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on civil and
political rights**

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HUMAN RIGHTS COMMITTEE
Ninety-fourth session
13 - 31 October 2008

VIEWS

Communication No. 1178/2003

<u>Submitted by:</u>	Aleksander Smantser (represented by counsel, Mr. Siarhei Buyakevich)
<u>Alleged victim:</u>	The author
<u>State party:</u>	Belarus
<u>Date of communication:</u>	27 February 2003 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 97 decision, transmitted to the State party on 28 May 2003 (not issued in document form)
<u>Date of adoption of Views:</u>	23 October 2008

* Made public by decision of the Human Rights Committee.

Subject matter: Criminal conviction after a long deprivation of liberty; unfair criminal proceedings.

Substantive issues: Cruel, inhuman or degrading treatment or punishment; right to humane treatment and respect for dignity; arbitrary arrest; right to be promptly informed of reasons for one's arrest and charges; right to be brought promptly before a judge; trial within a reasonable time; release when awaiting trial; right to be presumed innocent; right to adequate time and facilities for the preparation of defence; impartial tribunal; right to be tried without undue delay; equality before the law.

Procedural issue: Lack of substantiation of claim.

Articles of the Covenant: 7; 10, paragraph 1; 9, paragraphs 1, 2, 3 and 4; 14, paragraphs 1, 2, 3(b), (c) and (d)

Article of the Optional Protocol: 2

On 23 October 2008, the Human Rights Committee adopted the annexed text as the Committee's Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1178/2003.

[ANNEX]

ANNEX

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

Ninety-fourth session

concerning

Communication No. 1178/2003*

<u>Submitted by:</u>	Aleksander Smantser (represented by counsel, Mr. Siarhei Buyakevich)
<u>Alleged victim:</u>	The author
<u>State party:</u>	Belarus
<u>Date of communication:</u>	27 February 2003 (initial submission)

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

Meeting on 23 October 2008,

Having concluded its consideration of communication No. 1178/2003, submitted to the Human Rights Committee by Aleksander Smantser under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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

1.1 The author of the communication is Aleksander Smantser, an Israeli and Belarusian citizen born in 1961, who at the time of submission of the communication was in custody in Minsk. He claims to be a victim of violations by Belarus of article 7; article 10, paragraph 1; article 9, paragraphs 1, 2, 3 and 4; article 14, paragraph 3(b), (c) and (d), of the International Covenant on Civil and Political Rights. In his subsequent submissions the author added claims of violations of article 14, paragraphs 1 and 2. He is represented by counsel, Siarhei Buyakevich.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

1.2 The Covenant and the Optional Protocol entered into force for Belarus on 23 March 1976 and 30 December 1992, respectively.

The facts as presented by the author

2.1 From 7 March 2002,¹ the author was employed in Belarus as a consultant on foreign economic activity by the “Miramex Limited” company, registered in the United Kingdom in February 2001.²

2.2 At 9.30 a.m. on 3 December 2002, the author was arrested by officers of the Belarus Prosecutor’s Office and brought to the Headquarters of the Prosecutor’s Office 30 minutes later. At 11.50 a.m. the same day, he was presented with an arrest warrant issued by an investigator for particularly important cases of the Prosecutor’s Office, and subjected to a corporal search. At around 4 p.m. on the same day, he was brought to his residence by officers of the Prosecutor’s Office for a two hour search. He was then returned to the Headquarters of the Prosecutor’s Office, where he was detained until midnight, before being transferred to the temporary confinement ward (IVS) of the Department of Internal Affairs of the Minsk City Executive Committee.

2.3 On 3 December 2002, the same investigator issued a decision, according to which the author was suspected of having conspired criminally from April to July 2002, with high level officials of the Belarus Metalworks, who had knowingly concluded unprofitable contracts with “Miramex Limited” for the sale of the plant’s production at a dumping price (article 210, part 4, of the Criminal Code).

2.4 At 2 p.m. on 6 December 2002, the author was interrogated by the Deputy Prosecutor General who endorsed the author’s remand in custody as a measure of restraint.

2.5 On 12 December 2002, the author was charged under article 210, part 4, of the Criminal Code with repeated embezzlement on a particularly large scale, in conspiracy with high level officials of the Belarus Metalworks.

2.6 On 17 December 2002, the author complained about his arrest and remand in custody to the Central District Court of Minsk city, claiming, *inter alia*, that under article 9 of the Covenant, no one should be subjected to arbitrary arrest or detention; and that anyone arrested or detained on a criminal charge should be brought promptly before a judge or other officer authorized by law to exercise judicial power.

2.7 On 3 January 2003, a judge of the Central District Court of Minsk city rejected the complaint on the grounds that under article 126 of the Belarus Criminal Procedure Code, remand in custody is applied to a person suspected of having committed a crime punishable by more than two years’ imprisonment. The court found that the author was taken into custody on 4 December

¹ Earlier, on 1 January 2002, the author had signed a business consultancy agreement with “Miramex Limited”.

² On 21 January 2002, “Miramex Limited” obtained a permission of the Belarus Ministry of Foreign Affairs to open its Representative Office in Belarus.

2002,³ as he was suspected of having committed a particularly serious crime under article 210, part 4, of the Criminal Code; and if released, he could obstruct investigation and abscond.⁴ The court recalled that, on 12 December 2002, he was formally charged under article 210, part 4, of the Criminal Code and concluded that the author's right to defence was not violated by the investigator's actions and that the charge 'conformed to' the ruling relating to his remand in custody.

2.8 On 4 January 2003, counsel appealed the above ruling to the Minsk City Court. He argued that the first instance court had ignored his client's claims under article 9 of the Covenant. During the court hearing of 10 January 2003, counsel added that the exact time of the author's arrest was not indicated in his arrest protocol⁵ and that he was remanded in custody after the expiry of the maximum of 72 hours envisaged for this purpose under article 108, part 3, of the Criminal Procedure Code.

2.9 On 10 January 2003, a judge of the Minsk City Court dismissed the appeal of 4 January 2003 on the same grounds as the judge of the Central District Court of Minsk (paragraph 2.7 above). The ruling reads, *inter alia*, that "under article 126, part 1, of the Belarus Criminal Procedure Code, remand in custody is applied to a person suspected of having committed a crime punishable by more than two years' imprisonment. Remand in custody may be applied to persons suspected or accused of having committed a serious or particularly serious crime on a sole ground of gravity of the crime committed". This ruling is final.

2.10 On an unspecified date, the author applied to the Prosecutor's Office, requesting that he be released on bail. This request was denied on 5 February 2003 on the grounds that the author was accused of having committed a serious crime punishable by more than two years' imprisonment. The author claims that during his interrogation on 26 February 2003, the investigator stated that even if his current charge would not be proved, there would be another charge against him, as 'he should not have got involved in politics'.

2.11 On 25 June 2003, the legal qualification of the author's actions was changed to illegal business activities carried out without state registration, combined with a receipt of large quantities of revenues and committed by an organized group (article 233, parts 2 and 3, of the Criminal Code). On 12 August 2003, the Deputy Prosecutor General transmitted the case to the Central District Court of Minsk, which on 13 August 2003 prolonged his custody until 13 September 2003. On 15 August 2003, the case was transferred to the Frunze District Court of Minsk on jurisdiction grounds. That court, on 12 September 2003 extended the author's custody until 13 October 2003, "taking into account nature of the accusation, identity of the accused and in order to provide for due examination of the case by court". The ruling of 12 September 2003

³ The text of the Deputy General Prosecutor's endorsement available on file has both dates: 4 December 2002, when the ruling was issued by the investigator on particularly important cases of the Prosecutor's Office; and 6 December 2002, when it was endorsed by the Deputy General Prosecutor. The author's signature appears across the later date.

⁴ There is no further explanation or information in the decision of 3 January 2003, as to why the author would be particularly likely to obstruct the investigation or abscond.

⁵ Reference is made to a legal requirement under article 110, part 1, of the Belarus Criminal Procedure Code.

could be appealed to the Minsk City Court through the Frunze District Court of Minsk within 10 days after the receipt of the ruling by the accused. The author claims that this decision violated article 127, part 13, of the Belarus Criminal Procedure Code,⁶ as he was effectively deprived of the possibility to appeal the decision of 12 September 2003 which he received only after 13 September 2003. On 23 September 2003, the same court scheduled the hearing of the author's case for 7 October 2003 and confirmed his custody.

2.12 On 12 January 2004, the author was convicted under article 233, part 3, of the Criminal Code by the Frunze District Court of Minsk and sentenced to two years' imprisonment, with seizure of his property and deprivation of the right to carry out business activities for two years. The judgement states that the author was placed in custody on 4 December 2002. On 5 April 2004, this conviction was appealed by counsel and, on an unspecified later date, by the prosecutor. In his cassation appeal, counsel reiterated his claims under article 9, paragraphs 1, 2 and 3, of the Covenant.

2.13 On 13 January 2004, Law No. 266-3 "On the amnesty of certain categories of individuals that have committed crimes" was published. The author claims that he should have been released on the basis of articles 10 and 19 of this Law, but that this was not done.

2.14 On 7 May 2004, the Judicial College on criminal cases of the Minsk City Court quashed the conviction of 12 January 2004 and remitted the author's case for a re-trial. The court confirmed the author's custody, whereas, according to the author, the other co-accused, who was charged under the same article of the Criminal Code, was released on 13 December 2002, having provided a written undertaking not to leave Belarus.

2.15 On 1 October 2004, the author was again convicted under article 233, part 3, of the Criminal Code by the Frunze District Court of Minsk and sentenced to six years' imprisonment, with seizure of his property and deprivation of the right to carry out business activities for five years. On 19 November 2004, this conviction was appealed to the Judicial College on criminal cases of the Minsk City Court. In the cassation appeal of 19 November 2004, counsel challenged the facts and evidence on the basis of which the author's guilt had been established.

2.16 In the supplementary submission to the court of 29 November 2004, counsel wrote, *inter alia*, that on 20 September 2004, the presiding judge prolonged the author's custody until 1 November 2004. The judge, allegedly, was already aware that the author would be convicted and sentenced on 1 October 2004 but decided to extend custody until 1 November 2004. In counsel's opinion, this proves that the court was pre-determined about the author's guilt. Reportedly, the court tried to rectify its mistake by issuing, on 21 September 2004, yet another ruling signed by another judge, that extended the author's remand in custody until the same date, namely, until 1 November 2004. The author submits that, under article 127, part 13, of the Criminal Procedure Code, the accused in a criminal case who was transferred to court jurisdiction, cannot be kept in custody for more than six months from the date the case was transferred to the court to the date when he is convicted and sentenced. With regard to persons accused of serious and/or

⁶ Article 127, part 13, of the Criminal Procedure Code reads: [...] further extension of an accused person's placement in custody should be determined by the court not earlier than ten days before the expiry of each monthly extension of his being kept in custody [...]

particularly serious crimes, this period cannot exceed twelve months. The similar provisions of article 127, part 14, apply to those cases remitted to court for a re-trial. Under the latter provision, the maximum duration of the author's remand in custody expired at midnight on 11 August 2004. The author further submits that the ruling of the Frunze District Court of Minsk of 21 July 2004, extended this maximum duration without legal foundation until 1 September 2004. Counsel appealed this ruling on 27 July 2004 and the author himself on 28 July 2004. The latter appeal was ignored by the Minsk City Court in violation of article 9, paragraph 4, of the Covenant. Counsel's appeal was rejected by a judge of the Minsk City Court on 30 July 2004. This judge also glossed over the claims made under article 9, paragraph 1, of the Covenant. On 12 August 2004, counsel filed yet another complaint with the Frunze District Court of Minsk.

2.17 The appeal on cassation of 19 November 2004 (as amended by the supplementary submission of 29 November 2004) was rejected on 3 December 2004 by the Judicial College on criminal cases of the Minsk City Court, which concluded that there was no violation of the rights guaranteed by law to the accused.

The complaint

3.1 The author submits that the State party's decisions are contrary to both the Belarus Criminal Procedure Code and the Covenant. Contrary to article 9, paragraphs 1, 2 and 3, of the Covenant, he was not brought before a judge for more than eight months from the date of his actual arrest and the date when his case was transmitted to the court. Under article 108, part 3, of the Criminal Procedure Code, detention cannot exceed 72 hours from the time of actual arrest, after expiry of which the suspect should be either released or subjected to one of the forms of restraint measures. While the exact time of the author's arrest is not indicated in the arrest protocol, he claims that he was arrested at 9.30 a.m. on 3 December 2002 and subjected to the restraint measure (remand in custody) after 2 p.m. on 6 December 2002. Therefore, starting from 9.30 a.m. on 6 December 2002, he was detained unlawfully.

3.2 As to the claims under article 14, paragraph 3(b), (c) and (d), of the Covenant, the author states that his counsel joined the proceedings on 4 December 2002, but he was not present during the author's interrogation by the Deputy Prosecutor General on 6 December 2002. At the time of the submission of the initial communication to the Committee, the case had not been transferred to the court by the Prosecutor's Office.

3.3 The author alleges, without further substantiation, that he was deprived of food and water during the first 24 hours of his detention, in violation of article 7 and article 10, paragraph 1.

State party's admissibility and merits observations

4.1 On 17 November 2003, the State party explains that its Criminal Procedure Code applies to all relevant state bodies and officials. In case of conflict between the Code and the Constitution, the latter prevails. International treaties to which Belarus is a party and that define rights and freedoms of individuals and citizens apply in criminal proceedings, alongside the criminal and criminal procedure law in force.

4.2 On the facts, the State submits that on 3 December 2002, the author was declared a suspect under article 210, part 4, of the Criminal Code. At 11.30 a.m. he was so informed and his rights

and duties were explained to him. He was arrested at 11.50 a.m. the same day and was informed of the procedure for appealing the decision about his arrest. The author's corporal search was carried out between 11.50 a.m. and 1.45 p.m. Between 2.25 p.m. and 2.36 p.m. he was interrogated by the investigator of the Prosecutor's Office, as a suspect, and then transferred to the temporary confinement ward. On 4 December 2002, he was remanded. On 6 December 2002, the Deputy Prosecutor General endorsed the investigator's decision after the expiry of 72 hours from the time of arrest, as required by article 108, part 3, of the Criminal Procedure Code. On 12 August 2003, the author's charges were replaced by those under article 233, part 3, of the Criminal Code (illegal business activities), which also falls within a category of particularly serious crimes, and, therefore warranted the author's remand. At the time of submission of the State party's first observations, the case was awaiting consideration in the Frunze District Court of Minsk.

4.3 The State party concludes that there was no violation of the author's rights under article 7; article 10, paragraph 1; article 9, paragraphs 1, 2, 3 and 4; and article 14, paragraph 3, of the Covenant.

Author's comments on the State party's observations

5.1 On 19 December 2003, the author challenges the State party's version of the facts and reiterates that he was arrested at 9.30 a.m. on 3 December 2002, while leaving his residence and that he was brought to the Headquarters of the Prosecutor's Office by 10 a.m. While the State party claims that he was arrested only at 11.50 a.m., according to the State party itself, he was informed of his status as a suspect already at 11.30 a.m. This proves that by 11.30 a.m., he was already arrested. The arrest protocol drawn up at 11.50 a.m. did not indicate the exact time of his arrest. The author reiterates that contrary to the State party's factual version, he participated in the search of his residence between 4 p.m. and 6 p.m. on 3 December 2002, and was transferred to the temporary confinement ward only after midnight.

5.2 The author recalls that he remained in custody for more than a year, without being tried. His initial charges under article 210, part 4, of the Criminal Code were patently unlawful, because that provision refers to 'officials', whereas he has never been employed by the Belarus Metalworks, the property of which he reportedly embezzled. The other three individuals were in custody under the same charge for four and six months, respectively, before being released by the Deputy Prosecutor General.

Supplementary submissions by the parties

6.1 In a further submission dated 18 August 2004, the author reiterates the description of the facts and his initial claims. On 28 March 2005, he adds to the initial claims that the courts were neither independent nor impartial in examining his case, as the other co-accused person in the case and charged under the same provisions of the Criminal Code, was not remanded while the case was being considered. At the same time, the author's custody was confirmed by the courts despite numerous bail requests made by his counsel.

6.2 The author claims that his trial did not comply with the fair trial guarantees of article 14, paragraphs 1, 2 and 3 (c). Firstly, the trial judge arbitrarily refused his counsel's motion to put on record the expert opinions of the four Belarusian lawyers who confirmed that the *actus reus* set

out in the indictment did not qualify as “business activities” and, therefore, fell outside the scope of article 233 of the Criminal Code. Secondly, in the judgment of 1 October 2004, the court did not evaluate the testimony given by the Executive Director of “Miramex Limited” to the author’s counsel. In it, he had affirmed the author’s innocence and presented the report of independent auditors, who certified that “Miramex Limited” did not have business activities in Belarus and duly paid its taxes in the United Kingdom, where the company was registered. Thirdly, a lapse of 22 months between the author’s arrest on 3 December 2002 and his conviction on 1 October 2004, does not meet the requirement of article 14, paragraph 3 (c), to be tried without undue delay.

7.1 On 25 April 2005, the State party recalls that its Criminal Procedure Code stipulates the conditions of application, procedure and time limits on one’s remand, as well as the procedure for extending the deadlines and for the judicial review of the application of this form of restraint measures and the extension of deadlines. It concludes that the legal requirements and recognized principles of international law were complied with in the author’s case. The decision of 12 September 2003 to extend the author’s custody complied with article 127, part 13, of the Criminal Procedure Code, because the author’s custody ceased to be lawful on 13 September 2003 and had to be extended, as it is required by the above article, ‘not earlier than ten days before the expiry of each monthly extension’. The fact that the author received this decision after 13 September 2003 did not deprive him of the right to appeal, but he did not avail himself of this right. The State party explains why the author’s conviction of 12 January 2004 fell outside the scope of the Law “On the amnesty of certain categories of individuals that have committed crimes”.

7.2 The decision of 21 July 2004 to further extend the duration of the author’s custody was also lawful. As required by article 127, paragraphs 13 and 14, read together, the court calculated the six months limit on the author’s remand from the day the case was remitted by the Minsk City Court to the Frunze District Court of Minsk for a re-trial (7 May 2004) and the date when the author was convicted and sentenced (1 October 2004). The author’s right to have the lawfulness of his custody be examined by a court was not violated, as the Minsk City Court fully examined counsel’s appeal of the decision of 21 July 2004.

7.3 On 11 August 2005, the State party added that the author’s right to equality was not violated, because under article 117, part 2, of the Criminal Procedure Code, the court should take into account, *inter alia*, the following criteria in deciding on the necessity of further remand: the nature of suspicion or of the charge; the suspect or accused person’s personality, age, state of health, profession, family and financial situation and existence of a permanent place of residence. The fact that the author and his co-accused were charged under the same article of the Criminal Code and in the same criminal case does not imply that by law they had to be subjected to the same form of restraint measures.

7.4 On the issue of entry on record of the expert opinions of other lawyers, the State party submits that article 103, part 3, of the Criminal Procedure Code allows counsel to request opinions from experts with specialized knowledge on issues relevant to his client’s defence. This is intended, however, to cover specialized knowledge in the areas other than law; the latter should be mastered by counsel and the court.

7.5 With regard to the issue summarized in paragraph 2.16 above, the State party argues that had the author been acquitted on 1 October 2004 or sentenced to a different form of punishment, nothing would have prevented the court from changing or repealing the restraint measures. The decision on extension of the author custody until 1 November 2004 would not have been an obstacle, and the adoption of the above decision does not at all imply that the court was biased.

7.6 The State party concedes that the author's pre-trial investigation and court proceedings were prolonged but argues that they did not amount to a violation of the Covenant. The case file consisted of 33 volumes, and it required a long time for the prosecution to compile evidence and for it to be examined and evaluated by the judicial authorities. The State party adds that the absence of any reference to the testimony of the Executive Director of "Miramex Limited" and the auditors' report in the judgment related to the procedure of evaluation of evidence under article 105 of the Criminal Procedure Code. Under it, the court must assess pertinence, admissibility, reliability and sufficiency of the evidence. Under article 408 of the Criminal Procedure Code, a convict has the right to challenge the court's assessment of the evidence through the supervisory review procedure. This was not done by the author. The State party concludes that the allegations about the court's partiality and the violation of the right to defence are unfounded.

8. On 2 December 2005, the author refutes the State party arguments. He recalls that article 103, part 3, of the Criminal Procedure Code does not explicitly prohibit counsel from requesting expert opinions on legal issues. Therefore, such evidence is admissible in court. He further notes that the State party failed to explain why: (1) his criminal case was not transmitted from the Frunze District Court to the Minsk City Court for more than three months for the examination of his appeal on cassation; (2) the investigation of his case lasted from 3 December 2002 to 12 August 2004; (3) there were two rulings on the extension of the duration of his remand in custody (paragraph 2.16 above) until 1 November 2001 and (4) it was necessary for the trial judge to prolong his custody to 1 November 2004 rather than only 1 October 2004, when he was convicted and sentenced. The author contests the argument that he should have challenged the court's assessment of the evidence through the supervisory review procedure and notes that he is unaware of any supervisory protest being submitted on his behalf. He argues that this implies that the Belarus Supreme Court, which prepared the State party's submission of 11 August 2005, studied his case and did not find grounds to initiate supervisory review procedure *proprio motu*.

Issues and proceedings before the Committee

Consideration of admissibility

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

9.2 The Committee has ascertained, as required under article 5, paragraph 2, of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement and notes that the State party did not contest that domestic remedies in the present communication have been exhausted.

9.3 In relation to the alleged violation of article 7 and article 10, paragraph 1, of the Covenant, in that the author was deprived of food and water during the first 24 hours of his detention, the Committee takes note of the fact that the State party does not address this allegation. At the same time, it notes that the claim is couched only in very general terms. In these circumstances, the Committee considers that this part of the communication has been insufficiently substantiated, for purposes of admissibility and, thus, finds it inadmissible under article 2 of the Optional Protocol.

9.4 The author and the State party disagree about the facts related to the author's arrest, the exact date and time when he was arrested and remanded in custody, and the interpretation of applicable Belarus law. The Committee notes that the author's claims under article 9, paragraphs 1 and 2, relate, in their essence, to the evaluation of facts and evidence and to the interpretation of domestic legislation. The Committee also notes the author's claim that his rights under article 14, paragraphs 1 and 2, of the Covenant were violated in relation to his conviction by the Frunze District Court of Minsk city for illegal business activities carried out without the state registration, combined with a receipt of revenues in a particularly large amount and committed by an organized group. It further notes the State party's arguments contesting the author's interpretation of applicable Belarus law. It recalls its jurisprudence that the evaluation of facts and evidence and interpretation of domestic legislation is in principle for the courts of States parties, unless the evaluation and interpretation were clearly arbitrary or amounted to a denial of justice.⁷ In the absence of any pertinent information or documentation which would allow the Committee to assess whether the procedure leading to the author's deprivation of liberty and subsequent court proceedings suffered from such defects, the Committee considers that this part of the communication is inadmissible under article 2 of the Optional Protocol.

9.5 As to the claim under article 9, paragraph 4, the Committee observes that the author complained for the first time about his arrest and remand in custody to the Central District Court of Minsk on 17 December 2002, i.e. two weeks after his arrest. His complaint was examined on 3 January 2003. His and counsel's subsequent appeals of decisions about prolongation of custody, including that of 21 July 2004, were examined by the court. In this light, the Committee considers that the author failed to sufficiently substantiate, for purposes of admissibility, his claims under article 9, paragraph 4, and, therefore, finds them inadmissible under article 2 of the Optional Protocol.

9.6 With regard to the claim under article 14, paragraph 3 (b) and (d), in that his counsel was not present during his interrogation by the Deputy Prosecutor General on 6 December 2002, the Committee considers that the author has not sufficiently substantiated this claim, for purposes of admissibility and, thus, finds it inadmissible under article 2 of the Optional Protocol.

9.7 The Committee considers the author's remaining claims under article 9, paragraph 3, and article 14, paragraph 3 (c) to be sufficiently substantiated and accordingly declares them admissible.

⁷ See, *inter alia*, Communication No. 541/1993, *Errol Simms v. Jamaica*, Inadmissibility decision of 3 April 1995, paragraph 6.3.

Consideration of the merits

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

10.2 The Committee notes that, after the author's arrest on 3 December 2002, his remand in custody was initiated by the investigator for particularly important cases of the Prosecutor's Office, endorsed by the Deputy General Prosecutor two days later and subsequently renewed on several occasions by the Prosecutor's Office, until the author's case was formally transmitted to the court on 12 August 2003. The Committee considers that it is inherent to the proper exercise of judicial power that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with.⁸ In the circumstances of the present case, the Committee is not satisfied that the public prosecutor could be regarded as having the institutional objectivity and impartiality necessary to be considered an "officer authorized to exercise judicial power" within the meaning of article 9, paragraph 3.

10.3 The Committee notes that 13 months passed between the author's arrest on 3 December 2002 and his first conviction on 12 January 2004. Altogether, the author was kept in custody for a total of 22 months before his conviction on 1 October 2004 and that his and counsel's requests for release on bail were repeatedly denied by the Prosecutor's Office and by the courts. In this regard, the Committee reaffirms its jurisprudence that pre-trial detention should remain the exception and that bail should be granted, except in situations where the likelihood exists that the accused would abscond or tamper with evidence, influence witnesses or flee from the jurisdiction of the State party.⁹ The State party has argued that the author was charged with a particularly serious crime, and that there was a concern that he might obstruct investigations and abscond if released on bail. However, it has provided no information on what particular elements this concern was based and why it could not be addressed by fixing an appropriate amount of bail and other conditions of release. The mere assumption by the State party that the author would interfere with the investigations or abscond if released on bail does not justify an exception to the rule in article 9, paragraph 3, of the Covenant. In these circumstances, the Committee finds that the author's right under article 9, paragraph 3, was violated.

10.4 As to the claim under article 14, paragraph 3 (c), the Committee recalls its jurisprudence that if bail is denied because the accused is charged with a serious offence, he or she must be tried as expeditiously as possible.¹⁰ The burden of proof for justifying any delay and showing that a case was particularly complex rests with the State party.¹¹ The author was arrested on 3 December 2002, formally charged on 12 December 2002 and his initial criminal charges were

⁸ Communication No. 521/1992, *Kulomin v. Hungary*, Views adopted on 22 March 1996, paragraph 11.3; Communication No. 1100/2002, *Bandajevsky v. Belarus*, Views adopted on 28 March 2006, paragraph 10.3.

⁹ Communication No. 526/1993, *Hill v. Spain*, Views adopted on 2 April 1997, paragraph 12.3.

¹⁰ Communication No. 473/1991, *Barroso v. Panama*, Views adopted on 19 July 1995, paragraph 8.5; Communication No. 818/1998, *Sextus v. Trinidad and Tobago*, Views adopted on 16 July 2001, paragraph 7.2

¹¹ *Hill v. Spain*, supra n.9, paragraph 12.4.

changed on 25 June 2003. He was initially convicted on 12 January 2004, his conviction was subsequently quashed and his case remitted for a re-trial resulting in the author's conviction on 1 October 2004. None of the delays in the case can be attributed to the author or to his counsel. The State party has conceded that the author's pre-trial investigation and court proceedings were prolonged but argued that the delay was due to the size of the author's criminal case file and because "it required a long time for the prosecution to compile evidence and for it to be examined and evaluated by the judicial authorities". In these circumstances, the Committee cannot, on the basis of the material made available to it, conclude that the delay in the author's trial was such as to amount to a violation of article 14, paragraph, paragraph 3 (c), of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses a violation by the State party of article 9, paragraph 3, of the Covenant.

12. Pursuant to article 2, paragraph 3(a), of the Covenant, the Committee considers that the author is entitled to an effective remedy, including compensation. The State party is also under an obligation to take steps to prevent similar violations occurring in the future.

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

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]
