



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2100/2011\*, \*\*

<i>Communication submitted by:</i>	S.M. (not represented by counsel)
<i>Alleged victims:</i>	The author and his son
<i>State party:</i>	Bulgaria
<i>Date of communication:</i>	9 April 2011 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 21 September 2011 (not issued in document form)
<i>Date of adoption of decision:</i>	14 July 2016
<i>Subject matter:</i>	Alleged failure by the State party to investigate a shipwreck
<i>Procedural issues:</i>	Exhaustion of domestic remedies; non-substantiation of claims
<i>Substantive issues:</i>	Impartial investigation; right to life; torture — prompt and impartial investigation
<i>Articles of the Covenant:</i>	6, 7, 9 and 14
<i>Articles of the Optional Protocol:</i>	2 and 5 (2) (b)

1. The author of the communication is S.M., a Bulgarian citizen born in 1952 in Varna, Bulgaria. He claims that his son, M.M., is the victim of an enforced disappearance, in violation of articles 6, 7 and 9 of the Covenant. Moreover, he claims that he himself is the

\* Adopted by the Committee at its 117th session (20 June-15 July 2016).

\*\* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Ahmed Amin Fathalla, Yuji Iwasawa, Ivana Jelić, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Victor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Yuval Shany and Margo Waterval.



victim of violations of articles 7 and 14 of the Covenant. He is not represented. The Optional Protocol entered into force for the State party on 26 June 1992.

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

2.1 The author submits that on 12 February 2004 a ship (also described as a motor vessel) called *Hera* and sailing under the Cambodian flag sank in the Black Sea, in Turkish territorial waters, a few miles away from the Bosphorus. The sinking is said to have taken place in a matter of minutes. The vessel's crew consisted of 19 members: 17 Bulgarian and 2 Ukrainian nationals.<sup>1</sup> The bodies of five crew members were recovered 40 days after the disaster, of which three were of Bulgarian sailors and two of Ukrainians; 14 Bulgarian crew members, including the author's son, are still unaccounted for.

2.2 On 16 February 2004, criminal proceedings against unknown perpetrators were initiated by the Prosecutor's Office in Bulgaria. After the investigation, which was carried out in cooperation with the Turkish authorities, the Prosecutor's Office decided on 9 April 2010 to discontinue the pretrial proceedings. The attribution of the shipwreck to bad weather, the ship's poor maintenance and the captain's mistake was deemed satisfactory. During the pretrial proceedings, the author and other victims' relatives submitted a request to the Prosecutor's Office to start an investigation on the separate offence of "enforced disappearance", requesting the Prosecutor to question Bulgarian and Turkish State officials about their knowledge of the facts and of evidence of possible enforced disappearance committed by the Turkish military forces. The Prosecutor did not accede to their request.<sup>2</sup>

2.3 The author appealed before the City Court of Sofia against the decision of the Prosecutor's Office to close the investigation. The appeal was based on the author's contention that the investigation had not been carried out in an impartial, objective and complete manner. On 4 June 2010, the Court found that the Prosecutor's decision was grounded and lawful. It considered that the accusations made by the author and other victims' relatives that the Prosecutor and investigators deliberately hid facts and that the evidence were groundless; that the shipwreck seemed indeed to have been caused by wrong estimation and bad meteorological conditions; and that the end of criminal proceedings did not imply termination of all forms of investigation, which would continue to be carried out in cooperation with all stakeholders, including Turkey. The decision was not subject to appeal.

### **The complaint**

3.1 The author claims that his son is the victim of an enforced disappearance in violation of articles 6 and 9 of the Covenant. For the purpose of his claim, he refers to the definition of enforced disappearance provided in article 7 (2) (b) (i) of the Rome Statute of the International Criminal Court. He also alleges that he is the victim of a violation of articles 7 and 14 of the Covenant.

3.2 Recalling paragraph 4 of the Committee's general comment No. 6 (1982) on the right to life, the author considers that the State party has failed to take effective measures to protect his son's life and has not thoroughly investigated the disappearance of his son and the other seamen, in violation of article 6 of the Covenant. The author recalls that the right to life is one of the fundamental rights violated in cases of enforced disappearance. He further argues that any act of enforced disappearance involves a violation of article 9, which protects individuals from arbitrary detention. The lack of a proper investigation by the State

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<sup>1</sup> According to the submissions, there were no other passengers on board.

<sup>2</sup> The author notes that the crime of enforced disappearance does not exist under Bulgarian law.

party into the fate of his son and of the other victims of the shipwreck does not exclude that they could be held in custody in an undisclosed location.

3.3 The author further contends that he and his wife have suffered distress and anguish as a result of the disappearance of their son and their inability to find out what happened. He claims that the manner in which their complaint has been dealt with by the State party's authorities constitutes inhuman treatment, in violation of article 7 of the Covenant.

3.4 The author submits that he has not had effective access to the courts because a civil claim for damages would depend entirely on the outcome of the criminal investigation into the offences of detention and disappearance. Enforced disappearance is not criminalized under the Bulgarian Criminal Code. In the absence of relevant laws and any findings, the author is unable to effectively apply to a court. He also complains of the ineffectiveness of domestic remedies and the undue delays in the pretrial proceedings, which lasted more than six and a half years and did not establish whether an offence had been committed. The author considers that these facts reveal a violation of article 14 of the Covenant.

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

4.1 On 21 November 2011, the State party challenged the admissibility of the communication based on the fact that the author had not exhausted all available domestic remedies. The State party contends that the National Investigation Service, the agency in charge of the investigation of the incident, initiated proceedings under article 340 (3) (b) of the Penal Code.<sup>3</sup>

4.2 On 9 April 2010, by order of the Prosecutor's Office of Sofia, the investigation was suspended. The decision to suspend was upheld on 4 June 2010 by the City Court of Sofia. The suspension of the criminal proceedings under the procedure set out in article 244 (1) of the Criminal Procedure Code does not mean that the investigation has been discontinued indefinitely. Paragraph 2 of article 244 allows for a reopening of the investigation "after the elimination of the reasons for suspension or provided there is a need for further investigative actions".

4.3 The State party submits that, in accordance with established procedure, all the evidence is directed to the attention of the leading prosecutor, who, in turn, may reopen the proceedings "provided that such actions are relevant to the case and needed to shed light on its subject". At the time of the present submission, the criminal proceedings have not been closed by a final determination. Consequently, the domestic remedies have not been exhausted by the author and his complaint to the Committee should be declared inadmissible.<sup>4</sup>

4.4 Regarding the merits of the communication, specifically under article 6 of the Covenant, the State party submits that the circumstances of the sinking of the *Hera* have been investigated in detail "through written and oral evidence", such as the statements of witnesses, including crew members of a ship called *Vejen* who confirmed the fact that the *Hera* had sunk. The sinking has also been confirmed by the report of a forensic expert.

4.5 Requests for more evidence have been made under international legal assistance agreements with Georgia, Greece, Romania, Turkey and Ukraine, and a request for documentation has been addressed to the European Union Satellite Centre in Spain. In

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<sup>3</sup> As described by the State party, for damaging or allowing a ship to be damaged, to get stranded or to sink, resulting in the death of one or more persons.

<sup>4</sup> The State party further notes that the author has requested the Ombudsman to issue an opinion on potential violations in the present case, but it remains unclear whether such opinion has been issued.

addition, nine judicial orders were sent to Turkey, four judicial orders were sent to Ukraine and one investigation order was sent to Romania with a view to gathering information.

4.6 The Criminal Procedure Code demands that an investigation be carried out to ascertain all possible ways in which the ship could have sunk and the fate of the seamen on board. The speculations of the author about the shipwreck, however, go far beyond the facts collected during the investigation. To date, it has not been ascertained what exactly happened during the shipwreck, which is why the authorities are unable to make a final determination on the matter.

4.7 The State party also submits that the shipwreck occurred in Turkish territorial waters, making it impossible for the Bulgarian investigation team to collect evidence directly or independently. The Bulgarian authorities, for example, requested two additional underwater “inquests” of the sunken ship by Bulgarian experts, but those requests were denied by the Turkish authorities.

4.8 It is undeniable that the author, his wife and the relatives of the remaining 13 seamen are experiencing pain and suffering as a consequence of the shipwreck. The incident is in fact a human tragedy. The author’s claims cannot be brought forward under article 7 of the Convention, however, as there is no causal link between unquestionable pain and suffering and the actions of the State party. The claims should, therefore, be considered “invalid”. Moreover, the author has been fully informed about the steps that were carried out in the process of the investigation.

4.9 Furthermore, concerning the claims related to article 9 of the Covenant, all arguments about biased conduct of the investigation are “unfounded”. Not a single piece of evidence was collected in the course of the investigation to support the author’s allegations in connection with the sinking of the *Hera*. Article 9, in general, is irrelevant here, as it concerns of the rights of a detained person.

4.10 Regarding the effectiveness of the investigation, it was determined by the order of the City Court of Sofia dated 4 June 2010 that the proceedings were “objective, comprehensive and complete”. It cannot be accepted that this judicial order violated anyone’s rights. It is also established that private individuals cannot carry out official investigations; these must be carried out by the authorized State agencies. It is also not clear what preventive steps should have taken by the Bulgarian authorities, considering that the ship was owned by a company from Saint Vincent and the Grenadines, was sailing under a Cambodian flag and was en route from Mariupol, Ukraine, to the Turkish port of Gebze.

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

5.1 The author, responding to the State party’s observations on admissibility and the merits, reiterates his allegations of violations of the Covenant. He stresses that the Turkish military forces abducted 14 seamen from the *Hera* and that both Bulgaria and Turkey refuse to acknowledge this fact and to disclose the fate of the seamen.

5.2 The author claims that he has exhausted all domestic remedies and that the procedure he has undergone so far can be qualified as “unreasonably prolonged, ineffective” or otherwise unavailable to him. There are no indications that the State party’s authorities have any intention to reopen the investigation, which has been suspended.

5.3 Article 2 (2) and (3) of the Covenant requires States parties to take the steps necessary to adopt such laws and measures as may be necessary to give effect to the rights enshrined in the Covenant. The authorities of the State party have rejected the author’s view that there are “sufficient grounds to believe that grave crimes have been committed during the sinking” of the *Hera*. The State party failed to initiate a thorough inquiry into the allegations; it alone has access to all the relevant information. The State party failed to

investigate not only the shipwreck, but also the subsequent “abduction and disappearance of the survivors”.

5.4 Regarding the State party’s observations on the merits of his complaint, the author reiterates that his son, along with 13 other seamen, was subjected to an enforced disappearance and that no information is available about their fate.

5.5 Furthermore, the State party’s authorities do not appreciate the anguish, stress, anger and pain caused by the enforced appearances, as defined by the International Convention for the Protection of All Persons from Enforced Disappearance and in violation of article 7 of the Covenant. The continuing uncertainty about the fate and whereabouts of the seamen adds to the anguish. Besides the possible torture suffered by the seamen, their relatives continue to suffer torture as well.

5.6 Regarding his claims of violations under article 9, the author notes that the State party accepts no other explanation for the shipwreck than an accident. The facts indicate that survivors were abducted and placed in detention in an undisclosed location. The same is true for the claims of violations under article 14: the State party has taken the very convenient position that the investigation has been suspended owing to the lack of additional evidence.

#### **Additional observations by the State party**

6.1 On 9 February 2012 and on 23 April 2012, the State party submitted that it examined carefully the initial claims made by the author and his responses. The State party is fully aware of its obligations under article 2 (2) and (3). As the State party has not yet ratified the International Convention for the Protection of All Persons from Enforced Disappearance, it cannot comment on the author’s allegations relating to the provisions of that Convention.

6.2 In general, the State party’s authorities have taken all the steps necessary to investigate the sinking of the *Hera*, including, as already mentioned, contacting and cooperating with the authorities of Georgia, Greece, Romania, Turkey and Ukraine.

#### **Additional observations by the author**

7. On 22 February, 20 March and 11 April 2012, on 13 June and 5 and 23 October 2013, and on 31 July 2014, the author reiterated its previous position and requested that the State party investigate the disappearance of his son and the 13 other seamen.

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

##### *Consideration of admissibility*

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

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

8.3 With regard to the requirement set out in article 5 (2) (b) of the Optional Protocol, the Committee notes that the State party challenged the admissibility of the present communication on the ground of non-exhaustion of domestic remedies, arguing that the State party has not yet completed its investigation, which has been suspended. The Committee notes that the State party has not demonstrated that the continuing investigation would provide an effective remedy in the circumstances of the author’s case. The

Committee further notes that, under its long-standing jurisprudence, the domestic remedies cannot be unreasonably prolonged.<sup>5</sup> In such circumstances, the Committee considers that it is not precluded by article 5 (2) (b) of the Optional Protocol from considering the communication submitted by the author.

8.4 Further regarding admissibility, the Committee notes the author's claims under articles 6, 7 and 9 of the Covenant regarding the pain, suffering and anguish resulting from the loss of his son. The tragic nature of the shipwreck and the breadth of the human tragedy being undisputed, the Committee observes that the submissions before it do not contain sufficient information to clarify the exact cause of the shipwreck or to confirm the circumstances of the alleged disappearance or death of the author's son. Nor does the communication contain sufficient information regarding the details of the alleged abduction and illegal detention of the author's son and other missing seamen. The Committee therefore concludes that the author has failed to show both a connection between the shipwreck and his allegations of enforced disappearance and that the State party's investigation into the incident has been ineffective or otherwise deficient. In these circumstances, Committee declares that part of the communication inadmissible for lack of substantiation under article 2 of the Optional Protocol.

8.5 Regarding the author's claims under article 14 of the Covenant, the Committee considers that the author has failed to provide any facts to support his contention that the provisions of article 14 have been violated. The Committee therefore concludes that the author's claims under that article have not been sufficiently substantiated and declares that part of the communication inadmissible under article 2 of the Optional Protocol.

9. Therefore, the Committee decides that:

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

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<sup>5</sup> See, inter alia, communications No. 1560/2007, *Marcellana and Gumanoy v. Philippines*, Views adopted on 30 October 2008, para. 6.2; No. 1250/2004, *Lalith Rajapakse v. Sri Lanka*, Views adopted on 14 July 2006, paras. 6.1 and 6.2; and No. 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006, para. 8.3.