreme Court of Belarus rejected his appeal on 2 November 2011.

2.6 The author contends that he has exhausted all available and effective domestic remedies.

The complaint

3.1 The author claims that by arresting and prosecuting him, the State party violated his rights under articles 19 and 26 of the Covenant.³ He submits that the State party’s decision was not based on concerns of national security, public order, public health, morals or the reputation of others.

3.2 The author further claims that by not allowing him to summon witnesses in his defence, the State party violated his rights under article 14, paragraph 1, of the Covenant.

Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Human Rights Committee must determine whether it is admissible under the Optional Protocol to the International Covenant on Civil and Political Rights.

4.2 The Committee observes that although the author invokes a violation of article 14, paragraph 1, his claims seem to fall under article 14, paragraph 3 (e), of the Covenant, and are linked primarily to the evaluation of facts and evidence. The Committee recalls its jurisprudence according to which it is generally not up to the Committee, but rather the courts of the State party concerned, to review or evaluate facts and evidence, unless it can be ascertained that the conduct of the trial or the evaluation of facts and evidence was manifestly arbitrary or amounted to a denial of justice.⁴ The Committee observes that the materials before it, including the transcripts of court hearings, do not suggest that the impartiality of the court was affected, nor was the principle of equality of arms violated nor was the fairness of the author’s trial otherwise undermined. It therefore concludes that the

¹ This amount is equal to approximately 925€ based on the official exchange rate at the time.

² The author provides no further explanation as to who the witnesses were nor how their testimony would have changed the outcome of the court proceedings.

³ The author does not explain how article 26 was violated.

⁴ See the Committee’s general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 26, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI; see, inter alia, communications No. 541/1993, *Simms v. Jamaica*, decision of inadmissibility adopted on 3 April 1995, para. 6.2; No. 1616/2007, *Manzano v. Colombia*, decision of inadmissibility adopted on 19 March 2010, para. 6.4; No. 1532/2006, *Sedljar and Lavrov v. Estonia*, decision of inadmissibility adopted on 29 March 2011, para. 7.3.

author failed to substantiate his claim under article 14, paragraph 1, of the Covenant for purposes of admissibility, and declares the claim inadmissible under article 2 of the Optional Protocol.

4.3 Regarding the author's allegations under article 2, paragraph 1; article 19 and article 26, of the Covenant, the Committee notes that the information provided by the author does not provide any substantiation of his claim that his rights were violated. The Committee further notes that under article 19, paragraph 3 (a) and (b) of the Covenant, the right to freedom of expression may be subject to certain restrictions, including those necessary for the protection of public order (*ordre public*). As to the violation of his rights under article 26, the author has not explained how the issues are separate from those falling under article 19. Accordingly, the author has failed to sufficiently substantiate his claim for purposes of admissibility. The Committee therefore concludes that the author failed to substantiate his claims under article 2, paragraph 1; article 19 and article 26, of the Covenant for purposes of admissibility, and declares said claims inadmissible under article 2 of the Optional Protocol.

5. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be transmitted to the State party and to the author.

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

XI. Follow-up activities under the Optional Protocol

1. In July 1990, the Committee established a procedure for the monitoring of follow-up to its Views under article 5, paragraph 4, of the Optional Protocol, and created the mandate of the Special Rapporteur for follow-up on Views to this effect.
2. In 1991, the Special Rapporteur began to request follow-up information from States parties. Such information had been systematically requested in respect of all Views with a finding of a violation of Covenant rights; 809 of the 964 Views adopted since 1979 concluded that there had been a violation of the Covenant.
3. All attempts to categorize follow-up replies by States parties are inherently imprecise and subjective: it accordingly is not possible to provide a neat statistical breakdown of follow-up replies. Many follow-up replies received may be considered satisfactory, in that they display the willingness of the State party to implement the Committee's recommendations or to offer the complainant an appropriate remedy. Other replies cannot be considered satisfactory because they either do not address the Committee's Views or relate only to certain aspects of them. Some replies simply note that the victim has filed a claim for compensation outside statutory deadlines and that no compensation can therefore be paid. Still other replies indicate that there is no legal obligation on the State party to provide a remedy, but that a remedy will be afforded to the complainant on an *ex gratia* basis.
4. The remaining follow-up replies challenge the Committee's Views and findings on factual or legal grounds, constitute much-belated submissions on the merits of the complaint, promise an investigation of the matter considered by the Committee or indicate that the State party will not, for one reason or another, give effect to the Committee's recommendations.
5. In many cases, the Secretariat has also received information from complainants to the effect that the Committee's Views have not been implemented. Conversely, in rare instances, the petitioner has informed the Committee that the State party had in fact given effect to the Committee's recommendations, even though the State party had not itself provided that information.
6. The table below displays a complete picture of follow-up replies from States parties received up to the 107th session (11–28 March 2013), in relation to Views where the Committee concluded to a violation of the Covenant. It indicates whether follow-up replies are or have been considered as satisfactory or unsatisfactory, in terms of their compliance with the Committee's Views, or whether the dialogue between the State party and the Special Rapporteur for follow-up on Views continues. The notes following a number of case entries convey an idea of the difficulties in categorizing follow-up replies.
7. As of its 104th session, the Committee, in an effort to have its assessment on follow-up to Views issues disclosed in a more comprehensive, structured and transparent manner, decided to include an indication of its current assessment of the follow-up status in cases where submissions were received from the parties during the reporting period. Decisions to have the follow-up dialogue closed or suspended are also indicated in the table below.
8. Follow-up information provided by States parties and by petitioners or their representatives subsequent to the previous annual report (A/67/40) is set out in chapter VI (vol. I) of the present report.

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Algeria (20)	992/2001, <i>Bousroual</i> A/61/40				X	X
	1085/2002, <i>Taright</i> A/61/40				X	X
	1172/2003, <i>Madani</i> A/62/40				X	X
	1173/2003, <i>Benhadj</i> A/62/40				X	X
	1196/2003, <i>Boucherf</i> A/61/40				X A/64/40	X
	1297/2004, <i>Medjnoune</i> A/61/40				X A/67/40	X
	1327/2004, <i>Grioua</i> A/62/40				X	X
	1328/2004, <i>Kimouche</i> A/62/40				X	X
	1439/2005, <i>Aber</i> A/62/40				X	X
	1495/2006, <i>Madoui</i> A/64/40				X	X
	1588/2007, <i>Benaziza</i> A/65/40				X	X
	1753/2008, <i>Rakik</i> A/68/40				X	X
	1779/2008, <i>Mezine</i> A/68/40				X	X
	1780/2008, <i>Aouabdia et al.</i> A/66/40	X A/68/40		X		X A/68/40

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Algeria (<i>cont'd</i>)	1781/2008, <i>Berzig</i> A/67/40					X
	1791/2008, <i>Sahbi</i> A/68/40					X
	1806/2008, <i>Saadoun</i> A/68/40					X
	1807/2008, <i>Mechani</i> A/68/40					X
	1811/2008, <i>Djebbar and Chihoub</i> A/67/40					X
	1905/2009, <i>Ouaghliissi</i> A/67/40					X
Angola (2)	711/1996, <i>Dias</i> A/55/40	X A/61/40		X A/61/40		X
	1128/2002, <i>Marques</i> A/60/40	X A/61/40		X A/61/40		X
Argentina (4)	400/1990, <i>Mónaco de Gallichio</i> A/50/40	X A/51/40				X
	1458/2006, <i>González et al.</i> A/66/40					X
	1608/2007, <i>L.M.R.</i> A/66/40					X
	1610/2007, <i>L.N.P.</i> A/66/40	X A/68/40	X			X
Australia (25)	560/1993, <i>A.</i> A/52/40	X A/53/40, A/55/40, A/56/40		X		X

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Australia (<i>cont'd</i>)	900/1999, <i>C.</i> A/58/40	X A/58/40, CCPR/C/80/FU/1, A/60/40, A/62/40				X
	930/2000, <i>Winata et al.</i> A/56/40	X CCPR/C/80/FU/1, A/57/40, A/60/40 A/62/40 and A/63/40				X
	941/2000, <i>Young</i> A/58/40	X A/58/40, A/60/40, A/62/40 and A/63/40		X		X
	1014/2001, <i>Baban et al.</i> A/58/40	X A/60/40, A/62/40		X		X
	1020/2001, <i>Cabal and Pasini</i> A/58/40	X A/58/40, CCPR/C/80/FU/1		X*		
	1036/2001, <i>Faure</i> A/61/40	X A/61/40				X
	1050/2002, <i>Rafie and Safdel</i> A/61/40	X A/62/40 and A/63/40				X
	1069/2002, <i>Bakhitiyari</i> A/59/40	X A/60/40, A/62/40		X		X
	1157/2003, <i>Coleman</i> A/61/40	X A/62/40				X
	1184/2003, <i>Brough</i> A/61/40	X A/62/40				X
	1255, 1256, 1259, 1260, 1266, 1268, 1270 and 1288/2004, <i>Shams, Atvan, Shahrooei,</i> <i>Saadat, Ramezani, Boostani,</i> <i>Behrooz and Sefed</i> A/62/40	X A/63/40				X

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Australia (<i>cont'd</i>)	1324/2004, <i>Shafiq</i> A/62/40	X A/62/40 and A/63/40				X
	1347/2005, <i>Dudko</i> A/62/40	X A/63/40, A/64/40				X
	1442/2005, <i>Kwok</i> A/65/40	X A/67/40	X			
	Follow-up dialogue closed, with a note of a satisfactory implementation of the recommendation (see A/67/40, chap. VI).					
	1629/2007, <i>Fardon</i> A/65/40	X A/66/40, A/67/40		X		X A/68/40
	1557/2007, <i>Nystrom et al.</i> A/66/40			X		
	Follow-up dialogue closed, with a note of unsatisfactory implementation of the recommendation (A/68/40)					
Austria (5)	1635/2007, <i>Tillman</i> A/65/40	X A/66/40, A/67/40		X		X A/68/40
	415/1990, <i>Pauger</i> A/57/40	X A/47/40, A/52/40, A/66/40		X*		
	716/1996, <i>Pauger</i> A/54/40	X A/54/40, A/55/40, A/57/40, A/66/40, CCPR/C/80/FU/1		X A/67/40		
	965/2001, <i>Karakurt</i> A/57/40	X A/58/40, CCPR/C/80/FU/1, A/61/40				X

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Austria (<i>cont'd</i>)	1086/2002, <i>Weiss</i> A/58/40	X A/58/40, A/59/40, CCPR/C/80/FU/1, A/60/40, A/61/40				X
	1454/2006, <i>Lederbauer</i> A/62/40	X A/63/40				X
Azerbaijan (1)	1633/2007, <i>Avadanov</i> A/66/40				X	X A/68/40
Belarus (40)	780/1997, <i>Laptsevich</i> A/55/40				X A/56/40, A/57/40	X
	814/1998, <i>Pastukhov</i> A/58/40				X A/59/40	X
	886/1999, <i>Bondarenko</i> A/58/40	X A/59/40, A/62/40 and A/63/40				X
	887/1999, <i>Lyashkevich</i> A/58/40	X A/59/40, A/62/40 and A/63/40				X
	921/2000, <i>Dergachev</i> A/57/40				X	X
	927/2000, <i>Svetik</i> A/59/40	X A/60/40, A/61/40 and A/62/40				X A/62/40
	1009/2001, <i>Shchetko</i> A/61/40				X	X
	1022/2001, <i>Velichkin</i> A/61/40				X A/61/40	X
	1039/2001, <i>Boris et al.</i> A/62/40	X A/62/40				X

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Belarus (<i>cont'd</i>)	1047/2002, <i>Sinitzin, Leonid</i> A/62/40				X	X
	1100/2002, <i>Bandazhewsky</i> A/61/40	X A/62/40				X
	1178/2003, <i>Smantser</i> A/64/40	X A/65/40		X A/65/40		X
	1207/2003, <i>Malakhovsky</i> A/60/40	X A/61/40		X		X
	1226/2003, <i>Korneenko</i> A/68/40					X A/68/40
	1274/2004, <i>Korneenko</i> A/62/40	X A/62/40				X A/62/40
	1296/2004, <i>Belyatsky</i> A/62/40	X A/63/40				X
	1311/2004, <i>Osiyuk</i> A/64/40				X	X
	1316/2004, <i>Gryb</i> A/67/40				X	X A/68/40
	1354/2005, <i>Sudalenko</i> A/66/40				X	X
	1377/2005, <i>Katsora</i> A/65/40				X	X
	1383/2005, <i>Katsora et al.</i> A/66/40				X	X
	1390/2005, <i>Koreba</i> A/66/40				X	X
	1392/2005, <i>Lukyanchik</i> A/65/40	X A/66/40				X

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Belarus (<i>cont'd</i>)	1502/2006, <i>Marinich</i> A/65/40	X A/66/40				
	1553/2007, <i>Korneenko and Milinkevich</i> A/64/40	X A/65/40		X A/65/40		X
	1604/2007, <i>Zalesskaya</i> A/66/40				X	X
	1750/2008, <i>Sudalenko</i> A/67/40				X	X
	1772/2008, <i>Belyazeka</i> A/67/40				X	X
	1784/2008, <i>Schumilin</i> A/68/40					X A/68/40
	1785/2008, <i>Oleshkevish</i> A/68/40					X
	1787/2008, <i>Kovsh (Abramova)</i> A/68/40					X
	1790/2008, <i>Govsha et al.</i> A/68/40					X A/68/40
	1820/2008, <i>Krassovskaya</i> A/67/40					X A/68/40
	1830/2008, <i>Pivonos</i> A/68/40					X A/68/40
	1835-1837/2008, <i>Yasinovich</i> A/68/40					X
	1836/2008, <i>Katsora</i> A/68/40				X	X A/68/40

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Belarus (<i>cont'd</i>)	1838/2008, <i>Tulzhenkova</i> A/67/40				X	X X A/68/40
	1867/2009, 1936, 1975, 1977- 1891/2010, 2010/2010, <i>Levinov</i> A/68/40					X A/68/40
	2065/2011, <i>Kvasha</i> A/68/40					X A/68/40
	2120/2011, <i>Kovalev</i> A/68/40					X A/68/40
Belgium (1)	1472/2006, <i>Sayadi</i> A/64/40				X	X
Bolivia (Plurinational State of) (1)	176/1984, <i>Peñarrieta</i> A/43/40	X A/52/40				X
Bosnia and Herzegovina (1)	1917-1918-1925/2008, <i>Prutina et al.</i> A/68/40					X
Bulgaria (1)	2073/2011, <i>Naidenova et al.</i>					X
Cameroon (6)	458/1991, <i>Mukong</i> A/49/40				X A/52/40	X
	1134/2002, <i>Gorji-Dinka</i> A/60/40	X A/65/40			X	X
	1186/2003, <i>Titiahongo</i> A/63/40				X	X
	1353/2005, <i>Afuson</i> A/62/40	X A/65/40			X	X
	1397/2005, <i>Engo</i> A/64/40	X A/67/40, A/68/40		X		X A/68/40
	1813/2008, <i>Akwanga</i> A/66/40				X	X A/68/40

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Canada (11)	27/1978, <i>Pinkney</i> Fourteenth session Selected Decisions, vol. 1				X	X
	167/1984, <i>Ominayak et al.</i> A/45/50	X A/59/40, A/61/40, A/62/40				X A/62/40
	694/1996, <i>Waldman</i> A/55/40	X A/55/40, A/56/40, A/57/40, A/59/40, A/61/40		X		X
	829/1998, <i>Judge</i> A/58/40	X A/59/40, A/60/40	X A/60/40, A/61/40			X A/60/40
	1051/2002, <i>Ahani</i> A/59/40	X A/60/40, A/61/40		X		X* A/60/40
<i>*Note:</i> The State party went some way to implementing the Views: the Committee has not specifically said implementation is satisfactory.						
	1465/2006, <i>Kaba</i> A/65/40	X A/66/40				X
	1467/2006, <i>Dumont</i> A/65/40	X A/66/40, A/67/40, A/68/40				X A/68/40
	1544/2007, <i>Hamida</i> A/65/40	X A/66/40				X
	1763/2008, <i>Pillai et al.</i> Follow-up dialogue closed, with a note of a satisfactory implementation of the recommendation (see A/68/40)	X A/67/40				

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Canada (<i>cont'd</i>)	1792/2008 <i>Dauphin</i> A/64/40	X A/65/40		X A/65/40		X
	1912/2009, <i>Thuraisamy</i> A/68/40					X
	1959/2010, <i>Warsame</i> A/66/40				X	X
Central African Republic (1)	1587/2007 <i>Mamour</i> A/64/40				X	X
Colombia (16)	45/1979, <i>Suárez de Guerrero</i> Fifteenth session Selected Decisions, vol. 1	X A/52/40, A/68/40				X A/68/40
	46/1979, <i>Fals Borda</i> Sixteenth session Selected Decisions, vol. 1	X A/52/40		X		X
	64/1979, <i>Salgar de Montejó</i> Fifteenth session Selected Decisions, vol. 1	X A/52/40, A/68/40		X		X (A/68/40)
	161/1983, <i>Herrera Rubio</i> Thirty-first session Selected Decisions, vol. 2	X A/52/40, A/68/40				X A/68/40
	181/1984, <i>Sanjuán Arévalo brothers</i> A/45/40	X, A/52/40, A/64/40, A/68/40		X		X A/68/40
	195/1985, <i>Delgado Páez</i> A/45/40	X A/52/40, A/68/40				X A/68/40
	514/1992, <i>Fei</i> A/50/40	X A/51/40, A/68/40		X		X A/68/40
	612/1995, <i>Arhuacos</i> A/52/40	X A/68/40				X A/68/40

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Colombia (<i>cont'd</i>)	687/1996, <i>Rojas García</i> A/56/40	X A/58/40, A/59/40, A/68/40				X A/68/40
	778/1997, <i>Coronel et al.</i> A/58/40	X A/59/40, A/68/40				X A/68/40
	848/1999, <i>Rodríguez Orejuela</i> , A/57/40	X A/58/40, A/59/40, A/68/40		X		X A/68/40
	859/1999, <i>Jiménez Vaca</i> A/57/40	X A/58/40, A/59/40, A/61/40, A/68/40		X		X A/68/40
	1298/2004, <i>Becerra</i> A/61/40	X A/62/40, A/68/40				X A/68/40
	1361/2005, <i>Casadieago</i> A/62/40	X A/63/40, A/68/40				X A/68/40
	1611/2007, <i>Bonilla Lerma</i> A/66/40	X				X A/68/40
	1641/2007, <i>Calderón Bruges</i> A/67/40	X A/68/40				X A/68/40
Côte d'Ivoire (1)	1759/2008, <i>Traoré</i> A/67/40				X	X
Croatia (2)	727/1996, <i>Paraga</i> A/56/40	X A/56/40, A/58/40				X
	1510/2006, <i>Vojnović</i> , A/64/40	X A/65/40, A/66/40	X			
Czech Republic (27)*	<i>*Note:</i> For all of these property cases, see also follow-up to concluding observations for the State party's reply in A/59/40.					
	516/1992, <i>Simunek et al.</i> A/50/40	X A/51/40, A/57/40, A/58/40, A/61/40, A/62/40				X

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Czech Republic (<i>cont'd</i>)	586/1994, <i>Adam</i> A/51/40	X A/51/40, A/53/40, A/54/40, A/57/40, A/61/40, A/62/40				X
	747/1997, <i>Des Fours Walderode</i> A/57/40	X A/57/40, A/58/40, A/61/40, A/62/40				X
	757/1997, <i>Pezoldova</i> A/58/40	X A/60/40, A/61/40 and A/62/40				X
	765/1997, <i>Fábryová</i> A/57/40	X A/57/40, A/58/40, A/61/40, A/62/40				X
	823/1998, <i>Czernin</i> A/60/40	X A/62/40				X
	857/1999, <i>Blazek et al.</i> A/56/40	X A/62/40				X
	945/2000, <i>Marik</i> A/60/40	X A/62/40				X
	946/2000, <i>Patera</i> A/57/40	X A/62/40				X
	1054/2002, <i>Kriz</i> A/61/40	X A/62/40				X
	1445/2006, <i>Polacek</i> A/62/40				X	X
	1448/2006, <i>Kohoutek</i> A/63/40	X A/66/40				X
	1463/2006, <i>Gratzinger</i> A/63/40				X	X
	1479/2006, <i>Persan</i> A/64/40				X	X

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Czech Republic (<i>cont'd</i>)	1484/2006, <i>Lnenicka</i> A/63/40				X	X
	1485/2006, <i>Vlcek</i> A/63/40				X	X
	1488/2006, <i>Süsser</i> A/63/40				X	X
	1491/2006, <i>Fürst Blücher von Wahlstatt</i> A/65/40				X	X
	1497/2006, <i>Preiss</i> A/63/40				X	X
	1508/2006, <i>Amundson</i> A/64/40				X	X
	1586/2007, <i>Lange</i> A/66/40				X	X
	1533/2006, <i>Ondracka</i> A/63/40				X	X
	1563/2007, <i>Jünglingová</i> A/67/40				X	X
	1581/2007, <i>Drda</i> A/66/40				X	X
	1615/2007, <i>Zavrel</i> A/65/40				X	X
	1742/2007, <i>Gschwind</i> A/65/40				X	X
	1847/2008, <i>Klain and Klain</i> A/67/40				X	X

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Democratic Republic of the Congo (14)*	*Note: See A/59/40 for details of follow-up consultations.					
	16/1977, <i>Mbenge</i> Eighteenth session Selected Decisions, vol. 2				X	X
	90/1981, <i>Luyeye</i> Nineteenth session Selected Decisions, vol. 2				X A/61/40	X
	124/1982, <i>Muteba</i> Twenty-second session Selected Decisions, vol. 2				X A/61/40	X
	138/1983, <i>Mpandanjila et al.</i> Twenty-seventh session Selected Decisions, vol. 2				X A/61/40	X
	157/1983, <i>Mpaka Nsusu</i> Twenty-seventh session Selected Decisions, vol. 2				X A/61/40	X
	194/1985, <i>Miango</i> Thirty-first session Selected Decisions, vol. 2				X A/61/40	X
	241/1987, <i>Birindwa</i> A/45/40				X A/61/40	X
	242/1987, <i>Tshisekedi</i> A/45/40				X A/61/40	X
	366/1989, <i>Kanana</i> A/49/40				X A/61/40	X
	542/1993, <i>Tshishimbi</i> A/51/40				X A/61/40	X
	641/1995, <i>Gedumbe</i> A/57/40				X A/61/40	X A/68/40

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Democratic Republic of the Congo (<i>cont'd</i>)	933/2000, <i>Mundyo Busyo et al.</i> (68 judges) A/58/40				X A/61/40	X
	962/2001, <i>Mulezi</i> A/59/40				X A/61/40	X
	1177/2003, <i>Wenga and Shandwe</i> A/61/40				X	X
Denmark (1)	1554/2007, <i>El-Hichou</i> A/65/40	X A/66/40				X
Dominican Republic (2)	193/1985, <i>Giry</i> A/45/40	X A/52/40, A/59/40		X		X
	449/1991, <i>Mojica</i> A/49/40	X A/52/40, A/59/40		X		X
Ecuador (2)	277/1988, <i>Terán Jijón</i> A/47/40	X A/59/40		X		X
	319/1988, <i>Cañón García</i> A/47/40			X		X
Equatorial Guinea (3)	414/1990, <i>Primo Essono</i> A/49/40	A/62/40*			X	X
	468/1991, <i>Oló Bahamonde</i> A/49/40	A/62/40*			X	X
	1152 and 1190/2003, <i>Ndong et al.</i> and <i>Mic Abogo</i> A/61/40	A/62/40*			X	X
* The State party has not replied in writing, but it has met several times with the Special Rapporteur.						
Finland (1)	779/1997, <i>Äärelä et al.</i> A/57/40	X A/57/40, A/59/40				X
France (5)	1620/2007, <i>J.O.</i> A/66/40	X A/67/40		X		X

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
France (<i>cont'd</i>)	1760/2008, <i>Cochet</i> A/66/40				X	X A/68/40
	1852/2008, <i>Singh</i> A/68/40					X
	1876/2009, <i>Singh</i> A/66/40	X A/68/40				X A/68/40
	2002/2010, <i>Casanovas</i> A/66/40				X	X
Georgia (3)	626/1995, <i>Gelbekhiani</i> A/53/40	X A/54/40		X		X
	627/1995, <i>Dokvadze</i> A/53/40	X A/54/40		X		X
	975/2001, <i>Ratiani</i> A/60/40	X A/61/40				X
Germany (1)	1482/2006, <i>Gerlach</i> A/63/40	X A/64/40				X
Greece (4)	1070/2002, <i>Kouldis</i> A/61/40	X A/61/40				X
	1486/2006, <i>Kalamiotis</i> A/63/40	X A/64/40				X
	1558/2007, <i>Katsaris</i> A/68/40	X A/68/40				X
	1799/2008, <i>Georgopoulos et al.</i> A/65/40	X A/66/40, A/67/40, A/68/40				X A/68/40
Guyana (9)	676/1996, <i>Yasseen and Thomas</i> A/53/40	A/60/40* A/62/40			X A/60/40	X
	728/1996, <i>Sahadeo</i> A/57/40	A/60/40* A/62/40			X A/60/40	X

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Guyana (<i>cont'd</i>)	811/1998, <i>Mulai</i> A/59/40	A/60/40* A/62/40			X A/60/40	X
	812/1998, <i>Persaud</i> A/61/40	A/60/40* A/62/40			X	X
	862/1999, <i>Hussain and Hussain</i> A/61/40	A/60/40* A/62/40			X	X
	838/1998, <i>Hendriks</i> A/58/40	A/60/40* A/62/40			X A/60/40	X
	867/1999, <i>Smartt</i> A/59/40	A/60/40* A/62/40			X A/60/40	X
	912/2000, <i>Ganga</i> A/60/40	A/60/40* A/62/40			X A/60/40	X
	913/2000, <i>Chan</i> A/61/40	A/60/40* A/62/40			X	X
	* The State party has not replied in writing, but it has met several times with the Special Rapporteur.					
Hungary (3)	410/1990, <i>Párkányi</i> A/47/40	X		X		X
	521/1992, <i>Kulomin</i> A/51/40	X A/52/40				X
	852/1999, <i>Borisenko</i> A/58/40	X A/58/40, A/59/40		X		X
Iceland (1)	1306/2004, <i>Haraldsson and Sveinsson</i> , A/62/40 Follow-up dialogue closed, with a partly satisfactory implementation of the recommendation (see A/67/40, chap. VI).	X A/63/40, A/64/40, A/67/40				
Italy (1)	699/1996, <i>Maleki</i> A/54/40	X A/55/40		X		X

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Jamaica (98)	92 cases*					X
	*Note: See A/59/40. Twenty-five detailed replies were received, of which 19 indicated that the State party would not implement the Committee's recommendations; in 2, it promises to investigate; in 1, it announces the author's release (592/1994 — Clive Johnson — see A/54/40). There were 36 general replies indicating that death sentences have been commuted. No follow-up replies in 31 cases.					
	695/1996, <i>Simpson</i> A/57/40	X A/57/40, A/58/40, A/59/40, A/63/40, A/64/40				X
	792/1998, <i>Higginson</i> A/57/40				X	X
	793/1998, <i>Pryce</i> A/59/40				X	X
	796/1998, <i>Reece</i> A/58/40				X	X
	797/1998, <i>Lobban</i> A/59/40				X	X
	798/1998, <i>Howell</i> A/59/40	X A/61/40				X
Kazakhstan (1)	2024/2011, <i>Israil</i> A/67/40				X	X
Kyrgyzstan (14)	1275/2004, <i>Umetaliev and Tashtanbekova</i> A/64/40	X A/65/40				X
	1312/2004, <i>Latifulin</i> A/65/40	X A/66/40				X
	1338/2005, <i>Kaldarov</i> A/65/40	X A/66/40				X A/68/40
	1369/2005, <i>Kulov</i> A/65/40	X A/66/40				X A/68/40

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Kyrgyzstan (<i>cont'd</i>)	1402/2005, <i>Krasnov</i> A/66/40	X A/66/40, A/67/40		X		X
	1461, 1462, 1476 and 1477/2006, <i>Maksudov,</i> <i>Rakhimov, Tashbaev,</i> <i>Pirmatov</i> A/63/40	X A/65/40				X
	1470/2006, <i>Toktakunov</i> A/66/40	X A/67/40				
	Follow-up dialogue closed with a satisfactory implementation of the recommendation (see A/67/40, chap. VI).					
	1503/2006, <i>Akhadov</i> A/66/40	X A/67/40		X		X
	1545/2007, <i>Gunan</i> A/66/40	X A/67/40		X		X
	1547/2007, <i>Torobekov</i> A/67/40	X				X A/68/40
	1756/2008, <i>Moidunov and</i> <i>Zhumbaeva</i> A/66/40	X A/67/40, A/68/40		X		X A/68/40
Latvia (2)	884/1999, <i>Ignatane</i> A/56/40	X A/57/40	X			
	1621/2007, <i>Raihman</i> A/66/40				X	X A/68/40
Libya (14)	440/1990, <i>El-Megreisi</i> A/49/40				X	X
	1107/2002, <i>El Ghar</i> A/60/40	X A/61/40, A/62/40				X A/68/40

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Libya (<i>cont'd</i>)	1143/2002, <i>Dernawi</i> A/62/40				X	X
	1755/2008, <i>El Hagog Jumaa</i> A/67/40				X	X
	1782/2008, <i>Aboufaied</i> A/67/40				X	X
	1880/2009, <i>Nenova et al.</i> A/67/40				X	X
	1295/2004, <i>El Awani</i> A/62/40				X	X
	1422/2005, <i>El Hassy</i> A/63/40				X	X
	1640/2007, <i>El Abani</i> A/65/40				X	X
	1751/2008, <i>Aboussedra et al.</i> A/66/40				X	X
	1776/2008, <i>Ali Bashasha and Hussein Bashasha</i> A/66/40				X	X
	1804/2008, <i>Il Khwildy</i> A/68/40					X
	1805/2008, <i>Benali</i> A/68/40					X
Madagascar (4)	1913/2009, <i>Abushala</i> A/68/40					X
	49/1979, <i>Marais</i> Eighteenth session Selected Decisions, vol. 2				X*	X

*Note: According to the annual report (A/52/40), the author indicated that he had been released. No further information provided.

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Madagascar (<i>cont'd</i>)	115/1982, <i>Wight</i> Twenty-fourth session Selected Decisions, vol. 2				X*	X
	*Note: According to the annual report (A/52/40), the author indicated that he had been released. No further information provided.					
	132/1982, <i>Jaona</i> Twenty-fourth session Selected Decisions, vol. 2				X	X
	155/1983, <i>Hammel</i> A/42/40 Selected Decisions, vol. 2				X	X
Mauritius (1)	1744/2007, <i>Narrain et al.</i> A/68/40	X A/68/40				X A/68/40
Nepal (4)	1469/2006, <i>Sharma</i> A/64/40	X A/64/40, A/66/40, A/67/40, A/68/40				X A/68/40
	1761/2008, <i>Giri et al.</i> A/66/40	X A/67/40				X
	1863/2009, <i>Maharjan</i> A/68/40					X
	1870/2009, <i>Sobhraj</i> A/65/40	X A/66/40, A/67/40, A/68/40				X A/68/40
Netherlands (5)	786/1997, <i>Vos</i> A/54/40	X A/55/40		X		X
	976/2001, <i>Derksen</i> A/59/40	X A/60/40				X
	1238/2003, <i>Jongenburger Veerman</i> A/61/40				X	X

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Netherlands (<i>cont'd</i>)	1564/2007, <i>X.H.L.</i> A/66/40	X A/68/40				X A/68/40
	1797/2008, <i>Mennen</i> A/65/40				X	X
New Zealand (2)	1368/2005, <i>Britton</i> A/62/40	X A/63/40				X
	1512/2006, <i>Dean</i> A/64/40	X A/65/40			X	X
Nicaragua (1)	328/1988, <i>Zelaya Blanco</i> A/49/40	X A/56/40, A/57/40, A/59/40				X
Norway (2)	1155/2003, <i>Leirvag</i> A/60/40	X A/61/40	X* (A/61/40)			X
	<i>*Note:</i> Additional follow-up information expected.					
	1542/2007, <i>Aboushanif</i> A/63/40	X A/65/40				X
Panama (2)	289/1988, <i>Wolf</i> A/47/40	X A/53/40				X
	473/1991, <i>Barroso</i> A/50/40	X A/53/40				X
Paraguay (3)	1407/2005, <i>Asensi</i> A/64/40	X A/65/40, A/66/40				X A/68/40
	1828/2008, <i>Domínguez</i> A/67/40	X A/68/40				X A/68/40
	1829/2008, <i>Benítez Gamarra</i> A/67/40	X A/68/40				X A/68/40
Peru (15)	202/1986, <i>Ato del Avellanal</i> A/44/40	X A/52/40, A/59/40, A/62/40 and A/63/40				X A/68/40

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Peru (<i>cont'd</i>)	203/1986, <i>Muñoz Hermosa</i> A/44/40	X A/52/40, A/59/40, A/68/40				X A/68/40
	263/1987, <i>González del Río</i> A/48/40	X A/52/40, A/59/40				X
	309/1988, <i>Orihuela Valenzuela</i> A/48/40	X A/52/40, A/59/40				X
	540/1993, <i>Celis Laureano</i> A/51/40	X A/59/40, A/68/40				X A/68/40
	577/1994, <i>Polay Campos</i> A/53/40	X A/53/40, A/59/40				X
	678/1996, <i>Gutiérrez Vivanco</i> A/57/40	X A/58/40, A/59/40, A/64/40, A/68/40				X A/68/40
	688/1996, <i>Arredondo</i> A/68/40	X A/68/40				X A/68/40
	906/1999, <i>Vargas-Machuca</i> A/57/40				X A/58/40, A/59/40	X
	981/2001, <i>Gómez Casafranca</i> A/58/40	X A/59/40, A/68/40				X A/68/40
	1058/2002, <i>Vargas</i> A/61/40	X A/61/40 and A/62/40				X
	1125/2002, <i>Quispe</i> A/61/40	X A/61/40, A/68/40				X A/68/40
	1126/2002, <i>Carranza</i> A/61/40	X A/61/40, A/62/40, A/68/40				X A/68/40

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Peru (<i>cont'd</i>)	1153/2003, <i>K.N.L.H.</i> A/61/40	X A/61/40, A/62/40 and A/63/40				X
	1457/2006, <i>Poma Poma</i> A/64/40	X A/65/40				X A/68/40
Philippines (11)	788/1997, <i>Cagas</i> A/57/40	X A/59/40, A/60/40, A/61/40				X
	868/1999, <i>Wilson</i> A/59/40	X A/60/40, A/61/40, A/62/40		X A/62/40		X
	869/1999, <i>Piandiong et al.</i> A/56/40	X N/A				X
	1089/2002, <i>Rouse</i> A/60/40				X	X A/68/40
	1320/2004, <i>Pimentel et al.</i> A/62/40 The Committee decided to suspend the follow up dialogue, with a finding of a non- satisfactory implementation of its recommendation (see A/67/40, chap. VI).	X A/63/40, A/64/40, A/66/40, A/67/40				
	1421/2005, <i>Larrañaga</i> A/61/40				X	X A/68/40
	1466/2006, <i>Lumanog and Santos</i> A/63/40	X A/65/40, A/66/40				X
	1559/2007, <i>Hernandez</i> A/65/40				X	X
	1560/2007, <i>Marcellana and</i> <i>Gumanoy</i> A/64/40				X	X

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Philippines (<i>cont'd</i>)	1619/2007, <i>Pestaño</i> A/65/40	X A/66/40				X
	1815/2008, <i>Adonis</i> A/67/40				X	X
Portugal (1)	1123/2002, <i>Correia de Matos</i> A/61/40	X A/62/40, A/67/40				X A/68/40
Republic of Korea (120)	518/1992, <i>Sohn</i> A/50/40	X A/60/40, A/62/40				X
	574/1994, <i>Kim</i> A/54/40	X A/60/40, A/62/40, A/64/40				X
	628/1995, <i>Park</i> A/54/40	X A/54/40, A/64/40				X
	878/1999, <i>Kang</i> A/58/40	X A/59/40, A/64/40				X
	926/2000, <i>Shin</i> A/59/40	X A/60/40, A/62/40, A/64/40				X
	1119/2002, <i>Lee</i> A/60/40	X A/61/40, A/64/40				X
	1321 and 1322/2004, <i>Yoon, Yeo-Bzum and Choi, Myung-Jin</i> A/62/40	X A/62/40 and A/63/40 A/64/40				X
	1593 to 1603/2007, <i>Jung et al.</i> A/65/40	X A/66/40				X
	1642-1741/2007, <i>Jeong et al.</i> A/66/40	X A/67/40		X		X A/68/40
	1786/2008, <i>Kim et al.</i> A/68/40					X

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Romania (1)	1158/2003, <i>Blaga</i> A/60/40				X	X
Russian Federation (19)	712/1996, <i>Smirnova</i> A/59/40	X A/60/40				X
	763/1997, <i>Lantsov</i> A/57/40	A/58/40, A/60/40		X		X
	770/1997, <i>Gridin</i> A/55/40	A/57/40, A/60/40		X		X
	888/1999, <i>Telitsin</i> A/59/40	X A/60/40				X
	815/1997, <i>Dugin</i> A/59/40	X A/60/40				X
	889/1999, <i>Zheikov</i> A/61/40	X A/62/40				X A/68/40
	1218/2003, <i>Platanov</i> A/61/40	X A/61/40				X
	1232/2003, <i>Pustovalov</i> A/65/40	X A/66/40, A/67/40		X		X
	1278/2004, <i>Reshnetnikov</i> A/64/40				X	X
	1304/2004, <i>Khoroshenko</i> A/66/40				X	X A/68/40
	1310/2004, <i>Babkin</i> A/63/40	X A/64/40, A/66/40				X
	1410/2005, <i>Yevdokimov and Rezanov</i> A/66/40				X	X

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Russian Federation (<i>cont'd</i>)	1447/2006, <i>Amirov</i> A/64/40	X A/65/40, A/66/40				X
	1548/2007, <i>Kholodov</i> A/68/40					X
	1577/2007, <i>Usaev</i> A/65/40	X A/66/40				X
	1605/2007, <i>Zyuskin</i> A/66/40				X	X A/68/40
	1628/2007, <i>Pavlyuchenkov</i> A/68/40					X
	1866/2009, <i>Chebotareva</i> A/67/40				X	X
	1932/2010, <i>Fedotova</i> A/68/40					X
Saint Vincent and the Grenadines (1)	806/1998, <i>Thompson</i> A/56/40				X A/61/40	X
Serbia (1)	1556/2007, <i>Novaković</i> A/66/40	X A/66/40, A/67/40, A/68/40		X		X A/68/40
Sierra Leone (3)	839/1998, <i>Mansaraj et al.</i> A/56/40	X A/57/40, A/59/40				X
	840/1998, <i>Gborie et al.</i> A/56/40	X A/57/40, A/59/40				X
	841/1998, <i>Sesay et al.</i> A/56/40	X A/57/40, A/59/40				X
South Africa (1)	1818/2008, <i>McCallum</i> A/66/40				X	X
Spain (23)	493/1992, <i>Griffin</i> A/50/40	X A/59/40, A/58/40				X

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Spain (<i>cont'd</i>)	526/1993, <i>Hill</i> A/52/40	X A/53/40, A/56/40, A/58/40, A/59/40, A/60/40, A/61/40, A/64/40				X A/68/40
	701/1996, <i>Gómez Vásquez</i> A/55/40	X A/56/40, A/57/40, A/58/40, A/60/40, A/61/40				X
	864/1999, <i>Ruiz Agudo</i> A/58/40				X A/61/40	X
	986/2001, <i>Semey</i> A/58/40	X A/59/40, A/60/40, A/61/40				X
	1006/2001, <i>Muñoz</i> A/59/40				X A/61/40	X
	1007/2001, <i>Sineiro Fernando</i> A/58/40	X A/59/40, A/60/40, A/61/40				X
	1073/2002, <i>Terón Jesús</i> A/60/40				X A/61/40	X
	1095/2002, <i>Gomariz</i> A/60/40				X A/61/40	X
	1101/2002, <i>Alba Cabriada</i> A/60/40				X A/61/40	X A/68/40
	1104/2002, <i>Martínez Fernández</i> A/60/40				X A/61/40	X A/68/40
	1122/2002, <i>Lagunas Castedo</i> A/64/40				X	X
	1211/2003, <i>Oliveró</i> A/61/40				X	X

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Spain (<i>cont'd</i>)	1325/2004, <i>Conde</i> A/62/40				X	X
	1332/2004, <i>Garcia et al.</i> A/62/40				X	X
	1351 and 1352/2005, <i>Hens and Corujo</i> A/63/40				X	X
	1363/2005, <i>Gayoso Martínez</i> A/65/40	X A/66/40, A/68/40				X A/68/40
	1364/2005, <i>Carpintero</i> A/64/40	X A/68/40				X A/68/40
	1381/2005, <i>Hachuel</i> A/62/40				X	X
	1473/2006, <i>Morales Tornel</i> , A/64/40	X A/66/40, A/68/40				X A/68/40
	1493/2006, <i>Williams Lecraft</i> A/64/40	X A/65/40, A/66/40	X			
	1531/2006 <i>Cunillera Arias</i> A/66/40					X
	1945/2010, <i>Achabal</i> A/68/40					X
Sri Lanka (14)	916/2000, <i>Jayawardena</i> A/57/40	X A/58/40, A/59/40, A/60/40, A/61/40				X
	950/2000, <i>Sarma</i> A/58/40	X A/59/40, A/60/40, A/63/40				X
	909/2000, <i>Kankanamge</i> A/59/40	X A/60/40				X

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Sri Lanka (<i>cont'd</i>)	1033/2001, <i>Nallaratnam A/59/40</i>	X A/60/40, A/64/40				X
	1189/2003, <i>Fernando A/60/40</i>	X A/61/40		X A/61/40		X
	1249/2004, <i>Immaculate Joseph et al. A/61/40</i>	X A/61/40				X
	1250/2004, <i>Rajapakse A/61/40</i>				X	X
	1373/2005, <i>Dissanakye A/63/40</i>				X	X
	1376/2005, <i>Bandaranayake A/63/40</i>				X	X A/68/40
	1406/2005, <i>Weerawanza, A/64/40</i>				X	X A/68/40
	1426/2005, <i>Dingiri Banda A/63/40</i>				X	X
	1432/2005, <i>Gunaratna A/64/40</i>				X	X
	1436/2005, <i>Sathasivam A/63/40</i>				X A/65/40	X
	1862/2009, <i>Pathmini Peiris et al. A/67/40</i>					X
Suriname (8)	146/1983, <i>Baboeram</i> Twenty-fourth session Selected Decisions, vol. 2	X A/51/40, A/52/40, A/53/40, A/55/40, A/61/40				X

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Suriname (<i>cont'd</i>)	148 to 154/1983, <i>Kamperveen, Riedewald, Leckie, Demrawsingh, Sohansingh, Rahman, Hoost</i> Twenty-fourth session Selected Decisions, vol. 2	X A/51/40, A/52/40, A/53/40, A/55/40, A/61/40				X
Sweden (2)	1416/2005, <i>Alzery</i> A/62/40	X A/62/40				X
	1833/2008, X. A/67/40	X A/68/40				X A/68/40
Tajikistan (22)	964/2001, <i>Saidov</i> A/59/40 The Committee decided to suspend the follow-up dialogue, with a finding of a non-satisfactory implementation of its recommendation (see A/67/40, chap. VI).	X A/60/40, A/62/40, A/67/40				
	973/2001, <i>Khalilova</i> A/60/40 The Committee decided to suspend the follow-up dialogue, with a finding of a non-satisfactory implementation of its recommendation (see A/67/40, chap. VI).	X A/60/40, A/62/40, A/67/40				
	985/2001, <i>Aliboev</i> A/61/40 The Committee decided to suspend the follow-up dialogue, with a finding of a non-satisfactory implementation of its recommendation (see A/67/40, chap. VI).	A/62/40, A/67/40				

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Tajikistan (<i>cont'd</i>)	1042/2002, <i>Boimurudov</i> A/61/40 The Committee decided to suspend the follow-up dialogue, with a finding of a non-satisfactory implementation of its recommendation (see A/67/40, chap. VI).	X A/62/40, A/63/40, A/67/40				
	1044/2002, <i>Nazriev</i> A/61/40	X A/62/40, A/63/40				X
	1096/2002, <i>Kurbonov</i> A/59/40 The Committee decided to suspend the follow-up dialogue, with a finding of a non-satisfactory implementation of its recommendation (see A/67/40, chap. VI).	A/59/40, A/60/40, A/62/40, A/67/40				
	1108 and 1121/2002, <i>Karimov, Askarov and Davlatov</i> A/62/40 The Committee decided to close the follow-up dialogue concerning the case of Mr. A. Davlatov, and to suspend the dialogue, with a finding of a non-satisfactory implementation of its recommendation, concerning Mr. Karimov, Mr. Askarov, and Mr. N. Davlatov (see A/67/40, chap. VI).	X A/63/40, A/67/40				

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Tajikistan (<i>cont'd</i>)	1117/2002, <i>Khomidova</i> A/59/40 The Committee decided to suspend the follow-up dialogue, with a finding of a non-satisfactory implementation of its recommendation (see A/67/40, chap. VI).	X A/60/40, A/67/40				
	1195/2003, <i>Dunaev</i> A/64/40 The Committee decided to suspend the follow-up dialogue, with a finding of a non-satisfactory implementation of its recommendation (see A/67/40, chap. VI).				X	X
	1200/2003, <i>Sattorova</i> A/64/40 The Committee decided to suspend the follow-up dialogue, with a finding of a non-satisfactory implementation of its recommendation (see A/67/40, chap. VI).	X A/65/40, A/67/40				
	1208/2003, <i>B. Kurbanov</i> A/61/40 The Committee decided to suspend the follow-up dialogue, with a finding of a non-satisfactory implementation of its recommendation (see A/67/40, chap. VI).	X A/62/40, A/67/40				

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Tajikistan (<i>cont'd</i>)	1209/2003, 1231/2003 and 1241/2004, <i>Rakhmatov, Safarov and Salimov</i> , and <i>Mukhammadiev</i> A/63/40 The Committee decided to suspend the follow-up dialogue, with a finding of a non-satisfactory implementation of its recommendation (see A/67/40, chap. VI).	X A/67/40				
	1263/2004 and 1264/2004, <i>Khuseynov and Butaev</i> A/64/40 The Committee decided to suspend the follow-up dialogue, with a finding of a non-satisfactory implementation of its recommendation (see A/67/40, chap. VI).	X A/65/40, A/67/40				
	1276/2004, <i>Idiev</i> A/64/40 The Committee decided to suspend the follow-up dialogue, with a finding of a non-satisfactory implementation of its recommendation (see A/67/40, chap. VI).	X A/65/40, A/67/40				

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Tajikistan (<i>cont'd</i>)	1348/2005, <i>Ashurov</i> A/62/40	X A/67/40				
	The Committee decided to suspend the follow-up dialogue, with a finding of a non-satisfactory implementation of its recommendation (see A/67/40, chap. VI).					
	1401/2005, <i>Kirpo</i> A/65/40	X A/66/40, A/67/40				
	The Committee decided to suspend the follow-up dialogue, with a finding of a non-satisfactory implementation of its recommendation (see A/67/40, chap. VI).					
	1499/2006, <i>Iskandarov</i> A/66/40					
Togo (4)	1519/2006, <i>Khostikoev</i> A/65/40	X A/66/40, A/67/40				
	The Committee decided to suspend the follow-up dialogue, with a finding of a non-satisfactory implementation of its recommendation (see A/67/40, chap. VI).					
	422 to 424/1990, <i>Aduayom et al.</i> A/51/40	X A/56/40, A/57/40		X A/59/40		X
	505/1992, <i>Ackla</i> A/51/40	X A/56/40, A/57/40		X A/59/40		X

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Trinidad and Tobago (23)	232/1987, <i>Pinto</i> A/45/40 and 512/1992, <i>Pinto</i> A/51/40	X A/51/40, A/52/40, A/53/40		X		X
	362/1989, <i>Soogrim</i> A/48/40	X A/51/40, A/52/40 A/53/40, A/58/40			X	X
	434/1990, <i>Seerattan</i> A/51/40	X A/51/40, A/52/40, A/53/40		X		X
	523/1992, <i>Neptune</i> A/51/40	X A/51/40, A/52/40 A/53/40, A/58/40		X		X
	533/1993, <i>Elahie</i> A/52/40				X	X
	554/1993, <i>La Vende</i> A/53/40				X	X
	555/1993, <i>Bickaroo</i> A/53/40				X	X
	569/1996, <i>Mathews</i> A/43/40				X	X
	580/1994, <i>Ashby</i> A/57/40				X	X
	594/1992, <i>Phillip</i> A/54/40				X	X
	672/1995, <i>Smart</i> A/53/40				X	X
	677/1996, <i>Teesdale</i> A/57/40				X	X
	683/1996, <i>Wanza</i> A/57/40				X	X

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Trinidad and Tobago (<i>cont'd</i>)	684/1996, <i>Sahadath A/57/40</i>				X	X
	721/1996, <i>Boodoo A/57/40</i>				X	X
	752/1997, <i>Henry A/54/40</i>				X	X
	818/1998, <i>Sextus A/56/40</i>				X	X
	845/1998, <i>Kennedy A/57/40</i>				X A/58/40	X
	899/1999, <i>Francis et al. A/57/40</i>				X A/58/40	X
	908/2000, <i>Evans A/58/40</i>				X	X
	928/2000, <i>Sooklal A/57/40</i>				X	X
	938/2000, <i>Siewpersaud et al. A/59/40</i>				X A/51/40, A/53/40	X
Turkey (2)	1853/2008 and 1854/2008, <i>Atasoy and Sarkut A/67/40</i>	X A/68/40				X A/68/40
Turkmenistan (4)	1450/2006, <i>Komarovsky A/63/40</i>				X	X
	1460/2006, <i>Yklymova A/64/40</i>					X
	1530/2006, <i>Bozbey A/66/40</i>					X
	1883/2009, <i>Orazova A/67/40</i>					X

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Ukraine (4)	781/1997, <i>Aliev</i> A/58/40	X A/60/40		X A/60/40		X
	1412/2005, <i>Butovenko</i> A/66/40				X	X A/68/40
	1535/2006, <i>Shchetka</i> A/66/40				X	X
	1803/2008, <i>Bulgakov</i> A/68/40					X
Uruguay (39)	A. [5/1977, <i>Massera</i> Seventh session 43/1979, <i>Caldas</i> Nineteenth session 63/1979, <i>Antonaccio</i> Fourteenth session 73/1980, <i>Izquierdo</i> Fifteenth session 80/1980, <i>Vasiliskis</i> Eighteenth session 83/1981, <i>Machado</i> Twentieth session 84/1981, <i>Dermitt Barbato</i> Seventeenth session 85/1981, <i>Romero</i> Twenty-first session 88/1981, <i>Bequio</i> Eighteenth session 92/1981, <i>Nieto</i> Nineteenth session 103/1981, <i>Scarone</i> Twentieth session 105/1981, <i>Cabreira</i> Nineteenth session 109/1981, <i>Voituret</i> Twenty-first session 123/1982, <i>Lluberas</i> Twenty-first session]	X 43 follow-up replies received A/59/40*		X		X

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Uruguay (<i>cont'd</i>)	<p>B. [103/1981, <i>Scarone</i> 73/1980, <i>Izquierdo</i> 92/1981, <i>Nieto</i> 85/1981, <i>Romero</i>]</p> <p>C. [63/1979, <i>Antonaccio</i> 80/1980, <i>Vasiliskis</i> 123/1982, <i>Lluberas</i>]</p> <p>D. [4/1977, <i>Ramirez</i> Fourth session 6/1977, <i>Sequeiro</i> Sixth session 25/1978, <i>Massiotti</i> Sixteenth session 28/1978, <i>Weisz</i> Eleventh session 32/1978, <i>Touron</i> Twelfth session 33/1978, <i>Carballal</i> Twelfth session 37/1978, <i>De Boston</i> Twelfth session 44/1979, <i>Pietraroia</i> Twelfth session 52/1979, <i>Lopez Burgos</i> Thirteenth session 56/1979, <i>Celiberti</i> Thirteenth session 66/1980, <i>Schweizer</i> Seventeenth session 70/1980, <i>Simones</i> Fifteenth session 74/1980, <i>Estrella</i> Eighteenth session 110/1981, <i>Viana</i> Twenty-first session 139/1983, <i>Conteris</i> Twenty-fifth session 147/1983, <i>Gilboa</i> Twenty-sixth session]</p>					

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Uruguay (<i>cont'd</i>)	162/1983, <i>Acosta</i> Thirty-fourth session]					
	E. [30/1978, <i>Bleier</i> Fifteenth session 84/1981, <i>Dermitt Barbato</i> Seventeenth session 107/1981, <i>Quinteros</i> Nineteenth session]					
	<p><i>*Note:</i> Follow-up information was provided on 17 October 1991 (unpublished). The list of cases under A: the State party submitted that on 1 March 1985, the competence of the civil courts was re-established. The amnesty law of 8 March 1985 benefited all the individuals who had been involved as authors, accomplices or accessory participants in political crimes or crimes committed for political purposes, from 1 January 1962 to 1 March 1985. The law allowed those individuals held responsible for intentional murder to have either their conviction reviewed or their sentence reduced. Pursuant to article 10 of the Act on National Pacification all the individuals imprisoned under “measures of security” were released. In cases subjected to review, appellate courts either acquitted or condemned the individuals. By virtue of Act 15.783 of 20 November all the individuals who had previously held a public office were entitled to return to their jobs. On cases under B: the State party indicates that these individuals were pardoned by virtue of Act 15.737 and released on 10 March 1985. On cases under C: these individuals were released on 14 March 1985; their cases were included under Act 15.737. On cases under D: from 1 March 1985, the possibility to file an action for damages was open to all of the victims of human rights violations which occurred during the de facto government. Since 1985, 36 suits for damages have been filed, 22 of them for arbitrary detention and 12 for the return of property. The Government settled Mr. Lopez’s case on 21 November 1990, by paying him US\$ 200,000. The suit filed by Ms. Lilian Celiberti is still pending. Besides the aforementioned cases, no other victim has filed a lawsuit against the State claiming compensation. On cases under E: on 22 December 1986, the Congress passed Act 15.848, known as “termination of public prosecutions”. Under the Act, the State can no longer prosecute crimes committed before 1 March 1985 by the military or the police for political ends or on orders received from their superiors. All pending proceedings were discontinued. On 16 April 1989, the Act was confirmed by referendum. The Act required investigating judges to send reports submitted to the judiciary about victims of disappearances to the Government, for the latter to initiate inquiries.</p>					
	159/1983, <i>Cariboni</i> A/43/40 Selected Decisions, vol. 2				X	X
	322/1988, <i>Rodríguez</i> A/51/40, A/49/40				X A/51/40	X
	1887/2009, <i>Peirano Basso</i> A/66/40					X A/68/40

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Uruguay (<i>cont'd</i>)	1637/2007, 1757/2008, and 1765/2008, <i>Canessa Albareda et al.</i> A/67/40					X A/68/40
Uzbekistan (32)	907/2000, <i>Siragev</i> A/61/40	X A/61/40				X
	911/2000, <i>Nazarov</i> A/59/40	X A/60/40		X		X
	915/2000, <i>Ruzmetov</i> A/61/40				X	X
	917/2000, <i>Arutyunyan</i> A/59/40	X A/60/40		X A/60/40		X
	931/2000, <i>Hudoyberganova</i> A/60/40	X A/60/40		X A/60/40		X
	959/2000, <i>Bazarov</i> A/61/40	X A/62/40				X A/62/40
	971/2001, <i>Arutyuniantz</i> A/60/40	X A/60/40				X
	1017/2001, <i>Strakhov</i> and 1066/2002, <i>Fayzulaev</i> A/62/40				X	X
	1041/2002, <i>Tulayganov</i> A/62/40				X	X
	1043/2002, <i>Chikiunov</i> A/62/40				X	X
	1057/2002, <i>Korvetov</i> A/62/40	X A/62/40				X A/62/40
	1071/2002, <i>Agabekov</i> A/62/40				X	X

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Uzbekistan (<i>cont'd</i>)	1140/2002, <i>Khudayberganov</i> A/62/40				X	X
	1150/2002, <i>Uteev</i> A/63/40	X A/64/40		X		X
	1163/2003, <i>Isaev and Karimov</i> A/64/40	X A/65/40				X
	1225/2003, <i>Eshonov</i> A/65/40	X A/66/40				X
	1280/2004, <i>Tolipkhudzaev</i> A/64/40	X A/66/40				X
	1284/2004, <i>Kodirov</i> A/65/40	X A/66/40				X
	1334/2004, <i>Mavlonov and Sa'di</i> A/64/40				X	X
	1378/2005, <i>Kasimov</i> A/64/40				X	X
	1382/2005, <i>Salikh</i> A/64/40	X A/65/40				X
	1418/2005, <i>Iskiyaev</i> A/64/40	X A/65/40				X
	1449/2006, <i>Umarov</i> A/66/40	X A/66/40				X
	1478/2006, <i>Kungurov</i> A/66/40				X	X
	1552/2007, <i>Lyashkevich</i> A/65/40	X A/66/40				X
	1585/2007, <i>Batyrov</i> A/64/40	X A/66/40				X

<i>State party and number of case with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
Uzbekistan (<i>cont'd</i>)	1589/2007, <i>Gapirjanov</i> A/65/40	X A/66/40				X
	1769/2008, <i>Ismailov</i> A/66/40				X	X
	1914-1915-1916/2009, <i>Musaev</i> A/67/40	X A/68/40				X A/68/40
Venezuela (Bolivarian Republic of) (2)	156/1983, <i>Solórzano</i> A/41/40 Selected Decisions, vol. 2	X A/59/40		X		X
	1940/2010, <i>Eligio Cedeño</i> A/68/40					X
Zambia (6)	390/1990, <i>Lubuto</i> A/51/40	X A/62/40			X	X
	821/1998, <i>Chongwe</i> A/56/40	X A/56/40, A/57/40, A/59/40, A/61/40, A/64/40, A/66/40				X A/68/40
	856/1999, <i>Chambala</i> A/58/40	X A/62/40			X	X
	1132/2002, <i>Chisanga</i> A/61/40	X A/61/40, A/63/40, A/64/40, A/65/40				X
	1303/2004, <i>Chiti</i> A/68/40				X	X
	1859/2009, <i>Kamoyo</i> A/67/40				X	X