



**United Nations**

# **Report of the Human Rights Committee**

## **Volume II**

**103rd session  
(17 October–4 November 2011)**

**104th session  
(12–30 March 2012)**

**General Assembly  
Official Records  
Sixty-seventh session  
Supplement No. 40 (A/67/40)**



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**United Nations • New York, 2012**

*Note*

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## Annex 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. 1316/2004, *Gryb v. Belarus* (Views adopted on 26 October 2011, 103rd session)\*

<i>Submitted by:</i>	Mecheslav Gryb (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	9 July 2004 (initial submission)
<i>Subject matter:</i>	Refusal by minister to issue a lawyer's licence
<i>Procedural issue:</i>	Level of substantiation of claims
<i>Substantive issue:</i>	Unfair trial; discrimination/persecution on political grounds
<i>Articles of the Covenant:</i>	2; 14; 19, 21; 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 26 October 2011,*

*Having concluded* its consideration of communication No. 1316/2004, submitted to the Human Rights Committee by Mr. Mecheslav Gryb 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. The author of the communication is Mr. Mecheslav Gryb, a Belarusian national born in 1938, who claims to be a victim of violation, by Belarus, of his rights under articles 2, 14 and 26 of the Covenant. Although the author does not invoke it in his initial

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\* The following members of the Committee participated in the examination of the present communication: Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Rajsoomer Lallah, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvio, Mr. Krister Thelin and Ms. Margo Waterval.

communication, in a later submission he raises questions that appear to invoke article 21 of the Covenant. The author is unrepresented. The Optional Protocol entered into force for the State party on 30 December 1992.

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

2.1 The author is a politician and former Chairman of the Belarusian Supreme Soviet (1994–1996). Since 1997, he has been a member of the Minsk Bar. Pursuant to Presidential Decree No. 12 of 3 May 1997 on certain measures for the amelioration of the lawyers' and notaries' activities in Belarus, the author's lawyer's licence was cancelled.<sup>1</sup> He was offered the possibility of retaking the bar examination with the Qualification Commission on lawyers' activities (hereafter the Commission) established by the Ministry of Justice. This he did, successfully, on 1 July 1997.

2.2 According to the author, the examination was partial, because of the allegedly biased attitude shown by Commission members, including its Chairman. He believes that this was because he was an opposition leader who criticized openly the regime in place. For the same reason, allegedly, the Minister of Justice ("the Minister") refused to issue his lawyer's licence following his examination. As the author learned later, on 7 July 1997, without informing him, the Minister had ordered issuance of his licence to be postponed. This decision was based on the discovery that, in March 1997, the author had been fined by a court because of his participation, on 15 March 1997, in an unauthorized street rally commemorating the third anniversary of the adoption of the 1994 Belarus Constitution.<sup>2</sup>

2.3 On 30 July 1997, the Minister refused to issue a lawyer's licence to the author on a permanent basis, allegedly on the pretext that the latter had breached the legislation then in force and the rules of professional ethics. The refusal was allegedly based on the Regulations on the Qualification Commission (hereafter the Regulations).

2.4 On this point, the author contends that when he retook the examination, the Minister of Justice had no power to postpone or to refuse the issuance of licences to those who passed the qualifying examination. The Regulations were adopted by the Minister of Justice on 4 June 1997. On 29 July 1997, the same Minister modified them and, inter alia, obtained the right to deny the issuance of licences; the Minister applied his new prerogatives retroactively to the author's case. Thus, according to the author, the Minister's refusal was unlawful, and the retroactive application of the amended version of the Regulations to his case adversely affected his situation.<sup>3</sup>

2.5 The author claims that the Minister's refusal was also contrary to article 10 of the Law on the Lawyers (1993). This provision unequivocally lists all those situations under which a licence may not be issued. According to him, committing an administrative offence should not have led to the refusal of the issuance of his lawyer's licence. In addition,

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<sup>1</sup> By virtue of legislative changes, all lawyers' licences of individuals who had the status of civil servants when they passed their qualification examinations were annulled. This was the situation of the author, given that his status of a State official was equal to that of a civil servant when he had passed his lawyer's examination.

<sup>2</sup> In fact, the author was fined, by decision of the Partizansky District Court of Minsk on 20 March 1997, confirmed by the Minsk City Court on 21 May 1997, for his participation in an unauthorized rally that took place on 15 March 1997.

<sup>3</sup> The author points out that, pursuant to article 67 of the Law on normative legal acts, a legal act cannot be retroactive if its application would adversely affect the legal situation of those concerned. In addition, article 104, paragraph 6, of the Belarusian Constitution (1996) stipulates that laws cannot have a retroactive effect to the exception of situations when their application limits or eliminates the responsibility of the citizens.

according to the author, in March 1997, he still benefited from parliamentary immunity. A Member of Parliament can only be prosecuted with the Parliament's specific acquiescence. However, in his case, the Prosecutor General allegedly abused his power and, on 17 March 1997, gave written instructions to have the author's administrative liability engaged, without consulting Parliament. The author adds that he complained to a court in this connection, but his claims were rejected (no exact dates provided).

2.6 The author complained against the Ministerial refusal of 30 July 1997 to the Court of the Moscow District in Minsk, but his complaint was rejected on 18 August 1997. He appealed to the Minsk City Court, the Chairman of the Minsk City Court and the Supreme Court. On 5 September, 24 December 1997 and 18 March 1998, respectively, his appeals were rejected.

2.7 According to the author, the modification of the Regulations of 29 July 1997 was unlawful and aimed at permitting the punishment of lawyers who were opponents to the regime in place. The outcome of the court proceedings against him allegedly also confirmed the author's suspicion that the case had been decided beforehand. He adds that judges are not independent in Belarus.

2.8 On 17 August 2004, the author reiterates that the Minister's decision was preordained and proved the acts of discrimination that he was subjected to as a politician, because of his political opinions and because of his attachment to the values of democracy. In 1996, he was given a life pension as a former Chairman of the Supreme Council of Belarus, equivalent to 75 per cent of the salary of the actual Supreme Council's Chairman. This pension was never updated, however, and was equal, in 2004, to 3,600 Belarusian roubles (1.5 US dollars) per month. Other former Chairpersons of the Supreme Council, also opponents to the regime in place, were placed in the same situation as the author. At the same time, the Belarusian President has granted by Decree personal pensions to several former Chairpersons of the Supreme Council and other high-ranked officials of the Belarusian Soviet Socialist Republic, or the Republic of Belarus, who supported his policy. These pensions are equal to 75 per cent of the actual salary of the Prime Minister of Belarus.

2.9 The author affirms, without providing details, that since 1998 he and his wife have been excluded unlawfully from a special medical-care entitlement and that his complaint about this to the Office of the President remained unanswered.

2.10 In addition, the author is unable to work as a lawyer. In 1998, he started working as a lecturer in a private law institute. However, when the authorities learned this, the Institute's Rector was requested to dismiss him immediately.

2.11 The author argues that it is impossible to obtain a new lawyer's licence, given that the Qualification Commission is composed of representatives of the Presidential administration, Ministry of Justice officials, or lawyers, and it is headed by the Deputy Minister of Justice. Thus, since 1997 his situation has not improved.

### **The complaint**

3.1 The author claims that his right to have a fair trial, as protected by article 14, was violated, because his case was examined neither by a competent nor by an independent or impartial court, in particular as judges in Belarus depend on the Ministry of Justice, and the respondent in his case was the Ministry of Justice.

3.2 The author invokes a violation of his rights under articles 2 and 26, as he did not benefit of the equal protection of the law and he was persecuted because of his political opinions. For this reason, his lawyer's licence was not issued following an unlawful decision of the Minister of Justice. The author has also claimed that he cannot find work; he

never received his special pension as a former Chairperson of the Supreme Soviet; and he has lost his special medical-care entitlement.

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

4.1 On 17 December 2004, the State party explained that pursuant to article 11 of the Law on Lawyers, the Qualification Commission is empowered to determine who is entitled to practise as a lawyer. On 29 February 1996, the Commission conducted an examination of the author, who was then a Member of the Parliament. On the basis of the Commission's decision, the Ministry of Justice issued the author lawyer's licence No. 1238 on 27 May 1996.

4.2 According to the State party, it later became clear that when taking the examination, the author had the status of civil servant (State employee). In accordance with the (new) law then in force, the author's lawyer's licence was cancelled. The same applied to all individuals who were civil servants when they passed the lawyers' examination. Given that the author was no longer a civil servant, however, he was offered the possibility of retaking the examination. On this basis, on 1 July 1997, he again sat the examination, and the Commission concluded that he could be issued a lawyer's licence. The Commission did not reveal any ground, for purposes of article 10 of the Law on Lawyers, to deny to the author the right to practise as a lawyer.

4.3 The State party notes that, according to article 32 of the Regulations on the Qualification Commission (No 1902/12 of 4 June 1997), the Minister of Justice is empowered to postpone the issuance of a lawyer's licence or to annul it, when it is established that the Commission's decision does not correspond to the facts of the case, that it is against the legislation in force, against norms of professional ethics of lawyers or if other information attesting that an individual is unable to exercise the legal profession exists.

4.4 By order No. 75 of 7 July 1997, the Minister of Justice postponed the issuance of the author's lawyers' licence, and by order No. 91 of 30 July 1997, the Minister refused to issue the licence. The first order was based on the verification of the circumstances of the commission of an administrative offence by the author. The refusal to issue the licence was grounded on the fact that the author had indeed breached the legislation in force and norms of the lawyers' professional ethics, as he had committed an administrative offence by participating in an unauthorized meeting on 15 March 1997, offence for which he was fined by the Partisansky District Court of Minsk on 20 March 1997.

4.5 The State party explains that the author's administrative offence constituted a misconduct, incompatible with the functions of a lawyer, and contrary to the requirements of article 18, part 2, of the Law on Lawyers, and the lawyers' ethic rules that require lawyers to act within the law, and to maintain constantly the highest professional standard.

4.6 Given that this fact had not been taken into account by the Qualification Commission when it decided on the author's case, the Minister of Justice was entitled to postpone or to refuse issuance of the author's lawyer's licence. The author's contention that the Ministry of Justice should not have taken into account his fining is contrary to the law in force.

4.7 According to the State party, the author's contention that the Minister of Justice has no right to modify the Commission's Regulations and to establish the modalities for postponement or refusal to issue licences is groundless. The Minister is empowered to do so by law, in particular by Decree No. 12 of 3 May 1997 on certain measures to improve lawyers and notaries.

4.8 The State party points out that the author asked the courts to declare the Minister's orders unlawful and to oblige the Ministry of Justice to issue him a lawyer's licence. On 18 August 1997, the Court of the Moscow District in Minsk rejected his claim. This decision was confirmed on appeal, on 25 September 1997, by the Minsk City Court. The State party contends that these court decisions are lawful and fully grounded. The courts found that the Partizansky District Court of Minsk had fined the author in March 1997. In that light, they correctly concluded that the orders of the Minister, taken within his competency, were lawful, given that the author had breached the law in force.

4.9 The State party adds that the Supreme Court also examined the author's complaints under the supervisory review procedure, and checked the lawfulness and the grounds of the lower courts' decisions. The Supreme Court found no reason to challenge these decisions.

4.10 The State party notes that at present, the author could request the Ministry of Justice to take a new legal examination with the Qualification Commission.

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

5.1 On 21 January 2005, the author affirmed that in most aspects, the information of the State party does not correspond to reality. He had been issued a lawyer's licence initially in 1996. At that time, he was a member of the Supreme Council of Belarus, held a law degree and the title of "Honoured lawyer of the Republic of Belarus". In November 1996, the Supreme Council was dissolved, and the author was no longer a Member of Parliament.

5.2 In January 1997, he started work as a lawyer at the Minsk City Bar. On 3 May 1997, the Belarusian President issued the decree prohibiting civil servants from receiving lawyers' licences and all lawyers' licences issued to civil servants were annulled. Individuals who were no longer civil servants when the decree was adopted could retake the qualification examination. According to the author, the decree had thus a retroactive effect and infringed the rights of those who have had obtained their lawyer's licence prior to its adoption. It also allegedly violated article 104 of the Constitution, pursuant to which laws do not have a retroactive effect, with the exception of situations where their application does not limit or annul the liability of the citizens.

5.3 The author reiterates that the Minister of Justice had no right to refuse licences to those who had passed the lawyers' qualification examination. The Minister allegedly obtained this right on 29 July 1997 only, after the modification of the Qualification Commission's Regulations. This, according to the author, contradicts the Belarusian Constitution and is also allegedly contrary to article 67 of the Law on the normative acts, pursuant to which legal acts cannot apply retroactively. The author reiterates that the refusal to issue him a lawyer's licence constitutes a premeditated act of open persecution against him because of his opposition activities.

5.4 The author further claims that the mere participation in a meeting (authorized or unauthorized) cannot, according to him lead to the prohibition to practise as lawyer. In its reply, the State party has only repeated "the accusations that were invented" against him.

#### **Additional submissions by the parties**

6.1 On 15 November 2005, the State party reiterates that, in 1997, the author's lawyer's licence was cancelled due to a reform. The same applied for all lawyers in this situation. He passed a new examination; shortly after, however, it became clear that he had been fined, in March 1997, by a court and this decision had entered into force.

6.2 Under the Qualification Commission's Regulations (4 June 1997), the Minister of Justice was empowered to refuse to issue lawyers' licence in certain situations. Committing an administrative offence is incompatible with the functions of a lawyer. By his activities,

the author had breached paragraph 18, part 2, of the Law on Lawyers, and, in accordance with article 32 of the Qualification Commission Regulations, the Minister of Justice correctly refused to issue his lawyer's licence. The Minister's refusal was confirmed by the courts. According to article 24 of the Law on Lawyers, there is no possibility to act as a lawyer for an individual who has committed an offence that is incompatible with lawyers' functions. Thus, nothing shows that in the present case, the Ministry of Justice had acted on a biased manner. In addition, the author could retake the examination.

7.1 On 29 August 2007, the author once again contests the State party's observations, affirms that in November 1996, the Belarus Parliament was dissolved illegally, and thus he thereby lost his status of Member of Parliament. The author claims that the meeting of 15 March 1997 was authorized by the Minsk City Council. He was fined because, due to the big number of participants, he made few steps on the street, trying to walk around some participants. According to him, by fining him, the authorities violated his right to peaceful assembly. This latter fact would also appear to raise issues under article 21, although this provision had not been expressly invoked by the author. The authorities have applied the laws against him in an arbitrary manner, which is confirmed, according to the author, by the fact that the amount of his fine was particularly high, and the most important ever determined at that time.

7.2 The author reiterates that as a consequence of the Minister's refusal, he cannot work, and since 1998, he lives on his pension of former member of the Ministry of Internal Affairs. His life pension as a former Chairman of the Supreme Soviet was not paid to him, which shows, according to him, that he is persecuted on political grounds.

8.1 On 2 May 2008, the State party explained that the Belarus General Prosecution Office, in 2005, checked the legality of the Court of the Moscow District of Minsk of 18 August 1997 on the author's complaint against the Minister of Justice. The court rejected the author's complaint, and this was confirmed by the Minsk City Court on 25 September 1997. His further complaint to the Supreme Court was rejected by the deputy Chairman of the Supreme Court.

8.2 The State party reiterates that the Minister of Justice was empowered to postpone or refuse to issue lawyers' licences. In this case, on 7 July 1997, he postponed the issuance of the licence in order to verify the circumstances of the administrative offence committed by the author. On 30 July, the Minister refused to issue the lawyer's licence. In light of the fact that the author had been fined by court for his participation in the meeting in 1997, the courts concluded that the Minister had acted within his powers, and his orders were found to be lawful and the decision fully grounded.

#### **Committee's decision on admissibility**

9.1 The Committee examined the admissibility of the communication at its ninety-fifth session, on 30 March 2009. It noted, as required by article 5, paragraph 2 (a) and (b), of the Optional Protocol, that the same matter was not being examined under any other international procedure of investigation or settlement, and that it was uncontested that domestic remedies have been exhausted.

9.2 It further noted the author's claims that, in violation of the requirements of article 14 of the Covenant, his case was examined neither by a competent nor an impartial or independent court. He also contends, without providing further explanations, that in his case, the judges failed to reply to a number of issues he had raised. He finally affirmed that judges in Belarus are not independent, as they are subordinated to the Ministry of Justice. The State party has in turn replied that all decisions in the author's case were lawful and fully grounded. The Committee noted that the author's allegations related primarily to the evaluation of facts and evidence; it recalled that it is generally for the courts of States



parties 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,<sup>4</sup> and decided that this part of the communication is inadmissible under article 2 of the Optional Protocol, as insufficiently substantiated.

9.3 Similarly, in the absence of any other pertinent information or explanations, the Committee considered that the author's blanket claim about the lack of independence of the State party's judiciary was not sufficiently substantiated, for purposes of admissibility, and was inadmissible under article 2 of the Optional Protocol.

9.4 The Committee further noted the author's claim of being a victim of discrimination because he was deprived of his special medical-care entitlements and his letters in this respect remained unanswered. His pension as a former Chairman of the Supreme Council was also never updated or paid to him, whereas, at the same time, other high-level officials, loyal to the regime in place, including former Chairpersons of the Supreme Soviet — i.e. exactly in his situation — were granted personal life pensions by Presidential Decree. The Committee noted that the State party had not specifically commented on these allegations, but, in the absence of any other pertinent information or explanations in this relation, and given that, from the documents on file, it was not possible to verify whether these allegations were ever drawn to the State party's competent authorities and courts, the Committee considered that this part of the communication was insufficiently substantiated and was therefore inadmissible under article 2 of the Optional Protocol.

9.5 The Committee finally noted that it was uncontested that the author's lawyer's licence was not issued because he had breached the legislation in force, by attending an unauthorized street rally in March 1997, an act which constitutes an administrative offence in Belarus. The author claimed that in violation of article 2 of the Covenant, this fact was arbitrarily exploited by the Minister of Justice, in order to punish him for his political opinions. The Committee noted that, although not explicitly invoked by the author, his claims raised issues under article 21 (see para. 7.1 above). In view of the intimate connection of the acts protected by articles 19 and 21, the Committee considered that the communication may also raise issues under article 19 of the Covenant. In particular, the Committee decided that it should examine whether the refusal to issue the licence, as a result of the administrative fine, had not breached the author's rights under these articles. The Committee found that that the author's allegations in this connection had met the requirements for substantiation for purposes of admissibility. Accordingly, it declared this part of the communication admissible, as far as it raised issues under articles 19 and 21 alone or read together with article 2, and 26, of the Covenant.

#### **State party's additional observations**

10.1 By Note Verbale of 24 March 2009,<sup>5</sup> the State party presented additional information. It recalls its previous observations and adds that the author's allegations that the Ministry of Justice should not have taken into account the fact that he had participated in an unauthorized rally in order not to issue his lawyer's licence are in contradiction with the current legislation, in particular article 24 of the Law on Lawyers. The State party explains that if a lawyer commits an administrative offence, he/she commits an action which is incompatible with the lawyers' activity and thus it was not possible to issue a

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<sup>4</sup> See, inter alia, communication No. 541/1993, *Simms v. Jamaica*, decision of inadmissibility adopted on 3 April 1995, para. 6.2.

<sup>5</sup> The State party's submission was received after the adoption of the Committee's decision of admissibility.

lawyer's licence to the author. Therefore, the Ministry of Justice cannot be seen as having acted in a biased manner in this case.

10.2 Lawyers' licences are issued for a period of five years in Belarus, and accordingly, at present the author is in a position to request to undergo again the lawyer's qualification examination with the Ministry of Justice.

10.3 The State party adds that on 18 August 1997, the Moscow District Court of Minsk rejected the author's complaint against the refusal of the Minister of Justice to issue him a lawyer's licence. This decision was confirmed on appeal by the Minsk City Court on 25 September 1997. In March 1998, the author complained to the Supreme Court under the supervisory review proceedings. His complaints were rejected by a Deputy Chairman of the Supreme Court. The author did not complain to other officials empowered to decide whether to request a supervisory review of a civil case and thus, according to the State party, domestic remedies have not been exhausted in the present case.

#### **Author's comments**

11.1 The author presented comments on 3 June 2011. He first notes that the State party has not presented comments to the Committee's admissibility decision and has not provided information on the alleged violations of his rights under articles 19 and 21, of the Covenant and has not explained the reasons which could justify the limitations of his rights under these provisions.

11.2 As far as the issue of non-exhaustion is concerned, the author recalls that he had asked the Supreme Court to have his case examined under the supervisory proceedings, but without success. Under article 439 of the Civil Procedure Code, a supervisory review may be initiated by the Chairperson of the Supreme Court (or his/her deputies), and the Chairpersons of the Minsk Region or City Court and their deputies.

11.3 The author further notes that he was fined for having participated in an unauthorized rally in commemoration of the adoption of the new Constitution of Belarus. He participated in the rally not in his capacity of a lawyer, but as an ordinary citizen. He was fined pursuant a decree of the President, and not under the provisions of a law, thus in violation of article 21 of the Covenant.

11.4 The author further points out that pursuant to the provisions of the Basic Principles on the Role of Lawyers, lawyers "like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession". Notwithstanding, the author has been fined for his participation in a rally, and this subsequently served for not having him issued a lawyer's licence, even if he had passed his qualification examination.

11.5 The author finally notes that before the refusal to issue him a licence on 30 July 1997, the Ministry of Justice has never done so, on the basis of participation to a peaceful assembly by a lawyer. According to him, the Ministry failed to do so after 30 July 1997. This shows, according to the author, that he was targeted and treated in a discriminatory manner, due to his opposition political activities and due to his criticisms against the regime in place.

### Additional information by the State party

12.1 By Note Verbale of 10 August 2011, the State party provided additional information. It recalls the facts of the case and adds that in February 1997, the author requested the examination of his case under the supervisory review proceedings of the Supreme Court of Belarus. His complaint was rejected by decision of a Deputy Chairman of the Supreme Court. Pursuant to article 439, paragraph 1, of the Civil Procedure Code, supervisory review can be ordered by the Chairman of the Supreme Court or his/her deputies or the Prosecutor General or his/her deputies. The State party adds that the Civil Procedure Code does not prevent submitting of further complaints to the same supervisory jurisdiction. Thus, according to the State party, the author has not exhausted available domestic remedies.

12.2 The Committee notes that the State party has not formally sought the review of the admissibility decision in the present case, adopted on 30 March 2009.

### Consideration of the merits

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

13.2 The author has claimed that following his participation in a peaceful rally in commemoration of the anniversary of the adoption of a 1994 Constitution of Belarus, he was fined and for this reason, he was not issued a lawyer's licence, even if he had passed a qualification examination. He claimed that he was a victim of discrimination on political grounds, as he belonged to an opposition movement critical to the regime in place, and that no other lawyers in such situation were refused issuance of lawyer's licence. The Committee considers that these claims raise issues under articles 19 and 21, and 26 read together with article 2, of the Covenant. The State party has not addressed these claims specifically considering these provisions of the Covenant, but has explained that the author's licence was not issued because, by having his administrative liability engaged for participation in an unauthorized meeting in violation of a Presidential Decree on Mass Actions, he had breached his duties as a lawyer set out in the Law on Lawyers.

13.3 The Committee recalls that freedom of opinion and freedom of expression are indispensable conditions for the full development of the person, that they are essential for any society, and that they constitute the foundation stone for every free and democratic society.<sup>6</sup> It notes further that the rights and freedoms set up in articles 19 and 21 of the Covenant are not absolute and may be subject to limitations in certain situations. Under article 19, paragraph 3, such limitations must be provided by law and necessary for respect of the rights or reputations of others, or for the protection of national security or of public order (*ordre public*) or public health or morals. Similarly, the second sentence of article 21, of the Covenant, requires that no restrictions may be placed on the exercise of the right to peaceful assembly other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of rights and freedoms of others.

13.4 The Committee notes that in the present case, the State party has limited itself in explaining that the author had been fined lawfully, under the provisions of the Code of Administrative Offences, which, as a consequence, had led to the subsequent non-issuance of his licence as a lawyer, in light of the provisions of the Law on Lawyers. The Committee

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<sup>6</sup> See general comment No. 34 (2011) on article 19, para. 2.

notes that the State party, however, has not adduced any explanation on how the non-issuance of the author's lawyer's licence was justified and necessary, for purposes of article 19, paragraph 3, and/or the second sentence of article 21, of the Covenant. In the circumstances of the present case, and in absence of any other pertinent information on file, the Committee considers that the author's rights under article 19, paragraph 2, and article 21, of the Covenant, have been violated in the present case.

13.5 In light of the above conclusion, the Committee decides not to examine separately the author's claims under article 26, read together with article 2, of the Covenant.

14. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of articles 19, paragraph 2, and 21 of the Covenant.

15. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, which should include the reissuance of the author's lawyer's license, and reparation, including adequate compensation. The State party should also ensure that no similar violations occur in the future.

16. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognised 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 recognised in the Covenant and to provide an effective and enforceable remedy in case that a violation has been established, 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, to have them translated in Belarusian language and widely distributed in the two official languages of the State party.

[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 to the General Assembly.]

**B. Communication No. 1547/2007, *Torobekov v. Kyrgyzstan*  
(Views adopted on 27 October 2011, 103rd session)\***

<i>Submitted by:</i>	Munarbek Torobekov (represented by counsel, Nurbek Toktakunov)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Kyrgyzstan
<i>Date of communication:</i>	12 April 2006 (initial submission)
<i>Subject matter:</i>	Failure to promptly bring a person detained on a criminal charge before a judge; court proceedings in violation of fair trial guarantees
<i>Procedural issue:</i>	Non-substantiation of claims
<i>Substantive issues:</i>	Arbitrary arrest and detention; right to be brought promptly before a judge; right to a fair hearing by an independent and impartial tribunal; right to be presumed innocent; right to adequate time and facilities for the preparation of defence; right to be tried without undue delay; right to legal assistance; right to obtain the attendance and examination of witnesses; arbitrary interference with one's home
<i>Articles of the Covenant:</i>	9, paragraphs 1 and 3; 14, paragraphs 1, 2, 3 (b), (c), (d), (e); and 17, paragraph 1
<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 27 October 2011,*

*Having concluded* its consideration of communication No. 1547/2007, submitted to the Human Rights Committee by Munarbek Torobekov 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:

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\* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

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

1. The author of the communication is Munarbek Torobekov, a Kyrgyz national born in 1966. He claims to be a victim of violations by Kyrgyzstan of his rights under article 9, paragraphs 1 and 3; article 14, paragraphs 1, 2, 3 (b), (c), (d), (e); and article 17, paragraph 1, of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 7 January 1995. The author is represented by counsel, Nurbek Toktakunov.

### Factual background

2.1 The author submits that, in the morning of 25 April 2003, several police officers from the Crime Detection Unit of the Pervomaysky District Department of Internal Affairs (District Department), led by Mr. Zh.O., entered his apartment in Bishkek. It appears that, as soon as the author opened the door and was asked by a police officer about a television set, the author immediately pointed to a box standing near the entrance that contained the television set. When the author tried to prevent police officers from coming inside, Mr. Zh.O. showed his police card and warned the author that in case of resistance the police would use force against him. When the author requested to see the search warrant, he was told by Mr. Zh.O. that there was no need for one. Mr. Zh.O. seized the television set and drew up a report of discovery and seizure to certify it. The television set's serial number was not included in the report, despite the author's request to do so. He was not provided with a copy of the report.<sup>1</sup>

2.2 On the same day, the author, his girlfriend and an acquaintance, Mr. T.B., were brought to the District Department and interrogated. Subsequently, the investigator of the District Department, Ms. T.I., initiated criminal proceedings under article 167, part 3 (robbery), of the Criminal Code; the author and Mr. T.B. were arrested and interrogated as suspects in this criminal case in the absence of a lawyer. The author testified that the television set was given to him by Mr. A.R. as compensation for the beating of the author's girlfriend, as she needed money for medical treatment. The author submits that, prior to the interrogation, their rights as suspects were not explained to them. However, the arrest report of 25 April 2003 that bears the author's signature, states that he had familiarised himself with the report and that his rights and duties provided for under article 40 of the Criminal Procedure Code had been explained to him.

2.3 Later that day, Mr. A.R. and his mother, Ms. T.R., were interrogated by the investigator as victims and testified that, at around 3 a.m. on 25 April 2003, the author had taken away their television set by force. They refused, however, to undergo a forensic medical examination that was necessary in order to corroborate this assertion. The author submits that the interrogation report does not include the description of the television set in question and its serial number. The same day, the investigator ordered Mr. A.R. and Ms. T.R. to undergo a forensic medical examination, without, however, allowing the author and Mr. T.B. to familiarize themselves with the respective orders. Upon arrival of the author's privately hired lawyer, who was also representing Mr. T.B., at the District Department, the investigator referred to her workload and scheduled interrogation for the next day, i.e., 26 April 2003, although she had already interrogated the author and Mr. T.B. in the absence of their lawyer.

2.4 On 26 April 2003, the investigator postponed the interrogation to 28 April 2003, allegedly because the suspects were not transported from the temporary confinement ward

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<sup>1</sup> The report of discovery and seizure of 25 April 2003 bears the author's signature.

(IVS).<sup>2</sup> On the same day, counsel tried to meet with his clients in the IVS but he was refused access on the basis of article 17 of the law “On the procedure and conditions of detention of persons suspected and accused of having committed crimes,” pursuant to which administration, heads and staff of the confinement institutions should allow the suspects and accused persons to meet with their lawyers only when presented with a written authorization given by the prosecutor or investigator. The author claims that his lawyer was unable to receive such an authorization as the registry of the District Department was closed on Saturday, whereas the registry stamp was necessary for an authorization to be considered as an official document.

2.5 On 28 April 2003, the author’s lawyer was taken to the hospital. He notified the investigator in charge of the case about the hospitalization and requested her to assign another lawyer to his clients, pursuant to the requirements of article 46 of the Criminal Procedure Code. On the same day, the investigator returned the television set to Ms. T.R. without registering its serial number in the material evidence examination report. Later that day, the author and Mr. T.B. were charged with premeditated robbery, the use of non-lethal force or threat thereof and entry into a dwelling. The author and Mr. T.B. were subsequently interrogated by the investigator in their capacity of accused in the absence of a lawyer. Their placement in custody was authorized by the Prosecutor of the Pervomaysky District on 28 April 2003. As transpires from the decision of the Prosecutor of the Pervomaysky District, the author’s placement in custody was necessary, because of a previous conviction and a risk that he could abscond if released.

2.6 On 4 May 2003, that is 9 days after the incident and 8 days after the ordering of a forensic medical examination, Mr. A.R. and Ms. T.R. were examined by a medical expert. On 13 May 2003, the investigator carried out a confrontation between the author and Ms. T.R. in the absence of a lawyer. On 19 May 2003, the medical expert concluded that there were light injuries, such as bruises and scratches, on the bodies of Mr. A.R. and his mother. The author submits that neither he nor his co-accused was informed about the conclusions of the forensic medical examination.

2.7 On 28 May 2003, the author’s lawyer (who had then left the hospital) complained to the investigator that his clients had not been assigned another lawyer. On 28 May 2003, the investigator in the case, Ms. T.I., resigned and, on 11 June 2003, the case was reassigned to another investigator. On 18 June 2003, the author’s lawyer requested the new investigator, Mr. M.N., to interrogate his clients in his presence and to carry out a confrontation between Mr. A.R. and his clients. The request of the author’s lawyer to carry out the confrontation was rejected by the investigator on 21 June 2003, allegedly due to his inability to establish the victims’ whereabouts.

2.8 As transpires from the decision of the investigator of 21 June 2003, the author’s lawyer had not presented himself on 28 April 2003 for the scheduled interrogation of his clients, without, however, informing the investigator, Ms. T.I., about the reasons for his absence. Due to the unavailability of an ex officio lawyer on call, it was not possible for the investigator to assign a new lawyer to the author and Mr. T.B. On an unspecified date, the new investigator, Mr. M.N., questioned the first investigator, Ms. T.I., who stated that, on 25 April 2003, the lawyer of the author and Mr. T.B. instructed his clients to testify in his absence and told them that he would be able to sign the interrogation reports at a later stage. At around 4 p.m. on 28 April 2003, the lawyer called the investigator and informed her that he was unable to represent his clients due to the hospitalization and that he would send another lawyer to replace him. The replacement lawyer, however, did not appear and an ex

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<sup>2</sup> Изолятор временного содержания (ИВС) is an institution for confinement of individuals who are suspected of, but not yet charged with, having committed a crime.

officio lawyer on call was unavailable. In the circumstances, the investigator had no other choice but to carry out the investigative actions in the absence of a lawyer.

2.9 On 21 June 2003, the author and his co-accused were interrogated by the new investigator in the presence of their lawyer and were informed of the conclusions of the forensic medical examination of Mr. A.R. and his mother.

2.10 On 24 June 2003, the investigation was completed. The author's lawyer examined the content of the criminal case file and requested the investigator to close the criminal case, because the television set was seized unlawfully as a result of an unauthorized search of the author's apartment by police officers and, thus, the material evidence had no evidential value. He also considered that the conclusions of the forensic medical examination did not have any evidential value either as the examination was conducted in violation of the procedural requirements. Furthermore, his clients were only shown the conclusions of the medical examination on 21 June 2003, whereas these conclusions had been ready on 19 May 2003.

2.11 On 25 June 2003, the investigator rejected the request of the author's lawyer of 24 June 2003. As transpires from the decision of the investigator of 25 June 2003, reference was made to article 8 of the law "On Investigation and Search Operations," which provides for the possibility of "examining" the dwellings of individuals suspected of having committed crimes by inquiry officers with the aim of finding the traces of the crimes. This law is based on the Constitution and does not interfere with the right of inviolability of one's home. Inquiry officers had, according to the decision, entered the author's apartment with the permission of its inhabitants and did not use any force or other violence in the course of the "examination".

2.12 On an unspecified date, the author's criminal case was transmitted to the Pervomaysky District Court of Bishkek. On 14 October 2003, before the start of the trial, the author's lawyer requested the court to recognise the material evidence as having no evidential value due to the fact that it was acquired unlawfully. On 14 October 2003, the Pervomaysky District Court dismissed this request without giving any grounds for its decision. On the same day, it interrogated the author and his co-accused, who testified that Mr. A.R. and Ms. T.R. had voluntarily given away their television set, as compensation for the beating of the author's girlfriend. In addition, the author testified that he did not give permission to the police officers to enter his apartment and that he was not presented with any documents authorizing their entry into his apartment. Also on the same day, Ms. T.R. stated in court that her son had left for Russia and had no intention to appear before the court and testify.

2.13 On 14 October 2003, the Pervomaysky District Court returned the case to the Prosecutor of the Pervomaysky District in order for him to provide "further proofs of the defendants' guilt" and "to ensure the appearance of Mr. A.R. before the court". The author's lawyer requested the release of his clients from custody. The court refused to change the measure of restraint applied in relation to the author and Mr. T.B. and considered that their placement in custody was necessary, because they had previous convictions and could abscond if released. Furthermore, they have been charged with having committed a particularly serious crime,<sup>3</sup> whereas under article 110, part 2, of the Criminal Procedure Code "placement in custody may be applied to persons accused of

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<sup>3</sup> According to article 13 of the Criminal Code, particularly serious crimes are premeditated crimes punishable by more than 10 years' imprisonment or the death penalty. The author was charged under article 167, part 3, of the Criminal Code with having committed a premeditated crime punishable by 7 to 12 years' imprisonment and seizure of property.



having committed a particularly serious crime on a sole ground of gravity of the crime committed”.

2.14 On 25 December 2003, the trial of the author and Mr. T.B. resumed in the Pervomaysky District Court, but Mr. A.R. did not appear in court. The author’s lawyer again requested the release of his clients from custody but his request was again rejected on the same grounds. Due to the absence of Mr. A.R., the Pervomaysky District Court decided to postpone the hearing. On 5 January 2004, Mr. A.R. again did not appear in court. On the same day, the judge of the Pervomaysky District Court ordered the Prosecutor of the Pervomaysky District to ensure the appearance of Mr. A.R. in court by 9 January 2004, stating that “it was impossible to take any decision on the substance of the case without having heard the victim’s testimony”.

2.15 On 9 January 2004, the appearance of Mr. A.R. in court was still not ensured by the prosecution, and the court decided to examine the case in his absence. Mr. Zh.O., the police officer who seized the television set on 25 April 2003, was interrogated by the court and testified that although the search of the author’s apartment had not been authorized, the author on a voluntary basis has given him a permission to enter his apartment. The prosecutor then asked the Pervomaysky District Court to proceed with the hearing and suggested to read in court the testimony given by the alleged victims during the preliminary investigation. The author’s lawyer submits that he “had to agree” with the continuation of the trial in the absence of the victim, so as to not to continue his client’s pre-trial custody indefinitely. The court then read out the victim’s testimony given during the preliminary investigation. The author submits that in his statement, the prosecution claimed that the guilt of the author and Mr. T.B. has been proven by the victims’ testimony and other case materials collected during the investigation.

2.16 On 14 January 2004, the author’s lawyer requested the Pervomaysky District Court to acquit his clients and to send the case for further investigation, because (1) the television set was seized unlawfully as a result of an unauthorized search of the author’s apartment by police officers and, thus, the material evidence had no evidential value; (2) the conclusions of the forensic medical examination did not have any evidential value, as the examination was conducted in violation of the procedural requirements; and (3) the court was unable to interrogate Mr. A.R., who, according to the author and Mr. T.B., could have given testimony exonerating them. The court dismissed the arguments of the author’s lawyer in relation to the evidential value of the seized television set and the conclusions of the forensic medical examination, by establishing that the author himself showed and surrendered the television set to police officers and that the arguments concerning the conclusions of the medical examination were groundless. On the same day, the Pervomaysky District Court found the author and Mr. T.B. guilty under article 168 (robbery with violence) of the Criminal Code and sentenced them to 6<sup>4</sup> and 8 years’ imprisonment, respectively.

2.17 As transpires from the judgment of the Pervomaysky District Court of 14 January 2004, reference was made to article 61 of the Criminal Code, which provides for a deduction of the length of pre-trial detention from the overall length of imprisonment imposed by the court. Pursuant to this provision, one day of the author’s pre-trial detention corresponds to two days of imprisonment in the high security prison.

2.18 On 14 January 2004, the author’s lawyer submitted an appeal to the Bishkek City Court against the judgment of the Pervomaysky District Court. The appeal was dismissed

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<sup>4</sup> On 30 November 1995, the author was sentenced to six years’ imprisonment by the Pervomaysky District Court and, therefore, on 14 January 2004, the same court concluded that there was a repeat commission of an offence by the author.

on 11 March 2004 by the Judicial Chamber for Criminal Cases of the Bishkek City Court. On 25 May 2004, the Judicial Chamber for Criminal and Administrative Cases of the Supreme Court upheld the judgment of the Pervomaysky District Court of 14 January 2004 and the ruling of the Bishkek City Court of 11 March 2004 through the supervisory review procedure.

### **The complaint**

3.1 The author claims to be a victim of violations by Kyrgyzstan of his rights under article 9, paragraphs 1 and 3; article 14, paragraphs 1, 2, 3(b), (c), (d), (e); and article 17, paragraph 1, of the Covenant.

3.2 In relation to article 9, paragraph 1, of the Covenant, the author claims that from the moment of his arrest, he was suspected of having committed a particularly serious crime and, therefore, pursuant to the requirements of article 46 of the Criminal Procedure Code, he should have been provided with a lawyer from the moment of his arrest. Contrary to this requirement, he was arrested, interrogated and charged with having committed a particularly serious crime in the absence of a lawyer. The author adds that the Prosecutor of the Pervomaysky District did not ensure that his placement in custody was authorized in accordance with law, although the absence of the lawyer's signature was evident from the case materials.

3.3 In addition, any detention should be necessary and just. In the present case, there was no need to deprive the author of his liberty, as it was possible to ensure his presence in investigative and judicial proceedings through less severe restraint measures. Furthermore, the authorities have not provided any proof in support of their assertion that the author would abscond or commit other crimes if released. Additionally, as argued by the author's lawyer in court, he "had to agree" with the continuation of the trial in the absence of the victim, so as not to continue his client's pre-trial custody indefinitely. On two occasions, the author's lawyer had requested the Pervomaysky District Court to release the author, but his requests were denied. Under article 339, part 2, of the Criminal Procedure Code, the ruling of the first instance court on the application of the measure of restraint is final and could not be appealed.

3.4 The author claims that, contrary to article 9, paragraph 3, of the Covenant, the State party's law does not require that anyone arrested or detained on a criminal charge be brought promptly before the judge. His placement in custody was authorized by a prosecutor, who cannot be considered independent. Furthermore, under article 9, paragraph 3, the placement in custody is an exceptional measure. The Pervomaysky District Court, however, has twice rejected the requests of the author's lawyer to release his client, on the sole ground of gravity of the committed crime (see para. 2.13 above). The author submits that it would be ineffective to raise his claims under article 9, paragraph 3, before the domestic courts, because in the absence of relevant domestic law, the courts would be unable to enforce his rights guaranteed under article 9, paragraph 3, of the Covenant. Thus, there are no domestic remedies to exhaust for the claims under this provision of the Covenant.

3.5 The author claims that he is a victim of a violation of article 14, paragraph 2, of the Covenant. At the stage of preliminary investigation and in court, the author's lawyer challenged the evidential value of the conclusions of the forensic medical examination and of the seized television set. The State party's law requires the suspects and defendants to be informed of the day of the expert examination in order to allow them to be present, ask additional questions to the expert and challenge the conclusions. The investigator ordered the forensic medical examination of Mr. A.R. and Ms. T.R. on 25 April 2003 but did not inform the author and Mr. T.B. of the respective orders, thus, making it impossible for them to exercise their rights. The author and Mr. T.B. were informed by the investigator about

the orders to conduct the forensic medical examination and the conclusions thereof only on 21 June 2003, when they were no longer able to challenge the conclusions. Moreover, the television set was seized unlawfully as a result of an unauthorized search of the author's apartment by police officers; its serial numbers and special features were not registered anywhere, which made it impossible for the author to prove that police officers had seized a television set that did not belong to the victims. The right to be presumed innocent until proven guilty requires that all doubts be interpreted in the defendant's favour. Despite the absence of Mr. A.R. in court, the Pervomaysky District Court based its decision on his testimony given during the preliminary investigation. By having interpreted all doubts about the author's guilt in favour of the prosecution, and placed the burden of proof on him to prove his innocence, the State party's courts have violated article 14, paragraph 2, of the Covenant.

3.6 On 26 April 2003, the author's lawyer was unable to meet with his client, because under the law "On the procedure and conditions of detention of persons suspected and accused of having committed crimes" the administration, heads and staff of the confinement institutions should allow the suspects and accused persons to meet with their lawyers only when presented with a written authorization given by the prosecutor or investigator. The author claims that the above-mentioned law itself is in violation of article 14, paragraph 3(b), of the Covenant.

3.7 The author submits that the preliminary investigation and court proceedings in his case took a total of 10 months and 16 days. He claims, therefore, that his right under article 14, paragraph 3(c), of the Covenant to be tried without undue delay was violated.

3.8 The author claims that from 28 April to 23 May 2003, he was unable to prepare for his defence and to consult with his lawyer, as the investigator did not assign him another lawyer while the lawyer of his choosing was in the hospital. As a result, he was formally arrested, interrogated, charged and placed in custody in the absence of his lawyer, contrary to article 14, paragraphs 3(b) and (d), of the Covenant.

3.9 The author claims that the prosecution's inability to ensure the appearance of Mr. A.R. in court, despite his and his lawyer's numerous requests resulted in a violation of his right to examine the witnesses against him and to obtain the attendance and examination of witnesses on his behalf, guaranteed under article 14, paragraph 3(e), of the Covenant.

3.10 Article 14, paragraph 1, provides for the right to a fair and public hearing by the competent, independent and impartial tribunal. Impartiality, *inter alia*, implies that the court act as a referee between the prosecution and defence. However, in the author's case, the court clearly acted in favour of the prosecution, at times even fulfilling its tasks.

3.11 As to the claim under article 17, paragraph 1, the author points out that the television set was seized unlawfully as a result of an unauthorized search of his apartment by police officers. However, all his and his lawyer's complaints related to this unlawful interference were rejected on the grounds that no search had taken place, since the author himself had opened the door of his apartment and showed the television set to police officers. The author argues that that it is irrelevant for the purposes of article 17 of the Covenant whether his apartment was searched or "examined", since in any case the police needed to enter the apartment in order to seize the television set. He adds that the State party's courts could have ensured the right of inviolability of his home, by ruling that the seized television set could not be used as material evidence, since it was obtained unlawfully.

#### **State party's failure to cooperate**

4. By notes verbales of 6 March 2007, 28 April 2008, 1 October 2009 and 1 September 2010, the State party was requested to submit to the Committee information on the admissibility and merits of the communications. On 20 December 2010, a copy of the

initial submission of 12 April 2006 in its entirety was retransmitted to the State party upon its request of 9 December 2010. The Committee notes, however, that the requested information has not been received from the State party. The Committee regrets the State party's failure to provide any information with regard to admissibility or the substance of the author's claims. It recalls that under the Optional Protocol, the State party concerned is required to submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that it may have taken. In the absence of a reply from the State party, due weight must be given to the author's allegations, to the extent that these have been properly substantiated.<sup>5</sup>

### Issues and proceedings before the Committee

#### *Consideration of admissibility*

5.1 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.

5.2 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. In the absence of any State party objection, the Committee considers that the requirements of article 5, paragraph 2(b), of the Optional Protocol have been met.

5.3 The Committee notes the author's claim that his rights under article 9, paragraph 1, and article 14, paragraphs 3(b) and (d), of the Covenant were violated, because he was formally arrested, interrogated, charged and placed in custody in the absence of his privately hired lawyer. The Committee also notes that, as transpires from the decision of the investigator of 21 June 2003 (see para. 2.8 above), the absence of the author's lawyer on 25 April 2003 and 28 April 2003 can at least in part be attributed to the lawyer himself. Furthermore, on 21 June 2003, the author and his co-accused were interrogated by the new investigator in the presence of their lawyer and were informed of the conclusions of the forensic medical examination of Mr. A.R. and his mother. In the circumstances, the Committee considers that these claims are inadmissible as insufficiently substantiated for purposes of admissibility under article 2 of the Optional Protocol.

5.4 With respect to the author's allegations under article 14, paragraphs 1, 2 and 3(e), the Committee observes that these complaints refer primarily to the appraisal of evidence adduced at the trial. It recalls<sup>6</sup> that it is generally for the courts of States parties to the Covenant 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. In the present case, the Committee is of the view that the author has failed to demonstrate, for purposes of

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<sup>5</sup> See communications No. 1208/2003, *Kurbonov v. Tajikistan*, Views adopted on 16 March 2006, para. 4; Nos. 1209/2003, 1231/2003 and 1241/2004, *Sharifova et al. v. Tajikistan*, Views adopted on 1 April 2008, para. 4; Nos. 1461, 1462, 1476 and 1477/2006, *Maksudov et al. v. Kyrgyzstan*, Views adopted on 16 July 2008, para. 9.

<sup>6</sup> See, inter alia, communications No. 541/1993, *Errol Simms v. Jamaica*, decision of inadmissibility adopted on 3 April 1995, para. 6.2; No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, decision of inadmissibility adopted on 2 November 2004, para. 7.3; No. 886/1999, *Bondarenko v. Belarus*, Views adopted on 3 April 2003, para. 9.3; No. 1138/2002, *Arenz et al. v. Germany*, decision of inadmissibility adopted on 24 March 2004, para. 8.6; 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.

admissibility, that the conduct of the criminal proceedings in his case in fact suffered from such defects. It consequently considers that this part of the communication is insufficiently substantiated, for purposes of admissibility, and is therefore inadmissible under article 2 of the Optional Protocol.

5.5 The Committee also notes the author's argument that he is a victim of a violation of article 14, paragraph 3(b), of the Covenant, because he could not meet with his lawyer on 26 April 2003, because of the lawyer's inability to comply with the requirements of the law "On the procedure and conditions of detention of persons suspected and accused of having committed crimes." The Committee notes, however, that the author does not explain how this affected the determination of the criminal charges against him. It concludes, therefore, that the author has failed to sufficiently substantiate, for purposes of admissibility, this part of the communication. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

5.6 As to the author's claim under article 14, paragraph 3(c), concerning the alleged unreasonable delay of 10 months and 16 days between his arrest on 23 April 2003 and the ruling of the Judicial Chamber for Criminal Cases of the Bishkek City Court of 11 March 2004, after which his sentence became executory, the Committee notes that official charges were brought against the author on 28 April 2003 and that he was convicted on 14 January 2004. The Committee observes that the author has not presented sufficient information to indicate why he considers this delay excessive.<sup>7</sup> In the light of the information before the Committee, it finds that this claim is insufficiently substantiated and therefore declares it inadmissible under article 2 of the Optional Protocol.

5.7 Finally, with regard to the author's allegations under article 17, paragraph 1, of the Covenant, the Committee notes the vagueness of these claims in relation to the lawfulness or otherwise of the entry or search or examination of the author's apartment by police officers and to the author's consent or lack thereof for such actions. For this reason, the Committee is unable to conclude that these allegations are sufficiently substantiated, for purposes of admissibility. Accordingly, the Committee considers this part of the communication inadmissible under article 2 of the Optional Protocol.

5.8 The Committee considers that the author's remaining claims under article 9, paragraph 3, of the Covenant, have been sufficiently substantiated, for purposes of admissibility, and proceeds to their examination on the merits.

#### *Consideration of the merits*

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

6.2 The Committee notes the author's claim that his rights under article 9, paragraph 3, of the Covenant, have been violated, as his placement in custody was authorized by a prosecutor who cannot be considered independent. In this respect, the Committee recalls its jurisprudence<sup>8</sup> that paragraph 3 of article 9 entitles a detained person charged with a criminal offence to judicial control of his/her detention. It is generally admitted in the

<sup>7</sup> See communication No. 1338/2005, *Kaldarov v. Kyrgyzstan*, Views adopted on 18 March 2010, para. 7.8.

<sup>8</sup> See, inter alia, communications No. 521/1992, *Kulomin v. Hungary*, Views adopted on 22 March 1996, para. 11.3; No. 1218/2003, *Platonov v. Russian Federation*, Views adopted on 1 November 2005, para. 7.2; No. 1348/2005, *Ashurov v. Tajikistan*, Views adopted on 20 March 2007, para. 6.5; *Kaldarov v. Kyrgyzstan* (note 7 above), para. 8.2.

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. In the circumstances of the case, the Committee finds that the public prosecutor cannot be characterized 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, and, therefore, concludes that there has been a violation of this provision.

6.3 The Committee further notes that, according to article 9, paragraph 3, anyone detained on a criminal charge is entitled to trial within a reasonable time or to release. The Committee recalls its jurisprudence that, in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification.<sup>9</sup> In the present case, the Pervomaysky District Court has determined that the author’s placement in custody was necessary, because he was charged with a particularly serious crime, had been previously convicted and that, therefore, there was a concern that he might abscond if released. While the author submits that he should have been released pending trial, he does not allege that the justification put forward by the Pervomaysky District Court for his placement in custody was inappropriate. The Committee also notes that the length of the author’s pretrial detention was deducted from the overall length of his imprisonment imposed by the Pervomaysky District Court at a ratio of one to two days (see para. 2.17 above). For these reasons, the Committee finds that the length of the author’s pretrial detention cannot be deemed unreasonable and that, consequently, there is no violation of article 9, paragraph 3, in this respect.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is therefore of the view that the facts before it disclose a violation of the author’s right under article 9, paragraph 3, of the Covenant.

8. In accordance with article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, in the form of appropriate compensation. The State party is also under an obligation to take all necessary steps to prevent similar violations occurring in the future.

9. 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 and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee’s Views. The State party is also requested to publish the Committee’s Views and to have them translated into the official language and widely distributed.

[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 to the General Assembly.]

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<sup>9</sup> See communications No. 900/1999, *C. v. Australia*, Views adopted on 28 October 2002, para. 8.2; No. 1014/2001, *Baban v. Australia*, Views adopted on 6 August 2003, para. 7.2.

**C. Communication No. 1563/2007, Jünglingová v. Czech Republic  
(Views adopted on 24 October 2011, 103rd session)\***

<i>Submitted by:</i>	Oldřiška (Olga) Jünglingová (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	The Czech Republic
<i>Date of communication:</i>	29 May 2006 (initial submission)
<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>Articles 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 24 October 2011,*

*Having concluded* its consideration of communication No. 1563/2007, submitted to the Human Rights Committee by Ms. Oldřiška (Olga) Jünglingová 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. The author of the communication, dated 29 May 2006, is Oldřiška (Olga) Jünglingová, a naturalized American citizen residing in the United States of America and born on 19 February 1917 in Bystročice, District of Olomouc, 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.<sup>1</sup> She is not represented by counsel.

\* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli and Ms. Margo Waterval.

<sup>1</sup> The Optional Protocol entered into force for the Czech Republic on 1 January 1993, as a consequence of the Czech Republic's notification of succession to the ratification of the Optional Protocol by the Czech and Slovak Federal Republic on 12 March 1991.

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

2.1 The author's husband, Augustin Jüngling, an evangelical pastor, fled Czechoslovakia shortly after the communist coup of February 1948 and the author and her two daughters followed him in 1949. The family obtained United States citizenship in 1957, and lived in the United States until their return to the Czech Republic in 1994.

2.2 On 31 March 1938, the author had obtained, as part of her dowry, two parcels of land, recorded in the Land Register in Olomouc as parcels No. 219/1, of 86.180 m<sup>2</sup>, and No. 324/3, of 183.280 m<sup>2</sup>. A piano, which was not on that list, had been purchased new for 20,000 Czech koruna. The author also had a bank deposit of 15,990 Czech koruna. After she left Czechoslovakia, all the author's possessions, including her land parcels, equipped house and furniture, were confiscated by the State.

2.3 An agreement on the release of real property between the Agricultural Cooperative Bystročice-Žerůvsky and the author was concluded on 20 October 1995. The District Land Office in Olomouc rejected this agreement on 23 April 1996 under Act No. 229/1991, on the basis that the author did not meet the condition of Czech citizenship as of 31 January 1993,<sup>2</sup> as she only acquired citizenship on 29 May 1995. On 4 February 1997, the Regional Court in Ostrava confirmed the decision of the District Land Office in Olomouc. On 13 August 1997, the District Land Office of Olomouc ruled that both parcels had become the property of the Municipality of Bystročice. The property had been evaluated in 1950 at 37,952 Czech Crowns and sold.

2.4 On 22 February 1999, the District Court of Olomouc rejected the author's claim for compensation for 60,000 Czech crowns under Law No. 87/1991 on extrajudicial rehabilitation, on the ground that she should have submitted her claim before the deadline set by the law and as she was not a Czech citizen within the statutory restitution period.<sup>3</sup> On 24 May 2000, this decision was confirmed by the Regional Court in Ostrava.

2.5 The author contends that no domestic remedies are available for the restitution of her property, referring to a decision of the Constitutional Court, which upheld the constitutionality of Law No. 87/1991.<sup>4</sup>

### **The complaint**

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

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<sup>2</sup> Act No. 229/1991 on the Regulation of Property Relations to the Land and Other Agricultural Property, sect. 13, para. 4.

<sup>3</sup> Law No. 87/1991 on extrajudicial rehabilitation was adopted by the Czech Government, spelling out the conditions for recovery of property for persons whose property had been confiscated under the Communist rule. Under this law, in order to claim entitlement to recover property, a person claiming restitution of the property had to be, inter alia, (a) a Czech citizen, and (b) a permanent resident in the Czech Republic. These requirements had to be fulfilled during the time period in which restitution claims could be filed, namely between 1 April and 1 October 1991. A judgment by the Czech Constitutional Court of 12 July 1994 (No. 164/1994) annulled the condition of permanent residence and established a new time-frame for the submission of restitution claims by persons who had thereby become entitled persons, running from 1 November 1994 to 1 May 1995.

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



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

4.1 On 12 November 2007, the State party submits its observations on the admissibility and merits. It refers to the applicable law, namely Act No. 229/1991 on the Regulation of Property Relations to the Land and Other Agricultural Property and Law No. 87/1991 on extrajudicial rehabilitation.

4.2 Under Act No. 229/1991, section 4, paragraph 1, and section 13, paragraph 4, a Czechoslovak citizen was entitled to recover his/her legal title over land which had previously passed on to the State within a fixed time limit (by 31 January 1993). Law No. 87/1991 (section 3, paragraph 1, and section 13, paragraph 2) further allowed entitled persons, i.e. Czechoslovak citizens, compensation (60,000 Czech Crowns), where the judicial decision by which the State had seized their real property was subsequently rescinded under Act No. 119/1990 on Judicial Rehabilitation. Such compensation request had to be filed within one year of the day of entry into force of the Act, or within one year of the day of finality of the judgement which dismissed the claim for recovery.

4.3 The State party outlines the reasons for which the author's restitution requests were rejected: in addition to the fact that she did not submit her claims within the time limits set forth under Act No. 229/1991 and Law No. 87/1991, and that she was not a Czech citizen within the relevant statutory period, the author should have engaged legal proceedings against the municipality of Bystročice, rather than the Cooperative Zemědělské družstvo Bystročice-Žerůvsky, with whom she had concluded an agreement for the release of the property on 20 October 1995. A further reason for dismissing her request was the fact that, contrary to the explicit provision of Law No. 87/1991, section 13, paragraph 2, part of the confiscated property consisted in real property.

4.4 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 its submission. The State party however submits that the author submitted her communication before the Committee on 29 May 2006, which is six years after the last decision of the domestic court dated 24 May 2000. The State party argues that the author has not presented any reasonable justification for this delay, and therefore considers that the communication should be declared inadmissible by the Committee.<sup>5</sup>

4.5 On the merits, the State party argues that the author failed to comply with the legal citizenship requirement and recalls its earlier submissions in similar cases, clarifying the rationale and historic reasons for the legal scheme adopted on 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

5.1 On 4 January 2008, the author submits her comments on the State party's observations on the admissibility and merits.

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<sup>5</sup> The State party refers to communication No. 787/1997, *Gobin v. Mauritius*, decision of inadmissibility of 16 July 2001, para. 6.3.

5.2 With regard to her belated submission of the present communication, she argues that the State party does not publish any decisions by the Human Rights Committee; hence she only belatedly became aware of this avenue.

5.3 Concerning the merits, the author reiterates the discriminatory nature of the citizenship requirement contained in Act No. 229/1991 and Law 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.

6.3 The Committee observes that the author has not exhausted all available domestic remedies, as she could have appealed the decision of the Regional Court of Ostrava of 24 May 2000. 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; that earlier views of the Committee in similar cases remain unimplemented and that the Constitutional Court nevertheless upheld the constitutionality of the Restitution Law.<sup>6</sup> Recalling its previous jurisprudence,<sup>7</sup> the Committee is of the view that any further appeal of the author would have been futile.

6.4 The Committee has noted the State party's argument that the communication should be considered inadmissible as an abuse of the right of submission of a communication under article 3 of the Optional Protocol in view of the delay in submitting the communication to the Committee. The State party asserts that the author waited more than six years after exhaustion of domestic remedies before submitting her complaint to the Committee. The author argues that the delay was caused by lack of available information. The Committee observes that according to its new rule of procedure 96 (c), applicable to communications received by the Committee after 1 January 2012, the Committee shall ascertain that the communication does not constitute an abuse of the right of submission. An abuse of the right of submission is not, in principle, a basis of a decision of inadmissibility *ratione temporis* on grounds of delay in submission. However, a communication may constitute an abuse of the right of submission, when it is submitted after five years from the exhaustion of domestic remedies by the author of the communication, or, where applicable, after three years from the conclusion of another procedure of international investigation or settlement, unless there are reasons justifying the delay taking into account all the circumstances of the communication. Nevertheless, in the meantime and in accordance with its current jurisprudence, the Committee considers that in the particular circumstances of the instant case it does not consider the delay of six years and five days since the exhaustion of domestic remedies to amount to an abuse of the right

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<sup>6</sup> Constitutional Court of the Czech Republic, Pl. ÚS. 33/96-41.

<sup>7</sup> See, for example, communication No. 1742/2007, *Gschwind v. Czech Republic*, Views adopted on 27 July 2010, para. 6.4.

of submission under article 3 of the Optional Protocol.<sup>8</sup> The Committee therefore decides that the communication is admissible, in so far as it appears to raise issues under article 26 of the Covenant.

*Consideration of the merits*

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

7.2 The issue before the Committee, as it has been presented by the parties, is whether the application to the author of Law No. 87/1991 on extrajudicial rehabilitation amounted to discrimination, in violation of article 26, of the Covenant. The Committee reiterates its jurisprudence that not all differentiations in treatment can be deemed to be discriminatory under article 26. A differentiation which is compatible with the provisions of the Covenant and is based on objective and reasonable grounds does not amount to prohibited discrimination within the meaning of article 26.<sup>9</sup>

7.3 The Committee recalls its Views in the numerous Czech property restitution cases,<sup>10</sup> where it held that article 26 had been violated and that it would be incompatible with the Covenant to require the authors to obtain Czech citizenship as a prerequisite for the restitution of their property or, alternatively, for the payment of appropriate compensation. Bearing in mind that the authors' original entitlement to their properties had not been predicated on citizenship, it found in those cases that the citizenship requirement was unreasonable. In the case *Des Fours Walderode*,<sup>11</sup> the Committee observed that a requirement in the law for citizenship as a necessary condition for restitution of property previously confiscated by the authorities makes an arbitrary, and consequently a discriminatory, distinction between individuals who are equally victims of prior State confiscations, and constitutes a violation of article 26 of the Covenant. The Committee considers that the principle established in the above cases equally applies to the author of the present communication, and therefore concludes that the application to the author of the citizenship requirement under Law No. 87/1991 violates her rights under article 26 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 26 of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation if her property cannot be returned. The Committee reiterates that the State party should

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<sup>8</sup> See communication No. 1574/2007, *Slezak v. Czech Republic*, Views adopted on 20 July 2009, para. 6.3.

<sup>9</sup> See communication No. 182/1984, *Zwaan-de Vries v. The Netherlands*, Views adopted on 9 April 1987, para. 13.

<sup>10</sup> Communications No. 516/1992, *Simunek v. Czech Republic*, Views adopted on 19 July 1995, para. 11.6; No. 586/1994, *Adam v. Czech Republic*, Views adopted on 23 July 1996, para. 12.6; No. 857/1999, *Blazek v. Czech Republic*, Views adopted on 12 July 2001, para. 5.8; No. 945/2000, *Marik v. Czech Republic*, Views adopted on 26 July 2005, para. 6.4; No. 1054/2002, *Kriz v. Czech Republic*, Views adopted on 1 November 2005, para. 7.3; No. 1463/2006, *Gratzinger v. Czech Republic*, Views adopted on 25 October 2007, para. 7.5; and No. 1533/2006, *Ondracka and Ondracka v. Czech Republic*, Views adopted on 31 October 2007, para. 7.3.

<sup>11</sup> Communication No. 747/1997, *Des Fours Walderode v. Czech Republic*, Views adopted on 30 October 2001, paras. 8.3–8.4.

review its legislation to ensure that all persons enjoy both equality before the law and equal protection of the law.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not, and that, pursuant to article 2 of the Covenant, the State party 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 and enforceable remedy in case that a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views and to have them translated in the official language of the State party and widely distributed.

[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 to the General Assembly.]

**D. Communication No. 1637/2008, *Canessa v. Uruguay*  
 Communication No. 1757/2008, *Barindelli Bassini et al. v. Uruguay*  
 Communication No. 1765/2008, *Torres Rodríguez v. Uruguay*  
 (Views adopted on 24 October 2011, 103rd session)\***

<i>Submitted by:</i>	Néstor Julio Canessa Albareda, Mary Mabel Barindelli Bassini, Graciela Besio Abal, María del Jesús Curbelo Romano, Celia Dinorah Cosío Silva, Jorge Angel Collazo Uboldi and Elio Hugo Torres Rodríguez (not represented by counsel)
<i>Alleged victim:</i>	The authors
<i>State party:</i>	Uruguay
<i>Date of communications:</i>	5 July 2007, 15 January 2008 and 18 February 2008 (initial submissions)
<i>Subject matter:</i>	Discrimination against civil servants on grounds of age
<i>Procedural issue:</i>	Non-exhaustion of domestic remedies, insufficient substantiation of claims
<i>Substantive issues:</i>	-
<i>Articles of the Covenant:</i>	2; 5; 25, paragraph 2 (c); and 26
<i>Articles of the Optional Protocol:</i>	2 and 5, paragraph 2

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

*Meeting* on 24 October 2011,

*Having concluded* its consideration of communications Nos. 1637/2007, 1757/2008 and 1765/2008, submitted to the Human Rights Committee by Mr. Canessa et al. 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 authors of the communications and the State party,

*Adopts* the following:

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

1. The author of the first communication, dated 5 July 2007, is Néstor Julio Canessa Albareda, a Uruguayan citizen born in 1944. The authors of the second communication, dated 15 January 2008, are Mary Mabel Barindelli Bassini, Graciela Besio Abal, María del

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\* The following members of the Committee participated in the consideration of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Rajsoomer Lallah, 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. Krister Thelin and Ms. Margo Waterval.

Jesús Curbelo Romano, Celia Dinorah Cosio Silva and Jorge Angel Collazo Uboldi, Uruguayan citizens born in 1942, 1939, 1942, 1942 and 1946 respectively. The author of the third communication, dated 18 February 2008, is Elio Hugo Torres Rodríguez, a Uruguayan citizen born in 1940. All the aforementioned individuals are former diplomats who claim to be victims of violations by Uruguay of the rights recognized in articles 2, 5 and 26 of the International Covenant on Civil and Political Rights. The author of the third communication also claims a violation of article 25 (c) of the Covenant. The Optional Protocol entered into force for the State party on 23 March 1976. The authors are not represented by counsel.

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

2.1 The authors began working as civil servants in the Ministry of Foreign Affairs of Uruguay between 1973 and 1980 and were taken off their posts as secretaries in the Foreign Service upon reaching 60 years of age, pursuant to decisions adopted by the executive branch between 2001 and 2006. The decisions were based on article 246 of Act No. 16.170 of 28 December 1990, which replaced article 20 of Act No. 14.206 of 6 June 1974, on the Statute of the Foreign Service of the Ministry of Foreign Affairs, with the following: “Article 20: The following maximum age limits are established for the exercise of duties within the Ministry of Foreign Affairs: ambassador, minister, minister-counsellor, counsellor and category A technical professional, 70 years. First secretary, second secretary and third secretary, 60 years.”<sup>1</sup>

#### *Exhaustion of domestic remedies*

2.2 On 17 September 2005, the author of the first communication submitted an application for constitutional review of article 246 of Act No. 16.170, claiming that the article violated the principle of equality and the right to work. In a decision dated 12 October 2006, the Supreme Court rejected the application without examining the constitutionality of the contested article. The Supreme Court found that, once the Act had been applied, it could not be subject to an application for constitutional review, since the purpose of the latter is to have a particular article declared inapplicable in a specific case, not to have it completely annulled. In a concurring opinion, two Supreme Court judges took the view that the application was admissible, but that there had been no violation of the principle of equality because there had been no unequal treatment of individuals in the same position, namely first secretaries.<sup>2</sup>

2.3 The author of the first communication points out that an action for annulment was not an option in the case at hand as it applies only to administrative acts that represent a misuse, abuse or excessive use of power or are contrary to a rule of law, in accordance with article 23 of the Organization Act on the Administrative Court. In the present case, the decision to declare vacant the post of first secretary occupied by the author was based on a legislative provision and did not meet any of the aforementioned conditions. Such an action

<sup>1</sup> The previous version of article 20 of Act No. 14.206 established the following maximum age limits for the exercise of duties within the Ministry of Foreign Affairs:

- (a) Ambassador, minister, class “AaA” technical professional: 70 years;
- (b) Minister-counsellor: 65 years;
- (c) Counsellor: 60 years;
- (d) First secretary: 55 years;
- (e) Second secretary: 50 years;
- (f) Third secretary: 45 years.

<sup>2</sup> The details cited in this paragraph are taken from the Supreme Court decision of 20 September 2006, appended to the author’s initial communication.

therefore had no chance of success. The author of the first communication concludes that the application for constitutional review he submitted was the only viable remedy and that, consequently, he has exhausted all available domestic remedies.

2.4 The authors of the second communication also submitted an application for constitutional review of article 246 of Act No. 16.170, claiming that the article violated the principle of equality and the right to work. The Supreme Court rejected the application in a decision dated 8 June 2007. Citing its previous decision of 20 September 2006, the Court found that, as that decision matched the case at hand perfectly, the reasoning behind it should be considered to be applicable to the present decision.

2.5 On 26 April 2007, the author of the third communication submitted an application for constitutional review of article 246 of Act No. 16.170, claiming that the article violated the principle of equality and the right to work. The Supreme Court rejected this application on 14 December 2007. The Court found that the principle of equality was not undermined when, within the law, persons in different positions received different treatment. The Court was of the view that in the present case “there [was] no indication that the legal presumption [had] been established in an arbitrary or discriminatory manner”.<sup>3</sup>

*Efforts to secure the repeal of the contested article by the legislature*

2.6 The authors point out that since 1998 they have made various unsuccessful attempts to secure the repeal of article 246 by the legislature. They add that in November 1998 the International Affairs Committee of the Chamber of Representatives unanimously adopted a bill to that effect,<sup>4</sup> but it was opposed by the then Minister for Foreign Affairs, supposedly for political reasons.

**The complaint**

3.1 The authors maintain that the aforementioned article 246 of Act No. 16.170, which led to the loss of their right to occupy their posts as secretaries when they reached 60 years of age, violates article 26 and article 2, paragraphs 1 and 2, of the Covenant. The authors assert that the provision establishes unequal treatment for equal individuals, namely the civil servants of the Foreign Service. According to the authors, the difference between the treatment of secretaries and that of higher-level civil servants of the Foreign Service (counsellors, ministers and ambassadors) with regard to cessation of duties is neither reasonable nor objective, given that age is the only criterion used to exclude individuals from a professional career in which intellectual capacity and experience should be paramount. The authors point out that civil servants who have not reached the level of counsellor before reaching the age of 60 are forced to leave their post and carry out administrative tasks, losing all their legally acquired rights and privileges, including diplomatic status. By contrast, civil servants who reach the rank of counsellor before the age of 60 can remain in that position until the age of 70. The authors cite the Committee’s Views in the case of *Love et al. v. Australia* (communication No. 983/2001), in which the Committee found that a distinction related to age which is not based on reasonable and objective criteria may amount to discrimination on the ground of “other status” under article 26 of the Covenant. They also cite the Committee’s general comments Nos. 18, 25 and 26, along with relevant decisions of the Constitutional Court of Colombia.

3.2 The authors claim a violation of article 5, paragraph 2, of the Covenant, with reference to article 7 of the International Covenant on Economic, Social and Cultural

<sup>3</sup> The quotation in this paragraph is taken from the Supreme Court decision of 14 December 2004.

<sup>4</sup> The authors attach a copy of the bill in their communication of 10 October 2008, referred to in paragraph 5.1 below.

Rights (on the right to enjoy just conditions of work), articles 23 and 24 of the American Convention on Human Rights (on access to the public service under equal conditions, and on equality before the law), article 7 of the Additional Protocol to the American Convention on Human Rights (on the right to work), the 1958 International Labour Organization (ILO) Convention concerning Discrimination in Respect of Employment and Occupation (No. 111), and the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.

3.3 The author of the third communication also claims a violation of article 25 (c) of the Covenant, without providing any argument to justify that claim.

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

4.1 On 2 September 2008, the State party informed the Committee that its relationship with Uruguayan civil servants is of a statutory, not contractual, nature. Consequently, an appointment is not an employment contract but rather the placement of the appointee in a position provided for in a statute establishing his or her rights and obligations. The right to occupy a post means that civil servants who continue to meet the requirements for the post cannot be transferred except under the conditions established in the statute – in this case, the Statute of the Foreign Service. The State party emphasizes that the right to occupy a post should not be confused with the right to hold it permanently. The civil servant is there to fill the post; the post does not exist for the benefit of the civil servant. Thus, diplomatic status is a prerogative of the post, not of the individual.

4.2 The State party asserts that the contested provision — article 246 of Act No. 16.170 — is not discriminatory, since it meets the requirements of reasonableness and objectivity, as confirmed by the Supreme Court. The provision stipulates that all civil servants who, having reached the age of 60, have not advanced to the position of counsellor shall leave category M (diplomatic staff) to join category R (specialized non-diplomatic staff), while civil servants who have advanced to the position of counsellor shall remain in category M. The State party asserts that this provision affects equally all civil servants in the same situation as the authors – that is, those who have reached 60 years of age and hold a position below that of counsellor. Therefore, there is no discrimination among individuals with the same statutory position. The State party points out that it has the authority to rationalize the civil service, including to regulate the criteria for entry, promotion, competitive examinations and retirement from service, with a margin of discretion that does not infringe human rights. The State party adds that those civil servants who, like the authors, have not reached the position of counsellor before reaching 60 years of age still remain civil servants of the Ministry of Foreign Affairs, even though they are assigned to different, though equally dignified, duties in category R. Furthermore, the authors' retirement and social security entitlements are not affected.

#### **Authors' comments on the State party's submission**

5.1 On 10 October 2008, the authors maintained that the State party's claim that civil servants in the same class as themselves — secretaries who have reached 60 years of age and have not advanced to the position of counsellor — are treated equally is misleading, because the very existence of this group is the result of the application of a discriminatory provision. The Statute of the Foreign Service of Uruguay treats staff in category M as a single group and does not distinguish between them by class or grade. Article 246 of Act No. 16.170, on the other hand, gives preference to four classes within category M (counsellor, minister-counsellor, minister and ambassador), who can continue in their diplomatic duties until the age of 70, while secretaries are relieved of these duties at the age of 60. The authors cite article 250 of the Constitution as an example of a provision that is in



line with the contested right. That article establishes that all members of the judicial branch, without any discrimination, shall leave their posts when they reach 70 years of age. The authors add that the State party has not justified the distinction made in article 246. They claim that this is an arbitrary and discriminatory distinction that has the sole purpose of creating vacancies to enable newly recruited civil servants to be appointed for reasons of “aesthetic appeal”. The authors cite a communication dated 20 May 1998 from the Ministry of Foreign Affairs to the International Affairs Committee of the Chamber of Representatives in response to that Committee’s proposal to repeal article 246. The communication states that “in the exercise of diplomatic functions, the existence of civil servants at the rank of secretary who are much older than their counterparts from other countries could have a negative effect on the country’s image abroad”.<sup>5</sup>

5.2 The authors assert that article 60 of the Constitution of Uruguay provides for an administrative career for civil servants covered by the budget, who are declared to have permanent status. The authors consider that their career opportunities have been curtailed, given that they have no chance of promotion between the ages of 60 and 70, the age at which they retire.

5.3 The authors point out that they were not simply reassigned to different duties, but were taken off their posts and reassigned to another at a lower level. The authors add that the State party cannot expect them to be happy to be able to stay on as civil servants when they have been divested of their diplomatic status, are unable to take a post abroad, receive substantially lower remuneration and are unable to progress in their career.<sup>6</sup> The authors stress that their posts were not eliminated, but left vacant while the authors were reassigned to category R posts.

5.4 The authors conclude that, when adopting a law, the State party must ensure that it complies with the requirement set out in article 26 of the Covenant, namely that the law must not be discriminatory. They add that the Supreme Court made no comment on the articles of the Covenant they invoked in their applications for constitutional review.

#### **Additional observations by the parties**

6. On 6 February 2009, the State party reiterated the arguments raised in its note of 2 September 2008 regarding the nature of the position of civil servant and the absence of discrimination in the contested provision, given that it provides for equal treatment for civil servants in the same class. The State party points out that the old article 20 of Act No. 14.206, prior to its amendment by the contested provision, already included different age limits for different classes of civil servant. The State party also refers to the Supreme Court decisions on the applications for constitutional review submitted by the authors. According to the Court: “The *ratio legis* of the contested provision seems to be, inter alia, to avoid reduced effectiveness in the performance of the duties of first secretary in the Ministry of Foreign Affairs owing to the loss of reflexes, memory, etc. commonly found in persons over 60 years of age. The intention is to have the aforementioned duties carried out by persons who, in the view of the lawmakers, are likely to carry them out more effectively thanks to their age. While this purpose ... might be open to question, it does not seem irrational.”<sup>7</sup> The State party adds that the author of the first communication had the chance, between being notified of his removal from category M and being reassigned to category R,

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<sup>5</sup> The communication is appended to the authors’ comments of 10 October 2008.

<sup>6</sup> The authors append to the communication a copy of the salaries they received as category M civil servants and those they received after reassignment to category R.

<sup>7</sup> Quoted from Supreme Court decisions Nos. 42/93, 206/2002/312/2004 and 192/2005.

to take the examination for the post of counsellor but did not receive a high enough mark to qualify for promotion.

7.1 On 9 March 2009, the authors responded to the State party's observations, pointing out that the latter did not provide any new evidence, but rather reiterated the same arguments, which did not prove there had been no violation of article 26 of the Covenant and the other articles invoked. The authors maintain that the fact that the old article 20 of Act No. 14.206 established different age limits for different classes of civil servant in the diplomatic service does not justify drafting a new provision that is equally discriminatory. The authors reiterate their arguments that the contested provision constitutes discrimination against secretaries of the Foreign Service who have reached 60 years of age, given that, though they are allowed to remain in the civil service, they are reassigned to an administrative post of a lower level and pay outside the Foreign Service, and have no opportunity for advancement.

7.2 On 11 January 2011, the authors informed the Committee about the enactment of the National Budget Act (No. 18.719) of 27 December 2010. Article 333 of this Act replaces article 20 of Act No. 14.206, as amended by article 246 of Act No. 16.170, with the following: "Article 20. The maximum age limit for the exercise of duties in category M in the Foreign Service is hereby set at 70 years. Those civil servants who, on the date of entry into force of the present Act, hold category R positions within the Ministry of Foreign Affairs in application of the age limit established under the provision previously in force (article 246 of Act No. 16.170) shall be automatically reappointed to the category M posts they previously occupied, for all purposes. The difference in pay shall be settled in the form of personal compensation."

7.3 The authors point out that, in enacting this new law and setting the maximum age limit at 70 years for all civil servants of the Foreign Service, the State party acknowledges that discrimination had existed. However, the authors maintain that they were not able to obtain just compensation for the years during which they were cut off from their diplomatic careers and deprived of the associated rights. Furthermore, some of the authors had already reached the age of 70 by the time the above-cited article 333 entered into force. They had therefore retired after having been arbitrarily separated from the diplomatic service for 10 years, yet the aforementioned article does not provide for any compensation for them. Consequently, the authors ask the Committee to rule that there was a violation of the Covenant and to request the State party to provide just compensation for the injury and loss suffered by those reappointed to category M posts and, especially, appropriate reparation for the injury and loss caused to those who retired from category R at the age of 70 under the former legislation.

## **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 The Committee takes note of the reference to article 25 (c) by the author of the third communication. However, it notes that the author has not provided any evidence of a violation of that article. Consequently, the Committee declares this part of the communication inadmissible under article 2 of the Optional Protocol.

8.4 With regard to the authors' complaint under article 5, paragraph 2, the Committee notes that the authors have not demonstrated that there was any restriction upon or derogation from the human rights recognized in the State party on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent. Consequently, the Committee considers that the authors have not sufficiently substantiated this complaint for the purposes of admissibility and declares it inadmissible under article 2 of the Optional Protocol.

8.5 With regard to the authors' complaint under articles 26 and 2, the Committee considers it as sufficiently substantiated for the purposes of admissibility. It thus declares the communication admissible with respect to this complaint.

*Consideration of the merits*

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

9.2 The Committee must determine whether the authors were victims of discrimination in violation of article 26. The Committee recalls its long-standing jurisprudence that not every differentiation of treatment necessarily constitutes discrimination within the meaning of article 26 if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.<sup>8</sup> The Committee takes the view that age may constitute one of the grounds for discrimination prohibited under article 26, provided that it is the ground for establishing differentiated treatment that is not based on reasonable and objective criteria.<sup>9</sup>

9.3 In the case at hand, the Committee observes that the State party has not explained the purpose of the distinction established by article 246 of Act No. 16.170 between secretaries and other category M civil servants of the Foreign Service which led to the authors' cessation of duties, nor has it put forward reasonable and objective criteria for such a distinction. The Supreme Court of Uruguay mentions, as a possible *ratio legis* of the contested provision, the loss of reflexes and memory that might have an adverse effect on the effectiveness of staff performing the duties of first secretary, a reasoning which the Court does not find irrational.

9.4 The Committee takes the view that, while the imposition of a compulsory retirement age for a particular occupation does not per se constitute discrimination on the ground of age,<sup>10</sup> in the case at hand that age differs for secretaries and for other category M civil servants, a distinction which has not been justified by the State party. The latter has based its reasoning on the argument of the Supreme Court to the effect that the difference of treatment "does not appear irrational" and on the defence of a degree of discretion to which it would be entitled in exercising its right to rationalize the Public Administration. The Committee notes, however, that the State party has not explained how a civil servant's age can affect the performance of a secretary so specifically and differently from the

<sup>8</sup> See communications Nos. 1565/2007, *Gonçalves et al. v. Portugal*, Views adopted on 18 March 2010, para. 7.4; 983/2001, *Love et al. v. Australia*, Views adopted on 25 March 2003, para. 8.2; 182/1986, *F.H. Zwaan-de Vries v. The Netherlands*, Views adopted on 9 April 1987, para. 13; 180/1984, *L.G. Danning v. The Netherlands*, Views adopted on 9 April 1987, paras. 13 and 14; and *S.W.M. Broeks v. The Netherlands* communication No. 172/1984, Views adopted on 9 April 1987, para. 13.

<sup>9</sup> See in this respect communications Nos. 983/2001 (footnote 8 above), para. 8.2; and 1016/2001, *Hinostroza Solís v. Peru*, Views adopted on 27 March 2006, para. 6.3.

<sup>10</sup> See in this respect communication No. 983/2001 (footnote 8 above), para. 8.2.

performance of a counsellor, minister or ambassador as to justify the difference of 10 years between compulsory retirement ages. In light of the above, the Committee concludes that the facts before it reveal the existence of discrimination based on the authors' age, in violation of article 26 of the Covenant, read in conjunction with article 2.

10. 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 26, read in conjunction with article 2, of the Covenant.

11. The Committee takes note of the information provided by the authors to the effect that article 246 of Act No. 16.170 has been amended by article 333 of Act No. 18.719 of 27 December 2010, which has set the maximum age limit for all category M posts in the Foreign Service at 70 years and has provided for compensation for loss of earnings for the civil servants adversely affected by the now repealed article 246. The Committee further notes the authors' allegations that they were not able to obtain fair compensation for the years during which they were deprived of their posts and the rights associated thereto. Consequently, the Committee takes the view that the State party must recognize that reparation is due to the authors, including appropriate compensation for the losses suffered.

12. 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 or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views.

[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 to the General Assembly.]

**E. Communication No. 1641/2007, *Calderón Bruges v. Colombia*  
(Views adopted on 23 March 2012, 104th session)\***

<i>Submitted by:</i>	Jaime Calderón Bruges (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Colombia
<i>Date of communication:</i>	22 May 2007 (initial submission)
<i>Subject matter:</i>	Conviction of a person on appeal in cassation
<i>Procedural issue:</i>	Substantiation of claim
<i>Substantive issues:</i>	Right to a fair and public hearing by a competent, independent and impartial tribunal; right to be presumed innocent; right to have a conviction and sentence reviewed by a higher tribunal according to law; inviolability of the principle of <i>res judicata</i> ; right to equal protection of the law without discrimination
<i>Articles of the Covenant:</i>	14, paragraphs 1, 2, 5 and 7; 15; 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 23 March 2012,*

*Having concluded its consideration of communication No. 1641/2007, submitted to the Human Rights Committee by Mr. Jaime Calderón Bruges, 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. The author of the communication is Jaime Calderón Bruges, a Colombian national born on 17 March 1941. He claims to be the victim of a violation by Colombia of article 14, paragraphs 1, 2, 5 and 7; article 15; and article 26, read in conjunction with article 2, paragraphs 1 and 3, and article 14, paragraph 1, of the Covenant. The author is not

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\* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Sir Nigel Rodley, Mr. Fabián 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.

represented by counsel. The Covenant and its Optional Protocol entered into force for Colombia on 23 March 1976.

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

2.1 In November 1998, the Prosecutor-General's Office (*Fiscalía General de la Nación*) began to investigate the author for his alleged relationship with Miguel Angel Rodríguez Orejuela, a known drug trafficker. He was accused of having borrowed money from Orejuela that the latter had obtained from illegal activities, which would constitute the offence of illegal enrichment. On 7 December 1998, he was placed in pretrial detention and, as a result, he was suspended from his post as National Civil Registrar.

2.2 In a judgement of 18 January 2000, the Bogotá Third Special Circuit Criminal Court found the author not guilty due to a lack of conclusive evidence. The Public Legal Service (*Ministerio Público*) filed an appeal with the Bogotá Judicial District High Court, which, on 15 June 2000, upheld the verdict of the court of first instance, as it had not been proved that the author either knew Mr. Rodríguez Orejuela or was aware of the illegal origin of the funds, which had been borrowed through a third person. In addition, the High Court directed that the order of 30 March 2000 for the provisional release of the author be made definitive and unconditional.

2.3 On 24 August 2000, the prosecution service filed an appeal in cassation with the Supreme Court, citing alleged errors in the evaluation of the evidence by the Bogotá High Court. On 21 July 2004, the Supreme Court found that the Bogotá High Court had erred and quashed its judgement. It sentenced the author to 5 years' imprisonment and a fine and disqualified him from the exercise of public rights and duties for an equal period of time. He was thereupon sent to prison and suspended from the post of notary that he had occupied since his acquittal.

2.4 The author submitted an application for *tutela* (legal protection) to the Disciplinary Chamber of the Cundinamarca Council of the Judiciary against the cassation ruling, alleging, inter alia, violations of his right to life, liberty, equality and due process. He said that the cassation appeal was filed while articles 1 and 6 of Act No. 553/2000, which allowed such appeals against executory (final) judgements issued in the second instance by high courts, were in force. Although those provisions were declared unenforceable (unconstitutional) in that regard by the Constitutional Court in its decision No. C-252 of 28 February 2001, the earlier legislation, which was unfavourable to the author, was applied. The Supreme Court found that it was competent to hear the appeal, given that it had been submitted within the time limits specified under the law then in force<sup>1</sup> and that the declaration of unconstitutionality in 2001 was applicable with prospective effect. In its decision of 18 November 2004, the Council of the Judiciary rejected the application for *tutela*, ruling that *tutela* was not applicable to judicial interpretations and that the Supreme Court had not acted arbitrarily as the proceedings before it had been initiated in accordance with the regulations in force at the time.

2.5 The author challenged this decision, which led to a review by the Jurisdictional Disciplinary Chamber of the High Council of the Judiciary. On 2 February 2005, the High Council ruled in favour of the application for *tutela* and overturned the ruling of the Cundinamarca Council of the Judiciary. It found that, in view of decision No. C-252 of the Constitutional Court, the Supreme Court should not have admitted the cassation appeal against the judgement of the Bogotá High Court, since it was an executory judgement. It

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<sup>1</sup> Article 6 of Act No. 553/2000 states that an appeal in cassation must be submitted in writing within 30 days of the issuance of the executory judgement of the court of second instance and that if no appeal is submitted, the original case file is to be sent to the sentence enforcement judge.

therefore concluded that the Supreme Court had disregarded the most-favourable-law principle applicable to criminal cases and had thereby violated the author's right to due process and to liberty. As a result, the High Council ruled that the decision of the Supreme Court was null and void, upheld the ruling of the Bogotá High Court and ordered the immediate release of the author.

2.6 The Constitutional Court subsequently reviewed the judgement of the High Council of the Judiciary and, on 20 June 2005, issued a new ruling on the application for *tutela*. The Constitutional Court found that the Supreme Court's decision to hear the cassation appeal filed in August 2000 did not contravene decision No. C-252 of 2001 and was in compliance with the provisions of the Code of Criminal Procedure in force at the time, that is, prior to the Constitutional Court's declaratory judgement on partial unenforceability. The Constitutional Court's judgement stipulates that there is not necessarily "a single, exclusive and unavoidable interpretation leading to the conclusion that the Supreme Court ... should not have issued any judgement whatsoever on cassation appeals filed against executory judgements that acquitted the accused, as the petitioner claims, since that body took the action that it did on the understanding that, if such appeals were filed before decision No. C-252 of 2001 [was issued], ... it was required to rule on them, without distinction". The Constitutional Court therefore overturned the High Council's ruling and upheld the judgement of the Cundinamarca Council of the Judiciary.

2.7 The author submitted an application for annulment of this ruling, which was rejected by the Constitutional Court in a plenary session on 26 September 2005. When the decision of the High Council of the Judiciary was reversed, the author was once again deprived of his liberty.

### **The complaint**

3.1 The author maintains that, pursuant to decision No. C-252 of the Constitutional Court, the Supreme Court was not competent to hear the cassation appeal and that its verdict therefore was in violation of his rights under article 14 of the Covenant.

3.2 More specifically, the author claims to be a victim of a violation of article 14, paragraph 2, of the Covenant. He says that he was tried twice in ordinary courts in which evidence, pleadings and appeals could be submitted and contested and in which challenges could be lodged. He was acquitted in both trials, and the judgements were duly executory. At no time did evidence subsequently emerge to disprove his innocence as established by those judgements. Nevertheless, the Supreme Court undertook cassation proceedings in which he had no opportunity to produce or contest evidence or to appeal, much less challenge the Court's decisions. He alleges that this was not a genuine trial in terms of the due process required under the Covenant.

3.3 The author maintains that his trial came to an end with his definitive acquittal in the court of second instance. The cassation proceedings therefore did not represent an ordinary or extraordinary remedy but rather a separate action that led to a new trial, concerning the same acts, in which there was no opportunity to challenge the conviction. This situation contravenes article 14, paragraphs 1 and 5, which provides for the right of any convicted person to challenge any penalty or conviction.

3.4 The Colombian judiciary violated the principles of *res judicata* and *non bis in idem* as set forth in article 14, paragraph 7, of the Covenant, by not upholding the definitive acquittal handed down by the court of second instance and by trying the author again for the same offences – offences of which he had been acquitted by two courts in proceedings that were in full accordance with process and that gave him the opportunity to refute and contest the charges against him.

3.5 The author alleges that the Supreme Court disregarded his right to benefit from the most-favourable-law principle and therefore violated article 15 of the Covenant. The Court applied a procedural rule that had previously been rescinded because it violated fundamental rights. The cassation appeal was filed on the basis of Act No. 553/2000, which made it possible to do so within 30 days of the issuance of an executory judgement by the court of second instance. Under the previous law, which had been repealed by Act No. 553, appeals had to be filed before the court of second instance handed down its final verdict. Decision No. C-252 of the Constitutional Court reinstated the law that had preceded Act No. 553, and that law should have been applied both because it was in force when the cassation appeal was decided and in order to comply with the most-favourable-law principle.

3.6 According to the author, the Supreme Court treated identical sets of circumstances differently without justification. On the one hand, an individual who was acquitted by an executory judgement and whose case was submitted for cassation before the Constitutional Court had issued its decision in 2001 was obliged to forgo his or her fundamental rights. On the other hand, a person acquitted by an executory judgement issued after the Constitutional Court had handed down its decision in 2001 could not have his or her acquittal overturned. This constitutes a violation of article 26, read in conjunction with article 2, paragraphs 1 and 3, and article 14, paragraph 1, of the Covenant.

#### **State party's observations on admissibility**

4.1 In a note verbale dated 6 February 2008, the State party maintains that the communication should be declared inadmissible because the Committee is not competent to evaluate the facts and evidence, whereas the author is proposing that the Committee act as an appellate court or court of fourth instance and evaluate facts and situations or interpretations of domestic law which have already been evaluated by the country's legal system, notably by the Constitutional Court. The State party recalls that the opinions of the Committee are not supposed to take the place of the decisions of domestic courts regarding the evaluation of the facts and evidence in a given case. Rather, the Committee's task is to ensure that States provide their citizens with a justice system that is in compliance with the provisions for due process enshrined in the Covenant.

4.2 On 26 June 2008, the State party submitted its observations on the merits. It affirms that the cassation procedure is a special oversight mechanism that allows for a judicial review of judgements that mark the end of proceedings in courts of first and second instance. It verifies the legality of a judge's decisions and offers an opportunity to consider if any errors were made *in judicando* (regarding the merits) or *in procedendo* (relating to procedure). This legal remedy does not provide for a reconsideration of the matters settled by a judgement, but rather for an assessment of whether or not the verdict that concluded the proceedings was handed down in violation of the law. In the case in question, the court made an error *in judicando* because it failed to weigh the evidence properly.

4.3 Under Act No. 553/2000, cassation appeals were admissible against executory judgements, which is why the prosecution service filed such an appeal on 24 August 2000 against the judgement of the Bogotá High Court of 15 June 2000. At the same time, a public action was filed with the Constitutional Court to review the constitutionality of various articles of Act No. 553, including the article admitting cassation appeals against executory judgements. In its decision No. C-252, the Court found that such appeals breached due process.

4.4 Under article 235 of the Constitution, the Supreme Court may act as a court of cassation. The cassation procedure is a special oversight mechanism that allows for a judicial review of judgements that mark the end of proceedings in courts of first and second instance. Under both Act No. 553 and the law that it replaced, cassation appeals were



considered admissible, inter alia, when a judgement infringed a rule of substantive law, which could be the result of an error in the assessment of evidence, as in the case in question. This legal remedy does not allow for a re-examination of the matters considered in the courts of first and second instance, but instead allows for an assessment of whether the verdict that concluded the proceedings was or was not handed down in violation of the law. The cassation procedure is thus not separate from the proceedings in the courts of first and second instance.

4.5 There is no reason why the declaration of unenforceability of certain legal provisions, under which a cassation appeal was admissible at the time, should have affected the processing of that appeal or prevented the Supreme Court from handing down a decision, given that, as is implied in the Constitutional Court's judgement, the decision that the law in question was unconstitutional was applicable prospectively. The State party points out that, as stated by the Committee, the interpretation of domestic law is primarily a matter for the courts and authorities of the State party concerned.

4.6 Leaving aside the fact that the author wants the Committee to act as a court of fourth instance, he has failed to demonstrate either a lack of impartiality on the part of judges of the Criminal Division of the Supreme Court or any procedural irregularities; nor has he given any substantive reasons for believing his conviction to be unfair. There is thus no evidence of a violation of article 14, paragraph 1, of the Covenant.

4.7 With regard to the author's complaint that his right to be presumed innocent was not respected, the State party points out that the presumption of innocence is confined to ordinary criminal proceedings, and does not extend to cassation hearings. In such hearings, the accused is not tried again, but rather the legality of the verdict is examined. Moreover, the author was notified that a cassation appeal had been lodged and he had the opportunity to submit pleadings, which were then duly considered by the Supreme Court. The author was presumed innocent until the submission of the cassation appeal and has failed to establish how the justice system or the actions of judicial officials led to his being treated as guilty before he was convicted.

4.8 With regard to the alleged violation of article 14, paragraph 7, of the Covenant, the State party notes that, while the law in force when the cassation appeal was filed allowed cassation appeals against executory judgements, the word "executory" did not indicate that such judgements could not be challenged or overturned. A cassation appeal against this judgement, even though it was executory, was admissible under Act No. 553/2000, which allowed a petition to be filed against a verdict within 30 days of the issuance of an executory judgement by the court of second instance. Given that the law established that cassation appeals against executory judgements were admissible, such judgements were not immutable. Indeed, in Colombia the executory effect of a decision can be lifted as a result of other actions, such as petitions for review or *tutela*, which, in the same way as cassation appeals at the time, are intended to avert unfair trials or executory judgements that run counter to the Constitution or the law. The cassation process was therefore clearly an oversight mechanism designed to ensure legality and could be legally applied to the verdict delivered by the criminal court of second instance. There was therefore no violation of article 14, paragraph 7, of the Covenant.

4.9 With regard to the alleged violation of article 15 of the Covenant, the State party argues that the author was convicted for having committed acts that, at the time of the events, constituted an offence. The author was not given a heavier penalty, despite the fact that a new law (Act No. 599/2000) which imposed a heavier penalty had come into effect by the time the cassation judgement was handed down. The law applied was the one in force at the time of the events, as it was more lenient in terms of sentencing. The State party has therefore complied with the provisions of article 15 of the Covenant.

4.10 With regard to the alleged violation of article 26 of the Covenant, the State party denies that the author has been subjected to discriminatory treatment. It consistently applied the law in force at the time, which provided for cassation appeals against executory judgements. Once decision No. C-252 had been issued, the State party was also consistent in not applying the special remedy of cassation to executory judgements. Therefore, there has been no violation of article 26 of the Covenant.

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

5.1 On 4 September 2008, the author submitted comments on the State party's observations.

5.2 The author reiterates the arguments he put forward at the outset. He contends that his analysis of the judicial decisions and procedures in question is intended to demonstrate how the relevant articles of the Covenant were violated and that he is in no way seeking to invoke another, or higher, court than the national courts.

5.3 According to the author, the State party's argument that the writ of execution of a final judgement may be set aside in cassation is illogical. Neither the Covenant, nor domestic legislation, nor international or domestic jurisprudence characterize the remedy of cassation as having this operative feature. There are only two actions that can overturn an executory judgement: judicial review and *tutela* or *amparo*. These actions are aimed at establishing the material truth in the administration of justice and upholding the fundamental rights of the individual.

5.4 With regard to article 14, paragraph 2, the author maintains that his presumed innocence was converted into a proven fact by virtue of an ordinary trial that culminated in his acquittal by executory judgement.

5.5 With regard to article 14, paragraph 1, the author claims that the State party is confusing the cassation appeal with the appeal against the cassation ruling. The first was lodged on 24 August 2000, in accordance with Act No. 553/2000, which authorized the submission of cassation appeals against an executory judgement. The cassation ruling was issued on 21 July 2005, years after the Constitutional Court had eliminated cassation of executory judgements from the legal system on the grounds that it violated fundamental rights and, thus, the Covenant. He reiterates that when the Criminal Appellate Division of the Supreme Court ruled on the cassation appeal, it was not competent to do so, since it was applying unenforceable legal provisions and thereby violating an entire range of the fundamental rights provided for in the Covenant. Generally, the finding that a law is unconstitutional has prospective effect, unless the judgement specifies otherwise or the principle of the retroactive effect of the less severe criminal statute is applicable.

5.6 Concerning article 14, paragraph 7, the author restates his view that an executory judgement cannot be overturned in cassation and that procedural rules of a substantive nature are applicable immediately. The author cites an excerpt from decision No. C-252, which states: "Cassation is a special kind of judicial challenge used to give effect to material law, to restore the fundamental rights of participants in the proceedings and to redress grievances. It therefore becomes the most fitting and effective remedy for those purposes, provided that it is carried out made before the decision of the court of second instance becomes final, since this remedy is a means of confirming the decision's legal validity and this is only possible within the same criminal proceedings."

5.7 With regard to article 15, the author maintains that the State party's claims are improper and illogical, and he refers to the arguments submitted in his initial communication. With regard to article 26, he affirms that, irrespective of the outcome of the proceedings, equality lies in the application without discrimination of the most-favourable-law principle. In the case of a conviction upheld by a court of second instance, the cassation

proceedings should be carried out on the basis of that principle. For the same reasons, when a defendant is acquitted by that court, the court should refuse to hear it.

### **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, subparagraph 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 takes note of the State party's observation that the communication should be considered inadmissible because the Committee may not assess facts already examined and determined by the domestic courts. However, the Committee finds that the objectives of the author's complaints are not to have the Committee reassess the facts and evidence already examined by the domestic courts; they simply question the compatibility of certain procedural matters with the Covenant, as set out below.

6.4 With regard to the alleged violations of article 14, paragraphs 1 and 2, article 15 and article 2, paragraphs 1 and 3, the Committee notes that the author invokes these articles in a general way, without providing sufficient reasons to substantiate his claim that the alleged facts constitute specific violations of them. The Committee therefore considers that this part of the communication is inadmissible under article 2 of the Optional Protocol on the ground of insufficient substantiation. With regard to the complaint of a violation of article 26, to the effect that the principle of equality was not upheld during proceedings, the Committee finds no evidence in the information submitted by the author of discrimination in respect of the criteria set forth in that article. The Committee therefore considers that this complaint has not been substantiated for the purposes of admissibility and decides that it, too, is inadmissible under article 2 of the Optional Protocol.

6.5 The author claims to be a victim of a violation of article 14, paragraph 7, of the Covenant because he was, through the cassation proceedings, tried again for the same offences of which he had been acquitted in first and second instance. The Committee considers, in the light of the information contained in the case file, that the cassation appeal did not constitute a new trial, but rather a further stage in the proceedings against the author that began in 1998. That appeal was filed in 2000 in accordance with the requirements of the law in force at the time. Accordingly, the Committee considers that the author has failed to substantiate his claim sufficiently and declares it inadmissible under article 2 of the Optional Protocol.

6.6 With regard to the author's claim of a violation of article 14, paragraph 5, the Committee considers that it has been sufficiently substantiated, that the State party did not challenge the assertion that domestic remedies had been exhausted, and that the other requirements for admissibility have also been met. The Committee therefore considers this claim admissible and proceeds to consider it on its merits.

#### *Consideration of the merits*

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

7.2 The author contends that his conviction by the Supreme Court in a cassation judgement, after having been acquitted in the court of first instance and the appeals court, gave rise to a violation of article 14, paragraph 5, of the Covenant. The Committee notes that the author filed a number of applications for *tutela*, including with the Constitutional Court, in which he challenged the competence of the Supreme Court to institute cassation proceedings in his case. However, the Committee considers that, for the purpose of the application of article 14, paragraph 5, these proceedings were irrelevant, as their purpose was not the determination of criminal charges against the author.

7.3 The Committee recalls its jurisprudence to the effect that article 14, paragraph 5, guarantees the right to have a conviction reviewed.<sup>2</sup> In its general comment No. 32, the Committee has pointed out that: “article 14, paragraph 5, is violated not only if the decision by the court of first instance is final, but also where a conviction imposed by an appeal court or a court of final instance, following acquittal by a lower court, according to domestic law, cannot be reviewed by a higher court”.<sup>3</sup> The Committee notes that, in the case in question, the author was tried and acquitted by the Bogotá Third Special Circuit Criminal Court. This judgement was appealed by the Public Prosecutor before the Bogotá Judicial District High Court, which upheld the verdict of the court of first instance. Subsequently, the Prosecutor filed an appeal in cassation with the Supreme Court, citing alleged errors in the evaluation of the evidence by the High Court. The Supreme Court quashed the judgement of the High Court and sentenced the author to, inter alia, 5 years’ imprisonment. Since this conviction was not reviewed by a higher court, the Committee concludes that article 14, paragraph 5, of the Covenant has been violated.

8. 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 14, paragraph 5, of the Covenant.

9. In accordance with article 2, subparagraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, which includes the review of his conviction and adequate compensation. The State party is also under an obligation to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee’s Views. The State party is also requested to publish the present Views.

[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 to the General Assembly.]

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<sup>2</sup> Communication No. 1095/2002, *B.G.V. v. Spain*, Views of 22 July 2005, para. 7.1.

<sup>3</sup> See general comment No. 32: Article 14: right to equality before courts and tribunals and to a fair trial (CCPR/C/GC/32), para. 47.

**F. Communication No. 1750/2008, *Sudalenko v. Belarus*  
(Views adopted on 14 March 2012, 104th session)\***

<i>Submitted by:</i>	Leonid Sudalenko (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	17 March 2005 (initial submission)
<i>Subject matter:</i>	Seizure and partial destruction of electoral print materials in violation of the right to disseminate information without unreasonable restrictions
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Equality before the law; right to impart information; permissible restrictions; right to a fair hearing by a competent, independent and impartial tribunal
<i>Articles of the Covenant:</i>	14, paragraph 1; 19, paragraph 2
<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 14 March 2012,

*Having concluded* its consideration of communication No. 1750/2008, submitted to the Human Rights Committee by Mr. Leonid Sudalenko 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. The author of the communication is Mr. Leonid Sudalenko, a Belarusian national born in 1966. He claims to be a victim of violations by Belarus of article 14, paragraph 1; and article 19, paragraph 2, of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 30 December 1992.

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\* The following members of the Committee participated in the examination of the present communication: 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. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

### **Factual background**

2.1 The author has been a member of the United Civil Party since 2001 and, since 2002, the Chairperson of the Gomel City Section of the public association Civil Initiatives and a member of the Belarusian Association of Journalists. Since 2000, he has been working as a legal adviser in the public corporation Lokon based in Gomel.

2.2 On 9 August 2004, the District Electoral Commission of the Khoyniki electoral constituency No. 49 (the District Electoral Commission) registered an initiative group who had agreed to collect signatures of voters in support of the author's nomination as a candidate for the 2004 elections to the House of Representatives of the National Assembly (Parliament). On 16 September 2004, the District Electoral Commission refused to register the author as a candidate. Despite the refusal to register him as a candidate, the author continued his "propaganda and information work" among his supporters in order to inform them about the reasons for the non-registration of his candidacy and his opinion about the upcoming political events in the country.

2.3 On 8 October 2004, on his way to the town of Khoyniki, the author's private vehicle was stopped and searched by traffic police under the pretext that his car had been stolen and was under investigation. The author was taken to the Khoyniki District Department of Internal Affairs, at which point the following print materials were seized from him: (1) a leaflet entitled "Dear Compatriots!" (479 copies); (2) photocopy of an article from the newspaper *People's Will* (479 copies) and (3) a leaflet entitled "Five steps to a Better Life" (479 copies).

2.4 On 10 October 2004, the author, together with the head of his initiative group, Mr. N.I., was detained by police officers in the town of Khoyniki while he was distributing the print materials. This time the author was again taken to the Khoyniki District Department of Internal Affairs where another 310 copies each of the print materials listed in paragraph 2.3 above were seized from the author, together with 310 copies of the newspaper *Week*.

2.5 On an unspecified date, the author filed a complaint with the Prosecutor's Office of the Khoyniki District concerning his arbitrary detention and seizure of the print materials. On 15 October 2004, the author was informed by the Prosecutor of the Khoyniki District that the materials that were seized from him did not comply with article 26 of the Law on Press and Other Mass Media and that the author's actions fell within the scope of article 172-1, part 8 (illegal production and distribution of mass media outputs), of the 1984 Belarus Code on Administrative Offences.<sup>1</sup> He was further informed by the Prosecutor of the Khoyniki District that, on 13 October 2004, the Khoyniki District Department of Internal Affairs forwarded the conclusions of its investigation undertaken pursuant to article 234, part 1, clause 2-2, of the Code on Administrative Offences, to the Khoyniki District Council of Deputies of the Gomel region in order for the latter to draw up an administrative report in relation to the author and Mr. N.I.

2.6 On 9 November 2004, an Executive Officer of the Khoyniki District Executive Committee drew up an administrative report, stating that the author had committed an administrative offence under article 172-1, part 8, of the Code on Administrative Offences, by illegally disseminating print materials produced in violation of article 26 of the Law on Press and Other Mass Media. On an unspecified date, this report was transmitted to the Khoyniki District Court of the Gomel region.

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<sup>1</sup> The 1984 Belarus Code on Administrative Offences was replaced by the new Code on Administrative Offences as of 1 March 2007.

2.7 On 18 November 2004, a judge of the Khoyniki District Court of the Gomel region examined the administrative report of 9 November 2004 in relation to the author and found him guilty of having committed an administrative offence under article 172-1, part 8, of the Code on Administrative Offences. The author was ordered to pay 144,000 roubles (6 base amounts)<sup>2</sup> as fine. The court also ordered the confiscation and destruction of “one copy” of the seized print materials each. The court concluded that, by distributing photocopies of an article from the newspaper *People’s Will* issued on 28 September 2004 in the absence of a contractual agreement with the editorial board or the publisher, as well in the absence of other legal grounds, the author had engaged in illegal distribution of mass media outputs. This decision is final and executory.<sup>3</sup>

2.8 On unspecified dates, the ruling of the Khoyniki District Court of the Gomel region of 18 November 2004 was appealed by the author to the Gomel Regional Court and the Supreme Court under the supervisory review procedure. The author notes that he submitted to the higher courts a copy of the letter from the chief editor of *People’s Will* dated 3 December 2004, stating that the editorial board did not object to the copying of the articles published in the newspaper by the author. The author’s appeals, however, were dismissed by the Chair of the Gomel Regional Court on 10 February and by the Deputy Chair of the Supreme Court on 31 March 2005, respectively. Both courts found that the ruling of the Khoyniki District Court of the Gomel region of 18 November 2004 was lawful and well-founded.

### The complaint

3.1 The author claims that, contrary to the guarantees of article 14, paragraph 1, of the Covenant, his rights to equality before the courts and to a fair hearing by competent, independent and impartial court were violated. In particular, he submits that:

(a) Article 172-1, part 8, of the Code on Administrative Offences under which he was found guilty established liability for the “*illegal production and distribution of mass media outputs*”.<sup>4</sup> Under article 1, part 10, of the Law on Press and Other Mass Media, the term ‘mass media output’ is interpreted as full or partial circulation of the *periodical printed publication*,<sup>5</sup> an issue of the radio, TV, newsreel; full or partial circulation of the audio or video recording of the programme. Article 43, part 2, of the same Law stipulates that in case of conflict between the Law and the international treaty to which Belarus is a State party, the latter should prevail. Therefore, the author claims that in evaluating his actions of 8 and 10 October 2004, the court should have assessed, as required by article 19 of the Covenant, whether the sanctions applied to him were necessary *for respect of the rights or reputations of others, for the protection of national security or of public order, or of public health or morals*.<sup>6</sup>

(b) The Khoyniki District Court of the Gomel region did not take any measures to establish why it was necessary for the author to sign a contract with the editor or publisher of the publicly available newspaper *People’s Will* in order to make copies of a given article published in one of its issues. The court failed to establish how the author’s failure to sign such a contract negatively affected respect of the rights or reputations of

<sup>2</sup> Approximately 66.2 USD or 51.1 EUR.

<sup>3</sup> Under article 266 of the Code on Administrative Offences, the court’s decision in administrative case is final and it cannot be appealed through administrative proceedings. This decision, however, can be revoked by the chair of a court of superior jurisdiction through the supervisory procedure.

<sup>4</sup> Emphasis is added by the author of the communication.

<sup>5</sup> *Idem*.

<sup>6</sup> *Idem*.

others, for the protection of national security or of public order, or of public health or morals;

(c) The confiscation and destruction of one copy of the seized print materials each is not provided in the vindicatory part of article 172-1, part 8, of the Code on Administrative Offences;

(d) The court did not evaluate the author's actions in relation to the distribution of print materials other than the copies of the newspaper *People's Will*. It ordered, however, the confiscation and destruction of one copy of the seized print materials each. The court did not evaluate the author's actions that took place on 8 October 2004 when, according to the administrative report of the Khoyniki District Executive Committee, he was also allegedly illegally distributing the mass media outputs.

3.2 The author further claims a violation of his rights under article 19, paragraph 2, of the Covenant, because of the arbitrary seizure of elections related print materials, in particular, in violation of his right to impart information, and the State party has failed to justify the necessity of the restriction of this right.

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

4.1 By note verbale of 2 May 2008, the State party submitted its observations on admissibility and merits. It confirms that, on 18 November 2004, the Khoyniki District Court of the Gomel region found the author guilty of having committed an administrative offence under article 172-1, part 8, of the Code on Administrative Offences and ordered him to pay 144,000 roubles (6 base amounts) as a fine. The administrative report of 9 November 2004 also documents that in violation of the Law on Press and Other Mass Media, the author was distributing illegally produced copies of the newspapers and leaflets. Furthermore, the author did not deny that he was engaged in the production and distribution of the print materials in question. Therefore, on the basis of the evidence before him, the judge's decision in finding the author guilty of having committed an administrative offence was well-founded.

4.2 The State party submits that article 238 of the Code on Administrative Offences provides for a possibility of taking an offender to the police station with the purpose of drawing up an administrative report. Pursuant to articles 28 and 244 of the same Code, items constituting a direct object of the administrative offence can be seized and then confiscated. Thus, the author's delivery to the police station with the purpose of drawing up an administrative report, as well as the seizure and subsequent confiscation of the print materials constituting a direct object of the administrative offence were lawful and grounded. The State party adds that the decisions of the Gomel Regional Court and the Supreme Court to dismiss the author's appeals were justified and that he did not complain to the General Prosecutor's Office about the institution of administrative proceedings against him.

4.3 According to the State party, article 19, paragraph 3, of the Covenant provides for a possibility to subject the exercise of the rights provided for in paragraph 2 of this article to certain restrictions. Therefore, the Law on Press and Other Mass Media establishes a procedure for the production and distribution of mass media outputs. At the time when the author's actions in question took place, article 172-1 of the Code on Administrative Offences provided for administrative liability for the breach of the said procedure. The State party concludes that the institution of administrative proceedings against the author for illegal production and distribution of mass media outputs does not contravene the requirements of the Covenant and that, consequently, the author's rights guaranteed under the Covenant have not been violated.



### Author's comments on the State party's observations

5.1 On 22 February 2009, the author commented on the State party's observations. He notes that the State party justifies the restriction of his right to impart information by the alleged breach of the Law on Press and Other Mass Media. With reference to article 8, paragraph 1, of the Belarusian Constitution, which confirms the supremacy of the universally recognized principles of international law and prescribes a requirement of compliance of the laws of Belarus with such principles, the author submits that the State party's invocation of the provisions of its internal law as justification for its failure to comply with the requirements of the Covenant is groundless. He further refers to article 27 of the Law on International Treaties that incorporates into the domestic law the principles of *pacta sunt servanda* and correlation between internal law and observance of treaties established under articles 26 and 27 of the 1969 Vienna Convention on the Law of Treaties.

5.2 The author submits that the restriction of his right to impart information was not based on one of the legitimate grounds provided for under article 19, paragraph 3, of the Covenant and that, therefore, there was a violation of article 19, paragraph 2, read together with article 2 of the Covenant in his case.

5.3 The author reiterates his claims in relation to the alleged violation of article 14, paragraph 1, of the Covenant, and adds that, in its concluding observations on the fourth periodic report of Belarus (CCPR/C/79/Add.86), the Committee noted with concern that the procedures relating to tenure, disciplining and dismissal of judges at all levels did not comply with the principle of independence and impartiality of the judiciary (para. 13).<sup>7</sup>

5.4 Finally, the author submits that he did not avail himself of the right to submit a complaint to the General Prosecutor's Office, since such a complaint does not constitute an effective domestic remedy, as it does not entail a review of the case by the court. He recalls that, according to the Committee's jurisprudence, one is required to exhaust domestic remedies that are not only available but also effective.

### Further submissions from the State party

6.1 By note verbale of 4 September 2009, the State party submits that, pursuant to article 12.11 of the Executive Code on Administrative Offences, a prosecutor can lodge an objection against the court ruling on finding a person guilty of having committed an administrative offence. An objection can also be lodged in relation to a ruling that has already become executory. The State party adds that in 2008 a total of 2,739 complaints have been received by the prosecutorial authorities within the framework of administrative proceedings and 422 of them have been decided in favour of the submitting party. In particular, 146 court rulings have been revoked or revised by the Chairman of the Supreme Court in the framework of the administrative proceedings on the basis of the objections lodged by the General Prosecutor's Office in 2008. The State party further submits that 427 rulings have been revoked and 51 have been revised through the supervisory review procedure in civil cases in 2006. In 2007, the numbers were 507 and 30, respectively, and, in 2008, 410 and 36. The State party concludes, therefore, that the author's assertion in relation to the ineffectiveness of the complaint mechanism established within the General Prosecutor's Office is baseless.

6.2 The State party further submits that the Belarusian Constitution guarantees the independence of the judges when administering justice, their irrevocability and immunity,

<sup>7</sup> The author also refers to the report on the mission to Belarus of the Special Rapporteur on the independence of judges and lawyers, Dato' Param Cumaraswamy, submitted in accordance with resolution 2000/42 of the Commission on Human Rights, E/CN.4/2001/65/Add.1.

and prohibits any interference in the administration of justice. The Code “On Judicial System and Status of Judges” also provides legal guarantees for the administration of independent justice. Pursuant to article 110 of the Constitution, judges are independent and are only subject to the law; any interference in the administration of justice is impermissible and is liable to punishment.<sup>8</sup> The State party concludes, therefore, that the author’s claims about the lack of independence and partiality of the judges in Belarus are his own inferences that do not correspond to the State party’s law and practice.

#### **Further submissions from the author**

7.1 On 16 February 2011, the author reiterates his earlier arguments in relation to the ineffectiveness of the supervisory review procedure which allows a prosecutor to lodge an objection against the court ruling on finding a person guilty of having committed an administrative offence that has already become executory. He further adds that the State party failed to specify whether the statistical data provided by it included any revoked or revised rulings with regard to administrative offences related to the exercise of one’s civil and political rights or administrative persecution of socially and politically active individuals. The author states that he is unaware of any case over the last 10 years when the General Prosecutor’s Office would lodge an objection, requesting revocation of administrative proceedings related to the exercise of citizens’ civil and political rights. He submits that the supervisory review procedure is at the discretion of a limited number of high-level public officials, such as the Prosecutor General and Chair of the Supreme Court. Such review, if granted, takes place without a hearing and is allowed on questions of law only. Furthermore, the State party’s law does not allow an individual to submit an appeal to the Constitutional Court. The author asserts, therefore, that all domestic remedies have been exhausted for the purposes of article 5, paragraph 2 (b), of the Optional Protocol.

7.2 The author further submits that the State party failed to address any of his specific claims in relation to article 14, paragraph 1, of the Covenant. Furthermore, although the Khoyniki District Court of the Gomel region did not take any decision on what needed to be done with the remaining print materials that had been seized from the author on 8 and 10 October 2004,<sup>9</sup> their fate remains unknown to him. The author adds that the judge of the Khoyniki District Court of the Gomel region issued the ruling of 18 November 2004 exclusively on the basis of the domestic law and did not take into account the State party’s obligations under the Covenant. The author refers to the Committee jurisprudence in *Park v. Republic of Korea*<sup>10</sup> in support of his argument about the supremacy of the State party’s obligations under the Covenant over its domestic law.

#### **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.

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<sup>8</sup> The State party further lists a number of specific guarantees on the independence of the judiciary contained in the Code on Judicial System and Status of Judges.

<sup>9</sup> The author refers to the following print materials: (1) the leaflet entitled “Dear Compatriots!” (789 copies); (2) photocopy of an article from the newspaper *People’s Will* (789 copies); and (3) the leaflet entitled “Five steps to a Better Life” (789 copies).

<sup>10</sup> Communication No. 628/1995, *Park v. Republic of Korea*, Views adopted on 20 October 1998, para. 10.4.

8.2 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.

8.3 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 did not complain to the General Prosecutor's Office about the institution of administrative proceedings against him, specifically noting that an objection by a prosecutor can also be lodged in relation to a ruling that has already become executory. The Committee further notes the author's explanation that he had exhausted all available domestic remedies and that he has not lodged any complaint with the General Prosecutor's Office, since the supervisory review procedure does not constitute an effective domestic remedy. The Committee also notes that the author submitted an appeal to the Supreme Court, which upheld the ruling of the Khoyniki District Court of the Gomel region. In this regard, the Committee recalls its jurisprudence, according to which the supervisory review procedure against court decisions which have entered into force constitutes an extraordinary means of appeal which is dependent on the discretionary power of a judge or prosecutor and is limited to issues of law only.<sup>11</sup> In the circumstances, the Committee considers that it is not precluded, for purposes of admissibility, by article 5, paragraph 2 (b) of the Optional Protocol, from examining the communication.

8.4 As to the author's claim under article 14, paragraph 1, the Committee notes that it relates primarily to issues directly linked to those falling under article 19, of the Covenant, that is, the author's right to impart information. It also notes that there are no obstacles to the admissibility of the claims under article 19, paragraph 2, of the Covenant, and declares them admissible. Having come to this conclusion, the Committee decides not to separately consider the claims arising under article 14, paragraph 1, of the Covenant.<sup>12</sup>

#### *Consideration of the merits*

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

9.2 The first issue before the Committee is whether or not the application of article 172-1, part 8, of the Code on Administrative Offences to the author's case, resulting in the seizure and partial destruction of the following elections related print materials: (1) the leaflet entitled "Dear Compatriots!" (789 copies); (2) photocopy of an article from the newspaper *People's Will* (789 copies) and (3) the leaflet entitled "Five steps to a Better Life" (789 copies) and the subsequent fine, constituted a restriction within the meaning of article 19, paragraph 3, on the author's right to impart information. The Committee notes that article 172-1, part 8, of the Code on Administrative Offences establishes administrative liability for illegal production and distribution of mass media outputs. It also notes that since the State party imposed a "procedure for the production and distribution of mass media outputs", it effectively established obstacles regarding the exercise of the freedom to impart information, guaranteed by article 19, paragraph 2, of the Covenant.<sup>13</sup>

<sup>11</sup> See, for example, *Gerashchenko v. Belarus*, communication No. 1537/2006, inadmissibility decision adopted on 23 October 2009, para. 6.3; *P.L. v. Belarus*, communication No. 1814/2008, inadmissibility decision adopted on 26 July 2011, para. 6.2; *Tulzhenskova v. Belarus*, communication No. 1838/2008, Views adopted on 26 October 2011, para. 8.3.

<sup>12</sup> See communication No. 1377/2005, *Katsora v. Belarus*, Views adopted on 19 July 2010, para. 6.4.

<sup>13</sup> Communication No. 780/1997, *Laptsevich v. Belarus*, Views adopted on 20 March 2000, para. 8.1.

9.3 The second issue is, therefore, whether in the present case such obstacles are justified under article 19, paragraph 3, of the Covenant, which allows certain restrictions but only as provided by law and necessary: (a) for respect of the rights or reputations of others; and (b) for the protection of national security or of public order (*ordre public*), or of public health or morals. The Committee recalls its general comment No. 34 (2011) on freedoms of opinion and expression, according to which freedom of opinion and freedom of expression are indispensable conditions for the full development of the person, that they are essential for any society, and that they constitute the foundation stone for every free and democratic society.<sup>14</sup> Any restrictions to their exercise must conform to the strict tests of necessity and proportionality and “must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.”<sup>15</sup>

9.4 The Committee notes that the author has argued that article 172-1, part 8, of the Code on Administrative Offences does not apply to him, since the print materials that he was distributing on 8 and 10 October 2004 did not constitute a “mass media output” within the meaning of article 1, part 10, of the Law on Press and Other Mass Media, and that the sanctions thus were unlawful and constituted a violation of article 19 of the Covenant. In this regard, the Committee notes, firstly, that the author and the State party disagree on whether the elections related print materials that were seized from the author constituted a “mass media output” that was subject to the “procedure for the production and distribution of mass media outputs” established by the Law on Press and Other Mass Media. In particular, the author contests the applicability of a requirement of having a contractual agreement with the editorial board or the publisher of a newspaper in order to distribute photocopies of an article published in one of its issues. Secondly, the Committee notes that from the material on file, it transpires that the Khoyniki District Court of the Gomel region based its findings only on the absence of the said contractual agreement with the editor or publisher of the newspaper *People’s Will*.

9.5 The Committee considers that, even if the sanctions imposed on the author were permitted under national law, the State party has not advanced any argument as to why they were necessary for one of the legitimate purposes set out in article 19, paragraph 3, of the Covenant. It further notes that the State party has not explained why the breach of the requirement to have a contractual agreement with the editorial board or the publisher of a newspaper in order to distribute photocopies of an article published in one of its issues involved pecuniary sanctions, and the seizure and partial destruction of the leaflets in question. It finally notes that the author has submitted to the Gomel Regional Court and the Supreme Court a copy of the letter from the chief editor of *People’s Will* dated 3 December 2004, stating that the editorial board did not object to the copying of the articles published in the newspaper by the author. The Committee concludes that in the absence of any pertinent explanations from the State party, the restrictions of the exercise of the author’s right to impart information, cannot be deemed necessary for the protection of national security or of public order (*ordre public*) or for respect of the rights or reputations of others. The Committee therefore finds that the author’s rights under article 19, paragraph 2, of the Covenant have been violated in the present case.

10. 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 facts before it disclose a violation by Belarus of article 19, paragraph 2, of the Covenant.

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<sup>14</sup> *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 40*, vol. I (A/66/40 (Vol. I)), annex V, para. 2.

<sup>15</sup> *Ibid.*, para. 22.

11. Pursuant to article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including reimbursement of the value of the fine as at the situation of November 2004 and any legal costs incurred by the author, as well as compensation. The State party is also under an obligation to take steps to prevent similar violations in the future.

12. 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 and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views, and to have them widely disseminated in Belarusian and Russian in the State party.

[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 to the General Assembly.]

**G. Communication No. 1755/2008, *El Hagog Jumaa v. Libya*  
(Views adopted on 19 March 2012, 104th session)\* \*\***

<i>Submitted by:</i>	Ashraf Ahmad El Hagog Jumaa (represented by counsel, Liesbeth Zegveld)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Libya
<i>Date of communication:</i>	7 January 2008 (initial submission)
<i>Subject matter:</i>	Alleged torture of author and death penalty imposed after an unfair trial
<i>Procedural issue:</i>	Non-substantiation of allegations
<i>Substantive issues:</i>	Torture, unfair trial, arbitrary arrest and detention; death penalty imposed following unfair trial
<i>Article of the Covenant:</i>	6; 7; 9; 10; 14
<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 19 March 2012,

*Having concluded* its consideration of communication No. 1755/2008, submitted to the Human Rights Committee by Ashraf Ahmad El Hagog Jumaa, 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 Ashraf Ahmad El Hagog Jumaa, a Bulgarian national of Palestinian origin, born on 25 October 1969 in Alexandria, Egypt. He claims to be a victim of violation by Libya of articles 6, 7, 9, 10 and 14 of the Covenant. He is represented by Liesbeth Zegveld. The Optional Protocol entered into force for the State Party on 16 May 1989.

\* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Mr. Rajssoomer Lallah, 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.

\*\* The text of one individual opinion (partially dissenting), signed by Committee member Fabián Omar Salvioli, is appended to the present Views.

1.2 On 17 April 2008, the Committee, acting through its Special Rapporteur on New Communications and Interim Measures, decided to examine the admissibility of the communication separately from the merits.

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

2.1 The author was, until his arrival in Bulgaria on 24 July 2007, a stateless person of Palestinian origin. He and his family had been living in Libya since 4 September 1972. At the beginning of the events at the basis of the case, the author was a graduate medical student at Benghazi University, Libya. Since 1998, he had worked as an intern in El-Fatah paediatric hospital in Benghazi.

2.2 On 29 January 1999, the author was arrested. He was accused of premeditated murder and causing an epidemic by injecting 393 children in Al-Fatah paediatric hospital with HIV.

2.3 During the interrogations, the author was allegedly compelled to confess guilt under torture. Methods of torture allegedly included extensive use of electric shocks on legs, feet, hands and chest while stretched naked on a steel bed; beatings on the soles of the feet; being hung by the hands; creation of a sensation of suffocation and strangulation; being suspended from a height by the arms; being threatened of attack by dogs while blindfolded; beatings on the body; injection of drugs; sleep deprivation; sensory isolation; very hot or ice-cold showers; being held in overcrowded cells; being blinded by bright lights. The author was allegedly subjected to anal rape. His confession triggered a wave of arrests of, in particular, Bulgarian medical personnel in Libya.

2.4 On 9 February 1999, 23 Bulgarian nationals, working in different hospitals in Benghazi, including the Al-Fatah paediatric hospital, were arrested by Libyan police without being informed of the grounds for their arrest. Seventeen of them were released on 16 February 1999. The author and five co-accused Bulgarian nurses<sup>1</sup> were allegedly tortured repeatedly for approximately two months. After they confessed, torture became less frequent, but still continued. One of the five nurses arrested on 9 February 1999, Kristyana Valcheva, had never worked at Al-Fatah paediatric hospital.

2.5 On 15 May 1999, the case was referred to the Public Prosecution Office, which brought the following charges against the author and the five co-accused: commission of acts against the Libyan sovereignty, leading to the indiscriminate killing of people for the purpose of subversion of State security (capital offence); involvement in a conspiracy and collusion for the commission of the above premeditated crimes; deliberately causing an epidemic by injecting 393 children at Al-Fatah hospital with the AIDS virus (capital offence); premeditated murder through the use of substances which cause death, by injecting children with the AIDS virus (capital offence); and commission of acts contrary to Libyan law and traditions (such as illegal production of alcohol, drinking alcohol in public places, illegal transaction in foreign currency, illicit sexual relationships). On 16 May 1999, the author and the five co-accuseds were, for the first time, brought before the Public Prosecution Office, approximately four months after their arrest. They were subsequently brought before the Prosecutor every 30 to 45 days.

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<sup>1</sup> Kristyana Venelinova Valcheva, Nasya Stoycheva Nenova, Valentina Manolova Siropulo, Valya Georgieva Chervenashka and Snezhanka Ivanova Dimitrova.

*First trial*

2.6 The trial before the People's Court<sup>2</sup> began on 7 February 2000. The first time the author was granted access to a lawyer was on 17 February 2000, 10 days after the start of the trial. At that time, he raised the torture allegations in court. He was never given an opportunity to speak to his lawyer freely as State representatives were always present during their meetings. On 20 March 2001, the author was taken to the hospital due to his worsening state of health. He remained in hospital for 25 days. In June 2001, two of his co-defendants<sup>3</sup> retracted their confessions, stating they had been extracted under torture. Subsequently, the author and his co-defendants pleaded "not guilty." The confession and the contention of the Head of State that the accused worked as CIA and Mossad agents were considered to be the basis of the case.

2.7 The criminal case against the author and the co-defendants was initially suspended, as the Court had not gathered enough evidence to maintain the accusation of conspiracy against the State. On 17 February 2002, the People's Court dismissed the case and remanded it to the Criminal Prosecution Office, which forms part of the ordinary criminal justice system. The Prosecutor withdrew the charges of conspiracy and presented new charges of illegal drug experiments, as well as contamination with HIV/AIDS of 426 children.<sup>4</sup> Throughout this time, the author and the co-defendants remained in detention.

*Second trial*

2.8 In August 2002, the Indictment Chamber of the Benghazi Appeals Court maintained the charges as presented by the Criminal Prosecution Office and referred the case to an ordinary criminal court, the Benghazi Appeals Court. The prosecution relied on the confessions of the author and one of the co-defendants,<sup>5</sup> and the result of the search of the residence of another co-defendant,<sup>6</sup> where police had discovered five contaminated bottles of blood plasma. In July 2003, the second trial started. Professors Luc Montagnier and Vittorio Colizzi were appointed as experts. In September 2003, they testified that the infection of blood samples at Al-Fatah hospital had occurred in 1997, two years before the incriminating facts, and one year before the author became an intern in the hospital. Their expertise concluded that the cause of the infection was unknown and was not deliberate. Such nosocomial infections<sup>7</sup> were caused by a very specific and highly infectious virus strain, owing to poor standards of hygiene and neglect.<sup>8</sup> In December 2003, the Court appointed a second team of experts, which included five Libyan doctors. On 28 December 2003, the team rejected the findings made by the two renowned professors and stated that the AIDS epidemic was not attributable to nosocomial infections or to the re-use of infected medical equipment but to a deliberate act. The defendants called for another counter-expertise, but the court dismissed their request.

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<sup>2</sup> Extraordinary Court for crimes against the State.

<sup>3</sup> Kristiyana Valcheva and Nasya Nenova.

<sup>4</sup> In the charges read to the author, the number of children cited as being contaminated rose from 393 to 426 between the first and the second trial.

<sup>5</sup> Nasya Nenova.

<sup>6</sup> Kristiyana Valcheva.

<sup>7</sup> The author specifies that nosocomial infections are infections resulting from treatment in a hospital or hospital-like setting, but which are secondary to the patient's original condition

<sup>8</sup> See "Final report of Professors Luc Montagnier and Vittorio Colizzi to Libyan Arab Jamahiriya on the nosocomial HIV infection at the Al-Fateh Hospital, Benghazi, Libya" (Paris, 7 April 2003), which concludes that "no evidence has been found for a deliberated injection of HIV contaminated material (bioterrorism). Epidemiological stratification, according to admission time, of the data on seropositivity and results of molecular analysis are strongly against this possibility." (page 21).



2.9 On 6 May 2004, the Benghazi Appeals Court sentenced the author and the co-defendant to death for having caused the death of 46 children and contaminating 380 others. Nine Libyans working at Al-Fatah hospital, had also been charged with the same offence but appeared free at the trial, having been released on bail at the start of the proceedings. They were acquitted. As for the eight Libyan security officers who were accused of torture by the author and the co-defendants, the Court relinquished jurisdiction and referred their case back to the Prosecutor's office. On 5 July 2004, the author and the co-defendants appealed on points of law to the Libyan Supreme Court. The Prosecutor requested the Court to revoke the death sentences and refer the case to the Benghazi Appeals Court for retrial, as "irregularities" had occurred during the arrest and the interrogation of the author and his co-defendants. After postponing its sessions repeatedly, the Supreme Court quashed the judgement of the Benghazi Appeals Court and referred the case for retrial to the Tripoli Criminal Court on 25 December 2005. The Court refused to release the author and co-defendants on bail as there were insufficient guarantees that they would reappear for trial.

*Retrial and release*

2.10 The Tripoli Appeals Court reopened the trial on 11 May 2006. The Prosecutor reiterated his request for the death penalty for the author and his co-defendants. The author again pleaded not guilty and reiterated that he had been tortured to make him confess. On 19 December 2006, he was found guilty and sentenced to death. The Court stated it could not reconsider the torture allegations, as another Court had already dismissed the torture claims.

2.11 The author appealed to the Supreme Court on 19 December 2006. The session before the Court took place on 11 July 2007, although it was supposed to take place within three months after the submission of the appeal. According to the information provided by the author, the Supreme Court only had one session lasting one day. The result was the confirmation of the death sentence for the author and the co-defendants. On 17 July 2007, the High Judicial Council announced that the sentence would be commuted to life imprisonment, after a compensation agreement had been reached with the families of the victims. Subsequently, as a result of negotiations between Libya and Governments of other countries, the author was transferred to Bulgaria on 24 July 2007 to serve his sentence, where he was immediately pardoned and released.

2.12 The torture claims submitted by the author as early as 2000 were not investigated as expeditiously and thoroughly as they should have been. In June 2001, two of the co-defendants<sup>9</sup> retracted their confessions as they had been obtained under duress, and identified the persons responsible for the torture. Only in May 2002, did the Criminal Prosecution Office decide to investigate the matter and order a medical report. Consequently, the Prosecution brought charges against eight security officers who were in charge of the investigation, a doctor and an interpreter. In June 2002, a Libyan doctor appointed by the Prosecutor examined the author and the co-defendants and found marks on their bodies which he argued resulted from "physical coercion" and "beatings." In its judgement dated 6 May 2004, the Benghazi Appeals Court determined that it did not have the competence to rule on the matter since the offence had not been committed under its jurisdiction, but within the jurisdiction of the Tripoli Appeals Court.

2.13 On 7 May 2004, the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment sent a joint urgent appeal to the State party regarding the author's and co-defendants' case, and requested information about the allegations of torture and of

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<sup>9</sup> Kristiyana Valcheva and Nasya Nenova.

unfair trial. They enquired about the lack of prosecution of officials responsible for the alleged torture.<sup>10</sup> In response, the State party stated that the Department of Public Prosecutions had referred the case of the police officers to the Tripoli Appeals Court, since that court was the only one competent to hear the case. The trial against the police officers, one doctor and an interpreter started before the Tripoli Court. During the hearings, some of the police officers admitted that they had tortured the author and some of his co-defendants to obtain confessions.<sup>11</sup> The Court rejected the expert medical opinion produced by the defence, which was performed three years after the incriminating facts, on the grounds that a Libyan doctor officially appointed as expert considered that the examination had not been conducted in accordance with the protocols, that marks of torture were undetectable and that in all events, the alleged torture left no mark after two or three weeks. The Tripoli Court acquitted the suspects for lack of evidence on 7 June 2005. The author and the co-defendants appealed the Court's judgement, but the appeal was rejected by the Libyan Supreme Court on 29 June 2006. On 10 August 2007, international newspapers reported that the son of President Muammar Gaddafi, Saif al-Islam, had admitted in an interview with Al-Jazeera TV that the author and the co-defendants had indeed been tortured.<sup>12</sup>

<sup>10</sup> See E/CN.4/2005/7/Add.1, paras. 396–398.

<sup>11</sup> Extract of statement from Major Salim Jum'a Salim, Chief of the police station for training dogs, 30 June 2002:

"At the orders of brigade General Harb Derbal, the suspects Ashraf, Kristiyana, Nasya, Snezhana and Valya were taken to the department of criminal investigation for interrogation. [...] When the interrogation started he [Harb Derbal, Director General of Criminal Investigation] brought a telephone machine along which works with cushions. He wanted to use it during the interrogation. It gives an electric shock. During the interrogation everyone was taken in separately. Brigade General Harb requested to attach the wire to the fingers. He requested to activate the machine in order to interrogate the suspect. He asked me a couple of times to switch on the machine. Since it was an order, I carried it out. The suspects were also put blindfolded on the square. The person named Ashraf was put in a cage where there were no dogs. As concerns the use of dogs at the interrogation, this did not occur. [...] An anaesthetist was called in. His name was Abduljalil Wafaa. All suspects were sedated. [...]

When I switched on the machine, I did it because I am a military. When I get the order to switch it on, I switch it on."

Extract of statement from Izzudin Mukhtar Saleh Al Baraki, Sergeant-Major at the Directorate General for Criminal Investigation, guard of the author, 29 July 2002:

"Q: Did you notice any traces of force on the body of the aforementioned suspect?

A: Yes, I saw traces of force between the fingers. One time Lieutenant Nwar Abu Za'ainin came to him when he was praying. He pushed him, while he was praying. He did not stop with it. I prevented him from further hitting. Always when he [Ashraf] came out after examination, I saw fear on his face. Sometimes he cried and I saw tears in his eyes."

Extract of statement from Salim Jum'a Salim, Chief of the police station for training dogs, guard of the author and his co-defendants, also present during the interrogations, 29 July 2002:

"Q: Can you tell us what sort of pressure and physical force was exerted on the suspects?

A: As regards Ashraf Ahmad Jum'a, Kristiyana and Nasya, electrical equipment was used. The suspects were further placed in dog cages. They also were made to run on the square. I know that Jum'a Al Mashari has exerted physical force with electrical equipment. Also, Abdulmajid Al Shawal and Brigade General Harb Derbal. Usama Uwaidat was also often present at the interrogation sessions."

<sup>12</sup> According to the interview record, Saif al-Islam stated: "Yes, they were tortured by electricity and they were threatened that their family members would be targeted. But a lot of what the Palestinian doctor has claimed are merely lies."

### The complaint

3.1 The author claims that the State party violated articles 6, paragraph 2; 7; 9; 10 and 14 of the Covenant.

3.2 He claims that the death sentence was imposed after an unfair and arbitrary trial in violation of article 6, paragraph 2. He considers that both the verdict of 19 December 2006 and the upholding of the judgement by the Supreme Court on 11 July 2007 were the result of a flagrantly unfair and arbitrary trial. Referring to the jurisprudence of the Committee and its general comment No. 6, he contends that the imposition of an unfair trial with numerous violations of article 14 of the Covenant violates article 6, paragraph 2, of the Covenant.<sup>13</sup> Although the death sentence was later commuted to life imprisonment, this should not relieve the State party from its obligation under this provision. The author emphasizes that the death sentence was commuted to life imprisonment only after a large sum of money had been offered to the families of the infected children, and heavy pressure had been brought to bear by the European Union, Bulgaria and other States.

3.3 The author claims that he was subjected to torture and drugged. The facts as described, according to him, are clear-cut evidence, confirmed by medical records and witnesses' statements that the Libyan authorities are responsible for the torture of the author at the hands of the investigators; and the fact that some of the perpetrators omit or refuse to mention the more severe ill-treatment is contradicted by the medical findings concerning the author and his co-defendants. While the doctor could not establish the exact time of the torture by rape and use of electrical equipment, there is no indication that the author went into detention in bad health. He emphasizes that the burden of proof cannot solely rest on him.<sup>14</sup> The complaints were made at the earliest possible stage, when he was finally brought before a judge, eight months after being held incommunicado. At that time, he showed clear signs of torture, but no action was taken by the public prosecutor or by the court.<sup>15</sup> The author contends that the severity of his ill-treatment was such as to be necessarily characterized as torture, since it was used to extract a confession. Cruel methods were applied for a lengthy period of time and a number of practices described above constitute torture per se.<sup>16</sup> These practices as well as the lack of a timely and thorough investigation into his torture claims constitute a violation of article 7 of the Covenant. The author finally contends that his treatment throughout his detention also amounts to a violation of article 7.

3.4 The author considers that his arrest and detention were arbitrary. Under Libyan law, the author should have been brought before the Prosecutor within 48 hours after his arrest. This was however not done until four months later, on 16 May 1999. Even then, the authorities kept him incommunicado until 30 November 1999, when his family was finally allowed to see him. In this respect, the State party violated article 9, paragraph 1, of the Covenant. Moreover, the author was allegedly not informed promptly of charges against

<sup>13</sup> See Communications No. 250/1987, *Carlton Reid v. Jamaica*, Views adopted on 20 July 1990; No. 730/1996, *Marshall v. Jamaica*, Views adopted on 3 November 1998; No 16/1977 *Daniel Mbenge v. Zaire*, Views adopted on 25 March 1983; No 349/1989, *Clifton Wright v. Jamaica*, Views adopted on 27 July 1992; Nos. 464/1991 and 482/1991, *Peart and Peart v. Jamaica*, Views adopted on 19 July 1995; and No. 719/1996, *Levy v. Jamaica*, Views adopted on 3 November 1998.

<sup>14</sup> The author refers to the jurisprudence of the Committee, particularly communications No. 1096/2002, *Kurbanova v. Tajikistan*, Views adopted on 6 November 2003; and No 992/2001, *Louisa Bousroual v. Algeria*, Views adopted on 30 March 2006.

<sup>15</sup> The author cites the jurisprudence of the Committee on this issue, inter alia, communications No. 612/1995, *Arhuacos. v. Colombia*, Views adopted on 29 July 1997; No 563/1993, *Bautista de Arellana v. Colombia*, Views adopted on 27 October 1995; and No. 04/1977, *William Torres Ramirez v. Uruguay*, Views adopted on 23 July 1980.

<sup>16</sup> The author refers here to the use of electric shocks on genitals and anal rape.

him. It was not until he was brought before the Prosecutor that he was finally properly informed of the charges against him, still without legal counsel. This constitutes a violation of article 9, paragraph 2, of the Covenant. Finally, he was not brought promptly before a “judicial authority;” in fact, his first appearance in court was on 7 February 2000. Before this date, he only saw the Prosecutor, which constitutes a violation of article 9, paragraph 3 of the Covenant.

3.5 The author contends that the treatment to which he was subjected following his arrest also violated his rights under article 10 of the Covenant. He adds that he did not receive any medical care commensurate with his state of health during his detention, which is also in violation of article 10, paragraph 1. It was only after the abrupt deterioration of his state of health that he was hospitalized on 20 March 2001.

3.6 The author considers that the State party violated his right to a fair trial, as he was not informed of charges against him for the first four months of his detention; nor was he assigned a lawyer until 17 February 2000 – 10 days after the start of the trial and a full year after his arrest. He was forced to testify against himself through torture; he was not assisted by a lawyer when he made his confession before the Prosecutor; the court, without providing sufficient reasons, dismissed the expert report of Professors Montagnier and Collizi, despite every indication that their report exonerated the author and his co-defendants; the second search of Ms. Valcheva’s home, during which the police “providentially”<sup>17</sup> discovered five bottles of contaminated blood plasma, was conducted without the presence of the accused or a defence lawyer; the inconsistencies in this “discovery,”<sup>18</sup> the fact that the prosecution never produced the records of the searches, and finally that the court itself mistook the findings of one search for the findings of another prove that it was fabricated. The author concludes that the trial also suffered unreasonable delays.<sup>19</sup> These elements constitute, according to the author, a violation of article 14 of the Covenant.

#### **State party’s observations on admissibility**

4.1 On 24 March 2008, the State party challenged the admissibility of the communication on grounds of non-substantiation. It notes that the case was the subject of lengthy legal and judicial proceedings aimed at establishing the truth in a case concerning more than 450 children, and relating to violation of their fundamental right to life. According to the State party, the author was afforded full legal guarantees ensuring his right to a fair trial in conformity with international standards. Civil society organizations in Libya, international human rights organizations and foreign diplomatic missions in Libya followed the proceedings throughout.

4.2 The State party recalls that on 30 September 1998, a Libyan citizen, Mohammed Bashir Ben Ghazi, lodged a complaint with the Department of Public Prosecutions affirming that his son, then 14 months old, had been infected with the AIDS virus after a stay at Al-Fatah paediatric hospital in Benghazi. He discovered that his son was infected after he had been transferred to Egypt for treatment. On 12 October 1998, the Department of Public Prosecutions opened an investigation as it had received more complaints. It took 233 statements from parents of infected children and took measures, such as issuing an injunction to prevent foreign workers at the hospital from travelling abroad.

<sup>17</sup> In quotation marks in the author’s initial submission.

<sup>18</sup> The analysis of the bottles was carried out in March 1999, whereas the search of Ms. Valcheva’s home took place a month after.

<sup>19</sup> More than eight years from the date of arrest on 29 January 1999 until the final judgement of the Supreme Court dated 11 July 2007.

4.3 The Secretary of the General People's Committee for Justice and Public Security issued Decision No 28/1209 to investigate the spread of the AIDS virus among children treated at Al-Fatah paediatric hospital. The investigating committee consisted of the director of the General Department of Criminal Investigations, senior investigating officers from the same department and doctors. It began work on 9 December 1998 and eventually identified the author, a Palestinian doctor, and five Bulgarian nurses as suspects. The State party explains that the committee concluded its work on 15 May 1999 and sent a report with the evidence and names of the suspects to the General Prosecution Office, which conducted an interview with the author and the co-defendants. The author confessed to committing the crime, in association with the five nurses.

4.4 The State party explains that as a consequence of the author's torture claim before the Benghazi Appeals Court on 3 June 2002, the judge of the indictment chamber issued a decision entrusting a representative of the Department of Public Prosecutions with the investigation of the author's allegations. From 13 June 2002, the Department of Public Prosecutions took statements from the defendants about their claims of torture. It also took statements from the committee tasked with investigating the spread of the AIDS virus among the children. Once the investigations were completed, the findings were transmitted to the indictment chamber which referred the case to the Benghazi Appeals Court on 4 July 2003. That court heard the case in more than 20 sittings. It sentenced the author to death on 6 May 2004, and ruled that it did not have territorial jurisdiction to hear the charges of torture against members of the investigation committee.

4.5 The State Party explains that the case on the charges of torture was referred to the Tripoli Appeals Court. This court delivered its verdict on 7 June 2005, acquitting the members of the committee. The author and the co-defendants appealed the death sentence pronounced by the Benghazi Appeals Court on 6 May 2004 to the Supreme Court, which delivered its verdict on 25 December 2005. The Court quashed the death sentence and sent the case back to the Benghazi Appeals Court for a hearing by a different panel of judges. From 11 May 2006, a new panel of judges heard the case over a total of 13 sittings. On 19 December 2006, the Court again sentenced the author and the co-defendants to death. On 12 February 2007, the defendants decided to appeal to the Supreme Court, which delivered its judgement on 11 July 2007.

4.6 The State party considers that the author confessed to participating in the commission of the crime at every stage of the investigation, beginning with his appearance before the investigation committee, then before the Office of the Prosecutor-General, which is the highest judicial investigation body in Libya,<sup>20</sup> and again before the Public Prosecution Office and during numerous sessions of the court which decided on the extension of his preventive detention.

4.7 The lengthy judicial proceedings in the case were aimed at uncovering the truth and identifying the perpetrators in a serious case. They were to afford full guarantees to the convicted persons, so that they could receive a fair trial in which all due process standards were met. According to the State party, the convicted persons could exercise their right to defence through a team of lawyers. The trial was held in open court and was attended by many representatives of civil society and human rights organizations and foreign diplomatic missions in Libya. The convicted persons, through their lawyers, appealed to the Supreme Court. The Court quashed the verdict the first time and sent the case back to the Benghazi Appeals Court to be heard by a new panel of judges. The new panel handed down a guilty verdict and the defendants again appealed to the Supreme Court. This time, the Supreme Court upheld the verdict.

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<sup>20</sup> The State Party provided a copy of the author's detailed confessions.

4.8 With regard to the allegations of torture, the State Party notes that the author appeared before the committee formed to investigate this case on 11 April 1999. He confessed to participating in the commission of the crime. He was subsequently referred to the Office of the Prosecutor-General, where he was questioned on 15 May 1999 by a member of the Department of Public Prosecutions employed at the Office of the Prosecutor-General. He gave a detailed confession about his participation in the commission of the crime, in association with the Bulgarian nurses. He said nothing about being tortured by the above-mentioned investigation committee. He consistently confessed to his participation in the commission of this crime before all the different judicial authorities to which he was referred. It was only after the People's Court issued a decision about lack of jurisdiction to try the case, and the case was referred to the indictment chamber of the South Benghazi court of first instance on 3 June 2002, that the author told the judge of the indictment chamber that he had been tortured. The judge immediately entrusted the Department of Public Prosecutions with the investigation of the author's torture allegations. The latter launched an investigation and took statements from the author, the Bulgarian nurses and the members of the investigation committee. Even though the Department of Public Prosecutions was convinced that the allegations of torture were groundless, it framed charges against the members of the investigation committee. The court heard the case and delivered its verdict on 7 June 2005, acquitting the members of the investigation committee.

4.9 The State Party recalls that a total of 115 visits were paid to the convicted persons in prison by members of foreign organizations and diplomatic missions. The Secretary for Justice issued instructions to allow members of the author's family to visit him every Sunday, throughout his time in prison. A group of lawyers from Bulgaria was given permission to participate in the defence of the accused.

4.10 Commenting on the author's defence note submitted to the Supreme Court of Libya at the appeal against the verdict delivered by the Benghazi Appeals Court on 19 December 2006, the State party points out that the Supreme Court replied to all the objections raised by the author against the verdict of the Criminal Court.<sup>21</sup>

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

5.1 On 2 July 2008, the author reaffirms that the communication is admissible. He adds that, as explained in his initial submission, all available domestic remedies were exhausted, both in relation to the torture claims and allegations of unfair trial. He points out that the State party did not argue that he had failed to exhaust these remedies. Moreover, upon his transfer to Bulgaria, the State party made the author sign a document that he would not initiate proceedings against the State Party.

5.2 As for the State Party's contention of non-substantiation of claims, the author considers he has substantiated and extensively pleaded the violation of his rights under the Covenant. On the other hand, the author considers that the State party's observations on the admissibility of the communication as mere refutation, and lacking legal precision about the conditions of his arrest and detention. The author recalls that he was held in an isolation cell normally reserved for detainees sentenced to death for 11 months. The size of the room was 10 square metres; it had no electricity or running water.

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<sup>21</sup> In its judgment dated 11 July 2007, the Supreme Court of Libya confirmed, point by point, the ruling of the Benghazi Appeals Court of 19 December 2006. The Court particularly focused on the contradiction in the author and the co-defendant's testimonies throughout the procedure, sometimes confirming the confessions made during the interrogation phase, sometimes refuting them.

5.3 The author refutes the State Party's argument that he only complained about torture four years after he had allegedly been tortured. Immediately after his incommunicado detention, which lasted 10 months in 1999, he continuously stated that he had been tortured. When his family was allowed to visit him on 31 December 1999, he revealed that he had been tortured. At that moment, his family hired a lawyer, who continuously reiterated the allegations. When the author repeatedly fainted during court sessions, the judge finally granted a request made by the author's lawyer to transfer him to a hospital, where he stayed for 25 days. Throughout the court sessions, the judge refused to research the torture allegations made by the author and the five nurses. In several reports, it has been determined that he and the five nurses were tortured. Some members of the criminal investigation team themselves admitted to having tortured the author and the nurses, or stated that they had seen them being tortured. The deputy head of the security police stated that the torture had a direct effect on the confessions of the author and the nurses; 10 of the 25 officers who committed the torture were prosecuted.

5.4 The author explains that during his detention from 1999 until 2007, he was mostly kept in isolation. From the time the death sentence was imposed on 6 May 2004 until his release, his defence lawyers were not allowed to visit him. He also explains that a high-level official told him to give a full confession on the alleged crimes, as this would lead to his release.

#### **Committee's decision on admissibility**

6.1 The Committee considered the admissibility of the communication at its ninety-seventh session on 5 October 2009.

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

6.3 The Committee noted that the State party challenged the admissibility of the author's claim on grounds of non-substantiation, stating that the author was accorded adequate guarantees ensuring his right to a fair trial, in conformity with international standards. It also noted that, according to the State party, the author confessed to participating in the commission of the crime at every stage of the investigation and that, despite doubts as to the reliability of the author's allegations of having been tortured, the Libyan authorities carried out an investigation. In the State party's opinion, these two elements should lead the Committee to consider the communication inadmissible for non-substantiation of claims. On the other hand, the author considered that his claims were extensively substantiated for purposes of admissibility, and that, on the contrary, the State party confined itself to merely refuting the facts as presented. Considering the amount of information provided by the author, both in terms of testimonies and medical and expertise reports, the Committee considered that the author had sufficiently substantiated, for purposes of admissibility, that the treatment he was subjected to in detention, and the trial that he had faced raised issues under articles 7, 9, 10 and 14 of the Covenant, which should be examined by the Committee on the merits.

6.4 As for the author's claim that the death sentence was imposed after an unfair and arbitrary trial, in violation of article 6, the Committee noted that the death sentence was not maintained. In view of the commutation of the author's death sentence, there was no longer any factual basis for the author's claim under article 6 of the Covenant. Accordingly, the

Committee found that this part of the claim had not been substantiated and was therefore inadmissible under article 2 of the Optional Protocol.<sup>22</sup>

### **Absence of State party's observations on the merits**

7. In notes verbales dated 5 November 2009, 6 August 2010, 7 October 2010 and 2 March 2011, the Committee requested the State party to convey information to it on the merits of the communication. The Committee notes that it did not receive the requested information. It recalls that, under the Optional Protocol, the State concerned is required to submit to the Committee written explanations or statements clarifying the matter and indicating what remedies, if any, may have been taken. In the absence of further observations from the State party, the Committee will examine the merits of the case on the basis of the information contained in the file. It will also give due weight to the author's allegations insofar as they have been sufficiently substantiated.

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

#### *Consideration of the merits*

8.1 The Committee has considered the present communication in the light of all the written information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee notes the author's allegation that he was tortured and drugged during interrogation, and that the allegations were corroborated in court by medical records and witnesses' statements. The Committee takes note of the author's argument that the burden of proof cannot rest solely on him and that to this effect, there is no indication that the traces of rape and use of electrical equipment noted on his body could be attributed to a period prior to his detention, which therefore suggests that they were the result of torture at the hands of the interrogators. The Committee notes the author's contention that no immediate action was taken by the judge, who he saw for the first time in February 2000, although torture marks were still visible on his body. The Committee also notes that according to the author the investigation was not carried out thoroughly, but in an expeditious manner.

8.3 The Committee takes note of the State party's argument that the author consistently confessed to his participation in the commission of the crime of which he was accused before all the different judicial authorities to whom he was referred; that it is only on 3 June 2002 that the author told the judge of the indictment chamber that he had been tortured; that the judge immediately entrusted the investigation of those allegations to the Department of Public Prosecutions; and that even though it was convinced that the allegations of torture were groundless, the Public Prosecution Office framed charges against the members of the investigation committee. The Committee also takes note of the State party's observation that the Tripoli Criminal Court, which was competent to deal with the author's claims of torture, delivered its verdict acquitting the alleged perpetrators on 7 June 2005. The Committee notes that the author refutes the State party's argument in relation to the first time he reported having been tortured and reiterates that this occurred for the first time when he was presented before the judge in 2000 and at each appearance before a judicial authority.

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<sup>22</sup> See communications No. 971/2001, *Arutyuniantz v. Uzbekistan*, Views adopted on 30 March 2005; No. 609/1995, *Williams v. Jamaica*, Views adopted on 4 November 1997; No. 1161/2003, *Kharkhal v. Belarus*, decision of inadmissibility adopted on 31 October 2007; No 1141/2002, *Gougnina v. Uzbekistan*, decision of inadmissibility adopted on 1 April 2008.



8.4 The Committee notes the author's further allegation that he was detained incommunicado from the moment of his arrest on 29 January 1999 until he was brought for the first time before the Public Prosecution Office on 16 May 1999; and that during those four months, he was prevented from communicating with his family and the outside world. The Committee also notes the author's contention that after he was sentenced, he was held in an isolation cell normally reserved for detainees sentenced to death, with no access to his lawyer for 11 months; that the size of the room was 10 square metres; that it had no electricity or running water; and that prior to that date, he was held in isolation almost throughout his detention. The Committee notes that the State party did not refute these allegations.

8.5 The Committee reaffirms its jurisprudence<sup>23</sup> that the burden of proof cannot rest solely on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence, and frequently the State party alone has the relevant information. Article 4, paragraph 2, of the Optional Protocol implies that it is the State party's duty to investigate, in good faith, all allegations of violations of the Covenant made against it and its representatives, and to furnish to the Committee the information available to it. In cases where the author made all reasonable attempts to collect evidence in support of his claims, and where further clarification depends on information exclusively in the hands of the State party, the Committee may consider the author's allegations substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party. The Committee further recalls its jurisprudence that the State party has the duty not only to carry out thorough investigations of alleged violations of human rights, particularly violations of the prohibition of torture, but also to prosecute, try and punish anyone held to be responsible for such violations. As for incommunicado detention, the Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20 on article 7, which recommends that States parties make provision against incommunicado detention.<sup>24</sup>

8.6 In the light of the above, the Committee concludes that the treatment inflicted on the author constitutes torture and that the explanations provided by the State party, including the reference to the verdict of the Tripoli Appeals Court of 7 June 2005, do not enable the conclusion that a prompt, thorough and impartial investigation was carried out, despite the presentation of clear evidence of torture, as contained in the medical reports and testimonies of the alleged perpetrators. On the basis of the information available to it, the Committee concludes that the torture inflicted on the author, his incommunicado detention, his prolonged isolation before and after his conviction, and the absence of a prompt, thorough and impartial investigation of the facts constitute a violation of article 7 of the Covenant, both alone and read in conjunction with article 2, paragraph 3, of the Covenant.

8.7 Having come to this conclusion, the Committee decides not to address the author's allegations under article 10 of the Covenant.<sup>25</sup>

8.8 With regard to the alleged violation of article 9 of the Covenant, the Committee notes that the author was arrested on 29 January 1999 and that he was brought for the first time before the Public Prosecution Office on 16 May 1999, although under Libyan law, he should have been brought before the Prosecutor within 48 hours after arrest. The

<sup>23</sup> Communication No. 1412/2005, *Butovenko v. Ukraine*, Views adopted on 19 July 2011, para. 7.3.

<sup>24</sup> Committee's general comment No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment, para. 11, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A.

<sup>25</sup> Communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.8.

Committee further notes the author's allegation that even after that date, he was prevented from seeing his family, who was allowed to see him for the first time on 30 November 1999; that he was not informed of the charges against him until he was brought before the Prosecutor; that he was not provided with legal counsel; and that he was brought before a judge for the first time on 7 February 2000 when the trial started. The Committee notes that the State party has not provided any information to refute these claims. In the absence of any pertinent explanations from the State party, the Committee finds a violation of article 9 of the Covenant.<sup>26</sup>

8.9 The author also invokes a violation by the State party of article 14 of the Covenant. In this regard, the Committee notes the author's allegation that he was granted access to a lawyer for the first time on 17 February 2000, ten days after the beginning of the trial and more than one year after his arrest; and that he was never given the opportunity to speak to the lawyer freely. The Committee also notes the author's contention that he was forced to testify against himself through torture and that he was not assisted by a lawyer during interrogation nor in preparation for the trial. The Committee also notes the author's allegations that the expert report of Professors Montagnier and Collizi was dismissed without sufficient reasons, despite every indication that it exonerated the author; that searches of the house of one of the co-defendants were carried out without the presence of the accused or a defence lawyer; and that the prosecution never produced the records of the searches. The Committee notes the State party's argument that the author was afforded full legal guarantees ensuring his right to fair trial; that his trial was held under international scrutiny; that the lengthy judicial proceedings were aimed at uncovering the truth and identifying the perpetrators in a serious case; and that the author was defended by a team of lawyers.

8.10 The Committee recalls its general comment No. 32 on article 14, in which it emphasizes that the right to equality before courts and tribunals, in general terms, guarantees, in addition to the principles mentioned in the second sentence of article 14, paragraph 1, those of equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination.<sup>27</sup> In the present case, taking into account the information provided by the State party, the Committee considers that an accumulation of violations of the right to fair trial took place, including the violation of the right not to testify against oneself; the violation of the principle of equality of arms – through unequal access to pieces of evidence and counter-expertise; and violation of the right to prepare one's own defense through the lack of access to a lawyer prior to the beginning of the trial and the inability to speak to said lawyer freely. The Committee therefore concludes that the trial and sentence of the author disclose a violation of article 14 of the Covenant.

9. 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 facts before it disclose a violation of article 7, both alone and read in conjunction with article 2, paragraph 3, and of articles 9 and 14 of the Covenant.

10. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the State party is under the obligation to provide the author with an effective remedy, including conducting a new full and thorough investigation into allegations of torture and ill-treatment and initiating proper criminal proceedings against those responsible for the

<sup>26</sup> Communication No. 1761/2008, *Giri v. Nepal*, Views adopted on 24 March 2011, para. 7.8.

<sup>27</sup> The Committee's general comment 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 8, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI.

treatment to which the author was subjected; and providing the author with appropriate reparation, including compensation. The State party is also under the obligation to take steps to prevent similar violations occurring in the future.

11. In becoming a State party to the Optional Protocol, the State party recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. 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 and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State Party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official language of the State party.

[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 to the General Assembly.]

## Appendix

### **Individual opinion of Committee member, Mr. Fabián Omar Salvioli (partly dissenting)**

1. In general I concur with the introductory part and conclusions of the Views reached by the Human Rights Committee on communication No. 1755/2008, *El Hagog Jumaa v. Libya*, but I regret that I am unable to agree with the statement in paragraph 6.4, as follows: “As for the author’s claim that the death sentence was imposed after an unfair and arbitrary trial, in violation of article 6, the Committee noted that the death sentence was not maintained. In view of the commutation of the author’s death sentence, there was no longer any factual basis for the author’s claim under article 6 of the Covenant. Accordingly, the Committee found that this part of the claim had not been substantiated, and was therefore inadmissible under article 2 of the Optional Protocol.”
2. I thought that it might be decided to reopen discussion on the admissibility of the possible violation of article 6 of the Covenant when the Committee considered the merits of the case, but unfortunately it maintained the position which gives rise to my partly dissenting opinion.
3. The Committee concludes its Views by stating that “an accumulation of violations of the right to fair trial took place, including the violation of the right not to testify against oneself, the violation of the principle of equality of arms through unequal access to pieces of evidence and counter-expertise; and of the right to prepare one’s own defense through the lack of access to a lawyer prior to the beginning of the trial and the inability to speak to him freely. The Committee, therefore, concludes that the trial and sentence of the author disclosed a violation of article 14.” (para. 8.10, emphasis added).
4. It is correctly indicated in the above paragraph that the death sentence handed down against Mr. El Hagog Jumaa resulted from an unfair and arbitrary trial. In the interests of consistency, the Committee should have concluded that the imposition of the death sentence following judicial proceedings in which the requirements of the Covenant were not fulfilled is a violation of article 6.
5. A violation of article 6, paragraph 2, of the International Covenant on Civil and Political Rights can occur without the death sentence necessarily having to be carried out; as the Committee pointed out on a previous occasion, “the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant” (communication No. 1096/2002, *Safarmo Kurbanova v. Tajikistan* (CCPR/C/79/D/1096/2002), 6 November 2003, para. 7.7). This jurisprudence was based on earlier decisions of the Committee stating that a preliminary hearing that did not respect the safeguards laid down in article 14 violates article 6, paragraph 2, of the Covenant (*Conroy Levy v. Jamaica*, communication No. 719/1996, para. 7.3; *Clarence Marshall v. Jamaica*, communication No. 730/1996, para. 6.6). This being so, I cannot understand how the Committee can fail to find a violation of article 6 in the present case, *El Hagog Jumaa v. Libya*, when it has established that violations of articles 7 and 14 of the Covenant occurred in the course of the proceedings against Mr. Ashraf Ahmad El Hagog Jumaa.
6. The commutation of the death sentence cannot erase the violation committed; the violation in question was committed precisely at the moment when the death sentence was upheld by decision of the Libyan Supreme Court, dated 11 July 2007.

7. The effect of the commutation of the death sentence in the present case is to avoid the commission of arbitrary deprivation of the right to life and resultant responsibility for the State for violation of article 6, paragraph 1, but it cannot extend to treating a violation that was indeed committed, in this case of article 6, paragraph 2, as not having occurred.

8. As I have previously argued, in both individual and joint opinions, the Committee must duly pronounce on all violations committed in a case, because this has practical consequences – for instance, in regard to due compensation.<sup>a</sup>

9. The Committee should reaffirm its jurisprudence which offers the greatest guarantees in this respect; the principles of progressiveness and non-regressiveness require that a victim of a violation of the Covenant deserves, as a minimum, a measure of protection and resolution equal to that accorded in previous cases decided by the same body, in the most protective interpretation.<sup>b</sup>

10. Accordingly, while acknowledging the commutation of the death sentence in the present instance, I consider that the Committee ought to have indicated that there was also a violation of article 6, paragraph 2, of the International Covenant on Civil and Political Rights in the El Hagog Jumaa case.

[Done 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 to the General Assembly.]

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<sup>a</sup> See communication No. 1378/2005, *Kasimov v. Uzbekistan*, Views adopted on 30 July 2009, partly dissenting opinion of Committee member Mr. Fabián Salvioli, paras. 4, 7 and 8; and communication No. 1284/2004, *Kodirov v. Uzbekistan*, Views of 20 October 2009, partly dissenting opinion of Committee members Ms. Christine Chanet, Ms. Zonke Zanele Majodina and Mr. Fabián Salvioli, paras. 3, 6 and 7.

<sup>b</sup> *Ibid.*

**H. Communication No. 1759/2008, *Traoré v. Côte d'Ivoire*  
(Views adopted on 31 October 2011, 103rd session)\***

<i>Submitted by:</i>	Zoumana Sorifing Traoré (represented by the World Organization against Torture, OMCT)
<i>Alleged victims:</i>	The author and his cousins Chalio Traoré and Bakary Traoré
<i>State party:</i>	Côte d'Ivoire
<i>Date of communication:</i>	29 November 2007 (initial submission)
<i>Subject matter:</i>	The arbitrary arrest and detention, torture and holding in inhuman conditions of one person and the enforced disappearance of his cousins who were accused of political dissent
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to life, prohibition of torture and cruel and inhuman treatment, right to liberty and security of the person, the inherent dignity of the human person, the right to an effective remedy
<i>Article of the Covenant:</i>	2, para. 3; 6, para. 1; 7; 9; and 10, para. 1
<i>Article of the Optional Protocol:</i>	5, para. 2 (b)

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

*Meeting on 31 October 2011,*

*Having concluded* its consideration of communication No. 1759/2008, submitted to the Human Rights Committee by Zoumana Sorifing Traoré 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. The author of the communication, dated 29 November 2007, is Mr. Zoumana Sorifing Traoré, a Côte d'Ivoire national born on 12 November 1977, acting on his own

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

The text of the dissenting opinion of Committee members Mr. Krister Thelin and Mr. Michael O'Flaherty is appended to the present document.

behalf and on behalf of his cousins, Mr. Chalio Traoré and Mr. Bakary Traoré, born, respectively, in 1971 and 1974. He claims to be a victim of a violation by Côte d'Ivoire of articles 2, paragraph 3; 7; 9, paragraphs 1, 2, 3, 4 and 5; and article 10 of the Covenant. He also claims that his cousins were victims of a violation of the same articles and of article 6, paragraph 1, of the Covenant. The author is represented by the World Organization against Torture (OMCT).<sup>1</sup>

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

2.1 In September 2002, the author, then aged 25, was a student living in a rented room at a university residence in Williamsville (Abidjan). He was a member of the Rassemblement des Républicains (RDR) and of the committee of the organization's youth wing, the Rassemblement des Jeunes Républicains (RJR), at his campus, but he was only a sympathizer, not a militant activist. To finance his studies, he also worked as a day labourer in the company GESTOCI. His cousin, Bakary Traoré, had found him the job.

2.2 Bakary Traoré, who was born in 1974, worked as an electrician at GESTOCI. Bakary had a brother, Chalio Traoré, born in 1971, who repaired sewing machines at the large market in the Adjamé neighbourhood. Bakary Traoré was also a member of RDR and had been one for several years. He had also once been the President of RJR. Chalio Traoré was no more than an RDR sympathizer.

2.3 On 18 September 2002, fighting broke out in Abidjan and spread to other towns across the country as three armed opposition groups clashed with Government forces (the army and the security forces). At about 11 o'clock on the morning of 19 September, after a night of fighting, the author received a visit from his cousin Bakary Traoré. Caught by the curfew later that day, they decided he should spend the night at the author's residence. At 8 o'clock the following morning, Bakary Traoré returned to his own home.

2.4 Given the worsening security situation, the author decided not to leave his room. During the night of 22–23 September, armed men in military fatigues burst into his room. Without giving a reason or producing a warrant for the search, they asked him his name and went through everything in his room. When they did not find anything, they beat him savagely. The author was then arrested and driven to the headquarters of the security agency, the Republican Security Company (CRS), one street away from his university residence. The CRS agents called him a "belligerent" and threatened to kill him. They burned him with their cigarettes, beat him with their fists and their truncheons, kicked him, and shot water into his eyes using a high-powered jet. The author received such a heavy blow to his left eye that it was severely and permanently damaged. The condition of his eye has worsened over time and the injury is now irreparable.

2.5 Shortly after his arrest, the author was interrogated. One of the agents asked him if he knew Bakary Traoré. The author replied that Bakary Traoré was his cousin. The agent then asked what Bakary Traoré did for a living, and the author replied that he was an electrician at GESTOCI. The agent asked the same questions about Chalio Traoré. The author said that he knew Chalio Traoré as well since he was Bakary Traoré's brother and therefore also his cousin. He told the agents that Chalio Traoré repaired sewing machines at the main market in Adjamé. That was when the agents shouted out, "That's them! You are all belligerents! You'll see!" The CRS agents then told him that his cousins, Bakary Traoré and Chalio Traoré, had been arrested, together with Bakary Traoré's girlfriend, Charlotte Balma. The authorities suspected Chalio Traoré of being an accomplice to the rebels.

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<sup>1</sup> The Covenant and its Optional Protocol entered into force for Côte d'Ivoire on 26 March 1992 and on 5 March 1997, respectively.

According to some, he was supposed to have helped belligerents who had been injured in the fighting. According to others, he had participated in the fighting himself and had been reported to the police by the doctor who had tended his wounds. During the interrogation, the CRS agents told the author that they had “processed” his cousins and soon it would be his turn. They then asked him to tell them the names of his accomplices, but he said nothing. It was at that moment that one agent grabbed some pincers and placed the author’s second toe of his right foot between the two blades. When he did not get a response from the author, he brutally severed his toe.

2.6 A short time after this incident, the author’s cousins and Charlotte Balma were also brought to CRS headquarters. The author saw that all three had been tortured. Chalio Traoré’s left arm was “ripped open” and he had a gash in one hand. He was asking the agents to kill him. He had the worst injuries of the group. Bakary Traoré had a huge wound on his back as if he had been dragged over the ground. He also had injuries on his face and could barely stand. On the night of 23 September 2002, all four were transferred to Abidjan police headquarters in the Le Plateau district and then to the facilities of the criminal investigation police, also in Le Plateau. Apart from Ms. Balma, all of them were tortured in the criminal investigation police facilities. During the interrogations, the author was beaten with a truncheon. He was also given electric shocks. Finally he was locked up in a security cell. Bakary and Chalio Traoré underwent the same kinds of interrogations. They ended up confessing to having participated in the attack on the gendarmerie in Agban (Abidjan) and of having been trained for a year by Chief Sergeant Ibrahim Coulibaly. The author supposes that they confessed owing to the intense torture they were put through or in order to protect him. The author received treatment for his severed toe but his cousins did not receive any medical attention whatsoever.

2.7 On the afternoon of 27 September 2002, the author and his relatives were transferred to the facilities of the Investigative Gendarmerie in the Le Plateau district of Abidjan. There they were questioned by gendarmes, who threatened to kill them. They received no food or drink. On that day they were visited by representatives of the International Committee of the Red Cross (ICRC), whose request to attend to Chalio and Bakary Traoré was met with opposition from the gendarmes. That evening, they were transferred with Ms. Balma to the gendarmerie in the Adjamé neighbourhood of Abidjan. The author received a second visit from ICRC representatives on 14 October 2002. On 29 September 2002, in the author’s presence, Chalio Traoré was taken away by men wearing the uniform of the presidential security guard, who were acting on the orders of their commander, Colonel Dogbo. They returned the next day, 30 September 2002, to take away Bakary Traoré. The two brothers have been missing ever since. The author believes they have been unlawfully executed. The author was then held for seven months, mainly in the Abidjan Detention and Correction Centre. He never saw or heard from his cousins again.

2.8 On 15 October 2002, while he was still being held at the facilities of the Investigative Gendarmerie in Abidjan, the author was brought before a judge for the first time. The judge informed him that he was being prosecuted for “undermining the authority of the State, membership of an armed gang, possession of weapons of war, criminal association, political assassination, rape, pillage and the destruction of persons and public assets”. The author took advantage of the opportunity of appearing before a judge to denounce the torture to which he had been subjected and to report the disappearance of his cousins. The judge replied that it was for the public prosecutor to open an inquiry into complaints of torture.

2.9 After the hearing, the judge issued a detention order for the author and instructed that he be taken that same day to the Abidjan Detention and Correction Centre. He was therefore transferred to the Centre on 15 October 2002, at the same time as Ms. Balma. He was placed in building C, the Centre’s high security wing, which contains the punishment



cells reserved for dangerous criminals. The cells measure about five square metres and are divided into two rooms. They contain a toilet, a 20-litre water container and a concrete bed. A hole in the ceiling covered by iron bars is the only source of ventilation, and the daylight it lets in is the only source of light. During the time that the author was there, prisoners were kept naked, 10–12 to a cell. They slept on the floor, received no medical attention whatsoever, and were allowed only one shower a week, without soap. There was one meal a day, which consisted of a beaker of cooked white rice without any kind of sauce. Detainees were not allowed to receive visits from family members. All that relatives were allowed to do was bring them food every Wednesday, but often they would be bullied by ordinary prisoners into handing over their food to them instead.

2.10 While held at the Abidjan Detention and Correction Centre, the author's eye was examined for the first time by a doctor. The doctor said that a thorough ophthalmologic examination was necessary but he was not able to obtain authorization for a medical visit. During his time at the Centre, the author was brought before the judge on three more occasions. Each time he denounced the treatment he was receiving there, and each time the judge referred to the public prosecutor's competence in the matter. On 18 April 2003, after seven months in detention, the author was released by order of the judge in compliance with the Linas-Marcoussis Agreement.<sup>2</sup> After leaving prison, he was threatened by certain security agents. The author claims that he is being sought by the police unit responsible for the disappearance of his cousins because he has managed to identify one of the men in military fatigues who participated in their disappearance. On more than one occasion, he was close to being arrested by agents from the unit in question.

2.11 In the face of relentless pressure, the author eventually fled Côte d'Ivoire on 7 October 2006 for Morocco. Upon arrival, he contacted the Office of the United Nations High Commissioner for Refugees (UNHCR) in Morocco. He was granted refugee status there on 24 April 2007, but his health deteriorated, and UNHCR decided to transfer him to another country for urgent medical treatment. He was therefore sent to Norway on 29 June 2007 to receive the medical attention he needed. He has been living there ever since.

2.12 As regards the exhaustion of domestic remedies, the author has tried to lodge an appeal with various authorities. While still in custody, he denounced the acts of torture to which he was subjected to the judge. The judge each time refused to rule on the matter and never gave him any information on the appropriate course of action to take. The author also asked the judge on each occasion if he knew where the author's cousins were. The judge never answered. After leaving prison on 18 April 2003, the author tried to learn from his relatives what had become of his cousins, but he discovered that nobody had dared take any action for fear of reprisals.

2.13 In May 2003, the author contacted two lawyers, who advised against lodging a complaint on account of the situation in the country at the time. He consulted the United Nations Operation in Côte d'Ivoire (UNOCI), but nothing was done to help him. In 2004, he approached the United Nations International Commission of Inquiry for help, but none was forthcoming. On 20 April 2006, given the impossibility of seeking an effective legal remedy, the author turned to the Ministry of Solidarity and War Victims to claim compensation for damages suffered during his detention, under Act No. 2003-309, which granted amnesty for the acts perpetrated in Côte d'Ivoire as of 19 September 2002. He also mentioned his cousins' disappearance. The author had still not received a response to that claim when he submitted his communication to the Human Rights Committee. On 14 May

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<sup>2</sup> Agreement approved by the United Nations, the European Union and the African Union, which provides for the release of all persons detained for "threatening State security" and an amnesty for all soldiers prosecuted on those grounds.

2007, the author took steps to find his cousins through ICRC. ICRC had to end the investigation, however, because there was insufficient information on which to proceed.

### The complaint

3.1 The author maintains that the State party violated his rights under articles 2, paragraph 3; 7; 9, paragraphs 1, 2, 3, 4 and 5; and 10, paragraph 1, of the Covenant; and that it violated the rights of his cousins Chalio and Bakary Traoré under articles 2, paragraph 3; 6, paragraph 1; 7; 9, paragraphs 1, 2, 3, 4 and 5; and 10, paragraph 1, of the Covenant. The author asks the Committee to recognize these violations and to recommend that the State party should guarantee the launch of a thorough, independent and impartial investigation to identify those responsible, bring them before an independent, competent and impartial court and punish them as provided for by law.

3.2 With regard to his own case, the author draws attention first and foremost to the impossibility of filing a complaint in the judicial system and the silence of the competent authorities on the subject of compensation for war victims, which constitute a violation of article 2, paragraph 3, of the Covenant. In this regard, the author cites the six periodic reports of UNOCI and the reports prepared by non-governmental organizations on the period 2002–2007, which state that no effective remedies are available in Côte d'Ivoire to the victims of torture or other human rights violations.<sup>3</sup> The author also stresses the threats he would face if he pursued a legal remedy, since he is being sought by the police unit responsible for the disappearance of his cousins.

3.3 Moreover, pursuant to the Linas-Marcoussis Agreement, Act No. 2003-309 (the Amnesty Act), which grants amnesty for the acts that took place after 19 September 2002, was passed into law on 8 August 2003. The Amnesty Act was intended to promote national reconciliation by granting full amnesty to the perpetrators, joint perpetrators and accomplices involved in violations of State security and national defence, regardless of the nature of those violations or the penalties they incurred or might incur. At the same time, the Act provided for victim compensation inasmuch as it stated that the modalities for granting indemnity and reparation and arranging rehabilitation were to be determined by law. Those modalities have never been defined, however. It was therefore impossible at the time of the events in question for victims' relatives to obtain reparation under the Amnesty Act. The author stresses that he was not in a position to claim his rights in Côte d'Ivoire since domestic remedies were neither available nor effective, in fact or in law.

3.4 From his arrest, on 22 September 2002, until his transfer to the Abidjan Detention and Correction Centre, on 15 October 2002, the author was detained without any member of his family being told where he was. At no time was he able to contact his relatives. Nor was he able to get in touch with any family members during the six months he was held at the Abidjan Detention and Correction Centre. During the first weeks of his detention at the

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<sup>3</sup> The author cites six periodic reports prepared by the Human Rights Division of UNOCI on the human rights situation in Côte d'Ivoire during the period January 2005–December 2006. The author also cites the reports of Human Rights Watch and Amnesty International, particularly Human Rights Watch's report "Côte d'Ivoire: le Coût de l'Impasse Politique pour les Droits Humains" (Côte d'Ivoire: The costs of the political impasse for human rights), of 21 December 2005, p. 27. The author also cites the report of the International Commission of Inquiry into allegations of human rights violations in Côte d'Ivoire, entitled "Rapport sur la situation des droits de l'homme en République de Côte d'Ivoire depuis le 19 septembre 2002 jusqu'au 15 octobre 2004, conformément aux dispositions de l'Annexe VI de l'Accord de Linas-Marcoussis" (Report on the human rights situation in Côte d'Ivoire between 19 September 2002 and 15 October 2004, in accordance with the annex VI provisions of the Linas-Marcoussis Agreement) and the Statement by the President of the Security Council of 25 May 2004 (S/PRST/2004/17).

Centre, he suffered severe torture, and holding conditions failed to meet the United Nations Standard Minimum Rules for the Treatment of Prisoners.<sup>4</sup> He also received death threats and endured considerable suffering upon seeing his cousins tortured. He is still suffering today on account of his cousins' disappearance and the psychological impact of the torture he himself underwent. All the treatment described above constitutes torture, in violation of article 7, read in conjunction with article 10, paragraph 1, of the Covenant.

3.5 The author was not informed of the reasons for his arrest until 23 days after it had taken place. At no point during his detention did he have the opportunity to challenge the legality of his arrest or his detention before any kind of authority. Consequently, all the paragraphs of article 9 of the Covenant were violated in his case.

3.6 As regards Chalio and Bakary Traoré, the author cites article 7, paragraph 2 (i), of the Rome Statute of the International Criminal Court. The Ivorian authorities have made no attempt to investigate the two men's disappearance and have not given their families any information regarding their fate. Nobody from a government agency has been prosecuted for their disappearance, and no compensation has been given to their relatives. If they have died, then the State party has violated their relatives' right to be informed of the circumstances of their deaths and the location of their remains. The State party has thus violated the right to an effective remedy guaranteed in article 2, paragraph 3, of the Covenant.

3.7 According to the author, all the facts point to Chalio and Bakary Traoré having probably been extrajudicially executed. If this is the case, their killing could not have been motivated by the need to protect lives or prevent an escape. The Ivorian authorities thus arbitrarily deprived the victims of their lives, in violation of article 6, paragraph 1, of the Covenant. Their secret detention, ill-treatment and the appalling conditions in which they were detained together and separately constitute a violation of articles 7 and 10 of the Covenant.

3.8 Lastly, the author refers to the Committee's jurisprudence, which has concluded that cases of enforced disappearance, arbitrary arrest, prolonged secret detention and presumed death entail multiple violations of article 9 of the Covenant.

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

4.1 On 8 May 2009, the State party challenged the admissibility of the communication on the grounds that the author had not exhausted domestic remedies.

4.2 The State party maintains that the author has not provided evidence of the efforts made to exhaust domestic remedies. In the case of serious offences such as torture, extrajudicial executions and ill-treatment, the Ivorian Criminal Code allows all persons to file complaints of violations of which they are aware with the public prosecutor under articles 40–43 and 46 of the Criminal Code. The author, the relatives of the two disappeared men and human rights organizations could therefore petition the Ivorian criminal courts to open a judicial inquiry into the matter. The author himself could have filed a complaint with the police, since he alleges that he was taken away together with his cousins.

4.3 The State party further notes that according to settled jurisprudence, appearing before a judge (in this case the judge he had asked for news of his cousins) does not constitute seizure of the matter by the competent legal authority. The State party deduces that the author has not brought the matter to the attention of the competent courts, since it

<sup>4</sup> According to the conclusions of the Report of the International Commission of Inquiry (op. cit.) and the Statement by the President of the Security Council of 25 May 2004 (S/PRST/2004/17).

would be easy to prove if he had done so: copies of the court register, the prosecution service register or even the police report would show that the matter had been duly referred to the Ivorian judicial authorities. Since no such evidence exists, the author cannot claim that the Ivorian courts have been lax in their handling of the case.

4.4 Lastly, the State party notes that Ivorian law (the Criminal Code and the Code of Criminal Procedure) protects citizens from violations as serious as those alleged in this case. That is why the Amnesty Act implemented in 2003 is not applicable to serious violations of human rights and international humanitarian law. The State party maintains, therefore, that the requirement to exhaust all domestic remedies, in accordance with article 5, paragraph 2 (b), of the Covenant, has not been met.

4.5 On 7 September 2010, the State party added in a separate letter that the preceding observations regarding the allegations made by the author, on his own behalf and on behalf of his cousins, referred to both the admissibility and the merits of the case.

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

5.1 On 17 February 2011, the author submitted his comments on the State party's observations, noting first of all the considerable delay with which the State had submitted those observations. Also, the State party had not made any comment on the merits of the case. The lack of diligence on the part of the State party had considerably delayed the processing of the complaint, which had caused additional suffering to the author.

5.2 Given that only matters associated with the admissibility of the complaint had been raised by the State party, the author limits his comments to admissibility as well, on the grounds that the merits of the case are not being challenged. The author refers first to the initial submission in which he described in full the efforts made to exhaust domestic remedies. The Amnesty Act, as amended in 2007, makes it impossible to instigate criminal proceedings for acts of torture, which violates the author's right to an effective remedy. The author also argues that remedy proceedings have been unreasonably prolonged and their use constitutes an additional and real risk for the author. He maintains that no effective remedy is available to him in Côte d'Ivoire.

5.3 The author recalls that during his detention he appeared before a judge on four occasions and each time denounced the torture and ill-treatment he had suffered, as well as his cousins' disappearance. At each of the hearings held in the Palais de Justice of Abidjan, first on 15 October 2002 and then on three other occasions between then and 18 April 2003, the judge refused to consider the author's allegations. The judge merely referred to the public prosecutor's competence in such matters, saying that only the public prosecutor was empowered to open an enquiry and he (the judge) therefore had no part in the case. The author recalls the approach made to the Mouvement Ivoirien des Droits de l'Homme (Ivorian Human Rights Movement) (MIDH), which had steered him towards two lawyers who had dissuaded him from filing a complaint since "no lawyer or judge would risk assuming his defence in the current circumstances in the country". Unable to seek justice through the legal system, the author had turned to the Ministry of Solidarity and War Victims in an attempt to obtain reparation for the damages suffered and have an inquiry opened into his cousins' disappearance, but it was all in vain. Thus, despite the risks involved, the author had attempted to claim his rights through the courts and through administrative bodies, but his case had not been taken up in either instance.

5.4 The author maintains that the exception established in article 5, paragraph 2 (b), of the Optional Protocol, regarding the effectiveness and efficiency of domestic remedies and on the requirement that they are not unreasonably prolonged, should apply in his case. He refers to the Committee's jurisprudence in the case of *Phillip v. Trinidad and Tobago* in which it was decided that the author did not have to exhaust domestic remedies if it would

be dangerous to do so.<sup>5</sup> Also in the case of *Pratt and Morgan v. Jamaica*, the Committee ruled that the authors did not have to exhaust domestic remedies since, objectively, they had no chance of succeeding.<sup>6</sup>

5.5 After the troubles that the country has been through, the State party has not shown any political will to bring those responsible for serious human rights violations to justice. The judicial system has proven to be ineffective and subject to pressure from the executive and from outside influences. The author refers the Committee to the United Nations International Commission of Inquiry, which found that Côte d'Ivoire sorely lacks a neutral, impartial and independent body that is sufficiently effective to enable the peaceful settlement of conflicts.<sup>7</sup> Apart from the patent lack of judicial independence, the constant lack of security has made it impossible for private individuals to seek legal remedies. To file suit is tantamount to pointing oneself out to the authorities and therefore to placing one's life in danger. It is in that extremely worrying context that the author has in vain attempted to obtain justice. Under such circumstances, it is impossible for the author to claim his rights effectively and efficiently.

5.6 The author recalls that he fled Côte d'Ivoire and obtained refugee status in Morocco on account of the constant threats he was receiving in his own country. UNHCR recognized his refugee status on the basis of the serious physical abuse he had suffered during the interrogations he was subjected to and during which he had been forced to confess to acts he had not committed, bearing in mind that he had also been intimidated and threatened with death and that such treatment constituted torture. The author recalls that, after his release, he continued to receive direct threats from certain members of the security forces. The threats aimed to dissuade him from taking legal action. The author had nevertheless taken the risk of filing a complaint with a national administrative body (the Ministry of Solidarity and War Victims), which, considering the dangers involved, was beyond what could be expected of him.

5.7 The author notes that the Act granting amnesty for the acts that took place between 17 September 2000 and 19 September 2002, which was passed into law on 8 August 2003, served only to ensure impunity for the perpetrators of serious human rights abuses even though the text excludes "serious violations of human rights and international humanitarian law". The Act provides for the opening of inquiries into all such violations and compensation for victims. In practice, however, not a single inquiry has been conducted and no compensation has been awarded. A new Amnesty Act came into force under Ordinance No. 2007-457 of 12 April 2007. In content, it is practically identical to the previous one but covers a different period: it covers acts committed between 17 September 2000 and 12 April 2007. The new Act also removes the explicit exclusion of serious violations of human rights and humanitarian law from the amnesty. Given that these are the only substantial changes made to the 2003 Act, the author submits that the State party wishes to avoid any legal action being taken in regard to serious violations of human rights and international humanitarian law committed during the conflict in Côte d'Ivoire. Moreover, no enforcement measures have been implemented, rendering victims without any means to claim their rights.

5.8 As to the merits of the case, the author recalls his claims regarding articles 2, paragraph 3; 7, read in conjunction with article 10, paragraph 1; and 9 of the Covenant; as

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<sup>5</sup> Communication No. 594/1992, *Phillip v. Trinidad and Tobago*, Views adopted on 20 October 1998, para. 6.4.

<sup>6</sup> Communication No. 210/1986 and communication No. 225/1987, *Earl Pratt and Ivan Morgan v. Jamaica*, Views adopted on 6 April 1989, para. 12.3.

<sup>7</sup> Report of the International Commission of Inquiry, op. cit.

well as his claims regarding his cousins, in accordance with the same provisions and article 6, paragraph 1, 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 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 matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes the State party's objection that the author has not exhausted domestic remedies as he is required to do under article 5, paragraph 2 (b), of the Optional Protocol. The Committee also notes that, according to the State party, in the case of serious offences such as torture, extrajudicial executions and ill-treatment, the Ivorian Criminal Code states that any person may denounce violations to the public prosecutor under articles 40–43 and 46 of the Code, and that the author could have taken his complaint to the police himself. The Committee further notes that, according to the State party, the author has not referred the case to the competent legal authorities because raising a matter during a hearing before a judge does not represent seizure of that matter by the competent judicial authority.

6.4 The Committee notes that the author denounced the acts of torture to which he and his two cousins had allegedly been subjected, as well as the disappearance of his two cousins, to the judge when he was first brought before him on 15 October 2002, three weeks after his arrest; that the judge replied that it was the responsibility of the public prosecutor to open an inquiry into torture allegations; and that the case was never referred to the public prosecutor. The Committee also notes that these allegations of torture and enforced disappearance were made each time the author appeared before the same judge, that no inquiry was ever opened, and that the judge failed to inform the author of the procedures open to him for filing a complaint about the treatment received. The Committee notes the author's argument that legal remedies in Côte d'Ivoire are in fact not available due to the lack of independence of the judiciary, that he has been personally threatened since he left prison by members of the security forces, that those threats prevented him from taking the matter to court as such action would draw the attention of the authorities and therefore endanger his life, and that the author consequently had to flee to Morocco, where he was granted refugee status.

6.5 The Committee recalls its jurisprudence to the effect that authors must avail themselves of all judicial remedies in order to fulfil the requirement of exhaustion of all available domestic remedies, insofar as such remedies appear to be effective in the given case and are de facto available to the author.<sup>8</sup> In the case under consideration, the author made serious allegations of torture and enforced disappearances to the judge from 15 October 2002 onwards since the judge was the only authority to whom he had access while he was in detention. He was not able to refer the matter to the competent authorities after his release because he received serious threats to his person, which drove him to flee Côte d'Ivoire and obtain refugee status in a third country. The Committee also recalls that the

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<sup>8</sup> Communication No. 1003/2001, *P.L. v. Germany*, decision on admissibility adopted on 22 October 2003, para. 6.5. See also communication No. 433/1990, *A.P.A. v. Spain*, decision on admissibility adopted on 25 March 1994, para. 6.2.

State party has a duty not only to carry out thorough investigations of alleged violations of human rights brought to the authorities' attention, but also to prosecute, try and punish anyone held to be responsible for such violations.<sup>9</sup> On the basis of the information made available to it, the Committee finds that legal remedies have not in fact been open to the author and that insurmountable obstacles prevented him from exhausting all domestic remedies. Hence, the Committee considers that article 5, paragraph 2 (b), of the Optional Protocol does not constitute an impediment to the admissibility of the communication regarding the author and his cousins.

6.6 The Committee finds that the author has sufficiently substantiated, for purposes of admissibility, the allegations made on his own behalf and on behalf of his cousins insofar as they raise issues under articles 6, paragraph 1; 7; 9; 10; and 2, paragraph 3, of the Covenant, and therefore proceeds to consider the communication on the merits.

*Consideration of the merits*

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

7.2 The Committee notes that despite the repeated requests made by the Committee, the State party has provided observations only on the admissibility of the author's allegations, without presenting the required clarification regarding the merits of the case. Furthermore, these observations were submitted more than one year after the communication was brought to the attention of the State party. It recalls that the State party has a duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to furnish to the Committee the information available to it.<sup>10</sup> In cases where the allegations are corroborated by credible evidence submitted by the author and where further clarification depends on information that is solely in the hands of the State party, the Committee may consider an author's allegations to be substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party. In the absence of any explanations from the State party in this respect, due weight must be given to the author's allegations.<sup>11</sup>

7.3 The Committee notes the author's allegations that he and his cousins were subjected to torture, including cigarette burns, beatings, severe injury to the author's eye, the amputation of his right toe and electric shocks; the lack of adequate medical attention; and the disappearance of the author's cousins. Given that the State party has not refuted the facts, the Committee concludes that the acts of torture suffered by the author and his cousins, the secret detention of the same and the enforced disappearance of the author's cousins constitute violations of article 7 of the Covenant.<sup>12</sup>

7.4 The Committee notes the allegations regarding the conditions of detention of the author and his cousins at the facilities of the Investigative Gendarmerie in the Le Plateau

<sup>9</sup> Communication No. 1780/2008, *Zarzi v. Algeria*, Views adopted on 22 March 2011, para. 6.3.

<sup>10</sup> See, inter alia, communication No. 1640/2007, *El Abani v. Libyan Arab Jamahiriya*, Views adopted on 26 July 2010, para. 7.3; and communication No. 1780/2008, *Mériem Zarzi v. Algeria*, Views adopted on 22 March 2011, para. 7.3.

<sup>11</sup> See communication No. 1295/2004, *El Awani v. Libyan Arab Jamahiriya*, Views adopted on 11 July 2006, para. 6.5; communication No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para. 6.2; and communication No. 1761/2008, *Yubraj Giri v. Nepal*, Views adopted on 24 March 2011, para. 7.4.

<sup>12</sup> See communication No. 1761/2008, *Yubraj Giri v. Nepal*, Views adopted on 24 March 2011, para. 7.6.

district of Abidjan and the conditions of detention of the author at Abidjan Detention and Correction Centre. It notes that the State party has not contested the information. The Committee recalls that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; they must be treated in accordance with, inter alia, the Standard Minimum Rules for the Treatment of Prisoners.<sup>13</sup> It considers that the author's conditions of detention, as described, constitute a violation of the right of all persons to be treated with humanity and with respect for the inherent dignity of the human person and are, therefore, contrary to article 10, paragraph 1, of the Covenant.

7.5 With regard to the author's claim of a violation of article 9 of the Covenant, the Committee notes that the author was detained secretly at the premises of the Republican Security Company (CRS) and did not appear before a judge to be informed of the charges against him until three weeks after his arrest. In the absence of any pertinent explanations from the State party concerning the matter, the Committee concludes that there was a violation of article 9 of the Covenant.<sup>14</sup>

7.6 The author also invokes article 2, paragraph 3, of the Covenant, under which States parties are required to ensure access to effective remedies for all individuals whose rights, as recognized in the Covenant, have been violated. The Committee reiterates the importance which it attaches to States parties' establishment of appropriate judicial and administrative mechanisms for addressing alleged violations of rights, even during a state of emergency.<sup>15</sup> The Committee further recalls that failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.<sup>16</sup> In the present case, the information before the Committee indicates that the author did not have access to an effective remedy owing to the failure of the judicial authorities to duly investigate the allegations made by the author from 15 October 2002 onwards and the threats made against him to prevent him from pursuing the matter in the courts. With regard to the Amnesty Act of 2003, which was subsequently amended in 2007, the Committee notes the author's argument that the 2007 amendments exclude any possibility of criminal prosecution for serious violations of human rights or international humanitarian law. The Committee notes that the State party has referred only to the initial 2003 text of the Act and not to the amended version. The Committee therefore concludes that the facts before it reveal a violation of article 2, paragraph 3, read in conjunction with article 7, article 9, and article 10, paragraph 1, of the Covenant, with regard to the author.

7.7 With regard to the enforced disappearance and probable extrajudicial execution of the author's cousins, the Committee notes that on 29 September 2002, Chalió Traoré was, in the author's presence, taken away by men wearing the uniform of the presidential security guard acting on the order of their commander, Colonel Dogbo; that the men returned the next day, 30 September 2002, to take away Bakary Traoré; that since that date the two men have disappeared and the author thinks they have been extrajudicially executed; that the author first reported his cousins' disappearance to the judicial authorities on 15 October 2002, the date of his first appearance before a judge; and that his allegations were never investigated. The Committee also notes that the allegations have not been

<sup>13</sup> General comment No. 21 [44] on article 10, paras. 3 and 5; communication No. 1134/2002, *Fongum Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2; and communication No. 1813/2008, *Ebenezer Derek Mbongo Akwanga v. Cameroon*, Views adopted on 22 March 2011, para. 7.3.

<sup>14</sup> See communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.5; and communication No. 1469/2006, *Sharma v. Nepal*, Views adopted on 28 October 2008, para. 7.3.

<sup>15</sup> General comment No. 29 on article 4, A/56/40 (vol. I), annex VI, para. 14.

<sup>16</sup> General comment No. 31 on article 2, A/59/40 (vol. I), annex III, para. 15.



contradicted by the State party, which has not taken any steps to shed light on the fate of Mr. Chalio Traoré and Mr. Bakary Traoré. In accordance with the information made available to it, the Committee therefore concludes that there was a violation of articles 6, paragraph 1; 7; and 9, alone and read in conjunction with article 2, paragraph 3, of the Covenant.

7.8 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 of articles 7; 9; and 10, paragraph 1; and article 2, paragraph 3, read in conjunction with articles 7; 9; and 10, paragraph 1, of the Covenant vis-à-vis the author. The Committee is also of the view that articles 6, paragraph 1; 7; 9; and 10, paragraph 1, alone and read in conjunction with article 2, paragraph 3, of the Covenant were breached with regard to the author's cousins, Mr. Chalio Traoré and Mr. Bakary Traoré.

7.9 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy by: (i) ensuring a thorough and diligent investigation into the torture and ill-treatment suffered by the author and his cousins and into the enforced disappearance of the author's cousins, as well as the prosecution and punishment of those responsible; (ii) providing the author with detailed information on the results of its investigation; (iii) immediately releasing Chalio and Bakary Traoré if they are still being detained; (iv) if Chalio and Bakary Traoré have died, returning their remains to their relatives; and (v) providing the author and either Chalio and Bakary Traoré or their immediate families with reparation, including in the form of adequate compensation. The State party is also under an obligation to prevent similar violations in the future.

7.10 Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely distributed.

[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 to the General Assembly.]

## Appendix

### **Dissenting opinion of Mr. Krister Thelin and Mr. Michael O'Flaherty**

The Committee has concluded that there is a direct violation of article 6 of the Covenant in respect of Mr. Chaliou Traoré and Mr. Bakary Traoré. We disagree with this finding for reasons set out in our dissenting opinions in the two cases of enforced disappearance involving Algeria<sup>a</sup> which were decided during the same session as the present case. In the case before us, the Committee should not have found a violation of article 6, paragraph 1, on its own, but only in conjunction with article 2, paragraph 3, of the Covenant.

(Signed) Krister **Thelin**

(Signed) Michael **O'Flaherty**

[Done 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 to the General Assembly.]

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<sup>a</sup> Communication No. 1781/2008, *Djebrouni v. Algeria*, Views adopted on 31 October 2011 and communication No. 1811/2008, *Chihoub v. Algeria*, Views adopted on 31 October 2011.

**I. Communication No. 1772/2008, *Belyazeka v. Belarus*  
(Views adopted on 23 March 2012, 104th session)\***

<i>Submitted by:</i>	Syargei Belyazeka (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	23 February 2008 (initial submission)
<i>Subject matter:</i>	Breaking up a peaceful assembly aimed at commemorating the victims of the Stalinist repressions in violation of the right to express opinions and the right to hold a peaceful assembly without unreasonable restrictions
<i>Procedural issue:</i>	None
<i>Substantive issues:</i>	Right to freedom of expression; permissible restrictions; right to peaceful assembly
<i>Article of the Covenant:</i>	19, paragraph 2; 21
<i>Article of the Optional Protocol:</i>	None

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

*Meeting on 23 March 2012,*

*Having concluded* its consideration of communication No. 1772/2008, submitted to the Human Rights Committee by Syargei Belyazeka 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. The author of the communication is Syargei Belyazeka, a Belarusian national born in 1974, residing in Vitebsk, Belarus. He claims to be a victim of violations by Belarus of article 19, paragraph 2, and article 21 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 30 December 1992. The author is unrepresented.

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

### **Factual background**

2.1 On 30 October 2007, the author, together with 30 other inhabitants of Vitebsk whose relatives perished in the Stalinist camps in Soviet Russia, took part in a commemoration service. According to the author, all those who took part in the commemoration shared the view that the communist (Stalinist) regime was repressive and aimed at the suppression of political pluralism in Soviet society. Therefore, participation in the commemoration was a way for the author and other participants to collectively express their negative attitude to the violent suppression of all types of dissent. The commemoration was intended to include a visit to the location in the proximity of Polyai village where some of the victims of political repressions had been executed, as well as two cemeteries close to Voroni and Kopti villages, the laying of wreaths and the erection of a cross.

2.2 When the participants arrived at the parking lot next to the venue for the commemoration in Polyai village, police officers demanded that the commemoration be stopped, as in the opinion of the Deputy Head of the Vitebsk District Department of Internal Affairs, it was an unauthorized mass event, i.e. a “picket”. The participants refused to stop and were allowed to carry out the commemoration. When, however, they boarded a bus to continue to Voroni and Kopti villages, the Deputy Head of the Vitebsk District Department of Internal Affairs entered the bus and announced that he was breaking up the commemoration and that all the bus passengers were being detained as participants at an unauthorized mass event (“picket”). The participants, including the author, expressed their disagreement with this decision but obeyed the order.

2.3 The author, together with the other participants, was transported to the Vitebsk District Department of Internal Affairs on the bus, where an administrative protocol in relation to the author was drawn up. He was accused of committing an administrative offence under article 23.34, part 3, of the Code on Administrative Offences (violation of the established procedure for organizing or conducting a mass event or a “picket”).

2.4 On 31 October 2007, a judge of the Vitebsk District Court found the author guilty of having committed an administrative offence under article 23.34, part 3, of the Code on Administrative Offences and ordered him to pay a fine of 620,000 Belarusian roubles (20 baseline value units).<sup>1</sup> The author challenged in court the legal definition of his actions, since, inter alia, he did not display any flags and the commemoration took place in woodland and not in a public place. The court referred to article 2 of the Law on Mass Events of 30 December 1997, according to which:

a “picket” is a public expression by a citizen or by a group of citizens of public and political, group or individual and other interests or the protest (without a procession), including by hunger strike, on any issues, with or without the use of posters, banners and other materials.

The Vitebsk District Court concluded that, by actively taking part in a mass event in a public place and, in particular, by holding unfurled flags and a cross for a long period of time on the parking lot with the other participants at the mass event, the author publicly expressed his personal and other interests.

2.5 On 8 November 2007, the author filed a cassation appeal with the Vitebsk Regional Court against the ruling of 31 October 2007. In his appeal, the author stated that the Vitebsk District Court had erred in the legal definition of his actions. Specifically, the author submitted that he had not displayed any posters, banners or other propaganda materials and, therefore, could not publicly express any group, individual or other interests or protest.

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<sup>1</sup> Approximately US\$ 288.4/202.9 euros.

Even if he did take part in an unauthorized mass event (“picket”), article 23.34 of the Code on Administrative Offences proscribes a violation of the established procedure for the organization or holding of a mass event or of a “picket”, it does not penalize mere participation in a mass event of this type. Moreover, from 28 October 2007 to 3 November 2007, Christians in Belarus were observing the autumn day of the dead: the exercise of religious rites is not governed by Belarus laws. Lastly, the author claimed that the commemoration in which he took part was a peaceful citizens’ gathering. They did not pose a threat to national security, public safety, public order, the protection of public health, morals or rights and freedoms of others. Therefore, his right to peaceful assembly as guaranteed by the Belarus Constitution and by the international obligations of Belarus was violated.

2.6 On 28 November 2007, a judge of the Vitebsk Regional Court rejected the author’s appeal. The court referred to the Law on Mass Events,<sup>2</sup> which required participants at the commemoration to apply for the competent State authorities’ permission to hold a mass event. According to the author’s cassation appeal, no such application was submitted in the present case. Furthermore, article 23.34 of the Code on Administrative Offences provides for the administrative liability of an individual who repeatedly breaches the established procedure of organization or holding of a mass event or of a “picket” within a year after he or she has already been subjected to an administrative penalty for the same offence. The Vitebsk Regional Court noted that, on an earlier occasion, on 27 April 2007, the author had been found guilty of committing an administrative offence under article 23.34, part 1, of the Code on Administrative Offences and ordered him to pay a fine of 155,000 Belarusian roubles.<sup>3</sup>

2.7 On 21 December 2007, the author appealed the rulings of the Vitebsk District Court and the Vitebsk Regional Court to the Supreme Court under the supervisory review procedure. In his appeal, the author reiterated his argument that article 23.34 of the Code on Administrative Offences provides for administrative liability only for a violation of the established procedure of organizing or holding a mass action (“picket”) and not for mere participation therein. He, however, had merely participated in the commemoration and was neither among its organizers nor leading it. The Deputy Chair of the Supreme Court dismissed the author’s appeal on 4 February 2008. The Supreme Court took into account that the author had previously been the subject of an administrative penalty under article 23.34, part 1, of the Code on Administrative Offences and determined that the lower courts had correctly defined his actions under part 3 of the same article.

### **The complaint**

3.1 The author submits that his detention by the police on 30 October 2007 in the course of the commemoration interfered with his right to freedom of expression, as guaranteed by article 19, paragraph 2, of the Covenant. The author maintains that he did not display any flags, posters or other propaganda materials, as shown in the video recording presented by the police as proof of his guilt. Therefore, his acts were wrongly defined by the court as a mass event.

3.2 The author also submits that the commemoration was never intended to be a political, social or economic action and, for that reason, its participants did not request authorization for the organization of a mass event from the competent authorities. The

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<sup>2</sup> See article 5 of the Law on Mass Events (application for holding a mass event); article 6 (procedure for consideration of the application and passing the decision thereon); article 7 (appealing the decision on banning the holding of the mass event or on changing the date, place and time thereof).

<sup>3</sup> Approximately US\$ 72.3/53.6 euros.

commemoration in which he took part was a peaceful citizens' gathering, and the participants' actions neither impaired the rights and freedoms of others, nor resulted in damage to citizens' or municipal property. According to the author, the authorities had not presented any facts disclosing a breach of national security or of public order during the commemoration, and thereby endorsed its peaceful nature. Neither did they provide any documentary evidence of threats to the life and health of individuals, to their morals or breaches of their rights and freedoms. Therefore, the author claims that the State Party has also violated his right to peaceful assembly under article 21 of the Covenant.

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

4.1 By note verbale of 20 May 2008, the State party submitted its observations on the admissibility and merits of the communication. It confirms that, on 31 October 2007, a judge of the Vitebsk District Court found the author guilty of having committed an administrative offence under article 23.34, part 3, of the Code on Administrative Offences and ordered him to pay a fine of 20 baseline value units. The court had valid reasons for determining that the author, on 30 October 2007 at 12.30 p.m., took part in a public expression of personal and other interests at the parking lot on the Vitebsk–Liozno motorway in the proximity of Polyai village, without regard for the procedure for conducting mass events established by the Law on Mass Events. His participation in the said mass event was corroborated by witness statements and the video recording of the event that took place on 30 October 2007.

4.2 The State party submits that the conduct of the said mass event had not been authorized by either the head or deputy head of the local executive body. It adds that the Law on Mass Events aims at creating the conditions for the exercise of the constitutional rights and freedoms of citizens, and compliance with the Law serves as a guarantee for the protection of public safety and order in the course of such mass events. The State party concludes that the author's claims, alleging a violation of his constitutional rights and the international obligations of Belarus, are unfounded.

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

5.1 On 2 July 2008, the author commented on the State party's observations. He notes that under article 2, paragraph 2, of the Covenant, Belarus undertook to adopt such legal and legislative measures as may be necessary to ensure exercise of their rights by individuals subject to its jurisdiction. The author submits that article 33 of the Constitution guarantees freedom of thought, opinion and freedom of expression to everyone, while article 35 of the Constitution establishes that the "freedom to hold assemblies, meetings, street marches, demonstrations and 'pickets' that do not disturb law and order or violate the rights of other citizens of Belarus, shall be guaranteed by the State. The procedure for holding the above-mentioned events shall be determined by law." He states that these rights can be exercised by a citizen of Belarus under any circumstances, subject to the restrictions that are provided in law and are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

5.2 The author reiterates his argument that, at the time of his detention and in court, he was not accused of encroaching upon national security or public safety by his actions. Nor was he accused of breaching public order or making threats to the life and health of individuals, to their morals or in breach of their rights and freedoms. The author submits that he was fined for the mere fact of taking part in a "picket", which reportedly was organized without regard for the procedure for conducting mass events.

5.3 The author recalls that article 23.34 of the Code on Administrative Offences does not proscribe mere participation in a mass event. He adds that, at the time of his detention

and in court, it was not established that he either organized or led the commemoration. Therefore, as a mere participant in the event, he should not have been taken away from the venue and subjected to an administrative penalty. The author explains that by taking him away from the commemoration, the State party's authorities deprived him of the right to peaceful assembly. The peacefulness of the assembly is demonstrated by its aim of paying tribute to the victims of the Stalinist repressions. The peaceful nature of the commemoration has not been disputed by the police officers who detained the author, the State party's courts that have examined his case or by the State party in its observations to the Committee.

5.4 The author submits that by breaking up the commemoration, the State party's authorities also deprived him of the right to freedom of expression. He recalls that he did not display any posters, flags, banners or other propaganda materials and that the only way in which he expressed his opinion about past political repression was to take part in the event. The author adds that he deliberately chose this way of expressing his opinion, because it did not pose any threat to national security or public safety, public order, public health or morals or the rights and freedoms of others. The author asserts, therefore, that his rights under article 19, paragraph 2, and article 21 of the Covenant have been violated.

#### **Further submissions from the State party**

6.1 By note verbale of 11 December 2008, the State party submits that the author's claims concerning the unlawfulness of subjecting him to administrative liability under article 23.34, part 3, of the Code on Administrative Offences are unfounded. The State party explains that, further to the requirement of article 35 of the Constitution, the Law on Mass Events established the procedure for holding such events in order to create the conditions for the exercise of the constitutional rights and freedoms of citizens, as well as to ensure public safety and public order in the course of such mass events.

6.2 The State party argues that in his comments the author does not dispute the fact that he took part in the mass event on 30 October 2007, which he describes as a peaceful assembly, i.e. the commemoration. At the same time, the event in question took place at the parking lot, which was not intended for such purposes and then on the Vitebsk-Liozno motorway with the use of white/red/white flags. Flags of this colour combination, however, are not the official State symbol of Belarus.

6.3 The State party submits that the courts have correctly determined that the author took part in a "picket", a definition of which is contained in article 2 of the Law on Mass Events. This conclusion is supported by the fact that a number of individuals took part in the event, that they used symbols that were not the official State symbols of Belarus and that they intended to erect crosses in arbitrary locations. Furthermore, the said actions were accompanied by public statements.

6.4 The State party also points out that, contrary to the requirements of the Law on Mass Events, the "picket" of 30 October 2007 was not authorized. For this reason, police officers who arrived at the venue of the mass event indicated to the participants that they should stop it. This demand was not complied with. Therefore, the courts correctly determined that the author took part in a "picket" in violation of the established procedure for the conduct thereof. Since the author had committed a similar administrative offence less than a year before, having taken part in a "picket" on 30 October 2007, this time he was found guilty under article 23.34, part 3, of the Code on Administrative Offences.

6.5 The State party concludes by saying that the desire of a group of citizens to hold a mass event or to take part in it should not infringe the rights and freedoms of others. All persons are equal before the law and the State guarantees the protection of its citizens, inter alia, through ensuring compliance with the provisions of the Law on Mass Events.

**Further submissions from the author**

7.1 On 23 January 2009, the author submits that the State party's authorities have not adduced any additional arguments in support of their claim that he did not have the right to take part in a peaceful assembly, i.e. the commemoration, or to publicly express his opinion about the political repression in Soviet Russia. He adds that in its observations the State party has acknowledged that (1) the commemoration took place where the execution of the victims of political repressions was carried out; (2) the event was a peaceful assembly; (3) the commemoration took place in a rural area; (4) the symbols used by the participants (white/red/white flags and wooden crosses) have not been proscribed either by the law or courts; (5) the public statements did not contain any calls for the overthrow of government, the organization of mass riots or other unlawful action; (6) the State party's authorities (police officers) interfered with the peaceful assembly and expression of their opinion by the participants; (7) there is no information that the commemoration resulted in the infliction of moral suffering or bodily injuries to anyone; and (8) no individuals whose rights were infringed by the commemoration have been identified.

7.2 The author states that the commemoration took place in woodland where the execution of the victims of political repression was carried out and not at the parking lot or on the motorway. He notes that the State party's authorities have failed to identify the organizers of the event and instead have randomly punished selected participants of the commemoration. The author reiterates his argument that, by taking part in a peaceful assembly, he had legitimately expressed his opinion about the political repression that took place during the Stalinist regime. Consequently, the police officers' demand that the commemoration be stopped was not aimed at suppressing the author's unlawful actions but rather at depriving him of the right to peaceful assembly and the right to freedom of expression.

**Additional submissions from the State party**

8.1 By note verbale of 25 May 2009, the State party reiterates its earlier arguments, summarized in paragraphs 6.2–6.5 above, and adds that article 19, paragraph 3, of the Covenant provides for the possibility to subject the exercise of the rights provided for in paragraph 2 of this article to certain restrictions. Article 21 of the Covenant guarantees the right of peaceful assembly. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

8.2 The State party argues that Belarus has implemented provisions of the Covenant, including articles 19 and 21 thereof, into its national legislation.<sup>4</sup> At the same time, article 23 of the Constitution allows for restrictions upon personal rights and freedoms but only in the instances specified by law, in the interest of national security, public order, protection of public health and morals, as well as of the rights and freedoms of other persons.

**Additional submissions from the author**

9. On 21 July 2009, the author submitted that his political opinions in general differ from those of the current establishment in Belarus and that he has been punished on numerous occasions for taking part in peaceful assemblies and expressing his views. He concludes that in violation of article 2, paragraph 1, of the Covenant, the State party has failed to take the necessary measures to ensure exercise of his right of peaceful assembly

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<sup>4</sup> Reference is made to articles 33 and 35 of the Constitution.



and the right to freedom of expression due to his political and other opinions and, in particular, his negative attitude to the Stalinist repressions in Soviet Russia. The author, therefore, respectfully requests the Committee to determine that his rights under article 19, paragraph 2, and article 21 of the Covenant have been violated.

### **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 case is admissible under the Optional Protocol to the Covenant.

10.2 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. In the absence of any objection by the State party, the Committee considers that the requirements of article 5, paragraph 2(b), of the Optional Protocol have been met.

10.3 The Committee considers that the author's claims under article 19, paragraph 2, and article 21 of the Covenant are sufficiently substantiated, for purposes of admissibility, declares them admissible and proceeds to their examination on the merits.

#### *Consideration of the merits*

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

11.2 The Committee notes the author's claim that, by breaking up, on 30 October 2007, the commemoration to honour the victims of the Stalinist repressions in Soviet Russia, the State party's authorities violated his right to freedom of expression under article 19, paragraph 2, of the Covenant, since he was taken away from the commemoration and subsequently fined 620,000 Belarusian roubles for publicly expressing personal and other interests during the unauthorized "picket". It further notes the State party's contention that the author was subjected to administrative liability under article 23.34, part 3, of the Code on Administrative Offences for having breached the procedure for organizing and holding mass events.

11.3 The first issue before the Committee is whether or not the application of article 23.34, part 3, of the Code on Administrative Offences to the author's case, resulting in the termination of the commemoration and the subsequent fine, constituted a restriction within the meaning of article 19, paragraph 3, on the author's right to freedom of expression. The Committee notes that article 23.34, part 3, of the Code on Administrative Offences establishes administrative liability for violation of the established procedure for organizing or conducting a mass event. It also notes that since the State party imposed a "procedure for holding mass events", it effectively established restrictions regarding the exercise of the freedom to impart information, guaranteed by article 19, paragraph 2, of the Covenant.<sup>5</sup>

11.4 The second issue is, therefore, whether in the present case such restrictions are justified under article 19, paragraph 3, of the Covenant, i.e. are provided by law and necessary: (a) for respect of the rights or reputations of others; and (b) for the protection of national security or of public order (*ordre public*), or of public health or morals. The

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<sup>5</sup> Communication No. 780/1997, *Laptsevich v. Belarus*, Views adopted on 20 March 2000, para. 8.1.

Committee recalls that freedom of opinion and freedom of expression are indispensable conditions for the full development of the person, that they are essential for any society, and that they constitute the foundation stone for every free and democratic society.<sup>6</sup> Any restrictions on their exercise must conform to the strict tests of necessity and proportionality and “must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated”.<sup>7</sup>

11.5 The Committee observes that, in the present case, the State party has argued that the provisions of the Law on Mass Events are aimed at creating the conditions for the exercise of the constitutional rights and freedoms of citizens and the protection of public safety and public order in the course of such mass events. The Committee also observes that the author has argued that article 23.34 of the Code on Administrative Offences does not apply to him, since it does not provide for administrative liability for mere participation in a mass event. Furthermore, since such commemorations are not governed by Belarusian laws, the participants at the commemoration that took place on 30 October 2007 did not request authorization for the organization of a mass event from the competent authorities. In this regard, the Committee notes that the author and the State party disagree on whether the commemoration in question constituted a “mass event” that was subject to the “procedure for holding mass events” established by the Law on Mass Events, whether article 23.34 of the Code on Administrative Offences proscribes mere participation in a mass event and whether the author displayed any flags, or other symbols or propaganda materials.

11.6 Even if the sanctions imposed on the author were permitted under national law, the Committee notes that the State party has not advanced any argument as to why they were necessary for one of the legitimate purposes set out in article 19, paragraph 3, of the Covenant, and what dangers would have been created by the author’s publicly expressing his negative attitude to the Stalinist repressions in Soviet Russia. The Committee concludes that in the absence of any pertinent explanations from the State party, the restrictions on the exercise of the author’s right to freedom of expression cannot be deemed necessary for the protection of national security or of public order (*ordre public*) or for respect for the rights or reputations of others. The Committee therefore finds that the author’s rights under article 19, paragraph 2, of the Covenant have been violated in the present case.

11.7 The Committee further notes the author’s claim that his right to freedom of assembly under article 21 of the Covenant was violated, since he was arbitrarily prevented from holding a peaceful assembly. In this context, the Committee recalls that the rights and freedoms set forth in article 21 of the Covenant are not absolute but may be subject to limitations in certain situations. The second sentence of article 21 of the Covenant requires that no restrictions may be placed on the exercise of the right to peaceful assembly other than those imposed (1) in conformity with the law and (2) which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.<sup>8</sup>

11.8 In the present case, the Committee must consider whether the restrictions imposed on the author’s right to freedom of assembly are justified under any of the criteria set out in the second sentence of article 21 of the Covenant. The Committee notes the State party’s assertion that the restrictions were in accordance with the law. However, the State party has

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<sup>6</sup> See Human Rights Committee general comment No. 34 (2011) on article 19, Freedoms of opinion and expression, para. 2.

<sup>7</sup> *Ibid.*, para. 22.

<sup>8</sup> See communication No. 1604/2007, *Zaleskaya v. Belarus*, Views adopted 28 March 2011, para. 10.6.

not provided any information as to how, in practice, commemorating the victims of the Stalinist repressions would violate the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others as set out in article 21 of the Covenant. Accordingly, the Committee concludes that in the present case, the State party has also violated the author's right under article 21 of the Covenant.

12. 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 facts before it disclose a violation by Belarus of article 19, paragraph 2, and article 21 of the Covenant.

13. Pursuant to article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including reimbursement of the value of the fine as at October 2007, any legal costs incurred by the author and compensation. The State party is also under an obligation to take steps to prevent similar violations in the future.

14. 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 and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views, and to have them widely disseminated in Belarusian and Russian in the State party.

[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 to the General Assembly.]

**J. Communication No. 1781/2008, *Berzig v. Algeria*  
(Views adopted on 31 October 2011, 103rd session)\***

<i>Submitted by:</i>	Fatma Zohra Berzig (represented by TRIAL – Swiss Association against Impunity)
<i>Alleged victims:</i>	Kamel Djebrouni (the author's son) and the author herself
<i>State party:</i>	Algeria
<i>Date of communication:</i>	8 February 2008 (initial submission)
<i>Subject matter:</i>	Enforced disappearance
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to life, prohibition of torture and cruel and inhuman treatment, right to liberty and security of person, respect for the inherent dignity of the human person, recognition as a person before the law and right to an effective remedy
<i>Article of the Covenant:</i>	Article 2, paragraph 3; article 6, paragraph 1; article 7; article 9, paragraphs 1 to 4; article 10, paragraph 1; and article 16
<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 31 October 2011,

*Having concluded* its consideration of communication No. 1781/2008, submitted to the Human Rights Committee by Fatma Zohra Berzig 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:

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\* The following members of the Committee participated in the consideration of the present communication: Mr. Abdelfattah Amor, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Lazhari Bouzid did not take part in the examination of the present communication.

The texts of two individual opinions, signed by Mr. Michael O'Flaherty, Mr. Krister Thelin, Mr. Fabián Omar Salvioli and Mr. Cornelis Flinterman, are appended to the present Views.

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

1.1 The author of the communication, dated 8 February 2008, is Fatma Zohra Berzig, an Algerian citizen born on 2 March 1936. She submits this communication on behalf of her son, Kamel Djebrouni, who was born on 10 July 1963 in Sidi M'hamed, Algiers. The author also submits the communication on her own behalf. The author considers that her son is the victim of violations by Algeria of article 2, paragraph 3; article 6, paragraph 1; article 7; article 9, paragraphs 1 to 4; article 10, paragraph 1; and article 16 of the Covenant. She also considers herself to be the victim of violations of article 2, paragraph 3, and article 7 of the Covenant. She is represented by TRIAL (Swiss Association against Impunity).<sup>1</sup>

1.2 On 12 March 2009, the Special Rapporteur on new communications, acting on behalf of the Committee, rejected the State party's request, dated 3 March 2009, that the Committee should consider the admissibility of the communication separately from the merits.

### The facts as submitted by the author

2.1 On 20 November 1994 at 2 a.m., about 15 armed soldiers in uniform and wearing hoods raided the home of Kamel Djebrouni in Cité Balzac, Sidi M'hamed (Algiers) and arrested him. The soldiers had arrived in army vehicles and a small armoured truck. At first, they went to the wrong door. A neighbour who heard that the soldiers were looking for "Kamel the taxi driver" directed them to the Djebrouni family home. They woke up the author and her three sons, asked Kamel Djebrouni for his papers and car keys and forced him to accompany them. As her son was wearing only a tracksuit and tee-shirt, the author asked the soldiers to allow him time to dress. One of the soldiers replied that he would only be gone for a few minutes and that they would soon release him.

2.2 The victim has never returned home and the authorities have failed to inform his family of his fate. The only news his family has received dates from 23 February 1995, when one of the missing man's former colleagues went to the family's home to inform them that a former detainee, whose name and address he was unwilling to reveal and whom the security forces had released 17 days earlier, claimed to have shared a cell with the victim. However, the Djebrouni family was unable to speak to the fellow detainee directly.

2.3 Immediately after Kamel Djebrouni's arrest, his brother went to the local police station (in the eighth arrondissement). The officers on duty said that they could not give him any information about his brother and advised him to wait until the end of the 12-day custody period established under the anti-terrorist law. Once that period had elapsed, his family approached various courts in Algiers to find out whether Kamel Djebrouni had been brought before a prosecutor.

2.4 On 11 January 1995, the victim's brother provided the National Human Rights Observatory with details of the arrest. The official who received him told him that a request to trace the victim would be sent to the various security forces and that he would be notified in writing of the results of the investigation. The Observatory has never provided the family with any information about the victim, even though his brother followed up his visit with a number of telephone calls and wrote to them more than three years later (14 February 1998).

2.5 On 12 September 1998, gendarmes went to the family home in search of the victim. They asked the author to report the following day to the Bab Edjedid gendarmerie with her family civil-status book and two witnesses to the arrest. The author, her son and two

<sup>1</sup> The Covenant and its Optional Protocol entered into force for Algeria on 12 September 1989.

witnesses went to the gendarmerie on 13 September 1998. The gendarmes took the son's statement first, then interviewed the two witnesses separately. They decided to record only the first witness's statement, on the ground that the second witness had seen nothing. The author and the two witnesses challenged that decision and went on, nonetheless, to record their version of events in a signed written statement authenticated by the Daira of Sidi M'hamed on 24 September 1998.

2.6 On 9 June 1999, the National Human Rights Observatory wrote to Kamel Djebrouni's family informing them that efforts to trace him had failed nor was he wanted by the security services or been arrested by them, as indicated in the report forwarded by the gendarmerie on 15 September 1998, just two days after they had interviewed the family and witness. The family was not informed of the investigative measures taken by the security forces and never received a copy of the report referred to in the letter from the National Human Rights Observatory. The author points out that the date of arrest mentioned in the letter sent to the family on 9 June 1999 is wrong. The victim was arrested on 20 November 1994 and not on 2 September 1995, as stated in the letter. On 24 August 1999, the author's son wrote to the Secretary-General of the National Human Rights Observatory drawing his attention to the error.

2.7 On 27 July 2004, the National Advisory Commission on the Promotion and Protection of Human Rights (CNCPPDH), the successor body to the National Human Rights Observatory, wrote to the Djebrouni family requesting them to report for an interview at their head office on 7 August 2004. The family appeared for the hearing and provided the Commission with all the factual elements pertaining to the victim's abduction. The family has not heard from the Commission since.

2.8 Also, having been informed of Kamel Djebrouni's disappearance by his family, Amnesty International submitted his case to the Working Group on Enforced or Involuntary Disappearances on 11 December 1995. The Working Group requested the Algerian State to initiate a search for the victim but the State party has taken no action.

### **The complaint**

3.1 The author considers that her son has been a victim of enforced disappearance<sup>2</sup> in violation of article 2, paragraph 3; article 6, paragraph 1; article 7; article 9, paragraphs 1 to 4; article 10, paragraph 1; and article 16 of the Covenant. The author also considers herself to be the victim of a violation of article 7, read alone and in conjunction with article 2, paragraph 3, of the Covenant.

3.2 Kamel Djebrouni's arrest by Government officials was followed by a refusal to admit that he had been deprived of liberty or to say what had happened to him. He was therefore deliberately denied the protection of the law. His prolonged absence and the circumstances and context of his arrest suggest that he died in custody. Invoking the Committee's general comment on article 6,<sup>3</sup> the author claims that incommunicado detention poses an unacceptable risk of a violation of the right to life, since victims are at the mercy of their jailers who, by the very nature of the circumstances, are subject to no oversight. Even in the event that disappearance does not lead to the worst, the threat to the person's life at the time constitutes a violation of article 6, insofar as the State has failed in its duty to protect the fundamental right to life.<sup>4</sup> The author adds that the State party's

<sup>2</sup> The author refers to the definition of "enforced disappearance" in paragraph 2 (i) of article 7 of the Rome Statute of the International Criminal Court and in article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance.

<sup>3</sup> The author refers to general comment No. 6 of 27 July 1982, para. 4.

<sup>4</sup> The author refers to communication No. 84/1981, *Dermot Barbato v. Uruguay*, Views adopted on 21

failure to comply with its obligation to guarantee Kamel Djebrouni's right to life was compounded by the fact that no effort was made to conduct an investigation into the victim's fate. The author therefore considers that the State party has violated article 6, read alone and in conjunction with article 2, paragraph 3, of the Covenant.

3.3 With reference to the Committee's jurisprudence, the author maintains that the mere fact of subjection to enforced disappearance constitutes inhuman or degrading treatment. Consequently, the anguish and suffering caused by the alleged victim's indefinite detention and complete lack of contact with his family and the outside world amount to treatment which is contrary to article 7 of the Covenant with respect to Kamel Djebrouni.<sup>5</sup> The author of the communication also considers that her son's disappearance constituted and continues to constitute for herself and the rest of her family a paralysing, painful and distressing experience given that they know nothing of his fate or, if he is in fact dead, of the circumstances of his death and where he is buried. In view of the Committee's jurisprudence on the issue,<sup>6</sup> the author concludes that the State party has also violated her rights under article 7, read alone and in conjunction with article 2, paragraph 3, of the Covenant.

3.4 The author notes that the authorities approached by the Djebrouni family failed to admit to holding the victim; that the State party explicitly denied, through the National Human Rights Observatory, that Kamel Djebrouni had been arrested by soldiers; that the Algerian authorities have still not admitted to arresting and illegally detaining him even though the arrest took place in the presence of witnesses. All of these facts reveal a violation of article 9, paragraphs 1 to 4, of the Covenant. With regard to article 9, paragraph 1, the author recalls that Kamel Djebrouni was arrested without a warrant and without being informed of the reasons for his arrest. No member of his family has seen him or been able to communicate with him since his abduction. It appears from the circumstances of Kamel Djebrouni's arrest that he was at no point informed of the criminal charges against him, in violation of article 9, paragraph 2, of the Covenant. Moreover, Kamel Djebrouni was not brought before a judge or other judicial authority such as the public prosecutor of the Court of Algiers, the town where he was arrested, which court has jurisdiction in the case, neither once the lawful period of police custody had started nor at its end. Recalling that incommunicado detention may constitute per se a violation of article 9, paragraph 3, the author concludes that this provision was violated in Kamel Djebrouni's case. In conclusion, as Kamel Djebrouni has been denied the protection of the law during the entire period of his indefinite detention, he has never been able to institute proceedings to contest the lawfulness of his detention or seek his release through the courts, in violation of article 9, paragraph 4, of the Covenant.

3.5 The author also maintains that, given his incommunicado detention in violation of article 7 of the Covenant, her son was not treated with humanity and with respect for the inherent dignity of the human person. Thus, she claims that her son was the victim of a violation by the State party of article 10, paragraph 1, of the Covenant.

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October 1982, para. 10.

<sup>5</sup> The author refers to the jurisprudence of the Committee, in particular communication No. 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006, para. 9.8; and communication No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003, para. 9.5.

<sup>6</sup> In addition to the above-mentioned jurisprudence, the author refers in particular to communication No. 1044/2002, *Shukurova v. Tajikistan*, Views adopted on 17 March 2006, para. 8.7; communication No. 959/2000, *Bazarov v. Uzbekistan*, Views adopted on 14 July 2006, para. 8.5; communication No. 1159/2003, *Sankara et al. v. Burkina Faso*, Views adopted on 28 March 2006, para. 12.2.

3.6 The author also claims that, as a victim of enforced disappearance, Kamel Djebrouni was denied the protection of the law, in violation of article 16 of the Covenant. The author refers in this connection to the Committee's position established in its jurisprudence on enforced disappearances.

3.7 The author furthermore maintains that, since all the steps she took to discover her son's fate were fruitless, the State party did not fulfil its obligation to guarantee Kamel Djebrouni an effective remedy, since it should have conducted an in-depth and diligent investigation into his disappearance. The absence of an effective remedy is compounded by the fact that a total and general amnesty was declared following the promulgation on 27 February 2006 of Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation, which prohibits, on pain of imprisonment, the pursuit of legal remedies to shed light on the most serious crimes such as enforced disappearances, guaranteeing impunity to the individuals responsible for violations. This amnesty law is in breach of the State's obligation to investigate serious violations of human rights and of the right of victims to an effective remedy. The author claims a violation of article 2, paragraph 3, of the Covenant with regard to herself and her son.

3.8 As to the exhaustion of domestic remedies, the author stresses that all her efforts and those of her family have been to no avail. By failing to initiate a prompt, serious and impartial investigation, the police officers of the eighth arrondissement were responsible for a failure not only to comply with the State party's international commitments, but also to enforce its domestic legislation, in that article 63 of the Algerian Code of Criminal Procedure states that "when an offence is brought to their attention, the judicial police, acting either on the instructions of the State prosecutor or on their own initiative, shall undertake preliminary inquiries".<sup>7</sup> Apart from approaches to the National Human Rights Observatory, later the National Advisory Commission on the Promotion and Protection of Human Rights, the only investigation undertaken to date is the one the gendarmerie claims to have conducted. However, that investigation was superficial and inadequate, the final report of the investigation having been sent to the Observatory just two days after the family and the only witness interviewed made their statements, although the hearing process generally marks the start of an investigation. The authorities even denied that State agencies were involved in Kamel Djebrouni's disappearance, even though the victim's entire family and some neighbours witnessed his abduction.

3.9 In the alternative, the author maintains that she no longer has the legal right to take judicial proceedings since the promulgation of Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation.<sup>8</sup> Not only did all the remedies attempted by the author prove ineffective, they are now also totally unavailable. The author therefore maintains that she is no longer obliged to keep pursuing her efforts at the domestic level,

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<sup>7</sup> Ordinance No. 66-155 of 8 June 1966 implementing the Code of Criminal Procedure, as amended and supplemented.

<sup>8</sup> The author notes that the Charter rejects "all allegations holding the State responsible for deliberate disappearances". Furthermore, article 45 of the Ordinance, promulgated on 27 February 2006, provides that "legal proceedings may not be brought against individuals or groups who are members of any branch of the defence and security forces of the Republic for actions undertaken to protect persons and property, safeguard the nation and preserve the institutions of the People's Democratic Republic of Algeria. Any allegation or complaint shall be declared inadmissible by the competent judicial authority". Article 46 provides that "anyone who, through his or her spoken or written statements or any other act, uses or makes use of the wounds caused by the national tragedy to undermine the institutions of the People's Democratic Republic of Algeria weaken the State, impugn the honour of its agents who served it with dignity or tarnish the image of Algeria abroad shall be liable to a term of imprisonment of 3 to 5 years or a fine of 250,000 to 500,000 Algerian dinars".



which would expose her to criminal prosecution, to ensure that her communication is admissible before the Committee.

#### **State party's observations on admissibility**

4.1 On 3 March 2009, the State party contested the admissibility of the communication and of 10 other communications submitted to the Human Rights Committee. It did so in a "background memorandum on the inadmissibility of communications submitted to the Human Rights Committee in connection with the implementation of the Charter for Peace and National Reconciliation". The State party is of the view that communications incriminating public officials, or persons acting on behalf of public authorities, in enforced disappearances during the period in question — from 1993 to 1998 — should be considered in the context of the socio-political and security conditions that prevailed in the country during a period when the Government was struggling to combat terrorism.

4.2 During that period the Government was obliged to combat groups that were not formally organized. Hence there was some confusion in the manner in which a number of operations were carried out among the civilian population, and it was difficult for civilians to distinguish between the actions of terrorist groups and those of the security forces, to whom civilians often attributed enforced disappearances. There are numerous explanations for cases of enforced disappearance, but they cannot, according to the State party, be blamed on the Government. Data documented by many independent sources, including the press and human rights organizations, indicate that the concept of disappearance in Algeria during the period in question covers six distinct scenarios, none of which can be blamed on the Government. The first scenario concerns persons reported missing by their relatives when in fact they chose to return secretly in order to join an armed group and asked their families to report that they had been arrested by the security services as a way of "covering their tracks" and avoiding "harassment" by the police. The second concerns persons who were reported missing after their arrest by the security services and who took advantage of their release to go into hiding. The third scenario concerns persons abducted by armed groups who, because they were not identified or had taken uniforms or identification documents from police officers or soldiers, were incorrectly identified as members of the armed forces or security services. The fourth scenario concerns persons who were reported missing but who had actually abandoned their families and in some cases even left the country because of personal problems or family disputes. The fifth scenario concerns persons reported missing by their families who were actually wanted terrorists who had been killed and buried in the maquis after factional infighting, doctrinal disputes or arguments over the spoils of war among rival armed groups. Finally, the sixth scenario concerns persons reported missing who were in fact living in Algeria or abroad under false identities created via a vast network of document forgers.

4.3 The State party stresses that it was in view of the diversity and complexity of the situations covered by the concept of disappearance that the Algerian legislature, following the referendum on the Charter for Peace and National Reconciliation, recommended a comprehensive approach to the issue of the disappeared under which the cases of all persons who had disappeared during the "national tragedy" would be dealt with, all victims would be offered support to overcome their ordeal and all victims of disappearance and their beneficiaries would be entitled to redress. According to statistics from the Ministry of the Interior, 8,023 disappearances have been reported, 6,774 cases examined, 5,704 approved for compensation and 934 rejected, with 136 still pending. A total of 371,459,390 Algerian dinars (DA) has been paid out as compensation to all the victims concerned. In addition, a total of DA 1,320,824,683 has been paid out in monthly pensions.

4.4 The State party further argues that not all domestic remedies have been exhausted. It stresses the importance of distinguishing between simple formalities involving the political

or administrative authorities, non-contentious remedies pursued through advisory or mediation bodies, and contentious remedies pursued through the relevant courts of justice. The State party observes that, as may be seen from the authors' statements,<sup>9</sup> the complainants have written letters to political and administrative authorities, petitioned advisory or mediation bodies and petitioned representatives of the prosecution service (chief prosecutors and public prosecutors), but have not actually initiated legal proceedings and seen them through to their conclusion by availing themselves of all available remedies of appeal and cassation. Of all these authorities, only the representatives of the prosecution service are authorized by law to open a preliminary inquiry and refer a case to an investigating judge. In the Algerian legal system, it is the public prosecutor who receives complaints and who institutes criminal proceedings if these are warranted. Nevertheless, in order to protect the rights of victims and their beneficiaries, the Code of Criminal Procedure authorizes the latter to sue for damages by filing a complaint with the investigating judge. In that case, it is the victim, not the prosecutor, who institutes criminal proceedings by bringing the matter before the investigating judge. This remedy, which is provided for in articles 72 and 73 of the Code of Criminal Procedure, was not used, despite the fact that it would have enabled the victims to institute criminal proceedings and compel the investigating judge to initiate an investigation, even if the prosecution service had decided otherwise.

4.5 The State party also notes the authors' contention that the adoption by referendum of the Charter for Peace and National Reconciliation and its implementing legislation — in particular, article 45 of Ordinance No. 06-01 — makes it impossible to consider that any effective and available domestic remedies exist in Algeria to which the families of victims of disappearance could have recourse. On this basis, the authors believed they were under no obligation to bring the matter before the relevant courts, thereby prejudging the position and findings of the courts on the application of the ordinance. However, the authors cannot invoke this ordinance and its implementing legislation to absolve themselves of responsibility for failing to institute the legal proceedings available to them. The State party recalls the Committee's jurisprudence to the effect that a person's subjective belief in, or presumption of, the futility of a remedy does not exempt that person from the requirement to exhaust all domestic remedies.<sup>10</sup>

4.6 The State party then turns its attention to the nature, principles and content of the Charter for Peace and National Reconciliation and its implementing legislation. It stresses that, in accordance with the principle of the inalienability of peace, which has become an international right to peace, the Committee should support and consolidate peace and encourage national reconciliation with a view to strengthening States affected by domestic crises. As part of this effort to achieve national reconciliation, the State party adopted the Charter, and its implementing ordinance prescribes legal measures for the discontinuance of criminal proceedings and the commutation or remission of sentences for any person who is found guilty of acts of terrorism or who benefits from the provisions of the legislation on civil dissent, except for persons who have committed or been accomplices in mass killings, rapes or bombings in public places. This ordinance also helps to address the issue of disappearances by introducing a procedure for filing an official finding of presumed death, which entitles beneficiaries to receive compensation as victims of the "national tragedy". Social and economic measures have also been put in place, including the provision of employment placement assistance and compensation for all persons considered victims of

<sup>9</sup> As the State party has provided a common reply to 11 different communications, it refers to the "authors". This reference thus also includes the author of the present communication.

<sup>10</sup> The State party cites, in particular, communications Nos. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989.

the “national tragedy”. Finally, the ordinance prescribes political measures, such as a ban on holding political office for any person who exploited religion in the past in a way that contributed to the “national tragedy”, and establishes the inadmissibility of any proceedings brought against individuals or groups who are members of any branch of Algeria’s defence and security forces for actions undertaken to protect persons and property, safeguard the nation and preserve its institutions.

4.7 In addition to the establishment of funds to compensate all victims of the “national tragedy”, the sovereign people of Algeria have, according to the State party, agreed to a process of national reconciliation as the only way to heal the wounds inflicted. The State party insists that the proclamation of the Charter for Peace and National Reconciliation reflects a desire to avoid confrontation in the courts, media outpourings and political score settling. The State party is therefore of the view that the authors’ allegations are covered by the comprehensive domestic settlement mechanism provided for in the Charter.

4.8 The State party asks the Committee to note how similar the facts and situations described by the authors are and to take into account the socio-political and security context at the time; to note that the authors failed to exhaust all domestic remedies; to note that the authorities of the State party have established a comprehensive domestic mechanism for processing and settling the cases referred to in these communications through measures aimed at achieving peace and national reconciliation that are consistent with the principles of the Charter of the United Nations and subsequent covenants and conventions; to find the above-mentioned communications inadmissible; and to request the authors to avail themselves of the appropriate remedy.

#### **Additional observations by the State party on the admissibility of the communication**

5.1 On 9 October 2009, the State party transmitted a further memorandum to the Committee in which it raises the question of whether the submission of a series of individual communications to the Committee might not actually be an abuse of procedure aimed at bringing before the Committee a broad historical issue involving causes and circumstances of which the Committee is unaware. The State party observes in this connection that these “individual” communications dwell on the general context in which the disappearances occurred, focusing solely on the actions of the security forces and never mentioning those of the various armed groups that used criminal concealment techniques to incriminate the armed forces.

5.2 The State party insists that it will not address the merits of these communications until the issue of their admissibility has been settled, since all judicial or quasi-judicial bodies have a duty to deal with preliminary questions before considering the merits. According to the State party, the decision in the cases in point to consider questions of admissibility and the merits jointly and simultaneously — aside from the fact that it was not arrived at on the basis of consultation — seriously prejudices the proper consideration of the communications in terms of both their general nature and their intrinsic particularities. Referring to the rules of procedure of the Human Rights Committee, the State party notes that the sections relating to the Committee’s procedure to determine the admissibility of communications are separate from those relating to the consideration of communications on the merits, and that therefore these questions could be considered separately. With regard, in particular, to the question of the exhaustion of domestic remedies, the State party stresses that none of the communications submitted by the authors was channelled through the domestic courts for consideration by the Algerian judicial authorities. Only a few of the communications that were submitted reached the indictments chamber, a high-level investigating court with jurisdiction to hear appeals.

5.3 Recalling the Committee’s jurisprudence regarding the obligation to exhaust domestic remedies, the State party stresses that mere doubts about the prospect of success

or worries about delays do not exempt the authors from the obligation to exhaust these remedies. As to the question of whether the promulgation of the Charter for Peace and National Reconciliation has made it impossible to avail oneself of any remedy in this area, the State party replies that the failure of the authors to take any steps to submit their allegations for examination has so far prevented the Algerian authorities from taking a position on the scope and limitations of the applicability of the Charter. Moreover, under the ordinance in question, the only proceedings that are inadmissible are those brought against “members of any branch of the defence and security forces of the Republic” for actions consistent with their core duties to the Republic, namely, to protect persons and property, safeguard the nation and preserve its institutions. On the other hand, any allegations concerning actions attributable to the defence or security forces that can be proved to have taken place in any other context are subject to investigation by the appropriate courts.

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

6.1 On 13 May 2011, the author submitted comments on the State party’s observations on admissibility and provided additional arguments on the merits.

6.2 The author points out that the State party has recognized the competence of the Committee to consider individual communications. This competence is of a general nature and its exercise by the Committee is not subject to the discretion of the State party. In particular, it is not for the State party to determine whether it is appropriate for the Committee to take up a specific case. That is for the Committee to decide when it considers the communication. Referring to article 27 of the Vienna Convention, the author considers that the State party’s adoption of domestic legislative and administrative measures to support the victims of the “national tragedy” cannot be invoked at the admissibility stage to prohibit individuals subject to its jurisdiction from using the procedure provided for under the Optional Protocol.<sup>11</sup> In theory, such measures may well have an impact on the settlement of a dispute, but they must be studied with regard to the merits of the case and not to its admissibility. In the instant case, the legislative measures adopted amount to a violation of the rights enshrined in the Covenant, as the Committee has previously observed.<sup>12</sup>

6.3 The author recalls that Algeria’s declaration of the state of emergency on 9 February 1992 does not affect people’s right to submit individual communications to the Committee. Article 4 of the Covenant allows for derogations from certain provisions of the Covenant during states of emergency, but does not affect the exercise of rights under the Optional Protocol. The author therefore considers that the State party’s observations on the appropriateness of the communication do not constitute a ground for inadmissibility.

6.4 The author again refers to the State party’s argument that the requirement to exhaust domestic remedies calls on the author to institute criminal proceedings by filing a complaint with the investigating judge, in accordance with articles 72 et seq. (paras. 25 ff) of the Code

<sup>11</sup> Article 27 of the Vienna Convention on the Law of Treaties states that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.”

<sup>12</sup> The author refers to the concluding observations of the Human Rights Committee, Algeria, CCPR/C/DZA/CO/3, 12 December 2007, paras. 7, 8 and 13. The author also refers to communication No. 1588/2007, *Daouia Benaziza v. Algeria*, Views adopted on 26 July 2010, para. 9.2; and communication No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 11. The author further refers to the concluding observations of the Committee against Torture, Algeria, CAT/C/DZA/CO/3, 26 May 2008, paras. 11, 13 and 17. Lastly, she refers to general comment No. 29 on derogations during a state of emergency, para. 1.

of Criminal Procedure. She refers to the Committee's recent jurisprudence in the Daouia Benaziza case, in which it stated in its Views adopted on 27 July 2010 that "the State party has a duty not only to carry out thorough investigations of alleged violations of human rights, particularly enforced disappearances or violations of the right to life, but also to prosecute, try and punish anyone held to be responsible for such violations. To sue for damages for offences as serious as those alleged in the present case cannot be considered a substitute for the charges that should be brought by the public prosecutor".<sup>13</sup> The author therefore considers that, given the serious nature of the alleged offences, it was the responsibility of the competent authorities to take up the case. However, no action was taken despite several attempts by Kamel Djebrouni's family to alert the authorities to his disappearance. All their efforts were in vain.

6.5 As to the State party's argument that mere "subjective belief or presumption" does not exempt the author of a communication from the requirement to exhaust all domestic remedies, the author cites article 45 of Ordinance 06-01, whereby legal proceedings may not be brought against individuals or groups who are members of any branch of the defence or security forces of the Republic. Any person making such a complaint or allegation is liable to a term of imprisonment of 3 to 5 years or a fine of 250,000 to 500,000 Algerian dinars. The State party has therefore not convincingly demonstrated how suing for damages would have enabled the competent courts to receive and investigate complaints as that would involve violating article 45 of the Ordinance, or how the author of a complaint could have been guaranteed immunity from prosecution under article 46 of the Ordinance. As treaty body jurisprudence confirms, a reading of these provisions leads to the conclusion that any complaint regarding the violations suffered by the author and her son would be not only declared inadmissible but also treated as a criminal offence. The author notes that the State party fails to provide an example of any case which, despite the existence of the above-mentioned Ordinance, has led to the effective prosecution of the perpetrators of human rights violations in a similar case. The author concludes that the remedies mentioned by the State party are futile.

6.6 With respect to the merits of the communication, the author notes that the State party has simply listed the general scenarios in which the victims of the "national tragedy" might have disappeared. Such general observations do not dispute the allegations made in the present communication. Furthermore, the comments are listed in the same way as in a number of other cases, thus demonstrating the State party's continuing unwillingness to consider such cases individually.

6.7 With regard to the State party's argument that it is entitled to ask for the admissibility of the communication to be considered separately from the merits, the author refers to rule 97, paragraph 2, of the rules of procedure which states that the "working group or special rapporteur may, because of the exceptional nature of the case, request a written reply that relates only to the question of admissibility". Consequently, it is not for the author of the communication or the State party to make such assessments; that is the sole prerogative of the working group or special rapporteur. The author considers that the present case is no different from other cases of enforced disappearance and that admissibility should not be considered separately from the merits.

6.8 Lastly, the author notes that the State party has not countered her allegations. These are corroborated and substantiated by numerous reports on the security forces' actions at the time and her own persistent efforts. In view of the State party's involvement in her son's disappearance, the author is unable to provide additional information in support of her communication, as that information is solely in the hands of the State party.

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<sup>13</sup> Communication No. 1588/2007, *Daouia Benaziza v. Algeria*, para. 8.3.

## 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 must ascertain that the same matter is not being examined under another procedure of international investigation or settlement. The Committee notes that the disappearance of Kamel Djebrouni was reported to the Working Group on Enforced or Involuntary Disappearances. However, it recalls that extra-conventional procedures or mechanisms established by the Commission on Human Rights or the Human Rights Council, and whose mandates are to examine and report publicly on human rights situations in specific countries or territories, or cases of widespread human rights violations worldwide, do not generally constitute an international procedure of investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.<sup>14</sup> Accordingly, the Committee considers that the examination of Kamel Djebrouni's case by the Working Group on Enforced or Involuntary Disappearances does not render it inadmissible under this provision.

7.3 The Committee notes that, in the State party's view, the author has not exhausted domestic remedies, since she did not consider the possibility of bringing the matter before the investigating judge and suing for damages in criminal proceedings under articles 72 and 73 of the Code of Criminal Procedure. The Committee also notes that, according to the State party, the author's failure to take any steps to submit her allegations for examination has so far prevented the Algerian authorities from taking a position on the scope and limitations of the applicability of the Charter for Peace and National Reconciliation. The Committee takes note of the author's argument that the day after Kamel Djebrouni disappeared his brother visited the police station in the eighth arrondissement of Algiers (Sid M'hamed) to enquire about his whereabouts; that his family subsequently approached various courts in Algiers to discover whether he had been brought before a prosecutor; and that there had been no thorough investigation of the statements given to officers from the Bab Edjedid gendarmerie by the author, her son and two witnesses on 13 September 1998. The Committee notes that, according to the author, article 63 of the Code of Criminal Procedure states that "when an offence is brought to their attention, the judicial police, acting either on the instructions of the State prosecutor or on their own initiative, shall undertake preliminary inquiries". The Committee notes the author's argument that, given the serious nature of the alleged offences, it was the responsibility of the competent authorities to take up the case, which they failed to do. It also notes that, according to the author, anyone filing a complaint of actions that fall within the scope of article 46 of Ordinance 06-01 shall be punished.

7.4 The Committee recalls that the State party has a duty not only to carry out thorough investigations of alleged violations of human rights, particularly enforced disappearances or violations of the right to life, but also to prosecute, try and punish anyone held to be responsible for such violations. The victim's family repeatedly contacted the competent authorities concerning Kamel Djebrouni's disappearance, but all their efforts were to no avail. The State party failed to conduct a thorough and effective investigation into the disappearance of the author's son, despite serious allegations of enforced disappearance. The State party has also failed to provide sufficient information indicating that an effective

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<sup>14</sup> Communication No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996, para. 7.1.

and available remedy is available de facto, while Ordinance 06-01 of 27 February 2006 continues to be applied, notwithstanding the Committee's recommendations that it should be brought into line with the Covenant.<sup>15</sup> Reiterating its previous jurisprudence, the Committee considers that to sue for damages for offences as serious as those alleged in the present case cannot be considered a substitute for the charges that should be brought by the public prosecutor.<sup>16</sup> Moreover, given the vague wording of articles 45 and 46 of the Ordinance and, in the absence of satisfactory information from the State party about their interpretation and actual enforcement, the author's fears of the consequences of filing a complaint are reasonable. The Committee concludes that article 5, paragraph 2 (b), of the Optional Protocol is not an obstacle to the admissibility of the communication.

7.5 The Committee finds that the author has sufficiently substantiated her allegations insofar as they raise issues under articles 6, paragraph 1; article 7; article 9, paragraphs 1–4; article 10; article 16; and article 2, paragraph 3, of the Covenant and therefore proceeds to consider the communication on the merits.

#### *Consideration of the merits*

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

8.2 As the Committee has emphasized in previous communications in which the State party provided general and collective comments on the serious allegations made by the authors of such complaints, it is clear that the State party prefers to maintain that communications incriminating public officials, or persons acting on behalf of public authorities, in enforced disappearances during the period in question, that is, from 1993 to 1998, must be considered in the broader context of the domestic socio-political and security environment that prevailed during a period in which the Government was struggling to fight terrorism. The Committee wishes to recall its concluding observations concerning Algeria of 1 November 2007,<sup>17</sup> as well as its jurisprudence,<sup>18</sup> according to which the State party may not invoke the provisions of the Charter for Peace and National Reconciliation against persons who invoke provisions of the Covenant or who have submitted or may submit communications to the Committee. Ordinance No. 06-01, without the amendments recommended by the Committee, appears to promote impunity and therefore cannot, as it currently stands, be considered compatible with the Covenant.

8.3 The Committee notes that the State party has not replied to the author's claims concerning the merits of the case and recalls its jurisprudence,<sup>19</sup> according to which the burden of proof should not be solely on the author of a communication, especially given that the author and the State party do not always have the same degree of access to evidence and that often only the State party has the necessary information. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to provide the Committee with the information available to it.<sup>20</sup> In the absence of any

<sup>15</sup> Concluding observations of the Human Rights Committee, Algeria, CCPR/C/DZA/CO/3, 12 December 2007, paras. 7, 8 and 13.

<sup>16</sup> Communication No. 1588/2007, *Daouia Benaziza v. Algeria*, para. 8.3.

<sup>17</sup> CCPR/C/DZA/CO/3, para. 7 (a).

<sup>18</sup> Communication No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 11; communication No. 1588/2007, *Benaziza v. Algeria*, para. 9.2.

<sup>19</sup> See, inter alia, communication No. 1640/2007, *El Abani v. Libya*, Views adopted on 26 July 2010, para. 7.4.

<sup>20</sup> See communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.3.

explanations from the State party in this respect, due weight must be given to the author's allegations, provided they have been sufficiently substantiated.

8.4 The Committee notes that, according to the author, her son disappeared following his arrest on 20 November 1994 and that the authorities have always denied detaining him even though there were witnesses to his arrest. It notes that, according to the author, the chances of finding Kamel Djebrouni alive are shrinking by the day and his prolonged absence suggests that he died while in custody; that incommunicado detention creates an unacceptable risk of violation of the right to life, since victims are at the mercy of their jailers who, by the very nature of the circumstances, are subject to no oversight. The Committee notes that the State party has produced no evidence refuting the author's allegation. The Committee concludes that the State party has failed in its duty to guarantee Kamel Djebrouni's right to life, in violation of article 6 of the Covenant.<sup>21</sup>

8.5 The Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20 on article 7, which recommends that States parties should make provision against incommunicado detention. It notes in the instant case that Kamel Djebrouni was arrested on 20 November 1994 and that his fate is still unknown. In the absence of a satisfactory explanation from the State party, the Committee considers that this disappearance constitutes a violation of article 7 of the Covenant with regard to Kamel Djebrouni.<sup>22</sup>

8.6 The Committee also takes note of the anguish and distress caused to the author by the disappearance of Kamel Djebrouni. It considers that the facts before it disclose a violation of article 7 of the Covenant with regard to her.<sup>23</sup>

8.7 With regard to the alleged violation of article 9, the information before the Committee indicates that Kamel Djebrouni was arrested without a warrant and without being informed of the reasons for his arrest; that he was at no point informed of the criminal charges against him; that he was not brought before a judge or other judicial authority to challenge the legality of his detention, which remains indefinite. In the absence of satisfactory explanations from the State party, the Committee finds a violation of article 9 with regard to Kamel Djebrouni.<sup>24</sup>

8.8 Regarding the complaint under article 10, paragraph 1, the Committee reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that they must be treated with humanity and respect for their dignity. In view of his incommunicado detention and in the absence of information provided by the State party in that regard, the Committee finds a violation of article 10, paragraph 1, of the Covenant.<sup>25</sup>

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<sup>21</sup> Communication No. 992/2001, *Bousroual Saker v. Algeria*, Views adopted on 30 March 2006, para. 9.11; communication No. 449/1991 *Barbarin Mojica v. Dominican Republic*, Views adopted on 15 July 1994, para. 5.6; and communication No. 181/1984, *Elcida Arévalo Pérez v. Colombia*, Views adopted on 3 November 1989, para. 11.

<sup>22</sup> See communications Nos. 1295/2004, *El Awani v. Libya*, Views adopted on 11 July 2007, para. 6.5; 1422/2005, *El Hassy v. Libya*, note 16, para. 6.2; 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996, para. 8.5; and 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994, para. 9.4.

<sup>23</sup> See communications Nos. 1640/2007, *El Abani v. Libya*, para. 7.5; 1422/2005, *El Hassy v. Libya*, note 16, para. 6.11; 107/1981, *Quinteros v. Uruguay*, Views adopted on 21 July 1983, para. 14; and 950/2000, *Sarma v. Sri Lanka*, para. 9.5.

<sup>24</sup> See communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.5.

<sup>25</sup> See general comment No. 21 [44] on art. 10, para. 3; communication No. 1780/2008, *Mériem Zarzi v. Algeria*, Views adopted on 22 March 2011, para. 7.8; and communication No. 1134/2002, *Gorji-*



8.9 With regard to the alleged violation of article 16, the Committee reiterates its settled jurisprudence, according to which the intentional removal of a person from the protection of the law for a prolonged period of time may constitute a refusal to recognize that person as a person before the law if the victim was in the hands of the State authorities when last seen and if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (Covenant, art. 2, para. 3) have been systematically impeded.<sup>26</sup> In the instant case, the Committee notes that the State party has not furnished adequate explanations concerning the author's allegations that she has had no news of her son. The Committee concludes that the enforced disappearance of Kamel Djebrouni, which has lasted almost 17 years, has denied him the protection of the law and deprived him of his right to recognition as a person before the law, in violation of article 16 of the Covenant.

8.10 The author invokes article 2, paragraph 3, of the Covenant, which imposes on States parties the obligation to ensure an effective remedy for all persons whose Covenant rights have been allegedly violated. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing claims of rights violations. It refers to its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, which provides, *inter alia*, that a failure by a State party to investigate allegations of violations could, in and of itself, give rise to a separate breach of the Covenant. In the instant case, the victim's family repeatedly contacted the competent authorities regarding Kamel Djebrouni's disappearance, but all their efforts were in vain and the State party failed to conduct a thorough and effective investigation into the disappearance of the author's son. Furthermore, the absence of the legal right to take judicial proceedings since the promulgation of Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation continues to deprive Kamel Djebrouni and the author of access to an effective remedy, since the Ordinance prohibits, on pain of imprisonment, the pursuit of legal remedies to shed light on the most serious crimes such as enforced disappearances.<sup>27</sup> The Committee concludes that the facts before it reveal a violation of article 2, paragraph 3, read in conjunction with article 6, paragraph 1; article 7; article 9; and article 16 of the Covenant with regard to Kamel Djebrouni; and article 2, paragraph 3, read in conjunction with article 7 of the Covenant, with regard to the author.

9. 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 violations by the State party of article 6, paragraph 1; article 7; article 9; article 10, paragraph 1; article 16; and article 2, paragraph 3, read in conjunction with article 6, paragraph 1; article 7; article 9; article 10, paragraph 1, and article 16 of the Covenant with regard to Kamel Djebrouni, and of article 7, read alone and in conjunction with article 2, paragraph 3, of the Covenant with regard to the author.

10. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including by (a) conducting a thorough and effective investigation into the disappearance of Kamel Djebrouni; (b) providing the author with detailed information about the results of the investigation; (c) freeing him immediately if he is still being detained incommunicado; (d) if he is dead, handing over his remains to his family; (e) prosecuting, trying and punishing those

*Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2.

<sup>26</sup> Communication No. 1780/2008, *Mérim Zarzi v. Algeria*, para. 7.9; communication No. 1588/2007, *Daouia Benaziza v. Algeria*, para. 9.8; communication No. 1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007, para. 7.8; and communication No. 1495/2006, *Zohra Madoui v. Algeria*, Views adopted on 28 October 2008, para. 7.7.

<sup>27</sup> CCPR/C/DZA/CO/3, para. 7.

responsible for the violations committed; and (f) providing adequate compensation for the author for the violations suffered and for Kamel Djebrouni if he is alive. Notwithstanding Ordinance No. 06-01, the State party should ensure that it does not impede enjoyment of the right to an effective remedy for the victims of crimes such as torture, extrajudicial killings and enforced disappearance. The State party is also under an obligation to take steps to prevent similar violations in the future.

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

[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 to the General Assembly.]

## Appendix

### **Individual opinion of Committee member Mr. Krister Thelin, joined by Committee member Mr. Michael O'Flaherty (dissenting)**

The Committee has found a direct violation of article 6 of the Covenant, in concluding that the State party has failed in its duty to guarantee the right to life of Kamel Djebrouni and Mourad Chihoub. I disagree with this finding for the following reasons.

The Committee's long established jurisprudence in cases of enforced disappearances, where the facts do not lend themselves to an interpretation of the victim's actual death, has put the emphasis on the State Party's duty to protect and ensure effective and enforceable remedies under article 2, paragraph 3 and thus invoke art. 6, paragraph 1 only to be read in conjunction with this article. The Committee has recently confirmed this approach in two cases of enforced disappearances against the same State Party and within a similar factual frame.<sup>a</sup>

However, in the case before us, the Committee has without any discussion, including any reference to how the case has been argued,<sup>b</sup> made a finding in line with what has hitherto been advanced only by a minority, i.e. of a direct violation of art 6, paragraph 1 without any connection to art 2, paragraph 3.

This extensive interpretation of the right to life under the Covenant sets, in my view, the Committee on an uncharted course, where direct violations of art 6, notwithstanding that the victim is presumed to be alive, in the future could be found in various settings also outside the scope of enforced disappearances. De minimis, the majority should have offered reasons for its new application of art 6 violations.

(Signed) Krister Thelin

(Signed) Michael O'Flaherty

[Done 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 to the General Assembly.]

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<sup>a</sup> Views 26 July 2010, *Benaziza v. Algeria* (No. 1588/2007) and 22 March, 2011, *Aouabdia v. Algeria* (No. 1780/2008), and, in particular, dissenting opinions in both by Committee member Mr. Fabián Salvioli.

<sup>b</sup> See para. 7.11 of communication No. 1780/2008.

### **Individual opinion of Committee member Mr. Fabián Salvioli, joined by Mr. Cornelis Flinterman (concurring)**

1. I fully agree with the decision of the Human Rights Committee in the case *Djebrouni v. Algeria*, communication No. 1781/2008, concerning the finding of violations of human rights, whose victims were Kamel Djebrouni and his mother Fatma Berzig, deriving from the former's enforced disappearance.

2. However, for the reasons set out below, I consider that the Committee should also have concluded that the State party has committed a violation of article 2.2 of the International Covenant on Civil and Political Rights. Finally, the Committee should indicate that in its view, the State of Algeria must, as a guarantee of non-recurrence, rescind Ordinance No. 06-01.

#### **(a) Competence of the Committee to find violations of articles not referred to in the complaint**

3. Since I became a member of the Committee, I have maintained that it has of its own volition and incomprehensibly limited its competence to determine a violation of the Covenant in the absence of a specific legal claim. Provided the facts clearly demonstrate such a violation, the Committee can and must — in accordance with the principle of *iura novit curiae* (“the court knows the law”) — examine the legal framework of the case. The legal basis and explanation of why this does not mean that States will be left without a defence may be found in paragraphs 3 to 5 of my partially dissenting opinion in the case of *Weerawansa v. Sri Lanka* to which I refer to avoid repeating them.<sup>a</sup>

4. It should in any case be pointed out, that in this case, *Djebrouni v. Algeria*, the author expressly claims that there has been a violation of article 2 (see, for example, paragraphs 1.1 and 3.1) although she refers to paragraph 3 thereof.

#### **(b) The violation of article 2.2 of the Covenant**

5. The international responsibility of the State may be engaged, inter alia, by an act or omission on the part of any of its branches, including, of course, the legislative branch or any other branch with legislative powers by virtue of the Constitution. Article 2.2 of the Covenant specifies: “Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.” Although the obligation laid down in article 2.2 is of a general nature, failure to fulfil it may engage the international responsibility of the State.

6. The provision in question is of a self-executing nature. The Committee, quite rightly, has indicated in its general comment No. 31 that: “The obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level — national, regional or local — are in a position to engage the responsibility of the State Party.”<sup>b</sup>

<sup>a</sup> *Anura Weerawansa v. Sri Lanka*, communication No. 1406/2005; partially dissenting opinion of Mr. Fabián Salvioli.

<sup>b</sup> General comment No. 31. The Nature of the General Legal Obligation Imposed on States Parties to

7. Just as States parties to the Covenant must adopt legislative measures to give effect to rights, they also bear a negative obligation, deriving from article 2.2, not to adopt legislative measures which violate the Covenant; if it does so, the State party commits per se a violation of the obligations laid down in article 2.2.

8. Algeria ratified the International Covenant on Civil and Political Rights on 12 September 1989; it has thus assumed the obligation to comply with the Covenant as a whole and consequently to fulfil the obligations laid down in and deriving from its article 2.2. On that same date, 12 September 1989, Algeria acceded to the Optional Protocol to the Covenant, since when it has recognized the competence of the Committee to consider communications from individuals.

9. In the case at hand, the Committee is fully competent to examine the legal framework of the case before it; on 27 February 2006, the State adopted Ordinance No. 06-01 which prohibits the pursuit of legal remedies to shed light on the most serious crimes such as enforced disappearances, guaranteeing impunity to the individuals responsible for serious human rights violations. Without any doubt, when it adopted that legislation the State introduced a law that is contrary to the obligation laid down in article 2, thereby committing, per se, a violation to which the Committee should refer in its decision, in addition to the violations found, because the author and her son have been the victims — inter alia — of that provision of the law.

10. The Ordinance applies directly to the case; accordingly, the conclusion that there has been a violation of article 2.2 in the Djebrouni case is neither abstract nor merely of academic interest: finally, it should not be overlooked that the violations found have a direct impact on any reparation which the Committee might determine when it decides each individual case.

**(c) Reparation in the Djebrouni case**

11. Paragraph 10 of the Committee's decision is an excellent illustration of a comprehensive approach to reparation; it orders non-pecuniary measures of restitution and satisfaction and guarantees of non-repetition (a thorough and effective investigation of the facts, freeing of the victim if he is still alive, handing over his remains if he is dead and the prosecution, trial and punishment of those responsible for the violations committed); the Committee's decision also orders pecuniary measures of reparation (adequate compensation for the author for the violations suffered and for Kamel Djebrouni if he is alive).

12. However, at the end of paragraph 10 the Committee states that "*Notwithstanding Ordinance No. 06-01, the State party should ensure that it does not impede enjoyment of the right to an effective remedy for the victims of crimes such as torture, extrajudicial killings and enforced disappearance. The State party is also under an obligation to take steps to prevent similar violations in the future.*"

13. That paragraph leaves no room for doubt: the Committee considers Ordinance No. 06-01 to be incompatible with the Covenant and for that reason indicates to the State that it must guarantee an effective remedy for the victims "*notwithstanding Ordinance No. 06-01*". Is the Committee thereby stating that the State's judicial branch must disregard that ordinance which makes it impossible to proceed with the investigation of acts concerning serious violations of human rights?

14. The answer to this is yes; the State's judicial branch is required to "*ascertain compatibility with treaties*" and not to apply any domestic norms that are incompatible with

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the Covenant, adopted at the 2187th meeting on 29 March 2004, paragraph 4.

the Covenant. This is essential in order not only to comply with obligations in respect of human rights, but also to avoid engaging the State's international responsibility.

15. However, not only the judicial branch is bound by the Covenant; the other branches of the State must take the steps necessary to guarantee human rights, and article 2.2 refers specifically to "*legislative measures*".

16. How is non-recurrence to be guaranteed? It is possible for the State to adopt a set of measures (human rights training for its officials, in particular police officers and members of the armed forces, adoption of effective protocols on action in response to complaints of enforced disappearance, actions to keep alive the memory of what happened, etc.). Notwithstanding the foregoing, there is no doubt that the Committee should have indicated in paragraph 10 of its views that the State of Algeria must amend the domestic legislation in question (Ordinance No. 06-01, adopted on 27 February 2006) to bring it into line with its obligations under the International Covenant on Civil and Political Rights. To keep in force a law that is per se incompatible with the Covenant is inconsistent with current international standards regarding reparation for cases of human rights violations.

(Signed) Fabián **Salvioli**

(Signed) Cornelis **Flinterman**

[Done 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 to the General Assembly.]

**K. Communication No. 1782/2008, *Aboufaied v. Libya*  
(Views adopted on 21 March 2012, 104th session)\***

<i>Submitted by:</i>	Tahar Mohamed Aboufaied (represented by Al-Karama for Human Rights and Track Impunity Always (TRIAL))
<i>Alleged victims:</i>	Idriss Aboufaied and Juma Aboufaied (the author's brothers), and the author
<i>State party:</i>	Libya
<i>Date of communication:</i>	5 April 2008 (initial submission)
<i>Subject matter:</i>	Unlawful arrest, incommunicado detention, secret detention, torture and ill-treatment, arrest without a warrant, right to a fair trial, enforced disappearance
<i>Procedural issue:</i>	State party's failure to cooperate
<i>Substantive issues:</i>	Right to an effective remedy; right to life; prohibition of torture and cruel and inhuman treatment; right to liberty and security of the person; arbitrary arrest and detention; respect for the inherent dignity of persons deprived of their liberty; right to liberty of movement and freedom to choose one's residence; right to a fair trial; recognition as a person before the law; right to freedom of expression; and right to peaceful assembly
<i>Article of the Covenant:</i>	2, paragraph 3; 6, paragraph 1; 7; 9, paragraphs 1 to 4; 10, paragraph 1; 12, paragraph 2; 14; 16; 19 and 21
<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 21 March 2012,

*Having concluded* its consideration of communication No. 1782/2008, submitted to the Human Rights Committee by Tahar Mohamed Aboufaied under the Optional Protocol to the International Covenant on Civil and Political Rights,

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\* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, 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, Mr. Krister Thelin and Ms. Margo Waterval.

The texts of four individual opinions by Committee members Ms. Christine Chanet jointly with Mr. Cornelis Flinterman, Sir Nigel Rodley, Mr. Walter Kälin and Mr. Fabián Omar Salvioli are appended to the text of the present Views.

*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, dated 5 April 2008, is Tahar Mohamed Aboufaied, a Libyan citizen born in 1974 and residing in Gheriane, Libya. He is acting on behalf of his two brothers, Idriss Aboufaied, born in 1957, and Juma Aboufaied, age unknown, as well as on his own behalf. He is represented by Al-Karama for Human Rights and Track Impunity Always (TRIAL). The Optional Protocol entered into force for Libya on 16 May 1989.

1.2 The author claims that the circumstances of his brother Idriss Aboufaied's two arrests, related to the peaceful expression of his political opinions, followed by prolonged detention, including incommunicado detention and an unfair trial, together with lack of effective remedies, constitute breaches by the State party of the latter's rights under articles 2, paragraph 3; 6, paragraph 1; 7; 9, paragraphs 1 to 4; 10, paragraph 1; 12, paragraph 2; 14, paragraphs 1 and 3(a) and (d); 16; 19 and 21 of the Covenant.

1.3 The author further alleges that the unlawful arrest, and subsequent incommunicado detention for over a year of his brother Juma Aboufaied constitute breaches of articles 2, paragraph 3; 6, paragraph 1; 7; 9, paragraphs 1 to 4; 10, paragraph 1; and 16 of the Covenant. Finally, he submits that he, himself, suffered violation of articles 2, paragraph 3; and 7 of the Covenant.

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

2.1 The communication describes the situation of the authors' brothers as of April 2008 in the following terms. The author subsequently informed the Committee that both of his brothers were later released, alive.<sup>1</sup>

##### *Idriss Aboufaied*

2.2 Idriss Aboufaied had practised as a civilian medical doctor in various Libyan towns before enrolling in a medical army unit and being sent to the front in 1987, during the Chad-Libya armed conflict. He was captured by the Chadian forces and detained for two years. Because of Colonel Gaddafi's refusal to recognize the existence of the armed conflict and thus the prisoners-of-war status of detained Libyan personnel, Idriss Aboufaied joined the National Front for the Salvation of Libya, an organized opposition group. In 1990, he obtained political asylum in Switzerland, where he continued to denounce human rights violations in his country. In 1998, together with other Libyan refugees, he founded the National Union for Reform (NUR), one of the most active Libyan opposition groups in exile. As Secretary General of NUR, he participated in significant meetings of Libyan dissidents, and openly advocated the promotion of the rule of law and respect for human rights.

2.3 In summer 2006, Colonel Gaddafi invited opponents in exile to return to Libya, assuring them that they would be permitted to express themselves freely, and that their civil and political rights would be guaranteed. As a result, in August 2006, Idriss Aboufaied

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<sup>1</sup> See paras. 5.1–5.4 below.



announced his intention to return to Libya, where he would resume his political activities.<sup>2</sup> In September 2006, the Libyan Embassy in Bern issued him a passport, and renewed the Government's assurances that he would not be persecuted in Libya. Idriss Aboufaied arrived in Tripoli on 30 September 2006, where he was met by members of various Libyan security agencies and subjected to interrogation. His passport was confiscated without explanation and he was instructed to collect it at the Internal Security Office the following week. Idriss Aboufaied then proceeded to his family home in Gheriane, about 100 km from Tripoli, from where he wrote to two opposition websites, reaffirming his call for democracy and respect for human rights in Libya. A few days later, he was informed by his family that the Internal Security Agency (ISA) had sent agents to look for him while he was out of the house, and had ordered him to report to their office in the capital. However, around midnight that same day, ISA agents presented themselves at the family home, and ordered Idriss Aboufaied to report the next morning to the ISA Office in Gheriane, which he did. Following an interrogation, he was instructed to report to the ISA Office in Tripoli on 5 November 2006. In the meantime, Idriss Aboufaied contacted several opposition websites, informing them of the visits by ISA, and that he would be travelling to Tripoli pursuant to orders received.<sup>3</sup>

2.4 On 5 November 2006, Idriss Aboufaied reported to the ISA Office in Tripoli and was arrested. Thereafter, the family was without news from him. On 21 November 2006, his case was transmitted to several mechanisms of the Human Rights Council.<sup>4</sup> By 22 November 2006, his health condition had severely deteriorated. A medical doctor was called to examine him in the detention centre,<sup>5</sup> and diagnosed symptoms of poisoning and intense fatigue. It was also confirmed that he had been tortured during his detention and deprived of sleep for several days. Idriss Aboufaied was then sent to the Gargarech psychiatric hospital in Tripoli.

2.5 On 29 December 2006, after 54 days in secret custody, Idriss Aboufaied was released. During his captivity, he was never brought before a judge, his family was not informed of his whereabouts, nor of the reasons for his arrest, as the authorities had refused to provide them with such information.

2.6 On 17 January 2007, despite his efforts to have his passport returned, so as to return to Switzerland, where he legally resided, Idriss Aboufaied was verbally notified that his request had been denied. He sought a lawyer to undertake legal proceedings, but as none agreed to represent him, out of fear of reprisals, he mandated the Geneva-based non-governmental organization Al-Karama<sup>6</sup> to represent him before the Human Rights Committee. On 22 January 2007, this organization wrote to the Libyan Permanent Mission in Geneva on his behalf, seeking the restitution of his passport.

2.7 On 1 February 2007, Idriss Aboufaied published a statement on foreign-based news websites, announcing his intention to organize a peaceful public protest in Tripoli on 17 February 2007.<sup>7</sup> He also notified the United States Embassy in Tripoli of this plan.

<sup>2</sup> The author annexes a public statement in this regard, signed by Idriss Aboufaied (under the heading "National Union for Reform"), dated 16 September 2006.

<sup>3</sup> Two public statements in this regard are annexed.

<sup>4</sup> Namely, the Working Group on Arbitrary Detention; the Special Rapporteur on the question of torture; the Special Rapporteur on the right to freedom of opinion and expression; and the Special Rapporteur on the situation of human rights defenders.

<sup>5</sup> The author does not indicate the place of detention where the victim was then held captive.

<sup>6</sup> Co-counsel for the author in the present communication.

<sup>7</sup> To commemorate the anniversary of the death of 12 demonstrators in Benghazi, and to demand respect for human rights and the rule of law.

2.8 On 16 February 2007, that is the day before the planned protest, Idriss Aboufaied was arrested by a group of armed men, who had violently broken into his house. The officer in charge was identified as the local Head of ISA. Eleven other men were arrested in connection with the planned demonstration.

2.9 Idriss Aboufaied was held for two months in secret detention, reportedly at an ISA detention centre in Tripoli. After 20 April 2007, he was transferred to Ain Zara prison in Tripoli, together with four co-accused, where he was kept in a basement without light for several months, and not allowed to receive family visits. All the detainees reported acts of torture during the first five months of their captivity, including punches and beatings with wooden objects, beatings on the soles of the feet (*falaqa*), and being placed in a coffin during interrogation as a form of intimidation.

2.10 On 20 April 2007, while he was gravely ill, Idriss Aboufaied was brought before a special tribunal in the District of Tajoura, Tripoli, along with 11 co-accused, to face several criminal charges.<sup>8</sup> The charges were vague and ambiguous, such as planning to overthrow the Government, possession of arms, and meeting with an official from a foreign Government. Idriss Aboufaied denied the first two charges, while admitting that he had contacted the United States Embassy ahead of the planned demonstration in February 2007. The case was transferred to the Revolutionary Security Court, where the charges brought against Idriss Aboufaied included violation of article 206 of the Libyan Penal Code.<sup>9</sup> A lawyer was assigned to him by the authorities, but he was not able to meet with him outside the courtroom.

2.11 The trial began on 24 June 2007, with three open court sessions in July 2007. Another hearing was to take place before the Revolutionary Security Court on 20 November 2007, which was postponed to 4 December 2007. The hearing was again postponed to 8 January 2008 for unclear reasons; it finally took place on 11 March 2008. The accused were not present at most of the hearings.<sup>10</sup>

#### *Juma Aboufaied*

2.12 Immediately after Idriss Aboufaied's second arrest on 16 February 2007,<sup>11</sup> his brother Juma, who resided at the family home in Gheriane, alerted a representative of Al-Karama. He also contacted a Libyan opposition news website by phone, indicating that he did not know his brother's whereabouts, and was afraid that he would be arrested as a reprisal for his communicating this information. On the same day, at 4:00 a.m., Juma Aboufaied was arrested at his home by State agents. He was last seen two days later, when he was brought back to the family home to collect his mobile phone and computer, which were confiscated. Since then, and up to the date of their communication to the Committee, the author had not received any information on Juma Aboufaied's whereabouts.<sup>12</sup> As he was not among the demonstration organizers, the author asserts that there is every reason to believe that the arrest and detention of Juma Aboufaied was related to his relationship with

<sup>8</sup> All the co-accused were identified by name by the author.

<sup>9</sup> The author explains that article 206 provides for the imposition of the death penalty on persons calling for "the establishment of a grouping, organization or association proscribed by law," as well as for those belonging to or supporting such organizations or associations.

<sup>10</sup> The author adds that in an interview given to the BBC on 2 August 2007, the son of Colonel Gaddafi, Saif al-Islam al-Gaddafi (then Executive Director of the influential Gaddafi International Charity and Development Foundation) declared that the accused had possessed arms and ammunition, and that "Idriss Aboufaied and his people [were] terrorists".

<sup>11</sup> See para. 2.8 above.

<sup>12</sup> New facts however emerged, as detailed in the author's subsequent submission to the Committee; see para. 5.1–5.4 below.

his brother Idriss, and the information he shared on the latter's arrest. This is confirmed by the fact that at the moment of his arrest, State agents made allusions to his phone conversations, and two days later confiscated his cell phone.

### The complaint

3.1 The author claims that Idriss and Juma Aboufaied were both subjected to enforced disappearance by the Libyan authorities, albeit during different periods. Between 5 November and 29 December 2006, Idriss Aboufaied was illegally detained by State agents, kept in isolation and prevented, in particular, from any contact with family or legal counsel. He was subjected to the same conditions during the first two months and four days of his second detention,<sup>13</sup> until he was brought before the court of Tajoura on 20 April 2007. Consequently, Idriss Aboufaied was subjected to enforced disappearance for 54 days in 2006, and for over two months in 2007. The author further contends that Juma Aboufaied, who was subjected to similar conditions of detention as his brother Idriss, has been forcibly disappeared since his arrest in February 2007.

3.2 The author alleges that Idriss and Juma Aboufaied are victims of a violation of article 6 of the Covenant, as the State party has not recognized their incommunicado detention, leaving the victims at the mercy of those holding them, with a major threat to their life. Consequently, and even if such circumstances did not lead to the actual death of the victims, the author contends that the State party failed to fulfil its obligation to protect their right to life, and breached its duty under article 6 of the Covenant.

3.3 The author further contends that by the very fact of their being subjected to enforced disappearance, Idriss and Juma Aboufaied, who were deprived of any contact with relatives and the outside world, were subjected to treatment contrary to article 7 of the Covenant.<sup>14</sup> Idriss Aboufaied was also exposed to actual acts of torture during his first detention, which led to serious deterioration of his health, and prompted his medical internment. He was seriously ill when he was first presented before a court on 20 April 2007. On the same day, he was transferred to Ain Zara prison, where he was kept in a basement without light for several months. Although no information was then available to the author regarding the treatment inflicted on Juma Aboufaied, nor regarding his state of health, the author refers to persisting reports of widespread use of torture and appalling living conditions in Libyan places of detention, and to the ill-treatment inflicted on Idriss Aboufaied. He also stresses that despite complaints of torture made by Idriss Aboufaied and his 11 co-defendants, the State party has not undertaken any investigation, let alone provided victims with effective remedies. The author therefore reiterates that the State party breached article 7 with respect to Idriss and Juma Aboufaied in several respects.

3.4 The author contends that he himself is a victim of a violation of article 7 of the Covenant,<sup>15</sup> in the light of the continuous and severe emotional distress he experienced as a

<sup>13</sup> That is, between 16 February and 20 April 2007.

<sup>14</sup> The author refers to communications No. 449/1991, *Mojica v. the Dominican Republic*, Views adopted on 15 July 1994; No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996; No. 542/1993, *Tshishimbi v. Zaire*, Views adopted on 25 March 1996; No. 440/1990, *El-Megreisi v. Libyan Arab Jamahiriya*, Views adopted on 23 March 1994, para. 5.4; No. 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006, para. 9.8; and No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003, para. 9.5.

<sup>15</sup> The author refers to communications No. 107/1981, *Quinteros v. Uruguay*, Views adopted on 21 July 1983; No. 992/2001, *Bousroual v. Algeria* (note 14 above); No. 950/2000, *Sarma v. Sri Lanka* (note 14 above); No. 886/1999, *Schedko v. Belarus*, Views adopted on 28 April 2003, para. 10.2; No. 1044/2002, *Shukurova v. Tajikistan*, Views adopted on 17 March 2006, para. 8.7; No. 959/2000, *Bazarov v. Uzbekistan*, Views adopted on 14 July 2006, para. 8.5; and No. 1159/2003, *Sankara v.*

result of the successive disappearances of his brothers, knowing that both of them were exposed to life-threatening conditions and torture.

3.5 The author alleges that the arrests of Idriss and Juma Aboufaied by ISA agents were undertaken in the absence of an enabling warrant, and their prolonged detention without judicial review exceeded maximum periods prescribed by law, in breach of Libyan law<sup>16</sup> and of article 9, paragraph 1, of the Covenant.<sup>17</sup> Neither Idriss nor Juma Aboufaied was promptly informed of the reasons for his detention. The former only learned of the charges against him more than two months after his second arrest. According to the author, both were therefore victims of violations of article 9, paragraph 2 of the Covenant. Furthermore, at no point during his first detention was Idriss Aboufaied brought before a judicial authority. Following his second arrest, he was brought before a special tribunal in the Tajoura District on 20 April 2007, but the two-month delay between his arrest and court appearance exceeds the standard of a “few days” as interpreted by the Committee under article 9, paragraph 3.<sup>18</sup> Juma Aboufaied was never brought before a judicial authority, and no criminal prosecution was initiated against him. The author therefore contends that both Idriss and Juma Aboufaied were victims of a violation of article 9, paragraph 3. Although Idriss Aboufaied was briefly brought three times before a Court, and a lawyer was formally assigned for his defence, the court’s lack of impartiality, and the inherently flawed nature of the proceedings resulted in the de facto impossibility for him to challenge the legality of his arrest and detention. Juma Aboufaied had no access to legal counsel or family members during his detention. The author concludes that the rights of Idriss and Juma Aboufaied under article 9, paragraph 4, of the Covenant were violated.

3.6 The author also asserts that, because Idriss and Juma Aboufaied were subjected to treatment amounting to a violation of article 7 of the Covenant during their detention, the abuses perpetrated against them also naturally result in a consequential violation of their rights under article 10, paragraph 1, of the Covenant.<sup>19</sup>

3.7 According to the author, by confiscating Idriss Aboufaied’s passport without justification upon his arrival in Libya, and explicitly refusing to return it to him, the State party’s authorities precluded his exercise of his right to freedom of movement, in breach of article 12, paragraphs 2 of the Covenant. No justification has been offered for the confiscation and retention of the passport, and it is maintained that no circumstances

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*Burkina Faso*, Views adopted on 28 March 2006, para. 12.2.

<sup>16</sup> The author refers to art. 14 of the Libyan Promotion of Freedom Act; art. 30 of the Code of Criminal Procedure, as well as arts. 122 and 123, which provide for a maximum period of 15 days in custody, which may be extended to 45 days only if a Magistrate deems it necessary.

<sup>17</sup> The author refers to communications No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.5; No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para. 6.5; and No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 9.5.

<sup>18</sup> The author refers to the Committee’s general comment No. 8 (1982) on the right to liberty and security of persons, *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40)*, annex V; also communications No. 1128/2002, *Marques de Morais v. Angola*, Views adopted on 29 March 2005, para. 6.3; No. 992/2001, *Bousroual v. Algeria* (note 14 above), para. 9.6; No. 1196/2003, *Boucherf v. Algeria* (note 17 above), para. 9.5; and No. 277/1988, *Terán Jijón v. Ecuador*, Views adopted on 26 March 1992, para. 5.3.

<sup>19</sup> The author refers to the Committee’s general comment No. 21 (1992) on humane treatment of persons deprived of their liberty, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. B, para. 3.

existed which rendered these actions permissible in terms of article 12, paragraph 3, of the Covenant.<sup>20</sup>

3.8 Under article 14, the author refers to the general lack of independence of the judiciary from the Executive in the State party, particularly with regard to special courts, such as the Revolutionary Security Court, and trials against political opponents. Idriss Aboufaied was prevented from attending most of the court hearings, which were held in closed sessions. Charges against him were not clearly enunciated and were only notified to him more than two months after his arrest.<sup>21</sup> He was never provided with adequate facilities to prepare and present his defence, as he was never provided with the case file, nor was he able to meet with his lawyer outside the courtroom. Also, he could not request a change of counsel. For these reasons, the author contends that Idriss Aboufaied's rights under article 14, paragraphs 1, 3(a) and (d) were violated.<sup>22</sup>

3.9 The author further points out that, as victims of enforced disappearance, Idriss and Juma Aboufaied were denied the right to be recognized as persons before the law, in violation of article 16 of the Covenant.<sup>23</sup>

3.10 The author asserts that Idriss Aboufaied was imprisoned, and faced the possibility of being severely punished<sup>24</sup> for his attempt to peacefully meet with others and express their opposition to the regime in place. Such interference with the right to freedom of assembly and freedom of expression cannot, in the circumstances, be considered to be a justified restriction, as the State party never claimed to be protecting one of the legitimate purposes set out in article 19, paragraph 3, of the Covenant. Consequently, the author claims that Idriss Aboufaied is a victim of a violation by the State party of articles 19 and 21 of the Covenant.

3.11 Concerning article 2, paragraph 3, the author refers to the Committee's jurisprudence,<sup>25</sup> and stresses that by failing to take necessary measures to protect the victims' rights and offer them effective remedies for violation of articles 6, 7, 9, 10, 12, 14, 6, 9 and 21 read alone, the State party further breached the provisions of those articles read in conjunction with article 2, paragraph 3, of the Covenant.

<sup>20</sup> The author refers to the Committee's general comment No. 27 (1999) on freedom of movement, *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40*, vol. I (A/55/40 (Vol. I)), annex VI, sect. A, para 9; also communications No. 1107/2002, *El Ghar v. Libyan Arab Jamahiriya*, Views adopted on 2 November 2004, para 7.3; and No. 1143/2002, *El Dernawi v. Libyan Arab Jamahiriya*, Views adopted on 20 July 2007, para 6.2.

<sup>21</sup> See para. 2.10 above.

<sup>22</sup> The author refers to the Committee's 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; communications No. 80/1980, *Vasilskis v. Uruguay*, Views adopted on 31 March 1983, para 11; No. 52/1979, *Lopez Burgos v. Uruguay*, Views adopted on 29 July 1981, para 13; and No. 662/1995, *Lumley v. Jamaica*, Views adopted on 30 April 1999, para 7.4.

<sup>23</sup> The author refers here to communications No. 1328/2004, *Kimouche v. Algeria*, Views adopted on 10 July 2007, para 7.9; and communication No. 1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007, para. 7.9.

<sup>24</sup> At the time of the author's initial communication, judicial proceedings against Idriss Aboufaied were still pending.

<sup>25</sup> The author refers to communication No. 612/1995, *Arhuacos v. Colombia*, Views adopted on 29 July 1997; and the Committee's general comment 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. 8.

3.12 As to the question of exhaustion of domestic remedies, the author claims that no remedies are available, in practice, for victims of human rights violations in Libya. Referring to human rights violations committed by the State party,<sup>26</sup> the author asserts that the fear of reprisals prevented him from initiating judicial action or seeking resort to other domestic remedies on behalf of his brothers. Idriss Aboufaied unsuccessfully tried to seek professional legal assistance prior to his second arrest, and the virtual impossibility of finding legal representation, as lawyers fear reprisals, constitutes a serious impediment to access to justice.<sup>27</sup> In addition, the author submits that even if he had had access to domestic remedies, had they been available, they would have been totally ineffective because of the deeply flawed judicial system within the State party.<sup>28</sup> The author therefore requests the Committee to consider, in the circumstances, that the requirement of exhaustion of domestic remedies has been satisfied.

#### **State party's failure to cooperate**

4. On 28 January 2009, 22 April 2009 and 14 July 2009, the State party was requested to submit information concerning the admissibility and merits of the communication. The Committee notes that this information has not been received. It regrets the State party's failure to provide any information with regard to the admissibility and/or substance of the author's claims. It recalls that, under the Optional Protocol, the State party concerned is required to submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by the State. In the absence of a reply from the State party, due weight must be given to those of the author's allegations that have been properly substantiated.<sup>29</sup>

#### **Additional submission by the author**

5.1 On 4 July 2008, the author informed the Committee that at the beginning of April 2008, Idriss Aboufaied, who had been detained at Abu Salim prison, was transferred to Sabrata Hospital,<sup>30</sup> and was only allowed to leave the hospital to attend hearings in his trial. According to his family, his medical condition is serious and rapidly deteriorating.

5.2 On 15 April 2008, a hearing took place close to Abu Salim prison, in the presence of the accused and one of his family members. Another hearing took place on 13 May 2008, in the presence of the accused and two family members. Further to Idriss Aboufaied's request for release on medical grounds, the Court requested a medical report, and adjourned the hearing. On 10 June 2008, the last hearing took place, attended by the 12 accused. The author was also present. On that date, Idriss Aboufaied was sentenced to 25 years' imprisonment. The tribunal did not address his request for release on medical grounds. The

<sup>26</sup> Such as arbitrary arrests and detentions, extrajudicial killings, collective punishments and the relentless harassment against dissidents and their families.

<sup>27</sup> The author refers to communications No. 798/1998, *Howell v. Jamaica*, Views adopted on 21 October 2003, para 5.3; and No. 146/1983 and 148-154/1983, *Baboeram-Adhin et al. v. Suriname*, Views adopted on 4 April 1985, para. 9.2.

<sup>28</sup> The author refers to the lack of independence of the judiciary, in practice, and to the long-standing and consistent pattern of political trials, characterized by unfair and summary proceedings before the "special revolutionary courts" (replaced in 2005 by the "State security court"), as well as secret trials, and trials *in absentia*, aimed at intimidating political opponents, and suppressing political dissent.

<sup>29</sup> See, inter alia, communications No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya* (note 17 above), para. 4; No. 1295/2004, *El Alwani v. Libyan Arab Jamahiriya*, Views adopted on 11 July 2007, para. 4; No. 1208/2003, *Kurbonov v. Tajikistan*, Views adopted on 16 March 2006, para. 4; and No. 760/1997, *Diergaardt et al. v. Namibia*, Views adopted on 25 July 2000, para. 10.2.

<sup>30</sup> He remained interned at that hospital at the time of the author's additional submission.

author contends that inasmuch as the conviction of Idriss Aboufaied was the outcome of a grossly unfair trial,<sup>31</sup> his detention pursuant to this decision should be deemed by the Committee to be contrary to his right to liberty and security of the person, and therefore in breach of article 9, paragraph 1, of the Covenant.

5.3 In the same submission, the author further informed the Committee that Juma Aboufaied had been released on 27 May 2008, after having spent over 15 months in secret detention. At no point during his detention was he presented before a judicial authority, nor was he charged with an offence. Subsequent to his release, the State party authorities have taken no step with a view to granting Juma Aboufaied reparation for the arbitrary arrest and prolonged secret detention, nor have they undertaken any investigation to clarify the facts and prosecute perpetrators. The author requested the Committee to take these developments into account when considering his communication.

5.4 On 22 October 2008, the author informed the Committee that Idriss Aboufaied had been released on the night of 8–9 October 2008. Prior to his release, he was held at Sabrata hospital, since his transfer from Abu Salim prison in early April 2008. The author added that Idriss Aboufaied had requested authorization to leave the country in order to receive adequate medical treatment abroad, but that he remained, in the meantime, under close surveillance at his family home. Finally, the author requested the Committee to take these developments into account when considering his communication.

### 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 article 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 Further to article 5, paragraph 2 (a), of the Optional Protocol, the Committee must ascertain that the same matter is not being examined under another procedure of international investigation or settlement. The Committee notes that the case of Idriss Aboufaied was submitted in 2006 to the following: the United Nations Working Group on Arbitrary Detention, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on freedom of opinion and expression, and to the Special Rapporteur on the situation of human rights defenders. However, it observes that extra-conventional procedures or mechanisms established by the former Commission on Human Rights, the Economic and Social Council or the Human Rights Council, whose mandates are to examine and publicly report on human rights situations in specific countries or territories or on major phenomena of human rights violations worldwide, do not constitute procedures of international investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.<sup>32</sup> Furthermore, the communication concerning Idriss Aboufaied, who is no longer detained, has been filed without opinion by the Working Group on Arbitrary Detention.<sup>33</sup> Accordingly, the Committee is of the view that the matter concerning the rights of Idriss

<sup>31</sup> The author recalls his observations as outlined in paras. 3.5 and 3.8 above.

<sup>32</sup> See communications No. 540/1993, *Celis Laureano v. Peru* (note 14 above), para. 7.1; No. 1776/2008, *Bashasha v. Libyan Arab Jamahiriya*, Views adopted on 20 October 2010, para. 6.2; No. 1559/2007, *Hernandez v. Philippines*, Views adopted on 26 July 2010.

<sup>33</sup> See communications No. 688/1996, *Arredondo v. Peru*, Views adopted on 27 July 2000, para. 10.2; No. 1172/2003, *Madani v. Algeria*, Views adopted on 28 March 2007, paras. 2.7 and 7.2.

Aboufaied is not being examined under another procedure of international investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 With respect to the question of exhaustion of domestic remedies, the Committee reiterates its concern that, in spite of three reminders addressed to the State party, no information or observations on the admissibility or merits of the communication have been received from the State party. Given these circumstances, the Committee finds that it is not precluded from considering the communication under article 5, paragraph 2 (b), of the Optional Protocol.

6.4 As to the alleged violations of articles 19 and 21, read alone and in conjunction with article 2, paragraph 3, the Committee considers that, in view of the limited information provided, the author's allegations have been insufficiently substantiated for purposes of admissibility. The Committee considers that the other allegations of violation have been sufficiently substantiated, and therefore finds no reason to consider the rest of the communication inadmissible. The Committee therefore proceeds to its consideration of the merits based on the claims made with respect to (a) Idriss Aboufaied, under articles 2, paragraph 3; 6, paragraph 1; 7; 9, paragraphs 1 to 4; 10, paragraph 1; 12, paragraph 2; 14, paragraphs 1, 3 (a) and (d); and 16 of the Covenant; (b) Juma Aboufaied, under articles 2, paragraph 3; 6, paragraph 1; 7; 9, paragraphs 1 to 4; 10, paragraph 1; and 16 of the Covenant; and (c) the author himself, under articles 2, paragraph 3; and 7 of the Covenant.

#### *Consideration of the merits*

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

7.2 Regarding the alleged secret and incommunicado detention of Idriss and Juma Aboufaied, the Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment, in which it recommends that States parties make provision against incommunicado detention. It notes that Idriss Aboufaied was kept in incommunicado detention in an undisclosed location during two distinct periods: between 5 November and 29 December 2006, and from his second arrest on 16 February 2007, until he was brought before the court of Tajoura on 20 April 2007. During these periods, he was kept in isolation, and prevented from any contact with his family or legal counsel. He remained in detention until 8 October 2008. In total, he was detained for a period of close to 22 months,<sup>34</sup> of which almost four months were in secret detention. Juma Aboufaied remained in secret detention for 15 months, from his arrest in February 2007, until he was released on 27 May 2008.

7.3 The Committee notes that the author alleges that his two brothers, Idriss and Juma Aboufaied, were subjected by the Libyan authorities to enforced disappearance. The Committee recalls that it considers that acts leading to such a disappearance constitute a violation of many of the rights enshrined in the Covenant, including the right to recognition everywhere as a person before the law (art. 16), the right to liberty and security of person (art. 9), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art. 7), and the right of all persons deprived of their liberty to be treated

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<sup>34</sup> From 5 November to 29 December 2006 and from 16 February 2007 to 8 October 2008 (date of his final release).



with humanity and with respect for the inherent dignity of the human person (art. 10). They may also constitute a violation or a grave threat to the right to life (art. 6).<sup>35</sup>

7.4 The Committee notes that the State party has provided no response to the author's allegations regarding the enforced disappearance of his two brothers, nor to his allegation that Idriss Aboufaied was subject to acts of torture in detention. The Committee also notes the author's claim that on 20 April 2007, the latter was transferred to Ain Zara prison, where he was kept in a basement without light for several months, despite his critical health condition, which was known to the State party. The Committee reaffirms that the burden of proof cannot rest on the author of the communication alone, especially since the author and the State party do not always have equal access to the evidence and it is frequently the case that the State party alone has the relevant information.<sup>36</sup> It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and provide the Committee with information available to it. In cases where the allegations are corroborated by credible evidence submitted by the author and where further clarification depends on information that is solely in the hands of the State party, the Committee may consider an author's allegations substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party. In the absence of any explanation from the State party in this respect, due weight must be given to the author's allegations. On the basis of the information at its disposal, the Committee concludes that to have kept Idriss and Juma Aboufaied in captivity for a prolonged period, to have prevented them from communicating with their family and the outside world, and to have subjected Idriss Aboufaied to acts of torture, constitute a violation of article 7 of the Covenant with regard to each of them.<sup>37</sup>

7.5 With regard to the author, the Committee notes the anguish and distress caused by the successive disappearance of his two brothers Idriss and Juma Aboufaied. Recalling its jurisprudence, the Committee concludes that the facts before it reveal a violation of article 7 of the Covenant with regard to the author.<sup>38</sup>

7.6 Regarding article 9, the information before the Committee shows that Idriss Aboufaied was twice arrested without a warrant by agents of the State party, and that he was held in secret detention for approximately two months on each occasion, without access to defence counsel, without being informed of the grounds for his arrest, and without being brought before a judicial authority. He was first informed of the charges against him in April 2007, when he was brought before a special tribunal in Tajoura District. Juma Aboufaied was kept in secret detention for fifteen months, without access to a lawyer, and

<sup>35</sup> See communications No. 1328/2004, *Kimouche v. Algeria* (note 23 above), para. 7.2; No. 1295/2004, *El Awani v. Libyan Arab Jamahiriya* (note 29 above), para. 6.2; No. 992/2001, *Bousroual v. Algeria* (note 14 above), para. 9.2; and No. 950/2000, *Sarma v. Sri Lanka* (note 14 above), para. 9.3; also Declaration on the Protection of All Persons from Enforced Disappearance (adopted by General Assembly resolution 47/133 of 18 December 1992), art. 1, para. 2.

<sup>36</sup> See communications No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya* (note 17 above), para. 6.7; and No. 1297/2004, *Medjnoune v. Algeria* (note 17 above), para. 8.3.

<sup>37</sup> See communications No. 1295/2004, *El Awani v. Libyan Arab Jamahiriya* (note 29 above), para. 6.5; No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*, (note 17 above), para. 6.2; No. 540/1993, *Celis Laureano v. Peru*, (note 14 above), para. 8.5; No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994, para. 9.4; and No. 440/1990, *El-Megreisi v. Libyan Arab Jamahiriya* (note 14 above), para. 5.4.

<sup>38</sup> See communications No. 1640/2007, *El Abani v. Libyan Arab Jamahiriya*, Views adopted on 26 July 2010, para. 7.5; No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya* (note 17 above), para. 6.11; No. 107/1981, *Quinteros v. Uruguay* (note 15 above), para. 14; and No. 950/2000, *Sarma v. Sri Lanka* (note 14 above), para. 9.5.

without ever being informed of the grounds for his arrest. During these periods, Idriss and Juma Aboufaied were unable to challenge the legality of their detention or its arbitrary character. In the absence of any explanation from the State party, the Committee finds violations of article 9 of the Covenant with regard to both periods of detention of Idriss Aboufaied, and with regard to the entire period of detention of Juma Aboufaied.<sup>39</sup>

7.7 The Committee has taken note of the author's allegation under article 10, paragraph 1, that Idriss Aboufaied was subjected to acts of torture during his detention, and that he was kept in inappropriate detention facilities, given his medical condition. Juma Aboufaied was held incommunicado for the totality of his detention. The Committee reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty, and that they must be treated with humanity and respect for their dignity. In the absence of information from the State party concerning the treatment of the author's brothers in detention, the Committee concludes that the rights of Idriss and Juma Aboufaied under article 10, paragraph 1, were violated.<sup>40</sup>

7.8 As to the author's allegations under article 12, paragraph 2, of the Covenant, the Committee observes the uncontested information before it, according to which State party agents confiscated Idriss Aboufaied's passport without justification upon his arrival in Libya on 30 September 2006, and explicitly refused to return it to him, thereby precluding him from leaving the country and returning to his place of legal residence, in Switzerland. The Committee recalls that a passport provides a national with the means "to leave any country, including his own," as stipulated in article 12, paragraph 2, of the Covenant, and that such right may, by virtue of paragraph 3 of that article, be subject to restrictions "which are provided by law [and] are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant". In the present case, the State party has not put forward any argument to that effect. Consequently, the Committee finds that the confiscation of the author's passport, and failure to restore the document to him, must be deemed an unjustified interference with his right to freedom of movement, in violation of article 12, paragraph 2, of the Covenant.<sup>41</sup>

7.9 With respect to the author's complaint under article 14, the Committee notes from the information before it that on 20 April 2007 — two months after his second arrest — Idriss Aboufaied was brought before a special tribunal in Tajoura District, Tripoli, to face several criminal charges, of which he had not been previously informed. The case was then transferred to a Revolutionary Security Court which held some of its hearings in closed session, for reasons that have not been identified. Although a lawyer was assigned to him by the authorities, he was not able to meet with him outside the courtroom, nor was he able to examine the case file, and he was not permitted to attend some of the court hearings. On 10 June 2008, he was sentenced to 25 years' imprisonment and was maintained in detention until his release on 8 October 2008, despite his request for release on medical reasons, which was not considered by the Court. Based on the material before it, and in the absence of rebuttal information from the State party, the Committee concludes that the trial and sentencing of Idriss Aboufaied in the circumstances described disclose a violation of article

<sup>39</sup> Communication No. 1297/2004, *Medjnoune v. Algeria* (note 17 above), para. 8.5.

<sup>40</sup> See the Committee's general comment No. 21 (1992) on humane treatment of persons deprived of their liberty, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40* (A/47/40), annex VI, sect. B, para. 3; communications No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2; No. 1640/2007, *El Abani v. Libya*, (note 38 above), para. 7.7; and No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya* (note 17 above), para. 6.4.

<sup>41</sup> See communications No. 1143/2002, *El Dernawi v. Libyan Arab Jamahiriya* (note 20 above), para. 6.2; and No. 1107/2002, *El Ghar v. Libyan Arab Jamahiriya* (note 20 above), para. 7.3.

14, paragraphs 1, 3 (a) and (d), of the Covenant. Having so concluded, the Committee will not examine separately the claims of violation of article 2, paragraph 3, in conjunction with article 14.

7.10 In respect of article 16, the Committee reiterates its established case law, according to which intentionally removing a person from the protection of the law for a prolonged period of time may constitute a refusal of recognition as a person before the law if the victim was in the hands of the State authorities when last seen and, at the same time, if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (see art. 2, para. 3, of the Covenant) have been systematically impeded.<sup>42</sup> In the present case, the State party authorities subjected Idriss and Juma Aboufaied to incommunicado detention and refused to provide the family with any information concerning their whereabouts or condition, and further intimidated the family from seeking redress or assistance for them. The Committee, therefore, finds that the enforced disappearance of Idriss and Juma Aboufaied deprived them of the protection of the law during that period, in violation of article 16 of the Covenant.

7.11 The author invokes article 2, paragraph 3, of the Covenant, which requires States parties to ensure that individuals have accessible, effective and enforceable remedies for asserting the rights recognized in the Covenant. The Committee reiterates the importance it attaches to States parties establishing appropriate judicial and administrative mechanisms for addressing alleged violations of rights under domestic law. It refers to its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, in which it states that failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. In the present case, the information before the Committee indicates that Idriss and Juma Aboufaied did not have access to an effective remedy, leading the Committee to find a violation of article 2, paragraph 3, read in conjunction with article 6, paragraph 1; 7; 9; 10, paragraph 1; and 16 with regard to Idriss and Juma Aboufaied, and read in conjunction with article 12, paragraph 2, with regard to Idriss Aboufaied.<sup>43</sup> The Committee also finds there has been a violation of article 2, paragraph 3, read in conjunction with article 7, with regard to the author.<sup>44</sup>

7.12 Having reached the foregoing conclusions, together with the fact that both brothers were released alive, the Committee will not examine separately the claims of violation of article 6 read alone.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, finds that the facts before it reveal violations by the State party of articles 7; 9; 10, paragraph 1; and 16 with regard to Idriss and Juma Aboufaied. It also finds that there was a violation of articles 12, paragraph 2; and 14, paragraphs 1, 3 (a) and (d) with regard to Idriss Aboufaied. The Committee further finds that the State party acted in violation of article 2, paragraph 3, read in conjunction with articles 6, paragraph 1; 7; 9; 10, paragraph 1; and 16 with regard to Idriss and Juma Aboufaied, and read in conjunction with article 12, paragraph 2, with

<sup>42</sup> See communications No. 1640/2007, *El Abani v. Libyan Arab Jamahiriya* (note 38 above), para 7.9; No. 1327/2004, *Grioua v. Algeria* (note 23 above), para. 7.8; and No. 1495/2006, *Madoui v. Algeria*, Views adopted on 28 October 2008, para. 7.7.

<sup>43</sup> See communications No. 1422/2005, *El Hassy v. the Libyan Arab Jamahiriya* (note 17 above), para. 6.9; and No. 1196/2003, *Boucherf v. Algeria* (note 17 above), para. 9.9.

<sup>44</sup> See communication No. 1811/2008, *Chihoub v. Algeria*, Views adopted on 31 October 2011, para 8.11.

regard to Idriss Aboufaied. Lastly, the Committee finds a violation of article 7, read alone and in conjunction with article 2, paragraph 3, of the Covenant with regard to the author.

9. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author and his brothers with an effective remedy, including (i) a thorough and effective investigation into the disappearance of Idriss and Juma Aboufaied and any ill-treatment that they suffered in detention; (ii) providing the author and his brothers with detailed information on the results of its investigations; (iii) prosecuting, trying, and punishing those responsible for the disappearance or other ill-treatment; and (iv) appropriate compensation to the author and his brothers for the violations suffered. The State party is also under an obligation to take measures to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party 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 and enforceable remedy in the event that a violation is established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official language of the State party.

[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 to the General Assembly.]

## Appendix

### I. Individual opinion of Committee member Sir Nigel Rodley (concurring)

While concurring with some hesitation with the substantive findings of the Committee, I have misgivings about the Committee's unexplained treatment of these cases — or at least the case of Idriss Aboufaied — explicitly as “enforced disappearances”. There is no doubt that both brothers were victims of secret detention. The question is whether they were also placed outside the protection of the law, thus justifying both the categorization of the detentions as enforced disappearances and as violations of article 16.

Those who are experienced in working with the grotesque and unconscionable practice of enforced disappearance are familiar with the need to distinguish an unacknowledged detention, that perhaps exceeds national or international time limits and thus constitutes at least arbitrary detention, from the horrible reality of enforced disappearance. This distinction would appear to imply a temporal element in the notion of enforced disappearance. Indeed, there is a risk of trivializing the notion, if it is held to cover any secret detention (by which I understand neither the detention to be acknowledged nor the whereabouts disclosed) for however short a period.

On the other hand, only one of the international definitions of enforced disappearance, notably that in article 7, paragraph 2 (i) of the Rome Statute of the International Criminal Court addresses this temporal dimension.<sup>a</sup> It requires that there be an intent to deprive the person of the protection of the law “for a prolonged period of time”. Effectively, the implication may be that the temporal element is evidence of the placing of the person outside the protection of the law. Indeed, the Committee's standard language in paragraph 7.10 with regard to article 16 specifically refers to “a prolonged period of time”.

Normally, I think the Committee should require more than the mere assertion — albeit, as in this case, uncontested by the State party — that a person falls into that category without a significant temporal element. Not every secret detention, even for as much as two months, as was inflicted on Idriss Aboufaied, would necessarily fall to be treated as an enforced disappearance, as there would not on that basis alone be sufficient evidence of deprivation of protection of the law.

However, in the present case, there is less doubt regarding the treatment of Juma Aboufaied who was secretly detained for 15 months; and the case of his brother, who had twice been subject to two months' secret detention, is on the facts inseparable from his. Moreover, the existence of the practice of enforced disappearance in Libya is already familiar to the Committee.<sup>b</sup> Under these circumstances, it is probable that both brothers were indeed denied protection of the law, thus rendering permissible their categorization as enforced disappearances and the finding of a violation of article 16.

<sup>a</sup> Other definitions are found in the International Convention for the Protection of All Persons from Enforced Disappearance (2006), art. 2; and the Inter-American Convention on Forced Disappearance of Persons (1994), art. II.

<sup>b</sup> See communications No. 440/1990, *El-Megreisi v. Libyan Arab Jamahiriya* (note that the term was not invoked in this case); No. 1295/2004, *El Alwani v. Libyan Arab Jamahiriya*; No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*; No. 1640/2007, *El Abani v. Libyan Arab Jamahiriya*; No. 1751/2008, *Aboussedra v. Libyan Arab Jamahiriya*; No. 1776/2008, *Bashasha v. Libyan Arab Jamahiriya*.

The misgivings remain, however; most enforced disappearances are really camouflages for clandestine murder. Very occasionally the victims reappear. We should be cautious about relatively brief secret detentions — arbitrary and torturous though they be — being treated as authentic enforced disappearances.

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

## II. Individual opinion of Committee member Mr. Walter Kälin (partly dissenting)

While I agree with the finding of the majority that article 16 of the Covenant was violated in the case of Juma Aboufaied, I am not in a position to share this conclusion with regard to his brother, Idriss, who was secretly detained on two occasions for periods of approximately two months each. Both brothers were victims of secret detention, and thus of violations of Article 9 of the Covenant, but it is more than doubtful that, as the majority seems to suggest, secret detention always and regardless of its duration amounts to a violation of the right to recognition as a person before the law.

Article 16 of the Covenant protects the absolute and non-derogable right to be recognized as someone having the capacity to be a bearer of rights and duties, and thus is the most fundamental of all rights insofar as “recognition of legal personality is [...] a necessary prerequisite to all other rights of the individual.”<sup>a</sup>

It is probably for this reason that, for a long time, the Committee was hesitant to apply article 16 to cases of enforced disappearance. Only as late as 2007 did the Committee start to examine whether and under what circumstances a forced disappearance may amount to a violation of article 16. It held “that intentionally removing a person from the protection of the law for a prolonged period of time may constitute a refusal to recognize that person before the law if the victim was in the hands of the State authorities when last seen and, at the same time, if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (Covenant, art. 2, para. 3) have been systematically impeded”. It explained that in such cases, victims “are in practice deprived of their capacity to exercise entitlements under the law, including all their other rights under the Covenant, and of access to any possible remedy, as a direct consequence of the actions of the State.”<sup>b</sup>

This reasoning makes clear that not every case of a denial of justice or access to a remedy in case of a violation of a right violates article 16 of the Covenant. Rather, as the Committee since 2007 has consistently recognized,<sup>c</sup> this non-derogable guarantee is violated where victims are *systematically* and for a *prolonged* period of time deprived of any possibility to exercise their rights and denied access to a remedy against such violations. It is only under these circumstances that a de facto denial of the right to be treated as a bearer of rights is taking place. On the basis of the information available to the Committee,<sup>d</sup> I am unable to conclude that these conditions were fulfilled in the case of Idriss Aboufaied.

This conclusion should not be interpreted as disregarding the most serious anguish and suffering imposed on Idriss Aboufaied and his relatives. I am also fully aware that contemporary human rights definitions of enforced disappearance do not contain a temporal element.<sup>e</sup> However, while I am deeply convinced that forced disappearance is one of the

<sup>a</sup> Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd edition, (Kehl am Rhein, Engel, 2005), p. 369.

<sup>b</sup> Communications No. 1327/2004, *Grioua v. Algeria*, para. 7.8, and No. 1328/2004 *Kimouche v. Algeria*, para. 7.8.

<sup>c</sup> See, inter alia, communication No. 1751/2008, *Aboussedra v. Libyan Arab Jamahiriya*, Views adopted by the Committee on 25 October 2010, para. 7.9.

<sup>d</sup> See paras. 2.4, 2.5 and 2.9 of the Views in this case.

<sup>e</sup> See International Convention for the Protection of All Persons from Enforced Disappearance (2006), art. 2; Inter-American Convention on Forced Disappearance of Persons (1994), art. II. In contrast, art.

most heinous human rights violations, I maintain that the role of Committee is to apply article 16 rather than interpret a notion that is not enshrined in the Covenant. In this regard, I fear that by giving up the elements of the duration and systematic character of the deprivation of a person of the protection of the law when examining cases under article 16, the majority risks to trivialize this fundamental human rights guarantee.

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

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7, para. 2 (i) of the Rome Statute of the International Criminal Court requires that there be an intent to deprive the person of the protection of the law “for a prolonged period of time”.



### **III. Individual opinion of Committee member Ms. Christine Chanet jointly with Committee member Mr. Cornelis Flinterman (concurring)**

I express reservations over the use, in the statement of grounds for the Committee's decision not to address the issue of article 6 of the Covenant, of the expression "and in light of the fact that both brothers were released alive" (para. 7.12).

This wording might be interpreted as necessarily meaning that proof of death must be established with certainty for a finding of violation of article 6 to be made in respect of enforced disappearance.

In my view, this interpretation would wrongly give pride of place to the last sentence of article 6, paragraph 1, which states that "No one shall be arbitrarily deprived of his life", to the detriment of the second sentence of that paragraph, which states that the right to life "should be protected by law," when the two sentences are of equal importance.

In the matter of enforced disappearance, whether the victim is alive or dead, the mere fact of incommunicado detention which cuts the individual concerned off from the human community by severing contact between them, even temporarily, entails a risk to life for which the State is accountable.

This is the analysis made by the Human Rights Committee in the cases of *Djebrouni v. Algeria* (communication No. 1781/2008) and *Ouaghlossi v. Algeria* (communication No. 1905/2009), and it should not be jeopardized by a different interpretation as might result from the wording I criticize.

[Done 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 to the General Assembly.]

#### IV. Individual Opinion of Committee member Mr. Fabián Omar Salvioli (partly dissenting)

1. In general, I agree with the Committee's decision in the *Aboufaied v. Libya* case (communication No. 1782/2008), but I regret to have to dissent from the contents of paragraph 7.12 of the Views and the conclusions drawn therefrom. In that paragraph, the Committee decided that, having previously found a violation of article 2, paragraph 3, read in conjunction with article 6, and in light of the fact that the Aboufaied brothers were released alive, "the Committee will not examine separately the claims of violation of article 6 read alone."

2. The Committee commonly places the "duty to guarantee" in the context of article 2, paragraph 3, of the Covenant; in my view, however, the provision concerned refers to only one aspect of that duty, namely the duty to ensure a remedy in respect of the violations committed. The duty to guarantee under international human rights law is far broader than the provision of an effective remedy; guaranteeing the exercise of a right is an obligation of the State not only after a violation occurs but also, essentially, before.

3. In previous individual opinions concerning other individual cases dealt with by the Committee,<sup>a</sup> I mentioned the right of guarantee in its three dimensions under the International Covenant on Civil and Political Rights. Although I refer back to those statements in order to avoid repeating identical arguments whenever an instance of enforced disappearance, such as the present one, occurs, I consider that in the Aboufaied case, bearing in mind the third dimension of the duty to guarantee, the Committee should have found a violation of article 6 of the Covenant in respect of both victims.

4. Apart from involving a restricted focus on the right to life, the position that article 6 is violated only in the event of the victims' death ignores the fact that the duty of guarantee covers each of the rights laid down in the Covenant (in this case, the right to life), for which the corresponding legal provision is made (in this instance, in article 6).

5. To limit the duty to guarantee rights to the existence of an effective judicial remedy, in accordance with the reasoning followed by the majority of the Committee in the present case, is to water down the responsibilities and obligations that all States parties to the International Covenant on Civil and Political Rights are required to discharge in good faith in order, in this particular case, to guarantee the right to life. In my opinion, therefore, the Committee should have concluded in its Views that a violation of article 6, paragraph 1, was committed in respect of the brothers Idriss and Juma Aboufaied.

##### **Is there a minimum length of time required for detention to be regarded as constituting enforced disappearance?**

6. I would not like to end this opinion without mentioning a matter which, although correctly resolved in the case of the present communication, may give rise to problems in the future. I refer to the risk of weakening the concept of enforced disappearance by introducing a time dimension as an additional element.

7. In the present case, the Committee correctly categorized the situations of both Idriss and Juma Aboufaied as constituting "enforced disappearance." Enforced disappearance is a complex violation of human rights attributable to the State in which public officials or

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<sup>a</sup> Human Rights Committee, communication No. 1588/2007, *Benaziza v. Algeria*, Views of 26 July 2010, Partly dissenting opinion of Committee member Mr. Fabián Salvioli, paras. 19–21.

individuals act with its support or acquiescence; it entails detention (lawful or unlawful), deprivation of liberty and a refusal to acknowledge detention or to provide information on the fate or whereabouts of the person detained with the aim of placing the person concerned outside the protection of the law. This is a continuing crime which ends only with the appearance of the victim, alive or not (hence, the extrajudicial execution of the individual is not a determinant of the crime of enforced disappearance).

8. The United Nations codification of enforced disappearances began with the Declaration on the Protection of All Persons from Enforced Disappearance.<sup>b</sup> In this instrument, the element of detention is dissociated from the status of the perpetrator (whether or not an agent of the State), and the nature of the detention (lawful or unlawful); although the Declaration does stipulate that there must be a refusal to acknowledge the disappearance or to disclose the fate *or whereabouts* of the person concerned.<sup>c</sup> The time factor (requirement of a minimum length of time to determine whether or not an enforced disappearance has been committed) is not even mentioned.

9. The emphasis on refusal to disclose the person's whereabouts indicates a realization of the risk that victims may be subjected to certain practices constituting grave violations of human rights, especially torture or cruel, inhuman or degrading treatment. Not surprisingly, therefore, the Declaration states that "any person deprived of liberty shall be held in an officially recognized place of detention and, in conformity with national law, be brought before a judicial authority promptly after detention", and also requires that "accurate information on the detention of such persons and their place or places of detention, including transfers, shall be made promptly available to their family members, their counsel or any other persons having a legitimate interest in the information, unless a wish to the contrary has been manifested by the persons [deprived of liberty]."<sup>d</sup>

10. The two specific treaties on the subject (the International Convention for the Protection of All Persons from Enforced Disappearance<sup>e</sup> and the pioneering Inter-American Convention on Forced Disappearance of Persons<sup>f</sup>) uphold the same criteria. The International Convention states the following: "For the purposes of this Convention, 'enforced disappearance' is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law".<sup>g</sup> The Inter-American Convention qualifies forced disappearance in virtually identical terms: "For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that

<sup>b</sup> Declaration on the Protection of All Persons from Enforced Disappearance, adopted on 18 December 1992 by General Assembly resolution 47/133.

<sup>c</sup> *Ibid.*, third preambular paragraph.

<sup>d</sup> *Ibid.*, art. 10, paras. 1 and 2.

<sup>e</sup> International Convention for the Protection of All Persons from Enforced Disappearance, adopted by the United Nations General Assembly on 20 December 2006.

<sup>f</sup> Inter-American Convention on Forced Disappearance of Persons, adopted by the General Assembly of the Organization of American States on 9 June 1994.

<sup>g</sup> International Convention for the Protection of All Persons from Enforced Disappearance, art. 2.

person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees”.<sup>h</sup>

11. The clarity of the rules laid down in these two instruments saves me from further argument, but in order to dispel any possible doubt, and in view of the possibility that the duration of detention may be analysed to determine whether or not it constitutes “enforced disappearance” or “secret detention”, in any case the International Convention for the Protection of All Persons from Enforced Disappearance states emphatically that “No one shall be held in secret detention”.<sup>i</sup>

12. The Rome Statute<sup>j</sup> (which is not a human rights treaty but an international criminal law treaty) has been heavily criticized for not following the definitions laid down in the international human rights instruments for various types of crimes; in the case of enforced disappearance, it incorporates the time dimension as an element of intent on the part of the perpetrator (the perpetrator must have intended to remove a person from the protection of the law for a prolonged period of time). *However, it should be noted that there is no reference to the duration of detention: it merely has to be proved that the perpetrator intended to remove the person from the protection of the law for a certain length of time.*<sup>k</sup> Thus, for example, if a person is detained or abducted by or with the acquiescence of agents of the State, no information is provided on the place of detention and a few days later the person concerned is found dead, or even if he succeeds in escaping from captivity and is reunited with his family, it is difficult to maintain that he was not the victim of enforced disappearance, as has happened in numerous cases in many countries of the world, particularly in South America during the military dictatorships.

13. Incorporating the time dimension into the topic under discussion could have still more serious consequences: how much time should be allowed before implementing the urgent action mechanisms provided for by the conventions protecting persons against enforced disappearance,<sup>l</sup> or United Nations non-treaty mechanisms?<sup>m</sup> International human rights law was very wise never to have introduced a minimum duration of detention to establish an artificial and fragmented standard for the crime of enforced disappearance.

14. The time dimension, in the sense of requiring a minimum duration of detention, has no place in the categorization of enforced disappearance. As regards the parameters to apply in dealing with acts of enforced disappearance, the Human Rights Committee would be ill-advised to use the Rome Statute as a reference, instead of continuing to be guided by its own rich jurisprudence (which has never referred to a period of time) or by the clear provisions of the United Nations Convention on the subject.

[Done 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 to the General Assembly.]

<sup>h</sup> Inter-American Convention on Forced Disappearance of Persons, art. II.

<sup>i</sup> International Convention for the Protection of All Persons from Enforced Disappearance, art. 17.

<sup>j</sup> The Rome Statute establishing the International Criminal Court was adopted on 17 July 1998.

<sup>k</sup> See “International Criminal Court, Elements of Crimes” United Nations document PCNICC/2000/1/Add.2 (2000), art. 7 (l) (i), para. 6.

<sup>l</sup> See International Convention for the Protection of All Persons from Enforced Disappearance, art. 30; and Inter-American Convention on Forced Disappearance of Persons, art. XIV.

<sup>m</sup> For example, the Working Group on Enforced or Involuntary Disappearances.

**L. Communication No. 1801/2008, G.K. v. Netherlands  
(Views adopted on 22 March 2012, 104th session)\***

<i>Submitted by:</i>	G.K. (represented by Böhler Franken Koppe Wijnngaarden Avocaten)
<i>Alleged victim:</i>	The author
<i>State party:</i>	The Netherlands
<i>Date of communication:</i>	30 July 2008 (initial submission)
<i>Subject matter:</i>	Expulsion to Armenia
<i>Procedural issue:</i>	None
<i>Substantive issues:</i>	Risk of being detained and tortured if returned to Armenia; lack of adequate remedy
<i>Articles of the Covenant:</i>	7 and 2, paragraph 3, read in conjunction with 7
<i>Articles of the Optional Protocol:</i>	None

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

*Meeting on 22 March 2012,*

*Having concluded* its consideration of communication No. 1801/2008, submitted to the Human Rights Committee by G. K., 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, dated 30 July 2008, is G. K., an Armenian national born on 19 September 1967. He claims that the Netherlands would violate his rights under articles 7 and 2, paragraph 3, read in conjunction with article 7 of the International Covenant on Civil and Political Rights, if he were to be deported to Armenia. He is represented by counsel, Böhler Franken Koppe Wijnngaarden Avocaten.<sup>1</sup>

\* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, 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, Mr. Krister Thelin 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.

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

1.2 On 5 August 2008, pursuant to rule 92 of the Committee's rules of procedure, the Committee, acting through its Special Rapporteur on New Communications and Interim Measures, requested the State party not to deport the author while his case is under consideration by the Committee.

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

2.1 The author was an overt supporter of the Armenian opposition leader, Ter-Petrosian, who openly expressed himself against the Government of President Sarkisian. He worked as a police officer at the Yerevan police district from 1994 until he left Armenia on 15 June 2008. As a police officer at Yerevan police station, his main task was to secure banks and maintain public order during public events. The police apparatus functions directly under the responsibility of the Government. Dissent is not tolerated within the police force. The author never hid his political ideas and on three occasions, he refused to obey orders to suppress demonstrations held against President Sarkisian, around and after the 2008 elections.<sup>2</sup> Although the use of violence by the police during these demonstrations was encouraged, the author refused to use such methods against demonstrators. On 24 April 2008, during a major demonstration, the author refused to use force, even though he was promised a bonus for doing so. His superiors discovered it. They threatened him and physically ill-treated him. Intimidation by his superiors continued over time.

2.2 Before the elections, the district mayor and several of his employees were offering the population money in exchange for their votes for President Sarkisian. In this context, they came several times to the author's house in the Yerevan suburb. The author consistently refused the money offered. The municipality therefore became aware of the author's political opinions.

2.3 The author's wife was also threatened because of her support for Ter-Petrosian. She used to work at the parliament buildings, where she was threatened by colleagues. They tried to convince her to vote for President Sarkisian, but she refused. This refusal resulted in threats and intimidation. Between 19 and 25 March 2008, the authorities tried to break her resistance. The authorities inflicted a treatment on her that the author was unable to reveal during the first stage of his asylum procedure in the Netherlands. Following these events, the author's wife fled to Russia on 4 April 2008.

2.4 The author stayed in Armenia and tried to keep a low profile. He continued his work until the intimidation became too frequent and too serious. His superiors beat him at his work on 24 April 2008. On 10 May 2008, the author requested holiday leave, which was refused. His second request was refused as well. However, when he promised to work during his holiday leave if necessary, he was granted leave from 19 May until 19 June 2008. He was asked to be present at his work several times during this period. On 19 May 2008, he was again beaten by his superiors. From this day on, they called him on a daily basis threatening him. Between 5 and 15 June 2008, he went into hiding and slept for several nights at his mother-in-law's house and at a friend's house. Meanwhile, he prepared his escape: he had already made his first request for a visa in April 2008 at the Embassy of the United States of America, which was rejected on 6 May 2008. His second visa request made at the Egyptian Embassy was granted on 2 June 2008. With this visa, his valid passport and a flight ticket, he left Armenia on 15 June 2008.

2.5 Colleagues of the author were also arrested, detained and ill-treated because of their political opinions. The police started harassing and intimidating the author's family

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<sup>2</sup> President Serge Sarkisian was inaugurated on 9 April 2008, having defeated several other candidates, including Levon Ter-Petrosian (President, 1991–1998) who finished in second place, in elections held on 19 February 2008.

(mother, brother Artak and sister-in-law Nelly) and mother-in-law for the first time on 22 June 2008, after the author had left the country. They asked about the whereabouts of the author, threatening them and intimidating them with their weapons. On 17 July 2008, the author's brother Artak was arrested and subjected to inhuman treatment by officers of a special department, in order to obtain information concerning the author's whereabouts.

2.6 When the author left Armenia on 15 June 2008, he flew to the Netherlands, arriving there on the same day. He immediately lodged an asylum request. On 16 June 2008, he had his first interview, during which he was asked questions regarding his identity, nationality and itinerary. On 18 June 2008, he had his second interview during which he exposed the reasons for his asylum request.

2.7 On 19 June 2008, written notification was given of the Government's intention to dismiss the author's asylum request. Although it deemed the author's account credible, it considered him not to be an important political opponent, who could fear persecution. The report considered that the author's continuous working activity during his holiday, his stay with his mother-in-law and a friend for a while (in the State party's view an obvious hiding place for the authorities to look for him) and his flight from Armenia with his own passport, were evidence that the author did not fear persecution or ran the risk of being inhumanely treated upon return to Armenia. The author was given the possibility to give his written viewpoint on the intention within 3 hours, which he did.

2.8 The author submitted his written viewpoint, as well as corrections and additions to the second interview the same day at 6:00 p.m., three hours after receiving the report of the second interview and the Government's intention. In his additional points, the author stated that following his refusal to obey police orders, he was threatened and beaten by three of his superiors on 19 May 2008. The only reason for such treatment was his political opinions. At this stage, the author also mentioned that prior to her flight to Russia, his wife had not only been threatened but also raped by persons linked to the district mayor and persons working at the parliament building. The author also submitted reports from Human Rights Watch, the International Crisis Group and Amnesty International, as well as articles from Radio Free Europe, to substantiate his claims. These reports confirm that no free elections were held, and that the opposition was intimidated, threatened and violently attacked by security forces (army and police). They further state that security forces are a powerful apparatus that can operate without hindrance or punishment, and that civil servants were forced by their superiors to vote for President Sarkisian and attend pro-Sarkisian rallies. The author emphasized the ill-treatment and threats that he and his wife were subjected to, and the fact that he had not returned to work after the expiration of his holiday leave, which drew negative attention to his political stand.

2.9 The author's asylum request was rejected on 20 June 2008 on the ground that he was never persecuted, arrested, detained or sentenced in Armenia; that during the second interview, the author did not mention the ill-treatment that he and his wife were subjected to; that the threats from superiors would not be sufficient reasons to fear persecution upon return; and that the documents provided after the second interview were of a broad nature and not directly related to the author's specific case. The author appealed to the Hague District Court in Haarlem substantiating his claim to the threats against his mother and one of his colleagues. He also submitted the contracts of his property in Yerevan to demonstrate that he did not leave Armenia for economic reasons. The appeal was rejected on 8 July 2008. The author then appealed to the Administrative Law Division of the Council of State, bringing additional information that the police came to the house of his mother and mother-in-law to inquire about him on 22 June, 3 and 10 July 2008.

2.10 On 18 December 2008, the author informed the Committee that all his documents, such as his passport, marriage certificate, police membership card and air ticket had been sent by the State party authorities to the Armenian Embassy. The Armenian authorities

were therefore informed of the author's presence in the Netherlands, which increased his risk of persecution upon return.

### **The complaint**

3.1 The author considers that the State party's decision to expel him to Armenia would violate his rights under article 7 of the Covenant. The author further argues that the accelerated asylum procedure he was submitted to violates article 2, paragraph 3 of the Covenant, in conjunction with article 7.

3.2 As a political dissident within the police apparatus, the author argues that he faces a real risk of being persecuted upon return to Armenia. The police are under the strong influence and control of President Sarkisian. As a police officer, the author is not allowed to be officially politically active or to be a member of a political party. In the past, he and his wife were intimidated, threatened and ill-treated. These allegations were supported by letters from witnesses to such ill-treatment, including the author's mother, who confirms that the author was beaten, and a colleague's mother, who alleged similar treatment of her own son. The author further alleges that since his departure from Armenia, his family has been subjected to intimidation and threats by the police, using weapons. On 17 July 2008, the author's brother Artak was arrested and subjected to inhuman treatment by officers of a special department in order to obtain information about the author's whereabouts.

3.3 Human Rights Watch, the International Crisis Group, Amnesty International, as well as articles from Radio Free Europe confirm the violence in 2008. Some reports mention that physical abuse and ill-treatment of detainees during apprehension and on the way to the police department were documented. In some cases, abuses continued in custody.<sup>3</sup> The reports also state that violence continued after the election period. The author notes that the reports do not make any distinction between prominent opponents and ordinary political opponents. Given the treatment reserved for political opponents, as demonstrated by the reports submitted, the State party would be in violation of article 7 of the Covenant should he be expelled to Armenia.

3.4 The author's rights under article 2, paragraph 3, in conjunction with article 7, have also been violated as his asylum request was considered in the framework of the accelerated asylum procedure, which is limited in time (48 procedural hours) and therefore leaves almost no time for preparation by the asylum seeker and his/her representative. A Human Rights Watch report states that the accelerated procedure often deprives the applicants of their fundamental right to a full and fair consideration of their claims; and that applicants have little opportunity to document their need for protection. The rigid framework of deadlines also fails to allow meaningful access to legal counsel and raises serious risks of refoulement. As a result of this criticism, on 24 June 2008, the Minister of Justice announced plans to revise the accelerated procedure and to prolong it from 48 hours to 8 days.

3.5 The author considers that he should have been referred to the long-term asylum procedure, since his asylum account was deemed credible by the authorities. The long-term procedure would have enabled them to conduct a more extensive examination of the author's claim of violations of the 1951 Convention on the Status of Refugees and of article 3 of the European Convention on Human Rights. In order for State party authorities to obtain more credible information, more time should be granted to asylum seekers to enable them to gather information and evidence to support their claims. The author also criticizes the refusal of the State party authorities to consider the testimonies of the author's family as

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<sup>3</sup> See Human Rights Watch, "Armenia after the Election," written statement, 17 April 2008.



relevant pieces of evidence. Moreover, not enough scrutiny was applied at the appeal level before the District Court in Haarlem and the Council of State. The burden of proof should not lie solely on the applicant, especially since the author and the State party do not always have equal access to evidence.

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

4.1 On 5 February 2009, the State party submitted its observations on admissibility and merits. It starts by recounting the author's asylum procedure, specifying that after the first interview on 16 June 2008, the author prepared for the second interview on 17 June 2008 with the assistance of a legal adviser. The legal adviser may discuss with the asylum seeker the report of the first interview and the results of the investigations on his identity, nationality and travel route, and spend a maximum of two hours helping him to prepare for the second interview.<sup>4</sup> During the second interview, the author was given an opportunity to elaborate on his asylum application. Reports were drawn up of both interviews, which took place in Armenian with the help of an interpreter. On 19 June 2008, written notification was given of the intent to dismiss the author's asylum application. The report of the second interview was appended to that notification.

4.2 The author was given the opportunity to make substantive changes and/or additions to the report of the second interview, in writing. He was then given the opportunity to express his opinion about the notification of intent to reject his asylum application, which he did by letter of 19 June 2008. A large number of public documents were appended to the notification. On 20 June 2008, the asylum application was rejected within the application centre procedure (accelerated procedure),<sup>5</sup> because it was possible to determine, without a time-consuming investigation, that the author was not eligible for residence in the Netherlands on one of the grounds referred to in section 29 of the Aliens Act 2000.<sup>6</sup> On the same day the author filed an application for judicial review. The author also applied for an injunction to suspend his expulsion. Both applications were considered on 1 July 2008 by the Hague District Court in Haarlem. By judgement of 8 July 2008, the district court rejected the author's application. The author lodged an appeal on 15 July 2008 with the Administrative Jurisdiction Division of the Council of State, which the Division declared manifestly ill-founded by decision of 25 July 2008.<sup>7</sup>

4.3 In his second interview, as grounds for his asylum application, the author mentioned his position as police officer, his unwillingness to vote for President Sarkisian, despite

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<sup>4</sup> This time frame can be extended to three hours, upon request.

<sup>5</sup> According to the State party, the application centre procedure is an accelerated procedure in which a decision is taken within 48 hours if it is determined that the application can be either rejected on the grounds of sections 30 or 31 of the Aliens Act 2000 or section 4:6 of the General Administrative Law Act (this includes futile cases and Dublin claim cases), or granted without a time-consuming investigation during the application centre procedure on the grounds of section 29 of the Aliens Act 2000.

<sup>6</sup> See section 29 of the Aliens Act 2000 which provides for a temporary asylum residence permit to be issued to an alien: who is a refugee within the meaning of the 1951 Convention on the Status of Refugees; who makes a plausible case that he has reasonable grounds to believe 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, in the opinion of the State Secretary of Justice, to return to his country of origin; for whom return to the country of origin would, in the opinion of the State Secretary, constitute an exceptional hardship in connection with the overall situation.

<sup>7</sup> Pursuant to section 91, subsection 2, of the Aliens Act 2000, when issuing its judgement, the Division may, as in the case at hand, confine itself to stating its opinion that the appeal is manifestly unfounded.

pressures from his superiors, and his non-affiliation to any political party. The author explained that starting 20 February 2008, after President Sarkisian's electoral victory, a number of peaceful demonstrations took place, at which the author was present to maintain order. From 1 March 2008 onwards, the demonstrations became violent. Because he was on leave on 1 March 2008, the author was not present during the first violent demonstration. However, the author was present at the demonstrations of 21 March, 23 March and 9 April 2008, in his capacity as police officer. Because he was positioned at the end of the ranks, he did not have to use force against demonstrators. During the asylum procedure, the author reported that the district mayor was a member of the Government party and knew that the author and his wife had refused to take money in exchange for votes in favour of President Sarkisian. At the end of March 2008, the district mayor and a number of other men attempted to abduct and rape the author's wife. He suspects that his superiors were also involved. The author's wife was able to escape and decided to flee to Russia on 4 April 2008, against her husband's will. At the end of April 2008, the author decided to leave Armenia as well.

4.4 In this interview, the author further mentioned that he had started sympathizing with the demonstrators and therefore did not agree with the way they were treated by police forces. Consequently, he invented an excuse to avoid having to be present during the demonstration that took place on 24 April 2008. He did go to work that day to guard a bank. The author submitted requests for leave on 10 and 19 May 2008. Both requests were denied initially. However, in order to avoid having to serve during demonstrations, the author made an agreement with his superiors that if they approved his leave request in writing, he would show up to work to guard banks only. The author stopped going to work on 19 May 2008. His phone rang every day from that moment on, but he did not answer. On 1 June 2008, his commanding officer called to inform him that if he did not show up to work, measures would be taken. His commanding officer also said that he knew who the author had voted for. He added that if the author did not show up to work, he would disappear. The author, who in the meantime had arranged for a flight ticket and a visa to Egypt, reported for work at the police station on 2 June 2008, and was instructed to guard the bank every other day. On 3 June 2008, the author received his visa for Egypt. From 3 to 14 June 2008 he continued receiving phone calls, and during that time, he spent most of his time with his parents-in-law or a friend. On 15 June 2008, he flew to Egypt, then proceeded to the Netherlands.

4.5 Recalling the asylum application process and the possibility of resorting to the accelerated application centre procedure, the State party explains that the author's asylum application was evaluated on the basis of information from the Ministry of Foreign Affairs country report of March 2008 and various reports compiled by Radio Free Europe, Radio Liberty, Amnesty International, Human Rights Watch and the International Crisis Group, which the author submitted during the procedure. When the decision was made, the policy on asylum seekers from Armenia was based on the country report dated March 2008. The State party emphasizes that the situation in Armenia is not such that every asylum seeker from Armenia should automatically be designated a refugee within the meaning of the 1951 Convention on the Status of Refugees, nor can it be concluded that returning to Armenia would, in itself, expose a person to the risk of torture or cruel, inhuman or degrading treatment or punishment within the meaning of article 7 of the Covenant.

4.6 At the time of the decision on the author's asylum request, the State party considered that specific groups required special attention. One such group included members of opposition political parties. The information relied upon by the State party was that opposition parties were impeded by the Armenian authorities as of March 2008. There were reports of raids, arrests, a bomb attack and arson. Deadly force was sometimes used and some arrests and convictions were political. The country report was issued in March 2008 and pertains to the period from October 2006 until January 2008 and therefore does not

cover the presidential elections in Armenia on 19 February 2008, and the alarming situation that developed in the wake of the elections, particularly in the run-up to the author's departure. However, in evaluating the author's asylum application, the State party made use of information from other public documents, namely those submitted by the author in the national procedure.

4.7 Regarding the author's claim under article 7 of the Covenant, the State party first acknowledges the consistency of the author's account with the political situation in Armenia following the presidential elections of 19 February 2008. The State party specifically refers to inter-governmental and non-governmental reports, stating that many Armenian State employees reported being coerced by their superiors to vote for Sarkisian or to attend his rallies.<sup>8</sup> A large number of arrests were made as a result of the demonstration of 1 March 2008, from which a large majority of the persons detained have been found guilty and sentenced.<sup>9</sup> The State party therefore does not refute the author's assertions at the second interview that he and his wife were offered money to vote for Sarkisian and that they refused it, that the author tried to avoid working at demonstrations and that his wife was a victim of attempted rape.

4.8 The State party considers, however, that this version of the author's account provides insufficient reason to conclude a well-founded fear of treatment in breach of article 7 of the Covenant. The author never carried out political activities against the authorities of his country, nor was he politically active. The author was merely sympathetic to the opposition and voted for the President's opponent. In contrast to the author's claim in his communication to the Committee, it cannot be concluded from the report of the second interview that the author made his political convictions known to the Armenian authorities. The interview report indicates that the author suspects that his superiors knew about his political sympathies when he refused to take money to vote for Sarkisian. However, there is no evidence to suggest that the author ever made his political preferences explicitly known. The State party refers to the report of the second interview, in which the author said that he had justified his refusal to work during the demonstration of 24 April 2008, by claiming that he had not yet been paid. The State party therefore understands such behaviour as a means used to conceal his political preferences from his superiors.

4.9 Furthermore, the reports mentioned by the author refer to political activists. Based on the author's statements, he cannot be considered as belonging to any of those groups, nor can it be concluded that the authorities would attribute such oppositional activities to him. In addition, according to the report issued by the Commissioner for Human Rights of the Council of Europe dated 29 September 2008, even active members of the opposition and participants in the violent protests that took place on 1 and 2 March 2008 were only given prison sentences in the worst cases, and most were subjected to non-custodial measures. It cannot be concluded that the authorities have a special interest in the author because he and his wife refused to take money in exchange for voting for Sarkisian and because he refrained from doing certain police work. According to the report of the second interview, the objective of the conversations between the author and his superiors, which he described as threatening, was to induce him to return to work so that he could carry out his duties. References in those conversations to the author's support for presidential candidate Ter-Petrosian are not sufficient evidence to disclose a violation of article 7 of the Covenant. The author's fear that he would suffer harsh treatment in the future is based on

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<sup>8</sup> See OSCE/ODIRH Election Observation Mission Report dated 30 May 2008 on the presidential election in Armenia on 19 February 2008; and the International Crisis Group report, "Armenia: Picking-up the Pieces," dated 8 April 2008.

<sup>9</sup> See report of the Commissioner for Human Rights of the Council of Europe dated 29 September 2008, "Special Mission to Armenia, Summary of Findings, Yerevan, 13–15 July 2008."

unsubstantiated suspicions, which the State party, given its knowledge of Armenia, considers implausible.

4.10 Moreover, the conversations held with his superiors did not prompt the author to leave the country immediately. Even the attempted rape of his wife at the end of March 2008 did not induce him to leave, since he only left the country on 15 June 2008. In addition, the author failed to substantiate his assertion that the Armenian authorities could be held partly responsible for the rape attempt, which is based on mere suspicions. The author did not report these events to the police nor did he substantiate his assertion that reporting them would have been futile. The documents provided by the author did not further support his claims.

4.11 The author did not seem to have suffered adverse consequences when he went to work at the police station on 2 June 2008, as ordered by his superiors. If the authorities had viewed him as an object of suspicion because of his political sympathies, they would have been justified in taking disciplinary action against him. Furthermore, the author left the country with his national passport and a visa without encountering any problems. The author's chosen method of leaving the country suggests that he did not anticipate any trouble with the authorities.

4.12 The State party's conclusion is not altered by the author's later allegations that on 24 April 2008 and 19 May 2008 he was maltreated by his superiors and his wife was raped, which he did not mention until after the interviews. It is the asylum seeker's responsibility to mention any relevant fact necessary for a decision to be made regarding the asylum procedure. In the present case, the author was assisted by a lawyer who was in charge of advising him to disclose all information relevant for the procedure, even the ones that could be sensitive or difficult to reveal. Despite such advice, the author failed to mention some aspects which he only revealed later. The State party is all the more puzzled by such behaviour since the second interview report states that when asked explicitly whether he had been maltreated, the author said he had not been. He was also asked at that interview whether it was true that his wife had managed to escape from her attackers, and had not been harmed, and he answered in the affirmative. Moreover, in his letter of 19 June 2008, which contained corrections and additions to the report of the second interview, the author mentioned only an assault that allegedly took place on 19 May 2008. Subsequently, he has claimed that he was also maltreated on 24 April 2008. The author keeps changing his story.

4.13 The State party does not give much credit to the testimonies gathered later from his relatives, as they cannot be considered objective sources. Even if the content of the letters were to be taken into account, it could well be that the Armenian authorities were merely trying to determine why the author had not shown up for work or where he was residing.

4.14 Regarding the author's contention, referred to in his letter dated 18 December 2008, that the Armenian authorities are now aware that he is residing in the Netherlands because his passport, marriage certificate, police membership card and air ticket were sent to the Armenian representation to the Netherlands, the State party replies that the standard practice is that all documents left behind at the Royal Military Constabulary are returned to the representation of the alien's country of origin if the alien or his representative does not claim them within two months. In the present case, the author's representative requested those documents three months after the release of the author. The State party insists that it does not reveal any information regarding the existence of an asylum procedure to the alien's diplomatic representation.

4.15 As for the author's allegations under article 2, paragraph 3, of the Covenant, the State party notes that all procedural guarantees were observed during the author's asylum procedure. He was legally represented and twice took the opportunity of appeal, first before the district court, and then before the Division. The mere fact that judicial proceedings did

not play out in his favour is not sufficient to show that he did not have access to judicial remedies. The State party therefore considers this part of the communication unfounded.

### **The authors' comments to the State party's observations**

5.1 On 29 April 2009, the author commented on the State party's observations. He claims that his asylum request was too complicated and extensive to be dealt with in the application centre procedure, which is meant to be an exception to the normal procedure. According to the Dutch Aliens Circular, cases can be considered under the application centre procedure if it is possible to decide without time-consuming investigations that the application should be rejected. The author could not sustain his initial claim within 48 procedural hours, especially since he had to obtain information from Armenia and from a physician or a psychiatrist.

5.2 The author refers to a report requested by Amnesty International, dated 7 March 2009, providing a psychiatrist's assessment of the author's condition based on his claim of maltreatment by his superiors. In the report, the psychiatrist substantiates that the applicant was mentally incapable of mentioning the ill-treatment and the attempted rape on his wife during the interview. The psychiatrist also confirms the plausibility of the author's mental and physical symptoms being the result of ill-treatment. The psychiatrist concludes that the author's chronic symptoms and hypertension could indicate a long increased emotional tension which could plausibly be the result of the alleged torture. The report therefore supports the author's allegation related to the occurrence of traumatic events in Armenia before his flight. Under these circumstances, it could not be expected that the author would have mentioned in an earlier phase of the asylum procedure the ill-treatment of his wife and himself.

5.3 In its jurisprudence, the European Court of Human Rights has stated with regard to another State, that "the automatic and mechanical application of [the timeframe requirement] for submitting an asylum application must be considered at variance with the protection of the fundamental value embodied in article 3 of the Convention."<sup>10</sup> As mentioned by the State party itself, the author's asylum application was evaluated based on information contained in the Ministry of Foreign Affairs' country report of March 2008, which does not cover the events alleged, and on reports submitted by the author. The State party has therefore only used materials submitted by the author and did not make any investigations itself.

5.4 Regarding the allegations submitted during the asylum application process, the State party did not carefully consider his statements. It has not disputed that the author refused on three occasions to obey orders to suppress demonstrations held against Sarkisian and that he received oral threats from his superiors because of his known support for presidential candidate Ter-Petrosian. The author already explained that his political convictions were known both within the police apparatus and to the district mayor and his employees, as they came several times to his house to offer the author and his wife money in exchange for votes. The author was politically active insofar as his political convictions had become clear to the authorities. As a police officer, he was not allowed to become a member of a political party. His disobeying orders three times, his flight from Armenia and the continuous intimidation of his relatives after his flight would place him in breach of the loyalties demanded by his State employer. The State party's reference to the report of the Commissioner for Human Rights of the Council of Europe support his claim, as both fines and prison sentences reflect the suppression of political activism in Armenia. The report further underlines the lack of fair trial, and considers that it is unacceptable to continue to

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<sup>10</sup> See ECHR, *Jabari v. Turkey*, judgement of 11 July 2001 (No. 40035/98).

hold in detention or to convict anyone, solely on the basis of their political beliefs or non-violent activities.

5.5 The author further claims that his wife's rape was not merely attempted, but indeed took place. Concerning the author's alleged failure to report his wife's rape to the police, he points out that his wife fled the country immediately after her rape. He cites an expert report dated 11 December 2008, written by Robert Chenciner, a Senior Associate Member of St. Anthony's College of Oxford and Honorary Member of the Russian Academy of Science, Dagestan Science Centre. This report states that rape is sociologically a terrible crime in Armenia, especially of a policeman's wife, and that in the climate of violence against women prevailing in Armenia, rape should be taken seriously as a means of punishment. The author therefore contends that complaining about his wife's rape to the authorities would not have supported him, especially since he was seen as a political opponent.

5.6 With regard to the letters written by his relatives, the author contends that in one of the letters, his mother mentioned that his brother had been subjected to inhuman treatment by officers of a special department over two days in order to find out about the author's whereabouts. Moreover, his mother-in-law stated that she and her family had been harassed and intimidated for the same reason. These cannot be considered normal behavior by authorities to obtain information on the author's whereabouts. The Dutch Administrative Law applies the theory of free evidence. This implies that any type of evidence is admissible during the asylum application process. The author also refers to the United Nations High Commissioner for Refugees (UNHCR) Handbook which states that "the requirement of evidence should [...] not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself." UNHCR further states that "it will, in any event, be necessary to lighten the burden of proof normally incumbent upon the applicant, and information that cannot easily be obtained from the applicant may have to be sought elsewhere, e.g. from friends, relatives and other persons closely acquainted with the applicant."<sup>11</sup> The author also asserts that the European Court of Human Rights has given considerable weight to letters from relatives.<sup>12</sup> Thus, while the burden of proof, in principle, rests on the author, the duty to ascertain and evaluate all relevant facts is shared between the author and the State party, which the latter failed to do in the present case.

5.7 The author considers that the State party failed to substantiate its contention that the author did not fear any trouble with the authorities by leaving the country with his own passport. The State party does not take into account the fact that the author was granted official holiday leave, which is the only condition for a police officer to be able to leave the country.

5.8 As for the State party's sending the author's original personal documents to the Armenian diplomatic representation, it has breached the absolute rule that a State should never contact or approach the authorities of the country of origin of the asylum seeker during an asylum procedure. Contact with the diplomatic representation can only take place with the explicit approval of the asylum seeker and after consultation with the Immigration Service. The State party has therefore knowingly put the author at risk especially since these documents were sent to the diplomatic representation after the author's submission of

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<sup>11</sup> See UNHCR, 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.1), paras. 197 and 210.

<sup>12</sup> See ECHR, *Ammari v. Sweden*, judgement of 22 October 2002 (No. 60959/00).

his communication to the Committee and the granting of interim measures by the Special Rapporteur.

#### **Further information provided by the State party**

6.1 On 23 June 2010, the State party responded that in his comments, the author considerably broadened the scope of his original communication by raising in a general sense the issue of the asylum application centre procedure. The State party insists that the purpose of the individual communications procedure before the Committee is not to challenge, in the abstract, national legislation or practices which seem to be contrary to the Covenant.<sup>13</sup> Furthermore, the issue that is central to the author's claim under article 7 is whether expelling him to his country of origin would expose him to a real risk of treatment contrary to the Covenant.

6.2 Regarding the application centre procedure,<sup>14</sup> cases are evaluated at several points of the procedure to determine whether they can be processed properly in that context or if further investigation is required. The first evaluation is made after the first interview when the applicant's legal adviser has the opportunity to inform the Immigration and Naturalization Service (IND) of his opinion that the case requires considerably more research. The IND then determines whether to continue with the accelerated procedure or send the application to a handling officer for further consideration and refer the asylum seeker to a reception centre. In the present case, the legal adviser did not make use of this option. At the end of the second interview, a decision is again made as to whether the case is suited for further processing at the application centre. The final decision is made after the asylum seeker has expressed his views on the intended decision. The views expressed by the author on 19 June 2008 did not constitute grounds for discontinuing the consideration of his case at the application centre. Enough safeguards are set in place to ensure an accurate and proper assessment of the risk. The first safeguard is the existence of multiple interviews, where the applicant is assisted by a legal adviser and the second is the existence of multiple points at which a decision is taken as to whether it is appropriate to continue processing the case at the application centre. This decision is subject to appeal before domestic courts, of which the author availed himself. The domestic courts did not consider that it was impossible to assess the risk of treatment contrary to article 7 of the Covenant within the application centre procedure.

6.3 The State party further rejects the author's claim that he was given too little time to prepare his application. Asylum seekers are not expected to prove what happened in their country of origin but rather to establish the plausibility of their account. The State party considered the statements made by the author during his second interview to be plausible. The documents submitted by the author were also thoroughly assessed within the application centre procedure and by the courts. However, they were insufficient to establish the plausibility of the author's claim that if returned to Armenia he would suffer a treatment contrary to article 7 of the Covenant. Given that the author did not leave the country until 15 June 2008, he would have had enough time to obtain documents in support of his account.

6.4 The author submitted a new asylum application on 16 April 2009, supporting his claim with the Amnesty International report and other documents reporting on his medical condition. These documents prompted the State party to have the Medical Assessment Section (Bureau Medische Advisering (BMA)) examine the author's medical condition and

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<sup>13</sup> See the Committee's communication No. 35/1978, *Aumeeruddy-Cziffra et al. v. Mauritius*, Views adopted on 9 April 1981, para. 9.2

<sup>14</sup> See C12/3 and C13/2 of the Aliens Act Implementation Guidelines 2000.

respond to the report issued on 7 March 2009 by Amnesty International's medical examination group. The BMA examined him and reported its findings to the State party on 6 November 2009 and 12 August 2009. The author's new asylum application was rejected on 14 January 2010. The author subsequently submitted an application for judicial review of this decision, which was still pending at the time of the State party's further information.<sup>15</sup>

6.5 Prior to the second interview, the author was asked whether there were any medical reasons that could prevent him from being interviewed. He replied that he was fit to be interviewed. In his new asylum application dated 16 April 2009, the author submitted the Amnesty International report to demonstrate that during the second interview he was not fit to reveal that he had been maltreated by his superiors and that his mental and psychological problems were related to the inhuman treatment he had been subjected to in Armenia. In the State party's opinion, the report is too inconclusive to satisfactorily establish such claim. While the author's physical injuries, such as the persistent localized pain that he is experiencing in his upper abdomen, the 3-mm scar on his shinbone, and the missing back teeth, could all be consequences of torture, they could also be the result of injuries sustained under other circumstances.

6.6 The Amnesty International report states that the author's account contains evidence that he suffers from post-traumatic stress disorder (PTSD). However, the report states that they can best be classified as an adjustment disorder. The report also states that the current uncertainty of the person's living circumstances also play a role in the severity and development of his symptoms. The report concludes, however, that although the uncertainty of his living circumstances might be a factor, the author's disorder appears to be the result of torture/ill-treatment. In his report dated 12 August 2009, the BMA physician expressed doubts regarding the method used by the Amnesty International expert to reach such a conclusion, given the preliminary assessment of an adjustment disorder.

6.7 In its judgement of 8 July 2008, the District Court in Haarlem found that in the report of the second interview, the author made a detailed statement when asked to recount his story and he did not seem to have been interrupted or hindered on that occasion. When asked for further clarifications, the author was able to reply satisfactorily. The Court also found that there were no indications as to why the author could not have stated in the second interview that he had been assaulted. After the interview, when consulted on this issue, the author replied that he was satisfied with the way the interview had been carried out. The State party therefore doubts the veracity of the author's subsequent allegations related to his assault and his wife's rape.

6.8 The State party finally notes that the poor human rights situation in Armenia, and particularly the events linked to the Presidential elections and the consequences on political rights were taken into account during the entire asylum process. However, the situation has since changed; according to the United States State Department 2009 Human Rights Report, a general amnesty was declared on 19 June 2009. Subsequently, approximately 30 of the 44 opposition supporters still being held in connection with the Presidential elections in February 2008 were released. The State party maintains that the author is not at risk of any treatment contrary to article 7 of the Covenant upon return to Armenia. Since the author has always kept his political convictions unknown by his superiors and he would not

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<sup>15</sup> By letter dated 2 September 2010, the State party informed the Committee that the Hague District Court, sitting in Amsterdam, had declared the author's application for review unfounded. The author lodged an appeal against this judgement with the Administrative Jurisdiction Division of the Council of State on 12 August 2010. By letter dated 18 January 2011, the author informed the Committee that his appeal had been rejected on 14 January 2011, thus closing once again domestic remedies.



be in danger merely because he refused to take money in exchange for votes in the context of the 2008 Presidential elections, or because he avoided certain tasks as a policeman. Moreover, by 2010, two years has elapsed since the elections.

#### **Further comments by the author**

7.1 On 1 October 2010, the author gives detailed arguments in support of his claim that the accelerated procedure as applied to him did not meet minimum requirements enabling a risk assessment. Since 1 July 2010, the accelerated asylum procedure has been replaced by the general asylum procedure, whose length has been extended to 8 days. The replacement of the accelerated procedure by a general asylum procedure is a sign that the previous process did not guarantee asylum seekers' rights. This new procedure allows for a rest and preparation time of at least six days before the process starts. In the accelerated asylum procedure which was in force until 1 July 2010, there was no rest and preparation time, no meeting at the lawyer's office and there were different lawyers at every stage of the procedure. Hence, the lawyer who assisted the author, after the first interview, to prepare the second interview was not the same lawyer who met with the author after the second interview. These circumstances did not contribute to an environment in which the applicant felt sufficiently safe to state all his reasons for asylum right at the beginning.

7.2 In the corrections and additions that he submitted with the views on the intention to reject his asylum request, the author claimed that he had been threatened, beaten and physically ill-treated by his superiors because of his political support for Ter-Petrosian, and that his wife had been raped by persons linked to the district mayor. These corrections should have prompted the State party to decide that the author's request could not be handled in the accelerated procedure. The State party simply stated that it did not deem these corrections and additions credible. Moreover, the letters written by his relatives were not considered by the State party as they were only submitted at the appeal stage. As to the State party's contention that the author had enough time to gather evidence in support of his account before leaving the country, the author replies that if he brought such documents with him he would have risked having them discovered at the airport before his flight. On the other hand, the letters from his relatives were written after his departure and could therefore not be gathered in the first phase of the proceedings.

7.3 During the proceedings for the author's second asylum application, the contents of the documents submitted were not considered by the State party, which latter applied strict procedural rules, stating that the documents were not authentic and/or not from objective sources or just general documents and that they did not concern the author personally. The District Court in Amsterdam rejected the author's application for review on 15 July 2010 considering that documents such as Amnesty International's report on the author's medical condition, the report of Armenia expert Robert Chenciner and the fact that the State party authorities sent original documents concerning the author to the Armenian diplomatic representation were not new facts within the meaning of section 4:6 of the General Administrative Law Act, which in the author's opinion, did not ensure the author the procedural guarantees necessary for an adequate risk assessment.

7.4 The author mentions a report from the Dutch National Ombudsman which concludes that the State party has violated the law by sending the author's original documents to the Armenian diplomatic representation while the asylum procedure was ongoing. The Ombudsman further stated that it could not exclude that by receiving these documents, the Armenian authorities became aware of the author's asylum request in the State party.

7.5 Regarding the Amnesty International report, the author refutes the State party's contention that it is unclear and inconclusive. The psychiatrist who is the author of the report states that the psychological disorder seems to be the result of torture/ill-treatment. He concludes that the psychiatric symptoms, the scar on the author's left leg and the

author's loss of back teeth are consistent with the torture/ill-treatment alleged. In response to the report, the State party's medical adviser pointed out in a report dated 12 August 2009 that it was not clear why the psychiatrist concluded that torture/ill-treatment had more effect on the psychiatric symptoms than the current living conditions. On the other hand, the medical adviser did not doubt the conclusion that the psychiatric symptoms could be classified as consistent with the allegation of torture/ill-treatment. Furthermore, he did not cast any doubt on the conclusions in the report concerning the consistency of the scar and the missing teeth with the torture/ill-treatment.

7.6 The author refers to jurisprudence of the European Court of Human Rights where the Court considered that "although the certificate was not written by an expert specializing in the assessment of torture injuries, [...] it nevertheless gave a rather strong indication to the authorities that the applicant's scars and injuries may have been caused by ill-treatment or torture. In such circumstances it was for the [State authorities] to dispel any doubts that might have persisted as to the cause of such scarring. [The State authorities] ought to have directed that an expert opinion be obtained as to the probable cause of the applicant's scars in circumstances where he had made out a prima facie case as to their origin. It did not do so and neither did the appellate courts. [...] The State has a duty to ascertain all relevant facts, particularly in circumstances where there is a strong indication that an applicant's injuries may have been caused by torture."<sup>16</sup> In the above-mentioned jurisprudence, the report had been produced by a non-expert, whereas in the author's case, a psychiatrist from Amnesty International wrote the report. Therefore the author rejects the State party's contention that he should have mentioned all facts relevant to his case from the beginning of the asylum procedure. On the contrary, the State party should have brought medical evidence which could challenge Amnesty International's medical report regarding the author's inability to mention his torture early in the asylum procedure.

7.7 After recalling his earlier arguments regarding the risk of suffering treatment contrary to article 7 of the Covenant, the author refers back to the jurisprudence of the European Court of Human Rights, more specifically, *R.C. v. Sweden*, where the Court held that "having regard to its finding that the applicant [...] discharged the burden of proving that he [had] already been tortured, the Court [considered] that the onus [rested] with the State to dispel any doubts about the risk of his being subjected again to treatment contrary to article 3 in the event that his expulsion proceeds."<sup>17</sup>

7.8 The author refers to recent reports on the human rights situation in Armenia, stating that following investigations on the events related to the 2008 Presidential election, the Armenian Parliamentary Committee concluded that no mistakes had been made by the police and security forces in suppressing the disturbances; that since the amnesty of June 2009, people continue to be imprisoned due to these events;<sup>18</sup> that more than half of the prisoners interviewed alleged having been tortured during the police investigations before they were transferred to prison; and that torture and ill-treatment in custody is widely reported by local civil society groups in Armenia.<sup>19</sup> The author therefore contends that torture and ill-treatment are still widespread in Armenia and that the State party has violated his rights under article 2, paragraph 3 read in conjunction with article 7 and would violate article 7 alone should he be returned to Armenia.

<sup>16</sup> See ECHR, *R.C. v. Sweden*, judgement of 9 March 2010 (No. 41827/07), para. 53.

<sup>17</sup> *Ibid.*, para. 55.

<sup>18</sup> See Dutch Minister of Foreign Affairs, Country report on Armenia, 27 August 2010.

<sup>19</sup> See Human Rights Watch submission to the Universal Periodic Review on Armenia on "Torture and ill-treatment," November 2009.

**Additional observations by the State party and further comments by the author**

8.1 On 29 July 2011, the State party submitted that the replacement of the application centre procedure with a general asylum procedure was motivated, in part, by a desire for qualitative improvements in the handling of asylum applications, which does not imply that decisions made in the previous procedure were made without the required due care.

8.2 The author's allegations according to which he did not have the assistance of a legal adviser to prepare for his first interview does not mean that the first asylum procedure was conducted without due care. An asylum seeker's reasons for seeking asylum are not discussed in this first interview but in the second interview. The author was assisted by a legal adviser in preparing for the second interview, and he was explicitly informed, at the second interview, of the importance of mentioning all facts and circumstances relating to his account. There seems to be no reason why the author could not have mentioned that his wife had been raped and that he had been subjected to inhuman treatment in his country of origin, at that stage. The State party notes that the District Court in Haarlem, in its judgement of 8 July 2008, discussed at length the question of whether the second interview was conducted with due care, and concluded that it was.

8.3 Regarding the second application, the State party contends that the authorities did take account of his medical condition in their assessment. At the request of the author's legal representative, the author was examined by a doctor on 15 April 2009. This doctor concluded that the author's medical condition did not permit a lengthy interview but that it was possible to hear him briefly concerning any facts or altered circumstances. The interview was held the following day and took account of his medical state. The Immigration and Naturalization Service (IND) also asked the Medical Assessment Section (Bureau Medische Advisering (BMA)) to respond to the report of the Amnesty International medical examination group and to give advice on the author's medical problems. Following BMA's findings of 12 August 2009 and 6 November 2009, an agreement was made with the author's representative to present a number of questions in writing so that no additional interview would be needed. Both the subsequent notification of intent of 11 December 2009 and the decision of 14 January 2010 considered whether the author's medical condition justified the conclusion that his return to his country of origin would lead to treatment in violation of article 7 of the Covenant.

8.4 The new application procedure under section 4:6 of the General Administrative Law Act allows asylum seekers to request a reconsideration of an earlier decision dismissing the asylum application, if new facts or altered circumstances arise. Under section 4:6, subsection 2, of the Act, the Minister for Immigration and Asylum Policy may, at his/her discretion, dismiss the new application by referring to the earlier decision that dismissed the previous application. However, the Ministry did not resort to the latter provision in the present case. Instead, the Ministry substantially assessed the new application, focused on all the documents submitted by the author, and then stated the reasons for dismissing the application. On its review of the dismissal, the district court considered whether the author had submitted new facts or evidence that he had not submitted earlier, and also whether the items adduced would affect the position taken in the original decision. In its judgement of 15 July 2010, the court decided that the Amnesty International report was not conclusive; that the reports (including that of Mr. Chenciner) and articles submitted on the general situation in Armenia did not affect the evaluation of the author's individual situation; that the newspaper articles dated 11 April 2008 and 28 June 2008 were copies whose authenticity could not be confirmed and they did not concern the author's situation; that letters from the author's friends and relatives were written at his request and were not corroborated by any objective sources. The Administrative Jurisdiction Division of the Council of State confirmed the district court's judgement on 14 January 2011.

8.5 The author had the right to apply to the district court for a review of the decisions of 20 June 2008 and 14 January 2010 and did so. After a full assessment and judgement by the district court, the author appealed to the Administrative Division against the judgement, but the judgement was upheld. Therefore, effective legal remedies as referred to in article 2, paragraph 3, of the Covenant do exist against the dismissal of an original or new application for asylum.

8.6 The report of the Amnesty International medical examination group states that the author's symptoms do not satisfy the standard criteria given in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) for post-traumatic stress disorder (PTSD), nor can his condition be characterized as depression in the psychiatric sense, or brain damage, as a result of the alleged torture/assault a likely explanation of his current symptoms. Based on the DSM-IV-TR classification, his symptoms can best be attributed to an adjustment disorder. As the BMA notes in its report of 12 August 2009, it is not clear what exactly the basis is for the medical examination group investigator's conclusion that this disorder was caused by the alleged torture/assault. The report and examination give no reason as to why the alleged torture/assault should have had so much (more) influence on the author's current psychiatric symptoms, than the current uncertainty and other events in his life have had. The investigator's use of the words "consistent with" does not rule out the possibility that the author's symptoms might have some other cause. The State party quotes the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment (the Istanbul Protocol) which, in paragraph 187 (b) states that "consistent with" generally means that the "lesion could have been caused by the trauma described, but it is non-specific and there are many other possible causes." With respect to the missing molars, it can only be said of one of them that its absence is consistent with the alleged torture/assault, as the other molar was pulled by a dentist. In view of the formulations used, there are other possible causes for both the missing molar and the 3-mm scar on the author's shinbone. Accordingly, the report cannot be considered as substantiating the claim that the author was in fact assaulted or tortured, nor can it be viewed as justifying the conclusion that the author was incapable of making consistent statements at the time of the second interview.

8.7 Finally, the State party considers that the general situation in Armenia does not justify the assumption that now, over three years after the Presidential elections, the author has reason to fear treatment in violation of article 7 of the Covenant.

9. On 9 September 2011, the author reiterates his previous arguments on the inadequacy of the accelerated procedure to his complex case; the lack of due care given to documents such as the report of the Amnesty International medical examination group; and the risk he would still face if returned to Armenia. The conclusion of the medical report leaves little room for other causes for his PTSD than the torture and ill-treatment he suffered in Armenia, this conclusion being based on a detailed and thorough investigation. The author also refers to recent reports issued by the United States Department of State of April 2011, Human Rights Watch of January 2011, and the Commissioner for Human Rights of the Council of Europe of May 2011, which report arrests of political opponents; continuous detention since the 2008 elections; and acts of torture inflicted during interrogation.

### **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, 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.

10.3 The Committee notes that the State party has not contested the admissibility of the communication. It considers that there are no obstacles to admissibility and that the author has sufficiently substantiated his claims under article 2, paragraph 3, and article 7 of the Covenant. It therefore declares the communication admissible and proceeds to its examination on the merits.

*Consideration of the merits*

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

11.2 The Committee considers it necessary to bear in mind the State party's obligation under article 2 of the Covenant to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, including in the application of its processes for expulsion of non-citizens.<sup>20</sup> The Committee recalls that it is generally for the instances of the States parties to the Covenant to evaluate facts in such cases.<sup>21</sup>

11.3 The Committee has to assess whether in the present case, the author's asylum request asserting that he was at risk upon return to Armenia was adequately evaluated by the State party authorities and whether he would indeed face a real risk of being subjected to torture or ill-treatment upon return to his country of origin. In that respect the Committee recalls its general comment No. 31 in which it refers to the obligation of States parties "not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm" (para. 12).

11.4 With regard to the author's claim that if the State party deported him to Armenia, it would violate his rights under article 7 of the Covenant, the Committee notes the author's allegation that at the time of the Presidential elections in 2008, he and his wife refused to take money in exchange for voting in favour of candidate Sarkisian, which raised suspicion among the district mayor's team. The Committee notes that this part of the claim has not been refuted by the State party. The Committee also notes that the author is a police officer who sought to avoid repressing political protesters during the post-election demonstrations, thus revealing his political convictions to his superiors. The Committee notes that this aspect of the claim is partly refuted by the State party, which states that during the asylum procedure at the national level, the author simply stated that in order not to work at a demonstration on 24 April 2008, he said he had not yet been paid, and that this version is more plausible, given that the author has never received disciplinary sanctions for allegedly disobeying orders. The Committee also notes the State party's assertion that although political opponents were violently suppressed during this period, the author cannot be considered to be a political activist in the eyes of the Armenian authorities, simply because he refused to take money to vote for Sarkisian; and that the author has therefore not substantiated that he would be of special interest to the authorities for this reason.

11.5 The Committee further notes the author's allegations that he was beaten twice by his superiors on 24 April and 19 May 2008; that his wife was raped by persons connected to the district mayor; and that she then fled to Russia. The Committee notes that the State

<sup>20</sup> See the Committee's general comments Nos. 6 and 20.

<sup>21</sup> See the Committee's communication No. 1763/2008, *Pillai v. Canada*, Views adopted on 25 March 2011, para. 11.2.

party refutes these allegations on the basis that they lack credibility because the author has repeatedly revised his account in a manner that contradicts his statements at the second interview. Regarding the rape or attempted rape of the author's wife, the Committee observes that the author offered an explanation of why he would have been reluctant to confirm at the second interview that the attempt was successful; but the Committee also observes that the author has described this attack as retaliation for her own political opinion rather than directed at him. The author has not, however, adequately explained the inconsistencies regarding the claims that he was beaten on one or more occasions. The Committee finds that it was not unreasonable for the State party's authorities to consider these inconsistencies as seriously undermining the credibility of his allegations.

11.6 The Committee further notes the author's claim that by applying the accelerated procedure to his case and not giving due weight to the documents that he presented, the State party has violated article 2, paragraph 3, read in conjunction with article 7 of the Covenant. Although the Committee has expressed concern about the limited timeframe of the application centre procedure,<sup>22</sup> it observes that the author received multiple opportunities to supplement his application, and that none of the evidence he provided was sufficient to overcome the contradictions among his differing accounts of the events preceding his departure from Armenia. Under these circumstances, it cannot be said that the State party's consideration of his claims suffered from procedural irregularities or denied him an effective remedy.

11.7 With regard to the version of the author's allegations that the State party did find credible, the question remains whether he would face a real risk of torture or ill-treatment in Armenia in the future. The Committee notes its concern over the fact that the author's documents were erroneously sent to the Armenian Embassy. Still, given that the author was never politically active, given that he is no longer a police officer, and given the passage of time since the disputed 2008 election, the Committee cannot conclude that the author would face a real risk of treatment contrary to article 7 of the Covenant if he were returned to Armenia.

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, considers that the author's deportation to Armenia would not violate any of the rights under the Covenant.

[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 to the General Assembly.]

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<sup>22</sup> See the Committee's concluding observations (CCPR/C/NLD/CO/4), 28 July 2009, para. 9.

**M. Communication No. 1811/2008, *Djebbar and Chihoub v. Algeria*  
(Views adopted on 31 October 2011, 103rd session)\***

<i>Submitted by:</i>	Taous Djebbar and Saadi Chihoub (represented by TRIAL – Swiss Association against Impunity)
<i>Alleged victim:</i>	Djamel and Mourad Chihoub (their children, born in 1977 and 1980 respectively) and the authors
<i>State party:</i>	Algeria
<i>Date of communication:</i>	25 August 2008 (initial submission)
<i>Subject matter:</i>	Enforced disappearance of two persons detained incommunicado for the past 15 years
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to life, prohibition of torture and cruel and inhuman treatment, right to liberty and security of person, respect for the inherent dignity of the human person, recognition as a person before the law, prohibition of unlawful and arbitrary intrusions into one's family life, right to family life, right to protection for minors
<i>Articles of the Covenant:</i>	Article 2, paragraph 3; article 6, paragraph 1; article 7; article 9, paragraphs 1 to 4; article 10, paragraph 1; article 16; article 17; article 23, paragraph 1; and article 24
<i>Article of the Optional Protocol:</i>	Article 5, paragraphs 2 (a) and 2 (b)

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

*Meeting on 31 October 2011,*

*Having concluded* its consideration of communication No. 1811/2008, submitted to the Human Rights Committee by Taous Djebbar and Saadi Chihoub under the Optional Protocol to the International Covenant on Civil and Political Rights,

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\* The following members of the Committee participated in the consideration of the present communication: Mr. Abdelfattah Amor, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Lazhari Bouzid did not take part in the examination of the present communication.

The text of the two individual opinions signed by Michael O'Flaherty, Krister Thelin, Fabián Omar Salvioli and Cornelis Flinterman is appended to these Views.

*Having taken into account* all written information made available to it by the authors of the communication,

*Adopts* the following:

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

1.1 The authors of the communication dated 25 August 2008 are Taous Djebbar and Saadi Chihoub, both Algerian nationals. They submit the communication on behalf of their two sons, Djamel and Mourad Chihoub, born on 8 January 1977 in Hussein Dey (Algiers) and 29 September 1980 in El Harrach (Algiers) respectively. The authors claim that Djamel Chihoub and Mourad Chihoub are victims of enforced disappearance by Algeria, in violation of article 2, paragraph 3; article 6, paragraph 1; article 7; article 9, paragraphs 1 to 4; article 10, paragraph 1; article 16; article 17 and article 23, paragraph 1, of the Covenant. They also claim that Mourad Chihoub is the victim of a violation of article 24, paragraph 1, of the Covenant. The authors further claim that they themselves are victims of a violation of article 2, paragraph 3; article 7; article 17 and article 23, paragraph 1, of the Covenant. They are represented by TRIAL (Swiss Association against Impunity). The Covenant and its Optional Protocol entered into force in Algeria on 12 September 1989.

1.2 On 12 March 2009, the Special Rapporteur for new communications, acting on behalf of the Committee, rejected the State party's request, dated 3 March 2009, that the Committee should consider the admissibility of the communication separately from the merits.

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

2.1 Djamel, unemployed, single, and Mourad, a high school student, were both living at their parents' residence in Baraki, Algiers. The authors claim that on 16 May 1996 at 8 a.m., a group of members of the Algerian army appeared at the family residence in Baraki. The group included about 20 soldiers from the barracks in Baraki dressed in paratrooper uniforms, accompanied by 2 agents from the Research and Security Department (DRS) dressed in civilian clothes and a hooded militiaman. The soldiers had with them a list of names and photos. The commander<sup>1</sup> showed Saadi Chihoub a photo of his eldest son, Saïd Chihoub, who had left the family home about a year and a half earlier, and asked where he was. Saadi Chihoub said that he did not know. The soldiers then seized Djamel Chihoub, saying "when Saïd gives himself up, then we will free Djamel". Saadi Chihoub and his youngest son Mourad tried to intervene, but the soldiers hit Mourad, who fell to the ground. After snatching Djamel away from his father, the soldiers left the premises, taking the young man away with them. These events occurred in the presence of the authors, their five daughters and their son Mourad, who were in the apartment at the time. Several neighbours also witnessed the scene.<sup>2</sup>

2.2 The authors allege that the abduction of their son Djamel was part of a raid conducted jointly by various branches of the army, during which several persons from the same neighbourhood were also arrested. Djamel Chihoub was allegedly first taken to the barracks of the Research and Security Department, then to the operational command headquarters (*poste de commandement opérationnel*) in Châteauneuf, according to a fellow prisoner who was later freed. According to other unconfirmed sources, he was said to have

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<sup>1</sup> The authors indicate the name of the commander in question.

<sup>2</sup> The authors append the testimonies of two neighbours, who testify that they saw Djamel Chihoub being arrested.



later been transferred to the barracks of the Research and Security Department in Beni Messous. His family has never seen him since. His elder brother, Saïd Chihoub, whom the soldiers were looking for when they entered the family home, was subsequently shot dead in the street by security forces during a clash on 27 June 1996. Yet, Djamel Chihoub, who, according to the officer responsible for his arrest himself, was taken hostage in connection with the search for his brother Saïd, was never freed.

2.3 On 13 November 1996 at around 11 p.m., about a dozen soldiers from the Baraki barracks broke down the door of the authors' residence and arrested their youngest son, Mourad Chihoub, then 16 years old, without showing any arrest warrant or even providing any explanation. The same commander who led the arrest of Djamel Chihoub also led this operation, assisted by two lieutenants and two non-commissioned officers. The soldiers were also accompanied by at least one militiaman who lived in the neighbourhood, was well-known by the residents, and often took part in similar operations. Mourad Chihoub was arrested in the presence of the authors and his five sisters. Several neighbours were also present.<sup>3</sup> His father, Saadi Chihoub, was nearly killed while trying to intervene. The commander spoke to Saadi Chihoub and confirmed that he did not have any evidence that the victim was in any way involved in illegal activities.

2.4 Mourad Chihoub was allegedly first brought to the Baraki barracks along with other arrested persons. His family later learned from fellow prisoners who had subsequently been released that Mourad Chihoub had allegedly been detained there for three months before being transferred to the operational command headquarters in El Madania (Salembier) and then to the Research and Security Department Centre in Ben Aknoun. Since then, no one from his family has seen him or heard any news of him.

2.5 The Chihoub family, and the authors in particular, have made ceaseless efforts to find their children. Following the arrest of Djamel and then of Mourad Chihoub, the authors immediately attempted to find out what had happened to their sons and where they were being detained. They made enquiries with various barracks, police stations and gendarmerie posts in the region and with the public prosecutor's office of El Harrach, with no success.

2.6 On 15 July 1996, Saadi Chihoub wrote a letter to the President of the National Human Rights Observatory (ONDH) asking him to shed light on the fate of his son Djamel. He also wrote a letter to the President of the Republic on 26 July 1996, and to the Minister of Justice the following day. Saadi Chihoub then wrote two letters dated 7 September 1996 to formally petition the public prosecutor of the Supreme Court of Algiers regarding the abduction of his son Djamel Chihoub. He did not receive any reply. On 16 March 1997, Saadi Chihoub addressed a second letter to the President of the Republic and a letter to the Ombudsman, asking them to intervene to shed light on the disappearance of his two sons. On 4 June 1997, he wrote again to the Minister of Justice, but there was still no response.

2.7 It was not until 10 months after Saadi Chihoub reported the disappearance of Djamel Chihoub to the Ombudsman that the latter confirmed receipt of Saadi Chihoub's petition, on 18 January 1998. In that letter, the Ombudsman replied that all he could do was report the case to the competent authorities, which the family had already done. On 4 July 1998, Taous Djebbar wrote a letter to the President of the Republic requesting his help regarding the disappearance of her two sons. She received no reply to that letter.

2.8 On 13 November 1999, that is, two and a half years after the family had petitioned the National Human Rights Observatory regarding their son Djamel Chihoub, that body informed the family that, according to the results of an investigation conducted by a unit of

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<sup>3</sup> The authors append the testimony of a neighbour who states that he knew about the arrest of Mourad Chihoub.

the national gendarmerie, Djamel Chihoub was not wanted by the authorities and the security services had not issued a warrant for his arrest, and that in any case the investigation had not shed any light on his fate. According to the letter, the national gendarmerie drafted a report dated 18 January 1997 following its investigation of the matter. However, the authors were never granted access to this document, which might have provided answers about the concrete steps undertaken regarding the disappearance of Djamel Chihoub. The family was not informed of the opening or the developments of this investigation while it was under way and were only apprised of its closure nearly two years later by the National Human Rights Observatory.

2.9 On 9 October 1999, Saadi Chihoub filed a formal complaint with the investigating judge of El Harrach regarding the abduction and disappearance of his son Mourad Chihoub, who was a minor at the time of his arrest. Taous Djebbar, for her part, filed a complaint on 22 December 1999 with the public prosecutor of Algiers regarding the abduction of her two sons. On the same date, she also wrote again to the Minister of Justice asking whether her sons were alive, and if so, where they were being held. Taous Djebbar also brought her sons' case to the attention of the President of the Republic in a letter dated 23 May 2004.

2.10 Since they had received no response from the authorities they had contacted, the family turned to the United Nations Working Group on Enforced or Involuntary Disappearances. The case of the Chihoub brothers was submitted to the Working Group on 19 October 1998. Nonetheless, the State party has not apprised the Working Group of the brothers' fate.

2.11 Beginning in 1998, the authors were summoned on several occasions to give statements before various national authorities, including the gendarmerie, the military prosecutor's office, the investigating judge of El Harrach, the police of the Daïra of Baraki, the principal public prosecutor's office of Algiers, and the National Consultative Commission for the Protection and Promotion of Human Rights (which replaced the National Human Rights Observatory). The family does not know under what proceedings these statements were taken, as that information was not specified in the related summons. Furthermore, the authors were not aware of any other investigative steps being taken. In particular, to the authors' knowledge the individuals who participated in the abduction of their disappeared sons were never questioned or otherwise called to account. Also, the neighbours who witnessed the two abductions were never summoned to give statements as part of these proceedings. None of the steps taken by the authors resulted in a court decision, or even in a diligent, reasonably complete investigation. The only judicial authority to decide on the matter was the investigating judge of El Harrach, who discontinued the proceedings in a dismissal of action dated 3 April 2000, of which the family was notified in a brief, handwritten note that gave no reasons for the decision. The family has never received a copy of the formal dismissal of action.

### **The complaint**

3.1 The authors maintain that the facts show that their sons Djamel and Mourad Chihoub were victims of enforced disappearance<sup>4</sup> from the moment they were arrested by agents of the State party on 16 May 1996 and 13 November 1996 respectively. Since their arrest, the State party has refused to acknowledge the deprivation of their liberty or to disclose their fate, thereby deliberately removing them from the protection of the law.<sup>5</sup> The

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<sup>4</sup> The authors refer to the definition of "enforced disappearance" in article 7, paragraph 2 (i), of the Rome Statute of the International Criminal Court and in article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance.

<sup>5</sup> The authors add that the State party's practice with regard to enforced disappearances can be

authors stress that incommunicado detention entails too high a risk of a violation of the right to life, since the victim is at the mercy of his or her jailers, who, by the very nature of the situation, are completely unsupervised. Even in cases where the disappearance does not lead to the worst outcome, the threat to the victim's life at that moment constitutes a violation of article 6, insofar as the State party has not fulfilled its duty to protect the fundamental right to life.<sup>6</sup> The authors add that the State party has compounded its failure to guarantee the right to life of the two victims by making no effort to inquire into their fate. Pointing out, moreover, that the chances of finding Djamel and Mourad Chihoub are remote now that 12 years<sup>7</sup> have passed since their disappearance in a secret detention facility, and referring to the Committee's general comment No. 14 (1984) on article 6, the authors claim that their two sons suffered a violation of their rights guaranteed under article 6, read alone and in conjunction with article 2, paragraph 3, of the Covenant.<sup>8</sup>

3.2 The authors also claim that the enforced disappearance of Djamel and Mourad Chihoub, and the resulting anguish and suffering, constitute treatment violating article 7 of the Covenant with regard to the two victims.<sup>9</sup>

3.3 With regard to themselves, the authors maintain that the disappearance of Djamel and Mourad Chihoub was and remains a paralysing, painful and distressing experience given that they know nothing of the fate of their two sons or, if they are dead, of the circumstances of their deaths or in the event of their place of burial. This uncertainty, which continues to cause the whole family great suffering, has lasted since their arrests in May and November 1996. Since that time the authorities have never sought to relieve the family's distress by conducting effective investigations. The authors claim that the State party has thereby acted in violation of article 7 of the Covenant with regard to themselves, read alone and in conjunction with article 2, paragraph 3, of the Covenant.<sup>10</sup>

3.4 With regard to article 9 of the Covenant, the authors recall that their sons were arrested by members of the Armed Forces of the State party without a warrant and without being told the reasons for their arrest. None of their family members have seen them or been able to communicate with them since their arrest. It was only through third parties who had been in detention with the two victims that, in the absence of official communication from the State party, the family became aware that Djamel Chihoub had been held at the operational command headquarters of Châteauneuf and at the Research and Security Department barracks in Beni Messous, and that Mourad Chihoub had been interned at the Baraki military barracks and at the operational command headquarters in El Madania (Salembier). All subsequent attempts by the authors to learn news about their sons were unsuccessful. According to the authors, this constitutes gross failure by the State party

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considered a crime against humanity to the extent that it is systematic and widespread.

<sup>6</sup> The authors refer to communication No. 84/1981, *Guillermo Ignacio Dermit Barbato and Hugo Haroldo Dermit Barbato v. Uruguay*, Views adopted on 21 October 1982, para. 10.

<sup>7</sup> Now 15 years.

<sup>8</sup> The authors also refer to communication No. 84/1981, *Dermi Barbato v. Uruguay*, supra, para. 10.

<sup>9</sup> The authors refer to communication No. 440/1990, *Youssef El-Megreisi v. The Libyan Arab Jamarihiya*, Views adopted on 24 March 1994, para. 5.4; communication No. 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006, para. 9.8; and communication No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003, para. 9.5.

<sup>10</sup> The authors refer, inter alia, to communication No. 107/1981, *María del Carmen Almeida de Quinteros v. Uruguay*, Views adopted on 21 July 1983, para. 14, and to the Committee's concluding observations on its consideration of the second periodic report of Algeria, CCPR/C/79/Add.95, 18 August 1998, para. 10.

to meet its obligations under article 9, paragraph 1, with regard to Djamel and Mourad Chihoub.<sup>11</sup>

3.5 The authors add that, as their sons were never informed of the criminal charges against them, article 9, paragraph 2, of the Covenant was also violated with regard to the two victims. Concerning Djamel Chihoub in particular, in reference to whom the commander leading his arrest allegedly said “when Saïd gives himself up, then we will free Djamel”, it appears that the only motive for his arrest was to put pressure on his brother Saïd, in violation of the principles of legality and justice. Furthermore, as the commander who arrested Djamel admitted himself, there was no evidence that the latter had been involved in any illegal activity. As for Mourad, there was no apparent reason for his arrest in November 1996 other than deliberate persecution of the family, given that his brother Saïd Chihoub had been killed one month before. The authorities of the State party would also later confirm that Mourad Chihoub had not been wanted by the authorities and that there had been no warrant for his arrest.<sup>12</sup> Consequently, article 9, paragraph 2 was violated with regard to the two victims.

3.6 Given that Djamel and Mourad Chihoub were not promptly brought before a judge or other judicial authority, the authors maintain that article 9, paragraph 3 was also violated with regard to the victims.<sup>13</sup> Lastly, the authors maintain that Djamel and Mourad Chihoub are also victims of a violation of article 9, paragraph 4, given that they were detained incommunicado since 1996 and deprived of all contact with the outside world, and that it was therefore physically impossible for them to contest the legality of their detention or ask a judge to set them free.

3.7 The authors further maintain that, given that their sons Djamel and Mourad Chihoub were detained incommunicado, they were not treated humanely or with respect for the inherent dignity of a human person. Thus, they claim, their sons were victims of a violation by the State party of their rights guaranteed under article 10, paragraph 1, of the Covenant.

3.8 The authors also claim that, as victims of enforced disappearance, Djamel and Mourad Chihoub were denied the right to be recognized as having rights and obligations – in other words, were reduced to the status of “non-persons”, in violation of article 16 of the Covenant, by the State party.<sup>14</sup>

3.9 The authors further maintain that, given that the Armed Forces of the State party burst into their home without any arrest warrant for their two sons, going so far as to break down the door to arrest Mourad Chihoub, and to threaten his father, this constitutes arbitrary interference in the authors’ private life and home in violation of article 17 of the

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<sup>11</sup> The authors refer to communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.5, and communication No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 7.5.

<sup>12</sup> *Supra*, para. 2.8.

<sup>13</sup> The authors refer, inter alia, to the Committee’s general comment No. 8 [16] of 8 July 1982, para. 2; communication No. 1128/2002, *Marques de Morais v. Angola*, Views adopted on 29 March 2005, para. 6.3; communication No. 1196/2003, *supra*, para. 7.6; and communication No. 992/2001, *supra*, para. 9.6.

<sup>14</sup> The authors refer to communication No. 1328/2004, *Kimouche v. Algeria*, Views adopted on 10 July 2007, para. 7.9; and communication No. 1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007, para. 7.9.

Covenant.<sup>15</sup> They add that since their two sons Djamel and Mourad lived at their parents' home, they are also victims under article 17.<sup>16</sup>

3.10 Through the enforced disappearances of their sons Djamel and Mourad, and the death of their eldest son Saïd, the authors lost three of their children. As a result, they claim that through their actions the authorities of the State party have destroyed their family life, in violation of their obligation to protect the family as set out in article 23, paragraph 1, of the Covenant.<sup>17</sup>

3.11 Pointing out that Mourad Chihoub was 16 years old when he was arbitrarily arrested at his parents' home and placed in incommunicado detention, the authors maintain that the State party acted in violation of article 24, paragraph 1 with regard to him.<sup>18</sup>

3.12 The authors also maintain that, since all the steps they took to shed light on the fate of their two sons were fruitless, and since their sons were prohibited from exercising their right to contest the legality of their detention, the State party did not fulfil its obligation to guarantee Djamel and Mourad Chihoub an effective remedy, given that it should have conducted an in-depth and diligent investigation into their disappearance. They also contend that the absence of an effective remedy is compounded by the fact that a total and general amnesty has legally been declared, guaranteeing impunity to the individuals responsible for violations. As the State party did not take the necessary measures to protect the rights set out in articles 6, 7, 9, 10, 16, 17, 23 and 24, the authors are of the view that the State party acted in independent violation of article 2, paragraph 3, of the Covenant with regard to Djamel and Mourad Chihoub.<sup>19</sup>

3.13 With regard to the issue of exhaustion of domestic remedies, the authors maintain that all the authorities they petitioned failed to launch an adequate investigation. Judicial, governmental and administrative authorities were all solicited, to no avail.<sup>20</sup> The authors therefore maintain that all the available remedies were proven to be useless and ineffective. Subsidiarily, they add that they have no longer had the legal right to initiate judicial proceedings since the promulgation of Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation, which prohibits, on pain of imprisonment, the pursuit of legal remedies to shed light on the most serious crimes such as enforced disappearances.<sup>21</sup>

<sup>15</sup> The authors refer to communication No. 687/1996, *Rafael Armando Rojas García v. Colombia*, Views adopted on 3 April 2001, para. 10.3.

<sup>16</sup> The authors invoke communication No. 778/1997, *José Antonio Coronel et al. v. Colombia*, Views adopted on 24 October 2002, para. 9.7.

<sup>17</sup> The authors refer to communication No. 962/2001, *Marcel Mulezi v. The Democratic Republic of the Congo*, Views adopted on 8 July 2004, para. 5.4.

<sup>18</sup> The authors refer to communication No. 1069/2002, *Bakhtiyari v. Australia*, Views adopted on 29 October 2003, para. 9.7; and communication No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996, para. 8.7.

<sup>19</sup> The authors refer to communication No. 612/1995, *José Vicente et al. v. Colombia*, Views adopted on 29 July 1997; the Committee's general comment No. 20 [40] of 10 March 1992, para. 15; and general comment No. 31 [80] of 29 March 2004, para. 18.

<sup>20</sup> *Supra*, paras. 2.5 to 2.11.

<sup>21</sup> The authors point out that the Charter rejects all allegations that hold the State responsible for deliberate disappearances. Furthermore, Ordinance No. 06-01 of 27 February 2006 prohibits the opening of legal proceedings, under penalty of criminal prosecution, and thereby frees victims of the obligation to exhaust domestic remedies. The Ordinance prohibits the lodging of complaints against the security and defence forces for disappearance and other crimes (art. 45). The author adds that according to the Ordinance any allegation or complaint must be declared inadmissible by the competent legal authority, and that furthermore legal action can be taken against anyone who, through his or her spoken or written statements or any other act, uses or takes advantage of the wounds of the national tragedy to attack State institutions, weaken the State, impugn the honour of its agents or

Consequently, the authors maintain that they are no longer obliged to keep pursuing their efforts at the domestic level, which would expose them to criminal prosecution, in order to ensure that their communication is admissible before the Committee.

#### **State party's observations on admissibility**

4.1 On 3 March 2009 the State party contested the admissibility of the communication and of 10 other communications submitted to the Human Rights Committee. It did so in a "background memorandum on the inadmissibility of communications submitted to the Human Rights Committee in connection with the implementation of the Charter for Peace and National Reconciliation". The State party is of the view that communications incriminating public officials, or persons acting on behalf of public authorities, in enforced disappearances during the period in question — from 1993 to 1998 — should be considered in the context of the socio-political and security conditions that prevailed in the country during a period when the Government was struggling to combat terrorism.

4.2 During that period the Government was obliged to combat groups that were not formally organized. Civilians often attributed enforced disappearances to the security forces. There are numerous explanations for cases of enforced disappearance, but they cannot be blamed on the Government. Data documented by many independent sources, including the press and human rights organizations, indicate that the concept of disappearance in Algeria during the period in question covers six distinct scenarios, none of which can be blamed on the Government. The first scenario concerns persons reported missing by their relatives who in fact had gone into hiding of their own accord in order to join armed groups and had asked their families to state that they had been arrested by the security services as a way of "covering up" and avoiding "harassment" by the police. The second scenario concerns persons who were reported missing after their arrest by the security services and who took advantage of their release to go into hiding. The third scenario concerns persons abducted by armed groups who, because they were not identified or had stolen uniforms or identification documents, were incorrectly thought to be members of the armed forces or security services. The fourth scenario concerns persons who were reported missing by their families but who had in fact decided to abandon their families and in some cases even to leave the country because of personal problems or family disputes. The fifth scenario concerns wanted terrorists who were killed and buried in the bush following factional infighting, doctrinal disputes or arguments over the spoils of war among rival armed groups. Lastly, the sixth possibility mentioned by the State party concerns persons reported missing who were in fact living in Algeria or abroad under false identities created via a network of document forgers.

4.3 The State party points out that it was in view of the diversity and complexity of the situations covered by the general concept of disappearance that the Algerian legislature, following the referendum on the Charter for Peace and National Reconciliation, recommended a comprehensive approach to the issue of the disappeared, whereby the cases of all persons who had disappeared during the "national tragedy" would be dealt with, all victims would be offered support to overcome their ordeal and all victims of disappearance and their beneficiaries would be entitled to redress. According to statistics from the Ministry of the Interior, 8,023 disappearances have been reported, 6,774 cases examined, 5,704 approved for compensation and 934 rejected, with 136 still pending. A total of 371,459,390 Algerian dinars (DA)<sup>22</sup> has been paid out as compensation to all the victims

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tarnish Algeria's international reputation (art. 46).

<sup>22</sup> Approximately US\$ 5,241.

concerned. In addition, DA 1,320,824,683<sup>23</sup> has been paid out in the form of monthly pensions.

4.4 The State party further argues that not all domestic remedies have been exhausted. It stresses the importance of distinguishing between simple formalities involving the political or administrative authorities, non-contentious remedies pursued through advisory or mediation bodies, and contentious remedies pursued through the relevant courts of justice. As may be seen from the authors' statements,<sup>24</sup> the complainants have petitioned political and administrative authorities, advisory or mediation bodies and representatives of the prosecution service (chief prosecutors and public prosecutors), but have not actually initiated legal proceedings by availing themselves of all available remedies of appeal and cassation. Only the representatives of the prosecution service are authorized by law to open a preliminary inquiry and refer a case to an investigating judge. In the Algerian legal system, the public prosecutor receives complaints and institutes criminal proceedings if these are warranted. Nevertheless, in order to protect the rights of victims and their beneficiaries, the Code of Criminal Procedure authorizes the latter to sue for damages by filing a complaint directly with the investigating judge. In that case, it is the victim, not the prosecutor, who institutes criminal proceedings by bringing the matter before the investigating judge. This remedy, which is provided for in articles 72 and 73 of the Code of Criminal Procedure, was not used, despite the fact that all the victims needed to do was to launch criminal proceedings and oblige the investigating judge to disclose information, even if the prosecution service had decided otherwise.

4.5 The State party further notes that the authors mistakenly believed they were under no obligation to bring the matter before the relevant courts by virtue of article 45 of Ordinance No. 06-01. The State party recalls the Committee's jurisprudence to the effect that a person's subjective belief in, or presumption of, the futility of a remedy does not exempt that person from the requirement to exhaust all domestic remedies.<sup>25</sup>

4.6 The State party then turns its attention to the nature, principles and content of the Charter for Peace and National Reconciliation and its implementing legislation. It stresses that, in accordance with the principle of the inalienability of peace, which has become an international right to peace, the Committee should support and consolidate peace and encourage national reconciliation with a view to strengthening States affected by domestic crises. As part of this effort to achieve national reconciliation, the State party adopted the Charter, the implementing ordinance of which prescribes legal measures for the extinction of criminal proceedings and the commutation or remission of sentences for any person who is found guilty of acts of terrorism or who benefits from the provisions of the legislation on civil dissent, except for persons who have committed or been accomplices in mass killings, rapes or bombings in public places. This ordinance also helps to address the issue of disappearances by introducing a procedure for filing an official finding of presumed death, which entitles beneficiaries to receive compensation. Social and economic measures have also been put in place, including the provision of employment placement assistance and compensation. Finally, the ordinance prescribes political measures, such as a ban on holding political office for any person who exploited religion in the past, and establishes the inadmissibility of any proceedings brought against individuals or groups who are members of Algeria's defence and security forces for actions undertaken to protect persons and property, safeguard the nation and preserve its institutions.

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<sup>23</sup> Approximately US\$ 18,636.

<sup>24</sup> As the State party has provided a common reply to 11 different communications, it refers to the "authors". This reference thus also includes the authors of the present communication.

<sup>25</sup> The State party cites, in particular, communication Nos. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989.

4.7 In addition to the establishment of a fund to compensate the victims, the people of Algeria have, according to the State party, agreed to a process of national reconciliation. The authors' allegations are covered by this comprehensive domestic settlement mechanism.

4.8 The State party asks the Committee to note how similar the facts and situations described by the authors are and to take into account the socio-political and security context at the time; to note that the authors failed to exhaust all domestic remedies; to note that the authorities of the State party have established a comprehensive domestic mechanism for processing and settling the cases referred to in these communications through measures aimed at achieving peace and national reconciliation that are consistent with the principles of the Charter of the United Nations and subsequent covenants and conventions; to find the above-mentioned communications inadmissible; and to request the authors to avail themselves of the appropriate remedy.

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

5.1 On 9 October 2009, the State party transmitted an additional memorandum to the Committee, in which it reiterates that the communications submitted to the Committee relate to a broad historical issue involving causes and circumstances of which the Committee cannot be aware.

5.2 The State party states that it will not address the merits of these communications until the issue of their admissibility has been settled, and that all judicial or quasi-judicial bodies have a duty to deal with preliminary questions before considering the merits. According to the State party, the decision in the cases in point to consider questions of admissibility and the merits jointly and simultaneously — aside from the fact that it was not arrived at on the basis of consultation — seriously prejudices the proper consideration of the communications in terms of both their general nature and their intrinsic particularities. Referring to the rules of procedure of the Human Rights Committee,<sup>26</sup> the State party notes that the sections relating to the Committee's procedure to determine the admissibility of communications are separate from those relating to the consideration of communications on the merits, and that these questions may therefore be considered separately. With regard, in particular, to the question of the exhaustion of domestic remedies, the State party points out that none of the communications submitted by the authors was channelled through the domestic courts for consideration by the Algerian judicial authorities. Only a few of the communications that were submitted reached the indictments chamber, a high-level investigating court with jurisdiction to hear appeals.<sup>27</sup>

5.3 Recalling the Committee's jurisprudence regarding the obligation to exhaust domestic remedies, the State party stresses that mere doubts about the prospect of success or worries about delays do not exempt the authors from the obligation to exhaust these remedies. As to the question of whether the promulgation of the Charter for Peace and National Reconciliation has made it impossible to avail oneself of any remedy in this area, the State party replies that the failure of the authors to initiate any procedures has so far prevented the Algerian authorities from taking a position on the scope and limitations of the applicability of the Charter. Moreover, under the ordinance in question, the only proceedings that are inadmissible are those brought against "members of any branch of the defence and security forces of the Republic" for actions consistent with their core duties to the Republic, namely, to protect persons and property, safeguard the nation and preserve its

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<sup>26</sup> Rules 93–98 (Procedure to determine admissibility) and 99–101 (Procedure for the consideration of communications on the merits) of the rules of procedure of the Human Rights Committee.

<sup>27</sup> The State party does not specify to which communications it is referring.



institutions. Any allegations concerning actions attributable to the defence or security forces that allegedly took place in any other context are subject to investigation by the appropriate courts.

5.4 Lastly, the State party reiterates its position with regard to the pertinence of the settlement mechanism established by the Charter for Peace and National Reconciliation.

#### **Authors' comments on the State party's submission**

6.1 On 22 July 2011, the authors submitted comments on the State party's observations on admissibility and provided additional arguments on the merits of the communication.

6.2 Regarding the Committee's material competence, the authors point out that by ratifying the Covenant and the Optional Protocol, which entered into force for the State party on 12 December 1989 — prior to the events that led to this communication — the State party has recognized the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by the State Party of a right set forth in the Covenant. This competence, which is general in nature, is not subject to the State party's discretion. In particular, it is not up to the Government of the State party to decide whether or not it is appropriate for a specific situation to be referred to the Committee. Rather, that decision is to be made by the Committee when it decides on its material competence by determining whether the alleged events constitute a violation of the rights protected under the Covenant. Likewise, the Algerian Government's adoption of domestic administrative and legislative measures to deal with the victims of the "national tragedy" cannot be invoked at the admissibility stage to prohibit individuals subject to the Committee's jurisdiction from exercising their right under article 5 of the Optional Protocol. Even if such measures might affect the resolution of the dispute, they must be analysed with regard to the merits of the case rather than its admissibility. The authors also emphasize that the State party's arguments are surprising in the case at hand, because, as the Committee has already pointed out, the legislative measures adopted are themselves in violation of the rights protected under the Covenant.<sup>28</sup>

6.3 The authors recall that the declaration of a state of emergency by Algeria on 9 February 1992 does not in any way affect the right of individuals to submit individual communications to the Committee. Article 4 of the Covenant stipulates that only certain provisions of the Covenant may be derogated under a public emergency, which thus does not affect the exercise of the rights set out in the Optional Protocol. The authors thus consider that the State party's observations on the appropriateness of the communication do not constitute a valid ground for it to be declared inadmissible.

6.4 With regard to the argument that the authors did not exhaust all domestic remedies, because they did not institute criminal proceedings by bringing the matter before an investigating judge while suing for damages, the authors refer to the Committee's recent jurisprudence in the *Benaziza* case,<sup>29</sup> in which the Committee took the view that "the State party has a duty not only to carry out thorough investigations of alleged violations of human rights, particularly enforced disappearances or violations of the right to life, but also to prosecute, try and punish anyone held to be responsible for such violations. To sue for

<sup>28</sup> The authors refer to the concluding observations of the Human Rights Committee (Algeria), CCPR/C/DZA/CO/3, 12 December 2007, paras. 7, 8 and 13; communication No. 1588/2007, *Benaziza v. Algeria*, Views adopted on 26 July 2010, para. 9.2; and communication No. 1196/2003, *Boucherf v. Algeria*, supra, para. 11. The authors also refer to the concluding observations of the Committee against Torture (Algeria), CAT/C/DZA/CO/3, 16 May 2008, paras. 11, 13 and 17. Lastly, they cite general comment No. 29 (2001) on derogations during a state of emergency, para. 1.

<sup>29</sup> See communication No. 1588/2007, *Benaziza v. Algeria*, Views adopted on 26 July 2010, supra.

damages for offences as serious as those alleged in the present case cannot be considered a substitute for the charges that should be brought by the public prosecutor”.<sup>30</sup> The authors are therefore of the view that in the case of events as serious as those that allegedly took place, it was for the competent authorities to initiate proceedings. In the present case, all the steps taken by the family were futile, including the criminal complaints submitted and the communications addressed to the Ministry of Justice, the President of the Republic and the National Human Rights Observatory. Although both the police and the public prosecutor were aware of the disappearance of Djamel and Mourad Chihoub, no investigation was ordered, no court inquiry was launched, and none of the persons involved in the disappearance were called to account. The authors should therefore not be blamed for failing to exhaust domestic remedies in the case of a violation that is of such import that the State party should not have been unaware.

6.5 With regard to the State party’s argument that a mere subjective belief or presumption does not exempt the author of a communication from the requirement to exhaust all domestic remedies, the authors refer to article 46 of Ordinance No. 06-01 of 27 February 2006, according to which any individual or collective accusation or complaint against members of the defence and security forces of the Republic must be declared inadmissible by the competent judicial authority. The submission of such a complaint or accusation is subject moreover to a penalty of 3 to 5 years’ imprisonment and a fine of between DA 250,000 and DA 500,000. The State party has thus not convincingly explained how suing for damages would have enabled the competent courts to accept and investigate any complaint submitted, given that such a complaint would have violated article 45 of the Ordinance, nor has it explained how the authors could have been immune from the application of article 46 of the Ordinance. An objective reading of the provisions in force thus shows that not only would any complaint regarding the violations of the rights of Djamel and Mourad Chihoub have been declared inadmissible, it would also have been criminally punished. The authors conclude that the remedies to which the State party refers would have been futile.

6.6 With regard to the merits of the communication, the authors note that the State party merely lists the sort of situations in which victims of the “national tragedy” might have disappeared. These general observations do not in any way respond to the claims set out in the present communication and are repeated in exactly the same way in answer to a whole series of other cases, thereby showing that the State party does not wish to deal with these affairs individually or respond to the authors’ complaints and the suffering they have endured.

6.7 The authors note that, in accordance with the Committee’s rules of procedure, State parties do not have any right to request that the admissibility of a communication be considered separately from the merits. Rather, this is an exceptional privilege that pertains exclusively to the Committee. There is nothing distinguishing the present case from the other cases of enforced disappearance considered by the Committee that would justify separate consideration of its admissibility.

6.8 In brief, the authors are of the view that the State party has not refuted their allegations. Referring to the Committee’s jurisprudence,<sup>31</sup> they maintain all the facts put

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<sup>30</sup> Ibid., 8.3.

<sup>31</sup> According to which, in cases where “the allegations are corroborated by credible evidence submitted by the author and where further clarification depends on information exclusively in the hands of the State party, the Committee may consider an author’s allegations substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party” (communication No. 1422/2005, *El Hassy v. The Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para.

forward in their communication, noting that many reports on the actions of the security forces during the period in question and the many steps undertaken corroborate and add weight to their allegations. Given that the State party is responsible for the disappearance of the authors' sons, about whom they have not had any news for more than 15 years, the authors are not in a position to provide further evidence to support their communication, as only the State party holds such evidence. In conclusion, the authors renew their request that the Committee proceed to consider the communication on the merits, on the grounds that their allegations have been sufficiently substantiated. In their view, the absence of any response by the State party on the merits of the communication further constitutes its tacit acceptance of the accuracy of the facts alleged by the authors, which the Committee should therefore consider as proven.

### **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 must ascertain that the same matter is not being examined under another procedure of international investigation or settlement. The Committee notes that the disappearances of Djamel Chihoub and Mourad Chihoub were reported to the Working Group on Enforced or Involuntary Disappearances. However, it recalls that extra-conventional procedures or mechanisms established by the Commission on Human Rights or the Human Rights Council, and whose mandates are to examine and report publicly on human rights situations in specific countries or territories, or cases of widespread human rights violations worldwide, do not constitute an international procedure of investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.<sup>32</sup> Accordingly, the Committee considers that the examination of the cases of Djamel and Mourad Chihoub by the Working Group on Enforced or Involuntary Disappearances does not render the communication inadmissible under this provision.

7.3 The Committee notes that, according to the State party, the authors have not exhausted domestic remedies, since they did not consider the possibility of bringing the matter before the investigating judge and suing for damages in criminal proceedings. The Committee notes, however, that on 9 October 1999 Saadi Chihoub filed a formal complaint with the investigating judge of El Harrach regarding the abduction and disappearance of his son Mourad Chihoub. The Committee also takes note of the many steps the authors took to shed light on the fate of their sons Djamel and Mourad Chihoub, including petitions to politicians, the public prosecutor's office of El Harrach, the investigating judge and the competent administrative authorities. The Committee recalls its jurisprudence to the effect that authors must avail themselves of all legal remedies in order to fulfil the requirement of exhaustion of all available domestic remedies, insofar as such remedies appear to be effective in the given case and are de facto available to the authors.<sup>33</sup> The Committee is of the view that the State party has not provided evidence to suggest that such a remedy was de facto available to the authors, when Ordinance No. 06-01 of 27 February 2006 is still

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6.7).

<sup>32</sup> Communication No. 540/1993, *Celis Laureano v. Peru*, supra, para. 7.1.

<sup>33</sup> Communication No. 1003/2001, *P.L. v. Germany*, decision on admissibility adopted on 22 October 2003, para. 6.5. See also communication No. 433/1990, *A.P.A. v. Spain*, decision on admissibility adopted on 25 March 1994, para. 6.2.

being applied despite the Committee's recommendations regarding its compliance with the Covenant.<sup>34</sup> The Committee therefore concludes that article 5, paragraph 2 (b), of the Optional Protocol is not a barrier to the admissibility of the communication.

7.4 The Committee finds that the authors have sufficiently substantiated their allegations insofar as they raise issues under articles 6, paragraph 1; 7; 9, paragraphs 1–4; 10; 16; 17; 23; 24 and 2, paragraph 3, of the Covenant. It therefore proceeds to consider the communication on the merits.

#### *Consideration of the merits*

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

8.2 The Committee notes that the State party prefers to maintain that communications incriminating public officials, or persons acting on behalf of public authorities, in enforced disappearances between 1993 and 1998, must be considered in the broader context of the domestic socio-political and security environment that prevailed during a period in which the Government was struggling to fight terrorism and that, consequently, they cannot be considered by the Committee under the individual complaints mechanism. The Committee wishes to recall once again its concluding observations addressed to Algeria at its ninety-first session,<sup>35</sup> as well as its jurisprudence,<sup>36</sup> according to which the State party should not invoke the provisions of the Charter for Peace and National Reconciliation against persons who invoke provisions of the Covenant or who have submitted or might submit communications to the Committee. As emphasized in its concluding observations,<sup>37</sup> the Committee can only repeat that Ordinance No. 06-01, without the amendments recommended by the Committee, appears to promote impunity and therefore cannot, as it currently stands, be considered compatible with the Covenant.

8.3 The Committee refers to its observations in earlier cases<sup>38</sup> and notes that the State party has not replied to the claims set out by the authors of the present communication concerning the merits of the case. It also emphasizes that the burden of proof should not rest solely on the authors of a communication, especially given that the authors and the State party do not always have the same degree of access to evidence and that often only the State party holds the necessary information.<sup>39</sup> It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to provide the Committee with the information available to it.

<sup>34</sup> CCPR/C/DZA/CO/3, supra, 12 December 2007, paras. 7, 8 and 13.

<sup>35</sup> CCPR/C/DZA/CO/3, supra, para. 7 (a).

<sup>36</sup> See communication No. 1780/2008, *Aouabdia v. Algeria*, Views adopted on 22 March 2011, para. 7.2; communication No. 1588/2007, *Benaziza v. Algeria*, Views adopted on 26 July 2010, para. 9.2; and communication No. 1196/2003, *Boucherf v. Algeria*, supra, para. 11.

<sup>37</sup> CCPR/C/DZA/CO/3, para. 7.

<sup>38</sup> See communication No. 1780/2008, *Aouabdia v. Algeria*, supra; communication No. 1588/2007, *Benaziza v. Algeria*, supra; and communication No. 1640/2007, *El Abani v. The Libyan Arab Jamahiriya*, Views adopted on 26 July 2010.

<sup>39</sup> Ibid. See also communication No. 1422/2005, *El Hassy v. The Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para. 6.7; communication No. 139/1983, *Conteris v. Uruguay*, Views adopted on 17 July 1985, para. 7.2; and communication No. 1297/2004, *Medjnoune v. Algeria*, supra, para. 8.3.

8.4 The Committee notes that Djamel Chihoub was arrested on 16 May 1996 by members of the army of the State party. As for Mourad Chihoub, he was allegedly arrested on 13 November 1996 at the age of 16 by military officers from the Baraki barracks under orders from the same commander who had led the arrest of Djamel Chihoub a few months earlier. Allegedly, no one from his family has seen him or heard from him since. According to the authors, the chances of finding Djamel and Mourad Chihoub alive 15 years after their disappearance are negligible, and their prolonged absence, as well as the context and circumstances of their arrest, suggest that they died in detention. The Committee notes that the State party has not provided any information to refute these allegations, and concludes that the State party has failed in its duty to guarantee the right to life of Djamel and Mourad Chihoub, in violation of article 6 of the Covenant.<sup>40</sup>

8.5 Concerning the claim that Djamel and Mourad Chihoub were detained incommunicado, the Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20 (1992) on article 7, which recommends that States parties should make provisions against incommunicado detention. The Committee concludes, on the basis of the material before it, that the incommunicado detention of Djamel Chihoub and Mourad Chihoub since 1996 and the fact that they were prevented from communicating with their family and the outside world constitute a violation of article 7 of the Covenant in their regard.<sup>41</sup>

8.6 With regard to the authors, Taous Djebbar and Saadi Chihoub, the Committee acknowledges the anguish and distress caused to them by the disappearance of their two sons, of whom they have had no news for 15 years, without any effective investigation being conducted to establish the victims' fate, despite the many steps the authors have taken since the arrest of their two sons. The Committee is therefore of the opinion that the facts before it reveal a violation of article 7, read alone and in conjunction with article 2, paragraph 3, of the Covenant with regard to the authors.<sup>42</sup>

8.7 Regarding the complaint of a violation of article 9, the information before the Committee shows that Djamel and Mourad Chihoub were arrested by agents of the State party without a warrant, then detained incommunicado without access to defence counsel and without being informed of the grounds for their arrest or the charges against them. The Committee recalls that, in accordance with article 9, paragraph 4, judicial review of the lawfulness of detention must provide for the possibility of ordering the release of the detainee if the detention is declared incompatible with the provisions of the Covenant, in particular those of article 9, paragraph 1. As the State party authorities themselves admitted that there were no charges against Djamel Chihoub and no warrant for his arrest,<sup>43</sup> and in

<sup>40</sup> Communication No. 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006, para. 9.11; communication No. 449/1991, *Mojica v. Dominican Republic*, Views adopted on 15 July 1994, para. 5.6; and communication No. 181/1984, *Elcida Arévalo Pérez v. Colombia*, Views adopted on 3 November 1989, para. 11.

<sup>41</sup> See communication No. 1780/2008, *Aouabdia v. Algeria*; supra; communication No. 1640/2007, *El Abani v. The Libyan Arab Jamahiriya*; and communication No. 1588/2007, *Benaziza v. Algeria*, supra. See also communication No. 1295/2004, *El Awani v. The Libyan Arab Jamahiriya*, Views adopted on 11 July 2007, para. 6.5; communication No. 1422/2005, *El Hassy v. The Libyan Arab Jamahiriya*, supra, para. 6.2; communication No. 540/1993, *Celis Laureano v. Peru*, supra, para. 8.5; and communication No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994, para. 9.4.

<sup>42</sup> See communication No. 1640/2007, *El Abani v. The Libyan Arab Jamahiriya*, supra, para. 7.5; communication No. 1422/2005, *El Hassy v. The Libyan Arab Jamahiriya*, supra, para. 6.11; communication No. 107/1981, *Quinteros v. Uruguay*, Views adopted on 21 July 1983, para. 14; and communication No. 950/2000, *Sarma v. Sri Lanka*, supra, para. 9.5.

<sup>43</sup> *Supra*, para. 2.8.

the absence of any further explanation by the State party, the Committee concludes that the detention of Djamel Chihoub and Mourad Chihoub was in violation of article 9.<sup>44</sup>

8.8 Regarding the authors' complaint under article 10, paragraph 1, the Committee reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty, and that they must be treated with humanity and respect for their dignity. Noting that Djamel and Mourad Chihoub were detained incommunicado for 15 years, and were consequently deprived of all contact with their family and the outside world, and pointing out the absence of any information from the State party regarding the treatment they were given during their detention in various military establishments, the Committee finds a violation of article 10, paragraph 1, of the Covenant with regard to the two victims.<sup>45</sup>

8.9 In respect of article 16, the Committee reiterates its established jurisprudence, according to which intentionally removing a person from the protection of the law for a prolonged period of time may constitute a denial of their right to recognition as a person before the law if the victim was in the hands of the State authorities when last seen and if the efforts of their relatives to obtain access to effective remedies, including legal remedies, have been systematically impeded.<sup>46</sup> In the present case, in which the State authorities were petitioned on multiple grounds regarding the disappearance of Djamel and Mourad Chihoub and yet did not provide the authors with any information about them, the Committee concludes that the enforced disappearance of Djamel and Mourad Chihoub for 15 years denied them the protection of the law for the same period and deprived them of their right to recognition as persons before the law, in violation of article 16 of the Covenant.

8.10 The Committee is of the view that the facts before it show that, given that the State party arrested Mourad Chihoub at the age of 16 when he was still a minor, without an arrest warrant or any explanation, and then detained him incommunicado and deprived him of all contact with his family for 15 years, the State party did not ensure the special protection required for children under 18 years of age. Consequently, the Committee finds a violation of the rights guaranteed under article 24 with regard to Mourad Chihoub.<sup>47</sup>

8.11 The authors also invoke article 2, paragraph 3, of the Covenant, which requires States parties to ensure that individuals have accessible, effective and enforceable remedies for asserting the rights enshrined in the Covenant. The Committee reiterates the importance that it accords to States parties' establishment of appropriate judicial and administrative mechanisms for addressing alleged violations of rights under domestic law. It refers to its general comment No. 31 (2004), which states that failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.<sup>48</sup> The Committee also recalls that any act of enforced disappearance constitutes a violation of a number of rights enshrined in the Covenant and may also constitute a violation of or a grave threat to the right to life.<sup>49</sup> In the present case, the information before

<sup>44</sup> See, inter alia, communication No. 1297/2004, *Medjnoune v. Algeria*, supra, para. 8.5.

<sup>45</sup> See general comment No. 21 [44] on art. 10, para. 3; communication No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2; and communication No. 1422/2005, *El Hassy v. The Libyan Arab Jamahiriya*, supra, para. 6.4.

<sup>46</sup> See communication No. 1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007, para. 7.8; and communication No. 1495/2006, *Zohra Madaoui v. Algeria*, Views adopted on 28 October 2008, para. 7.7.

<sup>47</sup> See, for example, communication No. 1069/2002, *Bakhtiyari v. Australia*, supra, para. 9.7.

<sup>48</sup> Paras. 15 and 18.

<sup>49</sup> Communication No. 1328/2004, *Kimouche v. Algeria*, Views adopted on 10 July 2007, para. 7.2; communication No. 1295/2004, *El Awani v. The Libyan Arab Jamahiriya*, supra, para. 6.2; communication No. 992/2001, *Bousroual v. Algeria*, supra, para. 9.2; and communication No.

the Committee shows that the parents of Djamel and Mourad Chihoub did not have access to an effective remedy, as all the steps taken to shed light on their fate were futile. Furthermore, the denial of the legal right to take judicial proceedings following the promulgation of Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation continues to deprive them of any access to an effective remedy, given that the Ordinance prohibits, on pain of imprisonment, the pursuit of legal remedies to shed light on the most serious crimes such as enforced disappearances.<sup>50</sup> The Committee therefore concludes that the facts before it reveal a violation of article 2, paragraph 3, of the Covenant, read in conjunction with articles 6, paragraph 1; 7; 9; 10, paragraph 1; and 16 of the Covenant with regard to Djamel and Mourad Chihoub, and read in conjunction with article 24 of the Covenant with regard to Mourad Chihoub. The Committee also finds there has been a violation of article 2, paragraph 3, read in conjunction with article 7, with regard to the authors.

8.12 Having found a violation of article 7 of the Covenant, the Committee will not consider the complaint related to the violation of articles 17 and 23 of the Covenant.

9. 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 violations by the State party of article 6, paragraph 1; article 7; article 9; article 10, paragraph 1; and article 16 with regard to Djamel and Mourad Chihoub. It also finds that there was a violation of article 24 of the Covenant with regard to Mourad Chihoub. The Committee further finds that the State party acted in violation of article 2, paragraph 3, read in conjunction with article 6, paragraph 1; article 7; article 9; article 10, paragraph 1; and article 16 with regard to Djamel and Mourad Chihoub, and in violation of article 2, paragraph 3, read in conjunction with article 24 with regard to Mourad Chihoub. Lastly, the Committee finds a violation of article 7, read alone and in conjunction with article 2, paragraph 3, of the Covenant with regard to the authors (the victims' parents).

10. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including by (i) conducting a thorough and effective investigation into the disappearance of Djamel and Mourad Chihoub; (ii) providing their family with detailed information about the results of the investigation; (iii) freeing Djamel and Mourad Chihoub immediately if they are still being detained incommunicado; (iv) if they are dead, handing over their remains to their family; (v) prosecuting, trying and punishing those responsible for the violations committed; and (vi) providing adequate compensation for the authors and their family for the violations suffered, and for Djamel and Mourad Chihoub if they are still alive. Moreover, and notwithstanding Ordinance No. 06-01, the State party should ensure that it does not impede enjoyment of the right to an effective remedy for the victims of crimes such as torture, extrajudicial killings and enforced disappearance. The State party should also take steps to prevent similar violations from occurring in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive

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950/2000, *Sarma v. Sri Lanka*, supra, para. 9.3. See also article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance.

<sup>50</sup> CCPR/C/DZA/CO/3, supra, para. 7.

from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views.

[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 to the General Assembly.]



## Appendix

### **Individual (dissenting) opinion of Krister Thelin, joined by Michael O’Flaherty**

The Committee has found a direct violation of article 6 of the Covenant, in concluding that the State Party has failed in its duty to guarantee the right to life of Djamel and Mourad Chihoub. I disagree with this finding for the following reason.

The Committee’s long established jurisprudence in cases of enforced disappearances, where the facts do not lend themselves to an interpretation of the victim’s actual death, has put the emphasis on the State Party’s duty to protect and ensure effective and enforceable remedies under article 2, paragraph 3 and thus invoke art. 6, paragraph 1 only to be read in conjunction with this article. The Committee has recently confirmed this approach in two cases of enforced disappearances against the same State Party and within a similar factual frame.<sup>a</sup>

However, in the case before us, the Committee has without any discussion, including any reference to how the case has been argued,<sup>b</sup> made a finding in line with what has hitherto been advanced only by a minority, i.e of a direct violation of art 6, paragraph 1 without any connection to art 2, paragraph 3.

This extensive interpretation of the right to life under the Covenant sets, in my view, the Committee on an uncharted course, where direct violations of art 6, notwithstanding that the victim is presumed to be alive, in the future could be found in various settings also outside the scope of enforced disappearances. *De minimis*, the majority should have offered reasons for its new application of art 6 violations.

(Signed) Krister Thelin

(Joined by) Michael O’Flaherty

[Done 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 to the General Assembly.]

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<sup>a</sup> Communication No. 1588/2077, *Benaziza v. Algeria*, Views adopted on 26 July 2010, and communication No. 1780/2008, *Aouabdia v. Algeria*, Views adopted on 22 March 2011, and, in particular, dissenting opinions in both cases by Mr. Salvoli.

<sup>b</sup> See para 7.11 of communication No. 1780/2008 *Aouabdia v. Algeria*, *supra*.

### **Individual (concurring) opinion of Fabián Salvioli, joined by Cornelis Flinterman**

1. I fully agree with the decision of the Human Rights Committee in the case of *Chihoub v. Algeria*, communication No. 1811/2008, and with the finding of violations of the human rights of Djamel and Mourad Chihoub and of their parents Taous Djebbar and Saadi Chihoub resulting from the enforced disappearance of the former.

2. However, for the reasons set out below, I consider that the Committee should also have concluded that the State has committed a violation of article 2.2 of the International Covenant on Civil and Political Rights. The Committee should have indicated that, in its view, the State of Algeria should amend Ordinance No. 06-01 to ensure the non-repetition of such acts.

**(a) Competence of the Committee to find violations of articles not referred to in the complaint**

3. Since I became a member of the Committee, I have taken the view that the Committee has, of its own volition, incomprehensibly restricted its competence to determine a violation of the Covenant in the absence of a specific legal claim. Provided that the facts clearly demonstrate such a violation, the Committee can and must, in accordance with the principle of *iura novit curiae*, examine the legal framework of the case. The legal basis and explanation of why this does not mean that States will be left without a defence may be found in paragraphs 3 to 5 of my partially dissenting opinion in the case of *Weeramansa v. Sri Lanka*, to which I refer to avoid repeating them.<sup>a</sup>

4. In any event, it should be pointed out that, in the present case, *Chihoub v. Algeria*, the authors of the communication expressly allege a violation of article 2 (see, for instance, paragraphs 1.1 and 3.12), albeit referring to paragraph 3 of that provision.

**(b) Violation of article 2.2 of the Covenant**

5. The international responsibility of the State may be engaged, inter alia, by an act or omission of any of its branches, including, of course, the legislative branch or any other branch with legislative powers in accordance with the Constitution. Article 2.2 of the Covenant specifies: “Where not already provided for by existing legislative or other measures, each State party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.” Although the obligation laid down in article 2.2 is of a general nature, failure to fulfil it may engage the international responsibility of the State.

6. The provision in question is a self-executing one. In its general comment No. 31 (2004), the Committee rightly indicated that: “The obligations of the Covenant in general and article 2 in particular are binding on every State party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level — national, regional or local — are in a position to engage the responsibility of the State party.”<sup>b</sup>

<sup>a</sup> *Anura Weerawansa v. Sri Lanka*, communication No. 1406/2005; partially dissenting opinion of Mr. Salvioli.

<sup>b</sup> General comment No. 31 [80] on the nature of the general legal obligation imposed on States parties

7. Just as States parties to the Covenant must adopt legislative measures to give effect to rights, they also bear a negative obligation, deriving from article 2.2, not to adopt legislative measures contrary to the Covenant; if it does so, the State commits per se a violation of the obligations laid down in article 2.2.

8. Algeria ratified the International Covenant on Civil and Political Rights on 12 September 1989; by so doing, it entered into a commitment in respect of the entire Covenant, and hence undertook to fulfil the obligations established and deriving from article 2. On the same date, 12 September 1989, the State acceded to the Optional Protocol, recognizing the competence of the Human Rights Committee to receive individual communications.

9. In the present case, the Committee is fully competent to examine the legal framework of the facts laid before it: on 27 February 2006, the State promulgated Ordinance No. 06-01, which prohibits recourse to the courts to shed light on the most serious crimes such as enforced disappearances, thereby ensuring impunity for individuals responsible for serious violations of human rights. There is no doubt that, through this legislation, the State adopted a regulation directly contrary to the obligation laid down in article 2.2 of the Covenant and constituting per se a violation which the Committee should have pointed out in its decision in addition to the violations established, since the authors and their sons have been victims, inter alia, of the legislative provision concerned.

10. The regulation is directly applicable in the present instance, and therefore a conclusion of violation of article 2.2 in the Chihoub case is not an abstract or purely academic matter. It must not be overlooked that the violations found have a direct bearing on the reparation for which the Committee has to provide when deciding on an individual complaint.

**(c) Reparation in the Chihoub case**

11. Paragraph 10 of the Committee's decision is an excellent example of a comprehensive approach to reparation: it prescribes non-pecuniary measures of restitution and satisfaction and guarantees of non-repetition (conducting a thorough investigation of the facts, freeing the victims if they are still alive or handing over of their remains to the family if they are dead, and prosecuting, trying and punishing those responsible for the violations committed). The Committee's decision also provides for pecuniary measures of reparation (adequate compensation for the authors for the violations committed and for their two sons if they are still alive).

12. Nevertheless, at the end of paragraph 10, the Committee states that, notwithstanding Ordinance No. 06-01, the State party should also ensure that it does not infringe the right to an effective remedy for the victims of crimes such as torture, extrajudicial executions and enforced disappearances and that, moreover it is under an obligation to take steps to prevent similar violations in the future.

13. This paragraph leaves no room for doubt that, in the Committee's View, Ordinance No. 06-01 is incompatible with the Covenant, and for that reason it indicates that the State must guarantee an effective remedy for the victims notwithstanding that provision. Is the Committee therefore saying that the State judiciary should ignore this regulation, which impedes progress in the investigation of acts involving serious violations of human rights?

14. The answer is "yes". The judiciary has a duty to monitor conformity with treaties, and not to apply an internal regulation that is incompatible with the Covenant. This is

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to the Covenant, adopted at the 2187th meeting on 29 March 2004, paragraph 4.

essential not only to fulfil human rights obligations, but also to avoid engaging the international responsibility of the State.

15. However, not only is the judiciary bound by the Covenant, the other branches of government also have to adopt relevant measures to guarantee human rights, and article 2.2 specifically mentions legislative measures.

16. It has been the consistent practice of the Committee to adopt general wording indicating that the State should prevent similar acts in the future, and this has also been done at the end of paragraph 10 of its decision. How can the non-repetition of such acts be guaranteed? There are a series of measures that the State can take (training in human rights for public officials, especially members of the police and the armed forces, adoption of effective action procedures to deal with complaints of enforced disappearance, commemorative measures, etc.). Without prejudice to such steps, the Committee should undoubtedly have indicated in paragraph 10 of its Views that the State of Algeria should amend the domestic legislation challenged (Ordinance No. 06-01 promulgated on 27 February 2006), so as to bring it into line with its obligations under the International Covenant on Civil and Political Rights. To keep in force a law that is per se incompatible with the Covenant is inconsistent with current international standards regarding reparation for cases of human rights violations.

*(Signed)* Fabián **Salvioli**

*(Joined by)* Cornelis **Flinterman**

[Done 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 to the General Assembly.]

**N. Communication No. 1815/2008, *Adonis v. Philippines*  
(Views adopted on 26 October 2011, 103rd session)\***

<i>Submitted by:</i>	Alexander Adonis (represented by counsel, H. Harry L. Roque)
<i>Alleged victim:</i>	The author
<i>State party:</i>	The Philippines
<i>Date of communication:</i>	3 July 2008 (initial submission)
<i>Subject matter:</i>	Imprisonment of a radio broadcaster for alleged defamation
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to freedom of expression, due process guarantees
<i>Articles of the Covenant:</i>	14, paragraph 3 (b), (c) and (d); 19, paragraphs 2 and 3
<i>Articles of the Optional Protocol:</i>	2; 5, paragraph 2 (b)

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

*Meeting* on 26 October 2011,

*Having concluded* its consideration of communication No. 1815/2008, submitted to the Human Rights Committee on behalf of Mr. Alexander Adonis 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. The author of the communication, dated 3 July 2008, is Alexander Adonis, a Filipino national born in 1964. He claims to be a victim of violations by the Philippines of articles 14, paragraph 3 (b), (c) and (d), and 19, paragraphs 2 and 3 of the Covenant. He is represented by Counsel H. Harry L. Roque.

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\* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

The text of two individual opinions signed by Committee members Mr. Fabián Omar Salvioli and Mr. Rajsoomer Lallah are appended to the present Views.

**Facts as submitted by the author**

2.1 The author worked as a radio broadcaster at Bombo Radyo,<sup>1</sup> in Davao city, Philippines. On 27 July 2001, the author received a news dispatch from Bombo Radio News Centre involving a congressman's purported "illicit" relationship with a married television personality. This same news had been reported by two other national newspapers, the *Manila Standard* and the *Abante Tonight*. Upon receipt of this news dispatch, the station manager instructed the author to verify the information received and to contact the persons involved. The author immediately tried to contact these persons but did not succeed. At 7 a.m. that same day, the author conducted his regular news programme, together with the station manager, during which the referred information was reported without disclosing any names. The same information also became the subject of a debate during the author's radio programme at 11.30 a.m.

2.2 On 23 October 2001, the congressman filed two criminal complaints for libel, one against the author, in conspiracy with the radio manager, for the 7 a.m. news broadcast, and a second complaint against the author for the 11 a.m. programme. Charges were based on article 353 of the Revised Penal Code of the Philippines, which defines libel as "a public and malicious imputation of a crime, or of a vice or defect, real or imaginary, or any act, omission, condition, status, or circumstance tending to cause dishonour, discredit or contempt of a natural or juridical person".

2.3 The Regional Trial Court of Davao City rendered a joint judgment on 26 January 2007 acquitting the author and the radio manager of the charges brought in the first complaint for lack of sufficient evidence. However, the same court convicted the author of the charge of libel brought under the second complaint, based on article 353 of the Revised Penal Code. The Court considered that the imputation made against the congressman, "if true, consists of a criminal offense of adultery, which is a private crime not related to the official discharge of his function as congressman". The Court added that invocation of the truth by the accused "did not constitute a valid defence" and, in any case, "no proof of any such truth of the imputation had been presented". The Court further considered that the tone and nature of the author's words left no room for doubt as to the malicious and defamatory nature of the statement. The Court concluded that the evidence provided by the prosecution was sufficient to prove the author's guilt beyond reasonable doubt for a malicious, arbitrary, abusive and irresponsible act of maligning the honour, reputation and good name of Congressman ... and that of his family" and sentenced him to an indefinite penalty ranging from five months and one day to four years, six months and one day imprisonment, as well as payment of 100,000 Philippine pesos (approximately 2,300 USD) as compensation for moral damages to the victim and another 100,000 pesos amount as "exemplary damages", to serve "as an example for notorious display of irresponsible reporting".

2.4 The author notes that, while his case was still pending before the Regional Trial Court of Davao City, he was transferred by his company to work in Cagayan de Oro City, located six hours away from Davao. The author states that, as a result of the libel case brought against him, he fell into depression and stopped reporting to his new post. At this, his employer stopped paying his private counsel, who immediately withdrew his services. He claims that, since he was not notified of the fact that he was no longer represented and he was not assigned an ex officio counsel, he was convicted in absentia. Also, he could not appeal against this decision within the legally established timeframe of 10 days.

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<sup>1</sup> Bombo Radyo Philippines is one of the largest radio networks in the Philippines.

2.5 According to the facts established in the decision rendered by the Regional Trial Court of Davao City attached to the communication, the reason for the author's private counsel's withdrawal of services was that he could not contact the author, who had allegedly absconded, and he was therefore unable to represent the author's interest. Therefore, his private counsel submitted a motion to withdraw appearance as counsel, which was granted on 6 February 2006. Consequently, the author's provisional liberty was lifted and an arrest warrant was issued against the author. According to the same decision, the author's counsel had filed a number of motions and failed to appear to hearings on several occasions, as a result of which a public counsel had been assigned to the author in two occasions during the proceedings. The Court noted that such actions by counsel had a "patent intention to delay the proceedings".<sup>2</sup>

### The complaint

3.1 The author claims that his conviction for defamation under the Philippine Revised Penal Code constitutes an unlawful restriction of his right to freedom of expression under article 19 of the Covenant. He argues that criminalization of defamation is a disproportionate means of addressing the problem of unwarranted attacks on reputation because it discourages critical journalism and generates a chilling effect on freedom of expression, as recognized by the European Court of Human Rights.<sup>3</sup> The author notes that the Human Rights Committee has expressed concern over the misuse of criminal defamation laws which could be used to restrict criticism of the Government or public officials, in its concluding observations regarding a number of countries. According to the author, these laws constitute a breach of the right to freedom of expression in a majority of cases. The author further invokes a joint declaration by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and his counterparts in the Organization of American States (OAS) and Organization for Security and Cooperation in Europe (OSCE), where it was stated that "criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws".<sup>4</sup> The author adds that the criminal nature of the sanction for libel under Philippine law causes permanent damage to a journalist's career and prompts an extremely inhibitory self-censorship amongst journalists. According to the author, such regulation establishes a climate of fear in which writers, editors and publishers become increasingly reluctant to report and publish on matters of public interest.

3.2 The author contends that Philippine libel law, and criminal defamation laws in general, constitute unlawful restrictions on the right to freedom of expression. The sanction of imprisonment for libel fails to meet the standards of necessity and reasonableness laid down by article 19, paragraph 3. Imprisonment is an unnecessary sanction given that other effective means are available for the protection of others' reputation. The author invokes the Committee's Views in the case *Marques de Morais v. Angola*,<sup>5</sup> where the Committee

<sup>2</sup> The information is contained in the decision of the Regional Trial Court of Davao City of 26 January 2007.

<sup>3</sup> The author invokes the European Court of Human Rights (ECHR) decisions in the cases *Lingens v. Austria*, of 8 July 1986, application No. 9815/82, para. 42; *Oberschlick v. Austria*, of 23 May 1991, application No. 11662/85, para. 59; and *Lopes Gomes da Silva v. Portugal*, of 28 September 2000, application No. 37698/97, para. 30.

<sup>4</sup> Joint declaration by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the OSCE Representative on freedom of the Media and the OAS Special Rapporteur for Freedom of Expression, of 10 December 2002.

<sup>5</sup> Communication No. 1128/2002, *Marques de Morais v. Angola*, Views adopted on 29 March 2005, para. 6.8.

noted that restrictions on freedom of opinion must be proportional to the value which it seeks to protect.

3.3 The author further contends that Philippine libel law is not a reasonable restriction because it does not permit proof of truth as a complete defence but only allows it under very restricted conditions. Under article 361 of the Revised Penal Code, proof of truth shall only be admitted where the imputation against Government officials relates to the discharge of their official duties. Therefore, he was prevented from invoking truth as a defence in his case. The author cites international jurisprudence and soft law confirming that proof of truth of allegedly defamatory statements should fully absolve defendants of any liability.

3.4 The author notes that Philippine libel law does not allow invoking reasonable publication as a defence. According to the author, defamation cannot be a matter of strict liability as even the best journalists make honest mistakes. To impose criminal sanctions for every false or mistaken statement would undermine the public interest in receiving timely information. He notes that news stories need to be published on time to be relevant. The author refers to the European Court of Human Rights in that the safeguard afforded by article 10 of the European Convention to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism”.<sup>6</sup> The author also refers to national jurisprudence recognizing that, when the press has acted in accordance with professional guidelines, it should benefit from a defence of reasonable publication, taking into account the nature of the information on which the allegations are based, the reliability of the sources and the steps taken to verify the information.<sup>7</sup> He notes that the Regional Trial Court of Davao City failed to consider the evidence submitted by the author proving that the standard of professionalism had been met.

3.5 The author sustains that Philippine libel law is not a reasonable restriction on freedom of expression because it presumes malice in allegedly defamatory statements and places the burden of proof on the accused. A complainant is not required to prove the falsity of the allegedly defamatory statements. Instead, such statements are presumed defamatory unless the defendant can show that they fall under the exceptions established by article 354 of the Revised Penal Code, according to which “every defamatory imputation is presumed to be malicious, even if true, if no good intention and justifiable motive for making it is shown, except in the following cases: 1. A private communication made by any person to another in the performance of any legal, moral or social duty; and 2. A fair and true report, made in good faith, without any comments or remarks of any judicial, legislative or other official proceedings which are not of confidential nature, or of any statement, report or speech delivered in said proceedings, or of any other act performed by public officers in the exercise of their functions.” The author refers to the Joint Declaration referenced in paragraph 3.1 above, as well as regional and national jurisprudence that sustain that the plaintiff should bear the burden of proving the falsity of any facts on matters of public concern.<sup>8</sup> The author adds that article 7 (b) of the Principles on Freedom of Expression and Protection of Reputation establishes that “in cases involving matters of public concern, the plaintiff should bear the burden of proving the falsity of any statements on imputations of fact alleged to be defamatory”. He notes that the alleged adulterous – and, under Philippine

<sup>6</sup> ECHR decision on the case *Bladet Tromsø and Stensaas v. Norway*, application No. 21980/93, of 20 May 1999.

<sup>7</sup> The author cites, among others, a decision by the Supreme Court of Appeal of South Africa, *National Media Ltd and others v. Bogoshi*, 1999 LRC 616, p. 631.

<sup>8</sup> In this regard, the author cites the ECHR decision in case *Colombani v. France*, of 25 June 2002, Application No. 51279/99, para. 65, as well as other national jurisprudence.



law, criminal – conduct of a congressman, a public official and public figure, is a matter of public concern and interest.

3.6 The author claims that his right to legal aid recognized by article 14, paragraph 3 (d), of the Covenant has been violated because he was not notified of his counsel's withdrawal of services. Since he neither had a counsel to represent him at this stage nor had been informed of the delay to file an appeal, the decision became final. Under Philippine law, all pleading and court proceedings are served on counsel. He invokes the Committee's jurisprudence in the sense that legal assistance should be available at all stages of criminal proceedings, as well as jurisprudence of the European Court of Human Right in the same line. The author argues that he should have been appointed a counsel *ex officio* or a public defender. Instead, he was left without legal representation at the crucial moment of appeal and was not informed of his counsel's withdrawal. As a result, his right to an effective appeal was denied.

3.7 The author claims a violation of his right to be tried in his presence, recognized in article 14, paragraph 3 (d), given that he was convicted in *absentia*. He was not informed of the resumption of proceedings against him and could not appeal this resumption as he had not been personally notified.

3.8 Finally, the author claims a violation of his right not to be tried without undue delay, recognized in article 14, paragraph 3 (c). He notes that his case remained inactive for over five years. On 26 July 2006, the day initially scheduled for his arraignment, his counsel requested that it be postponed to 28 September 2006. On that date — when the author was no longer represented — the prosecution requested that it be postponed to 14 December 2006. After this long period of inactivity, he was convicted on 26 January 2007.<sup>9</sup>

3.9 The author requests that the Committee declare the violations referenced above, and that it order his immediate release from prison and compensation for the time spent in prison and the loss of his employment as a journalist.

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

4.1 By submission of 9 January 2009, the State party notes that the right to freedom of expression is not absolute under either the Covenant or the Philippine Constitution. The exercise of this right shall not be injurious to the equal enjoyment of other persons' rights, nor to the rights of the community or society, as determined by the Philippine Supreme Court. The State party contends that freedom of speech and the press goes no further than matters of public concern or interest and should be exercised with responsibility. It does not confer "unbridled license" that gives immunity for the exercise thereof without responsibility, which can affect other social rights or values that require protection.

4.2 The State party notes that enjoyment of a private reputation is a constitutional right at the same level as the right to life or liberty and property, and the law protects such right from slanderous attacks. For criticism against public officials to fall within the ambit of the right to freedom of expression, it must be directed against their policies or official acts, not against their private affairs. Citing articles 353 and 354 of the Revised Penal Code and

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<sup>9</sup> According to the decision of the Regional Trial Court of Davao City, the author's counsel had submitted numerous motions and incidents that delayed the process. Counsel failed to appear in two occasions at the scheduled arraignments in December 2001. Further motions were submitted by counsel in April and August 2002, respectively. Thereafter, pretrial was ordered terminated and trial on the merits was set on 15 April 2003. At this stage, a new counsel joined in the author's representation, together with the existing counsel.

national jurisprudence, the State party contends that in both of these cases, defamatory imputations are presumed libellous or malicious.

4.3 With regard to the author's claims under article 14, the State party notes that the Philippine Constitution recognizes the right to free access to the courts (sect. 11) and the "right of any person under investigation for the commission of an offense ... to be informed of his right to have competent and independent counsel, preferably of his own choice. If a person cannot afford the services of counsel, he must be provided with one" (sect. 12). Section 14 of the Constitution recognizes the right of the accused to be heard by himself and counsel and to have a speedy, impartial and public trial, among other due process guarantees. However, paragraph 2 of this section determines that "after arraignment, trial may proceed notwithstanding the absence of the accused provided that he has been duly notified and his failure to appear is unjustifiable." The right to be heard personally in one's defence may be constitutionally waived when the accused has already been arraigned, duly notified and his absence is not justifiable.

#### **Author's comments to the State party's observations**

5.1 By letter dated 17 May 2010, the author notes that he has complied with the requirement of exhaustion of available domestic remedies, which has not been disputed by the State party. He further notes that the State party has not contested any of his factual statements, including with regard to the lack of notification of his counsel's withdrawal from the case, and the lack of appointment of a public or ex officio counsel at a time that was crucial for the trial. By failing to do that, the State party has recognized its responsibility under article 14 of the Covenant.

5.2 The author informs the Committee that he has served his sentence. However, this fact does not absolve the State party's responsibility under the Covenant, especially since criminal libel remains in the Penal Code and continues to be applied by courts. The State party has not challenged his contention that Philippine libel law violates the standards of necessity and reasonableness of restrictions to freedom of expression, nor that the author's rights under articles 14, paragraph 3, and 19 have been violated. The State party failed to establish that constitutional guarantees supposedly available to an accused in the Philippines have in fact been made available to him. No indication is contained in the State party's submission as to whether these have in fact been observed in the author's case.

5.3. In a letter dated 12 September 2011, the author notes that the Supreme Court of the Philippines has interpreted criminal libel as a constitutional exception to the right to freedom of expression. On this basis, Philippine lower courts have routinely assumed the constitutionality of criminal libel and its consistency with constitutional freedoms. Therefore, Philippine law has maintained criminal libel with imprisonment as a penalty, even though certain exceptions have been allowed, such as public interest and public figure exceptions. However, these exceptions have been implemented unevenly and have not prevented these cases from resulting in prosecutions that run counter to freedom of expression, as in the present case. The author concludes that he has no further recourse under the Philippine judicial system to challenge the violation of his right to freedom of expression.

#### **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 With regard to the author's claims regarding the alleged violation of his right to due process guarantees under article 14, paragraph 3, and to freedom of expression under article 19 of the Covenant, the Committee considers that these claims have been sufficiently substantiated for the purpose of admissibility and proceeds to consider them on the merits.

*Consideration of the merits*

7.1 The Human Rights Committee has considered the present communication in the light of all the information received, in accordance with article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee notes the author's claims that his rights under article 14, paragraph 3 (d), have been violated because he was not notified of his counsel's withdrawal of services and, as a result, he neither had a counsel to represent him before the Regional Court nor was he informed of the deadline to file an appeal. He adds that, under Philippine law, all pleadings and court proceedings are served on counsel and, therefore, upon withdrawal of his lawyer he should have been appointed a counsel ex officio or a public defender. The State party has not contested these allegations. The Committee further notes the decision of the Regional Trial Court that counsel withdrew his services because he could not contact the author.

7.3 The author claims that, as he was not informed of the resumption of proceedings against him and was convicted in absentia, his right under article 14, paragraph 3, to be tried in his presence was not respected. The State party recalls in this respect that according to section 14, paragraph 2 of the Constitution, trial may proceed notwithstanding the absence of the accused provided that he has been duly notified and his failure to appear is unjustifiable.

7.4 The Committee recalls its jurisprudence that proceedings in the absence of the accused may in some circumstances be permissible in the interest of the proper administration of justice, i.e. when accused persons, although informed of the proceedings sufficiently in advance, decline to exercise their right to be present. Consequently, such trials are only compatible with article 14, paragraph 3 (d), if the necessary steps are taken to summon accused persons in a timely manner and to inform them beforehand about the date and place of their trial and to request their attendance.<sup>10</sup>

7.5 The Committee notes that the State party does not provide evidence showing that the Court sought to notify the author of the withdrawal of his lawyer, and the decision of the Court is unclear as to whether another counsel was appointed to represent the author. The State party does not show evidence either that the author was given timely enough notice of the Court's decision to allow him to file an appeal. Nevertheless, once the decision of 27 January 2007 became final the author was found and arrested.

7.6 In light of all the above, the Committee concludes that the author's rights under article 14, paragraph 3 (d), have been violated. Having reached this conclusion, the Committee will not address the author's claim regarding a violation of his right not to be tried without undue delay.

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<sup>10</sup> See 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. 36.

7.7 The Committee takes note of the author's allegation that his conviction for defamation under the Philippine Penal Code constitutes an illegitimate restriction of his right to freedom of expression because it does not conform to the standards set by article 19, paragraph 3, of the Covenant. The author maintains, in particular, that the criminal sanction of imprisonment established by the Philippine Revised Penal Code for libel is neither necessary nor reasonable, because of the following reasons: (a) there are less severe sanctions available; (b) it admits no proof of truth as a defence except for very limited cases; (c) it does not take into account the public interest as a defence; or (d) it presumes malice in the allegedly defamatory statements placing the burden of proof on the accused.

7.8 Article 19, paragraph 3, lays down specific conditions and it is only subject to these conditions that restrictions may be imposed, i.e. the restrictions must be provided by law; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality.<sup>11</sup>

7.9 The Committee recalls its general comment No. 34 according to which "defamation laws must be crafted with care to ensure that they comply with paragraph 3, and that they do not serve, in practice, to stifle freedom of expression. All such laws, in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expressions that are not, of their nature, subject to verification. At least with regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice. In any event, a public interest in the subject matter of the criticism should be recognized as a defence. Care should be taken by States parties to avoid excessively punitive measures and penalties. ... States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty".<sup>12</sup>

7.10 In light of the above, the Committee considers that, in the present case the sanction of imprisonment imposed on the author was incompatible with article 19, paragraph 3, of the Covenant.

8. 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 facts before the Committee disclose a violation by the Philippines of articles 14, paragraph 3, and 19 of the Covenant.

9. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the State party is under an obligation to provide the author with an effective remedy, including adequate compensation for the time served in prison. The State party is also under an obligation to take steps to prevent similar violations occurring in the future, including by reviewing the relevant libel legislation.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party 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

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<sup>11</sup> General comment No. 34, para. 22.

<sup>12</sup> *Ibid.*, para. 47.

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 present report to the General Assembly.]

## Appendix

### Individual opinion by Committee member, Mr. Fabián Omar Salvioli (partially dissenting)

1. I fully agree with the decision of the Human Rights Committee concerning a violation of article 19 of the International Covenant on Civil and Political Rights in the case *Adonis v. the Philippines*, communication No. 1815/2008. The Committee has rightly determined that the facts as established constitute a violation of the right to freedom of expression.

2. However, for the reasons set out below, I consider that the Committee should have concluded that in the case at hand the State party has also committed a violation of article 2, paragraph 2, of the International Covenant of Civil and Political Rights. The Committee should also have indicated that in its view, the State should amend the legislation which was applied to the detriment of the author and which is incompatible with the Covenant.

**(a) Competence of the Committee to find violations of articles not referred to in the complaint**

3. Since I became a member of the Committee, I have taken the view that the Committee has of its own volition and incomprehensibly restricted its competence to determine a violation of the Covenant in the absence of a specific legal claim, provided the facts clearly demonstrate such a violation. The legal basis and explanation of why this does not mean that States will be left without a defence may be found in paragraphs 3–5 of my partially dissenting opinion in the case of *Weerawansa v. Sri Lanka* to which I refer.<sup>a</sup>

**(b) The violation of article 2, paragraph 2, of the Covenant**

4. The international responsibility of the State may be engaged, inter alia, by an act or omission on the part of any of its branches, including, of course, the legislative branch or any other branch with legislative powers in accordance with the Constitution. Article 2, paragraph 2, of the Covenant specifies: “Where not already provided for by existing legislative or other measures, each State party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.” Although the obligation laid down in article 2, paragraph 2, is of a general nature, failure to fulfil it may engage the international responsibility of the State. The provision in question is of a self-executing nature. The Committee, quite rightly, has indicated that: “The obligations of the Covenant in general and article 2 in particular are binding on every State party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level (national, regional or local) are in a position to engage the responsibility of the State party.”<sup>b</sup>

<sup>a</sup> *Anura Weerawansa v. Sri Lanka*, communication 1406/2005; partially dissenting opinion of Mr. Fabián Salvioli.

<sup>b</sup> 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. 4.

5. Just as States parties to the Covenant may not adopt measures which violate recognized rights and freedoms, failure to adjust domestic legislation to the provisions of the Covenant in my view implies per se a violation of the obligations laid down in its article 2, paragraph 2. In the case at hand, Adonis, the author specifically alleges that the norm established by the Philippine Criminal Code implies a violation of the Covenant (see paragraph 3.1 in fine and paragraph 3.2 of the Committee's decision).

6. In this case, the Committee concludes that *the sanction imposed on the author is incompatible with article 19, paragraph 3, of the Covenant* (para. 7.10) and consequently decides that the facts disclose a violation of this article (para. 8).

7. The said sanction was imposed on the author by the court because it was provided for by the Criminal Code; consequently, that sanction is incompatible with the Covenant and its continued presence in the Philippine Criminal Code is a violation of the duty to adapt domestic legislation to the Covenant, which is specifically required by article 2, paragraph 2. As the sanction has been imposed, the Committee would not be deciding "*in abstracto*" in respect of the legislative policy of the State party. Consequently, the Committee should have found that in this case there has been a violation of article 2, paragraph 2, to the detriment of Alexander Adonis.

(c) **Reparation**

8. The Committee is inconsistent if it finds that a norm is incompatible with the Covenant but fails expressly to draw attention to the need to amend it: in paragraph 9 of its decision, it indicates that the State party should review its legislation. Does the State provide reparation merely by reviewing its Criminal Code? What happens if after such a review the State does not change the norm? Clearly, a norm that is considered by the Committee to be incompatible with the Covenant will remain in force. In this case, how will the State comply with that part of the Committee's decision in which it states that "*The State party is also under an obligation to take steps to prevent similar violations occurring in the future*"? Will the judicial branch be empowered to disregard the norm?

9. The judicial branch is required to ascertain compatibility with treaties and not to apply any domestic norms that are incompatible with the Covenant in order to avoid engaging the State's international responsibility; however, all the branches of government bear the same obligation in respect of human rights, including, naturally, the legislative branch. In the case at hand, *Adonis v. the Philippines*, the Committee has missed a clear opportunity expressly and unambiguously to indicate to the State party that it must change its criminal law on the crime of defamation to make it compatible with the Covenant and with the criteria of general comment No. 34.

10. The more specific the reparatory measures decided by the Committee, the easier it will be for a State to comply with its views and to honour the international commitments it has accepted to guarantee the human rights of all persons subject to its jurisdiction.

(Signed) Fabián Omar **Salvioli**

[Done 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 to the General Assembly.]

### **Individual opinion by Committee member, Mr. Rajsoomer Lallah**

I had indicated, at the conclusion of the deliberations on this communication, that I might join my colleague Salvioli in the separate opinion which he proposed to write and which he has now given. I would wish, however, to make some observations and suggest an alternative which would be usefully consistent with the Committee's approach in relation generally to article 2 of the Covenant as such.

As I have understood from my colleague Salvioli's approach in the particular case before us, since it was the legislation itself of the State Party that purported to restrict the article 19 rights guaranteed to the author of the communication, it would have been legitimate for the Committee to draw the conclusion, as a logical legal consequence, that the violation of the author's rights under article 19 also necessarily constituted a failure by the State party to give effect to its obligations under article 2 paragraph 2.

In my view, the different obligations assumed by a State party under part II of the Covenant (arts. 2–5) are basic and general in character. They apply to all the rights guaranteed under part III of the Covenant (arts. 6–27) and apply to all individuals in the territory of the State party or subject to its jurisdiction. A violation of any of those rights in relation to a victim would necessarily imply a failure by the State party to discharge its obligations under part II of the Covenant, depending on the particular nature of a victim's right which has been breached and the consequent corresponding obligation breached by the State party under any of the articles 2–5, for example article 5, paragraph 1, where a State party engages in an activity — which might conceivably include a legislative act — limiting or restricting a right to a greater extent than is warranted under the Covenant.

There is of course a direct link between a particular *right* of the individual under Part III of the Covenant and the *general obligations* of a State party under part II of the Covenant to ensure and respect it. In my view, it is not incorrect to deal with the State party's obligations in a separate paragraph as the Committee does in paragraph 9 of its Views.

I wonder, therefore, whether an express and specific declaration of a violation of that provision of article 2 is necessary as the only solution and whether an alternative approach consistent with the one adopted by the Committee in relation to the State party's general obligation to provide an effective remedy as prescribed in article 2, paragraph 3 (a), might not be the most appropriate solution. Clearly, paragraph article 4, paragraph 2, of the Optional Protocol assumes that the Committee has competence to determine whether such a remedy has been provided by the State party to the victim.

Of course, the solution I had ventured to propose in the Committee may turn out to be a routine drafting formulation in all relevant cases where the Committee finds a violation of a right guaranteed under part III of the Covenant, just as the reference to article 2, paragraph 3 (a), has turned out to be, where the Committee recalls the State party's obligation to provide an effective remedy to the author (vide the initial part of paragraph 9 of the Views). Indeed, in my view, it would perhaps have served the purpose designed to be achieved, when recommending a review of doubtful or inappropriate legislation, simply to make a formal reference to article 2, paragraph 2. At least, this approach would be consistent with the way in which the Committee in paragraph 9 of the Views deals with article 2, paragraph 3 (a), in relation to remedies. The last part of paragraph 9 of the Views could then only have included an appropriate reference as indicated in italics and as was



done in the first part of the paragraph in relation to remedies, as follows: “The State Party is also under an obligation, to take steps to prevent similar violations occurring in the future including reviewing, *in pursuance of article 2 paragraph 2*, the relevant legislation”.

(Signed) Rajsoomer **Lallah**

[Done 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 to the General Assembly.]

**O. Communication No. 1820/2008, *Krasovskaya v. Belarus*  
(Views adopted on 26 March 2012, 104th session)\***

<i>Submitted by:</i>	Irina Krasovskaya and Valeriya Krasovskaya (represented by the law firm of Böhler, Franken, Koppe and Wijngaarden)
<i>Alleged victim:</i>	The authors, their deceased husband and father respectively, Anatoly Krasovsky
<i>State party:</i>	Belarus
<i>Date of communication:</i>	10 June 2008 (initial submission)
<i>Subject matter:</i>	-
<i>Procedural issues:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Arbitrary deprivation of life; torture and ill- treatment; arbitrary deprivation of liberty; lack of proper investigation
<i>Articles of the Covenant:</i>	2, paragraph 3, 6, 7, 9 and 10
<i>Articles 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 26 March 2012,*

*Having concluded* its consideration of communication No. 1820/2008, submitted to the Human Rights Committee on behalf of Anatoly Krasovsky 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 authors of the communication,

*Adopts* the following:

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

1. The authors of the communication are Irina Krasovskaya and Valeriya Krasovskaya, both Belarusian nationals born in 1958 and 1982, respectively, currently residing in the Netherlands. They submit the communication on behalf of Anatoly Krasovsky, born in 1952, respectively their husband and father, and claim that Belarus violated his rights under articles 6, 7, 9 and 10 of the International Covenant on Civil and Political Rights. The authors also claim that they are victims of a violation of their rights under article 7 of the

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\* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, 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, Mr. Krister Thelin and Ms. Margo Waterval.

The text of an individual opinion by Committee member Mr. Fabián Omar Salvioli is appended to the text of the present Views.

Covenant. The authors are represented by the law firm Böhler, Franken, Koppe and Wijngaarden (Netherlands). The Optional Protocol entered into force for Belarus on 30 December 1992.

### **The facts as presented by the authors**

2.1 Mr. Krasovsky was a businessman in Belarus. During the 1990s, he provided the political opposition with financial and other support, and was a personal friend of Viktor Gonchar, a prominent opponent of Belarus President Alexander Lukashenko. Mr. Gonchar was also Deputy Prime Minister of Belarus (1994–1995), and Chairman of the Supreme Council (Parliament) in 1999.

2.2 In August 1999, Mr. Krasovsky was arrested by the police under the accusation of not having repaid a bank loan on time. He was discharged after a week, after having paid bail of US\$ 102,000. He was also harassed by the authorities because of his political activities.

2.3 On 19 September 1999, Mr. Krasovsky's friend, Mr. Gonchar, was planning to chair an extended session of Parliament to hear the findings of a Special Parliamentary Commission on grave crimes allegedly committed by President Lukashenko, in order to decide whether to initiate an impeachment procedure. When walking on the street on 16 September 1999, Mr. Gonchar and Mr. Krasovsky were approached by several unidentified individuals. These individuals forced them to get into Mr. Krasovsky's car and drove to an unknown destination. Traces of blood were later found at the place of their abduction.

2.4 There was a clear political motive to this disappearance. In support of their claims, the authors cite extensive portions of a memorandum by Christos Pourgourides prepared for the Parliamentary Assembly of the Council of Europe (the PACE memorandum).<sup>1</sup> According to the author, the Belarus President had at that time developed a reputation for disregarding basic human rights, and in the month preceding the disappearance of Mr. Krasovsky, former Minister of Interior Yuri Zakharenko had also disappeared.

2.5 On 20 September 1999, the Prosecutor's Office launched a criminal investigation into the disappearance of Mr. Krasovsky. Mr. Chumachenko was appointed as an investigator in the case.

2.6 On 21 November 2000, General Nikolai Lapatik, Chief of the Criminal Police of Belarus, wrote a letter to the Belarus Minister of the Interior.<sup>2</sup> In this handwritten letter, General Lapatik affirmed that the Secretary of the Belarusian Security Council had ordered the murder of former Minister of Interior Yuri Zakharenko. According to General Lapatik, the murder was carried out by a high-ranking officer, Colonel Dmitry Pavlichenko, with the assistance of the Minister of Interior at the time, Yuri Sivakov. The latter had provided Mr. Pavlichenko with the pistol, which had been temporarily removed from a prison.<sup>3</sup> The same weapon, affirmed General Lapatik, had been used on 16 September 1999, when Messrs. Gonchar and Krasovsky disappeared.

2.7 The authorities could not provide any plausible explanation for the removal of the pistol. The Prosecutor's Office failed to investigate the reasons for the removal of the pistol

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<sup>1</sup> The memorandum presents the results of the investigatory work on four disappearances in Belarus, including the disappearance of Mr. Krasovsky, carried out by the PACE Rapporteur, Christos Pourgourides. The memorandum was drafted following Mr. Pourgourides' visit to Belarus and a number of interviews with government officials.

<sup>2</sup> The authors do not provide a copy of this letter.

<sup>3</sup> According to the general, the weapon in question was a special pistol, and was used to carry out the executions of those on death row.

from the prison. The findings of the PACE memorandum show that the pistol was likely used to carry out the assassination of Mr. Krasovsky.

2.8 The authors, citing the PACE memorandum, submit that the genuineness of the handwritten note by General Lapatik was confirmed by then Minister of Interior Vladimir Naumov, the addressee of General Lapatik's note, and by then Prosecutor General of Belarus, Mr. Sheyman. The PACE memorandum found that no investigation into the accusations contained in General Lapatik's note was carried out. For example, the red paint found at the crime scene was not compared to the paint of the red car referred to in General Lapatik's letter that was allegedly driven by Colonel Pavlichenko. These findings of the PACE memorandum indicate clear efforts of collusion and cover-up during the investigation.

2.9 Following this and as a result of General Lapatik's letter, Colonel Pavlichenko was arrested on 22 November 1999. The arrest warrant was signed by then Chief of the Belarus KGB, Mr. Matskevich, and sanctioned by the Prosecutor General. However, Colonel Pavlichenko was released shortly afterwards and was promoted, presumably by direct orders of Mr. Lukashenko. Several other officials who had affirmed that other officers were involved in the abductions were promptly replaced or dismissed. Since then, the investigation into the disappearance of Messrs. Krasovsky and Gonchar has been blocked.

2.10 On 20 January 2003, a prosecutor decided to close the case. The authors appealed against the decision of the Prosecutor's Office to stop the investigation into Mr. Krasovsky's disappearance. As a result the case was officially reopened. To date, the investigation by the Belarus police has not yielded any tangible results. Every three months, a letter is sent to the authors, confirming that the investigation is still ongoing, but there is no proof or even a suggestion that actual investigatory work is being conducted. There are strong indications that Belarus officials are to be blamed for the enforced disappearance of both men, and that the police was kept from disclosing or acting upon this information by high-ranking government officials.

2.11 It is clear from a number of reports by non-governmental organizations<sup>4</sup> that the regime in place does not shy away from illegal acts in order to remain in power. At the time of the disappearance of Messrs. Krasovsky and Gonchar, an alternative presidential election campaign was being organized by the opposition, and both men were taking active part in it. The political situation in the country was very unstable.

2.12 The authors have consistently asked the authorities to investigate certain specific indications. However, none of their suggestions were followed by the investigators. On 9 October 2002, 5 November 2002, 20 November 2002, 10 January 2003, 3 February 2003 and other dates, they submitted numerous complaints. There is no other remedy to exhaust and in any case domestic remedies have already been unreasonably prolonged.

### **The complaint**

3.1 The authors claim that the State party has violated article 6 of the Covenant in relation to Mr. Krasovsky, as it is highly likely that he was the victim of an extrajudicial killing committed by State officials.

3.2 The State party has also violated Mr. Krasovsky's rights under article 7 of the Covenant. The authors point out that, in a number of cases, the Committee held that the enforced disappearance of a person constituted cruel and degrading treatment, as the victim

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<sup>4</sup> In support of their claims, the authors refer to Amnesty International reports, dated 1 January 2000 and 21 July 2000, and findings of the Governing Council for the Inter-Parliamentary Union, dated 19 October 2005.

had suffered a breach of his or her rights under article 7, and that his or her direct relatives had suffered likewise. The authors claim that therefore they are also victims of a violation of their own rights under article 7 of the Covenant, due to the mental anguish suffered because of Mr. Krasovsky's disappearance.

3.3 The State party has also breached Mr. Krasovsky's rights under article 9 of the Covenant, as his abduction should have been considered to be arbitrary and his arrest unlawful. He was also never brought before a judge and was unable to initiate proceedings before a court.

3.4 The authors lastly claim a violation of article 10 of the Covenant, as Mr. Krasovsky was likely killed while in the hands of State officials.

#### **State party's comments on admissibility and merits**

4.1 On 20 October 2009, the State party provided its observations on merits and admissibility. The State party claims that the authors' complaint is based on speculations about the disappearance of Mr. Krasovsky.

4.2 Belarus is not a member of Parliamentary Assembly of the Council of Europe (PACE) and did not participate in the preparation of the PACE memorandum by Mr. Pourgourides. The said memorandum, referred to by the authors, therefore has no bearing on the merits of the current case.

4.3 On 17 September 1999, the relatives of Mr. Krasovsky and Mr. Gonchar informed the law enforcement authorities of the city of Minsk about their disappearance. On 20 September 1999, the Prosecutor's Office of the city of Minsk launched a criminal investigation.

4.4 It was ascertained during the investigation that Mr. Gonchar and Mr. Krasovsky were last seen exiting a bathhouse and entering a Jeep Cherokee that belonged to Mr. Krasovsky. During the investigation of the scene, the investigators found plastic and glass fragments, trace evidence suggesting a car braking and hitting a tree, and traces of blood.

4.5 Based on the forensic tests conducted as a part of the investigation, the plastic and glass fragments could belong to the Jeep Cherokee that belonged to Mr. Krasovsky. It was also ascertained that the blood that was found was from Mr. Gonchar, not Mr. Krasovsky.

4.6 During the investigation, the law enforcement authorities have examined several motives for this crime, including personal relations, political connections and business activities. Law enforcement authorities also followed up reports in the mass media, which stated that Mr. Gonchar and Mr. Krasovsky were murdered by a gun taken from temporary confinement ward No. 1. Such allegations, circulated by Oleg Alkaev, the former head of temporary confinement ward No. 1, and Mr. Lapatik, the Chief of Criminal Police of the city of Minsk, were investigated and found to be groundless.

4.7 Law enforcement authorities also examined the location where some reports said Mr. Gonchar and Mr. Krasovsky were buried. No bodies were found during the examination. In connection with this crime, the law enforcement authorities also questioned two suspects, Mr. I. and Mr. M., both of whom are serving sentences for committing other serious crimes, and no connection was found.

4.8 The State party also contends that Colonel Pavlichenko, who is referred to in the authors' submissions, was never a suspect in the case, and was never arrested in relation to this case.

4.9 Despite all the measures that were taken, the whereabouts of Mr. Gonchar and Mr. Krasovsky remain unknown. The investigation into the disappearance is continuing, and the information remains confidential until it is completed. The State party claims that the

authors' allegations concerning inaction and the discontinuance of the investigation by law enforcement authorities are groundless.

4.10 Since the investigation is still ongoing, the authors have not exhausted all available domestic remedies, and therefore the Committee should consider the communication inadmissible.

#### **Further submission from the authors**

5.1 On 19 February 2010, the authors submit that despite the State party's submission on 20 October 2009, the communication must be considered admissible under all requirements of the Optional Protocol.

5.2 The authors reiterate their position that the State party did not properly investigate Mr. Krasovsky's disappearance. After several promising leads were discovered that possibly incriminated high-ranking officials, the investigation "collapsed", and on 20 January 2003, it was officially suspended. On 23 June 2003, the investigation was reopened. The authors submit that every three months they receive a letter stating that the investigation remains ongoing.

5.3 In support of their claims, the authors refer again to the PACE memorandum. They claim that the State party should not disregard this document, which contained very important findings.

5.4 Because the investigation did not produce any tangible results for over 10 years, the authors exhausted all domestic remedies. Since the reopening of the investigation on 23 June 2003, the authors have sent several requests to the police asking about the progress in the investigation.

5.5 The burden of proof cannot rest only on the author of the communication, according to a well-established Committee jurisprudence. The State party and the author do not always have equal access to the evidence. The authors claim that it is the State party's duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to furnish the Committee with the information available to it. Because no such information was provided, the authors claim there has been no effective investigation of the case by the State party.<sup>5</sup>

5.6 Mr. Krasovsky's case was submitted to the Working Group on Enforced or Involuntary Disappearances. This fact, the authors claim, should not preclude the Committee from considering the case.

#### **Further submissions from the State party**

6. In its further submissions dated 8 July 2010 and 4 September 2010, the State party reiterates its position that it assumed obligations under article 1 of the Optional Protocol to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by the State party of any of the rights set forth in the Covenant. The State party submits that it did not accept any other obligations under article 1 of the Optional Protocol. Therefore, the State party claims that the Committee cannot consider communications submitted to it by a third party.

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<sup>5</sup> The authors refer to parts of a resolution of the Committee on Human Rights of the Inter-Parliamentary Union, which, in turn, cites findings of the memorandum prepared by Mr. Pourgourides for the Parliamentary Assembly of the Council of Europe.

## 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 article 93 of its rules of procedure, decide whether or not it 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 must ascertain that the same matter is not being examined under another procedure of international investigation or settlement. The Committee notes that the disappearance of Mr. Krasovsky has been reported to the Working Group on Enforced or Involuntary Disappearances. However, it recalls that extra-conventional procedures or mechanisms established by the Commission on Human Rights or the Human Rights Council, and whose mandates are to examine and report publicly on human rights situations in specific countries or territories, or cases of widespread human rights violations worldwide, do not generally constitute an international procedure of investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.<sup>6</sup> Accordingly, the Committee considers that the examination of Mr. Krasovsky's case by the Working Group on Enforced or Involuntary Disappearances does not render the present communication inadmissible under this provision.

7.3 As to the State party's argument that the Committee cannot consider communications submitted to it by a third party, the Committee notes that there is nothing in the Optional Protocol that prevents the authors from designating third parties as recipients of the Committee's correspondence on their behalf. The Committee further notes that it has been its longstanding practice that the authors may designate representatives of their choice, not only to receive correspondence, but to represent them before the Committee. In the present case, the authors have presented a duly signed power of attorney for the counsel to represent them before the Committee. The Committee therefore considers that for purposes of article 1 of the Optional Protocol, the communication has been presented by the alleged victims themselves, through their duly designated representatives.

7.4 Regarding the State party's argument that the authors have not exhausted available domestic remedies, the Committee takes note of the authors' claim that they have submitted a number of complaints regarding the disappearance of Mr. Krasovsky and the lack of effectiveness of the investigation by the Prosecutor's Office, without any result, and that the investigation has been ongoing since 1999. The Committee takes note of the complaints filed by the authors on 9 October 2002, 5 November 2002, 20 November 2002, 10 January 2003, 3 February 2003, and others. The Committee notes that the State party has not furnished any details about the investigation and has not demonstrated that the continuing investigation is effective, in the light of the serious and grave nature of the allegations, and the apparent lack of any leads for many years. A State party cannot avoid the Human Rights Committee's review of a communication merely by claiming an ongoing investigation without results until some unknown time in the future. Under these circumstances, the Committee considers that domestic remedies have been unreasonably prolonged.<sup>7</sup> The

<sup>6</sup> Communication No. 1811/2008, *Djebbar and Chihoub v. Algeria*, Views adopted on 31 October 2011, para. 7.2.

<sup>7</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.

Committee accordingly finds that article 5, paragraph 2 (b), of the Optional Protocol does not preclude it from considering the communication.

7.5 The Committee considers that the authors' claims are sufficiently substantiated for purposes of admissibility, and therefore proceeds to consider them on the merits, in accordance with article 5, paragraph 2, of the Optional Protocol.

*Consideration of the merits*

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

8.2 The Committee notes the authors' claim that articles 6, 7, 9 and 10 of the Covenant have been violated by the State party because of the enforced disappearance of Mr. Krasovsky. The Committee recalls its jurisprudence that, in addition to effective protection of Covenant rights, States parties must ensure that individuals also have accessible and effective remedies to vindicate those rights.<sup>8</sup> The Committee notes that the submissions before it do not contain sufficient information to clarify the cause of Mr. Krasovsky's disappearance or presumed death, or the identity of any person who may have been involved, and therefore do not show a sufficient nexus between the disappearance of Mr. Krasovsky and the action and activities of the State party that allegedly led to the disappearance. In these circumstances, the Committee is of the view that the facts before it do not allow it to conclude that the disappearance of Mr. Krasovsky was carried out by the State party itself. Nor are they sufficient to establish a violation of articles 9 and 10 of the Covenant.

8.3 The Committee recalls that State parties have a positive obligation to ensure the protection of individuals against violations of Covenant rights, which may be committed not only by its agents, but also by private persons or entities.<sup>9</sup> The Committee further recalls its general comment No. 31, according to which States must establish appropriate judicial and administrative mechanisms for addressing claims of rights violations (para. 15), and that criminal investigation and consequential prosecution are necessary remedies for violations of human rights such as those protected by articles 6 and 7 of the Covenant.<sup>10</sup> In the instant case, the Committee observes that the numerous complaints filed by the authors have not led to the arrest or prosecution of a single perpetrator. The Committee further observes not only the failure of the State to conduct a proper investigation but also the failure to explain at which stage the proceedings are, 10 years after the disappearance of Mr. Krasovsky. In the absence of an explanation of the lack of progress in the investigation by the State party, and in view of the information before it, the Committee concludes that the State party has violated its obligations under article 2, paragraph 3, read in conjunction with articles 6 and 7, for failure to properly investigate and take appropriate remedial action regarding the disappearance of Mr. Krasovsky.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is therefore of the view

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<sup>8</sup> General comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 15 (*Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III).

<sup>9</sup> *Ibid.*, para. 8.

<sup>10</sup> See also communications No. 1619/2007, *Pestaño v. Philippines*, Views adopted on 23 March 2010, para. 7.2; No. 1447/2006, *Amirov v. Russian Federation*, Views adopted on 2 April 2009, para. 11.2; and No. 1436/2005, *Sathasivam and Saraswathi v. Sri Lanka*, Views adopted on 8 July 2008, para. 6.4.



that the facts as found by the Committee reveal violations by Belarus of article 2, paragraph 3, read in conjunction with articles 6 and 7 of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, which should include a thorough and diligent investigation of the facts, the prosecution and punishment of the perpetrators, adequate information about the results of its inquiries, and adequate compensation to the authors. The State party should also take measures to ensure that such violations do not recur in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in Belarusian and Russian in the State party.

[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 to the General Assembly.]

## Appendix

### **Individual opinion by Committee member Mr. Fabián Omar Salvioli (dissenting)**

1. I deeply regret that I must dissent from the Committee's decision in the findings reached by the majority on considering communication No. 1820/2008, *Krasovskaya v. Belarus*. I feel obliged to set out my position, as reflected in the following paragraphs.
2. The complexity of the facts before the Human Rights Committee in its consideration of the *Krasovskaya* case — and especially the volume and quality of evidence — led it to conclude that Belarus was responsible for violating article 2, paragraph 3, of the International Covenant on Civil and Political Rights, read in conjunction with articles 6 and 7.
3. However, the international responsibility of a State for violating an international human rights instrument is objective in nature, and the evidence is not governed by the same parameters as in internal law. In particular, the victims' representatives cannot be placed under an obligation to present evidence that is impossible to obtain without due cooperation from the State.
4. In the instant case, the Committee "observes that the numerous complaints filed by the authors have not led to the arrest or prosecution of a single perpetrator. The Committee further observes not only the failure of the State to conduct a proper investigation but also the failure to explain at which stage the proceedings are, 10 years after the disappearance of Mr. Krasovsky" (para. 8.3). Shortly before that, the Committee "notes that the submissions before it do not contain sufficient information to clarify the cause of Mr. Krasovsky's disappearance or presumed death, or the identity of any person who may have been involved, and therefore do not show a sufficient nexus between the disappearance of Mr. Krasovsky and the action and activities of the State party that allegedly led to the disappearance. In these circumstances, the Committee is of the view that the facts before it do not allow it to conclude that the disappearance of Mr. Krasovsky was carried out by the State party itself" (para. 8.2).
5. According to this analysis, the State is benefiting from its own inaction: there was no proper investigation or even a minimum of court proceedings, no progress was made in arresting or prosecuting anyone, and therefore the Committee has no means of proving the State's responsibility for the victim's disappearance.
6. Yet a different conclusion could be reached if due weight is given to circumstantial evidence and indications: the arrest of the victim and the harassment to which he was subjected because of his activities in support of members of the political opposition, especially Mr. Gonchar, are established; it is also proved that he was arrested by various persons together with this known political dissident and that, since that time, he has disappeared; lastly, it has been confirmed that the State did not make the slightest effort to conduct a proper investigation of the facts.
7. In addition, the petitioners have submitted a memorandum prepared by a Rapporteur of the Parliamentary Assembly of the Council of Europe setting out the results of its investigation of four disappearances, including that of Mr. Krasovsky. The State has responded by indicating that it is not a member of the Council of Europe. Of this there is no doubt, but what should be considered is not whether or not the State belongs to the Council of Europe, but documentary evidence resulting from an investigation directly related to the case. The Committee's position should be that, given the lack of a response to the

documentary evidence, this evidence can be appraised in accordance with the criterion of reasonable evaluation.

8. It is for the State to give a convincing explanation of what happened, in failing which the petitioners face a situation of *probatio diabolica*. Was the disappearance an abduction for purposes of extortion? This does not appear to be the motive, since no one asked the family for money in order to release the victim. Was it a case of common theft? If so, the question arises whether it was frequent at the time for those committing robberies at the scene of the events to abduct and execute their victims and eliminate their bodies; the State has not provided any criminal statistics on this matter. In the absence of a further possible explanation, the political activity of the victim and the person with him at the time of the abduction, the harassment suffered and the subsequent inaction of the State in conducting an investigation are sufficient to support a finding by the Committee that the State was internationally responsible for committing direct violations of the rights to life, physical integrity, liberty and due process.

9. Yet the Committee, on the basis of what it regards as a kind of deficiency of evidence, has merely found that the State is responsible for not providing the victims with an effective remedy against possible violations of their human rights, which is a very tenuous result, given the particular features of the case in question.

10. It will shortly be necessary for the Committee to review and discuss the criteria for appraising evidence for determining the international responsibility of States under the Optional Protocol; the conclusions reached will have a direct impact on central issues such as due compensation.

[Done 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 to the General Assembly.]

**P. Communication No. 1828/2008, *Olmedo v. Paraguay*  
(Views adopted on 22 March 2012, 104th session)\***

<i>Submitted by:</i>	Florentina Olmedo (represented by the Paraguayan Human Rights Coordinating Committee [CODEHUPY] and the World Organisation Against Torture [OMCT])
<i>Alleged victim:</i>	Eulalio Blanco Domínguez
<i>State party:</i>	Paraguay
<i>Date of communication:</i>	25 August 2008 (initial submission)
<i>Subject matter:</i>	Deprivation of life of an individual during a demonstration
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies
<i>Substantive issues:</i>	Violation of the right to life and to an effective remedy
<i>Articles of the Covenant:</i>	2 (3) and 6 (1)
<i>Articles of the Optional Protocol:</i>	5 (2) (b)

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

*Meeting on 22 March 2012,*

*Having concluded* its consideration of communication No. 1828/2008, submitted to the Human Rights Committee by Ms. Florentina Olmedo 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. The author of the communication, dated 25 August 2008, is Florentina Olmedo, a Paraguayan national born in 1942, who is acting on behalf of her deceased husband, Eulalio Blanco Domínguez, a Paraguayan national born in 1940. She alleges that her husband was the victim of a violation by Paraguay of articles 2, paragraph 3, and 6, paragraph 1, of the Covenant. The Optional Protocol entered into force for the State party on 10 January 1995. The author is represented by counsel.

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\* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Mr. Ahmad Amin Fathalla, 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, Mr. Krister Thelin and Ms. Margo Waterval.

### The facts as submitted by the author

2.1 Blanco Domínguez was an agricultural worker whose home and working farm were located in the community of Andrés Barbero (district of San Pedro de Ykuamandyju). He belonged to the Asociación María Auxiliadora, which brought together producers of lemon verbena (aloesia) and was supported by the Agricultural Producers Coordination Office – San Pedro Norte (CPA-SPN), the largest rural workers' trade organization in the area. Given the major inequalities in rural land distribution in Paraguay, the chief demand of rural workers' organizations is for agrarian reform. That situation has frequently led to conflicts between landowners, farm workers and government authorities.

2.2 The Government had initially provided support for growing and marketing lemon verbena. In 2002, it handed marketing over to the private sector, triggering a drop in prices and a surplus of unsold crops, with losses for producers. With the support of CPA-SPN, the lemon verbena producers held demonstrations in Santa Rosa del Aguaray on 10 February, 24 April and 19 May 2003, demanding that the State take action to address the situation. In the wake of these organized protests, the Ministry of Agriculture and Livestock pledged to grant the producers a subsidy; however, only a partial subsidy was paid and, following the failure of negotiations, on 29 May 2003, the farm workers gathered once more in Santa Rosa del Aguaray to set up camp and continue organizing protests. After that date, the farm workers held as many as two or three demonstrations a day and were based in a camp set up on the grounds of a public institution.

2.3 On 2 June 2003, the producers' organization issued a public statement requesting the authorities fully to implement the agreements signed by the Ministry of Agriculture before 7 a.m. on 3 June, failing which they would carry out a peaceful blockade of Route 3 in Santa Rosa del Aguaray to put pressure on them.

2.4 On 3 June 2003, around 1,000 demonstrators, including Blanco Domínguez, converged on the site of the demonstration. They found themselves facing a large number of police, anti-riot police and military personnel, under the orders of criminal prosecutor L.A., from the Santa Rosa district Prosecutor's Office, who was on duty that day. The demonstrators came face to face with the police barrier, which prevented them from advancing, and decided to blockade the road. The prosecutor ordered the leaders of the demonstration to unblock the road, and told them that if they failed to do so it would be cleared by force.

2.5 While negotiations were under way, the prosecutor ordered the road to be cleared. The police attack was immediate and violent, and involved the use of tear gas, firearms and water cannons. According to the author, the other demonstrators were given no prior loudspeaker warnings of the police intervention.

2.6 The police violently beat many demonstrators, fired indiscriminately at those who were fleeing and violently broke into and damaged various nearby houses, severely beating any persons they managed to catch. Both live and rubber bullets were used indiscriminately. Several demonstrators who were shot said that they had not been warned by the policemen who fired at them. They said that the shooting had often been unnecessary and disproportionate, and that it had occurred when demonstrators were fleeing or at close range when they had already surrendered.<sup>1</sup> The road was cleared in a matter of 10 to 15 minutes.

2.7 Blanco Domínguez had been at the head of the demonstration and, along with other demonstrators, had peacefully surrendered to the police, kneeling down with his hands up.

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<sup>1</sup> The author attached a sworn statement by eight demonstrators.

While he was in this position, an officer of the National Police shot him in the back at very close range. After he fell to the ground, he was hit on the head by the police. After a few minutes, he was rescued by some demonstrators and other policemen, who took him to the Santa Rosa del Aguaray Health Centre. As the centre was not equipped to treat him, he was transferred to the San Estanislao District Hospital (Department of San Pedro) and from there to the Asunción Medical Emergency Hospital. After two operations, Blanco Domínguez died on 5 June 2003.<sup>2</sup> Some 16 persons were wounded during the incident and required treatment at the above-mentioned health centre or hospitals.

2.8 On 3 June 2003, the National Police filed a complaint with the criminal prosecutor L.A. against Blanco Domínguez and another 42 demonstrators for allegedly committing the following offences: threatening the safety of persons on the highway, threatening the safety and orderly coexistence of persons and resistance with firearms and bladed weapons.<sup>3</sup> On the same date, the criminal prosecutor issued an order for the provisional detention of Blanco Domínguez and other demonstrators. On 4 June 2003, the prosecutor filed charges and applied for an order of pretrial detention against Blanco Domínguez and the other accused persons. On 3 December 2003, the criminal prosecutor filed an indictment against 32 demonstrators, not including Blanco Domínguez. On 2 May 2007, the Criminal Court of San Pedro de Ykuamandyju dismissed the indictment against the 32 demonstrators, on the grounds that the procedure had exceeded the maximum duration of three years without any definitive judicial decision. There was no appeal against the ruling, which became final.

2.9 The investigation into the death of Blanco Domínguez was opened on the basis of a police communication, dated 6 June 2003, addressed to prosecutor L.A. The case was assigned to Prosecutor No. 1 of the Santa Rosa del Aguaray District Prosecutor's Office. At the request of the Public Prosecution Service (*Ministerio Público*), the Police Chief of the Department of San Pedro filed a report of the incidents which took place on 3 June 2003, which stated the following:

The strategy and tactics used in the operation had been prepared in advance, and were based on the common knowledge that the demonstrators were overwhelmingly hostile and posed a significant threat to the physical integrity of law-enforcement officials. At the start of the operation, two water cannons adequately supplied with water and tear gas moved forward, backed up by a unit of riflemen equipped with rubber bullets, who were shielded by the cannons, whose purpose was specifically to control the demonstrators. The demonstrators fired at the police, hitting the water cannons with various calibres of bullets, forcing them onto the side of the main road, in a clear attempt to surround them. Meanwhile, as law-enforcement personnel who had been waiting at a safe distance on both sides moved forward, they found themselves face to face with the demonstrators. The armed demonstrators fled hastily down side streets, firing their weapons to cover themselves, while others ran away to hide in any available hiding places. Most of them returned to their quarters at the offices of the Rural Welfare Institute (IBR) and immediately used loudspeakers that were part of a discotheque sound system inside the building, to urge all their followers to fight to the death with the slogan "The people united will never be defeated".

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<sup>2</sup> The forensic report described the surgical operation that was performed as a "laminectomy of lumbar vertebrae one with right paravertebral removal of a rubber projectile and a foreign body".

<sup>3</sup> The author points out that the note dated 3 June states that "During the incident, persons who had suffered serious (but not critical) wounds who were taken by ambulance to the Asunción Medical Emergency Hospital included: Eulalio Blanco Domínguez (...) they had been shot with rubber bullets, all were in stable condition and their lives were not at risk (...)".

2.10 The report expressed regret at the loss of a human life as a result of the clash and declared that the police had exclusively used rubber bullets. The author points out that the Chief of Police of San Pedro submitted neither material evidence of the events it reported nor any probative evidence.

2.11 On 16 June 2003, the prosecutor requested the Director of the Asunción Medical Emergency Hospital to submit a certificate of the victim's medical diagnosis. This certificate was later added to the record of the investigation.

2.12 On 17 June 2003, the author requested the prosecutor assigned to the case to conduct various evidentiary proceedings, and on this same date, the author's son requested an investigation into the alleged homicide of his father. On 3 July 2003, the author and her son testified before the prosecutor and provided the names of possible witnesses of the incident.<sup>4</sup>

2.13 At the prosecutor's request, on 8 August 2003, a report by the Director of the Santa Rosa Health Centre was added to the record of the investigation. It indicated that Blanco Domínguez was treated on 3 June 2003, that he received appropriate treatment and that he was then transferred to another facility. On 14 August 2003, the prosecutor in charge of the case submitted a report on the request made by the Commander in Chief of the Armed Forces to deploy 30 troops to break up the demonstration that took place on 3 June 2003. At the prosecutor's request, on 14 November 2003, the forensic medicine department of the Medical Emergency Hospital submitted a medical diagnosis certificate for Blanco Domínguez. On 29 January 2004, the report of the forensic physician of the Public Prosecution Service, who analysed the medical diagnosis from the forensic medicine department of the Medical Emergency Hospital, was added to the record.

2.14 The Public Prosecution Service did not investigate the statements made by other witnesses identified by her and her son, nor did it take statements from other demonstrators and/or persons who were wounded in the incident. She also maintains that procedures such as the autopsy of the victim's body, ballistic reports, a crime-scene inspection and the collection of evidence at the site of the incident were not carried out.

2.15 On 5 November 2006, a lawyer from the Paraguayan Human Rights Coordinating Committee (CODEHUPY) acting on behalf of the victim's relatives, requested a copy of the criminal investigation record from the prosecutor in charge of the case. On 2 April and on 8 May 2008, the author requested additional information concerning the proceedings. The Public Prosecution Service never responded to those requests.

2.16 Other complaints had been lodged in relation to her husband's death. On 17 June 2003, CODEHUPY filed a complaint before the Human Rights Commission of the Senate on account of the arbitrary execution of Blanco Domínguez and other human rights violations that had taken place on 3 June 2003. On 20 June 2003, the complaint was submitted by the chairman of the Human Rights Commission to the Prosecutor-General's Office (*Fiscalía General del Estado*). On 24 June 2003, the Prosecutor-General's Office transmitted the complaint to a prosecutor in the Special Unit on Human Rights Offences; however, the complaint was not investigated.

2.17 The present communication falls within the scope of an exception to the rule requiring the prior exhaustion of all available domestic remedies, which is set out in article 5, paragraph 2 (b), of the Optional Protocol. According to applicable domestic law, the

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<sup>4</sup> The author included in the communication submitted to the Committee the statements of various witnesses. One witness stated that he saw a policeman shoot Blanco Domínguez with a rifle. Another stated that the policeman who shot him used a handgun. A third stated that he himself was shot in the side at close range by a policeman wearing a khaki uniform, at the same time as Blanco Domínguez.

Public Prosecution Service has a period of six months, beginning on the date of the initiation of proceedings, to complete its investigation (pretrial proceedings). This time limit may be extended in unusually complex cases; however, in no circumstances may an extension of pretrial proceedings effectively increase the total length of the criminal trial, which is set by the Code of Criminal Procedure at three years.

2.18 At the time the author submitted the present communication, the investigation had been under way for more than five years, without so much as a charge having been made. She adds that the Public Prosecution Service has not offered any satisfactory explanation to justify this delay, nor has it explained why it failed to order various routine investigation procedures, such as an autopsy of the body, ballistics reports, paraffin tests or the summoning of witnesses to testify for the author and her son. Consequently, she contends that the application of the remedies available to her under the domestic law has been unreasonably prolonged.

### **The complaint**

3.1 The author alleges that the facts described amount to a violation of article 6, paragraph 1, of the Covenant, since her husband was arbitrarily deprived of his life as a result of the unlawful, unnecessary and disproportionate use of force by public officials. Although the State is authorized to order the break-up of a demonstration that has become obstructive, the powers entrusted to the authorities in preserving law and order cannot be exercised arbitrarily and with contempt for human dignity, in particular when the conduct of public law-enforcement officials may threaten the right to life of the victims, as in the present case. The mere act of blocking a public thoroughfare by a peaceful assembly does not in and of itself justify the use of firearms against demonstrators, provided that the latter do not otherwise represent a grave and imminent threat to the life or physical integrity of the public officials or third parties concerned.

3.2 The author argues that the victim did not commit any act of violence against any police officer, nor did he endanger the life of third parties in such a way as to justify the use of firearms against him. Before he was killed, he had submitted to arrest without resistance and was kneeling with his hands up as a sign of surrender. Even if the police report submitted to the prosecutor were true, which was subsequently neither corroborated nor substantiated, and the police had in fact had to react to gunshots from demonstrators, it is obvious that, when her husband was shot, no distinction was made between persons who represented a grave and imminent threat and those who did not.

3.3 The shot was fired at short range and aimed at a part of the body where it was likely to cause severe injury or even death. Moreover, the first aid provided immediately after the shooting was inadequate, late and completely improvised. No measures had been taken to ensure that medical teams from the public emergency services were present at the site of the demonstration, if needed, to provide proper first aid to the wounded. More than 12 hours elapsed between the moment Blanco Domínguez was shot and his admission to hospital for proper medical treatment.

3.4 The author alleges that article 6, paragraph 1, was also violated, because the National Police gave the demonstrators no prior warning that they would use firearms. The police fired at the demonstrators without first trying other means of dissuasion or non-lethal force, showing the complete lack of any police procedure for dealing with demonstrations, assemblies or occupations of public or private property. The fact that the State's police regulations were inconsistent with the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials was a determining factor in the arbitrary execution of Blanco Domínguez. Act No. 222/93, National Police Organization Act, which was in force at the time of the incident and is still in force, is vague and imprecise about the circumstances in which police officers are lawfully authorized to use firearms. Articles 145 to 148 simply



restrict the criminal and administrative responsibility of public officials who use firearms and the precautionary measures that may be imposed during the investigation. The Guide to Police Procedure, which implements the Act, is also imprecise and is not consistent with the above-mentioned Basic Principles.

3.5 Moreover, the police force does not specify the type of weapon and ammunition that should be used, nor does it purchase or register them. Each police officer purchases his or her own weapon and ammunition, and no institutional standards have been formulated in this regard. It is therefore impossible to trace the bullets used during the police operation and to check whether the use of firearms was necessary or proportionate.<sup>5</sup>

3.6 The author maintains that the alleged facts also constitute a violation of article 6, paragraph 1, read in conjunction with article 2, paragraph 3, of the Covenant, since the investigation into the arbitrary execution of her husband was not conducted in an efficient manner. No account was taken of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions<sup>6</sup> or the Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.

3.7 According to the author, the investigation has been at a standstill since February 2004.<sup>7</sup> No autopsy was performed as part of the investigation. Neither the clinical history report submitted by the Medical Emergency Hospital, nor the report written by the forensic physician of the Public Prosecution Service satisfy the specific requirements of an autopsy, which would have been decisive in clarifying the most fundamental aspects of the investigation. This omission was not subsequently remedied by other means. The scene of the crime was not cordoned off, nor was a forensic inspection performed in order to collect evidence. The Public Prosecution Service did not take steps to interview eyewitnesses, including those identified by the author and her son in their testimonial statements. Nor did it ensure with due diligence that the firearms used by police who took part in unblocking the road were examined by an expert. The projectile extracted from Blanco Domínguez's body, which has since been misplaced, was neither examined by an expert nor included as part of the evidence listed in the criminal investigation record. None of the weapons carried by the policemen who took part in breaking up the demonstration were subject to expert inspection. The failure to obtain these essential items of evidence in the investigation has meant that evidence crucial for determining the truth and bringing criminal charges has been lost.

3.8 The author requests the Committee to recommend that the State party: (a) undertake a thorough and effective investigation into the circumstances of the arbitrary deprivation of life of the victim, and adopt appropriate measures to punish those responsible and guarantee the author full access and the capacity to act at all the stages and levels of that investigation; (b) supply and keep a check on all weapons and ammunition belonging to police forces, establishing regulations on the use of force in accordance with the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; and (c) take measures to ensure that the author receives full reparation for the years of suffering she has endured.

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<sup>5</sup> The Human Rights Committee expressed its concern at this situation in its concluding observations on the second periodic report of Paraguay, contained in document CCPR/C/PRY/CO/2, para. 11.

<sup>6</sup> Recommended by the Economic and Social Council in its resolution No. 1989/65, of 24 May 1989.

<sup>7</sup> The copy of the prosecution file (record of the investigation) transmitted by the State party contains a copy of the notification issued to two witnesses, dated 9 June 2008, summoning them to appear in order to give testimony.

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

4.1 In a note verbale dated 2 June 2009, the State party declared that the case had been brought as a result of a campesino demonstration led by lemon verbena producers on 3 June 2003 in the Department of San Pedro, where a clash with law-enforcement personnel had left both policemen and demonstrators wounded. It maintained that police and judicial procedures had been conducted in strict compliance with the applicable constitutional and legal provisions, that such conduct was consistent with the principles of lawful and reasonable use of force and that due attention had been given to the seriousness of the situation.

4.2 The State party also declared that various circumstances are still being investigated in order to establish the facts. In spite of this, it has not yet been able to determine the origin of the shot or who fired it. The State party regrets the death of Blanco Domínguez and is committed in its efforts to establish the facts.

4.3 The State party referred to general memorandum No. 39, dated 29 January 2009, which was submitted by the Office of the National Chief of Police. It indicated that the demonstrators, under the leadership of Eulalio Blanco Domínguez and Ernesto Benítez Gamarra, among other leaders of the Agricultural Producers Coordination Office – San Pedro Norte (CPA-SPN), had been asked to unblock the road in order to allow vehicle traffic to resume. However, they refused the dialogue and responded highly aggressively towards law-enforcement personnel after these legitimate requests. Thus, in accordance with applicable domestic rules and regulations and under the direction and supervision of the duty prosecutor of Santa Rosa del Aguaray, steps were taken to unblock the road and apprehend the most notorious of the leaders.

4.4 The State party also refers to the report of the Office of the Chief of the Police of San Pedro, dated 19 June 2003, which had been submitted to the Public Prosecution Service. It states that the demonstrators passed in front of Santa Rosa Police Station No. 18 “shouting, cheering, protesting and hurling insults at policemen. Ostentatiously carrying guns [...] and nail-studded clubs, on the orders of their main leaders [...] they threatened to kill members of the police force”. The report also indicates that the policemen involved in the operation exclusively used rubber bullets and that 10 policemen were wounded by firearms in the incident.

### **Author's comments on the State party's submission**

5.1 On 5 October 2009, the author commented on the State party's submission. She contends that, although the State party stated that investigations had been conducted to establish the facts, on the date of submission of the communication, the investigative phase into the incident had lasted more than five years, without not so much as a charge being made against the alleged perpetrators, nor any procedures being conducted with a view to establishing the facts.

5.2 The author reiterates that the incident referred to in the communication was not the result of a clash with law-enforcement personnel in which both policemen and civilians had been wounded, as suggested by the State party, but rather the disproportionate and unreasonable use of force by police officers against lemon verbena producers who were exercising their right to demonstrate.

## 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 takes note of the State party's argument to the effect that a number of circumstances are still being investigated in order to establish the facts. In this regard, the author maintains that the present communication falls within the scope of an exception to the rule requiring the prior exhaustion of all available domestic remedies, which is set out in article 5, paragraph 2 (b), of the Optional Protocol, owing to the length of time that has elapsed without any domestic procedures having been concluded. The criminal investigation in fact began on 16 June 2003, and since that date, no conclusions seem to have been reached regarding the circumstances of Blanco Domínguez's death. The Committee recalls that it is precluded from considering any communication unless it has been ascertained that all available domestic remedies have been exhausted. For the purposes of article 5, paragraph 2 (b), of the Optional Protocol, however, domestic remedies must be both effective and available, and must not be unduly prolonged. In the circumstances of the present case, the Committee notes that the State party has failed to explain why no progress has been made in the investigation nor has it provided a possible date for its conclusion. Consequently, the Committee considers that domestic remedies have been unreasonably prolonged and finds that article 5, paragraph 2 (b), of the Optional Protocol does not preclude it from considering the complaint.<sup>8</sup>

6.4 Considering that the other requirements for admissibility have been met, the Committee declares the communication admissible insofar as it raises issues under articles 6 and 2, paragraph 3, of the Covenant.

### *Consideration of the merits*

7.1 The Committee has considered the present communication in the light of all the information made available by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee takes note of the author's allegations to the effect that her husband was the victim of an arbitrary execution as a result of the unlawful, unnecessary and disproportionate use of force by police officers during a demonstration. She alleges that he was shot at close range after surrendering and subsequently struck on the head. She also alleges that the investigation into the incident was not conducted efficiently, that the circumstances surrounding the incident have still not been clarified and that responsibility has not been determined despite the time that has elapsed. The Committee also notes the State party's general argument that police and judicial procedures were carried out in strict compliance with applicable constitutional and legal provisions and that such procedures were conducted in conformity with the principles concerning the lawful and reasonable use of force. The Committee further notes that, according to the State party, a number of

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<sup>8</sup> See communications No. 1560/2007, *Marcellana and Gumanoy v. The Philippines*, Views adopted on 30 October 2008, para. 6.2; and No. 1619/2007, *Pestaño v. The Philippines*, Views adopted on 23 March 2010, para. 6.4.

circumstances are still being investigated in order to establish the facts. However, the State party has submitted no specific evidence shedding light on how or by whom Blanco Domínguez was fatally wounded.

7.3 With regard to the author's contention that article 6 of the Covenant was violated, the Committee recalls that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces.<sup>9</sup> The Committee refers to its jurisprudence, according to which both a criminal investigation and consequential prosecution are necessary remedies for violations of human rights such as those protected by article 6.<sup>10</sup> A violation of the Covenant may therefore arise as a result of a State party's failure to take appropriate measures to investigate and punish or redress such a violation.<sup>11</sup>

7.4 The Committee also recalls that, under article 2, paragraph 3, of the Covenant, States parties should ensure that all persons have accessible, effective and enforceable remedies in order to claim the rights embodied in the Covenant. The Committee further recalls its general comment No. 31, on the nature of the general legal obligation imposed on States parties, to the effect that, when the investigations reveal violations of certain Covenant rights, States parties must ensure that those responsible are brought to justice.<sup>12</sup>

7.5 The Committee considers that the State has an obligation to protect the life of persons under its jurisdiction and, in the present case, the State party had the obligation to protect the life of the demonstrators. The grave circumstances surrounding the death of Blanco Domínguez call for an effective investigation into the possible involvement of the State party's police forces. Despite the foregoing, the State party has not explained why the investigation that began on 16 June 2003 has made so little progress and still not reached any definitive conclusion. The Committee takes note of the author's statement, which has not been contested by the State party, to the effect that no autopsy was carried out and that the projectile extracted from the body of Blanco Domínguez was not examined and has been misplaced, which now makes it impossible to elucidate particularly important aspects of the investigation. The Committee also recalls that the burden of proof cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to evidence and that frequently the State party alone has access to relevant information. It is implicit in article 4, paragraph 2, of the Optional Protocol, that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its authorities, and to furnish to the Committee whatever information it has available.<sup>13</sup> In view of the foregoing, the Committee concludes that the facts before it reveal a violation of article 6, paragraph 1, of the

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<sup>9</sup> See the Committee's general comment No. 6, on the right to life (article 6 of the Covenant), *Official records of the General Assembly, Thirty-seventh Session, Supplement No. 40 [A/37/40] annex V*, para. 3.

<sup>10</sup> See, for example, communications No. 1447/2006, *Amirov v. Russian Federation*, Views adopted on 2 April 2009, para. 11.2, and No. 1436/2005, *Sathasivam v. Sri Lanka*, Views adopted on 8 July 2008, para. 6.4.

<sup>11</sup> See communication No. 1619/2007, *Pestaño v. The Philippines*, Views adopted on 23 March 2010, para. 7.2.

<sup>12</sup> *Official records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/37/40 [vol. I]) annex III, para. 18.

<sup>13</sup> See communication No. 1756/2008, *Zhumbaeva v. Kyrgyzstan*, Views adopted on 19 July 2011, para. 8.7.

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Covenant, and of article 2, paragraph 3, of the Covenant, read in conjunction with article 6, paragraph 1.<sup>14</sup>

8. 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 facts before it disclose a violation of article 6, paragraph 1, and of article 2, paragraph 3, read in conjunction with article 6, paragraph 1, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, which includes an effective and complete investigation of the facts, the prosecution and punishment of those guilty and full reparation, including appropriate compensation. The State party is also under an obligation to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views and to disseminate them widely.

[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 to the General Assembly.]

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<sup>14</sup> See communications No. 1458/2006, *González v. Argentina*, Views adopted on 17 March 2011, para. 9.4 and No. 1756/2008 (see footnote 13 above), paras. 8.8 and 8.10.

**Q. Communication No. 1829/2008, *Benitez Gamarra v. Paraguay*  
(Views adopted on 22 March 2012, 104th session)\***

<i>Submitted by:</i>	Ernesto Benítez Gamarra (represented by the Paraguayan Human Rights Coordinating Committee (CODEHUPY) and the World Organization against Torture (OMCT))
<i>Alleged victim:</i>	The author
<i>State party:</i>	Paraguay
<i>Date of communication:</i>	25 August 2008 (initial submission)
<i>Subject matter:</i>	Arrest during a demonstration
<i>Procedural issue:</i>	None
<i>Substantive issues:</i>	Torture or cruel, inhuman or degrading treatment; denial of effective remedy
<i>Articles of the Covenant:</i>	Article 2, paragraph 3; article 7
<i>Articles of the Optional Protocol:</i>	None

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

*Meeting on 22 March 2012,*

*Having concluded* its consideration of communication No. 1829/2008, submitted to the Human Rights Committee by Mr. Ernesto Benítez Gamarra, 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. The author of the communication, dated 25 August 2008, is Ernesto Benítez Gamarra, a Paraguayan citizen born in 1969. He claims to be the victim of a violation by Paraguay of article 2, paragraph 3, and article 7 of the Covenant. The Optional Protocol entered into force for the State party on 10 January 1995. The author is represented by counsel.

**The facts as submitted by the author**

2.1 The author is an educator and agricultural worker whose home and farm are in the Táva Guarani settlement. He is a member of the Agricultural Producers' Coordination

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\* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Mr. Ahmad Amin Fathalla, 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, Mr. Krister Thelin and Ms. Margo Waterval.

Office of San Pedro Norte (CPA-SPN), acting as coordinator for education. The chief demand of rural workers' organizations in Paraguay is for agrarian reform. This has often led to conflict between landowners, farmworkers and Government authorities.

2.2 The growing and marketing of lemon verbena was initially supported by the Government. In 2002, the Government gave the private sector responsibility for marketing the crop, which led to a fall in prices and losses to producers as surplus production went unsold. With the support of CPA-SPN, the lemon verbena producers held demonstrations in Santa Rosa del Aguaray on 10 February, 24 April and 19 May 2003, demanding that the State take action to address the situation. Following these organized protests, the Ministry of Agriculture and Livestock pledged to grant the producers a subsidy; however, only a partial subsidy was paid, and following the failure of negotiations, on 29 May 2003 the farmworkers gathered once more in Santa Rosa del Aguaray to set up camp and continue organizing protests. Starting from that date, the farmworkers held as many as two or three demonstrations a day and were based in a camp set up in the grounds of a public institution.

2.3 On 2 June 2003, the producers' organization issued a public statement requesting that the authorities give full effect to the agreements signed by the Ministry of Agriculture before 7 a.m. on 3 June, failing which they would carry out a peaceful blockade of Route 3 in Santa Rosa del Aguaray as a pressure tactic.

2.4 On 3 June 2003, around 1,000 demonstrators, including the author, converged on the site of the demonstration. They were met at the site by a strong security presence made up of 239 policemen and 40 anti-riot officers from the special branch of the National Police. The police and anti-riot officers were acting under the orders of V.A.R., the chief of police in the department of San Pedro. A contingent of 30 armed military personnel was also present. The military and police personnel were acting under the orders of criminal prosecutor L.A. from the Santa Rosa del Aguaray District Prosecutor's Office. The security forces had anti-riot water-cannon vehicles and were armed. As the demonstrators were unable to cross the police line blocking their way, they decided to block the road. The prosecutor ordered the leaders of the demonstration to unblock the road, indicating that if they failed to do so measures would be taken to clear it by force. The author was among those negotiating on behalf of the demonstrators.

2.5 While negotiations were under way, the prosecutor ordered the road to be cleared. The police assault was immediate and violent, as they fired tear gas, live rounds and water cannon. According to the author, the police intervention was not preceded by loudspeaker warnings to the rest of the demonstrators.

2.6 The police beat many of the demonstrators violently, fired indiscriminately and forced their way into several nearby houses where the demonstrators had taken refuge, causing considerable damage and severely beating those they managed to catch. The road was cleared in about 10 minutes.

2.7 The author and approximately 120 other demonstrators managed to escape the crackdown and sought refuge in the camp that they had set up in the grounds of the Rural Welfare Institute, some 300 or 400 metres from the scene of the violent incidents. The police cleared the area using firearms and batons. They then singled out between 20 and 25 people for arrest, including the author. Once the detainees had been identified, they were forced to lie on the ground and were then beaten with batons, kicked and stamped on.

2.8 The author was identified by a police chief as he was trying to contact Radio Cáritas on his mobile phone. A group of policemen surrounded him and one of them fired a shot, probably a rubber bullet, which knocked him to the ground. Like other detainees, he was forced to put his hands on the back of his head and lie face down on the ground. He was beaten and kicked by military personnel and police officers, who also stamped on him.

Later, the police destroyed and set fire to their belongings, including two motorcycles and a vehicle used for delivering supplies.

2.9 After being beaten, the author and the other detainees were taken in a military truck to Santa Rosa del Aguaray police station No. 18, some 500 metres away. During the ride, they were forced to lie face down with their hands behind their head. In the police station they were beaten again. The author was particularly targeted; he was taken aside to a room where police officers and military personnel kicked him and beat him with batons on the back, feet, stomach and head while he was handcuffed with his hands behind his back. While beating him, they threatened him, saying that he had been the cause of the problems in the area and that the only solution was for them to kill him. They also sprayed an irritant gas in his face. When they saw he was crying, the police officers made fun of him, painted his face with lipstick and cut locks of his hair which they said they would “take as a trophy to their chief”. This treatment went on for several hours and stopped only when journalists who were covering the demonstration arrived at the police station. According to the author, these acts were witnessed by prosecutor L.A., who was in the police station and gave no order for them to be stopped.

2.10 Subsequently, the author and the other detainees were placed in a cell measuring 1.5 m wide, 8 m long and 3 m high, where they were unable to sit or lie down. They were kept there, without being allowed to go to the toilet, until 5.30 a.m. the next day, 4 June 2003.

2.11 On 3 June 2003 the National Police filed a complaint with the criminal prosecutor L.A. against the author and other demonstrators for the offences of “endangering traffic”, “disturbing the peace”, “threatening to commit an offence” and “resistance with firearms and bladed weapons”. On the same date the prosecutor ordered the provisional detention of the author and another 40 demonstrators. The order for the provisional detention of the author was issued after his arrest.

2.12 On 4 June 2003, the author and 31 other detainees were transferred to the San Pedro del Ykuamandyju regional prison. On the same date, the prosecutor filed charges against the author and another 42 demonstrators for “endangering traffic” and “disturbing the peace”.

2.13 It was only on 4 and 5 June 2003 that the author and the other detainees were examined by forensic physicians of the Public Prosecution Service and the judiciary.<sup>1</sup> The author states that the forensic medical examinations, in addition to being inconsistent, were not carried out in accordance with the Istanbul Protocol.<sup>2</sup>

2.14 On 9 June 2003, at the request of the public defender, the Criminal Court of San Pedro del Ykuamandyju ordered the provisional release of the author and the other demonstrators still in detention. On 3 December 2003, the Public Prosecution Service brought charges before the Criminal Court against the author and 31 other demonstrators for “endangering traffic” and “disturbing the peace”. However, no public oral proceedings were ever held on the basis of these charges and the Public Prosecution Service failed to take the necessary procedural steps for that purpose. On 2 May 2007, the Criminal Court of

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<sup>1</sup> The report by the forensic physician of the judiciary, dated 4 June 2003, states that “the patient presents a left lateral neck oedema approximately 4 cm in diameter and painful swelling of the left parieto-frontal region”. The report by the forensic physician of the District Prosecutor’s Office of San Pedro del Ykuamandyju, dated 5 June 2003, states that the author presented “minor grazing to the left knee” and that “no other injury was detected”.

<sup>2</sup> The author attaches a report, dated 9 July 2008, by Dr. Carlos Portillo, a specialist in the care of torture victims, which concludes that the reports of the examinations carried out on 5 June 2003 fail to comply with the requirements of the Istanbul Protocol.



San Pedro del Ykuamandyju ruled that the criminal action against the author and the other 31 indicted demonstrators should be discontinued on the grounds that the three-year time limit for criminal proceedings had expired without any definitive judicial decision having been reached. The ruling was not appealed and became final.

2.15 On 10 June 2003, the author (and other demonstrators) filed a complaint for torture and ill-treatment with the Public Prosecution Service. The Paraguayan Human Rights Coordinating Committee (CODEHUPY) also filed a complaint with the Human Rights Commission of the Senate alleging serious human rights violations, including acts of torture against the author. On 20 June 2003, the chair of the Human Rights Commission lodged a complaint with the Public Prosecution Service.

2.16 The author was summoned to appear before the Special Unit on Human Rights Offences on 31 May 2004 with a view to establishing the facts; he confirmed his complaint and gave details of the events. On 12 July 2004, one year after the events, the prosecutor of the Special Unit charged the chief of Santa Rosa del Aguaray police station No. 18 and prosecutor L.A. with the offence of causing bodily harm in the exercise of public duties. The Public Prosecution Service requested a period of six months in which to bring charges and sought a number of interim measures against the accused, such as a prohibition on leaving the country, a monthly court appearance and a prohibition on communicating with the victims. The accused were not temporarily suspended from their duties.

2.17 On 18 March 2005, the Public Prosecution Service requested a temporary stay of proceedings against the accused on the grounds that, although it had evidence to support the view that an offence had been committed, the evidence to identify the perpetrators of the acts had not been processed.<sup>3</sup> Among the evidence yet to be collected, the Public Prosecution Service cited 33 witness statements that had not been taken and said that officials from the Service needed to go to the scene of the events to obtain the statements. In addition, the counsel of CODEHUPY who had filed the complaint with the Human Rights Commission of the Senate had yet to provide a witness statement.

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<sup>3</sup> The request states: "A number of farm workers were beaten and arrested by the security forces, who used excessive and disproportionate force to apprehend them, given that they had already been cornered and had capitulated. Subsequently, those arrested were taken to the police station ... where their physical and psychological ill-treatment continued, even though they now offered no resistance to the police. ... Despite the efforts of the Public Prosecution Service to obtain witness statements from the alleged victims ... the statements of many victims identified as having been at the scene of the events have still not been taken. These inquiries suggested that the prosecutor ... directing the proceedings was present at the time the demonstrators were physically abused and he was therefore charged. It was also clear that the assaults on the demonstrators by uniformed officers continued at the Santa Rosa del Aguaray police station; accordingly, the district chief, ..., was also charged. ... A large amount of evidence, such as medical reports and the statements of victims and other persons who witnessed the events, together with photographs and other reports, proves conclusively that an offence was committed; it establishes that the physical abuse and injuries to several lemon verbena producers who had been demonstrating in Santa Rosa del Aguaray were the result of assaults by members of both the National Police and the Armed Forces. ... However, in order to secure the conviction of the accused, it must be proved that they committed the offence. Although police reports confirmed that one of those in charge of the proceedings was the indicted police station chief ..., there was no specific evidence to indicate that he was responsible for ordering and carrying out the assaults on the demonstrators. In addition, although it was clear that prosecutor L.A. had ordered the road to be cleared ..., there was no evidence that he had ordered excessive use of force by uniformed personnel. Consequently ... it cannot be argued that the investigation has been completed since other inquiries must be conducted in order to obtain further evidence to justify an indictment or on which to base the relevant application."

2.18 On 3 August 2005, the San Pedro del Ykuamandyju interim Criminal Court of Guarantees rejected the request for a temporary stay of proceedings and ruled that the case against the accused should be dismissed on the grounds that the prosecutor's office did not have sufficient evidence to justify continuing the case against them.<sup>4</sup> According to the author, he was not formally notified of this decision and he was able to obtain information about the dismissal of the case only on his own initiative. The Special Unit on Human Rights Offences appealed the decision, but on 24 May 2006 the Caaguazú and San Pedro Appeal Court declared the appeal inadmissible on the grounds that it had not been filed by the deadline.

2.19 On 6 and 18 March 2008, the author asked the Santa Rosa del Aguaray Criminal Court and the San Pedro del Ykuamandyju Criminal Court for a copy of the court record concerning the charges brought by the Public Prosecution Service against the police station chief and the prosecutor. However, the record could not be found and is not in the courts where it should be kept. On 7 May 2008, the Public Prosecution Service informed the author that no further appeal was possible against the decision to dismiss the case taken on 3 August 2005. Consequently, the author maintains that he has exhausted all domestic remedies.

2.20 The author states that on 21 September 2004, the Judges Impeachment Panel instituted proceedings for administrative liability against prosecutor L.A., at the request of the San Pedro del Ykuamandyju Criminal Court, which notified the Panel of the charges brought against the prosecutor for the offence of causing bodily harm in the exercise of public duties to the author and the other demonstrators in detention. On the same date, the Panel decided to suspend the impeachment pending a final decision in the criminal case. Subsequently, on 22 November 2005, the Panel acquitted prosecutor L.A. on the grounds that the case had been dismissed by the Criminal Court.

### **The complaint**

3.1 The author alleges that the facts described are a breach of article 2, paragraph 3, and article 7 of the Covenant.

3.2 With regard to article 7 of the Covenant, the author contends that the physical abuse he suffered on 3 June 2003 amounts to torture or at least cruel or inhuman treatment contrary to article 7 of the Covenant. The acts of torture to which he was subjected by police and military officers were intended to intimidate him and temporarily undermine his ability to continue leading the agricultural workers' protests. The State party indicted him and placed him in pretrial detention not because it had grounds to bring criminal charges against him, but with a view to imposing restrictions on him and subjecting him to police and prosecutorial surveillance. He points out that the beatings, asphyxiation and death threats to which he was subjected were committed with the consent of the criminal prosecutor who subsequently ordered his detention.

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<sup>4</sup> In its decision the court states: "The legal basis for the temporary stay of proceedings depends on there being a real possibility that the concrete and specific evidence that they wished to submit in order to enable the proceedings to continue would in fact constitute sufficient proof to justify a change in the course of the case. In the present case, the representative of the Public Prosecution Service makes no reference to any evidence in support of his application. ... there is no evidence to fully satisfy this Court of the involvement of the accused in the offence in question. In addition, the prosecutor's office makes no mention of any other inquiries aimed at establishing the facts of the case."

3.3 The author states that the assaults have left him with physical and psychological sequelae.<sup>5</sup> The spraying of irritant gases directly into the face from a close distance causes a sensation of asphyxiation and drowning similar to that felt when being immersed in water, and is intended to cause severe pain and the sensation of dying from lack of air as a result of immersion. He argues that the sensation of anguish and fear of death was heightened by the fact that the acts were carried out with the consent of the judicial official responsible for protecting his life and physical and mental integrity.

3.4 The author recalls that the Public Prosecution Service itself recognized before the domestic court that physical punishment had taken place. In the application for the temporary stay of proceedings of 18 March 2005, the criminal prosecutor stated that there was ample evidence proving conclusively that the alleged offences had occurred. However, the judicial action taken was inadequate to fully clarify the circumstances of those offences, punish those responsible, compensate the victims and prevent similar situations from recurring.

3.5 The State party failed in its duty to investigate effectively, properly and promptly the complaints of torture filed by the author. In order to properly interpret the obligations under article 2, paragraph 3, in relation to article 7 of the Covenant, the Committee should take into account the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>6</sup> and, in particular, the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, known as the Istanbul Protocol.

3.6 The author asserts that the complaint of torture was not dealt with promptly and was subsequently processed slowly and incompetently. The two public officials whose possible individual criminal liability was self-evident were charged 13 months after the events. The Public Prosecution Service did not request the temporary suspension of those officials (or of any others) from their duties as a precautionary measure to prevent them from obstructing the investigation and influencing the course of the public prosecution. The prosecutor assigned to the case appealed the order dismissing the case two months after the deadline for submitting a challenge. This incompetence and unjustified delay demonstrate the ineffectiveness of the available remedy.

3.7 The author maintains that the medical examinations carried out on the author and the other victims by forensic physicians of the Public Prosecution Service and the judiciary failed to comply with the requirements of the Istanbul Protocol. The examinations were superficial and confined to an external examination of the victims and included no

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<sup>5</sup> The author attached a medical report by Dr. Christian Palmas Nicora (an orthopaedist and traumatologist), dated 14 July 2008, and one by Dr. Carlos Portillo, dated 9 July 2008. According to the first report, the author presents limitation of abduction of the right shoulder beyond 120 degrees and pain with maximum external rotation with the shoulder at 90 degrees; pain around the upper right scapula region; muscular atrophy in the right paravertebral region and the right periscapular muscles. In the left hand, the author presents stiffness of the distal interphalangeal joints of the index finger, painful lumps in the proximal interphalangeal joints of the index and middle fingers, with partial loss of ability to flex the fingers. Decreased muscle strength in the left hand. He has an old fracture of the third right rib, posterior arch, and joint impingement of the distal interphalangeal joint of the index finger of the left hand. According to the second report, there is recurring pain in the bones and joints, which at the time of his release affected his whole body and which is currently mostly felt in both knees, deviation of the joint between the second and third phalanges of the index finger of the left hand, micturition difficulties, conjunctival sensitivity in both eyes when exposed to irritants that did not previously cause watering of the eyes, irritability and intolerance of any sound similar to explosions or gunfire.

<sup>6</sup> General Assembly resolution 55/89, 22 February 2001.

diagnostic tests or psychological assessments. He points out that he received no medical care until the day after he was detained and beaten.

3.8 The place where the acts of torture occurred was not cordoned off and no judicial inspection was conducted to collect evidence. The first inspection of the crime scene by prosecutors was carried out on 15 October 2003, 4 months after the events, and the second inspection took place on 16 October 2004, 16 months after the events. The first inspection was confined to noting the size of the cell and the police station premises and the second to drawing up a basic plan of the police station. The alleged victims and other witnesses were not notified about or involved in either inspection. Only one of the indicted officials took part – the chief of the police station where the inspection took place.

3.9 The investigation by prosecutors was focused mainly on gathering witness statements. In this regard, the investigation was partial since most of the witnesses were officials who had participated in the crackdown and whose statements were intended to cover up their own responsibility and that of their superiors. The Public Prosecution Service interviewed as witnesses seven police officers, five military personnel, one official of the Public Prosecution Service and four demonstrators, including the author. No confrontations were arranged between witnesses who gave contradictory accounts and there was a failure to conduct other necessary investigations provided for by domestic law.

3.10 With respect to the application for a temporary stay of proceedings filed by the Public Prosecution Service, in which the prosecutor's office mentioned that 33 witnesses and victims had not been interviewed at the appropriate stage of the proceedings, the author maintains that 19 of those persons had been charged by the Public Prosecution Service and were under police and prosecutorial surveillance in the criminal case brought against them for blocking the road during the demonstration. Consequently, it is not true that it was difficult to identify and bring together the victims, since most of them were known to the Public Prosecution Service, they were under police and prosecutorial surveillance and they could be interviewed and brought to trial.

3.11 The author refers to the situation of impunity in the State party and states that the Public Prosecution Service's failure to file charges in the criminal investigation because of a lack of evidence collected at the appropriate stage of the proceedings is consistent with this pattern of impunity. In this regard, the author refers to the concluding observations of the Human Rights Committee<sup>7</sup> and to the report of the Special Rapporteur on torture.<sup>8</sup>

3.12 The author asks the Committee to recommend that the State party: (i) undertake a thorough and effective investigation into the circumstances in which the author was subjected to torture and ill-treatment and take appropriate measures to punish those responsible; and (ii) take measures to ensure that the author receives comprehensive and appropriate redress for the injury suffered.

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

4.1 In a note verbale dated 2 July 2009, the State party submits that the case was brought as a result of a demonstration by lemon verbena producers in the department of San Pedro on 3 June 2003. Following a clash with the security forces, both police officers and demonstrators were left injured. The State party refers to National Police reports indicating that no member of the security forces witnessed or was involved in acts of physical or psychological torture committed by the police force. The injuries and bruising sustained by

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<sup>7</sup> Concluding observations on Paraguay, CCPR/C/PRY/CO/2, para. 12.

<sup>8</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak. Mission to Paraguay, A/HRC/7/3/Add.3, 1 October 2007, paras. 53–55.

the demonstrators were caused while obstructing the police during the course of their duties. Police and judicial procedures were both carried out in strict compliance with the Constitution and the law, respecting the principles of legality and reasonableness in the use of force, taking into consideration the seriousness of the situation.

4.2 The State party maintains that there are circumstances that are still being investigated in order to establish the facts and that the national authorities have repeatedly indicated their determination to give effective follow-up to human rights complaints and to prevent any offence that gives rise to such complaints.

#### **Author's comments on the State party's submission**

5.1 On 5 October 2009, the author reiterates that the facts to which the communication relates were not the result of a "clash with the security forces", as the State party claims, in which "both police officers and demonstrators were left injured", but the disproportionate and unreasonable use of force by police officers against lemon verbena producers who were exercising their right to demonstrate.

5.2 The author reiterates that the proceedings for torture have been dropped following the dismissal of the case against the alleged perpetrators. On 7 May 2008, the prosecutor informed the author that no further remedies or other procedural means of appealing the dismissal decision were available.

#### **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 State party's affirmation that a number of circumstances are still being investigated in order to establish the facts. However, the State party provides no details concerning those circumstances. The Committee also notes that, according to the author, the case was dismissed definitively and that, on 7 May 2008, the Public Prosecution Service notified him that no further appeal against the decision to dismiss the charges was available. Consequently, the Committee considers that the communication meets the requirement of the prior exhaustion of domestic remedies, as set out in article 5, paragraph 2 (b), of the Optional Protocol.

6.4 As the other admissibility requirements have been met, the Committee declares the communication admissible insofar as it raises issues under articles 7 and 2, paragraph 3, of the Covenant.

##### *Consideration of the merits*

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, in accordance with article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee takes note of the author's claim that he was beaten at the time of his arrest and that, once at the police station, he was taken with other detainees to a room where police and military personnel beat him repeatedly while he was handcuffed with his hands behind his back. He also claims, inter alia, that he was subjected to death threats and

degrading treatment and that an irritant gas was sprayed in his face. The assaults have left him with physical and psychological sequelae, as indicated in medical reports prepared in 2008.

7.3 The Committee also notes that, on 10 June 2003, the author filed a complaint concerning these events with the Public Prosecution Service. However, it was only on 12 July 2004 that the police station chief and a prosecutor were indicted for the offence of causing bodily harm in the exercise of public duties. According to the author, the prosecutorial investigation, based mainly on taking witness statements, was partial, since most of the witnesses were police or military officers and only four demonstrators were interviewed. The Committee notes that on 18 March 2005, the Public Prosecution Service acknowledged that a large amount of evidence, such as medical tests, the statements of victims and witnesses, photographs and other reports proved conclusively that an offence had been committed. However, more evidence — including the testimony of many victims — had yet to be gathered to provide a basis for the charges against the two accused. The Committee also notes the State party's claims that the police and judicial procedures were carried out in strict compliance with the law.

7.4 Taking into account the author's detailed description of the events of 3 June 2003, the medical reports he submitted and the Public Prosecution Service's recognition that those events occurred, the Committee considers that the use of force by the police was disproportionate and that the treatment to which the author was subjected constitutes a violation of article 7 of the Covenant.

7.5 With regard to the author's complaint concerning the investigation of the events, the Committee recalls its general comment No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment<sup>9</sup> and general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant,<sup>10</sup> as well as its settled jurisprudence,<sup>11</sup> according to which complaints alleging a violation of article 7 must be investigated promptly, thoroughly and impartially by the competent authorities and appropriate action must be taken against those found guilty. In the present case, the Committee notes that the author filed the complaint on 10 June 2003 and that it was more than a year later — 12 July 2004 — that the prosecutor indicted two suspects. On 18 March 2005, the prosecutor requested a temporary stay of proceedings in order to allow further evidence to be gathered. However, the criminal court refused to allow such evidence to be gathered and dismissed the case. In those circumstances, and in the absence of any justification by the State party as to why the investigation into the case was interrupted, the Committee finds that the author did not have access to an effective remedy and that the facts before it amount to a violation of article 2, paragraph 3, read in conjunction with article 7 of the Covenant.

8. 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 facts before it disclose a violation of article 7 of the Covenant and of article 2, paragraph 3, of the Covenant, read in conjunction with article 7.

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<sup>9</sup> *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A, para. 14.

<sup>10</sup> General comment No. 31, the nature of the general legal obligation imposed on States parties to the Covenant, CCPR/C/21/Rev.1/Add.13 (2004), para. 18.

<sup>11</sup> See, for example, communication No. 1436/2005, *Sathasivam/Saraswathi v. Sri Lanka*, Views adopted on 8 July 2008, paras. 6.3 and 6.4; and communication No. 1818/2008, *MacCallum v. South Africa*, Views adopted on 25 October 2010, para. 6.7.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy which should, as an alternative to what has been undertaken so far, include an impartial, effective and thorough investigation of the facts, the prosecution and punishment of those responsible and full reparation, including appropriate compensation.<sup>12</sup> The State party is also under an obligation to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and ensure that they are widely disseminated.

[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 to the General Assembly.]

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<sup>12</sup> See, for example, communication No. 1605/2007, *Zyuskin v. Russian Federation*, Views adopted on 19 July 2011, para. 13.

**R. Communication No. 1833/2008, X. v. Sweden  
(Views adopted on 1 November 2011, 103rd session)\***

<i>Submitted by:</i>	X. (represented by counsel, Anna Lindblad)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Sweden
<i>Date of communication:</i>	26 November 2008 (initial submission)
<i>Subject matter:</i>	Deportation of an alleged bisexual person to Afghanistan
<i>Procedural issues:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Risk of torture and death upon return to country of origin
<i>Articles of the Covenant:</i>	6; 7
<i>Articles 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 1 November 2011,

*Having concluded* its consideration of communication No. 1833/2008, submitted to the Human Rights Committee on behalf of Mr. X 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. The author of the communication, dated 26 November 2008, is Mr. X., a national of Afghanistan. The author claims to be a victim of a violation by Sweden of his rights under articles 6 and 7 of the Covenant. He is represented by counsel, Anna Lindblad.

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\* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli and Ms. Margo Waterval.

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

An individual opinion signed by Committee member Rafael Rivas Posada is appended to the present Views.



### **Factual background**

2.1 The author arrived in Sweden on 2 October 2002 and applied for asylum the day after, on 3 October 2002. In his asylum application, he indicated that he was an active member of the Communist party in Afghanistan since 1989-1990. He was working for the party by way of producing documentary films and writing theatre scripts, literature and reports criticizing the Mujahedin; he also acted in his plays. This work made him famous in Afghanistan, as his films and plays became known to the public. After the fall of the Najibullah regime, he was arrested in 1993 by the Mujahedin, who were then in power in Mazar-e-Sherif. He was taken to a security prison, where there were only political prisoners. He was detained incommunicado and subjected daily to torture, including electric shocks, kicks, beatings, sexual abuses, including rape. He was imprisoned for about six months, without trial or access to legal aid. Finally, his father managed to bribe a person and obtain his release. During the following years, he was constantly living in hiding, going from one town to another, until he managed to leave the country in 2002. He claims that his father was killed by the Mujahedin. On 16 August 2005, his application for asylum was rejected by the Migration Board of Sweden. The author appealed the decision to the Aliens Appeals Board, which rejected his claim on 20 January 2006. This decision was the final rejection. On 7 April 2006, a temporary residence permit, valid until 7 April 2007, was granted to the author (as well as to other rejected Afghan asylum-seekers) due to the moratorium declared by the Migration Board regarding deportations to Afghanistan due to the situation in the country.

2.2 On 20 December 2006, the author filed a new application under chapter 12 of the Aliens Act, stating that there were new circumstances, referring to the same fear of persecution, including torture, and providing a medical certificate from the Centre for Crisis and Trauma of the Danderyd Hospital in Stockholm citing the consequences of past torture. His application was rejected by the Migration Board of Sweden on 20 June 2007; it stated that the author did not present any new circumstances. His appeal was rejected by the Migration Court on 16 July 2007.

2.3 Another application for asylum was filed by the author at the beginning of 2008. He reiterated his claim that he would be at risk of being killed because he was a former political prisoner who had left the country and was still regarded as an opponent to the Mujahedin because of his previous work. He claimed that the Mujahedin were still holding very powerful positions in Afghanistan. On that occasion, the author submitted documents, inter alia, a letter from Afghan officials confirming that he would still be at risk if he were to return to Afghanistan. On 13 March 2008, the Migration Board of Sweden rejected his claim, arguing that the author presented no new circumstances, therefore there were no grounds to reopen his case.

2.4 In September/October 2008, the author filed another application with the Migration Board of Sweden, in which he revealed, for the first time, his bisexuality as a reason for requesting asylum. He explained that he had his first homosexual relationship at the age of 15-16 with a boy and that they were together for about four to five years. The author said that he had never revealed his sexual orientation, not even to friends or family, as he was afraid of severe punishment by non-State actors or State authorities. He maintained his previous asylum claim, but added that the main reason for his arrest in 1993 was a play about bisexuality that he had written and in which he had acted himself and he appeared kissing a man. After he had received threats, the performances were discontinued. He claimed that he was arrested as a result of this and accused of acting against Islam and being a political opponent. He was tortured, and claimed that rape was part of the torture to which he was subjected. After his release, he continued to have sexual relations with both men and women, including during his marriage. He lived in constant fear that this would be

revealed and he would be reported to the authorities and severely beaten or killed by the State or by individuals, as the State does not offer protection.

2.5 While in Sweden, he had short and long homosexual relationships and became a member of the Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights (hereinafter RFSL). RFSL has sent letters to both the Migration Board and the Migration Court protesting against the decision to deport him to Afghanistan. During his stay in Sweden, although open about his sexuality, he never told any Afghan about his sexual orientation for fear of reprisal. However, it is possible that some Afghans know and could communicate that information to persons in Afghanistan.

2.6 On 17 November 2008, the Migration Board of Sweden rejected the author's new application, stating that he had not given a valid excuse as to why he had not revealed his sexual orientation to the asylum authorities initially. The author replied that this was due to the stigma associated with bisexuality and homosexuality in his culture, feelings of shame, fear of what his previous lawyer, migration authorities and interpreters would think of him, and fear of reprisal if other Afghans learned about it. Furthermore, he did not know that fear of persecution based on sexual orientation was a valid claim for refugee status and asylum in Sweden; he was unaware of the importance that this kind of argument could have.

2.7 On 24 November 2008, the author appealed the latest decision of the Migration Board of Sweden to the Migration Court. In addition to arguing that, due on his personal circumstances and the situation in Afghanistan, he would be at risk of torture and persecution if he returned to Afghanistan, the author also argued that the Migration Board had not applied the correct standard of proof. He stated that the Board had applied the "probable test" instead of the lower standard of proof which should be applied when new circumstances justify the reopening of a case. RFSL made submissions on his behalf, explaining the particular problems that homosexual and bisexual persons may encounter during the asylum process, including difficulties speaking about their sexuality. It supported the argument that the author would be at risk of persecution and torture if he returned to Afghanistan. On 25 November 2008, in a submission to the Migration Court, the Migration Board argued that the author had not given any valid excuse for not referring to his sexuality before. It also found it contradictory that although he had been open about his sexual orientation in Sweden, and had had homosexual relations and visited gay clubs, he did not see fit to confide in the migration authorities on that issue. On 26 November 2008, the Migration Court upheld the decision of the Migration Board of Sweden. The Court considered that there were no grounds, under chapter 12, section 19, of the 2005 Aliens Act, to examine the new asylum application based on new facts. Consequently, the author was deported to Afghanistan.

2.8 As regards the exhaustion of domestic remedies, the author stated that there was the possibility of formally appealing the decision to the Migration Court of Appeal of Sweden. However, this could not have been considered an effective remedy for two reasons: first, due to time constraints, since the risk of deportation was imminent; and second, there were reasons to believe that the Migration Court of Appeal would not have stopped the deportation, as in its previous decisions, it had clearly indicated that the Migration Court interpreted the criteria of "valid excuse" very strictly. For these reasons, the author considered that domestic remedies had been exhausted.

### **The complaint**

3.1 The author claims that his forcible return to Afghanistan amounts to a violation by Sweden of his rights under articles 6 and 7 of the Covenant, since there is a real risk of torture and other cruel, inhuman or degrading treatment or punishment, as well as threats to his life in Afghanistan by Afghan authorities, individuals as well as armed groups. The

Afghan authorities would not act with due diligence in order to offer him effective protection against non-State actors.

3.2 The author refers to information from the Office of the United Nations High Commissioner for Refugees (UNHCR) and the Ministry of Foreign Affairs of Sweden, which indicates that LGBT people could not live openly in Afghanistan without the risk of human rights violations. UNHCR's Eligibility Guidelines for Assessing the International Protection Needs of Afghan Asylum-Seekers (December 2007) states that "open homosexual relations are not possible in Afghanistan given conservative social mores. In addition to gays and lesbians risking violence from family or community members, most interpretations of the applicable criminal law indicate that homosexual acts would lead to severe punishment were they to come to the attention of authorities" (p. 9). The same document further states that "overt homosexual relations are [...] not possible to entertain. Homosexual persons would have to hide their sexual orientation. Homosexuality is outlawed under Islam, and punishable by death as a *Hudood* crime" (p. 72). According to the report of the Swedish Ministry of Foreign Affairs on the human rights situation in Afghanistan in 2007 (March 2008), "overt homosexuality does not exist and homosexual intercourse is prohibited according to Sharia law. There is no legal protection against discrimination for reasons of sexual orientation or gender identity." The author further claims that chapter 12, section 19, of the Swedish Aliens Act is contrary to articles 6 and 7 of the Covenant, as the issue of a "valid excuse" is irrelevant if there is a risk of *refoulement*. He claims that it is also contrary to Sweden's international obligation not to return anyone to a country where he or she would be at risk of torture or other serious human rights violations.

#### **Additional submission by the author**

4. In a letter dated 31 March 2010, counsel indicated that she had been in contact with the author in Afghanistan and he had stated that he was living a very difficult life, hiding and moving from city to city, between Afghanistan and Pakistan. He was afraid to go out and only managed to continue his daily life because he was financially supported by his brother who lived abroad.

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

5.1 On 25 February 2011, the State party provided its observations on the admissibility and merits of the communication. It presented detailed information on the pertinent Swedish asylum legislation. Referring to the notion of "valid excuse" in chapter 12, section 19, of the 2005 Aliens Act, it stated that the Migration Court of Appeal interprets this notion restrictively, essentially in the view of the following. The Swedish asylum procedure is designed to guarantee that the examination of an asylum claim by the Migration Board of Sweden and the migration courts maintains as high a level of legal certainty as possible within the framework of ordinary proceedings. Such proceedings will ultimately result in a decision that gains legal force and becomes enforceable. Accordingly, it is only exceptionally that an asylum-seeker can be considered to have a valid excuse for not having invoked all relevant circumstances prior to such decision.

5.2 The State party further submits the following information concerning the facts of the author's case, based primarily on the case files of the Migration Board of Sweden and the migration courts. The author applied for asylum on 3 October 2002, at which time the Migration Board held the initial interview with the author. During the interview, the author stated that, while at school, he was engaged in the youth section of the People's Democratic Party of Afghanistan (PDPA). He started to work in the security service and did so for three years. He stopped when the former president, Mohammad Najibullah, was about to be removed from power. He claimed that those who worked for Najibullah cannot live in

Afghanistan today, and if he was forced to return, he would be arrested and sentenced, and therefore he feared for his life.

5.3 On 3 December 2003, a counsel was appointed as his legal representative. The author filed two submissions with the Migration Board, dated 14 March 2005 and 18 March 2005, in which he stated, *inter alia*, that he was arrested by the mujahideen in 1993 and taken to a local prison where he was imprisoned for six months. He was accused of being a communist and an enemy of the mujahideen. They were aware of the author's past activities. He was repeatedly subjected to torture by beating and kicking, electric shocks and sexual harassment. He still suffers from the injuries he sustained from the torture. One evening, his father came to the prison and managed to bribe a person and obtain his release. After his escape, he had to hide from the mujahideen. He hid in and around Kabul. His father was murdered by the mujahideen who were searching for him. For the past year, he had been unable to contact his wife and son. The author also stated that he suffered from pain throughout his body, severe headaches and sleeping problems, which he believed were the result of the torture he was subjected to; he submitted copies of notes from his medical record.

5.4 On 16 August 2005, the Migration Board of Sweden rejected his application for a residence permit, a work permit, a declaration of refugee status and a travel document, and ordered his deportation to Afghanistan. Based on information from UNHCR, the International Crisis Group (ICG) and the Cooperation Centre for Afghanistan (CCA), the Board considered that an individual who had been a member of the PDPA in a low position was not at risk in Afghanistan. There was no information that former members of the PDPA were at risk of being persecuted by the Government or the authorities of Afghanistan. Further, many former members of the PDPA had been able to return from abroad and find employment in the public sector. The events that the author had invoked as a basis for his need for protection occurred a long time ago and nothing further had happened to him during the years he stayed in Afghanistan. Therefore, the Board concluded that the author had not shown that it was likely that he was at risk of being subjected to State-sanctioned persecution on account of his political involvement or his religion. Furthermore, an overall assessment of the humanitarian circumstances of the case, including his health status, did not reveal any exceptionally distressing circumstances to make the Swedish authorities consider granting a residence permit under chapter 2, section 4, of the Aliens Act.

5.5 The author appealed the decision to the Aliens Appeals Board, stating essentially the following. He was active and outspoken when he was involved in the Communist party. He was arrested and tortured as a direct result of this work. He claimed that within every security area in Afghanistan there are special groups taking care of returnees and he fears that these groups will arrest, torture and kill him. On 20 January 2006, the Aliens Appeals Board rejected the appeal and upheld the decision of the Migration Board. The decision was not subject to further appeal.

5.6 On 7 April 2006, the Migration Board granted the author a residence permit for one year (until 7 April 2007), on grounds that the author had spent a considerable time in Sweden and the situation in Afghanistan was such that it was not possible to enforce decisions to deport an individual there by force. The order to deport the author to his country of origin was not suspended. The decision to grant a residence permit was made for humanitarian reasons, but the permit was limited to one year.

5.7 On 27 April 2007, the author filed a new application for a residence permit to the Migration Board. He claimed that he suffered from severe headaches and was being treated at the Crisis and Trauma Centre for individuals suffering from torture. He also stated that he had found permanent employment. A formal report from the Crisis and Trauma Centre, issued on 13 June 2007, was subsequently submitted to the Board. The report stated that the author suffered from headaches, memory lapses, concentration problems and lack of

energy, and that he was under examination by a neurologist. On 20 June 2007, the Board rejected his application for a re-examination under chapter 12, section 19, of the 2005 Aliens Act, and found no impediments to the enforcement of the expulsion order. It added that the security situation in the part of Afghanistan where the author originates was not such that would constitute an armed conflict.

5.8 The author then submitted a letter claiming that he could not return because the mujahideen forces who had imprisoned him were still in power throughout the district he was from; the letter was handled by the Migration Court as a complaint. On 16 July 2007, the Migration Court rejected the complaint, on grounds that the new circumstances invoked by the author were modifications of and amendments to his originally invoked circumstances. The author submitted another letter to the Migration Court, claiming that the people who forced him to flee were still in power in half of the country, not least in the province from which he originated. On 17 September 2007, the Migration Court of Appeal decided not to grant leave to appeal against the 16 July 2007 judgment of the Migration Court.

5.9 On 21 September 2007, the author submitted a letter to the Migration Board, in which he maintained that he could not return to Afghanistan; he provided a certificate stating that he had been injured and treated in hospital for ten days in 1993. The certificate also stated that his life was in danger. On 2 October 2007, the Migration Board refused to re-examine the case as the submitted document was considered to have little value as evidence.

5.10 The author appealed the Migration Board's decision not to grant a re-examination of his case, claiming that, by virtue of his work, he is easily recognized in Afghanistan, including by the people in power and the Government. He claimed that after his arrest in 1993, he had escaped to another town, but also had to flee from there. He had received a letter from the police and his life was again in danger. He did not know whether his family was still in the country. If forced to return, he would be accused of heresy, hostility toward Islam and being a Christian, and would therefore be killed. On 9 November 2007, the Migration Court rejected the author's request for an oral hearing, but gave him the possibility to finalize his argumentation in writing. On 20 November 2007, the Migration Court rejected the appeal, stating that no new circumstances were adduced. On 21 February 2008, the Migration Court of Appeal decided not to grant leave to appeal the decision of the Migration Board.

5.11 On 3 March 2008, a letter was registered with the Migration Board, reiterating the author's previous claims. On 13 March 2008, the Migration Board decided to reject the author's third application for re-examination.

5.12 On 3 October 2008, another letter from the author, declared as an appeal, was registered with the Migration Board. In that letter, the author claimed for the first time that he was bisexual. On 9 October 2008, the appeal was dismissed as being filed beyond the relevant time limit. However, the letter was registered as an application for re-examination of the case. The author thereafter filed an additional application, based on his alleged bisexuality.

5.13 On 17 November 2008, the Migration Board decided to reject the author's fourth application for re-examination. The information that the author was bisexual was considered to be a new circumstance that had not been previously examined by the authorities. The Board stated that the situation in Afghanistan for homosexual or bisexual people was not such that this in itself warranted international protection, and that the examination had to be made on an individual basis. The Board considered that the author had not established that he risked being subjected to persecution if he were to return to Afghanistan.

5.14 The author submitted an appeal to the Migration Court. The Migration Board was given an opportunity to submit observations on the appeal and it stated the following. A prerequisite for granting a re-examination under chapter 12, section 19 of the Aliens Act is that the new circumstances had not been invoked previously or that the alien showed that he or she had a valid reason for not having done so. The longer the time elapses before new circumstances are invoked, the higher the demand on the explanation as to why those circumstances are invoked at a late stage in the process. When an asylum-seeker has withheld information of importance for the examination of his asylum application, this has an impact on the credibility of the new circumstances invoked. The author had on numerous occasions, and in different contexts, been given the possibility to present information regarding his sexual orientation during the six years he spent in Sweden. In the information submitted by him, no specific time was stated, other than “eventually” as to when he started to live more openly as a bisexual person, when he became involved in RFSL and when he started to meet other men. Nor did the author state why he had not been able to present these circumstances to the authorities, despite receiving several negative decisions regarding his application for protection. In the absence of any further explanation, it appeared contradictory that, on the one hand, the author had started to live openly as a bisexual person, but on the other hand, he had not felt confident enough about the Swedish authorities to invoke this. In view of the late disclosure, the credibility of the claim was so low that he could not be considered as having made probable that there were lasting impediments to the enforcement of the expulsion order. Consequently, the Board decided not to grant a re-examination of the author’s application.

5.15 On 26 November 2008, the Migration Court upheld the decision of the Migration Board. The author did not appeal the Migration Court’s decision to the Migration Court of Appeal.

5.16 As to the exhaustion of all domestic remedies, the State party submits that the expulsion order against the author became final on 20 January 2006, when the last instance at the material time, namely the Aliens Appeals Board, decided to reject the author’s appeal of the 16 May 2005 decision of the Migration Board. However, at a later stage of the proceedings, the author failed to appeal to the Migration Court of Appeal against the 26 November 2008 decision of the Migration Court rejecting his application for re-examination under chapter 12, section 19, of the Aliens Act, on the basis of his claim about being bisexual. As reasons for his failure to appeal, the author submitted that the day before he was to be expelled from Sweden, the Migration Court decided not to stay the enforcement of his expulsion, and that he had good reasons to believe that the Migration Court of Appeal would also reject his request for a stay of enforcement, in view of the fact that the Court of Appeal would probably not grant him leave to appeal.

5.17 The State party submits that, by the time the author had decided to inform the migration authorities about his bisexuality (October 2008), the expulsion order against him had been final for more than two and a half years. Both the Migration Board and the Migration Court were of the opinion that the author’s claim concerning his sexual orientation was a “new circumstance,” and therefore could have been examined under chapter 12, section 19, of the Aliens Act. However, the Migration Court was also of the view that the author had failed to meet the requirement of “valid excuse” under the same provision. The author could have appealed the 26 November 2008 decision of the Migration Court to the Migration Court of Appeal. He could have asked the Migration Court of Appeal to stay the enforcement of the expulsion order pending examination of the appeal. The respective court has the power both to decide on relevant interim measures and to grant a re-examination of the author’s case. Accordingly, the remedy was effective in that regard. Apparently, the author chose instead to file a complaint with the Committee. The author failed to show that an appeal to the Migration Court of Appeal was objectively futile. In November 2008, the Migration Court of Appeal had only issued one judgment

concerning the notion of “valid excuse”, which did not concern sexual orientation, and it had stated that a case-by-case assessment had to be made. Accordingly, it was far from certain how the Migration Court of Appeal would have dealt with an appeal from the author. In light of the above, the Committee should declare the present communication inadmissible for failure to exhaust domestic remedies. The State party also maintains that the author’s assertion that he is at risk of being treated in a manner that would amount to a breach of the Covenant fails to attain the basic level of substantiation required for purposes of admissibility; therefore the communication is manifestly unfounded and inadmissible under articles 2 and 3 of the Optional Protocol.

5.18 Should the Committee conclude that the communication is admissible, the issue before it is whether the author’s forced return to Afghanistan violated the obligations of Sweden under articles 6 and 7 of the Covenant. It follows from the Committee’s jurisprudence that for a violation of articles 6 or 7 to be found, it must be established that the individual concerned faced a real risk of being subjected to acts under articles 6 and 7 in the country to which he or she is returned. That the risk must be real means that it must be the necessary and foreseeable consequence of the forced return.<sup>1</sup> The Committee has also indicated that the risk must be personal.<sup>2</sup> The jurisprudence of the Committee indicates that there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists. Thus, all relevant facts and circumstances must be considered, including the general human rights situation in the author’s country of origin. Important weight should be given to the assessment conducted by the State party. The Committee has also held that it is generally up to the courts of the States parties to the Covenant to evaluate the facts and evidence in a particular case, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice.<sup>3</sup>

5.19 With regard to the human rights situation in Afghanistan, a number of reports<sup>4</sup> state that serious human rights violations, such as extrajudicial killings, torture, unlawful detention, rape, illegal expropriation of private property, trafficking, discrimination and harassments are still occurring in Afghanistan; the lack of respect for human rights is directly linked to the security situation in the country; crime is extensive and brutal and public administration is weak and under construction; torture is frequently used by police and prison authorities. The death penalty is prescribed in the new Constitution and the Penal Code and Islamic *Hudood* Law stipulates the death penalty for acts such as murder and apostasy. There is an obvious sensitivity against anything that could be considered as spreading immorality or non-Islamic messages.

5.20 As to the situation of homosexual or bisexual individuals in Afghanistan, according to Sharia law, homosexual activities are punishable as a *Hudood* crime by a maximum sentence of death. The US Department of State 2009 report states that the authorities only sporadically enforce the prohibition, and no death sentences have been handed out since the end of Taliban rule, although it is still technically possible. Organizations devoted to the protection or exercise of freedom of sexual orientation have remained underground.

<sup>1</sup> See communication No. 692/1996, *A.R.J. v. Australia*, Views adopted on 11 August 1997, paras. 6.8 and 6.14.

<sup>2</sup> *Ibid.*, para. 6.6.

<sup>3</sup> See communication No. 1549/2007, *Nakrash and Others v. Sweden*, Views adopted on 30 October 2008, paras. 7.3 to 7.4.

<sup>4</sup> See Sweden, Ministry of Foreign Affairs, 2007 Report on human rights in Afghanistan (March 2008); United States of America, Department of State, 2009 Human Rights Report: Afghanistan (March 2010); United Kingdom: Home Office, *Country of Origin Information Report – Afghanistan* (November 2010); Amnesty International, Report 2010 – Afghanistan; and Human Rights Watch, World Report 2009 – Afghanistan.

UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan (December 2010) stated, *inter alia*, that “In light of the strong societal taboos, as well as the criminalization of ‘homosexual conduct’, UNHCR considers that LGBTI individuals may be at risk on account of their membership of a particular social group, i.e. their sexual orientation and/or gender identity, since they do not, or are perceived not to conform to prevailing legal, religious and social norms” (p. 29). The US Department of State 2009 report noted, however, that there were no reported instances of discrimination or violence based on sexual orientation, but social taboos remained strong. Open homosexuality does not occur.

5.21 The Swedish migration authorities apply the same kind of test when considering an application for asylum under the Aliens Act, as the Committee applies when examining a complaint under the Covenant. The national authority conducting the asylum interview is in a very good position to assess the information submitted by an asylum-seeker and to evaluate the credibility of his or her claims. Thus, the Swedish migration authorities had sufficient information, including the facts and documentation available on file, to ensure that they had a solid basis for their assessment of the author’s need for protection. Great weight must therefore be attached to the assessment made by the Swedish migration authorities. Regarding the merits of the communication, the State party relies on the decisions of the Migration Board and the Migration Court and on the reasoning set out therein.

5.22 As concerns the author’s claim that he faces a real risk of being subjected to torture or other cruel, inhuman or degrading treatment or punishment in Afghanistan by the mujahideen due to his activities in the PDPA, the State party recalls that this claim was examined by the Migration Board on three occasions and by the Migration Court on two occasions. In all those examinations, the claim was rejected, as indicated above. The evaluation of the authorities can hardly be considered clearly arbitrary or as amounting to a denial of justice. Moreover, according to the author’s own statements, he was not subjected to threats, harassment, torture or other inhuman or degrading treatment or punishment after he was released from prison in 1993 and up to the time he left Afghanistan, that is, a period of almost ten years (1993-2002). According to the author, no such acts have been targeted against him since he was returned to Afghanistan as at the date of the present submission by the State party, that is, another two years. In light of the foregoing, the view expressed by the Migration Board of Sweden in its decision of 16 August 2005 is further strengthened. Consequently, the author has not substantiated that he faces a real risk of being subjected to torture or other cruel, inhuman or degrading treatment or punishment by the mujahideen or other actors in Afghanistan because of his previous involvement in the communist regime.

5.23 With regard to the author’s claim relating to his alleged bisexuality, the State party recalls that the author claimed for the first time that he was bisexual only in his fourth submission to the Migration Board, dated 3 October 2008, that is, after a stay of six years in Sweden. Although acknowledging the difficulties that a person may have in informing others, including the migration authorities, that he or she is bisexual, it is reasonable that, in some instances, the fact that a protracted period of time has elapsed between an asylum-seeker’s arrival in the country where protection is sought and his or her claim for protection based on sexual orientation would be allowed to influence the assessment of his or her claims. It is a basic principle under international and domestic refugee law that an alien who applies for protection in another country should state all his or her reasons for seeking protection as early as possible in the proceedings. In the present case, the author claimed his bisexuality six years later, despite the fact that during those years he had been in contact with the migration authorities and courts repeatedly.

5.24 The author submitted to the Committee that he did not disclose his sexual orientation at an earlier stage of the asylum proceedings because of the stigma associated



with bisexuality and homosexuality; feelings of shame; fear of what his previous lawyer, migration authorities and interpreters would think of him and how they would react; fear of reprisal if other Afghans learned about his sexual orientation. Another reason invoked by the author was that he had not been informed that fear of persecution based on sexual orientation would be a valid claim for refugee status and asylum in Sweden. The State party considers the above reasons insufficient. It is understandable that an individual from Afghanistan claiming to be bisexual would be affected by social taboos. However, the author had sexual relationships with men, and eventually women, since the age of 15 up until he left Afghanistan in 2002; he was responsible for the production of and performed in a play allegedly on the theme of bisexuality; he started to have relationships with men in Sweden only one year after his arrival; he started visiting gay clubs and taking part in their social activities as of 2004. The State party therefore concludes that on a personal level, the author was not in a state of denial about his bisexuality, either in Afghanistan or in Sweden. Accordingly, the author's reasons for not informing the migration authorities about his bisexuality at an earlier point in the process because of stigma, feelings of shame or fear of reprisal from other Afghans in Sweden are called into question. The State party further adds that Sweden is a country where there is generally an awareness and tolerance for individuals' rights related to their sexual orientation. The fact that the author started to live openly as a bisexual in Sweden as early as 2004 and to socialize with like-minded people indicates that he was well aware of this situation. For this reason, it is difficult to understand why he waited nearly six years before invoking his sexual orientation as a ground for seeking asylum, and even more so, when taking into account the fact that he came to Sweden with the specific aim of seeking protection. The author was represented by legal counsel throughout the domestic proceedings, which calls into question his claim that he had not been informed that sexual orientation could be a valid claim for refugee status in Sweden. Although a certain delay could be accepted with regard to matters of sexual orientation, the State party finds the six-year period to be unreasonably protracted.

5.25 The State party also points to inconsistencies in the author's statements regarding his bisexuality. A document submitted by the RFSL stated that it was difficult for the author to keep his contacts with men secret and that those around him eventually started to become aware of his bisexuality and harassed him, whereas in all the other submissions by the author regarding his alleged bisexuality he stated that he did not tell anyone about his sexual orientation and people were unaware of this. Moreover, the author stated that he was active in the communist party and that he worked for its security services for three years. He stated that it was during this period that he wrote and produced plays that ridiculed the mujahideen. When he submitted his claim concerning his bisexuality, he maintained but modified his previous claims to bring them in line with his previous statements. Thus, he stated that representatives of the mujahideen were present when the play about bisexuality was performed and that they threatened and abused him because of its content. The State party finds it unlikely that representatives of the mujahideen would have been allowed access to a play, regardless of its theme, which was a production within the secret service of the communist party and while it was still in power in Afghanistan. Consequently, the credibility of this claim is challenged. In view of the above, there are reasons to question the author's statements and claims relating to the alleged risk that he would be killed and/or subjected to torture or other ill-treatment upon return to Afghanistan because of his sexual orientation.

5.26 The State party also recalls that, according to the author, the incident of arrest and torture occurred in 1993, but he stayed in Afghanistan until 2002 without being arrested and tortured again. The State party also draws the Committee's attention to the fact that there is nothing in the author's counsel submission of 31 March 2010 indicating that the author has been subjected to any threats, harassment or treatment prohibited under articles 6 and 7 of

the Covenant since his return to Afghanistan. According to that submission, the author travels between Afghanistan and Pakistan.

5.27 In conclusion, the State party submits that the communication should be declared inadmissible under article 5, paragraph 2 (b), of the Optional Protocol for failure to exhaust all domestic remedies; and under article 2 of the Optional Protocol for failure to substantiate, for purposes of admissibility, his claims since the documentation and the circumstances invoked by the author do not suffice to show that there were substantial grounds for believing that he ran a real and personal risk of being subjected to treatment contrary to articles 6 and 7 when returned to Afghanistan. Concerning the merits, the State party contends that the present communication reveals no violation of the Covenant.

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

6.1 On 4 May 2011, the author's counsel acknowledged the fact that the author did not appeal the Migration Court's decision of 26 November 2008 to the Migration Court of Appeal. She explained that the Migration Court of Appeal was the last instance in asylum cases and a leave to appeal was required for the Court to rule on a case. She further claimed that leave to appeal was granted in about 1 to 2 per cent of cases, and therefore the domestic remedies were practically exhausted once the Migration Court had rendered its decision on 16 May 2005. The author's counsel also submitted that a request for re-examination under chapter 12, section 19, of the 2005 Aliens Act could be submitted without a time limit and as many times as wanted following a final rejection in an asylum case and before the expulsion of the asylum-seeker to his or her country of origin. The legal remedy under the respective chapter could therefore never be totally exhausted, since the possibility of recourse to this remedy always existed for an asylum-seeker at risk of expulsion.

6.2 The counsel stated that due consideration should be given to the position of UNCHR that LGBT individuals may be at risk on account of their membership of a particular social group, and maintained that the country information presented supported the author's claims. The counsel also informed that there had been no contact with the author in Afghanistan since 31 March 2010.

#### **State party's further observations**

7. By letter of 5 July 2011, the State party emphasized that it fully maintains its position regarding the admissibility and merits of the present communication, as expressed in its observations of 25 February 2011.

#### **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 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 Regarding the State party's contention under article 5, paragraph 2 (b), of the Optional Protocol with regard to exhausting domestic remedies, the Committee notes its argument that the author did not file an appeal to the Migration Court of Appeal against the Migration Court's decision of 26 November 2008, by which his application for a re-examination of his case based on his sexual orientation claim was rejected. The Committee also takes note of the author's arguments that the respective remedy was not considered

effective in light of the imminent deportation he faced and the fact that the Migration Court of Appeal would have probably rejected his request for a stay of enforcement and not granted him leave to appeal in view of its strict interpretation of the “valid excuse” requirement. The State party has refuted these arguments, stating that the Migration Court of Appeal had the power to decide both on the relevant interim measures request and on granting a re-examination of the author’s case, and therefore the author failed to demonstrate that the available remedy, in the form of an appeal to the respective court, was not effective or was objectively futile. Furthermore, since the only decision of the Migration Court of Appeal on the notion of “valid excuse” did not concern the author’s sexual orientation, he could not have been certain about the manner in which the Court of Appeal would have dealt with his appeal, especially noting the position of the Court that a case-by-case assessment is required for the interpretation of the concept of “valid excuse”.

8.4 The Committee recalls, in this context, its jurisprudence to the effect that authors must avail themselves of all judicial remedies in order to fulfil the requirement of article 5, paragraph 2 (b), of the Optional Protocol, insofar as such remedies may be effective in the given case and are de facto available to the author.<sup>5</sup> Although the Committee is satisfied that the remedy, in the form of an appeal to the Migration Court of Appeal would have been an effective remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol, it observes that the author’s deportation to Afghanistan was enforced shortly after the 26 November 2008 decision of the Migration Court was notified to the author, thus de facto depriving him of the right to file the respective appeal to the Migration Court of Appeal within three weeks of the date on which the decision of the Migration Court was issued, as provided under chapter 16, section 10, of the 2005 Aliens Act. The Committee considers that, when further domestic remedies are available to asylum-seekers who risk deportation to a third country, they must be allowed a reasonable length of time to pursue the remaining remedies before the deportation measure is enforced; otherwise, such remedies become materially unavailable, ineffective and futile. Under such circumstances, the Committee considers that it is not precluded by article 5, paragraph 2 (b), of the Optional Protocol from examining the communication.

8.5 In the Committee’s view, the author has sufficiently substantiated, for purposes of admissibility, the claims under articles 6 and 7 of the Covenant. The other admissibility requirements having been met, the Committee considers the communication admissible and proceeds to its examination on the merits.

#### *Consideration of the merits*

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

9.2 The Committee notes the author’s claim that his forcible return to Afghanistan would expose him to a risk of torture and other cruel, inhuman or degrading treatment or punishment, as well as threats to his life due to his sexual orientation. It recalls that States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by virtue of their extradition, expulsion or *refoulement*.<sup>6</sup> The Committee further notes the State party’s argument that the

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<sup>5</sup> See, for example, communications No. 1959/2010, *Wasame v. Canada*, Views adopted on 21 July 2011, para. 7.4; No. 1003/2001, *P.L. v. Germany*, decision of inadmissibility adopted on 22 October 2003, para. 6.5.

<sup>6</sup> See the Committee’s general comment No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment, para. 9, *Official Records of the General Assembly, Forty-*

author's asylum application was duly considered by the migration authorities which did not find that the situation of homosexual or bisexual persons in Afghanistan was such that in itself warranted international protection, and that the author had not established that he risked being subjected to persecution if he were to return to Afghanistan (see para. 5.13 above). In this context, the Committee recalls that it is generally for the instances of States parties to the Covenant to review or evaluate facts and evidence in order to determine the existence of such danger.

9.3 However, in the present communication, the Committee observes that the material before it shows that the State party's migration authorities rejected the author's application, not on the ground of the author's unchallenged sexual orientation and its impact on the author in the particular circumstances in Afghanistan, but rather on the ground that the sexual orientation claim had been invoked at a late stage in the asylum process which, in the view of the State party, substantially undermined his credibility, notwithstanding the reasons given by the author for the late disclosure of his claim – namely stigma associated with bisexuality and homosexuality, feelings of shame, fear of reprisal, as well as lack of knowledge that sexual orientation would be a valid claim for refugee status and asylum – and considered that he failed to meet the standard of “valid excuse” within the meaning of chapter 12, section 19, of the 2005 Aliens Act.

9.4 The State party found that the author would not face any risk of torture if returned to his country of origin, even though the State party itself referred to international reports according to which homosexual activities in Afghanistan are punishable as *Hudood* crimes by a maximum sentence of death. The Committee observes that in the assessment of the author's risk of being subjected to treatment contrary to articles 6 and 7 of the Covenant upon return to Afghanistan the State party's authorities focused mainly on inconsistencies in the author's account of specific supporting facts and the low credibility derived from the late submission of the sexual orientation claim. The Committee is of the view that insufficient weight was given to the author's allegations on the real risk he might face in Afghanistan in view of his sexual orientation. Accordingly, the Committee considers that, in the circumstances, the author's deportation to Afghanistan constitutes a violation of articles 6 and 7 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is therefore of the view that the State party has violated the author's rights under articles 6 and 7 of the International Covenant on Civil and Political Rights.

11. In accordance with article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including taking all appropriate measures to facilitate the author's return to Sweden, if he so wishes. The State party is also under an obligation to take steps to prevent similar violations in the future.

12. Bearing in mind that, by becoming a State 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 and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views and to have them translated in the official language of the State party and widely distributed.

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*seventh Session, Supplement No. 40 (A/47/40), annex VI, sect. A; and communications No. 1494/2006, A.C. v. the Netherlands, decision of inadmissibility adopted on 22 July 2008, para. 8.2; No. 1234/2003, P.K. v. Canada, decision of inadmissibility adopted on 20 March 2007, para. 7.2.*

[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 to the General Assembly.]

## Appendix

### Individual opinion by Committee member, Mr. Rafael Rivas Posada

The Human Rights Committee, in paragraph 10 of its decision on the case *X. v. Sweden*, concluded “that the State party has violated the author’s rights under articles 6 and 7 of the International Covenant on Civil and Political Rights”. In paragraph 9.4, the Committee justifies its conclusion on the grounds of “the real risk he might face in Afghanistan in view of his sexual orientation”. In other words, the mere risk or possibility that the author might lose his life in the country to which he is to be deported is sufficient reason to consider that there has been a direct violation of article 6 of the Covenant.

I believe that in this, as in other similar cases, the Committee is erroneously applying article 6 of the Covenant which, while it enshrines the right to life, quite clearly states that “No one shall be arbitrarily deprived of his life”. By taking the view that in this case the author runs the risk of losing his life in Afghanistan in view of his sexual orientation — a risk which the State party did not consider and in respect of which it did not request the usual diplomatic assurances — and that the risk is sufficient to decide that there has been a violation of article 6, the Committee seems to have altered the wording of article 6 to interpret it as if it stated that “No one shall be *subjected to the risk of being* arbitrarily deprived of his life”. However, this is not what article 6 says. Its meaning is unequivocal and not tainted by ambiguity. Only the “deprivation of life” gives grounds for its application, and the mere *risk* of being deprived of one’s life, however strong the likelihood, may not justify the conclusion that there has been a direct violation of the article.

Because in this case there is no doubt that there has been a violation of article 7, which, in accordance with the Committee’s jurisprudence, occurs not only when the cruel, inhuman or degrading treatment or punishment is of a physical nature, but also when it is psychological, the correct wording of the views should have been that “in this case, there has been a violation of article 7, taken in conjunction with article 6.” The reference to article 6 is justified because the risk to which the author might be subjected includes the possibility of being sentenced to death.

I agree with all the other elements of the Committee’s Views.

(Signed) Rafael Rivas **Posada**

[Done 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 to the General Assembly.]

**S. Communication No. 1838/2008, *Tulzhenkova v. Belarus*  
(Views adopted on 26 October 2011, 103rd session)\***

<i>Submitted by:</i>	Maria Tulzhenkova (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	27 October 2008 (initial submission)
<i>Subject matter:</i>	Imposition of a fine for non-compliance with the legal requirements on the organization of mass events
<i>Procedural issues:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Restrictions on freedom of expression, including freedom to impart information
<i>Article of the Covenant:</i>	19, paragraph 2
<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 26 October 2011,

*Having concluded* its consideration of communication No. 1838/2008, submitted to the Human Rights Committee by Ms. Maria Tulzhenkova 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. The author of the communication, dated 27 October 2008, is Maria Tulzhenkova, a Belarus national born in 1986. She claims to be a victim of violation by Belarus of her rights under article 19, paragraph 2, of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Belarus on 30 December 1992. The author is not represented by counsel.

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\* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Rajsoomer Lallah, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

Two individual opinions signed by Committee members Fabián Omar Salvioli and Rajsoomer Lallah are appended to the present Views.

### Factual background

2.1 On 14 March 2008, the author was distributing leaflets with information about an upcoming peaceful gathering in Gomel. She was arrested by police and a report that she had committed an administrative offence under article 23.34, part 1, of the Belarus Code of Administrative Offences was drawn up. This provision establishes administrative liability for violation of the procedure for organizing or holding gatherings, meetings, demonstrations, street marches and other mass events. The author submits that the organization of mass events is regulated by the Law on Mass Events in the Republic of Belarus (hereinafter Law on Mass Events). According to article 8 of the Law, before permission to hold the mass event is received, its organizer(s) and also other persons do not have the right to announce in mass media the date, place and time of its holding, prepare and distribute leaflets, posters and other materials for this purpose. Since the author was distributing leaflets with information about an upcoming peaceful gathering for which she did not yet have permission, police officers considered that she had breached the law. Accordingly, a report on the commission of an administrative offence was drawn up by police and transmitted to the Central District Court of Gomel.

2.2 On 17 March 2008, the Central District Court of Gomel found the author guilty of having committed an administrative offence under article 23.34, part 1, of the Code on Administrative Offences and imposed a fine of 350'000 roubles.<sup>1</sup> The court specifically stated that the author was advertising a mass event before the permission to hold said event was received from the authorities, thus breaching the order for organizing and holding mass events. The author claims that the court based its reasoning only on the police report and did not consider whether the restriction of her right to impart information was necessary to achieve any of the legitimate aims set out in article 19 of the Covenant. She claims that, in the absence of any well-founded explanation justifying the court's conclusion, the penalty imposed on her is not justified by the necessity to protect national security or public order, public health or morals or for respect of the rights and reputation of others, and therefore amounts to a violation of her rights under article 19 of the Covenant. The author further claims that her arguments about the unlawfulness of the administrative penalty imposed on her are supported by the Committee's Views in respect of communication No. 780/1997, *Laptsevich v. Belarus*.

2.3 The author claims that she has exhausted all domestic remedies. On 11 April 2008, the Gomel Regional Court upheld the decision of the Central District Court and rejected the author's appeal. On 17 October 2008, her application under supervisory review was rejected by the Chairman of the Supreme Court of Belarus. The author claims that national courts refused to qualify her actions pursuant to the norms enshrined in the Covenant. In particular, the author drew the court's attention to articles 26 and 27 of the Vienna Convention on the Law of Treaties, according to which treaty provisions must be complied with in good faith and parties may not invoke the provisions of its internal law as justification for its failure to comply with a treaty. She also recalls that under article 15 of the Law on International Treaties, the universally recognized principles of international law and international treaties to which Belarus is a State party are part of the domestic law.

### The complaint

3. The author claims that the above facts constitute a violation of her rights under article 19, paragraph 2, of the Covenant. She adds that the provisions of the Law on Mass

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<sup>1</sup> According to online exchange converters, on 17 March 2008 (date of the fine), this amount was equivalent to US\$162.7 or €103.76. At present (10 October 2011), due to an unprecedented devaluation of the Belarusian rouble, the amount is worth US\$62.25 or €46.53.



Events which restrict the right to freely impart information run counter to the international obligations assumed by Belarus, because the restrictions in question do not meet the requirement of necessity: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order, or of public health or morals. She maintains that the requirements provided for under the domestic law are incompatible with article 19 of the Covenant and constitute an impermissible restriction of her right to freedom of expression, including freedom to impart information under article 19, paragraph 2.

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

4.1 On 19 February 2009, the State party provided its observations on the admissibility and merits of the communication. It submits that on 17 March 2008, Ms. Tulzhenkova was held administratively liable under article 23.34, part 1, of the Belarus Code of Administrative Offences for violation of the procedure for organizing and holding of mass events. According to article 8 of the Law on Mass Events of 20 December 1997, before permission to hold the mass event is received, its organizer(s) and also other persons do not have the right to announce in mass media the date, place and time of its holding, prepare and distribute leaflets, posters and other materials for this purpose. At the time of distribution by Ms. Tulzhenkova of leaflets calling for the holding of a mass event on 25 March 2008, no permission to hold the mass event in question had been received. Thus, Ms. Tulzhenkova was administratively sanctioned in accordance with the requirements of national legislation.

4.2 The State party further submits that under domestic law, Ms. Tulzhenkova had the possibility to appeal the decision of the Central District Court of Gomel to the Chairman of the Supreme Court, as well as to file a motion to the General Prosecutor, requesting him to lodge an objection with the Chairman of the Supreme Court. The decision of the Chairman of the Supreme Court is final and not subject to further appeal. Pursuant to article 12.11, parts 3 and 4, of the Procedural-Executive Code of Administrative Offences, an objection to a decision on an administrative offence that has entered into force may be lodged within six months from the date of its entry into force. An objection filed after the time limit cannot be considered. The author lodged no complaint to the Prosecution's Office. Therefore, she has not exhausted all available domestic remedies and there are no reasons to believe that the application of those remedies would have been unavailable or ineffective.

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

5.1 In her comments dated 11 April 2009, the author submits that the State party in its observations has not indicated why the requirement of the national legislation to seek prior permission for holding a peaceful gathering with the purpose of disseminating information in her particular case would be a permissible restriction of her right, within the meaning of article 19, paragraph 3, of the Covenant. Notwithstanding the intentions of legislative organs, a national law may in itself be in violation of the Covenant if its application results in restrictions on or violations of the rights and freedoms guaranteed under the Covenant.

5.2 As to the State party's claim that she has not exhausted all available domestic remedies, the author submits that, according to the Committee's jurisprudence, in States where the decision on the review of court decisions under the supervisory procedure is dependent on the discretionary power of a limited number of officials, the exhaustion of domestic remedies is limited to the cassation proceedings. The author further recalls that she had availed herself of the right to file an application for supervisory review with the Chairman of the Supreme Court of Belarus. However, she did not file an application for supervisory review to the Prosecutor's Office, since this does not constitute an effective domestic remedy. She also recalls that, according to the established practice of the Human

Rights Committee, domestic remedies must only be exhausted to the extent that they are both available and effective. Therefore, all domestic remedies have been exhausted once the court examined her cassation appeal.

#### **State party's further observations**

6.1 On 26 May 2009, the State party submitted that article 35 of the Constitution guarantees the freedom to hold assemblies, gatherings, street marches, demonstrations and pickets that do not disrupt public order and do not violate the rights of other citizens. The procedure for holding such events is provided by law. In this respect, the provisions of the Law on Mass Events are aimed at creating conditions for the realization of citizens' constitutional rights and freedoms and the protection of public safety and public order during the holding of such events on streets, squares and other public locations. The State party further reiterates the information submitted in its earlier observations (see para. 4.1 above) concerning the legal basis for the administrative sanction imposed on the author, and recalls that at the time of distribution by Ms. Tulzhenkova of leaflets calling for the holding of a mass event on 25 March 2008, no permission to hold the mass event in question had been received, and therefore she was administratively sanctioned in accordance with the requirements of domestic law.

6.2 The State party further submits that, according to article 19, paragraph 2, of the Covenant, every individual has the right to freedom of expression; this right includes the freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his own choice. However, article 19, paragraph 3, of the Covenant, imposes on the rights holder special duties and responsibilities, and thus the right to freedom of expression may be subjected to certain restrictions that shall be provided by law and are necessary: (a) for respect of the rights or reputation of others; and (b) for the protection of national security or public order, public health or morals. Article 21 of the Covenant recognizes the right to peaceful assembly. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

6.3 The Republic of Belarus, as a State party to the Covenant, has incorporated the provisions of articles 19 and 21 into the domestic legal system. In conformity with article 23 of the Constitution, restrictions upon the rights and freedoms of individuals are only permitted in the instances specified by law, in the interest of national security, public order, protection of public health and morals as well as of rights and freedoms of other persons. The analysis of article 35 of the Constitution, which guarantees the right to freedom of public events, clearly demonstrates that the Constitution establishes the legislative framework for the procedure of holding such events. Presently, the order of organizing and holding assemblies, gatherings, street marches, demonstrations and pickets is regulated by the Law on Mass Events of 7 August 2003. The freedom of expression, as guaranteed under the Constitution, may be subject to restrictions only in instances provided by law, in the interest of national security, public order, protection of public health and morals as well as of rights and freedoms of other persons. Therefore, the restrictions provided for under Belarusian law do not run counter to its international obligations and are aimed at protecting national security and public order – in particular, this concerns the provisions of article 23.34 of the Belarus Code of Administrative Offences and article 8 of the Law on Mass Events.

### **Further comments by the author**

7.1 By letter of 14 November 2009, the author refutes the State party's arguments that the administrative sanction imposed on her for violation of the procedure for organizing and holding mass events was prescribed by law and was in conformity with the permissible restrictions set out in article 19 of the Covenant. Belarus is under an obligation to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and also to take the necessary steps, in accordance with its constitutional processes and with the provisions of the Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the Covenant. The restriction set out in article 8 of the Law on Mass Events, according to which it is prohibited to announce in mass media the date, place and time of a mass event, as well as prepare and distribute leaflets, posters and other materials for this purpose before the permission to hold said event is received, does not meet the requirement of necessity for the respect of the rights and reputation of others, the protection of national security or public order, public health or morals and, consequently, every time this provision is applied, it results in a violation of article 19, paragraph 2, of the Covenant.

7.2 The author does not share the view of the State party that, since the existing restrictions on the right to freedom of expression provided for under the domestic legislation are aimed at protecting the national security and public order, these restrictions are not contrary to the international obligations of Belarus. This argument would be valid only if the national courts would have had qualified her actions as falling under any of the permissible restrictions within the meaning of article 19. Since the State party has failed to substantiate why the prohibition on the preparation and dissemination of information regarding an upcoming mass event was necessary for one of the legitimate grounds set out in article 19, paragraph 3, such a restriction constitutes a violation of her rights under article 19 of the Covenant. When a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself, and each time the State party must justify that the imposed restrictions are "necessary" to achieve one of the legitimate purposes.

### **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 it 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 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 failed to file an application for supervisory review to the General Prosecutor, requesting him to lodge an objection with the Chairman of the Supreme Court, and therefore she has not exhausted all available domestic remedies. The Committee further notes the author's explanation that her application for supervisory review was rejected by the Chairman of the Supreme Court of Belarus and that she did not lodge an application with the Prosecutor's Office, since the supervisory proceedings do not constitute an effective domestic remedy. In this regard, the Committee recalls its jurisprudence, according to which supervisory

review procedures against court decisions which have entered into force constitute an extraordinary means of appeal which is dependent on the discretionary power of a judge or prosecutor and is limited to issues of law only.<sup>2</sup> In such circumstances, the Committee considers that it is not precluded, for purposes of admissibility, under article 5, paragraph 2(b), of the Optional Protocol, from examining the communication.

8.4 In the Committee's view, the author has sufficiently substantiated, for purposes of admissibility, the claims under article 19, paragraph 2, of the Covenant. The other admissibility requirements having been met, the Committee considers the communication admissible and proceeds to its examination on the merits.

#### *Consideration of the merits*

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

9.2 The Committee notes the author's claims that the administrative sanction imposed on her for distributing leaflets containing information about an upcoming peaceful gathering before permission to hold the event in question had been granted, as required under the domestic law, constitutes an unjustified restriction on her freedom to impart information, as protected by article 19, paragraph 2, of the Covenant. It further notes the State party's contention that the author was administratively sanctioned in accordance with the requirements of national legislation for having breached the procedure for the organization and holding of mass events. In the present case, the Committee has to consider whether the restrictions imposed on the author's right to freedom of expression are justified under any of the criteria set out in article 19, paragraph 3. The Committee observes that article 19 provides for certain restrictions only as provided by law and necessary: (a) for respect of the rights and reputation of others; and (b) for the protection of national security or public order (*ordre public*), or of public health or morals. It recalls that freedom of opinion and freedom of expression are indispensable conditions for the full development of the person; such freedoms are essential for any society and constitute the foundation stone for every free and democratic society.<sup>3</sup> Any restrictions to the exercise of such freedoms must conform to strict tests of necessity and proportionality and "be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated."<sup>4</sup>

9.3 The Committee observes that, in the present case, the State party has argued that the provisions of the Law on Mass Events are aimed at creating conditions for the realization of citizens' constitutional rights and freedoms and the protection of public safety and public order during the holding of such events on streets, squares and other public locations. However, the State party has not supplied any specific indication of what dangers would have been created by the early distribution of the information contained in the author's leaflet. The Committee considers that, in the circumstances of the case, the State party has not shown how the fine imposed on the author was justified under any of the criteria set out

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<sup>2</sup> See, for example, communications No. 1537/2006, *Yekaterina Gerashchenko v. Belarus*, decision of inadmissibility adopted on 23 October 2009, para. 6.3; No. 1814/2008, *P.L. v. Belarus*, decision of inadmissibility adopted on 26 July 2011, para. 6.2.

<sup>3</sup> See the Committee's general comment No. 34 (2011) on freedoms of opinion and expression, para. 2, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 40*, vol. I (A/66/40 (Vol. I)), annex V.

<sup>4</sup> *Ibid.*, para. 22.

in article 19, paragraph 3. It therefore concludes that the author's rights under article 19, paragraph 2, of the Covenant, have been violated.

10. 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 State party has violated the author's rights under article 19, paragraph 2, of the International Covenant on Civil and Political Rights.

11. Pursuant to article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including reimbursement of the value of the fine at the exchange rate in effect as at March 2008 and any legal costs incurred by the author, as well as compensation. The State party is also under an obligation to take steps to prevent similar violations in the future.

12. 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 and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views, to have them translated into Belarusian, and widely distributed in the two official languages of the State party.

[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 to the General Assembly.]

## Appendix

### Individual opinion of Committee member, Mr. Fabián Salvioli (concurring)

1. I agree with the decision of the Human Rights Committee in the case of communication No. 1838/2008, *Tulzhenkova v. Belarus*, concerning the violation of article 19 of the Covenant, regarding the imposition of an administrative sanction, citing violation of article 8 of the Law on Mass Events of the Republic of Belarus, according to which no one has the right to announce in the mass media the date, place and time of a meeting, or to prepare and distribute leaflets, posters and other materials for this purpose, before permission to hold the mass event has been granted.

2. However, for the reasons set out below, I consider that the Committee should have concluded that in the case at hand the State party has also committed a violation of article 2, paragraph 2, of the International Covenant on Civil and Political Rights. The Committee should also have indicated in its Views that the State party should amend the legislation which was applied against the author and which is incompatible with the Covenant.

3. Since becoming a member of the Committee, I have taken the view that the Committee has, of its own volition and incomprehensibly, restricted its competence to determining violations of the Covenant in the absence of a specific legal claim. Provided the facts clearly demonstrate such violations, the Committee can and must — in accordance with the principle of *iura novit curiae* (“the court knows the law”) — examine the legal framework of the case. The legal basis and explanation of why this does not mean that States parties will be left without a defence can be found in paragraphs 3 to 5 of my partially dissenting opinion in the case of *Weerawansa v. Sri Lanka*, to which I refer so as to avoid repeating them.<sup>a</sup>

4. It should be mentioned that in the case, *Tulzhenkova v. Belarus*, the author asserts, with reference to the legislation applied against her, that “a national law may in itself be in violation of the Covenant if its application results in restrictions on or violations of the rights and freedoms guaranteed under the Covenant”.

#### (a) Violation of article 2, paragraph 2, of the Covenant

5. The international responsibility of the State party may be engaged, inter alia, by an act or omission on the part of any of its branches, including, of course, the legislative branch or any other branch with legislative powers by virtue of the Constitution. Article 2, paragraph 2, of the Covenant specifies: “Where not already provided for by existing legislative or other measures, each State party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.” Although the obligation laid down in article 2, paragraph 2, is general in nature, failure to fulfil it may engage the international responsibility of the State party.

6. The provision in question is of a self-executing nature. The Committee, quite rightly, has indicated in its general comment No. 31 that: “The obligations of the Covenant

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<sup>a</sup> See communication No. 1406/2005, *Anura Weerawansa v. Sri Lanka*, appendix: partially dissenting opinion of Mr Fabián Salvioli.

in general and article 2 in particular are binding on every State party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level – national, regional or local are in a position to engage the responsibility of the State party.”<sup>b</sup>

7. Just as States parties to the Covenant must adopt legislative measures to give effect to rights, they also bear a negative obligation, deriving from article 2, paragraph 2, not to adopt legislative measures which violate the Covenant; if it does so, the State party commits per se a violation of the obligations laid down in article 2, paragraph 2.

8. The Republic of Belarus ratified the Covenant on 12 November 1973. Since then, it has assumed the express obligation to take the necessary steps to introduce appropriate legislative or other measures to give effect to the rights recognized in the Covenant (art. 2, para. 2), and consequently, the obligation not to adopt norms that are contrary to the rights established in the Covenant. In addition, Belarus acceded to the Optional Protocol to the Covenant on 30 December 1992, thereby recognizing the competence of the Committee to consider communications from individuals.

9. The Republic of Belarus adopted the Law on Mass Events on 20 December 1997; in so doing, it committed a violation of the Covenant, regardless of whether the Law was applied. Subsequently, the author submitted a claim to the Committee because the Law on Mass Events was applied against her; the Committee should have indicated in its Views that not only had the State party violated article 19, but also that the adoption of that Law violated article 2, paragraph 2, of the Covenant.

10. The Law on Mass Events was applied directly to the case; accordingly, the conclusion that there has been a violation of article 2, paragraph 2 in the Tulzhenkova case is neither abstract nor merely of academic interest. Finally, it should not be overlooked that the violations determined by the Committee have a direct impact on any reparation which it may determine when it decides each individual case.

**(b) Reparation in the Tulzhenkova case**

11. Paragraph 11 of the Committee’s Views is insufficient in that it indicates that “The State party is also under an obligation to take steps to prevent similar violations in the future ...” but goes no further. How is the State party to comply with that part of the Committee’s Views, if it does not amend the legislation which the Committee has found to be in violation of the Covenant? Undoubtedly, the Committee should have indicated that the Republic of Belarus should amend the domestic legislation in question (article 8 of the Law on Mass Events), so as to bring it into line with its obligations under the International Covenant on Civil and Political Rights. To keep in force a law that is per se incompatible with the Covenant is in itself inconsistent with current international standards regarding reparation for cases of human rights violations.

12. Accordingly, it is essential for the Committee to adopt a less ambiguous position in respect of non-pecuniary reparation, and especially in respect of measures of restitution, satisfaction and non-repetition. The clearer a decision taken by the Committee, the easier it will be for a State party to comply with it.

(Signed) Fabián Salvioli

<sup>b</sup> The Committee’s general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 4, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40, vol. I (A/59/40 (Vol. I)), annex III.*

[Done 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 to the General Assembly.]



**Individual opinion of Committee member, Mr. Rajsoomer Lallah  
(concurring)**

I observe that the findings of the Committee (para. 9.3) relate to the particular circumstances of the communication, namely the inadequacy or absence of any information provided by the State Party to justify the restrictions which might otherwise have possibly been permissible under article 19, paragraph 3 of the Covenant. The Committee has consequently found a violation of the author's basic right to freedom of expression under article 19, paragraph 2, of the Covenant, as specifically claimed by her.

Clearly, the violation found arose from the application of a law which does not specify that it is inapplicable in circumstances where it is not proved that the restrictions to freedom of expression go beyond what is permissible under article 19, paragraph 3(b), of the Covenant.

For the reasons explained in the separate opinion I gave in the case of *Adonis v. Philippines* (communication No. 1815/2008), it is my opinion that my colleague Salvioli's concerns, regarding failure by the State Party in its obligation to adopt appropriate legislation, could have been sufficiently allayed by a request for a review of the legislation in pursuance of article 2, paragraph 2, of the Covenant.

In my view, in paragraph 11 of the Views, it would perhaps have been more constructive and practical to add a request of the kind the Committee usually makes when questionable or otherwise faulty legislation turns out to be the source of the particular violation found. To this end, paragraph 11 of the Views could have included something to the effect that, in pursuance of article 2, paragraph 2, the State Party should review its legislation.

(Signed) Rajsoomer **Lallah**

[Done 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 to the General Assembly.]

**T. Communication No. 1847/2008, *Klain v. Czech Republic*  
(Views adopted on 1 November 2011, 103rd session)\***

<i>Submitted by:</i>	Miroslav Klain and Eva Klain (not represented by counsel)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Czech Republic
<i>Date of communication:</i>	16 March 2006 (initial submission)
<i>Subject matter:</i>	Discrimination on the basis of citizenship with respect to restitution of property
<i>Procedural issue:</i>	Non-exhaustion of domestic remedies and 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 and 5, paragraph 2 (b)

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

*Meeting* on 1 November 2011,

*Having concluded* its consideration of communication No. 1847/2008, submitted to the Human Rights Committee by Mr. Miroslav Klain and Ms. Eva Klain 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. The authors of the communication are Miroslav Klain and Eva Klain, who are both naturalized American citizens residing in the United States of America, born on 25 August 1927 and 24 February 1937, respectively, in Czechoslovakia. They claim to be victims of a

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\* The following members of the Committee participated in the consideration of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli, 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.

The text of an individual opinion signed by Committee member Mr. Krister Thelin is appended to the present Views.

violation by the Czech Republic of article 26 of the International Covenant on Civil and Political Rights.<sup>1</sup> They are not represented by counsel.

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

2.1 The authors and their two children left Czechoslovakia in November 1968 and sought refuge in the United States of America, where they eventually obtained United States citizenship in 1978, thereby losing their Czechoslovak citizenship pursuant to the Naturalisation Treaty of 1928. Since the authors left Czechoslovakia without permission, they were sentenced, in absentia, to two and a half years' and one year's imprisonment, respectively, and had their property confiscated. In 1990, they were fully rehabilitated but could not reclaim their property because of the subsequent restitution law No. 87/1991. The authors' property includes movables and a family dwelling No. 11 and building parcels Nos. 1872 and 1873/2 situated in the Lhotka cadastral area of the State party.<sup>2</sup>

2.2 The authors could not claim restitution of their property on the basis of Czech law No. 87/1991 on extrajudicial rehabilitation.<sup>3</sup> The authors argue that they did not pursue any domestic remedies based on their understanding that no courts would order restitution in their favour unless they reacquired their Czech citizenship. As a result, the authors applied and eventually obtained Czech citizenship towards the end of 2004. The authors claim that no effective domestic remedies are available following the decision of the Constitutional Court of June 1997.<sup>4</sup>

### **The complaint**

3. The authors claim that the Czech Republic violated their rights under article 26 of the Covenant in its application of Law No. 87/1991, which requires Czech citizenship for property restitution.

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

4.1 On 3 June 2009, the State party submitted its observations on admissibility and merits. It further confirmed the facts as submitted by the authors, that the authors lost their Czechoslovak citizenship when they acquired American citizenship on 20 October 1978, and that they reacquired their Czech citizenship by declaration on 29 June 2004.

4.2 The State party submits that the communication should be found inadmissible for non-exhaustion of domestic remedies under articles 2 and 5, paragraph 2 (b), of the Optional Protocol. The State party recalls that the purpose of article 5, paragraph 2 (b), of

<sup>1</sup> 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 to the ratification of the Optional Protocol by the Czech and Slovak Federal Republic on 12 March 1991.

<sup>2</sup> The address of the dwelling house has now changed to Na dlouhe mezi 11/2, Lhotka 142 00 Praha 411.

<sup>3</sup> Law No. 87/1991 on extrajudicial rehabilitation was adopted by the Czech Government, spelling out the conditions for recovery of property for persons whose property had been confiscated under the Communist rule. Under the Act, in order to claim entitlement to recover property, a person claiming restitution of the property had to be, inter alia, (a) a Czech citizen, and (b) a permanent resident in the Czech Republic. These requirements had to be fulfilled during the time period in which restitution claims could be filed, namely between 1 April and 1 October 1991. A judgment by the Czech Constitutional Court of 12 July 1994 (No. 164/1994) annulled the condition of permanent residence and established a new time frame for the submission of restitution claims by persons who had thereby become entitled persons, running from 1 November 1994 to 1 May 1995.

<sup>4</sup> See the decision of the Constitutional Court in the case of *Jan Dlouhy v. Czech Republic* passed on 4 June 1997.

the Optional Protocol is to afford the State parties an opportunity of preventing or putting right the violations of the Covenant alleged against them before those allegations are submitted for the Committee's consideration. The State party observes that the authors are claiming the restitution of their confiscated property after a period of more than 40 years from the date of its acquisition and, had the authors resorted to the Czech courts, the courts could have been afforded the opportunity to examine the merits of their assertions on discrimination within the ambit of article 26 of the Covenant. The State party submits that since the authors have not pursued any of the domestic remedies available to them such as approaching all levels of the court system up to the Constitutional Court. The State party, therefore, argues that the communication should be declared inadmissible.

4.3 The State party further submits that the communication 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 its submission. The State party, however, submits that the authors submitted their communication on 16 March 2006, which the State party argues is almost eleven years after the expiration of the prescribed time limit in the law of restitution, as interpreted by the Constitutional Court, i.e., 1 May 1995. The State party argues that this delay is unreasonable considering that the authors have not presented any reasonable justification for the delay. The State party further observes that it shares the view expressed by a Committee member in his dissenting opinion in similar cases against the Czech Republic, according to which in the absence of an explicit definition of the notion of abuse of the right of submission of a communication in the Optional Protocol, the Committee itself is called upon to define the time limits within which communications should be submitted.<sup>5</sup>

4.4 On the merits, the State party recalls the Committee's jurisprudence on article 26, which asserts that a differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26 of the Covenant.<sup>6</sup> The State party argues that the authors failed to comply with the legal citizenship requirement and, therefore, were not entitled to restitution of their property pursuant to the legislation in force. Finally, the State party argues that article 26 of the Covenant does not suggest an obligation on the part of the State party to provide redress for the injustices that occurred during the previous regime at a time that the Covenant did not exist. The State party submits that its legislature should enjoy a wide range of discretion in determining the factual areas of past injustices that they seek to address and the prescriptions for such remedies.

#### **Authors' comments on the State party's observations**

5.1 On 16 July 2009, the authors submitted their comments on the State party's observations on admissibility and merits. With regard to the exhaustion of domestic remedies, the authors argue that, following the finding by the Constitutional Court in June 1997 that denial of restitution to those persons who lost their Czech citizenship was legitimate, no effective remedies are available in the State party. They further argue that they could have just spent money on lawyers for no reason if they had decided to go to court because they do not know of any single case where a court ordered that an American citizen of Czech origin should have his property restituted.

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<sup>5</sup> See dissenting opinion by Mr. Abdelfattah Amor in communication No. 1533/2006, *Ondračka and Ondračková v. Czech Republic*.

<sup>6</sup> See, for example, communication No. 182/1984, *Zwaan-de Vries v. the Netherlands*, Views adopted on 9 April 1987, paragraphs 12.1–13.

5.2 With regard to the authors' belated submission of their communication, they argue that the Constitutional Court's decision being final on the issue of citizenship and restitution, they had come to the conclusion that they could not obtain restitution unless they reacquired their Czech citizenship. In this regard, they applied for citizenship, which they obtained towards the end of 2004. The authors argue that it is only after one year and a few weeks after they obtained their Czech citizenship that they decided to submit a communication to the Committee. They, therefore, reject the State party's assertion that the delay is almost eleven years.

5.3 With regard to the merits, the authors submit that their right to full restitution of their property has been violated following the application of a law that discriminated on the basis of citizenship. They submit that the legislation is illegal and unconstitutional.

#### **Additional submission by the State party**

6. The State party further claims, without any elaboration, that the communication should be declared inadmissible *ratione temporis* by the Committee.

#### **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 communication is admissible under the Optional Protocol to the Covenant.

7.2 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.

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 notes that the State party contends that the authors have decided not to use domestic remedies available to them in order for courts to examine the merits of their assertions in the context of non-discrimination under article 26 of the Covenant. However, the Committee recalls that it is only remedies that are both available and effective in a State party that must be exhausted. In this regard, the Committee reiterates that when the highest domestic court has ruled on the matter in dispute, thereby eliminating any prospect that a remedy before domestic courts may succeed, the author is not obliged to exhaust domestic remedies, which are in fact fruitless, for the purposes of the Optional Protocol.<sup>7</sup> The Committee observes that, after decision No. 185/1997 by the Constitutional Court of the Czech Republic, restitution was contingent upon proof of citizenship. The law No. 87/1991 on restitution prescribed a period for making claims which, as subsequently established by the Constitutional Court, expired in 1995. It, therefore, follows that the authors did not have a remedy after reacquiring their citizenship because, in order to benefit from the restitution laws, they needed to have been citizens during a specific and defined period of time before 2004, when they obtained Czech citizenship. Therefore, the Committee concludes that no effective remedies were available to the authors.

7.4 The Committee has also noted the State party's argument that the communication should be considered inadmissible on the basis that it constitutes an abuse of the right to submit communications under article 3 of the Optional Protocol. The State party contends that the authors waited for nearly eleven years after the time limit that was set by the

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<sup>7</sup> Communication No. 1095/2002, *Gomariz Valera v. Spain*, Views adopted on 22 July 2005, para. 6.4.

interpretation of the Constitutional Court of the law on restitution in order to submit a communication to the Committee. The State party therefore argues that, in view of the excessive delay in submitting the communication to the Committee and the absence of a justifiable reason, the communication should be declared inadmissible on the ground of abuse of the right of submission. However, the authors attribute the delay to the procedure undertaken in order to reacquire their Czech citizenship, which they argue was a condition for the recovery of their property. The authors thus argue that they approached the Committee a year and a few weeks after they reacquired their Czech citizenship in 2004, and not almost eleven years as submitted by the State party. The Committee notes that the State party calculates the delay from 1995, which was the time limit, as established by the decision of the Constitutional Court, set for individuals with Czech citizenship to invoke restitution laws and obtain restitution.

7.5 The Committee observes that the Optional Protocol does not establish time limits within which a communication should be submitted, and that the period of time elapsing before doing so, other than in exceptional circumstances, does not in itself constitute an abuse of the right of submission of a communication.<sup>8</sup> It is clear that, in determining what constitutes excessive delay, each case must be decided on its own facts. In the present case, the authors were stripped of their Czechoslovak citizenship when they left Czechoslovakia and left for the United States of America in 1968. Thus, during the time between the enactment of the laws on restitution and the year 2004, the authors were American citizens. The authors argue that the delay in submitting the communication was engendered by their knowledge and understanding, seemingly uncontested by the State Party, that there was no hope for them to obtain restitution, unless they reacquired their Czech citizenship, which they did in 2004.

7.6 The Committee observes that according to its new rule of procedure 96 (c), applicable to communications received by the Committee after 1 January 2012, the Committee shall ascertain that the communication does not constitute an abuse of the right of submission. An abuse of the right of submission is not, in principle, a basis of a decision of inadmissibility *ratione temporis* on grounds of delay in submission. However, a communication may constitute an abuse of the right of submission when it is submitted 5 years from the exhaustion of domestic remedies by the author of the communication, or, where applicable, after 3 years from the conclusion of another procedure of international investigation or settlement, unless there are reasons justifying the delay taking into account all the circumstances of the communication. In the meantime, 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.<sup>9</sup> In the circumstances of the instant case, the Committee considers that the delay, taking into account the authors' efforts and commitment in reacquiring Czech citizenship in order to pursue their claims, and despite the fact that no domestic action was taken by the authors as Czech citizens, does not constitute an abuse of the right of submission under article 3 of the Optional Protocol.

7.7 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 of the Optional Protocol for the Czech Republic, the legislation that excludes

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<sup>8</sup> See, for example, communications No. 1223/2003, *Tsarjov v. Estonia*, Views adopted on 26 October 2007, paragraph 6.3; No. 1434/2005, *Fillacier v. France*, decision of inadmissibility adopted on 28 April 2006, paragraph 4.3; and No. 787/1997, *Gobin v. Mauritius*, decision of inadmissibility adopted on 16 July 2001, paragraph 6.3.

<sup>9</sup> *Ibid.*

claimants who are not Czech citizens has continuing consequences subsequent to the entry into force of the Optional Protocol for the Czech Republic, which could entail discrimination, in violation of article 26 of the Covenant.<sup>10</sup>

7.8 In the absence of any further objections to the admissibility of the communication, the Committee declares it admissible, in so far as it may raise issues under article 26 of the Covenant, and proceeds to its consideration on the merits.

*Consideration of the merits*

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

8.2 The issue before the Committee, as it has been presented by the parties, is whether the application to the author of Law No. 87/1991 on extrajudicial rehabilitation amounted to discrimination, in violation of article 26 of the Covenant. The Committee reiterates its jurisprudence that not all differentiation in treatment can be deemed to be discriminatory under article 26. A differentiation which is compatible with the provisions of the Covenant and is based on objective and reasonable grounds does not amount to prohibited discrimination within the meaning of article 26.<sup>11</sup>

8.3 The Committee recalls its views in the case *Des Fours Walderode*<sup>12</sup> that a requirement in the law for citizenship as a necessary condition for restitution of property previously confiscated by the authorities makes an arbitrary and consequently discriminatory distinction between individuals who are equally victims of prior State confiscations, and constitutes a violation of article 26 of the Covenant. The Committee considers that the principle established in the above case, and many others, equally applies to the authors of the present communication. The Committee, therefore, concludes that the application to the authors of the citizenship requirement under Law No. 87/1991 violates their rights under article 26 of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 26 of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including compensation, if the properties cannot be returned. The Committee reiterates that the State party should review its legislation to ensure that all persons enjoy both equality before the law and equal protection of the law.

<sup>10</sup> See, communication No. 1615/2007, *Zavrel v. Czech Republic*, Views adopted on 27 July 2010, paragraph 8.6.

<sup>11</sup> See communication No. 182/1984, *Zwaan-de Vries v. The Netherlands*, Views adopted on 9 April 1987, paragraph 13.

<sup>12</sup> Communication No. 747/1997, *Des Fours Walderode v. Czech Republic*, Views adopted on 30 October 2001, paras. 8.3–8.4. See also communications No. 586/1994, *Adam v. Czech Republic*, Views adopted on 23 July 1996, para. 12.6; No. 857/1999, *Blazek v. Czech Republic*, Views adopted on 12 July 2001, para. 5.8; No. 945/2000, *Marik v. Czech Republic*, Views adopted on 26 July 2005, para. 6.4; No. 1054/2002, *Kriz v. Czech Republic*, Views adopted on 1 November 2005, para. 7.3; No. 1463/2006, *Gratzinger v. Czech Republic*, Views adopted on 25 October 2007, para. 7.5; No. 1533/2006, *Ondracka and Ondracka v. Czech Republic*, Views adopted on 31 October 2007, para. 7.3.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant 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 and enforceable remedy in case that a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views and to have them translated into the official language and widely distributed.

[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 to the General Assembly.]



## Appendix

### Individual opinion by Committee Member, Mr. Krister Thelin (dissenting)

The majority has found the communication to be admissible. I disagree. In my view the communication should have been deemed inadmissible and the Committee's decision in this respect should instead read as follows.

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 communication is admissible under the Optional Protocol to the Covenant.

7.2 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.

7.3 The Committee notes the State party's argument that the communication should be considered inadmissible on the ground of non-exhaustion of domestic remedies under articles 2, as read with 5(2) (b), of the Optional Protocol, as the authors have not raised the issue before national authorities.

7.4 The Committee notes that the authors' only argument for non-exhaustion of remedies is that, with the Constitutional Court's decision of June 1997 being final on the issue of citizenship and restitution, it is futile to exhaust domestic remedies. Yet, according to the authors, they acquired Czech citizenship in 2004, in order obviously to pursue their claim, contending that there was no hope for them to obtain restitution, unless they reacquired their Czech citizenship. However, no such claim, as evidenced by the information available, was ever submitted to any Czech court or other domestic authority and the authors have consequently never raised in any domestic proceedings the issue of discrimination against them in relation to the restitution of their property.<sup>a</sup>

7.5 The Committee, therefore, for reasons stated in the preceding paragraph, concludes that the communication is inadmissible for failure to exhaust domestic remedies pursuant to article 5, paragraph 2 (b), of the Optional Protocol.

7.6 In light of the conclusion reached by the Committee, it does not find it necessary to refer to the arguments of the State party related to the authors' abuse of the right of submission and the inadmissibility of the communication *ratione temporis*.

8. The Human Rights Committee therefore decides that:

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

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

(Signed) Krister Thelin

[Done 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 to the General Assembly.]

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<sup>a</sup> See communication No. 1515/2006, *Herbert Schmidl v. Czech Republic*, Views adopted on 1 April 2008.

**U. Communication No. 1853/2008, Atasoy v. Turkey  
Communication No. 1854/2008, Sarkut v. Turkey  
(Views adopted on 29 March 2012, 104th session)\***

<i>Submitted by:</i>	Cenk Atasoy (1853/2008) and Arda Sarkut (1854/2008) (represented by counsel, James E. Andrik, United States of America)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Turkey
<i>Date of communication:</i>	8 December 2008 (1853/2008) and 15 December 2008 (1854/2008) (initial submissions)
<i>Subject matter:</i>	Conscientious objection
<i>Procedural issue:</i>	Admissibility – non-exhaustion
<i>Substantive issues:</i>	Right to freedom of thought, conscience and religion
<i>Articles of the Covenant:</i>	18, paragraph 1
<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 March 2012,*

*Having concluded* its consideration of communications No. 1853/2008 and No. 1854/2008, submitted to the Human Rights Committee by Cenk Atasoy and Arda Sarkut, respectively, 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 authors of the communication and the State party,

*Adopts* the following:

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

1.1 The authors of the communication are Cenk Atasoy (No. 1853/2008) and Arda Sarkut (No. 1854/2008), both Turkish nationals. They claim to be victims of a violation by

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\* The following members of the Committee participated in the examination of the present communication: 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, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

The texts of three individual opinions by Committee members, Mr. Gerald L. Neuman, jointly with Mr. Michael O'Flaherty, Mr. Yuji Iwasawa, Mr. Walter Kälin; Sir Nigel Rodley, jointly with Mr. Cornelis Flinterman, Mr. Krister Thelin; and Mr. Fabián Omar Salvioli are appended to the text of the present Views.

the Republic of Turkey of article 18, paragraph 1, of the International Covenant on Civil and Political Rights. The authors are represented by counsel James E. Andrik of the United States of America. The Optional Protocol entered into force for the State party on 24 February 2007.

1.2 On 14 April 2009, at the request of the State party, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, decided that the admissibility of the communications would be considered separately from the merits.

1.3 On 5 July 2010, pursuant to rule 94, paragraph 2, of the Committee's Rules of Procedure, the Committee decided to join the two communications for decision in view of their substantial factual and legal similarity.

### **The facts as presented by the authors**

#### *Cenk Atasoy's case*

2.1 Mr. Atasoy is a Jehovah's Witness. On 7 August 2007, he submitted a petition to the Military Recruitment Office, explaining that he was a Jehovah's Witness and could not perform military service because of his religious beliefs. In a letter dated 31 August 2007, he was informed that further to articles 10 and 72 of the Constitution and article 1 of the Military Law, he could not be exempted from military service. On 29 January 2008, he received through his university, a letter from the Ministry of National Defence, Recruitment Affairs, informing him that he should carry out military dispatch procedures between 1 and 31 March 2008 and take part in the April 2008 call-up.

2.2 On 21 March 2008, the author went to the Military Recruitment Office and submitted another petition reiterating the reasons why he could not perform military service. He also explained that for the same reason he could not sit for the reserve officer exams to be held between 1 and 3 April. The author was given an Evasion of Enlistment Status Certificate and requested to carry out military dispatch procedures between 1 and 31 July 2008 and present himself to the August 2008 call-up. On 9 April 2008, he received an official response to his petition of 21 March 2008, in which it was reiterated that further to article 10 and 72 of the Constitution and article 1 of the Military Law he could "not be exempted from national service."

2.3 On 25 July 2008, he went to the Military Recruitment Office and submitted a petition relating to the August 2008 call-up, reiterating why he could not perform military service. He was again given an Evasion of Enlistment Status Certificate stating that he should carry out military service procedures between 1 and 30 November 2008 and come to the December 2008 call-up. He submitted another petition stating why he could not take part in the December 2008 call-up and received a letter on 18 August 2008, indicating again that he could not be exempted from military service. The author states that this situation will continue: that he will continue to be invited to call-ups and eventually imprisoned. On 4 November 2008, he was brought before the Penal Court with respect to his failure to take part in the April 2008 call-up. This case remains outstanding. He also fears that the company for which he works may receive letters from the Government advising it to terminate his employment.

2.4 In all of his petitions, the author indicated that he could perform "civil" service which would not conflict with his religious principles. He explains that the responses he has received from the Ministry of National Defence state that he cannot be exempted from national service. However, he argues that he has not asked to be so exempt; he has merely stated that he cannot perform such service in the way requested by the State.

*Arda Sarkut's case*

2.5 Mr. Sarkut is also a Jehovah's Witness. On 27 October 2006, he started work as an assistant lecturer at the Faculty of Jewellery and Accessories Technology and Design, Mersin University. In February 2007, he went to the Military Recruitment Office in Mersin to submit a petition stating that he would not be able to perform military service because of his religious beliefs. Since then, he has gone to the Military Recruitment Office every four months to submit a similar petition concerning the national service call-up, stating why he cannot perform such service. The Military Recruitment Office always refuses to accept his petitions, subsequent to which the author sends copies, by registered mail, to the Ministry of National Defense, Recruitment Department, in Ankara.

2.6 On 6 April 2007, the Military Recruitment Office in Beşiktaş sent a letter to Mersin University, requesting that it to dismiss the author as from 31 July 2007, so that he could take part in the August 2007 call-up. The university was also advised not to re-employ the author unless he provided a document from the Military Recruitment Office. In the event that the university did re-employ him, it would be accused of having committed a crime under, inter alia, articles 91, 92 and 93 of Military Law No. 1111. As a result, the author was forced to accept leave without pay as from 15 July 2007.

2.7 In July 2008, the author received a letter from Mersin University stating that it had initiated an investigation into his failure to perform military service, despite the fact that he had obtained time off to do so. On 12 August 2008, he sent a letter stating the reasons why he had not performed such service, and requesting to have his job back. In October 2008, he received a letter from the university stating that he was dismissed for having provided a "false statement". After sending a letter to the university objecting to the decision to dismiss him, on 20 November 2008, he received a letter from the university which stated that his objection "was not accepted". According to the author, the university will no longer employ him as a teacher due to his conscientious objection to serving in the military; the Ministry of National Defence has prevented him from being employed at a place that "pays social security" and he remains unemployed and under pressure due to the lawsuits that have been launched against him.

2.8 In all of his petitions (approximately 20, at the time of his submission), the author has indicated that he could perform civil service, which would not conflict with his religious principles. He explains that the responses he has received from the Ministry of National Defence states that he cannot be exempted from national service on the basis of, inter alia, article 10 of the Constitution.

2.9 Both of the authors refer to and provide copies of decisions of the Military Supreme Court on conscientious objection which state that, "the defence of the accused that he cannot serve in the military because of his religious belief, and that mandatory military service imposed on the accused under articles 35 and 47 of the Military Service Law and article 45 of the Military Criminal Law contradicts the freedom of religion and conscience regulated under article 24 of the Constitution of the Republic of Turkey, is not considered to be legal, proper and righteous."<sup>1</sup> Given these decisions of the Military Supreme Court, the authors are of the opinion that exhausting domestic remedies would be ineffective.

**The complaint**

3.1 The authors complain that the absence in the State party of an alternative to compulsory military service, subject to criminal prosecution and imprisonment, breaches

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<sup>1</sup> See Military Supreme Court of Appeals, Ankara, principle No. 2004/400 and decree No. 2004/396, 9 April 2004.

their rights under article 18, paragraph 1, of the International Covenant on Civil and Political Rights.

3.2 The authors refer to the Committee's communications Nos. 1321/2004 and 1322/2004, *Yoon and Choi v. the Republic of Korea*, Views adopted on 3 November 2006, in which the Committee found a violation by the State party of article 18, paragraph 1, of the Covenant, on the basis of similar facts as in the present communications, and in which the State party was obliged to provide the authors with an effective remedy.

#### **The State party's submission on admissibility and merits**

4.1 By submissions of 20 February 2009, the State party contests the admissibility of both communications on grounds of non-exhaustion of domestic remedies. As to the authors' view that domestic remedies would be ineffective, it argues that, according to article 5, paragraph 2 (b) of the Optional Protocol, the only exception to exhaustion of domestic remedies is proof that remedies would be "unreasonably prolonged" and that proof of ineffectiveness is not stipulated as an exception to the rule. However, it also argues that exhaustion of remedies would in any event be effective.

4.2 Concerning the authors' argument that, in light of a decision of the Military Supreme Court on conscientious objection involving four Jehovah's Witnesses, they are not required to exhaust domestic remedies in their cases, the State party submits that in 2006, the Act No. 353 on the Establishment and Trial Procedure of Military Courts was amended, according to which the offence of evading military service (*bakaya*) set out in article 63 of the Military Penal Code, when committed by civilians in peace time, shall be tried by civil courts instead of military courts.<sup>2</sup> The decisions of civil courts are subject to appeal before the Court of Cassation.

4.3 According to the State party, the authors' trials relating to the evasion of military service are ongoing. Both authors have cases pending before the Beyoğlu 1st Criminal Court (first instance court), and the second named author also has a case pending before the 2nd Criminal Court. During the first named author's hearing on 4 November 2008, he stated that as a Jehovah Witness he could not perform military service because of his conscience and based on his beliefs. He also argued that charges of evasion of military service violated article 9 of the European Convention on Human Rights. The second named author provided similar arguments.

4.4 The State party submits that international treaties have direct effect in the State and become part of domestic legislation upon ratification. In case of contradiction between human rights treaties, to which Turkey is a party, and domestic laws on the same matter, provisions of the international treaty shall prevail. Thus, the Beyoğlu 1st Criminal Court will consider the authors' arguments during the proceedings with due regard to the European Convention on Human Rights and the International Covenant on Civil and Political Rights, as well as the Constitution and other relevant legislation.

4.5 In addition, in the event that the authors are unsuccessful before the first instance court, they may appeal the decision before the Court of Cassation, which is the highest court for both civil and criminal matters. Neither the first instance court nor the Court of

<sup>2</sup> See art. 13 of Law No. 353, amended as Law No. 5530, promulgated in the Official Gazette on 5 July 2006, and entered into effect on 5 October 2006: "Trial court for civilians who commit offences subject to Military Criminal Court in peace time, article 13 – Offences provided for in articles 55, 56, 57, 58, 59, 61, 63, 64, 75, 79, 80, 81, 93, 94, 95, 114 and 131 of the Military Criminal Court, when committed in peace time by civilians who are not subject to military courts: the trial of such persons shall be conducted by ordinary courts of law".

Cassation is legally bound by the jurisprudence of military courts, even though the cases may be similar. Indeed, according to the State party, there is divergence of views between the Court of Cassation and the Military Supreme Court on similar cases. Furthermore, civil courts do not have established jurisprudence on conscientious objection.

### **The authors' comments on the State party's submission**

5.1 On 26 June 2009, the authors disputed the State party's arguments on the admissibility of their respective communications. They both provided an update on their trials. On 2 April 2009, the Beyoğlu 1st Criminal Court found both authors guilty of violating article 63/1-A of the Military Penal Code – not a civil law.<sup>3</sup> The first named author was sentenced to one month's imprisonment which was converted to a 600-YTL fine. Three decisions were rendered against the second named author: he was given two sentences of one month's imprisonment, which was converted, at 20 YTL a day, into a fine of 600 YTL; and a third sentence of four months' imprisonment, converted to a fine of 2000 YTL, calculated at 20 YTL per day for 100 days, instead of 120 days. According to the authors, the civil court may have made their situation even more difficult than if they had been tried in a military court, as the fact that their sentences were converted to fines (below the 2000 YTL threshold) meant that they could *not* be appealed before the Court of Cassation. Although the court based itself on military law to try the authors, the penalties were based on penal civil law.

Article 305 of the Penal Judging Procedures Law No. 1412 states, in the applicable part, that “the judgments of the penal courts can be appealed. However, ... judgments of fines up to 2 billion Turkish Lira (i.e., 2000 YTL, after the recent revaluing of the money) ... and decisions stated as “certain” cannot be appealed.”<sup>4</sup>

5.2 All of the authors' penalties were below the threshold. Indeed, the second named author alleges that the conversion of his four-month prison sentence was deliberately calculated in such a way as to ensure that it did not reach the threshold, thus circumventing his right to appeal. In addition, the authors claim that all of the decisions clearly stated that they were “certain”, which is also a criterion of decisions precluded from the possibility of appeal before the Court of Cassation. The authors' only options now are to pay the fine or go to prison. However, the matter is not expected to end there, as the authors will invariably be called up for military service again and face the same charges, convictions and penalties. For these reasons, the authors submit that domestic remedies have been exhausted and that their communications should be considered on the merits.

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<sup>3</sup> See Military Penal Code, art. 63/1-A – Individuals without an acceptable excuse who are, during peacetime, absentee conscripts, draft evaders or unregistered [for military service] and of whom the first contingent of peers or friends with whom they have been processed have been sent off; Reserve recruits who have been called up and [are absent] without excuse, and [in all the preceding cases] starting from the date of their peers being sent off: arrive within seven days, shall be imprisoned for a term of up to one month; are arrested [within seven days], shall be imprisoned for a term of up to three months; arrive between seven days to three months, shall be imprisoned for a term ranging from three months to one year; are arrested between seven days to three months, shall be imprisoned for a term ranging from four months to one-and-a-half years; arrive after three months, shall be imprisoned for a term ranging from four months to two years; are arrested after three months, shall be punished with a term of heavy imprisonment ranging from six months to three years.”

<sup>4</sup> Informal translation as provided by the authors.

## Issues and proceedings before the Committee

### *Consideration of admissibility*

6.1 The Committee examined the admissibility of the communications on 5 July 2010. As required by article 5, paragraph 2 (a), of the Optional Protocol, it ascertained that the same matter was not being examined under another procedure of international investigation or settlement.

6.2 The Committee noted the State party's arguments that both communications were inadmissible for failure to exhaust domestic remedies as, at the time of its submission to the Committee, the authors' cases were still pending before the civil courts. In addition, the State party has argued that any court decisions against the authors could be appealed in the Court of Cassation. The Committee further noted that since that submission, the authors had provided information to the effect that the first instance court had by then considered their cases and handed down decisions against them in each case. The Committee considered that the authors had also provided detailed information as to why they could not appeal any of the decisions before the Court of Cassation. The Committee observed that none of the authors' arguments had been challenged by the State party. For these reasons, the Committee considered that it was not precluded from examining the communications under article 5, paragraph 2 (b), of the Optional Protocol, and found both of them admissible.

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

7.1 In a note verbale of 4 February 2011, the State party commented on the Committee's admissibility decision. It explained that Mr. Atasoy had failed to take part in a number of drafting call-ups in 2008 and 2010 and for this reason, he was brought before the Penal Court where a number of criminal cases against him were pending. Furthermore, while Beyoğlu 2nd and 3rd Criminal Courts of Peace had ruled to release the author in the majority of the cases, according to the information provided by the Ministry of Justice, the cases in which the author has been found guilty were still pending before the Court of Cassation.

7.2 With regard to Mr. Sarkut, the State party explained that he had failed to take part in the drafting call-ups from 2007 to 2010 and on those grounds, he was brought before the Penal Court; a number of criminal cases against him were open. According to information available at the time, the Criminal Court had ordered the release of the author in two cases, while three other cases were still pending before the Court of Cassation.

7.3 The State party further reiterates its observations on the admissibility of the communications and contends that in decisions taken in 2006 and 2009, the Constitutional Court had found that article 305, paragraph 2 (1), of the Criminal Procedure Code was in contradiction with the Constitution, and thus made possible appeals by individuals against fines below 2000 YTL.

7.4 With regard to the merits, the State party reiterates that according to article 72 of the Constitution, military service is compulsory: "National service is the right and duty of every Turk. The manner in which this service shall be performed, or considered as performed, either in the Armed Forces or in public service shall be regulated by law." Furthermore, article 10 of the Constitution states that all individuals are equal, without discrimination, before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion, sect or any such considerations; and men and women have equal rights. The State shall have the obligation to ensure that this equality exists in practice. No privilege shall be granted to any individual, family, group or class. State organs and administrative authorities shall act in compliance with the principle of equality

before the law in all their proceedings. Article 18 of the Constitution guarantees the freedom of conscience, religious beliefs and conviction.

7.5 Under the State party's constitutional system, all articles of the Constitution carry equal weight, without any hierarchy among them. The articles are in conformity with each other and are mutually reinforcing; every article should be read in conjunction with the others. Thus, articles 72, 10 and 24 of the Constitution, read together, means that the exercise of freedom of conscience, religious belief and conviction cannot be valued above the duty of military service, as these provisions cannot be interpreted as contradicting or violating one another. Article 10, in parallel, guarantees equality among individuals without discrimination, and thus prevents the exemption of individuals or groups from performing military service on the ground that this would contradict their religious beliefs.

7.6 The legislation governing military service provides for male citizens to perform military service at a certain age. Even individuals who perform military service under a temporary scheme have to fulfil basic military training. Therefore, exemption from military service on the ground of conscience is not possible under the law, and this issue, according to the State party, falls under the margin of appreciation of the domestic authorities.

7.7 According to the State party, article 18 of the Covenant does not apply to the present case as it does not provide any tacit or express guarantee for conscientious objection. Referring to article 31 of the Vienna Convention on the Law of Treaties, the State party notes that a treaty should be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The State party believes that when an ordinary meaning is given to article 18 of the Covenant, in light of the object and purpose thereof, nothing therein can be construed as suggesting that any "right to a conscientious objection" is explicit in its provisions or may be derived from it. Even if, in arguendo, one should assume that the article, read in its letter and spirit, is ambiguous or obscure, recourse to the preparatory papers (*travaux préparatoires*) of the Covenant would confirm the fact that it had never been the intention of the drafters to create a separate and absolute "right to a conscientious objection" within the ambit of the right to freedom of thought, conscience and religion, at a time when compulsory military service was indeed the reality in many of the drafting States.

7.8 According to the State party, article 18, read in conjunction with article 8, paragraph 3 (c) (ii), of the Covenant, leaves no room for ambiguity as the latter provision explicitly refers to "those countries where conscientious objection is recognized". The State party contends that if the drafters intended to create a distinct and absolute "right to conscientious objection" under article 18 so that based on this understanding, compulsory military service would be regarded as "a violation of this right," then one would *not* expect such a contradictory reference in article 8 of the Covenant that clearly accepts the practice in countries where conscientious objection is not recognized. It would be inconsistent to interpret that in one article, the intention of the drafters was to prohibit compulsory military service, whereas in another article the intention was to give legitimacy to or at least to provide a general recognition of such a practice without expressing the need to reconcile articles 18 and 8. If it is to be assumed that the intention of the drafters was to declare compulsory military service a violation of the "right to conscientious objection," then one would legitimately challenge the rationale behind providing in another article for recognition of this "violation" in some States as an exception to forced or compulsory labour.

7.9 The State party goes on to explain that any inconsistencies among articles of a treaty are resolved by making necessary linkages between their provisions, so as to allow States parties to have a clear understanding of their obligations. In this case, however, article 8 makes it clear that some States may not recognize conscientious objection and that this practice would in no way be considered as violating any other provisions of the Covenant.



Articles 8 and 18 are consistent with each other, since the latter does not envisage a “right to conscientious objection.” Any other interpretation would, according to the State party go beyond what is permitted by the existing rules of the law of the treaties.

7.10 For the sake of argument, the State party explains that it may be considered that article 8 does not exclude conscientious objection as a State practice, however, it certainly does not recognize it as a “right” and it unequivocally does not delegitimize a State’s practice of compulsory military service as a “violation” of such “rights”. According to the State party, if the intention of the drafters was to forbid compulsory military service in article 18, one would expect them to have introduced a clear prohibition on this, such as “No one shall be compelled to perform military service against their thought, conscience or religion”.

7.11 According to the State party, the object and purpose of articles 8 and 18 are clear when their terms are given their ordinary meaning. In no way can they be construed as considering compulsory military service a “violation” of an inexplicit “right to conscientious objection”. In the State party’s view, arguing the contrary would not be consistent with the customary rule of interpretation reflected in article 31 of the Vienna Convention on the Law of Treaties. It considers that asserting a violation of such “an implied right” under the Covenant, given that military service is recognized under its other provision, would amount to an “abuse of right” under international law. Furthermore, it would be in contradiction with the fundamental principles of human rights law for a core treaty like the Covenant to establish a right (in article 18) on the one hand, and anticipate its recognition by *some* States, while, on the other hand, making it possible for other States *not to recognize* it (as in article 8). According to the State party, such an inconsistent approach would infringe upon the paramount principle of universality of human rights.

7.12 The State party adds that the present communication should not only be assessed in the light of article 18 of the Covenant, given the reference to “conscientious objection” in article 8 thereof. Further to the Vienna Convention, when interpreting the terms of a treaty, due regard should also be given to the context for the purpose of the interpretation which shall comprise “the text, including its preamble and annexes”.

7.13 The State party admits that it may be acceptable that the understanding of treaty provisions may “evolve” over time, but such “evolving interpretation” has limits, and a contemporary interpretation of a provision cannot ignore what is written therein already. The interpretation cannot go beyond the letter and spirit of the treaty or what the States parties initially and explicitly so intended. In this case, it is clear that the drafters of the Covenant acknowledge in article 8 that in some States where military service is compulsory, conscientious objection may not be recognized. If, in the future, States parties to the Covenant want to reconcile articles 8 and 18 thereof in view of changing circumstances, they should amend the Covenant accordingly; until then, any interpretation of the text should be faithful to its letter and spirit.

7.14 In the light of the above observations, the State party considers that the Covenant does not afford, even implicitly, a “right to conscientious objection” per se, and States parties have no obligation to recognize such a right. Therefore, as acknowledged by the Covenant, military service cannot be regarded as a “violation” of the “right to conscientious objection”.

7.15 According to the State party, even if one assumed in this case that the manifestation of the authors’ beliefs has been restricted, it should be noted that the authors were sentenced only because of their insistent disobedience of the military service rules. This did not prevent them from continuously objecting to perform military duties of any kind. In addition, according to article 18, paragraph 3, of the Covenant, some restrictions may be necessary in a democratic society for the protection of public safety and public order. Thus,

States parties have the right and responsibility to appreciate limits of the right of conscientious objection in such a way that exemption from military service does not perturb public safety and order.

#### **Authors' comments on the State party's observations**

8.1 The authors submitted their comments on the State party's observations on 23 March 2011. First of all, they inform the Committee that their situation remains unchanged and that they continue to be indicted because of their refusal to perform military service. As at that time, Mr. Atasoy had been indicted for three military call-ups, and he had to defend himself in court for six more call-ups periods, for a total of nine. Mr. Sarkut had been indicted for six military call-ups and had to defend himself in court for his refusal to join the army in six more call-ups, for a total of 12. Due to an order sent by military officials to his employer in November 2008, Mr. Sarkut has lost his employment as a teacher; the order will remain in effect until he performs military service. According to the authors, there is no realistic possibility that the authorities and courts will make a decision in their favour that would permanently release them from the obligation to perform military service, even if they are prepared to perform any other civil service as an alternative.

8.2 On the issue of non-exhaustion of domestic remedies, the authors note that on 23 July 2009, the Constitutional Court decided that fines below 2000 YTL could be appealed. The decision was published in the Official Gazette on 7 October 2009 and entered into force on 7 October 2010. Furthermore, after 7 October 2010, such appeals were only possible against fines determined after this date. Even if an appeal concerning the fines of conscientious objectors are heard by the Court of Cassation, there can be no reasonable expectation that the authors would be exempted from military service or provided with an acceptable alternative civilian service. Accordingly, even if the Court of Cassation accepted some of the authors' appeals against their fines, exhaustion of such remedies would, in fine, remain ineffective.

8.3 As to the State party's contention that the Covenant does not provide for the right of conscientious objection, the authors recall that although the Committee had initially concluded that article 18 of the Covenant did not provide for such a right,<sup>5</sup> its interpretation of the Covenant has since evolved and, at present, its position is that unjustified limitations on the rights of conscientious objectors amount to a violation of article 18. The authors point out that this position has been confirmed in the Committee's decisions regarding several individual communications, as well as in its general comment No. 22 on the right to freedom of thought, conscience and religion (article 18), and reflects the position of other United Nations bodies.<sup>6</sup> The authors consider that the above-mentioned information provides a sufficient answer to the State party's contentions in this connection.

8.4 As to the State party's view that exemption from military service would be a threat to public safety and public order, the authors state that they cannot imagine how they could constitute such a threat. They add that states such as Denmark, Israel, the Netherlands, Norway, the Russian Federation or the United Kingdom of Great Britain and Northern

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<sup>5</sup> See communication No. 185/1984, *L.T.K. v. Finland*, Decision of inadmissibility adopted on 9 July 1985.

<sup>6</sup> The authors refer, inter alia, to communications Nos. 1321-1322/2004, *Yoon and Choi v. the Republic of Korea*, Views adopted on 3 November 2006; Nos. 1593-1603/2007, *Jung et al. v. the Republic of Korea*, Views adopted on 23 March 2010; No. 666/1995, *Foin v. France*, Views adopted on 3 November 1999; as well as the Committee's general comment No. 22 (1993), in particular para. 11; several resolutions adopted by the Commission on Human Rights between 1971 and 2004, on the issue of conscientious objectors; and the work of the General Assembly on the matter.

Ireland have laws recognizing conscientious objection even during war time. Thus, in their view, the State party's argument is non-substantiated, given that at present less than one per cent of those enlisted for military service is composed of conscientious objectors in the State party, and it is difficult to envisage how such a small percentage could constitute a threat.

*Consideration as to re-opening the issue of admissibility*

9.1 The Committee notes that the State party's submission that the authors' cases are still pending before the Court of Cassation and that domestic remedies have not been exhausted. This would imply that the issue of admissibility should be revisited.

9.2 In the circumstances of the present case, the Committee considers that it does not need to re-consider its admissibility decision of 5 July 2010, and it decides to proceed to examine the communication on the merits.

*Consideration of the merits*

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

10.2 The Committee notes the authors' claim that their rights under article 18, paragraph 1, of the Covenant have been violated, due to the absence in the State party of an alternative to compulsory military service, as a result of which, they have been criminally prosecuted due to their failure to perform military service, with Mr. Sarkut having lost his employment. It further notes that the State party has not addressed this issue directly, but has explained rather that article 18 per se does not establish a "right to conscientious objection". The State party also invokes paragraph 3 of article 18, claiming that some restrictions may be necessary in a democratic society for the protection of public safety and public order.

10.3 The Committee also notes the State party's argument concerning article 8 of the Covenant, which states that "in countries where conscientious objection is recognized", national service by conscientious objectors does not constitute forced or compulsory labour. The Committee recalls that in its decision of inadmissibility regarding communication No. 185/1984, *L.T.K. v. Finland*, it had indeed regarded this phrase as reinforcing a conclusion that article 18 did not specifically confer a right to conscientious objection. Since that time, however, the Committee has confirmed that the oblique use of this phrase in a different context "neither recognizes nor excludes a right of conscientious objection,"<sup>7</sup> and so does not contradict the necessary consequences of the Covenant's guarantee of the right to freedom of thought, conscience and religion.

10.4 The Committee thus recalls its general comment No. 22 (1993), in which it considers that the fundamental character of the freedoms enshrined in article 18, paragraph 1, of the Covenant is reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4, paragraph 2, of the Covenant. Although the Covenant does not explicitly refer to a right of conscientious objection, the Committee

<sup>7</sup> See communications Nos. 1321-1322/2004, *Yoon and Choi v. the Republic of Korea*, Views adopted on 3 November 2006, para. 8.2. The Committee notes that the European Court of Human Rights subsequently reached a similar conclusion regarding similar language in art. 4 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, subsequent to the Committee's interpretation: see *Bayatyan v. Armenia*, Application No. 23459/03, judgement of 7 July 2011, paras. 62-64; also *Erçep v. Turkey*, Application No. 43965/04, judgement of 22 November 2011.

reaffirms its view that such a right derives from article 18, inasmuch as the obligation to be involved in the use of lethal force may seriously conflict with the freedom of conscience.<sup>8</sup> The Committee reiterates that the right to conscientious objection to military service is inherent to the right to freedom of thought, conscience and religion. It entitles any individual to an exemption from compulsory military service if the latter cannot be reconciled with the individual's religion or beliefs. The right must not be impaired by coercion. A State party may, if it wishes, compel the objector to undertake a civilian alternative to military service, outside of the military sphere and not under military command. The alternative service must not be of a punitive nature, but must rather be a real service to the community and compatible with respect for human rights.<sup>9</sup>

10.5 In the present cases, the Committee considers that the authors' refusal to be drafted for compulsory military service derives from their religious beliefs, which have not been contested and which are genuinely held, and that the authors' subsequent prosecution and sentences amount to an infringement of their freedom of conscience, in breach of article 18, paragraph 1, of the Covenant. The Committee recalls that repression of the refusal to be drafted for compulsory military service, exercised against persons whose conscience or religion prohibits the use of arms, is incompatible with article 18, paragraph 1, of the Covenant.<sup>10</sup>

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, concludes that the facts before the Committee reveal, in respect of each author, violations by the Republic of Turkey of article 18, paragraph 1, of the Covenant.

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including expunging their criminal records and providing them with adequate compensation. The State party is under an obligation to avoid similar violations of the Covenant 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 and subject to its jurisdiction, the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish these Views and to have them translated in the official language of the State party and widely distributed.

[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 to the General Assembly.]

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<sup>8</sup> See, for example, communications Nos. 1642-1741/2007, *Jeong et al. v. the Republic of Korea*, Views adopted on 24 March 2011.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

## Appendix

### I. Individual opinion of Committee member Mr. Gerald L. Neuman, jointly with members Mr. Yuji Iwasawa, Mr. Michael O’Flaherty and Mr. Walter Kälin (concurring)

I agree with the Committee’s conclusion that the State party has violated article 18 of the Covenant, but I would reach that conclusion by a somewhat different route. In *Yoon and Choi v. the Republic of Korea*,<sup>a</sup> the Committee explained that punishing conscientious objectors for their refusal to perform military service amounted to a restriction on their ability to manifest their religion or belief, and that the restriction would be compatible with article 18 of the International Covenant on Civil and Political Rights only if it were shown to be necessary for a valid purpose within the meaning of article 18, paragraph 3. I would apply the same analysis in the present case, bearing in mind the particular factual circumstances in Turkey – the State party has not identified any empirical reasons why its refusal to accommodate conscientious objection to military service would be necessary for one of the legitimate purposes listed in the Covenant.

The majority applies a different approach, first adopted by the Committee in *Jeong et al. v. the Republic of Korea*,<sup>b</sup> in March 2011. It attributes the right of conscientious objectors to decline military service directly to the right to freedom of conscience, and does not undertake any examination of its necessity. Indeed, the Committee’s general comment No. 22 (1993) on article 18 observes that freedom of conscience, in contrast with freedom to manifest religion or belief, is protected unconditionally by the Covenant and cannot be subjected to any limitations whatsoever.<sup>c</sup> I continue to believe that the majority’s new approach to conscientious objection to military service is mistaken.

Refusal to perform military service for reasons of conscience is among the “broad range of acts”<sup>d</sup> encompassed by the freedom to manifest religion or belief in worship, observance, practice and teaching. Such refusal involves not merely the right to hold a belief, but the right to manifest the belief by engaging in actions motivated by it. Article 18 of the Covenant does permit limitations on this freedom if the high standard of justification in paragraph 3 can be met. The majority’s Views in the present case do not provide any convincing reason for treating conscientious objection to military service as if it were an instance of the absolutely protected right to hold a belief. Nor does the majority clarify how conscientious objection to military service can be distinguished in this respect from other claims to exemption on religious grounds from legal obligations.

<sup>a</sup> Communication No. 1321-1322/2004, Views adopted on 3 November 2006. I observe that the same approach as in *Yoon and Choi* was subsequently adopted by the European Court of Human Rights in the cases cited by the majority: see *Bayatyan v. Armenia*, Application no. 23459/03, para. 112, and *Erçep v. Turkey*, Application no. 43965/04, para. 49.

<sup>b</sup> Communication No. 1642-1741/2007, Views adopted on 24 March 2011, in which I joined the individual opinion of Committee members Mr. Yuji Iwasawa et al.

<sup>c</sup> General comment No. 22 (1993) on the right to freedom of thought, conscience and religion, *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40 (A/48/40)*, annex VI, para. 3.

<sup>d</sup> *Ibid.*, para. 4; see also communication No. 1876/2009, *Singh v. France*, Views adopted on 22 July 2011, paras. 8.3–8.4, concerning exemption on religious grounds from the duty to appear bareheaded in an identity photograph.

I recognize that the majority writes narrowly, in a manner that does not invite a broad expansion of arguments for absolute protection of religiously motivated action and inaction. I also recognize that the majority's approach has not led it to an inappropriate result in the present case. Nonetheless, I think that the error in the analysis is important, and that the Committee has not yet provided an adequate justification for its new approach to this issue. I would return to the Committee's earlier approach, based on the freedom to manifest a religion or belief in practice.

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

## II. Individual opinion of Committee member Sir Nigel Rodley, jointly with members Mr. Krister Thelin and Mr. Cornelis Flinterman (concurring)

By way of explanation of its decision to treat this and earlier conscientious objection cases as violations of article 18 of the Covenant, without reference — as was its practice before *Jeong et al. v. the Republic of Korea*<sup>a</sup> — to the possible limitations applicable to a manifestation of religion or belief in article 18, paragraph 3, the Committee states at paragraph 10.4 of the above Views “that the right to conscientious objection to military service is inherent to the right to freedom of thought, conscience and religion. It entitles any individual to an exemption from compulsory military service if the latter cannot be reconciled with the individual’s religion or beliefs. The right must not be impaired by coercion.”

My understanding of the thinking behind this evolution is that freedom of thought, conscience and religion embraces the right not to manifest, as well as the right to manifest, one’s conscientiously held beliefs. Compulsory military service without possibility of alternative civilian service implies that a person may be put in a position in which he or she is deprived of the right to choose whether or not to manifest his or her conscientiously held beliefs by being under a legal obligation, either to break the law or to act against those beliefs *within a context in which it may be necessary to deprive another human being of life*.

Of course, there are other situations in which one may be compelled to manifest one’s conscientiously held beliefs. For example, a compulsory military service system that makes provision for conscientious objection may require someone wishing to avail him/herself of that alternative service to declare the belief that entitles the person to opt for it. The distinction here is that the person is having to do it for the purpose of staying within the law and ipso facto avoiding being put in a position of being at risk of having to deprive another person of life.

Claims for exemption from other legal obligations on grounds of religion or other conscientiously held belief may also arise and, as noted in the individual opinion of Mr Neuman and the colleagues joining him, conscientious objection needs to be distinguished from other such claims. For the purposes of the present case, the typical example would be conscientious objection to paying that part of one’s tax bill that is destined for a state party’s military capacity. In such a case, the Committee might answer that the distinction lies in the fact that the level of complicity in the involvement in the feared deprivation of life is one that is at least not self-evident. I would also suggest that the Committee’s earlier approach in *Yoon and Choi v. the Republic of Korea*<sup>b</sup> gave no better guidance than in the present case on how to distinguish conscientious objection to military service from similar objection to paying taxes or, for that matter, compliance with other legal obligations on conscientious grounds.

Furthermore, there is a certain lack of reality in basing the violation on an analysis of article 18, paragraph 3. The implication of relying on that provision is that circumstances could be envisaged in which the community interests contemplated by the provision could override the individual’s conscientious objection to military service. This goes against all our experience of the phenomenon of conscientious objection. It is precisely in time of

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<sup>a</sup> Communication No. 1642-1741/2007, Views adopted on 24 March 2011.

<sup>b</sup> Communication No. 1321-1322/2004, Views adopted on 3 November 2006.

armed conflict, when the community interests in question are most likely to be under greatest threat, that the right to conscientious objection is most in need of protection, most likely to be invoked and most likely to fail to be respected in practice. Indeed, I do not for a moment believe that the Committee would ever use an analysis of article 18, paragraph 3, to prevent a person from successfully invoking conscientious objection as a defence against legal liability.

In my view, the underlying issue concerns not article 18 alone, but article 18 in the penumbra of article 6, the right to life, the right that from its earliest days the Committee described as the “supreme right”.<sup>c</sup> Of course, not every deprivation of human life in armed conflict (or otherwise) is to be considered a violation of article 6, and deprivation of life (killing) is not the same as deprivation of the right to life. But the value underlying that right — the sanctity of human life — puts it on another plane than that of other deep human goods protected by the Covenant. Paragraphs 1 and 2 of article 18 acknowledge that completely; paragraph 3 cannot but acknowledge it incompletely. The right to refuse to kill must be accepted completely. That is why article 18, paragraph 3, is the less appropriate basis for the Committee’s decision.

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

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<sup>c</sup> Human Rights Committee, general comment No. 6 (1982) on the right to life, para. 1. *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40), annex V.*



### III. Individual opinion by Committee member Mr. Fabián Omar Salvioli (concurring)

1. I concur with the decision of the Human Rights Committee on communications No. 1853/2008 and 1854/2008 (*Atasoy and Sarkut v. Turkey*) and all the arguments put forward in the Committee's Views, which consolidate its vitally important jurisprudence on conscientious objection to compulsory military service, as established in its decision on communications Nos. 1642-1741/2007 (*Jeong et al. v. the Republic of Korea*), taken on the historic day of 24 March 2011. The debate has continued within the Committee in the lead-up to the decision in the case of Atasoy and Sarkut that is the subject of this analysis, and this has prompted me to set out my position in more detail.

2. It is important to clarify that the decision in the aforementioned cases is limited to conscientious objection to compulsory military service in the light of the International Covenant on Civil and Political Rights. The Committee's Views do not address other conscientious objection scenarios and their compatibility or otherwise with the Covenant, as the Committee has not had an opportunity to set out its position on these in its jurisprudence,<sup>a</sup> and it would be inappropriate to speculate on them in the context of individual communications on different subjects.

3. What is clear is that — regardless of the other possible scenarios — the nature of compulsory military service and its relationship to the use of armed force justify the Committee's attention to the subject, as explained in masterly fashion, it seems to me, by Sir Nigel Rodley in the last two paragraphs of his individual opinion to the communication concerning *Atasoy and Sarkut v. Turkey*.

4. The concept of conscientious objection to compulsory military service has been developed over time within the framework of the international protection of human rights; this development is reflected in the jurisprudence and opinions of the Committee, which must apply and interpret the Covenant as a living instrument. The most perceptive theorists in the field of international human rights law agree that legal instruments are dynamic and evolve on the basis of their interpretation by implementing bodies, which themselves reflect progress in international human rights law and offer interpretations that are used by other bodies and institutions. The development of conscientious objection to compulsory military service as a human right is a clear example of the fruitful interaction between the Human Rights Committee and other United Nations organs and bodies.

5. In its resolution 1989/59, the former Commission on Human Rights recognized the right of everyone to have conscientious objections to military service as a legitimate exercise of the right of freedom of thought, conscience and religion, as laid down in article 18 of the Universal Declaration of Human Rights and article 18 of the International Covenant on Civil and Political Rights.<sup>b</sup> The Commission subsequently maintained this

<sup>a</sup> It may be pointed out that the only such case which the Committee declared inadmissible concerned a complaint from a petitioner who refused to pay a certain percentage of his taxes, corresponding to the percentage of the federal budget allocated by Canada to military expenditure. The Committee noted that "although article 18 of the Covenant certainly protects the right to hold, express and disseminate opinions and convictions, including conscientious objection to military activities and expenditures, the refusal to pay taxes on grounds of conscientious objection clearly falls outside the scope of protection of this article" (communication No. 446/1991, *J.P. v. Canada*, Views adopted on 7 November 1991, para. 4.2).

<sup>b</sup> Commission on Human Rights resolution 1989/59, adopted on 8 March 1989, para. 1. The Commission had earlier adopted resolution 1987/46 on 10 March 1987, in which it appealed to States

position in various resolutions recognizing that conscientious objection to military service derived from principles and reasons of conscience, including profound convictions, arising from religious, ethical, humanitarian or similar motives.<sup>c</sup> In 1998, the Commission requested the Secretary-General of the United Nations to collect information from Governments, the specialized agencies and intergovernmental and non-governmental organizations on recent developments in this field and to submit a report,<sup>d</sup> which he did in 1999.<sup>e</sup>

6. The Special Rapporteur of the Commission on Human Rights on the elimination of all forms of religious intolerance addressed this issue on several occasions; the first holder of this mandate, Angelo Vidal d'Almeida Ribeiro, drew up a set of criteria relating to cases of conscientious objection to compulsory military service.<sup>f</sup> A subsequent mandate holder, Abdelfattah Amor, stressed in his report that the right of conscientious objection was closely related to freedom of religion, and expressed support for the views of the Commission on Human Rights.<sup>g</sup>

7. The Human Rights Council has continued to renew the mandate of the Special Rapporteur on this subject. Former Special Rapporteur Asma Jahangir noted in her 2007 report that many individuals have claimed the right to refuse to perform military service (conscientious objection) on the basis that this right derives from their freedom of thought, conscience and religion.<sup>h</sup> All such reports are, of course, brought to the attention of the General Assembly of the United Nations. In his reports, the current mandate holder, Heiner Bielefeldt, also sets out his position on conscientious objection to compulsory military service, including in his reports on country missions, such as the one on his visit to Paraguay in 2012.<sup>i</sup>

8. All the instruments referred to expressly mention the International Covenant on Civil and Political Rights and the work of the Human Rights Committee. The link between conscientious objection to compulsory military service and human rights is undeniable, and so it should be no surprise that the Human Rights Council has followed the path of "progressive development" in this area, as this principle permeates the entire sphere of international protection.

9. Although in the case of *Muhonen v. Finland* the author of the communication alleged that article 18, paragraph 1, of the Covenant had been violated because of his conscientious objection to performing military service — which was based on ethical reasons — the Committee did not express an opinion on this, as it found that part of the communication inadmissible on the grounds that the author had obtained a remedy within

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to recognize that conscientious objection to military service should be considered a legitimate exercise of the right to freedom of thought, conscience and religion.

<sup>c</sup> Commission on Human Rights resolution 1995/83, adopted on 8 March 1995 (preamble, penultimate paragraph). See also Commission on Human Rights resolution 1998/77, adopted on 22 April 1998, para. 1.

<sup>d</sup> Commission on Human Rights resolution 1998/77, adopted on 22 April 1998, para. 10.

<sup>e</sup> Report of the Secretary-General submitted pursuant to Commission resolution 1998/77 (E/CN.4/2000/55).

<sup>f</sup> Report of the Special Rapporteur on the elimination of all forms of religious intolerance, (E/CN.4/1992/52), para. 185.

<sup>g</sup> Report of the Special Rapporteur on the elimination of all forms of religious intolerance, to the General Assembly (A/52/477), paras. 77–78.

<sup>h</sup> Human Rights Council, Report of the Special Rapporteur on freedom of religion or belief, (A/HRC/6/5), para. 22.

<sup>i</sup> Report of the Special Rapporteur on freedom of religion or belief: Mission to Paraguay (A/HRC/19/60/Add.1), para. 56.

the State party that recognized the right he was claiming.<sup>j</sup> Shortly afterwards, in 1985, the Committee adopted its decision in the case of *L.T.K. v. Finland*, in which it observed that: “The Covenant does not provide for the right to conscientious objection; neither article 18 nor article 19 of the Covenant, especially taking into account paragraph 3 (c) (ii) of article 8, can be construed as implying that right.”<sup>k</sup> In its general comment No. 22 (1993), however, the Committee considers developments in the area and stresses that “the Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one’s religion or belief”.<sup>l</sup>

10. In 2006, the cases of Yeo-Bum Yoon and Myung-Jin Choi, two conscientious objectors to compulsory military service, were considered together by the Committee, which clearly stated that “the present claim is to be assessed solely in the light of article 18 of the Covenant, *the understanding of which evolves as that of any other guarantee of the Covenant over time in view of its text and purpose*” (emphasis added).<sup>m</sup> The Committee therefore considered that the State party had not demonstrated, in the case in point, that the restriction in question was “necessary” within the meaning of article 18, paragraph 3, of the Covenant. According to this line of reasoning, the Committee still accepted that a State party could justify the application of a law on compulsory military service, which was a limitation on the right to manifest one’s religion or belief, when it was necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.<sup>n</sup>

11. Finally, the Committee’s jurisprudence in the case of *Jeong et al. v. the Republic of Korea*<sup>o</sup> and in the present case of *Atasoy and Sarkut v. Turkey* marks the greatest development to date on the issue of conscientious objection to compulsory military service in relation to the International Covenant on Civil and Political Rights.

12. Indeed, there is no doubt that the Committee now considers that freedom of conscience and religion (art. 18 of the Covenant) includes the right to conscientious objection to compulsory military service; this is a substantial departure from past practice. No other conclusion can be drawn from an analysis of the decisions in the cases of *Jeong et al. v. the Republic of Korea* and *Atasoy and Sarkut v. Turkey*: “The right to conscientious objection to military service inheres in the right to freedom of thought, conscience and religion. It entitles any individual to an exemption from compulsory military service if this cannot be reconciled with that individual’s religion or beliefs. The right must not be impaired by coercion.”<sup>p</sup>

13. It is precisely because freedom of thought, conscience and religion is inherent in conscientious objection to compulsory military service, as recognized by the Committee,

<sup>j</sup> Communication No. 89/1981, *Muhonen v. Finland*, Views adopted on 6 April 1984 (decision of admissibility).

<sup>k</sup> Communication No. 185/1984, *L.T.K. v. Finland*, Views adopted on 9 July 1985, para. 5.2.

<sup>l</sup> Human Rights Committee, general comment No. 22 (1993), para. 11. *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40 (A/48/40)*, annex VI.

<sup>m</sup> Communications Nos. 1321-1322/2004, *Yoon and Choi v. the Republic of Korea*, Views adopted on 3 November 2006, para. 8.2.

<sup>n</sup> This is clear from para. 8.4 of the Committee’s Views on communications Nos. 1321-1322/2004, *Yoon and Choi v. the Republic of Korea*. In his dissenting opinion, Mr. Solari-Yrigoyen said he found it inappropriate to deal with the issue under article 18, paragraph 3; the Committee ought to have considered it exclusively under article 18, paragraph 1.

<sup>o</sup> Communications Nos. 1642-1741/2007, *Jeong et al. v. the Republic of Korea*, Views adopted on 24 March 2011.

<sup>p</sup> *Ibid.*, para. 7.3 (taken up in para. 10.4 of the Committee’s Views on *Atasoy and Sarkut v. Turkey*).

that the matter cannot be dealt with under article 18, paragraph 3. There can now be no limitation or possible justification under the Covenant for forcing a person to perform military service.

14. The Committee has also clearly set out the requirements to be met by a State party under the International Covenant on Civil and Political Rights as regards civilian alternatives to military service: “A State may, if it wishes, compel the objector to undertake a civilian alternative to military service, outside the military sphere and not under military command. The alternative service must not be of a punitive nature. It must be a real service to the community and compatible with respect for human rights.”<sup>q</sup> Consequently, any person may choose to perform alternative civilian service that meets these requirements.

15. Article 18, paragraph 1, of the International Covenant on Civil and Political Rights states that the right to freedom of thought, conscience and religion includes, for everyone, the *freedom to have or to adopt* beliefs of their choice and the freedom to *manifest* those beliefs. Requiring a person to perform military service against their will violates the two dimensions of the right to freedom of conscience and religion; this reasoning has led the Committee to categorize conscientious objection as *inherent* in freedom of conscience and religion (here I am referring to conscientious objection to compulsory military service, not to other possible forms of conscientious objection on which the Committee takes no position in the present case).

16. The discussion is not about whether, in the case in point, article 18, paragraph 1, of the Covenant has been violated: on this there is consensus. Rather, it is about whether or not the State party’s explanation should be subject to the requirements set out in article 18, paragraph 3. This is not possible, since compulsory military service *impedes conscientious objectors’ enjoyment of the right to have a certain religion or belief*, which is prohibited under article 4, paragraph 2, of the International Covenant on Civil and Political Rights, according to which the right to freedom of thought, conscience and religion is non-derogable in any circumstances.

17. Some members have taken the position that the Committee’s Views in the cases of *Atasoy and Sarkut v. Turkey* and *Jeong et al. v. the Republic of Korea* do not adequately explain its new approach.<sup>r</sup> With all due respect, I must strongly disagree with this position, for the reasons set out above in this reasoned individual opinion. In fact, what needs to be explained is how it can be reasonable to maintain the previous approach in this, the second decade of the twenty-first century. Under the old approach, a State party could find reasons to force a person to use arms, to be involved in an armed conflict, to run the risk of being killed and, worse still, to kill, without this being a violation of the Covenant. How can this be compatible with the freedom of conscience and religion of someone whose philosophical or religious beliefs lead that person to be a conscientious objector (regardless of their freedom to manifest those beliefs or not)?

18. The Committee stated in the case of *Yoon and Choi v. the Republic of Korea* — in connection with article 18, paragraph 3, of the Covenant — that “such restriction must not impair the very essence of the right in question”.<sup>s</sup> Conscientious objection to compulsory

<sup>q</sup> Ibid.

<sup>r</sup> See the individual opinion of Committee members Mr. Yuji Iwasawa, Mr. Gerald Neuman and Mr. Michael O’Flaherty (concurring) in the case of *Jeong et al. v. Republic of Korea* (communications Nos. 1642-1741/2007), in which the authors merely state that the Committee should follow the same reasoning that it used before; and, especially, the individual opinion of Mr. Gerald Neuman (jointly with Mr. Yuji Iwasawa, Mr. Michael O’Flaherty and Mr. Walter Kälin) in the present case of *Atasoy and Sarkut v. Turkey*.

<sup>s</sup> Communications Nos. 1321-1322/2004, *Yoon and Choi v. the Republic of Korea*, Views adopted on 3

military service *also involves* a manifestation of philosophical or religious beliefs. One further argument I would like to make — and this in no way contradicts what is said in the two preceding paragraphs — is that the performance of compulsory military service can never be considered a limitation that is permissible under article 18, paragraph 3, of the Covenant, *because such a so-called “limitation” is no such thing: it is intended to abolish the right altogether*. The Committee’s assessment of possible limitations to the freedom to manifest one’s beliefs or religion will apply to other potential cases of conscientious objection, but never to cases of conscientious objection to performing compulsory military service.

19. It would be impossible to produce figures on how many people in the course of history have had their beliefs flouted by being forced to do military service against their will, or have been persecuted or imprisoned for refusing to take up arms; many others were made to kill or died in armed conflicts in which they did not choose to take part. The recent jurisprudence of the Human Rights Committee on the subject of conscientious objection to military service is not only based on solid legal grounds; it also pays a belated but well deserved homage to those victims.

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

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November 2006, para. 8.3.

**V. Communication No. 1859/2009, *Kamoyo v. Zambia*  
(Views adopted on 23 March 2012, 104th session)\***

<i>Submitted by:</i>	William Kamoyo (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Zambia
<i>Date of communication:</i>	20 December 2008 (initial submission)
<i>Subject matter:</i>	Death penalty, undue delay for hearing of appeal
<i>Procedural issue:</i>	None
<i>Substantive issues:</i>	Right to life; mandatory nature of the death penalty; torture, cruel, inhuman or degrading treatment; due process; right to trial without delay; right to judicial review
<i>Articles of the Covenant:</i>	6, 7 and 14, paragraphs 3 (c) and 5
<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 23 March 2012,*

*Having concluded* its consideration of communication No. 1859/2009, submitted to the Human Rights Committee by William Kamoyo 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. The author of the communication is William Kamoyo, born in 1973, who is currently on death row in the Maximum Security Prison in Kabwe, Zambia. He claims to be a victim of violations by the State party of the International Covenant on Civil and Political Rights, as review of his case by the Supreme Court of Zambia has been unduly prolonged. Although he does not invoke any articles of the Covenant, his communication appears to raise issues under articles 6, 7 and 14 of the Covenant. He is not represented by counsel.<sup>1</sup>

\* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, 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, Mr. Krister Thelin and Ms. Margo Waterval.

<sup>1</sup> Both the Covenant and the Optional Protocol entered into force for Zambia on 9 July 1984.

**The facts as presented by the author**

2.1 On 9 June 1992, the author was charged with murder. His jury trial started in May 1993, and he was sentenced to death on 12 June 1995.

2.2 Less than 30 days after his conviction, the author lodged an appeal before the Supreme Court. At the time of submission of his communication to the Committee, that is, 13 years after he lodged his appeal, he was still awaiting review of his case by the Supreme Court, as his case file had been lost.

**The complaint**

3. The author claims that his appeal before the Supreme Court has been unduly delayed, which appears to raise issues under articles 6, 7 and 14, paragraphs 3 (c) and 5, of the Covenant.

**State party's failure to cooperate**

4. On 18 August 2009, 16 March 2010 and 24 January 2011, the State party was requested to submit information concerning the admissibility and merits of the communication. The Committee notes that this information has not been received. It regrets the State party's failure to provide any information with regard to the admissibility and/or substance of the author's claims. It recalls that, under the Optional Protocol, the State party concerned is required to submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by the State. In the absence of a reply from the State party, due weight must be given to those of the author's allegations that have been properly substantiated.<sup>2</sup>

**Issues and proceedings before the Committee***Consideration of admissibility*

5.1 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 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.

5.2 The Committee notes the State party's failure to provide any submission on this case. At the time of submission of his communication to the Committee, that is, 13 years after his conviction, the author was still waiting for his appeal hearing and remained on death row. The State party has provided no explanation for this delay, nor any other information of relevance to the author's communication. Thus, the Committee considers that the delay in the disposal of the author's appeal amounts to an unreasonably prolonged delay within the meaning of article 5, paragraph 2 (b), of the Optional Protocol and therefore declares the communication admissible.

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<sup>2</sup> See, inter alia, communications No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para. 4; No. 1295/2004, *El Alwani v. Libyan Arab Jamahiriya*, Views adopted on 11 July 2007, para. 4; No. 1208/2003, *Kurbonov v. Tajikistan*, Views adopted on 16 March 2006, para. 4; and No. 760/1997, *Diergaardt et al. v. Namibia*, Views adopted on 25 July 2000, para. 10.2.

*Consideration of the merits*

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

6.2 The Committee notes the author's allegation that his appeal had not yet taken place 13 years after his conviction, "because his case record was lost", and recalls that the State party has provided no arguments on the author's claim. It reaffirms that the burden of proof cannot rest on the author of the communication alone, especially considering that the author and the State party do not always have equal access to the evidence and frequently the State party alone has the relevant information. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to furnish to the Committee the information available to it. In the light of the failure of the State party to cooperate with the Committee on the matter before it, due weight must be given to the author's allegations, to the extent that they have been substantiated.

6.3 The Committee notes that the author was convicted of murder, and recalls its jurisprudence<sup>3</sup> as reflected in its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial,<sup>4</sup> that the rights contained in article 14, paragraphs 3 (c) and 5, read together, confer a right to review of a conviction without delay, and that the right of appeal is of particular importance in death penalty cases. It notes that 13 years after conviction, the author was still waiting for his appeal to be considered by the Supreme Court, due to apparent negligence resulting in the loss of his case record. The Committee recalls that at the time of examination of the present communication, that is, close to 17 years since the author's conviction, the State party has not submitted information indicating that the author's appeal has been heard. The Committee concludes that the delay in the instant case violates the author's right to review without delay, and consequently finds a violation of article 14, paragraphs 3 (c) and 5, of the Covenant.

6.4 The Committee recalls its jurisprudence that the imposition of a sentence of death upon conclusion of criminal proceedings in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant.<sup>5</sup> In the present case, the author's death sentence has been pending on appeal for nearly 17 years, in violation of the right to a fair trial as guaranteed by article 14 of the Covenant, and therefore also in violation of article 6 of the Covenant.

6.5 The Committee further considers that the author's detention on death row, where, at the time of submission of his communication, he had been waiting for 13 years for the hearing of his appeal, raises issues under article 7 of the Covenant. The Committee recalls that prolonged delays in the execution of a sentence of death do not per se constitute cruel, inhuman or degrading treatment. On the other hand, each case must be considered on its own merits, bearing in mind the imputability of delays in the administration of justice on

<sup>3</sup> See for example communications No. 390/1990, *Lubuto v. Zambia*, Views adopted on 31 October 1995; No. 523/1992, *Neptune v. Trinidad and Tobago*, Views adopted on 16 July 1996; No. 614/1995, *Thomas v. Jamaica*, Views adopted on 31 March 1999; No. 702/1996, *McLawrence v. Jamaica*, Views adopted on 18 July 1997; and No. 588/1994, *Johnson v. Jamaica*, Views adopted on 22 March 1996.

<sup>4</sup> *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI.

<sup>5</sup> See for example communications No. 719/1996, *Levy v. Jamaica*, Views adopted on 3 November 1998; No. 730/1996, *Marshall v. Jamaica*, Views adopted on 3 November 1998; and No. 1096/2002, *Kurbanova v. Tajikistan*, Views adopted on 6 November 2003.



the State party, the specific conditions of imprisonment in a maximum security prison and their psychological impact on the person concerned.<sup>6</sup> In the instant case, in addition to the psychological distress created by prolonged detention on death row, the uncontested evidence before the Committee indicates that the author's case record was lost. The Committee concludes that the failure of the Supreme Court of Zambia to decide on the author's appeal within a reasonable period must be attributed to negligence by the State party. As a consequence, the Committee considers that the author's prolonged detention on death row constitutes a breach of the obligations of Zambia under article 7 of the Covenant.

7. 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 State party has violated articles 6; 14, paragraph 3 (c); 14, paragraph 5; and 7 of the International Covenant on Civil and Political Rights.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including either his retrial in conformity with all guarantees enshrined in the Covenant, or his release;<sup>7</sup> as well as appropriate reparation, including adequate compensation. The State party is under an obligation to avoid similar violations in the future.

9. Bearing in mind that, by becoming a State 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 and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official language of the State party.

[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 to the General Assembly.]

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<sup>6</sup> See, inter alia, *Johnson v. Jamaica* (note 3 above), paras. 8.4 ff., and communication No. 606/1994, *Francis v. Jamaica*, Views adopted on 25 July 1995, para. 9.1.

<sup>7</sup> See, inter alia, *Kurbanova v. Tajikistan* (note 5 above), para. 9; and communication No. 1503/2006, *Akhadov v. Kyrgyzstan*, Views adopted on 25 March 2011, para. 9.

**W. Communication No. 1862/2009, *Pathmini Peiris et al. v. Sri Lanka*  
(Views adopted on 26 October 2011, 103rd session)\***

<i>Submitted by:</i>	Annakkarage Suranjini Sadamali Pathmini Peiris (represented by counsel, Asian Legal Resource Centre Ltd.)
<i>Alleged victims:</i>	The author, her deceased husband Mr. Siyaguna Kosgodage Anton Sugath Nishantha Fernando and their two minor children, Siyaguana Kosgodage Kalpani Danushi Fernando (born in 1992) and Siyagana Kosgodage Sinesh Antony Fernando (born in 1997)
<i>State party:</i>	Sri Lanka
<i>Date of communication:</i>	6 February 2009 (initial submission)
<i>Subject matter:</i>	
<i>Procedural issue:</i>	Non-cooperation of State party
<i>Substantive issues:</i>	Arbitrary deprivation of life; torture and ill-treatment; lack of proper investigation; right not to be subjected to arbitrary or unlawful interference with one's family; right to the family
<i>Articles of the Covenant:</i>	Article 2, paragraph 3; article 6; article 7; article 9, paragraph 1; article 17; article 23, paragraph 1
<i>Article of the Optional Protocol:</i>	None

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

*Meeting on 26 October 2011,*

*Having concluded* its consideration of communication No. 1862/2009, submitted to the Human Rights Committee on behalf of Ms. Annakkarage Suranjini Sadamali Pathmini Peiris, Mr. Siyaguna Kosgodage Anton Sugath Nishantha Fernando, and their two minor children, Siyaguana Kosgodage Kalpani Danushi Fernando (born in 1992), and Siyagana Kosgodage Sinesh Antony Fernando (born in 1997), 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,

*Adopts* the following:

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\* The following members of the Committee participated in the examination of the present communication: Lazhari Bouzid, Christine Chanet, Ahmad Amin Fathalla, Cornelis Flinterman, Yuji Iwasawa, Rajsoomer Lallah, Zonke Zanele Majodina, Iulia Antoanella Motoc, Gerald L. Neuman, Michael O'Flaherty, Rafael Rivas Posada, Fabián Omar Salvioli, Krister Thelin and Margo Waterval.

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

1.1 The author of the communication is Ms. Annakkarage Suranjini Sadamali Pathmini Peiris. She submits the communication on behalf of her husband, Mr. Siyaguna Kosgodage Anton Sugath Nishantha Fernando, deceased on 20 September 2008, on her own behalf, and on behalf of their two minor children, Siyaguna Kosgodage Kalpani Danushi Fernando and Siyaguna Kosgodage Sinesh Antony Fernando. The author claims that she and her family are the victims of violations of article 6, read in conjunction with article 2, paragraph 3; article 7, read in conjunction with article 2, paragraph 3; article 9, paragraph 1, read in conjunction with article 2, paragraph 3; article 17 and article 23, paragraph 1, of the Covenant by the Democratic People's Republic of Sri Lanka ("Sri Lanka"). She is represented by the Asian Legal Resource Centre Ltd.

1.2 On 12 February 2009, the Committee, acting through its Special Rapporteur for New Communications, and pursuant to rule 92 of its rules of procedure, requested the State party to take measures to ensure the protection of Ms. Annakkarage Suranjini Sadamali Pathmini Peiris and her family while her case was under consideration by the Committee. This request was reiterated on 15 September 2009. The State party has not responded to either of these requests by the Committee.

### The facts as presented by the author

2.1 The author and her husband, Mr. Siyaguna Kosgodage Anton Sugath Nishantha Fernando, purchased a lorry on 24 May 2003 from M.P., then officer in charge of the Kochikade police station. The officer sold the lorry to the author and her husband, giving them to believe that he was the legitimate owner of the vehicle. Later, it was revealed that the lorry was a stolen vehicle, and that the officer had changed its registration plate before selling it to the author and her husband. When they learned of his fraudulent conduct, the author and her husband filed a complaint against M.P., and a disciplinary inquiry was initiated against him. Once the inquiry started, the officer and several of his colleagues tried to threaten the author and her husband, asking them to withdraw their complaint. The officer was indicted in December 2005, but died in the same month. Because of this initial complaint filed, a number of police officers started considering the author and her husband as a threat.

2.2 A fabricated complaint was made by the Negombo police against the author's husband in 2003, when he had visited the police station to register a complaint against three local thugs who had robbed him in the street. Instead of recording his complaint, the police accused him of reporting a false crime. The author's husband filed a complaint before the Human Rights Commission of Sri Lanka, requesting intervention in his case, but no action followed. The officer in charge of the Negombo police station, M.D., demanded a bribe of 20,000 Sri Lanka rupees<sup>1</sup> from the author's husband. The latter refused to pay, and instead filed a further complaint before the National Police Commission (NPC) against the officer. No action followed. On 11 June 2004, the author and her husband gave a statement before the Bribery Commission. The Commission only initiated proceedings against Officer M.D. two years later. The procedure<sup>2</sup> is still pending before the Colombo High Court. According to the author, this new incident rallied several police officers close to M.D. against the author and her family.

2.3 In 2006, the Superintendent of Police in Negombo, M., summoned the author and her husband to his office, on the pretext that their statements needed to be recorded in the

<sup>1</sup> Approximately 180 United States dollars.

<sup>2</sup> Registered as B/1658/2006.

departmental inquiry against M.D. At the Superintendent's office however, the author and her husband were intimidated, and were threatened that unless they immediately withdrew their complaint against M.D., they would pay a heavy price for opposing the police. No statement was recorded. After this incident, the author and her husband filed a complaint against Superintendent M.

2.4 In the same year, the author and her husband went to the Negombo police station regarding a document concerning one of their vehicles. At the police station, they met with Chief Inspector N., as well as another officer who introduced himself as an officer attached to the Crime Branch. Instead of assisting them, the two officers shouted at and insulted the couple, ordering them not to come to the Negombo police station any more if they cared for their lives. The officers also stated that if they wished to stay alive, they had to withdraw the complaints they had filed against several police officers. After this incident, the author and her husband filed a further complaint against the Chief Inspector and the accompanying officer of the Negombo police station before the Office of the Deputy Inspector General in relation to the death threats received, asking for an investigation. To their surprise, the Deputy Inspector General directed this complaint to Superintendent M., against whom the couple had already filed a complaint.

2.5 In 2006, under the pretext of recording a statement related to the complaint against Superintendent M., the author and her husband were summoned to the office of the Senior Superintendent of Police, where they were verbally abused and threatened that they would be murdered if they maintained their complaints, asking them to withdraw complaints against officers M.D. and M.. The couple then filed a further complaint before the Deputy Inspector General's office, requesting an investigation into the incident, and seeking protection for their family. No action was taken in response to this complaint.

2.6 On 10 September 2006, after the author and her husband had gone to the market by motorcycle, they were approached by a police officer, who asked them why they were not wearing helmets. The couple replied that they did not need to, as they were not riding their motorcycle. Another officer then approached them, and asked them to immediately withdraw their complaint against Superintendent M., seized the keys to the motorcycle, and threatened to arrest the author's husband. The same day, the couple were arrested, and a false case was registered against them, but they were subsequently released on bail by the Negombo Magistrate Court.

2.7 On 23 September 2007, the lawyer who assisted the author and her children to deliver their statements was threatened over the telephone by an unknown person. The caller threatened to murder her if she further assisted the author and her family. Similar calls were made to the Right to Life, a local human rights organization. The author and her family started living in hiding.

2.8 On 12 November 2007, two police officers, Sub-Inspector A. and Constable D., came to the author's house, requesting her and her husband not to submit evidence against Officer M.D. at the Colombo High Court on 14 November 2007.<sup>3</sup> The officer further insulted and threatened to kill the author's husband. Officer A. then slapped the author's husband's face. The author's husband asked his daughter to write down the number of the officer's licence plate, but the officer drove towards her and hit her with his motorcycle, knocking her to the ground. Six additional officers were called to the author's house. Fearing for their lives, the author immediately contacted the Bribery Commission, seeking help. The officer who attended the call informed the author that he would relay the

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<sup>3</sup> Proceedings registered under B/1658/2006, and initiated before the Colombo High Court, further to the transfer of the couple's complaint against Officer M.D. by the Bribery Commission, *supra*, para. 2.2.

information to the Headquarter Inspector<sup>4</sup> for intervention. Headquarter Inspector S. arrived at the author's house accompanied by 50 officers, 20 of whom entered the house, and assaulted the entire family. The author's husband was attacked, fell to the ground and lost consciousness. The officers continued hitting and kicking him, while others assaulted the author. The Headquarter Inspector hit her on the face with a pistol, and another punched and hit the face of her 10-year-old son against the wall. The author, her husband and their daughter were then forced into the police vehicle. One officer tried to undress the author's daughter.

2.9 Following the incident,<sup>5</sup> the author filed a complaint before the Supreme Court of Sri Lanka for acts of torture, and thereby a breach of their fundamental rights against 13 police officers, including senior superintendents of the Negombo police, inspectors, sub-inspectors, sergeants and constables. The case is still pending before the Supreme Court.<sup>6</sup>

2.10 The author and her daughter were hospitalized at the Negombo hospital. The author was hospitalized for five days, and later needed to undergo surgery on her fractured nose. The police denied medical help to the author's husband. While the author and her daughter were in the hospital, the police charged the entire family with obstruction to police duties. The family obtained bail. The author alleges that as a result of the assault she suffered several injuries and contusions to her face, jaw and teeth.

2.11 On 23 June 2008, four persons in a lorry ordered the author and her husband to stop near Chilaw at Dalupata Bridge on the Colombo road. These included N.N. and N.M. (N.N. was an army deserter with a criminal record), who shouted that they were under instruction by the Negombo police to kill them. The author and her husband were frightened and immediately returned home. Shortly after, they found N.N. and N.M. along with two other persons in front of their house, asking her to open the gate, threatening to kill them the next day should they refuse to withdraw their complaint. The author and her husband later went to the office of the Deputy Inspector General (Crimes) and lodged a complaint about the incident.<sup>7</sup> The author's husband also filed an affidavit before the police the next day about the incident. The incident was reported to the Asian Human Rights Commission (AHRC), which wrote on 24 June 2008 to the Minister of Disaster Management and Human Rights in Colombo, seeking an intervention. The AHRC also submitted a communication to the United Nations Special Rapporteur on torture.

2.12 On 20 September 2008, while the author's husband and their son were inside their lorry at Dalupota junction near their house, two masked individuals approached them and fired two shots from a small firearm at the author's husband. The first shot missed him, but the second entered his head through the ear, killing him instantly. The assassins left the scene in the same vehicle in which they had arrived. The author's husband was declared dead at the hospital shortly afterwards.

2.13 On 11 November 2008, the author filed an affidavit at the Negombo Magistrate's Court, alleging that there were serious threats against her and her family in relation to her pursuit of her complaints of bribery and torture instituted against police officers. On 7 December 2008, the author filed another affidavit at the Paliyagoda Police Station, stating that she and her children were finding it extremely difficult to live in hiding since no investigation had been carried out regarding her husband's murder, and that his murderers

<sup>4</sup> Who reports to the police headquarters in Colombo, rather than to the local police station.

<sup>5</sup> The author did not specify whether they were detained, nor how long they were under arrest.

<sup>6</sup> Case SCFR 446/2007, filed against: the Senior Superintendent of Negombo police, P.V., Superintendent M., Headquarter Inspector S. L., Inspectors of Police S., S.L. and P., Sub-Inspectors of police A., R. N.H., L., Police Sergeant S. L. and Police Constable D.

<sup>7</sup> Complaint registered under number SIIV 345/266.

were searching for the author and her children to assassinate them. The author stressed in the affidavit that the reason why the murderers of her husband had not been identified or arrested was because the murder had been organized by the police officers who had threatened the author and her family on various occasions.

2.14 On 24 January 2009, the Right to Life organization received a call from Colombo, threatening staff assisting the author in her complaints of murder should they continue to do so. The President of the organization filed a complaint to the Inspector General of Police in this regard, but no proper investigation has so far been undertaken.

2.15 On 27 January 2009, while the author's lawyer was at the Negombo Police Station to file a complaint on her behalf, and to seek protection for her and her children, one of the police officers in the Supreme Court fundamental rights application filed by the author (Mr. B.)<sup>8</sup> verbally abused him, and threatened that he would also be killed if he continued helping the author. The officer assaulted the lawyer, threatening him with death if he came back to the police station, and coercing him to withdraw all the complaints against the police officers, including that regarding bribery, the fundamental rights application, and the complaints filed at various stages against police officers for threats received by the author and her family, as well as the complaint for torture. Fearing for his life, the lawyer left the police station.

2.16 After the incident, the lawyer filed a complaint before various authorities in Sri Lanka, including the Bar Association, but no investigation has been initiated. On 30 January 2009, an unknown arsonist set fire to his office. On 27 September 2008, two grenades were hurled into the house of another lawyer, whose name appears in the author's fundamental rights application. No proper investigation has been carried out into these incidents.

### **The complaint**

3.1 The author contends that the facts described constitute violations of article 6, read in conjunction with article 2, paragraph 3; article 7, read in conjunction with article 2, paragraph 3; article 9, paragraph 1, read in conjunction with article 2, paragraph 3; article 17 and article 23, paragraph 1, of the Covenant.

3.2 Regarding article 6, the author stresses that after the incident of 12 November 2007, when she and her family were publicly assaulted, they persistently sought help from the authorities. Even though they were filing complaint after complaint, the threats intensified, culminating in the murder of the author's husband. The author stresses that the lack of affirmative action by the State party to safeguard her life and that of her family, in particular her husband's, violates their rights guaranteed under article 6, read in conjunction with article 2, paragraph 3, of the Covenant.<sup>9</sup>

3.3 Concerning article 7, the author claims that they were severely tortured on 12 November 2007, causing her daughter's and her own hospitalization. The author stresses that in addition to these acts of torture, the family has been forced to live in hiding due to continuous threats to their lives from the police, which continued after her husband's death. Additionally, all those who have associated themselves with the author and her family have run considerable risks to their lives. The author contends that even though torture is recognized as a crime in Sri Lanka,<sup>10</sup> no one has been punished in relation to her case, and

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<sup>8</sup> *Supra*, para. 2.9.

<sup>9</sup> The author refers to communication No. 90/1981 *Luyeye Magana ex-Philibert v. Zaire*, Views adopted on 21 July 1983, para. 8.

<sup>10</sup> Act Number 22 (1994).

her fundamental rights application filed before the Supreme Court remains pending. She alleges that the lack of redress for acts of torture suffered amounts to a violation of article 7, read in conjunction with article 2, paragraph 3, of the Covenant with regard to her family.

3.4 With regard to article 9, paragraph 1, and stressing that her case is not an isolated incident in Sri Lanka, the author contends that by failing to take adequate action for the protection of the security of her family, the State party has breached article 9, paragraph 1, read in conjunction with article 2, paragraph 3, of the Covenant in their regard.

3.5 The author further alleges that the State party breached articles 17 and 23, paragraph 1, stressing that since 2004 they have been harassed by police officers by means of threatening telephone calls and visits. She contends that this has interfered with their peaceful enjoyment of life, and that despite several requests for protection, the threats intensified, culminating with the murder of her husband. The author also recalls that her family life has to date been marked by financial and emotional uncertainty, and that the children have been prevented from attending school, thereby denying them their right to education, and their family rights protected under article 17 and article 23, paragraph 1, of the Covenant.

3.6 Regarding exhaustion of domestic remedies, the author stresses that despite a dozen complaints filed before various State party authorities, including the President of Sri Lanka; the Chief Justice of the Supreme Court of Sri Lanka; the Minister of Disaster Management and Human Rights and the secretary of this ministry; the Inspector General of Police; the Deputy Inspector General of Police; the National Police Commission; the Human Rights Commission of Sri Lanka and the Magistrate's Court of Negombo, her husband was murdered, further threats continued to be received, no one has been arrested in connection with the events, and no investigation undertaken. Human rights defenders and lawyers assisting the family have themselves been threatened. In this context, the author stresses that the lack of progress in the proceedings, together with the fact that the alleged perpetrators have pursued their functions as police officers, have resulted in the de facto immunity of perpetrators to any proceedings. She adds that it is highly unlikely that any credible proceedings will be initiated, in light of the lack of effectiveness and delays in the proceedings in her case,<sup>11</sup> assessed in light of the general lack of domestic remedies<sup>12</sup> available to the complainant to be exhausted in Sri Lanka. The author therefore concludes that domestic remedies have been demonstrated to be ineffective, and that she should not be requested to pursue them further for her communication to be admissible before the Committee.

#### **Further submission from the author**

4.1 On 10 September 2009, the author informed the Committee that she had received a threat during time she spent in India, between 13 June and 26 August 2009, and that the danger had escalated since the family's return to Sri Lanka on the expiration of their visas. On 7 September 2009, the author's vehicle was chased by another car, when she was driving back from a court appearance. She also received a number of anonymous phone

<sup>11</sup> The author refers to communications No. 59/1996, *Encarnación Blanco Abad v. Spain*, decision adopted on 14 May 1998, paras. 8.2 and 8.6, and No. 60/1996, *M'barek v. Tunisia*, decision adopted on 10 November 1999, para. 11.6.

<sup>12</sup> The author stresses that in Sri Lanka, it is common for investigations to suffer long delays and illegal interventions by corrupt officers at various levels, due to the collapse of the rule of law regime in the country. She adds that the consistent position taken by the Government of Sri Lanka is that due to 28 years of armed conflict, criminal investigations as required by law are not possible as of now. Only two cases are known to the author in which perpetrators have been sentenced for engaging in torture in Sri Lanka.

calls, which informed her that her house would be burnt, and that her family would be murdered. The author also informed the Committee that despite its request for interim measures of protection on her behalf, the State party had not taken any steps in this regard.

4.2 On 15 September 2009, the above-mentioned information from the author was shared with the State party, along with a reminder of the Committee's request, pursuant to rule 92 of its rules of procedure, to the State party to take measures to ensure the protection of the author and her family while her case is under consideration by the Committee.

#### **State party's failure to cooperate**

5.1 By notes verbales of 15 September 2009, 24 February 2010 and 24 January 2011, the State party was requested to submit information to the Committee on the admissibility and merits of the communication. The Committee notes that this information has not been received. The Committee regrets the State party's failure to provide any information with regard to admissibility or the substance of the author's claims. It recalls that article 4, paragraph 2, of the Optional Protocol obliges States parties to examine in good faith all allegations brought against them, and to make available to the Committee all information at their disposal. In the absence of a reply from the State party, due weight must be given to the author's allegations, to the extent that they are substantiated.

5.2 The Committee further notes with regret that the State party has failed to respond to its request, made pursuant to rule 92 of its rules of procedure, to take measures to ensure the protection of the author and her family while her case is under consideration by the Committee. It recalls that interim measures are essential to the Committee's role under the Optional Protocol, and that flouting of the rule undermines the protection of Covenant rights through the Optional Protocol.

#### **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 article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol.

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

6.3 In the absence of any submission by the State party on the admissibility of the communication, and noting the author's statement that domestic remedies have proven to be ineffective, the Committee declares the communication admissible, in as far as it appears to raise issues under article 6, read in conjunction with article 2, paragraph 3; article 7, read alone and in conjunction with article 2, paragraph 3; article 9, paragraph 1; article 17 and article 23, paragraph 1, of the Covenant.

##### *Consideration of the merits*

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it, as provided in article 5, paragraph 1, of the Optional Protocol. It recalls that in the absence of a reply from the State party, due weight must be given to the author's allegations, to the extent that they are substantiated.



7.2 Regarding the author's claim under article 6, the Committee recalls that the right to life is the supreme right, from which no derogation is permitted.<sup>13</sup> It further recalls that States parties have a positive obligation to ensure the protection of individuals against violations of Covenant rights, which may be committed not only by its agents, but also by private persons or entities.<sup>14</sup> The Committee observes that according to the uncontested material at its disposal, the author and her family received a number of direct threats from the police, i.e. agents of the State party, including death threats, seeking to unlawfully coerce them into withdrawing complaints filed by them against police officers. On 20 September 2008, it is reported that the author's husband was shot dead by masked men, three months after two individuals had told the family that they had been instructed by the Negombo police to kill them. After this threat, the author and her husband had filed several complaints, including before the Office of the Deputy Inspector General and the police, but no action was undertaken by the authorities to protect the family. In these circumstances, and taking into account the State party's lack of cooperation, the Committee is of the view that the facts before it reveal that the death of the author's husband must be held attributable to the State party itself. The Committee accordingly concludes that the State party is responsible for the arbitrary deprivation of life of the author's husband, in breach of article 6 of the Covenant.

7.3 As to the claim under article 7, the Committee recalls that the State party has not challenged the evidence submitted by the author to the effect that on 12 November 2007, police officers broke into her residence, beat her husband until he fell to the ground and lost consciousness, hit her with a pistol, punched her 10-year-old son against the wall, hit her daughter with a motorcycle, knocking her to the ground, and later sought to undress her. In the circumstances, the Committee concludes that the author, her husband and their two children were subjected to treatment contrary to article 7 of the Covenant.

7.4 The Committee recalls that criminal investigation and consequential prosecution are necessary remedies for violations of human rights such as those protected by articles 6 and 7 of the Covenant.<sup>15</sup> In the instant case, the Committee observes that the numerous complaints filed by the author have not led to the arrest or prosecution of a single perpetrator. In the absence of any explanation by the State party, and in view of the detailed evidence placed before it, including the identification by name, by the author, of all alleged perpetrators, the Committee concludes that the State party must be held to be in breach of its obligations under article 2, paragraph 3, read in conjunction with articles 6 and 7, to properly investigate and take appropriate remedial action regarding the death of the author's husband, and the ill-treatment suffered by the author and her family.

7.5 Regarding the author's claim under article 9, paragraph 1, the Committee recalls its jurisprudence,<sup>16</sup> and reiterates that the Covenant also protects the right to security of

<sup>13</sup> General comment No. 6 (1982) on the right to life, *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40)*, annex V, para. 1.

<sup>14</sup> 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 (A/59/40 (Vol. I))*, annex III, para. 8.

<sup>15</sup> 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 (A/59/40 (Vol. I))*, annex III. See also communications Nos. 1619/2007, *Pestaño v. the Philippines*, Views adopted on 23 March 2010, para. 7.2; 1447/2006, *Amirov v. Russian Federation*, Views adopted on 2 April 2009, para. 11.2, and 1436/2005; *Sathasivam v. Sri Lanka*, Views adopted on 8 July 2008, para. 6.4.

<sup>16</sup> Communication No. 195/1985, *Delgado Páez v. Colombia*, Views adopted on 12 July 1990, para. 5.5; communication No. 711/1996, *Dias v. Angola*, Views adopted on 20 March 2000, para. 8.3;

persons outside the context of formal deprivation of liberty. The interpretation of article 9 does not allow a State party to ignore threats to the personal security of non-detained persons subject to its jurisdiction. In the present case, it appears that persons acting in an official capacity within the Negombo police station have on several occasions threatened the author and her family with death. In the absence of any action from the State party to take reasonable and appropriate measures to protect the author and her family, the Committee concludes that the State party breached the author's and her family's right to security of person, protected by article 9, paragraph 1, of the Covenant.

7.6 The Committee has taken note of the author's contention that police officers harassed her and her family in their home through threatening telephone calls and forced visits, including the severe assault on their home in November 2007, and that subsequently they feared to live in their home and were forced into hiding, and were unable to live a peaceful family life. The Committee also notes the continuing harm resulting from the State party's failure to take any action in response to the Committee's request to adopt interim measures to protect the author and her family. In the absence of any rebuttal by the State party, the Committee concludes that the State party's interference with the privacy of the family home of the author was arbitrary, in violation of article 17 of the Covenant.<sup>17</sup>

7.7 The Committee further takes note of the author's contention of a violation of article 23, paragraph 1, of the Covenant, and finds that the violation of articles 6, 7 and 17, in light of the circumstances of the case, also constitute a violation of these articles read in conjunction with article 23, paragraph 1, of the Covenant.

8. 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 facts as found by the Committee reveal violations by Sri Lanka of article 6, read alone and in conjunction with article 23, paragraph 1, vis-à-vis the author's husband; article 2, paragraph 3, read in conjunction with article 6 and article 7, vis-à-vis the author herself, her husband, and their two children; article 7, read alone and in conjunction with article 23, paragraph 1, vis-à-vis the author, her husband and their two children; article 9, paragraph 1, vis-à-vis the author, her husband and their two children; and article 17, read alone and in conjunction with article 23, paragraph 1, of the Covenant vis-à-vis the author, her husband and their two children.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, which includes ensuring that perpetrators are brought to justice, that the author and her two children can return to their domicile in safety, and ensure reparation, including payment of adequate compensation and an apology to the family. The State party should also take measures to ensure that such violations do not recur in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy where a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the

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communication No. 821/1998, *Chongwe v. Zambia*, Views adopted on 25 October 2000, para. 5.3.

<sup>17</sup> See communication No. 687/1996, *Rojas García v. Colombia*, Views adopted on 3 April 2001, para. 10.3.

Committee's Views, and to have them translated into the official languages of the State party, and widely distributed.

[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 to the General Assembly.]

**X. Communication No. 1866/2009, *Chebotareva v. Russian Federation* (Views adopted on 26 March 2012, 104th session)\***

<i>Submitted by:</i>	Olga Chebotareva (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Russian Federation
<i>Date of communication:</i>	18 October 2008 (initial submission)
<i>Subject matter:</i>	Refusal to issue permission to conduct pickets
<i>Procedural issue:</i>	Degree of substantiation of claims
<i>Substantive issues:</i>	Right to peaceful assembly and to a court hearing by a competent, independent and impartial tribunal
<i>Articles of the Covenant:</i>	14, paragraph 1, and 21
<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 26 March 2012,*

*Having concluded* its consideration of communication No. 1866/2009, submitted to the Human Rights Committee by Olga Chebotareva 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. The author of the communication is Olga Chebotareva, a national of the Russian Federation<sup>1</sup> born in 1980. She claims to be a victim of a violation by the Russian Federation of her rights under articles 14, paragraph 1, and 21 of the International Covenant on Civil and Political Rights. The author is not represented by counsel.

**The facts as presented by the author**

2.1 On 1 October 2007, the author and one Ms. Kozlovskaya requested the city administration of Nizhny Novgorod to grant them permission to conduct a public event — a

\* The following members of the Committee participated in the examination of the present communication: 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, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvio, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

<sup>1</sup> The Optional Protocol entered into force for the Russian Federation on 1 January 1992.

picket at the city's Gorky Square — which they were planning for 7 October 2007. The stated purpose of the event was to mark the anniversary of the murder of Anna Politkovskaya<sup>2</sup> and to protest against political repression in the country. They informed the city administration that 45 persons would be participating in the event.

2.2 On 2 October 2007, the city administration informed the author and other organizers that the city authorities were planning to hold events dedicated to Teachers' Day on 7 October 2007. It stated that those events would be held at the same Gorky Square. As an alternative, the city administration suggested conducting the picketing event in another location.

2.3 The author submits that the proposed location was far from the city centre. Because of the remote location, the purpose of the picket would be thwarted. On the same day they received the city administration's response, the author and other organizers informed the city administration by fax that, in their view, the reasons for denying the request for the picket were unsubstantiated. On 3 October 2007, the author and other organizers received another letter from the city administration, which stated that no agreement had been reached on the venue of the picket and, therefore, the organizers had no permission to hold the event.

2.4 Also on 2 October 2007, the author and other organizers submitted a second request to the city administration of Nizhny Novgorod, for an event in a different location. The requested venue for this picket, to be held on 7 October 2007, was the intersection of Bolshaya Pokrovskaya Street and Malaya Pokrovskaya Street. This second picket would also mark the anniversary of the murder of Anna Politkovskaya. The organizers informed the city administration that 30 persons would be participating in the event.

2.5 On 3 October 2007, Mr. Shimovolos, one of the picket organizers, submitted additional information on the second picket, indicating that the intended location for the event was on the right side of the "Jan Jak" hotel, away from pedestrians and car traffic.

2.6 On 4 October 2007, the city administration responded by again suggesting a different location for the picket, as, according to it, the location suggested by the organizers was an area of heavy vehicle and pedestrian traffic. Thus, according to the administration, the picket at that location would be a hazard to public safety. The city administration also claimed that they could not locate the "Jan Jak" hotel on the corner of Bolshaya Pokrovskaya Street and Malaya Pokrovskaya Street. Despite further clarifications provided by the organizers, the city administration refused to give permission. Consequently, neither event was held as planned.

2.7 The author claims that the two events would have been conducted in accordance with the law and would not have constituted a threat to the public safety, order, health or morals of the population. She also claims that on 7 November 2007, the day of the planned events, the city's Gorky Square was empty and there were no other events held, despite the city administration's previous statement.

2.8 On an unspecified date, the author and other organizers filed a suit with the Nizhegorodsky District Court, alleging violations of their right to freedom of assembly. On 18 December 2007, the Nizhegorodsky District Court issued a decision finding that the actions of the city administration were not unlawful. The author claims that the court that examined her claim was not a "competent, independent and impartial tribunal", as it did not address the claims regarding violations of the right to freedom of assembly. Instead,

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<sup>2</sup> Anna Politkovskaya was a Russian journalist, author and human rights activist well known for her opposition to the Chechen conflict and then-President Vladimir Putin.

according to the author, the court focused on the lawfulness of the Nizhny Novgorod city administration's decision.

2.9 On 21 December 2007, the author filed an appeal against the decision of the Nizhegorodsky District Court with the Nizhegorodsky Regional Court which, on 29 January 2008, rejected the appeal and upheld the decision of the lower district court.

2.10 The author submits that she also filed a supervisory review request on 27 May 2008 to the Nizhegorodsky Regional Court. On 3 June 2008, that Court rejected her appeal, citing violations of procedural rules for filing supervisory review appeals.

2.11 On 16 June 2008, the author submitted a second supervisory review request to the Nizhegorodsky Regional Court. On 24 July 2008, the court rejected the second appeal, finding that the lower court decisions had been authenticated by a notary public and not by a judge, as required by law. The author claims that the court had had no intention of looking into the merits of the case and rejected the appeal for purely technical reasons.

### **The complaint**

3.1 The author claims that, by refusing permission to conduct the pickets, the State party violated her right to freedom of assembly, as guaranteed by article 21 of the Covenant.

3.2 She further claims that the court hearing during which she challenged the city administration's decision was not conducted by a "competent, independent and impartial tribunal", thus violating her rights under article 14, paragraph 1, of the Covenant. The author submits that instead of considering the restrictions placed on her right to peaceful assembly, the court only looked into the lawfulness of the city administration's actions.

3.3 The author also submits that during the supervisory appeal, the Nizhegorodsky Regional Court never looked into the merits of her case, and rejected both supervisory appeals on purely formal and technical grounds.

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

4.1 By note verbale of 15 May 2009, the State party provided its observations on the admissibility and merits. It submits that on 1 October 2007, the author requested permission to conduct a picket at Gorky Square in Nizhny Novgorod. The State party submits that the city administration was planning to hold other events dedicated to Teachers' Day. Therefore, the organizers were given the option to conduct the picket at another location, and were provided with several suggestions for alternatives in other parts of the city.

4.2 The State party also points out that, according to Federal Law No. 54-FZ on gatherings, meetings, demonstrations, rallies and picketing, the organizers of the public event do not have a right to conduct such an event if the organizers and local authorities cannot agree on the event's location.

4.3 The State party further submits that on 2 October 2007, the city administration received the second request to conduct the picket, this time at the crossroads of Malaya Pokrovskaya and Bolshaya Pokrovskaya. According to the State party, the organizers did not specify the exact location of the event. The State party argues that this intersection is very busy with car and pedestrian traffic, and holding a public event there would jeopardize public safety. The city administration again suggested alternative locations in other districts of Nizhny Novgorod. The State party cites the same federal law on public events, arguing that the organizers and the local authorities must agree on the event's location.

4.4 The State party also argues that the Nizhegorodsky District Court correctly rejected the author's complaint, and the court came to the conclusion that no rights were violated, and that the city administration did not impose an unlawful ban on the picket, but rather

suggested changing the location of the event. According to the State party, the author's allegations on the unlawful restriction of her right to organize a picket were examined by the courts, and found to be groundless.

4.5 The State party further submits that both supervisory appeals filed by the author, on 27 May 2008 and 16 June 2008, violated procedural rules for filing supervisory appeals, as established by the Civil Procedure Code of the Russian Federation (chap. 41). It contends that the author had ample opportunity to correct the procedural mistakes and resubmit the supervisory appeal request, but that she failed to do so; she also failed to file a cassation appeal.

4.6 The State party also submits that due to these circumstances, the author's communication should be considered as an abuse of the right of submission, and should also be declared inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

#### **Authors' comments on the State party's observations**

5.1 By letter of 20 October 2009, the author recalls that, contrary to the State party's submission, she did in fact file the cassation appeal with the Nizhegorodsky Regional Court, and that this appeal was rejected on 29 January 2008.

5.2 The author further states that the supervisory appeals were rejected by the Nizhegorodsky Regional Court on formalistic grounds, such as the fact that the copies of previous court decisions were authenticated by a notary, and not the court itself, and due to the expiration of the six-month deadline for supervisory review claims, as introduced by a new law, following the examination of her case by the first-instance court. The author contends that she has asked to have the deadline for supervisory appeal extended, without success. As a result, the case could not be examined under the supervisory review proceedings.

5.3 The author also claims that there are multiple decisions of the European Court of Human Rights that indicate that supervisory appeals cannot be considered as constituting an "effective" domestic remedy.<sup>3</sup>

5.4 She also reiterates that the pickets were banned because the organizers were planning to protest against political repression, and that, according to her, all requirements of peaceful demonstrations were fulfilled. The author repeats her claims of the violation of article 21 of the Covenant.

#### **State party's further observations**

6.1 On 13 August 2010, the State party reiterated that it was up to the author to correct the mistake in her supervisory appeal of 27 May 2008, and that she had to appeal again. The State party claims that the author did not properly authenticate the lower court's decisions, which constitutes a violation of current legislation of the Russian Federation. The State party recalls that both of the author's appeals were therefore rejected without having the case considered on the merits.

6.2 The State party further submits that the author is a lawyer by profession, and must have been aware of all the requirements of the Constitution of the Russian Federation,

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<sup>3</sup> In support of her statement, the author provides reports by the Nizhny Novgorod Human Rights Union, and from Mr. Shimovolos, one of the other organizers of the pickets in this case. She adds that, in any event, the supervisory review is aimed mainly at checking whether serious procedural violations have occurred in a specific case, and not at considering the merits of the case; furthermore, equality of arms is not necessarily respected.

which requires strict adherence to the Constitution and laws of the Russian Federation (art. 15, para. 2, of the Constitution). The State party submits that the author's failure to follow the requirements set out by law was purposeful, and that the author never wanted the courts to look into merits of her case.

6.3 The State party therefore insists that the author abused her right of submission of an individual communication, and that her case cannot be considered admissible also in the light of the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

#### **Additional comments by the author**

7.1 On 28 September 2010, the author submitted additional comments. She argues that court decisions become enforceable after the examination of a cassation appeal. The entry into force of court decisions cannot be stayed during the supervisory appeal process. The author also invokes a ruling of the Constitutional Court of the Russian Federation in which, according to her, the Court admits that the supervisory appeal cannot be considered as an effective remedy.<sup>4</sup>

7.2 The author further argues that, based on articles 363 and 364 of the Civil Procedure Code of the Russian Federation, the grounds for supervisory appeal are very limited. Also, the author cites a European Court of Human Rights case in which the Court considered the supervisory appeal as an optional remedy, because it is a discretionary procedure that depends on authorities and not the complainant.<sup>5</sup>

7.3 The author admits that article 378 of the Civil Procedure Code requires the courts to authenticate the copies of the contested decisions. Such a requirement is also confirmed by resolution No. 36 of the Supreme Court of the Russian Federation. The author argues that such a resolution only regulates the activities of courts and cannot be considered a law. The author also cites a law on notaries public, which does not prohibit authentication of court decisions by notaries public.

#### **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 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 failed to follow the procedural rules when filing two separate supervisory appeals. The Committee notes, however, that the author filed a cassation appeal with the Nizhegorodsky

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<sup>4</sup> It should be noted, however, that in its ruling of 5 February 2007, the Constitutional Court refers to the supervisory appeal as constituting an "additional measure of protection under law", and stops short of calling it "ineffective". The Court also refers to the jurisprudence of the European Court of Human Rights when dealing with the issue of supervisory review (in which the European Court of Human Rights does call the supervisory appeal process "ineffective").

<sup>5</sup> The author cites *Tumilovich v. Russia*, application No. 47033/99, judgement of the European Court of Human Rights of 22 June 1999.



Regional Court, which upheld the decision of the first instance court.<sup>6</sup> The Committee recalls its previous jurisprudence, according to which supervisory review procedures against court decisions which have entered into force constitute an extraordinary remedy, dependent on the discretionary power of a judge or prosecutor,<sup>7</sup> and which, thus, do not need to be exhausted for purposes of admissibility. In these circumstances, the Committee considers that, in the present case, it is not precluded, by article 5, paragraph 2 (b), of the Optional Protocol, from examining the communication.

8.4 The Committee notes the author's claims that, in violation of the requirements of article 14 of the Covenant, her case was examined neither by a competent nor an impartial or independent court. She contends that the first instance court judge also failed to address in substance the issues she had raised. She further submits that the cassation and supervisory appeal judges failed to examine her case on the merits. The State party has in turn replied that all decisions in the author's case were lawful and fully grounded, and that the author's allegations on the unlawful restriction of her right to organize a picket were duly examined by the courts, and found to be groundless. The Committee recalls that the guarantees of article 14, paragraph 1, not only apply to courts and tribunals determining criminal charges or rights and obligations in a suit at law, but must also be respected where domestic law entrusts a judicial body with a judicial task.<sup>8</sup> The Committee observes that the relevant Nizhny Novgorod courts that heard the author's cases were composed of full-time professional judges. It also observes that the author has not sufficiently put forward specific elements which could call into question the competence, impartiality or independence of those judges or shown elements that could indicate that the application of domestic law was clearly arbitrary or amounted to a manifest error or denial of justice or that the court otherwise violated its obligation of independence or impartiality.<sup>9</sup> In these circumstances, the Committee considers that the author has failed to substantiate her claim under article 14, paragraph 1, for the purposes of admissibility, and that accordingly, this part of the communication is inadmissible under article 2 of the Optional Protocol.

8.5 The Committee considers that the author's claim under article 21 of the Covenant is sufficiently substantiated for the purposes of admissibility, and declares it admissible.

#### *Consideration of the merits*

9.1 The Human Rights Committee has considered the present communication in the light of all the information received, in accordance with article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee notes the author's allegation that her right to freedom of assembly under article 21 was violated, since she was arbitrarily prevented from holding a peaceful assembly (picket). In this context, the Committee recalls that the right to peaceful assembly as set forth in article 21 of the Covenant is not absolute but may be subject to limitations in certain situations. The second sentence of article 21 of the Covenant requires that no restrictions may be placed on the exercise of the right to peaceful assembly other than those

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<sup>6</sup> Copies of the decisions of those courts were submitted by the author to the attention of the Committee.

<sup>7</sup> See, inter alia, communications No. 836/1998, *Gelazauskas v. Lithuania*, Views adopted on 17 March 2003, and No. 1537/2006, *Gerashchenko v. Belarus*, decision of inadmissibility adopted on 23 October 2009.

<sup>8</sup> See 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. 7; and communication No. 1015/2001, *Pertterer v. Austria*, Views adopted on 20 July 2004, para. 9.2.

<sup>9</sup> See general comment No. 32, para. 26.

that are (a) imposed in conformity with the law and (b) necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of rights and freedoms of others.<sup>10</sup>

9.3 In the present case, the Committee must consider whether the restrictions imposed on the author's right to freedom of assembly were justified under any of the criteria set out in article 21. The Committee notes the State party's assertion that the restrictions were in accordance with the law. However, the State party has not demonstrated to the Committee's satisfaction that the impeding of the two pickets in question was necessary for the purpose of protecting the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. Moreover, the State party never refuted the author's claim that no event actually occurred at Gorky Square on 7 October 2007, and that the city administration's claim of a competing Teachers' Day event was in fact a mere pretext given in order to reject the author's request. In these circumstances, the Committee concludes that in the present case the State party has violated the author's right under article 21 of the Covenant.

10. 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 facts before it disclose a violation of the author's right under article 21 of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation and reimbursement of any legal costs paid by the author. The State party is also under an obligation to take steps to prevent similar violations in the future.

12. 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 and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official language of the State party.

[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 to the General Assembly.]

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<sup>10</sup> See communication No. 1604/2007, *Zaleskaya v. Belarus*, Views adopted 28 March 2011, para. 10.6.

**Y. Communication No. 1880/2009, *Nenova et al. v. Libya*  
(Views adopted on 20 March 2012, 104th session)\***

<i>Submitted by:</i>	N.S. Nenova et al. (represented by counsel, Liesbeth Zegveld)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Libya
<i>Date of communication:</i>	31 March 2009 (initial submission)
<i>Subject matter:</i>	Alleged torture of the authors; death penalty imposed after an unfair and discriminatory trial
<i>Procedural issue:</i>	None
<i>Substantive issues:</i>	Torture, unfair trial, arbitrary arrest and detention; death penalty imposed following unfair trial, lack of effective remedy and discrimination
<i>Articles of the Covenant:</i>	2; 6; 7; 9; 10, paragraph 1; 14 and 26
<i>Article of the Optional Protocol:</i>	None

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

*Meeting* on 20 March 2012,

*Having concluded* its consideration of communication No. 1880/2009, submitted to the Human Rights Committee by Ms. N.S. Nenova et al. 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 authors of the communication, and the State party,

*Adopts* the following:

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

1.1 The authors of the communication dated 31 March 2009 are Valya Georgieva Cherveniyashka, born on 22 March 1955, Snezhana Ivanova Dimitrova, born on 18 August 1952, Nasya Stoycheva Nenova, born on 2 July 1966, Valentina Manolova Siropulo, born on 20 May 1959 and Kristiyana Venelinova Valcheva, born on 12 March 1959. They are all Bulgarian citizens. They claim to be victims of violations by Libya of articles 2; 6; 7; 9; 10, paragraph 1; 14 and 26 of the Covenant.<sup>1</sup> They are represented by Ms. Liesbeth Zegveld.

\* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, 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.

<sup>1</sup> The Optional Protocol entered into force for the State party on 16 May 1989.

1.2 On 5 August 2009, the Committee, acting through its Special Rapporteur on new communications and interim measures, rejected the State party's request that it examine the admissibility of the communication separately from the merits.

#### **Facts as presented by the authors**

2.1 Other than Kristyana Venelinova Valcheva, the authors arrived in Libya between February 1998 and February 1999 to work as members of a Bulgarian medical team at Al-Fatah paediatric hospital in Benghazi. Kristiyana Venelinova Valcheva had arrived in Libya in 1991 and had been working at the Hauari hospital in Benghazi for six years at the time of the events.

2.2 On 9 February 1999, the authors together with 18 other members of medical teams, all Bulgarian, were arrested by the Libyan police without being told of the grounds for their arrest. Their hands were tied behind their backs and they were gagged and blindfolded before being taken away in a bus. After several hours, during which some of them were hit on the head and neck, they arrived at the police station on Al-Nasr Street in Tripoli. Seventeen of the Bulgarians were released on 16 February 1999. The authors and Mr. Ashraf El-Hagog Jumaa<sup>2</sup> who had been arrested on 29 January 1999, were charged with murder on suspicion of having infected 393 children with the HIV virus at Al-Fatah hospital in Benghazi. The penalty they faced for that crime was death. Kristyana Valcheva had never worked at Al-Fatah paediatric hospital.

2.3 Under interrogation, the authors were tortured into confessing. The methods used included frequent electric shocks to legs, feet, hands, chests and private parts while the women were tied naked to an iron bed. They also included beatings on the soles of the feet;<sup>3</sup> being suspended by the hands and arms; suffocation; strangulation; being threatened with death; being threatened that family members would be harmed; being threatened, while blindfolded, that they would be attacked by dogs; beatings; being dragged across the ground by the hair; being burned with cigarettes; having biting insects placed on their bodies; injection of drugs; sleep deprivation; sensory isolation; being exposed to flames and ice-cold showers; being held in overcrowded and dirty cells; and being exposed to blinding lights. Some of the authors were also raped. Such torture allegedly continued for approximately two months. Once all the authors had confessed, the torture became less frequent but still continued.

2.4 On 15 May 1999, the case was referred to the People's Prosecution Office (*parquet populaire*) which charged the authors and their fellow defendant, Ashraf El-Hagog Jumaa, with acts against Libyan sovereignty leading to indiscriminate killing for the purpose of subverting State security (a capital offence); conspiracy and collusion to commit the above premeditated crimes; deliberately causing an epidemic by injecting 393 children at Al-Fatah hospital with the HIV virus (a capital offence); premeditated murder with lethal substances, by injecting children with HIV (a capital offence); and acts contrary to Libyan law and traditions (illegal production of alcohol, consumption of alcohol in public places, illegal foreign currency dealings and illicit sexual relations). On 16 May 1999, approximately four months after their arrest, the authors were brought before the People's Prosecution Office for the first time. They were subsequently brought before the prosecutor every 30–45 days.

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<sup>2</sup> See *El Hagog Jumaa v. Libya*, communication No. 1755/2007, Views adopted on 19 March 2012.

<sup>3</sup> The *Falaqa* method.

*The first trial*

2.5 The trial before the People's Court (the extraordinary court for crimes against the State) began on 7 February 2000. The case rested on the confessions and an assertion by the Head of State that the accused were CIA and Mossad agents. Only on 17 February 2000, 10 days after the trial began, were the authors granted access to a lawyer and able to allege before the court that they had been tortured. They had been unable to do so previously because they had been threatened by their torturers and could not speak freely to their lawyer because State representatives were always present. In June 2001, two of the authors retracted their confessions, stating they had been extracted under torture.<sup>4</sup> The Court rejected their complaint without ordering an inquiry. Subsequently, the authors and the co-defendant pleaded "not guilty".

2.6 The case was initially suspended, because the Court had not gathered enough evidence to support the charge of conspiracy against the State. On 17 February 2002, the People's Court halted proceedings and referred the case back to the Criminal Prosecution Office (*ministère public*). The prosecutor withdrew the conspiracy charges and presented new charges of illegal drug testing and the deliberate infection of 426 children with HIV.<sup>5</sup> Throughout this time, the authors and the co-defendant remained in detention.

*The second trial*

2.7 In August 2002, the Indictments Chamber of the Benghazi Appeals Court upheld the charges presented by the prosecutor and referred the case to an ordinary criminal court, the Benghazi Appeals Court. The charges were based on confessions made by one of the authors<sup>6</sup> and the co-defendant to the prosecutor and the results of a search of the home of another one of the authors,<sup>7</sup> where the police allegedly discovered five bottles of contaminated blood plasma. The second trial started in July 2003. Professor Luc Montagnier and Professor Vittorio Colizzi were appointed as experts. In September 2003, they testified that the blood samples at Al-Fatah hospital had been infected in 1997, more than a year before the nurses had begun to work in the hospital and that infections had continued after their arrest. Their expert opinion was that the cause of the infection was unknown and not deliberate. Such nosocomial infections were caused by a very specific, highly infectious viral strain and by negligence and poor standards of hygiene.<sup>8</sup> In December 2003, the Court appointed a second team of experts consisting of five Libyan doctors. On 28 December 2003, this second team rejected the findings made by the two renowned professors, stating that the HIV/AIDS epidemic was due not to nosocomial infections or the reuse of infected medical equipment, but to a deliberate act. The defence called for a further expert appraisal, but the Court dismissed the request.

2.8 On 6 May 2004, the Benghazi Appeals Court sentenced the authors and co-defendant to death for having caused the death of 46 children and infected 380 others. Nine Libyans working at Al-Fatah hospital had been charged with the same offence, but had been released on bail at the start of the proceedings and were not remanded in custody

<sup>4</sup> Kristyana Valcheva and Nasya Nenova.

<sup>5</sup> In the charges read out to the authors, the number of children infected rose from 393 to 426 between the first and the second trial.

<sup>6</sup> Nasya Nenova.

<sup>7</sup> Kristyana Valcheva.

<sup>8</sup> "Final Report of Prof. Luc Montagnier and Prof. Vittorio Colizzi to Libyan Arab Jamahiriya on the Nosocomial HIV infection at the Al-Fatah Hospital, Benghazi, Libya, Paris, 7 April 2003", which concludes: "No evidence has been found for a deliberate injection of HIV contaminated material (bioterrorism). Epidemiological stratification, according to admission time, of the data on seropositivity and results of molecular analysis are strongly against this possibility."

pending trial. They were acquitted. The Court announced it had no jurisdiction over the eight Libyan security officers accused of torture by the authors and the co-defendant, and returned their cases to the prosecutor's office. On 5 July 2004, the authors and co-defendant appealed on points of law to the Libyan Supreme Court. The prosecutor asked the Court to revoke the death sentences and return the case to the Benghazi Appeals Court for a retrial, as there had been "irregularities" during the arrest and interrogation of the authors accused and the co-defendant. After several postponements, the Supreme Court quashed the judgement of the Benghazi Appeals Court and returned the case for retrial to the Tripoli Court on 25 December 2005. The Court refused to release the authors and co-defendant on bail on the grounds that there were insufficient guarantees they would reappear for the retrial.

#### *Retrial and release*

2.9 The Tripoli Court reopened the trial on 11 May 2006. The prosecutor once again requested the death penalty for the authors and co-defendant. The authors again pleaded not guilty and reiterated that they had been tortured into making confessions. On 19 December 2006, they were again found guilty and sentenced to death. The Court stated it could not re-examine the torture allegations because another court had already dismissed them.

2.10 The authors appealed to the Supreme Court on 19 December 2006. The hearing before the Supreme Court took place on 11 July 2007, although it ought to have taken place within three months of the submission of the appeal. The authors allege that the Court held only one sitting, lasting a day, and upheld the death sentences. On 17 July 2007, the High Judicial Council announced that the sentence would be commuted to life imprisonment pursuant to a compensation agreement reached with the victims' families. Then on 24 July 2007 as a result of negotiations between Libya and Governments of other countries, the authors were transferred to Bulgaria to serve their sentences. Once there, they were immediately pardoned and released.

2.11 The torture claims made by the authors from 2000 onwards were not investigated.<sup>9</sup> On 2 June 2001, two of the authors<sup>10</sup> retracted their confessions, which they said had been obtained under duress and named those responsible for the torture. Only in May 2002 did the Criminal Prosecution Office decide to investigate the matter and order a medical examination. Consequently, charges were brought against eight members of the security services in charge of the investigation, plus a doctor and an interpreter. In June 2002, a Libyan doctor appointed by the prosecutor examined the authors and co-defendant and found marks on their bodies which he argued resulted from "physical restraint" or "beatings". In a ruling dated 6 May 2004, the Benghazi Appeals Court determined it was not competent to pronounce on the matter since the offence had not been committed within the area under its jurisdiction, but in the jurisdiction of the Tripoli Appeals Court.

2.12 On 7 May 2004, the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment sent a joint urgent appeal to the State party regarding the authors' and co-defendant's case, asking for information about the allegations of torture and unfair trial. He also asked why the officials said to be responsible for the alleged torture had not been prosecuted.<sup>11</sup> In response, the State party stated that the Department of Public Prosecutions had referred the case of the police officers to the Tripoli Appeals Court as the only court competent to hear the case. The trial of the police officers, the doctor and the

<sup>9</sup> See para. 2.5 above.

<sup>10</sup> Kristyana Valcheva and Nasya Nenova.

<sup>11</sup> E/CN.4/2005/7/Add.1.

interpreter began there on 25 January 2005. During the hearings, officers admitted they had tortured some of the authors and the co-defendant to obtain confessions. The defence submitted an expert medical evaluation which it had not been possible to perform until three years after the alleged facts; the Court set it aside on the grounds that, according to the Libyan doctor officially appointed as an expert, the appropriate protocols had not been followed, traces of torture were undetectable and, in any event, the kinds of torture alleged would leave no mark after two or three weeks. The Tripoli Court acquitted the suspects for lack of evidence on 7 June 2005. The authors and co-defendant lodged an appeal, but the appeal was rejected by the Libyan Supreme Court on 29 June 2006. On 10 August 2007, the international press reported President Muammar Gaddafi's son, Seif Al-Islam, admitting in an interview with the Al Jazeera television channel that the authors and co-defendant had been tortured and threatened that their families would be harmed.<sup>12</sup>

### **The complaint**

3.1 The authors claim that the State party violated articles 2; 6; 7; 9; 10, paragraph 1; 14 and 26 of the Covenant.

3.2 They claim that both the death sentence passed on 19 December 2006 and the Supreme Court ruling of 11 July 2007 upholding that judgement were the result of a flagrantly unfair, arbitrary trial. The death sentence violated article 6, paragraph 2, of the Covenant. An unfair trial, with numerous violations of article 14 of the Covenant, violates article 6, paragraph 2, of the Covenant. The fact that the death sentence was later commuted to life imprisonment does not relieve the State party of its obligation under this provision. The death sentence was commuted to life imprisonment only when a large sum of money was offered to the families of the infected children and heavy pressure had been brought to bear by the European Union, Bulgaria and other States.

3.3 The authors claim that they were tortured and drugged without their consent for the purpose of extracting confessions, in violation of article 7 of the Covenant. Despite corroborative evidence and overwhelming testimony from security officers acknowledging certain acts of torture, all the accused were acquitted, showing that the trial was a sham. The authors emphasize that the burden of proof cannot rest solely on them. They lodged their complaints as soon as they were able, on finally being brought before a judge after eight months of being held incommunicado. At that time they bore clear signs of torture, but no action was taken by the prosecutor or by the court. The authors contend that the severity of their ill-treatment was such that it must be characterized as torture, since it was used to extract confessions.

3.4 The authors claim that the treatment they endured throughout their detention also amounts to a violation of article 7. They recount that for 14 months after their arrest they were held in police facilities, not in a prison, and that for the first few days they were imprisoned with 20 other women in a small, dirty, windowless cell. Kristyana Valcheva was then held in solitary confinement in a windowless, barely lit and poorly ventilated cell measuring 1.8 metres by 1.5 metres that contained only a dirty mattress on which to sleep. There was no toilet in the cell and she was forced to relieve herself in an empty milk carton. The other authors were held in similar conditions. They were unable to take a shower for several months, they were given water only once every 24 hours and they had no access to books or magazines. Snezhana Dimitrova was forced to pray in Arabic, convert to Islam and renounce her Christian faith, removing her cross from around her neck, crushing it

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<sup>12</sup> According to the interview record, Seif Al-Islam stated: "Yes, they were tortured by electricity and they were threatened that their family members would be targeted. But a lot of what the Palestinian doctor has claimed are merely lies."

underfoot and spitting on it. The authors also allege that they were deprived of access to the open air, to physical exercise and to contact with the outside, including their families, and were denied the possibility of seeing a doctor in private.

3.5 The authors consider that their arrest and detention were arbitrary. Under Libyan law, they should have been brought before the prosecutor within 48 hours after their arrest. They were not, however, until three months later, on 16 May 1999. Even then, the authorities held them incommunicado until 30 November 1999, when their families were finally allowed to see them. The State party thus violated article 9, paragraph 1. Moreover, the authors were reportedly not promptly informed of the charges against them. Only when they were brought before the prosecutor were they finally told, and even then without legal counsel present; this was a violation of article 9, paragraph 2. Finally, the authors were not brought promptly before a “judicial authority” since they made their first appearance in court on 7 February 2000. Before this date, they had only seen the prosecutor, and this is a violation of article 9, paragraph 3.

3.6 The authors contend that the treatment they endured following their arrest also constitutes a violation of their rights under article 10. They refer to their claims under article 7 of the Covenant and add that they were allowed to see their children and other family members only three or four times over a total of eight years in detention.

3.7 The authors contend that the State party violated their right to a fair trial because they were not informed of the charges against them for the first three months of their detention. They did not have access to an interpreter at any moment during the trial and were not assigned a lawyer to defend them until 17 February 2000, 10 days after the trial began and a full year after their arrest. They were forced to testify against themselves under torture, there was no lawyer in attendance when they made their confessions before the prosecutor and the court, without providing sufficient reasons, set aside Professor Montagnier’s and Dr. Collizi’s expert testimony despite every indication that their findings exonerated the authors and co-defendant. The second search of Ms. Valcheva’s home, during which the police “providentially”<sup>13</sup> discovered five bottles of contaminated blood plasma, was conducted with neither the authors nor a defence lawyer present. The inconsistencies in this “discovery”,<sup>14</sup> together with the fact that the prosecution never produced the search records and that the court itself mistook the findings of one search for those of the other, show that it was a complete fabrication. The authors also claim that the trial suffered unreasonable delays.<sup>15</sup> These points constitute, according to the authors, a violation of article 14 of the Covenant.

3.8 By seeking to discriminate on the basis of race, skin colour, language, religion and nationality, the State party allegedly violated the rights of the authors that are protected by articles 6, 7, 9, 10 and 14 of the Covenant. The Libyan authorities unfairly arrested and convicted the authors in order to make scapegoats of foreigners. The authors were arrested, in violation of articles 2 and 26 of the Covenant, precisely because they were foreign and differed from the Libyan population in their race, skin colour, language, religion and national origins. They report a discriminatory policy of arresting foreign medical personnel which had been manifest on several occasions before their own arrests and sought to make scapegoats of foreigners. They point out that all the Libyans arrested in the case were freed

<sup>13</sup> Placed in inverted commas by the authors in the initial submission.

<sup>14</sup> The contents of the bottles were analysed in March 1999; the search of Ms. Valcheva’s home took place a month later.

<sup>15</sup> Over eight years from the date of the arrest on 9 February 1999 until the final judgement of the Supreme Court dated 11 July 2007.



almost immediately or released on bail, were not remanded in custody during the trial and were all eventually acquitted.

3.9 With regard to the exhaustion of domestic remedies, the authors note that their allegations were brought to the attention of the authorities: the allegations of torture, arbitrary arrest and unfair trial, as well as the complaints of discrimination on the grounds of nationality filed in 2006.

3.10 As redress for the violations suffered, the authors claim reparation, including financial compensation, for physical and moral injury. They also ask for the State party to be urged to take steps to act on its obligations under the Covenant and the Optional Protocol, and to ensure that no similar violations occur in future.

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

4.1 In a note dated 4 August 2009, the State party asked the Committee to declare the communication inadmissible without providing grounds for its request.

4.2 On 8 December 2009, the State party submitted its observations on the admissibility and merits of the communication. It points out that there had been lengthy legal and judicial proceedings to establish the truth in a case involving over 450 children whose fundamental right to life had been violated. It considers that the authors were afforded all the safeguards of a proper trial in conformity with international standards. Libyan civil society organizations, international human rights organizations and foreign diplomatic missions in Libya followed the proceedings throughout.

4.3 The State party recalls that, on 30 September 1998, a Libyan citizen, Mohammed Bashir Ben Ghazi, complained to the Department of Public Prosecutions that his son, then 14 months old, had become infected with HIV during a stay at Al-Fatah paediatric hospital in Benghazi. He had learned the news in Egypt, where his son had been transferred for medical treatment. On 12 October 1998, the Department of Public Prosecutions opened an investigation, having received more complaints. It took 233 statements from parents of infected children and, in addition to other measures, issued an injunction prohibiting all foreigners working at the hospital from leaving the country.

4.4 By decision No. 28/1209, the Secretary of the General People's Committee for Justice and Public Security ordered an investigation into the infection with HIV of children who had been treated at Al-Fatah paediatric hospital. The investigating committee consisted of the Director and senior investigating officers of the General Criminal Investigations Department and doctors. It began work on 9 December 1998 and eventually identified the authors, a Palestinian doctor and a Bulgarian doctor as suspects. The committee concluded its work on 15 May 1999 and sent a report with the evidence and names of the suspects to the General Prosecution Office, which interviewed the suspects.

4.5 On 18 May 1999, the General Prosecution Office referred the case to the People's Prosecution Office which continued the investigation. On 17 February 1999, the People's Court announced that it was not competent to deal with the matter and referred the case back to the General Prosecution Office. During the trial before the criminal court, the defendants alleged they had been tortured by police during the investigation. The judge of the Indictments Chamber ordered a representative of the General Prosecution Office to investigate the allegations. The findings of that investigation were reported to the Indictments Chamber, which referred the case to the Benghazi Appeals Court on 4 July 2003. That court devoted more than 20 sittings to hearing the case. On 6 May 2004, it sentenced the authors and co-defendant to death and ruled that it did not have territorial jurisdiction to take up the charges of torture against members of the investigating committee.

4.6 From 13 June 2002 onward, the General Prosecution Office took statements from the defendants about their claims of torture. It also took statements from the committee assigned to investigate the infection of children with HIV. The complaint of torture was referred to the Tripoli Appeals Court, which handed down a judgement on 7 June 2005 acquitting the investigating committee. The authors and co-defendant appealed the death sentence before the Supreme Court, which delivered its ruling on 25 December 2005, revoking the death sentence and sending the case back to the Benghazi Appeals Court for consideration by a different panel of judges. That court held 13 sittings on the case. On 19 December 2006, it again sentenced the authors and co-defendant to death. The defendants decided to appeal to the Supreme Court, which delivered its judgement on 11 July 2007.

4.7 The defendants received a fair trial in which they were afforded full legal safeguards. They were able to exercise their right to defence through a team of lawyers. The trial was held in open court and was attended by many representatives of civil society and human rights organizations, and by representatives of foreign diplomatic missions in Libya.

4.8 With regard to the allegations of torture, the State party notes that the authors appeared before the committee set up to investigate this case on 11 April 1999. The Palestinian doctor and two of the authors (Nasya Nenova and Kristyana Valcheva) confessed to being party to the crime with the other authors. They were then referred to the Office of the Prosecutor-General, where they were questioned by a member of the Department of Public Prosecutions. The Palestinian doctor and one of the authors, Nasya Nenova, made detailed confessions about their involvement in the crime together with the other Bulgarian nurses. They said nothing about being tortured by the investigating committee. They consistently admitted their involvement in the crime to all the different judicial authorities before which they appeared. Only after the People's Court declared itself not competent and the case was sent to the Indictments Chamber of the South Benghazi Court of First Instance, on 3 June 2002, did they tell the judge that they had been tortured. The judge immediately instructed the Department of Public Prosecutions to investigate the allegations. The Department of Public Prosecutions launched an investigation and took statements from the Palestinian doctor, the authors and the members of the investigating committee. It also ordered a medical investigation. Even though the Department was convinced that the allegations were groundless, it brought charges against the members of the investigating committee. The Court heard the case, and acquitted the members of the investigating committee on 7 June 2005.

4.9 The State party records that a total of 115 visits were paid to the convicts in prison by members of foreign organizations and foreign diplomatic missions. The Secretary for Justice asked for members of the authors' families to be allowed to visit them every Sunday throughout their detention. A team of lawyers from Bulgaria was given permission to help with the defence of the accused.

4.10 With regard to the defence statement produced before the Supreme Court at the appeal against the judgement dated 19 December 2006, of the Benghazi Appeals Court, the State party points out that the Supreme Court answered all the objections raised by the authors.<sup>16</sup>

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<sup>16</sup> In its judgement dated 11 July 2007, the Libyan Supreme Court upheld, count by count, the judgement dated 19 December 2006 of the Benghazi Appeals Court. It highlighted the contradictions between the various statements made by the defence over the course of the proceedings, which sometimes confirmed the confessions made during the interrogation phase and sometimes refuted them.

### Authors' comments

5.1 In a reply dated 12 February 2010, the authors reiterate their arguments regarding the admissibility of the communication, including the exhaustion of domestic remedies and the substantiation of the allegations made. On the merits, they note that, in its observations, the State party only contests the arguments put forward in the initial communication and does not present any fresh arguments or evidence. The authors therefore refer the Committee to their initial submission.

5.2 On the subject of discrimination, the State party argued that all the evidence pointed towards the authors' guilt. The authors claim they were discriminated against on account of their nationality because, on the contrary, there was no evidence of their guilt, particularly not at the time of their arrest. This is corroborated by the fact that, on 9 February 1999, the authors and 18 members of the international medical team, all Bulgarians working at different hospitals in Benghazi, were arrested by the Libyan police. Seven days later, 17 of them were released. The only evidence against the authors was obtained after their arrest and consisted of confessions obtained under duress and the "unexpected" discovery of five bottles of contaminated blood plasma at the home of one of them.

### 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, as required by 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 As regards the authors' claim that the death sentence was imposed after an unfair trial, in violation of article 6, the Committee notes that the death sentence was not upheld. In view of the commutation of the death sentences, there is no longer any factual basis for the authors' claim under article 6 of the Covenant. Accordingly, the Committee finds that this part of the claim has not been substantiated and is therefore inadmissible under article 2 of the Optional Protocol.<sup>17</sup>

6.4 The Committee notes that the State party asked the Committee to declare the communication inadmissible without providing grounds for its request. The Committee, however, finds that there is nothing that prevents the communication from being considered admissible under articles 2; 7; 9; 10, paragraph 1; 14 and 26 of the Covenant as the allegations have all been sufficiently substantiated.

6.5 The Committee therefore declares the communication to be admissible insofar as it raises issues under articles 2; 7; 9; 10, paragraph 1; 14 and 26 of the Covenant.

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<sup>17</sup> Communication No. 971/2001, *Arutyuniantz v. Uzbekistan*, Views adopted on 30 March 2005; communication No. 609/1995, *Williams v. Jamaica*, Views adopted on 4 November 1997; communication No. 1161/2003, *Kharkhal v. Belarus*, inadmissibility decision adopted on 31 October 2007; communication No. 1141/2002, *Gougnina v. Uzbekistan*, inadmissibility decision adopted on 1 April 2008.

*Consideration of the merits*

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

7.2 The Committee notes the authors' allegation that they were drugged and tortured to obtain confessions and that those allegations were corroborated during the trial by medical reports and testimony from witnesses including the police officers in charge of the investigation. It takes note of the authors' arguments that the burden of proof should not rest solely on them; that the complaints of torture were made as soon as possible, when the authors were at last brought before a judge after a year in detention; that at that time they bore clear signs of torture but no action was taken by the prosecutor or the court; and that the subsequent investigation cannot be considered either prompt or thorough.

7.3 The Committee takes note of the State party's arguments that some of the authors consistently admitted involvement in the crime to all the different judicial authorities before which they appeared;<sup>18</sup> that it was not until 3 June 2002 that they told a judge they had been tortured; that the judge immediately instructed the General Prosecution Office to investigate the allegations of torture made by the authors and co-defendant, that the General Prosecution Office opened an investigation and took statements from the Palestinian doctor, the authors and members of the investigating committee; that the General Prosecution Office also ordered a medical investigation; and that, although it was convinced that the allegations were groundless, it brought charges against the members of the investigating committee. The Committee also takes note of the information from the State party that the court acquitted the committee members on 7 June 2005.

7.4 The Committee also notes that, for 14 months after their arrest, the authors were allegedly kept incommunicado in police facilities and not in a prison; that during the first few days they were held with 20 other women in a small, dirty, windowless cell; and that they were then kept in solitary confinement in degrading conditions that did not meet the minimum standards for the treatment of persons in detention. It notes the authors' further allegation under article 7 that one of them was forced to renounce her religion and adopt another. It notes that these allegations have not been refuted by the State party.

7.5 The Committee reaffirms its jurisprudence that the burden of proof cannot rest on the author of a communication alone, especially considering that the author and the State party do not always have equal access to the evidence and frequently the State party alone has the relevant information.<sup>19</sup> It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to furnish to the Committee the information available to it. In cases where the author has submitted allegations to the State party that are corroborated by credible evidence and where further clarification depends on information that is solely in the hands of the State party, the Committee may consider those allegations substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party. The Committee also recalls its jurisprudence that the State party is duty-bound not only to conduct thorough investigations into alleged violations of human rights, including violations of the prohibition of torture, but also to prosecute, try and punish the culprits.<sup>20</sup> With regard to the

<sup>18</sup> See para. 4.8 above.

<sup>19</sup> Communication No. 1412/2005, *Butovenko v. Ukraine*, Views adopted on 19 July 2011, para. 7.3.

<sup>20</sup> Communication No. 1588/2007, *Benaziza v. Algeria*, Views adopted on 26 July 2010, para. 8.3; communication No. 1780/2008, *Zarzi v. Algeria*, Views adopted on 22 March 2011, para. 6.3; communication No. 1781/2008, *Djebrouni v. Algeria*, Views adopted on 31 October 2011, para. 7.4;

incommunicado detention, the Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment, which recommends that States parties should make provision against detention incommunicado.<sup>21</sup>

7.6 In the light of the above, the Committee concludes that the treatment inflicted on the authors constitutes torture and that the explanations provided by the State party, including the reference to the verdict of the Tripoli Appeals Court of 7 June 2005, are not such as to conclude that a prompt, thorough and impartial investigation was carried out despite the presentation of clear evidence of torture, such as that contained in the medical reports and the testimony of the alleged culprits. On the basis of the information available to it, the Committee concludes that the torture inflicted on the authors and the absence of a prompt, thorough and impartial investigation of the facts constitute a violation of article 7, alone and read in conjunction with article 2, paragraph 3, of the Covenant.

7.7 Having reached that conclusion, the Committee decides not to address the authors' allegations under article 10 of the Covenant.

7.8 Concerning article 9, the Committee notes that in violation of Libyan law, the authors did not appear before the prosecutor until 16 May 1999, three months after their arrest, and that they were kept incommunicado until 30 November 1999, when their families were finally given permission to see them. The Committee notes the authors' allegations that they were not promptly informed of the charges against them; that it was not until they appeared before the prosecutor that they finally heard those charges, and then not in the presence of a lawyer; and that they were not brought promptly before a "judicial authority" as the first time they appeared in court was on 7 February 2000. The Committee notes that the State party has not refuted these allegations. In the absence of any pertinent explanations from the State party, the Committee finds a violation of article 9 of the Covenant.<sup>22</sup>

7.9 The authors also allege a violation of article 14 of the Covenant. Here the Committee notes the following: the authors claim they were not informed of the charges against them during the first three months of their detention; they did not have access to an interpreter throughout the trial; they were not assigned a lawyer to defend them until 17 February 2000, 10 days after the trial began and a whole year after their arrest; they were forced, under torture, to testify against themselves; and there was no lawyer in attendance when they made their confessions before the prosecutor. In addition, the Committee notes that the Court, without providing sufficient grounds, dismissed the expert testimony of Professor Montagnier and Professor Collizi; that the second search of Ms. Valcheva's home, in which the police discovered five flasks of contaminated blood plasma, was allegedly carried out without either the authors or a defence lawyer present; and that the prosecution allegedly never produced the official reports of the searches. It further notes the authors' allegation that the trial was subject to excessive delays, in violation of article 14 of the Covenant. It also notes the State party's argument that the authors received a fair trial in which they were afforded full legal safeguards, that they were able to exercise their right to defence through a team of lawyers, and that the trial was held in open court and attended by

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and communication No. 1811/2008, *Chihoub v. Algeria*, Views adopted on 31 October 2011, para. 7.4.

<sup>21</sup> *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A, para. 11.

<sup>22</sup> Communication No. 1761/2008, *Giri v. Nepal*, Views adopted on 24 March 2011, para. 7.8.

many representatives of civil society, human rights organizations and foreign diplomatic missions in Libya.

7.10 The Committee reaffirms its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial in which it insists that, in general terms, the right to equality before courts and tribunals in addition to guaranteeing the principles mentioned in the second sentence of article 14, paragraph 1, also guarantees those of equal access and equality of arms and ensures that the parties to the proceedings in question are treated without any discrimination.<sup>23</sup> In the present case, taking into account the information provided by the State party, the Committee is therefore of the view that the State party is responsible for an accumulation of violations of the right to fair trial, particularly as regards the violation of the right not to testify against oneself, the violation of the principle of equality of arms, which was violated through the unequal access provided to evidence and expert opinions, and the defendants' right to have adequate time and facilities for the preparation of their defence, through the lack of access to a lawyer prior to the beginning of the trial. The Committee concludes that the trial and conviction of the authors constitute a violation of article 14 of the Covenant.

7.11 In the light of the foregoing conclusion, the Committee decides not to address the authors' allegations under articles 2 and 26 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 7, read alone and together with article 2, paragraph 3; and violations of articles 9 and 14 of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including conducting, as an alternative to what has already been undertaken by the State party, a thorough, in-depth investigation of the allegations of torture and to prosecute those responsible for the treatment inflicted on the authors, and to grant the authors appropriate redress, including compensation. The State party is, further, required to take action to prevent similar violations in future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, that State party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official language of the State party.

[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 to the General Assembly.]

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<sup>23</sup> *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40, vol. I (A/62/40 (Vol. I)), annex VI, para. 8.*

**Z. Communication No. 1883/2009, *Orazova v. Turkmenistan*  
(Views adopted on 20 March 2012, 104th session)\***

<i>Submitted by:</i>	Svetlana Orazova (represented by counsel, Timur Misrikhanov)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Turkmenistan
<i>Date of communication:</i>	1 March 2009 (initial submission)
<i>Subject matter:</i>	Unjustified restrictions on travelling abroad and within the country, unlawful police surveillance, including unauthorized home searches, phone tapping and interference with correspondence
<i>Procedural issue:</i>	Non-substantiation of claims
<i>Substantive issues:</i>	Effective remedy; liberty of movement/free to leave any county, including one's own; restrictions necessary to protect national security, public order, public health or morals or the rights and freedoms of others; right to a fair hearing by an independent and impartial tribunal; arbitrary or unlawful interference with privacy, family, home or correspondence
<i>Articles of the Covenant:</i>	2, para. 3 (a) and (b); 12, paras. 1 and 2; 14, para. 1; 17, para. 1
<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 20 March 2012,*

*Having concluded* its consideration of communication No. 1883/2009, submitted to the Human Rights Committee by Ms. Svetlana Orazova 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:

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

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

1. The author of the communication is Ms. Svetlana Orazova, a national of Turkmenistan born in 1964. She claims to be a victim of a violation by Turkmenistan of her rights under article 2, paragraph 3 (a) and (b); article 12, paragraphs 1 and 2; article 14, paragraph 1; and article 17, paragraph 1, of the International Covenant on Civil and Political Rights.<sup>1</sup> The author is represented by counsel, Mr. Timur Misrikhanov.

### The facts as presented by the author

2.1 In January 2004, the author was prevented by border officials of Turkmenistan from boarding a flight departing from Ashgabat to Tashkent, without being provided with any explanation.<sup>2</sup> Since then, she has not been able to travel abroad and within the country. In June 2008, her husband, Mr. A.O., was prevented from boarding a flight departing from Ashgabat to Moscow, where he was supposed to undergo medical treatment for heart disease. The authorities also prevented their daughter, Ms. A.S., a student of the Beijing University at that time, from leaving the country.<sup>3</sup>

2.2 In July 2004, the author's father, resident of Dashoguz region, visited Ashgabat city for medical treatment. In Ashgabat, both the author and her father were unlawfully arrested and detained at the police station for eight hours. After the incident, the author's father was sent back to Dashoguz, while the author and her family were banned from visiting him in Dashoguz. The author claims that her mother, who was living with her in Ashgabat city, passed away in 2005 and her father could not even attend the funeral of his wife because of the travel ban imposed by authorities. In September 2005, when the author's father died, she was not allowed to go to Dashoguz to attend his funeral.

2.3 On 24 November 2007, the author and her daughter were prevented from boarding a plane to Moscow. Following all these events, the author had attempted to seek clarifications from the authorities about the travel ban imposed on her and her family. On 17 December 2007, she addressed a complaint to the State Agency for the Registration of Foreigners (the State Migration Service of Turkmenistan as of 2007), but did not receive any written response. However, during the conversation with the employees of the agency she learned that the restrictions in questions were instructed by the Ministry of National Security. She then contacted the Ministry of National Security to clarify the reasons for the restrictions, but did not receive any response. Nonetheless, during the author's conversation with one of the employees of the Ministry, Mr. G. K., she was unofficially informed that the restrictions to travel abroad and within the country were imposed due to the fact that the author's brother, the former Deputy Prime Minister of the Cabinet of Ministers of Turkmenistan, Mr. Khudaiberdy Orazov, had left Turkmenistan in 2001 and had joined opposition groups abroad.

2.4 After her complaints to the Ministry of National Security, the Ministry of Interior and the Prosecutor's Office remained unanswered, the author seized the courts. On 16 February 2008, the Kopetdag District Court refused to examine her case on grounds that she had failed to make use of the non-judicial settlement, as provided for by law, before turning to courts and advised her to address her petitions directly to the State Agency for

<sup>1</sup> The Optional Protocol entered into force in relation to Turkmenistan on 1 May 1997.

<sup>2</sup> As it transpires from the materials on file, the author addressed a complaint to the Ministry of National Security on 8 April 2004, but it appears that she received no response.

<sup>3</sup> Although in the communication reference is made to other family members of the author's family, the communication is submitted only on author's own behalf. Accordingly, she is regarded as the only alleged victim.



the Registration of Foreigners or the organ which is hierarchically superior. The author's cassation appeal was rejected by the Ashgabat City Court on 16 April 2008 on the same grounds. On 20 May 2008, the Supreme Court upheld the decisions of previous courts. The author further appealed to the President of Turkmenistan, however no response followed.

2.5 On 16 January 2009, the author submitted a petition to the General Prosecutor's Office of Turkmenistan complaining about the violation of her family's right to leave the country. In a letter dated 3 February 2009, the General Prosecutor's Office informed the author that, pursuant to article 32 of the Law on Migration of 7 December 2005, their right to leave the country was temporarily restricted and that at that moment there were no grounds to lift the restrictions. On 20 February 2009, the author filed another petition, requesting clarifications as to the legal grounds for the restriction imposed on their right to leave the country. In a letter of 10 March 2009, the General Prosecutor's Office invoked the same provision of article 32 of the Law on Migration, however failing to refer to any of the legal grounds that would have justified the restrictions in question. It also advised that at that moment there were no restrictions on the right of their daughter S. to leave the country.

2.6 The author submits that, according to article 26, para. 1, of the Law on Migration of 7 December 2005 and article 1 of the Law on the Procedure of Exiting and Entering Turkmenistan by Turkmen nationals of 18 June 1995, the nationals of Turkmenistan have the right to leave and enter the country. The same provisions states that a Turkmen national cannot be deprived of his/her right to leave and enter the country, however the right to leave it may be temporarily restricted in accordance with article 32 of the Law on Migration. The restrictions imposed on the right to leave the country must satisfy two requirements: (1) they must be temporary, i.e. there should be a concrete time limit for the validity of the restriction; (2) such restrictions shall be imposed for any of the 11 grounds listed in article 32, paragraph 1, of the same law, namely when (1) he or she is aware of information constituting State secrets – until expiration of the term established by the legislation; (2) criminal proceedings are instituted against the applicant – until completion of the proceedings; (3) an applicant is convicted of a crime – until completion of the sentence or exemption from criminal liability; (4) an applicant avoids fulfillment of obligations imposed by a court judgment – until such obligations are honoured; (5) an applicant has knowingly submitted false information about himself/herself; (6) he or she is subject to conscription – until completion of active military service or exemption thereof, except for in cases of departure for permanent residence abroad; (7) an applicant is defendant in a civil suit – until completion of legal procedure; (8) an applicant is declared, by sentence of a court, as a repeat offender who has committed a particularly dangerous offence or is under the administrative police supervision – until cancellation of conviction or termination of supervision; (9) there are reasons to believe that a Turkmen national will become victim of human trafficking or slavery while abroad; (10) an applicant during his or her previous stay abroad has violated the legislation of the host State; (11) his or her departure is contrary to the interests of the State's national security.

2.7 The author claims that she and her family do not fall under any of the categories of persons whose travel may be restricted by law. The authorities have not provided any official explanations for the restrictions. The only evidence she has is the instruction by the Ministry of National Security to the police stations ordering to detain her and her family in case of any attempt to leave the territory of the city. She claims that such instructions are usually issued for search of criminals. The author claims that, since 2004, all their correspondence is opened and subject to censorship. Her family is under around-the-clock surveillance and their phones are tapped.

2.8 The author further claims that national security officers or police can show up at their door any time in order to carry out searches. She has complained to various State agencies since 2004, including migration authorities and the President of the country, to no

avail. She also submits that she does not have access to qualified legal aid. The lawyers have refused to take on her case following the instructions given by officials of the intelligence service and the Ministry of Justice.

### **The complaint**

3. The author claims that the facts, as reported, amount to a violation by the State party of her rights under article 2, paragraph 3 (a) and (b); article 12, paragraphs 1 and 2; article 14, paragraph 1; and article 17, paragraph 1, of the Covenant and requests the Committee to grant compensation for moral and material damages she suffered as a result of the unlawful actions of the authorities.

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

4.1 On 26 March 2010, the State party provided its observations. It refutes as unfounded the author's allegations of restrictions imposed on the liberty of movement. It submits that the author's daughter S. had been admitted to the State University of Beijing and had freely entered China on several occasions. On 19 January 2010, after graduation, she returned to Turkmenistan and she is not subject to any restrictions on her right to leave and enter the country.

4.2 In 2007, the author's son, M., was admitted to a specialized musical school in the Russian Federation. He is temporarily living in the Russian Federation and visits periodically his family in Turkmenistan. There are no restrictions imposed on his right to leave and enter the country. As regards the author's husband, Ovez, he left Turkmenistan in 2007 in order to undergo a heart surgery in Moscow. However, he had never registered with the Cardiologic Centre and was instead working on construction sites in Moscow and returned to Turkmenistan in 2008.

4.3 The State party refutes the author's allegation that she was prevented from attending her father's funeral in 2005 (see para. 2.2 above), claiming that she and other close relatives did not attend the funerals deliberately because of a property-related conflict they had with their father. It adds that with the exception of Mr. Khudaiberdy Orazov, neither the author nor her relatives' names appear on the authorities' lists of persons whose right to leave Ashgabat is restricted.

4.4 The State party also submits that it has no information in its possession that would indicate that the author had attempted to leave the country legally and that she was prevented from doing so by the national competent authorities. It also rejects the author's allegation that she was unofficially informed by Mr. G. K., an employee of the Ministry of National Security, that the restrictions to travel abroad and within the country were imposed on all the relatives of the author's brother, Mr. Khudaiberdy Orazov (see para. 2.3 above). In this respect, the State party submits that Mr. G.K. denied this fact during questioning.

4.5 With regard to the author's claim that she and her father had been arrested by the police of Ashgabat city and detained for eight hours without being charged with any crime (see para. 2.2 above), the State party states that there are no records documenting their arrest or detention. It also adds that none of the author's relatives are subject of a search warrant by the Ministry of Interior of Turkmenistan, excepting her brother, Mr. Khudaiberdy Orazov.

4.6 As to the author's allegations of telephone-tapping, surveillance by domestic law enforcement bodies and unauthorized home searches (see paras. 2.7 and 2.8), the State party states that any such actions, according to national legislation, are subject to prior authorization by a prosecutor; there are no materials documenting that such actions have been carried out in relation to the author.

4.7 As regards the author's claim that she does not have access to qualified legal aid since lawyers are instructed to refuse to represent her, the State party submits that she has the opportunity to seek legal assistance provided by private lawyers (there are around 40 such lawyers and law firms in Turkmenistan) if she distrusts the activity of State institutions.

4.8 The State party concludes that the author's allegations are unfounded.

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

5.1 In her comments dated 23 June 2008, the author submits that the State party still provided no information as to the legal basis for the restrictions imposed on her and her family right to leave Turkmenistan. Furthermore, it is not clear whether the authorities would lift the respective restrictions imposed by the Ministry of National Security. She further submits that the State party misleads the Committee by claiming that no such restrictions have been imposed on her right to move freely within the country.

5.2 As regards the private lawyers that practise in Turkmenistan, the author states that there are only 40 such lawyers in a country with a 5 million population. Therefore, their assistance is unavailable and most people simply do not know about their existence. Moreover, these lawyers from the outset refuse to represent such complainants as the author because they are under pressure by officials of the Ministry of National Security and may risk losing their licence.

5.3 With reference to the State party's contention that any investigative measures are conducted only with the authorization of the prosecutor, the author maintains that, when persons like her are concerned, there are no limitations to telephone-tapping, surveillance and unauthorized searches.

5.4 The author confirms the information provided by the State party that the authorities allowed the departure of her daughter to China and of her son to the Russian Federation for study purposes, but this was done only after the submission of her complaint to the Human Rights Committee. The author herself has never been permitted to leave the country.

5.5 The author further reiterates her claims and requests the Committee to restore their rights to leave the country and their freedom of movement within the country. She submits that, as a result of the restriction to leave the country imposed on her husband, he was unable to undergo a heart surgery in Moscow and, as a consequence, died at the end of 2009.

#### **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 has ascertained, as required under article 5, paragraph 2 (a) and (b), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement, and that domestic remedies have been exhausted.

6.3 The Committee has noted the author's claims that her liberty of movement within the country, as guaranteed under article 12, paragraph 1, of the Covenant, has been restricted, and her allegations under article 17, paragraph 1, that her family is under around-the-clock surveillance, their correspondence is opened and subject to censorship and that they are victims of unauthorized telephone-tapping and home searches. In the light of the

information before it, the Committee considers that these claims have not been sufficiently substantiated, for purposes of admissibility. Accordingly, the Committee declares these claims, raising issues under article 12, paragraph 1, and 17, paragraph 1, of the Covenant, inadmissible under article 2 of the Optional Protocol.

6.4 The Committee further notes that the author invokes a violation of article 14, paragraph 1, of the Covenant, without however providing any information or arguments in support of this claim. In the absence of any pertinent information, the Committee considers that this part of the communication is insufficiently substantiated, for purposes of admissibility, and is therefore inadmissible under article 2 of the Optional Protocol.

6.5 The Committee considers that the author's remaining allegations under article 12, paragraph 2, of the Covenant, have been sufficiently substantiated, for purposes of admissibility, and proceeds to their examination on the merits.

#### *Consideration of the merits*

7.1 The Human Rights Committee has considered this communication in the light of all the information received, in accordance with article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee takes note of the author's claims that national authorities have imposed unjustified restrictions on her right to liberty of movement, as a result of which she has been prevented from leaving the country freely, in violation of article 12, paragraph 2, of the Covenant. The State party refutes these allegations as unfounded. The Committee observes that, as it transpires from the materials available to it, the Prosecutor's Office has confirmed in its replies of 3 February and 10 March 2009 that the author's and her family's right to leave the country had been temporarily restricted pursuant to article 32 of the Law on Migration, without however specifically indicating the legal grounds that would have justified the imposition of the respective restrictions (see para. 2.5 above).

7.3 The Committee recalls its general comment No. 27 (1999) on freedom of movement, according to which the liberty of movement is an indispensable condition for the free development of the individual.<sup>4</sup> It notes, however, that the rights covered by article 12, paragraph 2, are not absolute and may be restricted in conformity with the permissible limitations set out in article 12, paragraph 3, according to which any such restrictions shall be provided by law and necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and shall be consistent with the other rights recognized in the Covenant. In its general comment No. 27 the Committee also notes that "it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them" and that "restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function".<sup>5</sup>

7.4 In the light of the letters of the General Prosecutor's Office of 3 February and 10 March 2009 (see para. 2.5 above), which seem to clearly confirm the author's contention that her right to leave the country was temporarily restricted by the authorities, and in the absence of any explanations advanced by the State party in this regard, the Committee is of the view that the author's right under article 12, paragraph 2, of the Covenant, has been violated.

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<sup>4</sup> *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40*, vol. I (A/55/40 (Vol. I)), annex VI, sect. A, para. 1.

<sup>5</sup> See general comment No. 27, paras. 11 and 14; communication No. 1472/2006, *Sayadi and Vinck v. Belgium*, Views adopted on 22 October 2008, para. 10.5; communication No. 1585/2007, *Batyrov v. Uzbekistan*, Views adopted on 30 July 2009, para. 8.3.

8. 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 State party has violated the author's rights under article 12, paragraph 2, of the International Covenant on Civil and Political Rights.

9. Pursuant to article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. The remedy should entail measures to immediately restore Ms. Orazova's freedom to leave the country at her own will, as well as appropriate compensation. The State party is also under an obligation to take steps to prevent similar violations in the future.

10. Bearing in mind that, by becoming a State 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 and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the present Views, to have them translated in the official language of the State party, and widely disseminated.

[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 to the General Assembly.]

**AA. Communication No. 1905/2009, *Khirani v. Algeria*  
(Views adopted on 26 March 2012, 104th session)\***

<i>Submitted by:</i>	Farida Khirani (represented by the Alkarama for Human Rights foundation)
<i>Alleged victims:</i>	Maamar Ouaghlissi (her husband), Mériem Ouaghlissi and Khaoula Ouaghlissi (her daughters) and the author herself
<i>State party:</i>	Algeria
<i>Date of communication:</i>	1 July 2009 (initial submission)
<i>Subject matter:</i>	Enforced disappearance
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to life, prohibition of torture and cruel and inhuman treatment, right to liberty and security of person, right of persons deprived of their liberty to humane treatment, right to recognition as a person before the law and right to an effective remedy
<i>Articles of the Covenant:</i>	2, paragraph 3; 6, paragraph 1; 7; 9, paragraphs 1 to 4; 10, paragraph 1; and 16
<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 26 March 2012,*

*Having concluded* its consideration of communication No. 1905/2009, submitted to the Human Rights Committee by Farida Khirani 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,

*Adopts* the following:

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\* The following members of the Committee participated in the consideration of the present communication: 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, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

In accordance with article 91 of the rules of procedure, Mr. Lazhari Bouzid did not participate in the consideration of the communication.

The text of the individual opinion (concurring) of Mr. Krister Thelin and Mr. Walter Kälin is appended to the present Views.

The text of the individual opinion (concurring) of Mr. Fabián Salvioli is appended to the present Views.

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

1.1 The author of this communication, dated 1 July 2009, is Farida Khirani, born on 25 August 1963 at Ouargla, Algeria. She is submitting the communication on behalf of her husband, Maamar Ouaghliissi, born on 23 October 1958 at Constantine, Algeria. She claims that he has been a victim of violations by the State party of article 2, paragraph 3; article 6, paragraph 1; article 7; article 9; article 10, paragraph 1; and article 16 of the Covenant. The author is also acting on behalf of herself and of her two daughters, Mériem and Khaoula Ouaghliissi, born respectively on 25 November 1988 and 1 May 1990 at Jijel, Algeria. The author and her daughters consider that they are victims of a violation of article 7, read alone and in conjunction with article 2, paragraph 3, of the Covenant. The author is represented by the Alkarama for Human Rights foundation.<sup>1</sup>

1.2 On 17 December 2009, the Special Rapporteur on new communications, acting on behalf of the Committee, decided to reject the State party's request of 25 November 2009 that the Committee consider the admissibility of the communication separately from the merits.

### Background facts as submitted by the author

2.1 According to testimony from his co-workers, Maamar Ouaghliissi was arrested on 27 September 1994 while he was at work at the national railways company (SNTF), where he was employed as a quantity surveyor in the Infrastructure Department. No fewer than three plain clothes officers, claiming to be from the security services (Al-Amn), arrived at the SNTF Headquarters at around midday in a white Nissan Patrol four-wheel drive vehicle. This type of vehicle is regularly used by the criminal investigation police and the army's Intelligence and Security Department (DRS). Failing to find Maamar Ouaghliissi, they decided to wait for him and prevented his colleagues from leaving the premises, probably for fear that they might warn him. When the victim returned from his lunch break, at around 1 p.m., they asked him to follow them in his own vehicle, accompanied by two officers; they provided no explanation, nor did they show a warrant.

2.2 The author points out that over the previous few days and throughout the whole month there had been numerous arrests and abductions in Constantine particularly of members of local councils and deputies as well as people who were just activists and supporters of the Islamic Salvation Front (FIS). According to numerous witnesses, all the persons arrested by the police were held incommunicado for several weeks or months at the police headquarters in Constantine, where they were systematically tortured before being transferred to the Centre territorial de recherches et d'investigations (Territorial Centre for Research and Investigation) (CTRI) in the 5th military region, under the Intelligence and Security Department (DRS). Those persons abducted by DRS were taken directly to the Centre (CTRI) and many of them disappeared. Maamar Ouaghliissi was probably arrested as part of this operation, which was coordinated and planned by the police and DRS in Constantine.

2.3 Following the arrest, the SNTF head of personnel notified the management, which lodged a complaint with the 5th military region in Constantine. In addition, immediately after the arrest, family members went to the police headquarters in Constantine, gendarmerie brigades and various barracks in the city. As early as October 1994, the victim's father approached the court in Constantine to ascertain whether the victim had been brought before the public prosecutor. As these efforts proved fruitless, he lodged a complaint with the prosecution service about his son's disappearance and abduction.

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<sup>1</sup> The Covenant and the Optional Protocol entered into force for Algeria on 12 September 1989.

However, the Constantine public prosecutor never agreed to initiate investigations or to act on the complaint and the prosecution service refused to give the father the reference number under which the complaint was registered.

2.4 Eight months after the arrest, the author learned from a former detainee that her husband was being held at the Mansourah barracks, in the 5th military region, which is run by the Intelligence and Security Department (DRS). Maamar Ouaghliissi's father went to the barracks in May 1995 but was sent away by the soldiers, who denied that they were holding his son. Up until the end of 1995, the author or her relatives received a number of reports from army conscripts or released prisoners that her husband was being held in one or other of the DRS barracks. Another report provided by a soldier in 1996 indicated that her husband was still alive at that time. Since then, the family have had no news of him.

2.5 In 1998, the author of the communication lodged a complaint with the public prosecutor in Constantine about her husband's abduction and disappearance. However, no investigation seems to have been conducted, given that none of the witnesses was ever questioned. As she had heard that offices had been opened in each *wilaya* (prefecture) to register complaints from the families of people who had disappeared, she went to one on 28 September 1998 to lodge another complaint. That complaint was registered, however, no investigation appears to have been conducted.

2.6 On 23 April 2000, the author was summoned by the gendarmerie and was told that the investigations into her husband's disappearance had produced no results. In May 2000, she was again summoned, this time by the *daira* (subprefecture) of Hamma Bouzinae, an administrative area in Constantine; she was given an official report from the Ministry of the Interior and Local Authorities informing her that "the investigations carried out have not been able to determine the whereabouts of the person concerned". She was given no indication as to what investigations had been carried out, or by what authority. After receiving a further summons in June 2000 from the public prosecutor in Constantine, the author was criticized for continuing with her enquiries with different authorities, in particular for the letter that she had sent on 15 January 2000 to the general in command of the 5th military region, in which she requested information on her husband's disappearance; the letter remained unanswered. On 6 February 2001, the author also sent a registered letter to the Minister of Justice. However, there has been no response to it.

2.7 In 2006, as a result of her efforts to obtain an official certificate of disappearance from the gendarmerie so that she could receive welfare support for her family, she was given an "official certificate attesting to a disappearance under the circumstances arising from the national tragedy", although no investigation had been carried out by the gendarmerie that issued the certificate.

2.8 On 27 June 2005, the author brought her case to the attention of the United Nations Working Group on Enforced or Involuntary Disappearances; however, given the refusal of the Algerian authorities to clarify the case, that initiative also proved fruitless. Lastly, the author has been violently rebuked and beaten by the police on several occasions during peaceful gatherings in front of the local office of the National Consultative Commission for the Protection and Promotion of Human Rights.

### **The complaint**

3.1 The author considers that her husband has been a victim of enforced disappearance, in violation of article 2, paragraph 3; article 6, paragraph 1; article 7; article 9, paragraphs 1 to 4; article 10; and article 16, read alone and in conjunction with article 2, paragraph 3, of the Covenant. In addition, the author considers that the suffering caused to her daughters and herself by the disappearance of Maamar Ouaghliissi and the lack of information about



his fate constitute a violation of article 7, read alone and in conjunction with article 2, paragraph 3, of the Covenant.

3.2 The author points out that both the prolonged absence of Maamar Ouaghlissi and the circumstances in which he was arrested give reason to think that he died in detention. With reference to the Committee's general comment No. 6, the author alleges that incommunicado detention creates an exceedingly high risk of a violation of the right to life, since the victims are at the mercy of their jailers, who, by the very nature of the circumstances, are subject to no oversight. Moreover, even if a disappearance does not have a fatal outcome, the threat that it poses to the victim's life constitutes a violation of article 6, inasmuch as the State has failed to carry out its duty to protect the fundamental right to life. The State party has failed all the more so in its duty to protect the life of Maamar Ouaghlissi, because it has made no effort to investigate his fate. Consequently, the author considers that the State party has violated article 6, read alone and in conjunction with article 2, paragraph 3, of the Covenant.

3.3 With reference to the Committee's jurisprudence, the author alleges that the mere fact of being subject to an enforced disappearance constitutes inhuman or degrading treatment. Hence, the anxiety and suffering caused by the indefinite detention of Maamar Ouaghlissi, cut off from his family and the outside world, amount to treatment with respect to Maamar Ouaghlissi that is contrary to article 7 of the Covenant. The author also considers that her husband's disappearance has been, and continues to be, for herself and for her close relatives, a paralysing, painful and harrowing ordeal, because the family is completely ignorant of the victim's fate and, if he has died, of the circumstances of his death and his place of burial. In addition, one of Maamar Ouaghlissi's daughters, Khaoula Ouaghlissi, who is now 18 years old, was particularly affected by her father's disappearance and suffers to this day from chronic psychotic disorders that require constant and regular medical treatment. With reference to the relevant jurisprudence of the Committee, the author concludes that the State party has also violated her rights and those of her daughters, Mériem and Khaoula Ouaghlissi, under article 7, read alone and in conjunction with article 2, paragraph 3, of the Covenant.

3.4 Furthermore, the author points out that the Algerian authorities have yet to admit to having illegally arrested and detained Maamar Ouaghlissi and have deliberately concealed the truth about his fate. These facts also disclose a violation of article 9, paragraphs 1 to 4, of the Covenant. In respect of article 9, paragraph 1, the author draws attention to the fact that Maamar Ouaghlissi was arrested without a warrant and without being informed of the reasons for his arrest. None of his family have seen him again or been able to communicate with him since his abduction. Besides, it is clear from the circumstances of his arrest, as his co-workers, who were present when he was arrested, can attest that Maamar Ouaghlissi was at no time informed of the reasons for his arrest or served with a warrant in which the reasons were set out; this is a violation of article 9, paragraph 2, of the Covenant. Furthermore, Maamar Ouaghlissi was never brought before a judge or any other judicial authority such as the public prosecutor in Constantine, within whose jurisdiction the case falls, either during the legally prescribed period of custody or at its conclusion. The author points out that incommunicado detention may entail, per se, a violation of article 9, paragraph 3, of the Covenant, and concludes that this article has been violated. Lastly, given that he has been beyond the protection of the law for the entire duration of his detention — which remains indefinite — Maamar Ouaghlissi has never been able to challenge the lawfulness of his arrest or to apply to a judge for his release or even to ask a third party who is at liberty to make such an appeal or to take over his defence. This is a violation of article 9, paragraph 4, of the Covenant.

3.5 The author also maintains that, given that he has been held in incommunicado detention, in violation of article 7 of the Covenant, her husband has never been treated with

humanity or with respect for the inherent dignity of the human person. Consequently, he has been a victim of a violation of article 10, paragraph 1, of the Covenant.

3.6 As a victim of enforced disappearance, Maamar Ouaghliissi has been deprived of the protection of the law by reason of the refusal of those responsible for his disappearance to reveal his fate and whereabouts and to admit that he has been deprived of his liberty. This is a violation of article 16 of the Covenant. In this connection, the author refers to the position adopted by the Committee in its jurisprudence on enforced disappearances.

3.7 The author also maintains that, as a victim of enforced disappearance, Maamar Ouaghliissi was materially unable to exercise his right to challenge the lawfulness of his detention. As the State party has taken no action in response to all the efforts made by his relatives, it has failed in its obligation to guarantee an effective remedy, consisting in a thorough and diligent investigation into the victim's disappearance and fate, and to keep the family informed of the outcome of its investigation. The absence of an effective remedy is compounded by the fact that a full and general amnesty was legally declared following the promulgation, on 27 February 2006, of Ordinance No. 06-01 on the implementation of the Charter for Peace and National Reconciliation. The Ordinance prohibits, on pain of imprisonment, the pursuit of legal remedies to shed light on the most serious crimes such as enforced disappearances, thereby guaranteeing impunity to the individuals responsible for violations. This amnesty law is in breach of the State's obligation to investigate serious violations of human rights and of the right of victims to an effective remedy. The author concludes that the State party has violated article 2, paragraph 3, of the Covenant with regard to her husband, her daughters and herself.

3.8 Lastly, the author points out that, since the obligation to provide an effective remedy in cases of violations is a vital element of the positive obligations to guarantee the rights enshrined in the Covenant, the failure to take the necessary measures to protect the rights set forth in articles 6, 7, 9, 10 and 16 constitutes per se an autonomous violation of the rights enumerated in article 2, paragraph 3, of the Covenant.

3.9 With regard to the exhaustion of domestic remedies, the author stresses that all her efforts and those of her family have been to no avail. The police, the courts, and the other authorities have failed to initiate a proper investigation. Hence, they have failed to meet not just the State party's international obligations but also the requirements of domestic legislation, since article 63 of the Code of Criminal Procedure states that "when an offence is brought to their attention, the criminal investigation police, acting either on instructions from the State prosecutor or on their own initiative, shall undertake preliminary inquiries".<sup>2</sup> Despite having received a formal complaint, on two occasions, the public prosecutor in Constantine refused to launch an investigation, in keeping with his legal obligations. On the contrary he went so far as to reproach the author for continuing to make enquiries with the military authorities. Moreover, the office set up to receive the families of disappeared persons and tasked, according to the authorities, to help them find their relatives by conducting thorough investigations did not help the victim's father to obtain any further information either. No investigation was carried out, and the office has never interviewed the victim's beneficiaries or the witnesses.

3.10 The author maintains that she has no longer had the legal right to take judicial proceedings following the promulgation of Ordinance No. 06-01 on the implementation of

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<sup>2</sup> Ordinance No. 66-155 of 8 June 1966 on the implementation of the Code of Criminal Procedure, as amended and supplemented.

the Charter for Peace and National Reconciliation.<sup>3</sup> Not only did all the remedies attempted by the author prove ineffective, they are now no longer available to her.

#### **State party's observations on admissibility**

4.1 On 25 November 2009, the State party contested the admissibility of the communication in a "background memorandum on the inadmissibility of communications submitted to the Human Rights Committee in connection with the implementation of the Charter for Peace and National Reconciliation" which was accompanied by an additional note.

4.2 In its memorandum, the State party expresses the view that communications attributing blame to public officials or persons acting on behalf of public authorities in cases of enforced disappearance during the period in question — from 1993 to 1998 — should be considered in the context of the sociopolitical and security conditions prevailing in the country at a time when the Government was struggling to combat terrorism. During that period, the Government was obliged to combat groups that were not formally organized. Hence, there was some confusion in the manner in which a number of operations were carried out among the civilian population. It was difficult for civilians to distinguish between the actions of terrorist groups and those of the security forces, to whom civilians often attributed enforced disappearances. There are numerous explanations for cases of enforced disappearance, but they cannot, according to the State party, be blamed on the Government. Documented information from many independent sources, including the press and human rights organizations, indicates that in Algeria during the period in question the term "disappearance" referred to six distinct scenarios, none of which can be blamed on the Government. The State party cites the case of persons reported missing by their relatives when in fact they had chosen to return in secret in order to join an armed group. They asked their families to report that they had been arrested by the security services as a way of "covering their tracks" and avoiding "harassment" by the police. The second scenario concerns persons who were reported missing after being arrested by the security services but who took advantage of their release to go back into hiding. There were also cases of persons abducted by armed groups who were incorrectly identified as members of the Armed Forces or security services, because they were not identified or had taken uniforms or identification documents from police officers or soldiers. The fourth scenario concerns persons who were reported missing but who had actually abandoned their families and, in some cases, even left the country, because of personal problems or family disputes. The fifth scenario concerns persons reported missing by their families who were actually wanted terrorists and who were killed and buried in the maquis after factional infighting, doctrinal disputes or arguments over the spoils of war among rival armed groups. Lastly, the State party draws attention to a sixth scenario, where persons reported missing were in fact living in Algeria or abroad under false identities.

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<sup>3</sup> The author notes that the Charter rejects "all allegations attributing responsibility to the State for deliberate disappearances". Furthermore, article 45 of the Ordinance promulgated on 27 February 2006 provides that "legal proceedings may not be brought against individuals or groups who are members of any branch of the defence and security forces of the Republic for actions undertaken to protect persons and property, safeguard the nation and preserve the institutions of the People's Democratic Republic of Algeria". Article 46 provides that "anyone who, through his or her spoken or written statements or any other act, uses or exploits the suffering caused by the national tragedy to undermine the institutions of the People's Democratic Republic of Algeria, weaken the State, impugn the honour of its representatives who served it with dignity, or tarnish the image of Algeria abroad shall be liable to a term of imprisonment of from 3 to 5 years or a fine of from 250,000 to 500,000 Algerian dinars. Criminal proceedings shall be automatically initiated by the prosecution service."

4.3 The State party stresses that, given the diversity and complexity of the situations covered by the concept of disappearance, the Algerian legislature decided, following the referendum on the Charter for Peace and National Reconciliation, to recommend that a comprehensive approach should be taken to the issue of the disappeared. Under that approach, all persons who had disappeared during the “national tragedy” would be dealt with, all victims would be offered support to overcome their ordeal and all victims of disappearance and their beneficiaries would be entitled to redress. According to statistics from the Ministry of the Interior, 8,023 disappearances have been reported, 6,774 cases examined, 5,704 approved for compensation and 934 rejected, and 136 are still pending. A total of 371,459,390 Algerian dinars (DA) has been paid out in compensation to all the victims concerned. In addition, a total of DA 1,320,824,683 has been paid out in monthly pensions.

4.4 The State party further contends that not all domestic remedies have been exhausted. It stresses the importance of distinguishing between simple formalities undertaken vis-à-vis the political or administrative authorities, non-contentious remedies involving advisory or mediation bodies, and contentious remedies pursued before the relevant courts of justice. The complainants have written letters to political and administrative authorities, contacted advisory or mediation bodies and petitioned representatives of the prosecution service (chief prosecutors and public prosecutors), but have not actually initiated legal proceedings and seen them through to their conclusion by availing themselves of all available remedies of appeal and cassation. Of all these authorities, only the representatives of the prosecution service are authorized by law to open a preliminary inquiry and refer a case to an investigating judge. In the Algerian legal system, it is the public prosecutor who receives complaints and who institutes criminal proceedings, if these are warranted. Nevertheless, in order to protect the rights of victims and their beneficiaries, the Code of Criminal Procedure authorizes the latter to sue for damages by filing a complaint with the investigating judge. In that case, it is the victim, not the prosecutor, who institutes criminal proceedings by bringing the matter before an investigating judge. This remedy, which is provided for in articles 72 and 73 of the Code of Criminal Procedure, was not used, even though the authors of the communication could simply have instituted proceedings and compelled an investigating judge to initiate an investigation, even if the prosecution service had decided otherwise.

4.5 The State party also notes the author’s contention that the adoption by referendum of the Charter for Peace and National Reconciliation and its implementing legislation — in particular, article 45 of Ordinance No. 06-01 — rules out the possibility of any effective and available domestic remedies being provided in Algeria for the families of victims of disappearance. On this basis, the authors believed that they were under no obligation to bring the matter before the relevant courts, thereby prejudging the position and findings of the courts on the application of the ordinance. However, the authors cannot invoke the ordinance and its implementing legislation to absolve themselves of responsibility for failing to institute the legal proceedings available to them. The State party recalls the Committee’s jurisprudence to the effect that a person’s subjective belief in, or presumption of, the futility of a remedy does not exempt that person from the requirement to exhaust all domestic remedies.

4.6 The State party then turns its attention to the nature, principles and content of the Charter for Peace and National Reconciliation and its implementing legislation. It stresses that, in accordance with the principle of the inalienability of peace, which has become an international right to peace, the Committee should support and consolidate peace and encourage national reconciliation with a view to strengthening States affected by domestic crises. As part of this effort to achieve national reconciliation, the State party adopted the Charter, the implementing ordinance of which establishes legal measures for the termination of criminal proceedings and the commutation or remission of sentences in

respect of any person found guilty of acts of terrorism and anyone who benefits from the provisions on civil dissent, except for those who have committed or been accomplices in mass killings, rapes or bombings in public places. This ordinance also helps to address the issue of disappearances by introducing a procedure for obtaining an official pronouncement of presumed death that opens the way for beneficiaries to receive compensation as victims of the “national tragedy”. Social and economic measures put in place include assistance with job placement and compensation for all persons considered victims of the “national tragedy”. Lastly, the ordinance establishes political measures such as banning any person who exploited religion in the past in such a way as to contribute to the “national tragedy” from holding political office. It also establishes the inadmissibility of any proceedings brought by individuals or groups against members of any branch of the Algerian defence and security forces for actions undertaken to protect persons and property, safeguard the nation and preserve its institutions.

4.7 In addition to the establishment of compensation funds for all victims of the “national tragedy”, the sovereign people of Algeria, according to the State party, have agreed to a process of national reconciliation as the only way to heal the wounds that have been inflicted. The State party insists that the proclamation of the Charter for Peace and National Reconciliation reflects a desire to avoid confrontation in the courts, venting in the media and political score settling. The State party is therefore of the view that the allegations in the communication are covered by the comprehensive domestic settlement mechanism provided for in the Charter.

4.8 The State party asks the Committee to note how similar the facts and situations described by the authors are to those described by the authors of other communications; to take into account the sociopolitical and security context at the time; to note that the authors have failed to exhaust all domestic remedies; to note that the authorities of the State party have established a comprehensive domestic mechanism for processing and settling the cases referred to in these communications through measures aimed at achieving peace and national reconciliation that are consistent with the principles of the Charter of the United Nations and subsequent covenants and conventions; to declare the communication inadmissible; and to instruct the authors to take proceedings in the proper courts.

4.9 Moreover, in the additional note to the memorandum, the State stresses that it has taken into account the notes verbales informing it of the Committee’s decision to consider the question of admissibility of the communication jointly with the merits of the communications and requesting it to submit its comments on the merits and any additional comments on admissibility. In this connection, the State party raises the question of whether the submission of a series of individual communications to the Committee might not actually constitute an abuse of procedure aimed at bringing the Committee’s attention to a broad historical issue involving causes and circumstances of which the Committee is unaware. These “individual” communications dwell on the general context in which the disappearances occurred, focusing solely on the actions of the security forces and never mentioning those of the various armed groups that used criminal concealment techniques to put the blame on the Armed Forces.

4.10 The State party insists that it will not address the merits of these communications until the issue of their admissibility has been settled, since all judicial or quasi-judicial bodies have a duty to deal with preliminary questions before considering the merits. According to the State party, the decision in the cases in point to consider questions of admissibility and the merits jointly and simultaneously — aside from the fact that it was not arrived at on the basis of consultation — seriously prejudices the proper consideration of the communications both overall and in terms of their intrinsic characteristics. Referring to the rules of procedure of the Human Rights Committee, the State party notes that the sections on the Committee’s procedure for considering the admissibility of communications

are separate from those on the consideration of communications on the merits, and that therefore these questions could be considered separately. With regard, in particular, to the question of the exhaustion of domestic remedies, the State party stresses that none of the communications passed through the domestic courts to allow for consideration by the Algerian judicial authorities. Only a few of the communications that were submitted reached the indictments chamber, a high-level investigating court with jurisdiction to hear appeals.

4.11 Recalling the Committee's jurisprudence regarding the obligation to exhaust domestic remedies, the State party stresses that mere doubts about the prospect of success or worries about delays do not absolve the authors of the obligation to exhaust these remedies. As to the question of whether the promulgation of the Charter for Peace and National Reconciliation precludes access to any remedies in this domain, the State party replies that the failure of the authors to take any steps to submit their allegations for consideration has so far prevented the Algerian authorities from taking a position on the scope and limits of the applicability of the Charter. Moreover, under the ordinance in question, the only proceedings that are inadmissible are those brought against "members of any branch of the defence and security forces of the Republic" for actions consistent with their core duties to the Republic, namely, to protect persons and property, safeguard the nation and preserve its institutions. On the other hand, any allegations concerning actions by the defence or security forces that can be proved to have taken place in any other context can be investigated by the appropriate courts.

4.12 Lastly, the State party reiterates its position in respect of the settlement mechanism introduced by the Charter for Peace and National Reconciliation.

#### **Authors' comments on the State party's observations on admissibility**

5.1 On 6 January 2012, the author submitted comments on the State party's observations on admissibility and provided additional arguments on the merits.

5.2 The author maintains that it is not up to the State party to decide whether it is appropriate to bring a particular situation to the attention of the Committee. Furthermore, the adoption by the Algerian Government of a global domestic settlement mechanism or of any other legislative or other measure should not constitute grounds for declaring the communication inadmissible. Moreover, the Committee has already noted that those domestic measures adopted by the Algerian authorities are themselves a violation of the rights enshrined in the Covenant.<sup>4</sup>

5.3 The author also recalls that the declaration by Algeria of a state of emergency on 9 February 1992 does not affect the right to submit individual communications to the Committee. Article 4 of the Covenant provides for derogations only from certain provisions of the Covenant during states of emergency, but does not affect the exercise of rights under the Optional Protocol. Besides, the application of that measure for almost two decades constituted per se a violation of article 4, paragraph 3, of the Covenant, since the State failed to comply with its international obligations and in particular to immediately inform the other States parties of the provisions from which it had derogated and the reasons for such measures.<sup>5</sup> Accordingly, the author considers that the State party is not justified in

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<sup>4</sup> The author refers here, inter alia, to the concluding observations of the Human Rights Committee on Algeria, CCPR/C/DZA/CO/3, 12 December 2007, paras. 7, 8 and 13.

<sup>5</sup> The author quotes general comment No. 29 (2001), relating to article 4 on derogations in case of a state of emergency, para. 1. *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40*, vol. I (A/56/40 (Vol. I)), annex VI.

invoking its own violations of the international obligations by which it is bound to have the present communication declared inadmissible.

5.4 With regard to the argument that the author did not exhaust all domestic remedies, because she did not institute criminal proceedings by bringing the matter before an investigating judge, the author points out, first of all, that for such a procedure payment of a security or a “procedural fee” is required, failing which the complaint will be declared inadmissible. Under article 75 of the Algerian Code of Criminal Procedure, the amount of the security is set arbitrarily by the investigating judge and in practice turns out to be financially prohibitive because, in addition, litigants have no guarantee that a procedure involving members of the security services will actually lead to a prosecution.

5.5 Furthermore, given the numerous steps taken by Maamar Ouaghlissi’s employer and family members, the military, judicial and administrative authorities were aware of his abduction and disappearance and were therefore legally obliged to act upon the report of abduction and arbitrary detention. Those crimes are covered and punished by the Algerian Criminal Code, particularly articles 107, 108, 109, 291 and 292, and the prosecution service is obliged to open an immediate judicial investigation and to hand the perpetrators over to the criminal courts. However, no investigation has been ordered and none of the persons implicated in Maamar Ouaghlissi’s disappearance have been brought to book. Consequently, the State has failed in its duty to investigate and establish the facts about the crimes committed.

5.6 The author insists on the impossibility of initiating criminal proceedings against the perpetrators of human rights violations when imputable to the security services. Under article 45 of Ordinance 06-01, any complaint or accusation made individually or collectively against members of any branch of the defence or security forces of the Republic must be declared inadmissible by the competent judicial authority. Article 46 of the ordinance states, furthermore, that anyone who submits such a complaint is liable to a penalty of from 3 to 5 years’ imprisonment and a fine of between DA 250,000 and DA 500,000. This legislation thus “infringes freedom of expression and the right of any person to have access, at the national and international levels, to an effective remedy against violations of human rights”.<sup>6</sup>

5.7 With regard to the merits, the author notes that the State party appears to dispute the very fact that massive and systematic enforced disappearances occurred in Algeria. The State party paints a set of scenarios involving enforced disappearance, all of which exclude the responsibility of agents of the State. However, paradoxically it recognizes that it has compensated 5,704 beneficiaries of victims out of the 8,023 persons registered as having disappeared.

5.8 The authorities attempt to account for these disappearances by invoking the national tragedy and the context that is naturally created by terrorist crime. In this way, the Government persists in its failure to acknowledge the responsibility of its agents and presents them as the artisans of the country’s salvation.

5.9 The author notes that, in accordance with the Committee’s rules of procedure, States parties have no right to request that the admissibility of a communication be considered separately from the merits. Rather, this is an exceptional privilege that pertains exclusively to the Committee, while the State, for its part, is required to submit “explanations or statements that shall relate both to the communication’s admissibility and its merits”. Furthermore, referring to well-established jurisprudence of the Committee, the author

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<sup>6</sup> The author quotes the concluding observations of the Human Rights Committee, CCPR/C/DZA/CO/3, para. 8.

points out that, in the absence of comments on the merits of the communication, the applicant's allegations must be taken fully into account.

5.10 The author affirms the facts put forward in her communication and stresses that the refusal of the State party to reply to her allegations and to deal with the present communication in its own right is motivated by the involvement of the security services in the abduction and disappearance of Maamar Ouaghliissi. Therefore, according to the author, the absence of any response from the State party on the merits of the communication also constitutes tacit acceptance by the State party of the accuracy of the facts alleged, which the Committee should therefore consider as proven.

### **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 must ascertain that the same matter is not being examined under another procedure of international investigation or settlement. The Committee notes that the disappearance of Maamar Ouaghliissi has been reported to the Working Group on Enforced or Involuntary Disappearances. However, it recalls that extra-conventional procedures or mechanisms established by the Commission on Human Rights or the Human Rights Council with mandates to examine and issue public reports on human rights situations in specific countries or territories or cases of widespread human rights violations worldwide do not generally constitute an international procedure of investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.<sup>7</sup> Accordingly, the Committee considers that the examination of Maamar Ouaghliissi's case by the Working Group on Enforced or Involuntary Disappearances does not render it inadmissible under this provision.

6.3 The Committee notes that, in the State party's view, the author has not exhausted domestic remedies, since she did not consider the possibility of bringing the matter before the investigating judge and suing for damages in criminal proceedings under articles 72 and 73 of the Code of Criminal Procedure. The Committee also notes the author's contention that, after the victim's abduction, the management of the national railway company lodged a complaint with the 5th military region in Constantine; that the victim's relatives went immediately after his arrest to police headquarters in Constantine as well as to the gendarmerie brigades and other barracks in the town; that the victim's father took steps to find out from the court in Constantine whether the victim had been brought before the public prosecutor, lodged a complaint with the prosecution service about his son's abduction and disappearance and went to the DRS barracks in Mansourah to enquire about his son's whereabouts; that the author lodged a complaint with the prosecutor in Constantine about her husband's abduction and disappearance, as well as with the office established in each *wilaya* (prefecture) to receive complaints from the families of the disappeared; that she has also requested information on her husband's disappearance from the general in command of the 5th military region; that she also sent a registered letter to the Minister of Justice to reiterate her complaint and to inform him that no action had been taken on her previous complaints to the prosecution service in Constantine; and that she also approached the national gendarmerie to request an official certificate of disappearance.

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<sup>7</sup> *Celis Laureano v. Peru*, communication No. 540/1993, Views adopted on 25 March 1996, para. 7.1.



The Committee notes that, according to the author, article 63 of the Code of Criminal Procedure states that “when an offence is brought to their attention, the criminal investigation police, acting either on instructions from the State prosecutor or on their own initiative, shall undertake preliminary inquiries”. The Committee notes the author’s contention that, given the serious nature of the alleged offences, it was the responsibility of the competent authorities to take up the case, which they failed to do. It also notes that, according to the author, under article 46 of Ordinance 06-01, anyone filing a complaint for actions that fall within the scope of article 45 shall be punished.

6.4 The Committee recalls that the State party has a duty not only to carry out thorough investigations of alleged violations of human rights, particularly enforced disappearances or violations of the right to life, but also to prosecute, try and punish anyone held to be responsible for such violations. The victim’s family repeatedly contacted the competent authorities concerning Maamar Ouaghliissi’s disappearance, but all their efforts were to no avail. The State party has also failed to provide sufficient information indicating that an effective and available remedy is available de facto, while Ordinance 06-01 of 27 February 2006 continues to be applied, notwithstanding the Committee’s recommendations that it should be brought into line with the Covenant.<sup>8</sup> Reiterating its previous jurisprudence, the Committee considers that to sue for damages for offences as serious as those alleged in the present case cannot be considered a substitute for the charges that should be brought by the public prosecutor.<sup>9</sup> Moreover, given the vague wording of articles 45 and 46 of the Ordinance, the lack of satisfactory information from the State party about their interpretation and actual enforcement and the fact that the State has provided no examples illustrating the effectiveness of this remedy, the author’s fears of the consequences of filing a complaint are reasonable. The Committee concludes that article 5, paragraph 2 (b), of the Optional Protocol is not an obstacle to the admissibility of the communication.<sup>10</sup>

6.5 The Committee finds that the author has sufficiently substantiated her allegations insofar as they raise issues under articles 6, paragraph 1; article 7; article 9; article 10; article 16; and article 2, paragraph 3, of the Covenant and therefore proceeds to consider the communication on the merits.

#### *Consideration of the merits*

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

7.2 As the Committee has emphasized in respect of previous communications in which the State party provided general and collective comments on the serious allegations made by the authors of complaints, it is clear that the State party prefers to maintain that communications attributing responsibility to public officials or persons acting on behalf of public authorities for enforced disappearances during the period in question, that is, from 1993 to 1998, must be considered in the broader context of the domestic sociopolitical and security environment that prevailed during a period in which the Government was struggling to combat terrorism. The Committee wishes to recall its concluding observations

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<sup>8</sup> Concluding observations of the Human Rights Committee, Algeria, CCPR/C/DZA/CO/3, paras. 7, 8 and 13.

<sup>9</sup> *Benaziza v. Algeria*, communication No. 1588/2007, Views adopted on 26 July 2010, supra., para. 8.3.

<sup>10</sup> *Djebrouni v. Algeria*, communication No. 1781/2008, Views adopted on 31 October 2011, paras. 7.3 and 7.4.

concerning Algeria of 1 November 2007,<sup>11</sup> as well as its jurisprudence, according to which the State party may not invoke the provisions of the Charter for Peace and National Reconciliation against persons who invoke provisions of the Covenant or who have submitted or may submit communications to the Committee. Ordinance No. 06-01, without the amendments recommended by the Committee, appears to promote impunity and therefore cannot, as it currently stands, be considered compatible with the Covenant.<sup>12</sup>

7.3 The Committee notes that the State party has not replied to the author's claims concerning the merits of the case and recalls its jurisprudence,<sup>13</sup> according to which it is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to provide the Committee with the information available to it. In the absence of any explanations from the State party in this respect, due weight must be given to the author's allegations, provided that they have been sufficiently substantiated.

7.4 The Committee notes the author's claim that her husband disappeared following his arrest on 27 September 1994; that the authorities have always denied detaining him, even though there were witnesses to his arrest; and that the authorities themselves acknowledged the disappearance by issuing an "official certificate attesting to a disappearance under the circumstances arising from the national tragedy". It notes that, according to the author, the chances of finding Maamar Ouaghlissi alive are shrinking by the day; that his prolonged absence suggests that he died while in custody; and that incommunicado detention creates an exceedingly high risk of violation of the right to life, since victims are at the mercy of their jailers who, by the very nature of the circumstances, are subject to no oversight. The Committee notes that the State party has produced no evidence refuting the author's allegation. The Committee concludes that the State party has failed in its duty to protect Maamar Ouaghlissi's right to life, in violation of article 6 of the Covenant.

7.5 The Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20 on article 7, which recommends that States parties should make provision against incommunicado detention. It notes in the instant case that Maamar Ouaghlissi was arrested on 27 September 1994 and that his fate is still unknown. In the absence of a satisfactory explanation from the State party, the Committee considers that this disappearance constitutes a violation of article 7 of the Covenant with regard to Maamar Ouaghlissi.<sup>14</sup>

7.6 The Committee also takes note of the anguish and distress caused to the author and her daughters by the disappearance of Maamar Ouaghlissi. It considers that the facts before it disclose a violation of article 7, read alone and in conjunction with article 2, paragraph 3, of the Covenant with regard to them.<sup>15</sup>

7.7 With regard to the alleged violation of article 9, the information before the Committee indicates that Maamar Ouaghlissi was arrested without a warrant and without being informed of the reasons for his arrest; that he was at no point informed of the criminal charges against him; that he was not brought before a judge or other judicial authority to challenge the legality of his detention, which remains indefinite. In the absence of

<sup>11</sup> CCPR/C/DZA/CO/3, para. 7 (a).

<sup>12</sup> See, inter alia, *Djebrouni v. Algeria*, supra note 10, para. 8.2.

<sup>13</sup> *Ibid.*, para. 8.3.

<sup>14</sup> *Ibid.*, para. 8.5.

<sup>15</sup> Communication No. 1811/2008, supra, para. 8.6.

satisfactory explanations from the State party, the Committee finds that a violation of article 9 has been committed with regard to Maamar Ouaghliissi.<sup>16</sup>

7.8 Regarding the complaint under article 10, paragraph 1, the Committee reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that they must be treated with humanity and respect for their dignity. In view of his incommunicado detention and in the absence of information provided by the State party in that regard, the Committee finds a violation of article 10, paragraph 1, of the Covenant.<sup>17</sup>

7.9 With regard to the alleged violation of article 16, the Committee reiterates its established jurisprudence, according to which the intentional removal of a person from the protection of the law for a prolonged period of time may constitute a refusal to recognize that person as a person before the law if the victim was in the hands of the State authorities when last seen and if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (Covenant, art. 2, para. 3) have been systematically impeded.<sup>18</sup> In the instant case, the Committee notes that the State party has not furnished adequate explanations concerning the author's allegations that she has had no news of her husband. The Committee concludes that the enforced disappearance of Maamar Ouaghliissi, which has lasted over 17 years, has denied him the protection of the law and deprived him of his right to recognition as a person before the law, in violation of article 16 of the Covenant.

7.10 The author invokes article 2, paragraph 3, of the Covenant, which imposes on States parties the obligation to ensure an effective remedy for all persons whose Covenant rights have been allegedly violated. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing claims of rights violations. It refers to its general comment No. 31 (2004), which provides, *inter alia*, that a failure by a State party to investigate allegations of violations could, in and of itself, give rise to a separate breach of the Covenant. In the instant case, the victim's family repeatedly contacted the competent authorities regarding Maamar Ouaghliissi's disappearance, but all their efforts were in vain and the State party failed to conduct a thorough and effective investigation into the disappearance of the author's husband. Furthermore, the absence of the legal right to take judicial proceedings since the promulgation of Ordinance No. 06-01 on the implementation of the Charter for Peace and National Reconciliation continues to deprive Maamar Ouaghliissi, the author, and her daughters of access to an effective remedy, since the Ordinance prohibits, on pain of imprisonment, the pursuit of legal remedies to shed light on the most serious crimes such as enforced disappearances. The Committee concludes that the facts before it reveal a violation of article 2, paragraph 3, read in conjunction with article 6, paragraph 1; article 7; article 9; article 10; and article 16 of the Covenant with regard to Maamar Ouaghliissi and of article 2, paragraph 3, read in conjunction with article 7 of the Covenant, with regard to the author and her daughters.<sup>19</sup>

8. 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 violations by the State party of article 6, paragraph 1; article 7; article 9; article 10, paragraph 1; article 16; and article 2, paragraph 3, read in conjunction with article 6, paragraph 1; article 7; article 9; article 10, paragraph 1; and

<sup>16</sup> Communication No. 1781/2008, *supra*, para. 8.7.

<sup>17</sup> *Ibid.*, para. 8.8.

<sup>18</sup> *Ibid.*, para. 8.9.

<sup>19</sup> *Ibid.*, para. 8.10.

article 16 of the Covenant with regard to Maamar Ouaghliissi, and of article 7, read alone and in conjunction with article 2, paragraph 3, of the Covenant with regard to the author and her daughters.

9. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including by (i) conducting a thorough and effective investigation into the disappearance of Maamar Ouaghliissi; (ii) providing the author with detailed information about the results of the investigation; (iii) freeing him immediately if he is still being detained incommunicado; (iv) if Maamar Ouaghliissi is dead, handing over his remains to his family; (v) prosecuting, trying and punishing those responsible for the violations committed; and (vi) providing adequate compensation for the author and her daughters for the violations suffered and for Maamar Ouaghliissi if he is alive. Notwithstanding Ordinance No. 06-01, the State party should ensure that it does not impede enjoyment of the right to an effective remedy for the victims of crimes such as torture, extrajudicial killings and enforced disappearance. The State party is also under an obligation to take steps to prevent similar violations in the future.<sup>20</sup>

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to disseminate them widely.

[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 to the General Assembly.]

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<sup>20</sup> Ibid., para. 10.

## Appendix

### Individual opinion of Committee member Mr. Fabián Salvioli (concurring)

1. I concur fully with the decision of the Human Rights Committee in the case of *Ouaghliissi v. Algeria* (Communication No. 1905/2009) and with its findings of violations of the human rights of Maamar Oughlissi, his wife Farida Khirani and his daughters Meriem Ouaghliissi and Khaoula Ouaghliissi as a result of the enforced disappearance of Mr. Maamar Oughlissi.

2. However, for the reasons set out below, I consider that the Committee should also have concluded that the State party has committed a violation of article 2, paragraph 2, of the International Covenant on Civil and Political Rights. I also consider that the Committee should have indicated that, in its view, the State party should amend Ordinance No. 06/01 to ensure there is no repetition of such acts.

3. Since becoming a member of the Committee, I have taken the view that the Committee has, inexplicably restricted its own competence to determine violations of the Covenant in the absence of a specific legal claim. Provided that the evidence submitted by the parties clearly demonstrates that a violation has occurred, the Committee can and must — in accordance with the principle of *iura novit curiae* (“the court knows the law”) — examine the legal aspects of the case. The legal basis for this position and an explanation as to why this does not mean that States will be left without a defence may be found in paragraphs 3 to 5 of my partly dissenting opinion in *Weerawansa v. Sri Lanka*, to which I refer to avoid repeating them.<sup>a</sup>

4. In the Ouaghliissi case, both parties have made numerous references to Ordinance No. 06/01 on the implementation of the Charter for Peace and National Reconciliation; the author considers some of its provisions to be incompatible with the Covenant (see paragraphs 3.7, 3.10 and 5.6 of the Committee’s Views), with specific reference to article 2, paragraph 3.

5. For its part, the State party has also invoked Ordinance No. 06/01, but draws the opposite conclusion. In its view, the ordinance is perfectly compatible with the applicable international standards (see in particular paragraphs 4.6 and 4.8 of the Committee’s Views).

6. Consequently, the parties have provided sufficient arguments on their different views as to whether or not Ordinance No. 06/01 is in conformity with the provisions of the Covenant. It is for the Committee to resolve the matter by applying the law, without necessarily accepting the parties’ legal arguments, which it may completely or partially accept or reject depending on its own legal analysis.

7. In my individual opinions on similar cases regarding Algeria, I have explained why the Committee should address the question of the incompatibility of Ordinance No. 06/01 with the Covenant from the perspective of article 2, paragraph 2, and I have explained why the application of the ordinance to victims constitutes a violation of that provision of the Covenant in the case in question.<sup>b</sup>

<sup>a</sup> *Weerawansa v. Sri Lanka*, communication No. 1406/2005, Views adopted on 17 March 2009, partly dissenting opinion of Committee member Mr. Fabián Salvioli.

<sup>b</sup> *Chihoub v. Algeria*, communication No. 1811/2008, Views adopted on 31 October 2011, partly dissenting opinion of Committee member Mr. Fabián Salvioli, paras. 5–10.

8. This reasoning is relevant to the Ouaghlissi case, in which the Committee is fully competent to examine the legal issues relating to the facts laid before it: on 27 February 2006, the State party adopted Ordinance No. 06/01, which prohibits the pursuit of legal remedies to shed light on the most serious crimes such as enforced disappearances. This guarantees impunity to the individuals responsible for serious human rights violations.

9. With this piece of legislation, the State party introduced a law that is contrary to the obligations laid down in article 2, paragraph 2, thereby committing, per se, a violation to which the Committee should refer in its decision, in addition to the violations it has found. The authors and Mr. Ouaghlissi himself have been the victims — inter alia — of that provision of the law; therefore, the conclusion that there has been a violation of article 2, paragraph 2, in the present case is neither an abstract issue nor merely of academic interest. Lastly, it should not be overlooked that violations relating to the international responsibility of the State have a direct impact on any reparation which the Committee may call for when deciding on each communication.

10. As regards reparation in cases such as this, the Committee has made some progress recently in terms of requiring a guarantee of non-repetition: in the Benaziza and Aouabdia cases, for example, the Committee's decisions contain only a general statement that "the State party is under an obligation to take steps to prevent similar violations in the future",<sup>c</sup> without specifying how this should be done.<sup>d</sup> More recently, in the Djebourni case, the Committee stated as follows: "notwithstanding Ordinance No. 06-01, the State party should ensure that it does not impede enjoyment of the right to an effective remedy for the victims of crimes such as torture, extrajudicial killings and enforced disappearance. The State party is also under an obligation to take steps to prevent similar violations in the future."<sup>e</sup> Lastly, the Committee adopted a decision along very similar lines in the Chihoub case.<sup>f</sup>

11. Progress has undoubtedly been made. As I pointed out in my individual opinions on the two cases cited (the Djebourni and Chihoub cases), the relevant paragraphs are an example of a comprehensive approach to reparations. However, a little more progress is needed, as there remains some ambiguity about the guarantee of non-repetition; in particular, the Committee should make a firm statement declaring its opposition to the continued applicability of a legislative text that is per se incompatible with the Covenant, since it does not meet current international standards for reparation in cases of human rights violations.<sup>g</sup> In *Ouaghlissi v. Algeria*, the Committee reiterates the formula: "notwithstanding Ordinance No. 06/01, the State party should ensure that it does not impede enjoyment of the right to an effective remedy for the victims of crimes such as torture, extrajudicial killings and enforced disappearance. The State party is also under an obligation to take steps to prevent similar violations in the future" (para. 9).

12. The Committee's reasoning and decisions need to be more coherent; with regard to the question of reparation, a clear and unequivocal ruling is required – in the instant case, on the need for the State party to amend Ordinance No. 06/01 by repealing the articles that

<sup>c</sup> *Benaziza v. Algeria*, communication No. 1588/2007, Views adopted on 26 July 2010, para. 11; and *Aouabdia v. Algeria*, communication No. 1780/2008, Views adopted on 22 March 2011, para. 9.

<sup>d</sup> I have drawn attention to this problem in several individual opinions, especially on *Aouabdia v. Algeria*, supra note c, partly dissenting opinion of Committee member Mr. Fabián Salvioli, paras. 10–11.

<sup>e</sup> *Djebourni v. Algeria*, communication No. 1781/2008, Views adopted on 31 October 2011, para. 10.

<sup>f</sup> *Chihoub v. Algeria*, communication No. 1811/2008, Views adopted on 31 October 2011, para. 10.

<sup>g</sup> *Djebourni v. Algeria*, partly dissenting opinion of Committee member Mr. Fabián Salvioli, paras. 11–16 and *Chihoub v. Algeria*, partly dissenting opinion of Committee member Mr. Fabián Salvioli, paras. 11–16.

are per se incompatible with the Covenant, so as to provide an effective guarantee of non-repetition of some of the acts examined in the communication.

[Done 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 to the General Assembly.]

**Individual opinion of Committee members Mr. Krister Thelin, Mr. Walter Kälin and Mr. Michael O’Flaherty (concurring)**

1. The majority has found a violation of article 6, paragraph 1, although it has not been acknowledged that the victim is deceased. I do not disagree with this finding but consider the reasons offered in para 7.4 to be too brief.

2. The underlying premise for the majority’s finding is the new jurisprudence of the Committee as expressed in Communication No. 1781/2008, *Berzig v. Algeria* in October 2011. As pointed out in my dissenting opinion to that decision, the Committee in the *Berzig* case, without any discussion, departed from its long-standing jurisprudence in cases of enforced disappearance, where the facts do not lend themselves to an interpretation of the victim’s death, and found a direct violation of article 6, paragraph 1, without any connection to article 2, paragraph 3. The old approach was confirmed in a case against the same State party as late as in March 2011, and within a similar factual frame.<sup>a</sup>

3. In the case before us, the victim, born in 1958, has not been seen alive for the last 17 years. Given the circumstances of his arrest, the author indicates that her husband probably died in detention (see paragraph 3.2). The Algerian authorities have themselves acknowledged the disappearance by issuing an “official certificate testifying to a disappearance under the circumstances arising from the national tragedy”. Finally, the State party has produced no evidence refuting the author’s submissions, including that the victim died in detention.

For these reasons, the most probable scenario is that the victim is no longer alive. Under these circumstances, the Committee’s findings of a violation of article 6, paragraph 1, are correct – as the majority should have stated, instead of relying only on the new, broad interpretation of article 6 in the *Berzig* case, which the Committee has yet to explain.

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

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<sup>a</sup> *Aouabdia v. Algeria*, supra, note 3, in particular, the dissenting opinion of Mr. Fabián Salvioli.



**BB. Communication No. 1914/2009, *Musaev v. Uzbekistan*  
 Communication No. 1915/2009, *Musaev v. Uzbekistan*  
 Communication No. 1916/2009, *Musaev v. Uzbekistan*  
 (Views adopted on 21 March 2012, 104th session)\***

<i>Submitted by:</i>	Saida Musaeva (not represented by counsel)
<i>Alleged victim:</i>	Erkin Musaev (the author's son)
<i>State party:</i>	Uzbekistan
<i>Date of communication:</i>	18 January 2008 (initial submission)
<i>Subject matter:</i>	Failure to promptly bring a person detained on a criminal charge before a judge and to adequately address torture allegations; proceedings in violation of fair trial guarantees
<i>Procedural issue:</i>	Non-substantiation of claims
<i>Substantive issues:</i>	Arbitrary arrest and detention; right to be brought promptly before a judge; right to adequate time and facilities for the preparation of defence; right to legal assistance
<i>Articles of the Covenant:</i>	7; 9, paragraph 3; 14, paragraphs 3 (b), (d), (e) and (g)
<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 21 March 2012,

*Having concluded* its consideration of communications Nos. 1914, 1915 and 1916/2009, submitted to the Human Rights Committee by Mrs. Saida Musaeva, 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 communications and the State party,

*Adopts* the following:

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\* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, 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.

The text of an individual opinion by Committee members Mr. Fabián Omar Salvioli and Mr. Rafael Rivas Posada is appended to the text of the present Views.

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

1.1 The author of the communications is Mrs. Saida Musaeva, an Uzbek national born in 1944. She claims that her son, Mr. Erkin Musaev, an Uzbek national born in 1967, currently serving a 20-year prison term in Uzbekistan, is a victim of violation by Uzbekistan of his rights under articles 7; 9, paragraph 3; 11; 14, paragraphs 1, 3 (b), (d), (e), and (g), and 5; and 15, of the International Covenant on Civil and Political Rights. The author is unrepresented by counsel. The Covenant and the Optional Protocol entered into force for the State party on 28 December 1995.

1.2 On 21 March 2012, pursuant to rule 94, paragraph 2, of its rules of procedure, the Committee decided to examine the three communications jointly.

### Factual background

2.1 Mr. Erkin Musaev had worked at the Ministry of Defence of Uzbekistan, in various positions since 1993. He resigned in 2004, and started working as a project manager for the Tashkent office of the United Nations Development Programme (UNDP), on the joint European Union-UNDP Programmes for assistance with strengthening borders and drug control in Central Asia – the Border Management Programme in Central Asia (BOMCA) and the Central Asia Drug Action Programme (CADAP).

#### *First trial*

2.2 On 31 January 2006, Mr. Musaev was arrested at Tashkent airport, on his way to Bishkek, Kyrgyzstan, to participate in a regional conference there. During a check, border guards claimed that they had discovered in his luggage a computer disk containing classified information. According to the author, the disk in question was not seized in compliance with criminal procedure law, and there was no check to ascertain whether her son's fingerprints were on it. The author's son consistently claimed that the disk did not belong to him but was placed in his suitcase by the officials, as the luggage remained unaccompanied for a period of time during the check.

2.3 Mr. Musaev spent the night of 31 January 2006 in the Operative Department of the Ministry of National Security, and was interrogated there in the absence of a lawyer. On 1 February 2006, he was placed in the Pre-trial Investigation Detention Centre of the National Security Service. On 2 February 2006, his arrest was sanctioned by a Military Prosecutor who visited the Pre-trial Detention Centre. The same day, Mr. Musaev was charged and on 30 May 2006, his criminal case was brought to court. On 13 June 2006, the Military Court of Uzbekistan found him guilty and sentenced him to a 15-year prison term under article 157 (Planning or preparation of aggressive war or engagement in conspiracy in order to execute the said actions), 301 (Abuse of Power, Stretch of Power or Administrative Dereliction), 162 (disclosure of State secrets), and 302 (Neglect to [Military] Service), of the Criminal Code.

2.4 The author claims that while in detention at the premises of the National Security Service, investigators first subjected her son to psychological pressure in an attempt to force him to confess guilt. When he complained about this in two letters addressed to the Chairperson of the National Security Service (exact dates not provided), the investigators used physical coercion and he confessed. Mr. Musaev's family was not aware of his detention for 10 days. When they learned of the arrest, Mr. Musaev's parents wrote to the Chairperson of the National Security Service, requesting authorization to see their son, but the request was rejected, apparently in order not to obstruct the ongoing investigation of a serious criminal case. According to the author, they were denied the right to meet with their son because he had been subjected to psychological and physical pressure and they would thus have been in a position to witness the signs of ill-treatment.

2.5 The author claims that Mr. Musaev's criminal proceedings did not comply with the requirements of a fair trial: he was arrested because the authorities placed a disk containing classified information in his luggage, thereby falsifying evidence. During his unlawful arrest and detention, he was not represented by a lawyer, and, under torture, he was forced to confess guilt. Subsequently, his contact with his lawyer was unduly limited. At the end of the preliminary investigation, he was given only one day to acquaint himself with the charges against him and the criminal case file content, despite the requirements of the Criminal Procedure Code to give an accused person at least three days to study his/her case file before the beginning of a trial.

2.6 The author also claims that in establishing her son's guilt, the courts referred to evidence which was not on file. In particular, Mr. Musaev was found guilty of having orally provided a representative of a foreign State with classified information from official documents of the Apparatus of the National Security Council within the Presidency of Uzbekistan. However, according to the author, the documents in question were not part of the criminal case file and were not disclosed as they contained written instructions by the Minister of Defence, ordering Mr. Musaev to draw their contents to the attention of their foreign counterparts. If the documents had had to be disclosed in court, it would have become clear that the information he provided to foreign nationals was imparted in the context of his professional duties.

2.7 On 19 June 2006, Mr. Musaev wrote to the Military Court requesting to be allowed to meet with his lawyer to prepare his appeal. His request remained unanswered and he was thus prevented from preparing his appeal. He subsequently wrote to the Military Court several times requesting to be given an opportunity to study the content of the trial transcript, without receiving an answer. Only on 8 October 2007, i.e. more than one year after the judgment of first instance, Mr. Musaev was allowed to familiarize himself with the content of the trial transcript, and only then was he able to submit an appeal (no exact date is provided) against his conviction.

2.8 The author explains that on an unspecified date, the appeal body of the Military Court dismissed the author's son's and his lawyer's appeals and confirmed the conviction and sentence of 13 June 2006. Neither Mr. Musaev nor his lawyer was ever supplied with a copy of the appeal judgement.

2.9 In November 2007, Mr. Musaev filed a supervisory review request with the Supreme Court of Uzbekistan, which, according to the author, remained unexamined. He complained on several occasions to the Supreme Court and the General Prosecutor's Office, claiming violations of his procedural rights during both the preliminary investigation and the court trial, but received no answer. He also complained to the United Nations Working Group on Arbitrary Detention.<sup>1</sup>

#### *Second trial*

2.10 On 13 July 2006, in a separate trial, Mr. Musaev was found guilty of fraud under article 168 of the Criminal Code by the Tashkent City Court, and was sentenced to six years' imprisonment, together with two other persons, Mr. I and Mr. K., who were each sentenced to three years' imprisonment and heavy fines. Mr. Musaev's final sentence, aggregated with his previous sentence of 13 June 2006, was a 16-year prison term. On 10 July 2007, on appeal, the appeal body of the Tashkent City Court confirmed the sentence.

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<sup>1</sup> On 9 May 2008, the Working Group on Arbitrary Detention adopted opinion No. 14/2008, finding that Mr. Musaev's detention was arbitrary and in violation of his rights under articles 9 and 10 of the Universal Declaration of Human Rights and under articles 9 and 14 of the International Covenant on Civil and Political Rights.

Mr. Musaev was found guilty of fraud, committed in a group with Mr. I. and Mr., K. (representing a foreign business company without the necessary authorizations to act in Uzbekistan) in the context of a tender organized by UNDP for the supply of specially trained dogs for Uzbek Customs in 2005.

2.11 The group was found to have unlawfully taken possession of US\$ 25,286 out of a total of EUR 95,775 provided by UNDP for the acquisition of the dogs, by committing fraud against the official winner of the tender, a private firm named Tabiat. On an unspecified date, the director of Tabiat complained to the Prosecutor's Office, claiming irregularities in the execution of the terms of the tender. On this ground, on 12 January 2006, the Prosecutor's Office opened a criminal investigation. On 14 February 2006, i.e. when he was in pre-trial detention for the first criminal case against him, Mr. Musaev was informed of the content of an arrest warrant against him by the Tashkent City Prosecutor. The author claims that the case should not have been examined under criminal law, but under civil law, as in substance it concerned a dispute between two business entities.

2.12 In the context of this second set of criminal proceedings, the author claims, without providing further explanation, that her son was again subjected to torture and psychological and physical pressure to force him to confess guilt. She also claims that his arrest was ordered by a prosecutor and not by a court. His right to defence was also violated, as he was not represented by a lawyer during the preliminary investigation, and he was not able to acquaint himself with the content of the criminal case file before the beginning of the court trial. In addition, the court refused to call additional witnesses on Mr. Musaev's behalf.

#### *Third trial*

2.13 In a third trial, Mr. Musaev was found guilty by the Military Court of Uzbekistan on 21 September 2007 of State treason (article 157 of the Criminal Code), in particular for having repeatedly transmitted or facilitated the transmittal of secret information to foreign military officials, and was sentenced to a 20-year prison term, aggregated to his previous sentences. On 11 October 2007, the sentence was confirmed on appeal by the appeal body of the Military Court. The author claims that neither her son nor his lawyers were provided with the decision of 21 September 2007, which prevented them from preparing a proper appeal. The author also claims that in the context of this criminal case, on 2 March 2007, her son was transferred from the penitentiary centre where he was serving his previous sentence, to the Pre-trial Detention Centre of the Ministry of National Security and was kept there until 5 June 2007. He was only able to meet with his lawyer on 15 May 2007, despite repeated complaints, and he could not meet with his lawyer in private. During this period of time, he was not officially informed of the decision to prosecute him, despite his requests for information thereon. Mr. Musaev was provided with the indictment document only on 17 September 2007, i.e. during the court trial, and after numerous complaints.

2.14 The author claims that by use of unlawful methods of interrogation, psychological and physical pressure, the investigators were attempting to force her son to provide false testimony against three other individuals prosecuted for espionage. The author claims that her son's complaints in this regard were ignored by the court. She submits in particular a copy of her son's lawyer's final plea to the court (undated), in which the lawyer refers to evidence contained on file, pursuant to which Mr. Musaev, when in detention on the premises of the National Security Service, suffered a traumatic brain injury, serious enough for him to receive medical treatment from a surgeon in a hospital in Tashkent.

2.15 She further claims that her son was allowed to consult his indictment document only during the court trial, in violation of the three-day requirement under the Criminal Procedure Code. The court also rejected a number of requests by Mr. Musaev to call and question additional witnesses.

2.16 From the documents on file submitted by the author, it transpires that Mr. Musaev was accused of having, in the course of his activities concerning the joint European Union-UNDP Border Management and Drug Action Programmes in Central Asia (BOMCA and CADAP), facilitated the recruitment of Uzbek border guard officers on behalf of a foreign State with the aim of spying, having been himself recruited, in 2005, by a foreign undercover military agent. The author contends that this accusation is groundless, since the foreign citizen in question arrived in Uzbekistan only in 2006: she provides an attestation to this effect issued by the embassy of the foreign State in question in Tashkent. Mr. Musaev's two co-accused in the case testified that they, together with the author's son, met the military agent at the UNDP premises in February 2005, and this was reportedly accepted by the courts. However, according to an attestation issued by UNDP, only Mr. Musaev of the three was listed as a visitor at the United Nations premises from February to May 2005. This, according to the author, demonstrates that her son's accusation was based only on assumptions.

2.17 The author further contests the legality and the conclusions of an expert commission which has studied the level of the classified information which Mr. Musaev was accused of having provided to the foreign national. Mr. Musaev was not informed that an expert commission had been ordered to study documents, and was unable to question the methodology, call for recusal of experts, challenge the conclusions, etc. According to the author, a witness has confirmed in court that a number of experts have been put under pressure to sign the Commission's conclusions. Mr. Musaev's request in court to call for an additional expert examination thereon was rejected by the court without explanation.

### **The complaint**

3. The author claims that the above-mentioned facts amount to a violation of her son's rights under articles 7; 9, paragraph 3; 11; and 14, paragraphs 1, and 3 (b), (d), (e) and (g); article 14, paragraph 5; and article 15; of the International Covenant on Civil and Political Rights.

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

4.1 By Note Verbale of 11 January 2010, the State party provided its comments on the admissibility and merits of the case. It recalls the facts of the case, noting first that Mr. Musaev was found guilty of State treason, preparation or attempt to disclose State secrets, abuse of power by an official causing significant damage to Military interests, careless attitude concerning the service, and fraud in a particularly significant amount, by the Military Court of Uzbekistan (on 13 June 2006 and 21 September 2007) and the Tashkent City Court on 13 July 2006. He was finally sentenced to a combined 20-year prison term. On 11 October 2007, the Supreme Court confirmed the sentence of 21 September 2007.

4.2 The State party reports that as from 3 August 2006, Mr. Musaev has been held in the UYa 64/21 penitentiary institution in Bekabad City, where he is recorded as suffering from chronic bronchitis and chronic pyelonephritis, although his overall health status is satisfactory. At that time, Mr. Musaev had received 10 short and 8 long visits from his relatives, as well as two visits by his lawyers.

4.3 According to the State party, the author's allegations concerning the use of unlawful methods of investigation against her son and concerning violations of the criminal procedure legislation during the examination of his cases have not been confirmed. The Supreme Court of Uzbekistan has found all court decisions concerning Mr. Musaev to be lawful and grounded.

4.4 The State party further notes that during his stay in prison, Mr. Musaev has been subjected to disciplinary sanctions for having breached the penitentiary regime. No physical

or psychological pressure against Mr. Musaev has been permitted by the penitentiary authorities during his stay in prison.

#### **Author's comments on the State party's submission**

5.1 On 5 March 2010, the author presented her comments on the State party's observations. She notes first that the State party did not provide any reply as to the merits of her claims, inter alia concerning the failure of the courts to question additional witnesses or to conduct additional expert examination. According to the author, the Military Court's decision of 21 September 2007 was based mainly on the initial testimonies of two officials of the Committee on the Protection of the State Borders (CPSB) — also sentenced for espionage in the third trial of Mr. Musaev — who had stated that they had been present during a meeting between Mr. Musaev and a foreign official, held at the United Nations premises in March 2005. According to the author, the officials in question subsequently confirmed, in a cassation appeal complaint filed in 2009, that, at the time, they had been forced to give false testimony against Mr. Musaev. The author reiterates that UNDP confirmed in a letter of 17 September 2007 that neither the two CPSB officials nor the foreign national in question visited its premises during the period in question.

5.2 The author adds that she has continued to complain to different institutions about the violations of her son's rights, without success. She has also complained to the President, asking to have her son re-tried, but her letter remained unanswered.

#### **Additional information by the State party**

6.1 On 14 June 2011, the State party provided additional information. It explains that the content of the present communication has been carefully examined by its competent authorities, which have concluded that the author's allegations are groundless.

6.2 The State party points out that Mr. Musaev was found guilty of fraud in a particularly large amount (art. 168 of the Criminal Code) on 13 July 2006, by the Tashkent City Court, and the sentence was confirmed on appeal, by the appeal body of the same court, on 10 July 2007. Given that Mr. Musaev had already been found guilty by the Military Court on 13 June 2006 on counts of State treason, abuse of power, preparation of and attempt to commit a crime, disclosure of State secrets, and careless attitude concerning the service, and was sentenced to a 15-year prison term, the Tashkent City Court determined an aggregated sentence of 16 years' imprisonment for the totality of the crimes committed. Mr. Musaev was also declared jointly responsible with his two accomplices for the payment of 12,250,000 Uzbek sums<sup>2</sup> as damages for the prejudice suffered by one Ms. Kh. (the director of the Tabiat company).

6.3 According to the decision of the Tashkent City Court, in 2005, Mr. Musaev was working as a Programme Manager with UNDP on programmes for strengthening the State borders in Central Asia. The Court concluded that he and his co-accused had conspired together. His two co-accused, Mr. I. and Mr. K. — representatives of a foreign-registered commercial firm (FDN Holding) which did not have the necessary authorizations to act in Uzbekistan — concluded trade agreements on with the UNDP Office. Under cover of these agreements, the three individuals unlawfully cashed US\$ 25,286, and took possession of a further US\$ 3,000 belonging to Ms. Kh., manager of Tabiat. The three accomplices acted as a criminal group, with clearly defined roles. Mr. Musaev was looking for individuals and companies whose belongings were subsequently fraudulently misappropriated by the group,

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<sup>2</sup> Equivalent to around US\$ 10,000 at the material time.

and Mr. I. and Mr. K. specifically misled the said individuals and firms, making them sign forged documents.

6.4 According to the State party, Mr. Musaev's guilt in connection with the criminal acts concerned was proven by the testimonies of the injured party Mrs. Kh., the witnesses Mrs. K.; Mrs. M.; Mrs. V.; and Mrs. A; the records of interviews with the co-accused; the conclusions of expert examinations; and other evidence on file, all of which were duly assessed in court.

6.5 The author's allegations concerning violations of Mr. Musaev's criminal procedure rights during the preliminary investigation are, according to the State party, groundless. These allegations have been thoroughly examined in court and duly rejected, as it was found that they were in contradiction with the evidence retained by the court, and, in addition, the first-instance court conducted a full assessment of all evidence on file as collected by the investigators and transmitted to the court. According to the State party, no violation of Mr. Musaev's criminal procedure rights was committed during the court trial.

#### **Additional comments by the author**

7. On 22 August 2011, the author noted that, in her opinion, the State party provided no information on the merits of the communication. As to the State party's reference to a number of testimonies which served as a basis for establishing Mr. Musaev's guilt, the author contends that the testimonies in question in fact contained no reference to possibly unlawful activities of her son. The fact that the court listed these testimonies in establishing her son's guilt shows, according to the author, that the trial was biased and held in an accusatory manner. The author claims that a technical expert's examination of 9 March 2006 was conducted in the absence of her son or his lawyers, and Mr. Musaev was not informed of the outcome of the examination, and therefore the examination in question should have been deemed inadmissible.

#### **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, 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. The Committee has taken note that a similar complaint was submitted on behalf of Mr. Musaev to the United Nations Working Group on Arbitrary Detention, which concluded, on 9 May 2008, by Opinion No. 14/2008, that inter alia, Mr. Musaev's rights under articles 9 and 14 of the Covenant have been violated. Preliminarily, and without prejudice to the issue of whether the United Nations Working Group on Arbitrary Detention constitutes "another procedure of international investigation or settlement" for purposes of admissibility, the Committee notes that, in any event, the "same matter" is no longer "being examined" by this body. Therefore, in the absence of any reservation by the State party under article 5, paragraph 2 (a), of the Optional Protocol, the Committee concludes that it is not precluded by this provision from examining the present communication for purposes of admissibility.

8.3 Pursuant to article 5, paragraph 2 (b), of the Optional Protocol, the Committee notes that the author contends that available domestic remedies have been exhausted, and that this was not contested by the State party.

8.4 The Committee notes the author's claim concerning the second trial of her son, that his rights under articles 11 and 15 of the Covenant were violated, since the authorities opened a criminal case for fraud although the case related to a commercial dispute between two economic entities and parties to a trade agreement, which should be regulated by civil law. The Committee considers that this part of the communication is insufficiently substantiated, for purposes of admissibility, and is therefore inadmissible under article 2 of the Optional Protocol.

8.5 The Committee also notes the author's numerous claims relating to the manner in which her son's three criminal proceedings have been conducted by the investigation authorities and courts, showing, according to her, a violation of certain of his rights under article 14, paragraph 1, of the Covenant. The Committee has noted that the State party has not refuted these allegations specifically, but has stated in general terms that no violation of the criminal procedural rights of the author's son had occurred either at the stage of the preliminary investigation or during the court trial. The Committee observes that in substance, these complaints relate to the manner in which the State party's courts and authorities have evaluated facts and evidence and applied the law. The Committee recalls its jurisprudence, according to which it is incumbent upon the courts of States parties to evaluate the facts and 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.<sup>3</sup> Having taken due note of all information and materials before it, the Committee is of the opinion that it is not in a position to conclude that in this case the court proceedings suffered from such defects. The Committee thus considers that the author has failed to provide sufficient substantiation for her claims of a violation of Mr. Musaev's rights under article 14, paragraph 1, and this part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

8.6 The Committee has further noted that the author claimed, in general terms and without providing sufficient details, that in violation of her son's rights under article 14, paragraph 3 (e), of the Covenant, a number of requests made in court to have additional witnesses questioned were unduly rejected and that the court has refused to order the conduct of a new expert examination on at least one occasion. In the absence of more specific information, explanations, or documentation on file, in particular as to the significance of any additional witness statements, with a view to establishing the objective truth in the criminal cases against Mr. Musaev, and on the exact grounds provided by the court when dealing with the issue of an additional expert examination, the Committee considers that this part of the communication is insufficiently substantiated for purposes of admissibility, and is therefore inadmissible under article 2 of the Optional Protocol.

8.7 As far as the remaining claims are concerned, the Committee considers that they are admissible, as raising issues under article 7; article 9; and article 14, paragraphs 3 (b), 3 (d), 3 (g) and 5, of the Covenant.

#### *Consideration of the merits*

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

9.2 The Committee notes the author's claims that during the preliminary investigations in the first and second cases against him, in the absence of a lawyer, her son has been

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<sup>3</sup> See, inter alia, *Simms v. Jamaica*, communication No 541/1993, decision of inadmissibility adopted on 3 April 1995, para. 6.2.



subjected to torture, and put under psychological and physical pressure, to the point that he confessed guilt in relation to the criminal acts concerned. She also claims, in particular, that in the context of the third criminal case, her son suffered a brain injury (see paragraph 2.14 above) during an interrogation, when the investigators tried to force him to make statements incriminating his two co-accused, and that he had to undergo a surgical operation in a hospital in Tashkent. The author has also claimed that her son and his lawyers have complained about the forced confessions obtained under duress, including in court, but their claims were ignored. The Committee further notes that the State party has not refuted these allegations specifically, but has merely stated that no violation of Mr. Musaev's criminal procedural rights had occurred in the case. In the absence of any thorough explanation from the State party regarding the investigation into the torture allegations, the Committee has to give due weight to the author's allegations. In these circumstances, the Committee considers that the State party's competent authorities did not give due and adequate consideration to Mr. Musaev's complaints of torture and forced confessions made both during the pre-trial investigation and in court. Accordingly, the Committee concludes that the facts before it disclose a violation of Mr. Musaev's rights under articles 7 and 14, paragraph 3 (g), of the Covenant.<sup>4</sup>

9.3 The Committee has also noted the author's claim that her son was never brought before a judge or other officer authorized by law to exercise judicial power in order to verify the legality of his arrests and placement in pre-trial detention, but that the decisions to have him arrested and detained were taken by prosecutors only. The Committee recalls<sup>5</sup> its established jurisprudence, according to which article 9, paragraph 3, of the Covenant is intended to bring the detention of a person charged with a criminal offence under judicial control and recalls 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. In the circumstances of the present case, the Committee is not satisfied that the public prosecutor may be characterized 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. The Committee therefore concludes that there has been a violation of this provision.<sup>6</sup>

9.4 The Committee has noted the author's claim that her son's rights under article 14, paragraph 3 (b), of the Covenant, have been violated, as, after his arrest on 31 January 2006, in the context of his first trial, Mr. Musaev was kept in isolation at the premises of the National Security Service, and was interrogated and forced to confess guilt, in the absence of a lawyer; subsequently, during the pre-trial detention, his contacts with his lawyer were unduly limited. Concerning his second trial, the author claimed that her son's right to defence was also violated, as he was not represented by a lawyer during the preliminary investigation. As to the third trial, the author claims that on 2 March 2007, her son was brought to the Pre-trial Detention Centre of the National Security Service and was kept and interrogated there, until 5 June 2007, in the absence of a lawyer. According to the author, her son met with his lawyer only on 15 May 2007, in spite of his repeated requests and never met with his lawyer in private. The Committee notes that the State party has not

<sup>4</sup> See, for example, Human Rights Committee general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial (article 14), para. 60, and communication No. 1401/2005, *Kirpo v. Tajikistan*, Views adopted on 27 October 2009, para. 6.3.

<sup>5</sup> See, for example, *S. and M. Bazarov v. Uzbekistan*, communication No. 959/2000, Views adopted on 14 July 2006, para. 8.2.

<sup>6</sup> See, inter alia, communication No. 959/2000, *S. and M. Bazarov v. Uzbekistan*, Views of 8 August 2006, para. 8.2; communication No. 1449/2006, *Umarov v. Uzbekistan*, Views adopted on 19 October 2010, para. 8.6. The Committee takes note of the fact that the State party has changed its system, and as of January 2008, a system of judicial review over arrests and pre-trial detention is in place.

refuted these allegations specifically but that it has only stated, in general terms, that no violations of criminal procedure occurred in this case. In the circumstances, the Committee considers that due weight must be given to the author's allegations. Accordingly, the Committee considers that in the circumstances of the present case, the facts as presented by the author amount to a violation of Mr. Musaev's rights under article 14, paragraph 3 (b), of the Covenant. In light of these conclusions, the Committee decides not to separately examine the author's claim under article 14, paragraph 3 (d), of the Covenant.

9.5 The Committee has further noted the author's claim that her son was not provided with the judgment of the Military Court of 21 September 2007 (in his third trial), and thus was prevented from effectively presenting an appeal against it. It has also noted that the State party has not refuted this allegation specifically. In the circumstances, the Committee decides that due weight must be given to the author's allegations. The Committee recalls that the right to have one's conviction reviewed can only be exercised effectively if the convicted person is entitled to have access to a duly reasoned, written judgement of the trial court, and at least in the court of first appeal where domestic law provides for several instances of appeal.<sup>7</sup> In the circumstances of the present case, the Committee concludes that the State party's failure to provide the author's son with the judgement of the Military Court of 21 September 2007 amounts to a violation of Mr. Musaev's rights under article 14, paragraph 5, of the Covenant.

10. 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 State party has violated article 7; article 9; and article 14, paragraphs 3 (b), 3 (g) and 5, of the International Covenant on Civil and Political Rights.

11. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the State party is under an obligation to provide Mr. Musaev with an effective remedy, including: carrying out an impartial, effective and thorough investigation into the allegations of torture and ill-treatment and initiating criminal proceedings against those responsible; either his retrial in conformity with all guarantees enshrined in the Covenant or his release; and providing the victim with full reparation, including appropriate compensation. The State party is also under an obligation to take steps to prevent similar violations occurring in the future.

12. Bearing in mind that, by becoming a State 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 and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views, to translate them into the official language, in an accessible format, and to widely disseminate them.

[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 to the General Assembly.]

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<sup>7</sup> See, for example, the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial (art. 14), para. 49.

## Appendix

### **Joint opinion by Committee members Mr. Fabián Omar Salvioli and Mr. Rafael Rivas Posada (partially dissenting)**

1. In general, we concur with the Committee's conclusions regarding communications No. 1914, 1915 and 1916/2009, *Musaev v. Uzbekistan*. However, we wish to place on record our disagreement regarding the scope of military jurisdiction within the framework of the International Covenant on Civil and Political Rights.

2. We wish to highlight the need to review the current position of the Committee, which considers the trial of civilians in military courts to be compatible with the Covenant. This position is based on a paragraph contained in general comment No. 32, which has attracted criticism in a number of minority opinions regarding individual cases previously considered by the Committee.<sup>a</sup>

3. A close reading of article 14 would indicate that the Covenant does not even go so far as to suggest that military justice might be applied to civilians. Article 14, which guarantees the right to justice and due process, does not contain a single reference to military courts. On numerous occasions — and always with negative consequences as far as human rights are concerned — States have empowered military courts to try civilians, but the Covenant is completely silent on the subject.

4. It is true that the Covenant does not prohibit military jurisdiction, nor is it our intention here to call for its abolition. However, the jurisdiction of the military criminal justice system constitutes an exception which should be contained within suitable limits if it is to be fully compatible with the Covenant: *ratione personae*, military courts should try active military personnel, never civilians or retired military personnel; and *ratione materiae*, military courts should never have jurisdiction to hear cases involving alleged human rights violations. Only under these conditions can the application of military justice, in our opinion, be considered compatible with the Covenant.

[Done 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 to the General Assembly.]

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<sup>a</sup> Human Rights Committee: communication No. 1640/2007, *El Abani v. Libyan Arab Jamahiriya*; Views adopted on 26 July 2010, separate opinion of Mr. Fabián Salvioli, paras. 1–15; Human Rights Committee: communication No. 1813/2008, *Akwanga v. Cameroon*; Views adopted on 22 March 2011, separate opinion of Mr. Fabián Salvioli, paras. 1–14.

**CC. Communication No. 2024/2011, *Israil v. Kazakhstan*  
(Views adopted on 31 October 2011, 103rd session)\***

<i>Submitted by:</i>	Arshidin Israil (represented by counsel, Yury Stukanov)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Kazakhstan
<i>Date of communication:</i>	28 January 2011 (initial submission)
<i>Subject matter:</i>	Extradition to China of Uighur asylum-seeker
<i>Procedural issue:</i>	Non-compliance with request for interim measures
<i>Substantive issues:</i>	Arbitrary detention, refoulement
<i>Articles of the Covenant:</i>	6; 7; 9
<i>Article of the Optional Protocol:</i>	

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

*Meeting on 31 October 2011,*

*Having concluded* its consideration of communication No. 2024/2011, submitted to the Human Rights Committee on behalf of Mr. Arshidin Israil 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,

*Adopts* the following:

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

1.1 The author of the communication is Arshidin Israil, a Chinese national of Uighur origin, born in 1972, who, at the time of the initial submission was detained in an Isolation Detention Centre in Kazakhstan, awaiting extradition to China, following the refusal to grant him asylum in Kazakhstan. He submits that if the State party proceeds with his extradition, he would be at risk to be subjected to torture and could be sentenced to death in China. Although he does not invoke it specifically, these claims appear to raise issues under articles 6 and 7, of the Covenant. The author also claims to be a victim of violations by Kazakhstan of his rights under article 9, paragraph 1, and article 2, paragraph 3 (a), of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 30 September 2009. The author is represented by counsel.

\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Rajsoomer Lallah, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

1.2 On 1 February 2011, when registering the communication and pursuant to rule 92 of its rules of procedure, the Committee, acting through its Special Rapporteur on New Communications and Interim Measures, requested the State party not to proceed with Mr. Israil's extradition to China, pending examination of his case. This request was reiterated on 7 April 2011. On 27 June 2011, author's counsel informed the Committee that Mr. Israil had been extradited to China on 30 May 2011.

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

2.1 The author is a Chinese national of Uighur origins. In July 2009, while in China, he provided information over the phone to the Radio Free Asia<sup>1</sup> regarding the events in Urumchi town, where a number of Uighurs had been reportedly killed by the police during a demonstration. The author left China on 23 September 2009, fearing persecution because of his cooperation with foreign media. He crossed illegally the border with Kazakhstan, and, on 29 September 2009, he applied for asylum with the representation of the Office of the United Nations High Commissioner for Refugees (UNHCR) in Almaty. On 10 March 2010, the UNHCR Office granted him refugee status.

2.2 On 1 April 2010, the author was supposed to travel to a European country which had agreed to grant him residence. Instead of allowing him to travel, however, the Kazakh authorities placed him under house arrest, where he was under constant supervision and could not move freely. He remained there until 23 June 2010 and was repeatedly questioned by different Kazakh officials. On 23 June 2010, he was arrested by the police following an extradition request from the Chinese authorities on charges of having participated, in China, in terrorist activities and for having endangered public safety (arts. 120 and 125 of the Chinese Criminal Code). The author reports that at least one of the charges that the author faces in China is for a crime punishable by death penalty. He submits copies of: written order from the General Prosecutor of Kazakhstan; letter from the Chinese Embassy in Kazakhstan; request for judicial cooperation; extradition request by the Chinese General Prosecutor's Office, in which it is stated that the Supreme Court of China has decided that, if found guilty, the author would not be sentenced to death; search warrant; arrest warrant; copy of identity document.

2.3 On 25 June 2010, the Almalin Regional Court issued a detention order against the author for one month, pending extradition. On 28 June 2010, the author appealed against the detention order, which the Almaty City Court rejected on 2 July 2010. On 23 July 2010, 19 August 2010 and 27 August 2010, the Almalin Regional Court extended the author's detention by an additional month each time. All appeals against these orders were unsuccessful. On 9 September 2010, the Commission of the Almaty Department of the Migration Committee of Kazakhstan rejected the author's asylum application under article 12 of the Law on Refugees. On 20 September 2010, the author filed an appeal to the Chairman of the above Committee against the rejection, which to date remained unanswered. On 22 November 2010, the author appealed the rejection before the Almalin City Court. His appeal was rejected on 30 December 2010.

2.4 On 13 January 2011, the author filed a request to the General Prosecutor to be released from detention, since he was detained in excess of the terms provided for in the article 534 of the Criminal Procedure Code, which authorizes detention pending an extradition request for no more than three months. The General Prosecutor never responded to that request.

2.5 The author affirms that he has thus exhausted all available domestic remedies.

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<sup>1</sup> Based in the United States of America.

**The complaint**

3.1 At the time of registration of the communication, the author claimed that if the State party proceeded with his extradition, he would be tortured and sentenced to death in China. These claims appear to raise issues under articles 6 and 7 of the Covenant, although not specifically invoked by the author.

3.2 The author claims violations of the Kazakh criminal procedure, which led to violations of his rights under article 9, paragraph 1 and article 2, paragraph 3 (a), in particular because of his placement in house arrest between 1 April 2010 and 23 June 2010, and, later on, he was kept detained prior to expulsion from 23 June 2010 to 30 May 2011, even if the law allows only for a three months' pre-expulsion detention.

**State party's observations**

4.1 By Note Verbale of 1 April 2011, the State party challenged the admissibility of the communication. The State party informs that, on 9 November 2009, it received a request from the General Prosecutor's Office of China concerning the extradition of the author to China where he was accused of terrorist activities and threat to public security and was under an arrest warrant. The State party notes that the Chinese authorities have submitted material showing that the author was sentenced in China in 1997, for having participated in terrorist acts. He has been released after having served his prison term. According to the documents submitted (arrest warrant, search warrant, etc.), the author was accused of separatist and terrorist activities in connection with his participation in the mass disorders in Urumchi. The State party was also informed that the author had left China while he has been under investigation.

4.2 The State party points out that the author had crossed illegally the border with Kazakhstan in September 2009, and sought asylum with the UNHCR Office in Almaty on 29 September 2009. In February 2010, the UNHCR Office issued a refugee certificate to the author.

4.3 Given the entry into force of the State party's Law on Refugees, the author asked the Almaty Migration Committee to grant him refugee status, and his request was rejected. On 23 December 2010, this decision was confirmed by the Almalinsk District Court of Almaty, and on 9 February 2011, on appeal, by the Almaty City Court.

4.4 According to the State party, on 3 March 2011, the author filed a cassation appeal against the above-mentioned court decisions with the Almaty City Court. At this point in time, this appeal was still pending. On this ground, the State party believed that the communication should be declared inadmissible, for non-exhaustion of domestic remedies. The State party added that in any event, the author's extradition could only be addressed once the Almaty City Court renders its final decision.

4.5 By Note Verbale of 21 May 2011, the State party presented additional information and clarifications on the merits of the communication. It informs that the author had been arrested on 24 June 2010, following a request for extradition to China on charges of terrorism.

4.6 The State party adds that on 9 September 2010, the Commission of the Almaty Department on Migration examined the author's asylum request of 8 June 2010, in the presence of a special representative of UNHCR in Kazakhstan. According to the State party, all recommendations made by UNHCR in the present case have been taken into account. On 14 September 2010, the author's asylum request was rejected. The whole process was monitored also by a representative of the independent non-governmental organization (name provided). The author was represented by a lawyer provided by UNHCR. The lawyer in question participated directly in the interviews and sessions of the

Almaty Department on Migration. No complaints were formulated concerning the examination of the author's case by the Department on Migration.

4.7 The State party points out that the author had appealed against the refusal of the Department on Migration to grant him asylum before the courts of first instance, appeal, and cassation. His case was examined in public hearings, in a transparent manner. On 15 April 2011, the cassation instance rejected the author's claim and its decision entered into force. The author submitted a request to the Supreme Court of Kazakhstan to have his case examined under the supervisory review proceedings (no dates provided). On 18 May 2011, the Supreme Court decided to order the re-examination of the case under the supervisory proceedings.

4.8 The State party adds that the recommendations of UNHCR were taken into account in the present case. In 2010 and 2011, the State party's authorities met with senior officials of UNHCR, conducted consultations and transmitted information concerning the author. As a result, on 3 May 2011, UNHCR officially annulled the refugee certificate it had initially issued to the author.

4.9 The State party adds that the decision of the Department on Migration was based on established and verified information, showing that granting the author asylum in the State party or in a third country could pose serious damages to the security in the State party or in other neighbouring regions. The Kazakh authorities have actively monitored the author's actions for two years. The decision to extradite him was taken irrespective to his past activities, but was rather based on the future threats he could pose for the State party.

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

5.1 On 23 May 2011, the author provided clarifications about the proceedings in the author's case, and explained that on 5 May 2011, the author has submitted a request for a supervisory review of his case with the Supreme Court of Kazakhstan. Counsel also reports that, on 28 April 2011, he had requested the General Prosecutor's Office to provide him with a copy of the extradition order against the author, given that the law has changed in the meantime, and an appeal against such orders was now possible.

5.2 On 27 June 2011, counsel informed the Committee that the author was extradited to China on 30 May 2011. He notes that the decision to extradite his client was taken in September 2010, and at this point of time it was impossible to appeal against it. In January 2011, the Criminal Procedure Code was amended, and an appeal against such decisions was introduced under article 531-1 of the Criminal Procedure Code, dealing with appeals concerning forcible removals: this provision has a retroactive effect. Counsel recalls that he had requested a copy of the extradition order from the General Prosecutor's Office on 28 April 2011. He received a reply on 7 June 2011, informing him that if an appeal is filed against the extradition order, the Prosecutor's Office would transmit all materials to the competent court. Counsel appealed on 27 May 2011 with the Almalinsk District Court of Almaty, but no decision was taken.

#### **Additional information by the State party**

6. The State party presented additional information on 12 August 2011. It notes that the author's counsel claims that the complainant's extradition took place in violation of national law, as the Prosecutor's decision to extradite his client, taken in September 2010, was not subjected to appeal at that time. The State party explains that the Prosecutor's Office took its decision on 23 September 2010. However, given that the author had applied for asylum, his removal was stopped until the completion of the asylum proceedings. The legislation in force at this point of time provided for a court review of the extradition order. Article 109 of the Criminal Procedure Code of Kazakhstan regulates appeals against

actions/omissions to act and decisions by prosecutors. Individuals whose rights and freedoms are directly concerned by an action/omission to act and decisions by prosecutors may complain to court if postponing the verification of the legality of such actions/omissions or decisions until the trial stage would make the restoration of the person's rights or freedoms difficult or impossible. Thus, the decision of the General Prosecutor's Office to extradite the author could have been appealed in 2010.

### Issues and proceedings before the Committee

#### *Non-respect of the Committee's request for interim measures<sup>2</sup>*

7.1 The Committee notes that the State party extradited the author although his communication had been registered under the Optional Protocol and a request for interim measures of protection had been addressed to the State party in this respect. The Committee recalls that, by adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (preamble and art. 1).<sup>3</sup> Adherence to the Optional Protocol obliges a State party to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination, to forward its views to the State party and to the individual (art. 5, paras. 1 and 4). It is incompatible with these obligations, for a State party, to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views.

7.2 Apart from any violation of the Covenant found against a State party in a communication, a State party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration, by the Committee, of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile. In the present communication, the author alleged that his rights under articles 6 and 7 of the Covenant would be violated should he be extradited to China. Having been notified of the communication, the State party breached its obligations under the Optional Protocol by extraditing the author before the Committee could conclude its consideration and examination and the formulation and communication of its Views. It is particularly regrettable for the State to have done so after the Committee has acted under rule 92 of its rules of procedure, requesting the State party to refrain from doing so.

7.3 The Committee recalls<sup>4</sup> that interim measures pursuant to rule 92 of the Committee's rules of procedure adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Protocol. Flouting of the rule, especially by irreversible measures such as, as in the present case, the author's extradition undermines the protection of Covenant rights through the Optional Protocol.

#### *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.

<sup>2</sup> See, for example, communication Nos. 1461/2006, 1462/2006, 1476/2006 and 1477/2006, *Maksudov et al. v. Kyrgyzstan*, Views adopted on 16 July 2008, paras. 10.1–10.3.

<sup>3</sup> See, for example, communication No. 869/1999, *Piandiong et al. v. the Philippines*, Views adopted on 19 October 2000.

<sup>4</sup> See communication No. 964/2001, *Saidova v. Tajikistan*, Views adopted on 8 July 2004.



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

8.3 On the issue of exhaustion of domestic remedies for purposes of the requirements of article 5, paragraph 2 (b), of the Optional Protocol, the Committee notes that the author's counsel made reasonable attempts to complain against the appropriate authorities' refusal to grant Mr. Israil refugee status and their subsequent decision to have the latter extradited to China, but that these proceedings were rendered futile by the State party, which proceeded with the extradition in the meantime.

8.4 The Committee considers that the author's allegations, raising issues under articles 6 and 7, read together with articles 2, paragraph 3, and 9, read together with article 2, of the Covenant, have been sufficiently substantiated, for purposes of admissibility, and declares them admissible.

*Consideration on the merits*

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

9.2 The author has claimed having been initially kept under house arrest, from 1 April to 23 June 2010. On 23 June 2010, he was placed in detention pending extradition. According to the State party's law, such detention cannot exceed three months. In the present case, however, the author was kept detained from 23 June 2010 to 30 May 2011, when he was extradited. All appeals concerning the author's continuing house arrest and subsequent detention remained unsuccessful. The Committee recalls that deprivation of liberty is permissible only when it takes place on such grounds and in accordance with such procedure as are established by domestic law and when this is not arbitrary.<sup>5</sup> It notes that the State party has not addressed these claims specifically. In the circumstances, the Committee considers that due weight must be given to the author's allegations. Accordingly, the Committee concludes that, in the circumstances of the present case, the author's rights under article 9, paragraph 1, read together with article 2, paragraph 3 (a), of the Covenant, have been violated.

9.3 As to whether the author's extradition from Kazakhstan to China exposed him to a real risk of torture or other ill-treatment in the receiving State, in breach of the prohibition of refoulement contained in article 7 of the Covenant, the Committee observes that the existence of such a real risk must be decided in the light of the information that was known, or ought to have been known, to the State party's authorities at the time of the extradition. In determining the risk of such treatment in the present case, the Committee must consider all relevant elements.<sup>6</sup>

9.4 The Committee reiterates that States 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.<sup>7</sup> This principle is not subject to any balancing with considerations of national security or the type of criminal conduct of which an individual is accused or suspected.

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<sup>5</sup> See, for example, *Maksudov et al. v. Kyrgyzstan* (footnote 2 above).

<sup>6</sup> *Ibid.*

<sup>7</sup> Human Rights Committee, 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.

9.5 The Committee has noted the State party's arguments submitted in general terms as to the threat which could result from maintaining the author in Kazakhstan. It considers that, although not invoked by the State party specifically, these arguments tend in fact to establish that the State party has respected its obligations under article 13 of the Covenant, rather than addressing the issues related to the eventual risks for the author, under articles 6 and 7, as set forth in the present communication. The Committee considers at the outset that it was known, or should have been known, to the State party's authorities at the time of the author's extradition that there were widely noted and credible public reports that China resorted to use of torture against detainees and that the risk of such treatment was usually high in the case of detainees belonging to national minorities, including Uighurs, held for political and security reasons.<sup>8</sup> In the Committee's view, these elements in their combination show that the author faced a real risk of torture in China if extradited. Moreover, it is clear that the author was sought in China for serious crimes, and could face a death sentence there. While a statement was made by the Chinese authorities in their request of extradition that the author would not be sentenced to death (see para. 2.2 above) and the State party did not address this issue, the Committee considers that a risk of conviction and death sentence being procured through treatment incompatible with article 7 of the Covenant is not removed. In the circumstances, the Committee is of the view that there is also a risk of a violation of article 6 of the Covenant.

9.6 The Committee recalls<sup>9</sup> that if a State party removes a person within its jurisdiction to another jurisdiction where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, the State party itself may be in violation of the Covenant. In the circumstances of the present case, the Committee concludes that the author's extradition thus amounted to a violation of articles 6 and 7 of the Covenant.

10. 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 facts before it disclose a violation by Kazakhstan of the author's rights under article 9, paragraph 1 read together with article 2, paragraph 3 (a); article 6 and article 7, read alone and together with article 2, of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including adequate compensation. The State party is requested to put in place effective measures for the monitoring of the situation of the author of the communication, in cooperation with the receiving State. The State party should provide the Committee with updated information, on a regular basis, of the author's situation. The State party is also under an obligation to prevent similar violations in the future.

12. 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

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<sup>8</sup> See, for example Committee against Torture, concluding observations in connection with the examination of the fourth periodic report of China (CAT/C/CHN/CO/4), paras. 11 and 18, and report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (E/CN.4/2006/6/Add.6). The author has also referred to reports of Amnesty International, in particular on the inquiries concerning the 2009 disorders in the Xinjiang Uighur Autonomous Region in China.

<sup>9</sup> See, for example, communication No. 469/1991, *Ng v. Canada*, Views adopted on 5 November 1993, para. 6.2; Human Rights Committee, 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.

jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views, to have them translated in official languages of the State party and widely distributed.

[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 to the General Assembly.]

## Annex 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. 1606/2007, *A.I. v. Belarus* (Decision adopted on 26 March 2012, 104th session)\*

<i>Submitted by:</i>	E.I. (not represented by counsel)
<i>Alleged victim:</i>	The author's husband, A.I.
<i>State party:</i>	Belarus
<i>Date of communication:</i>	22 November 2006 (initial submission)
<i>Subject matter:</i>	Arbitrary detention and beating in custody of a suspect; violation of the criminal procedure legislation during a criminal trial
<i>Procedural issue:</i>	Level of substantiation of claims
<i>Substantive issues:</i>	Unfair trial; arbitrary detention; torture, cruel, inhuman or degrading treatment
<i>Articles of the Covenant:</i>	7; 9; 14
<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 26 March 2012,

*Adopts* the following:

#### Decision on admissibility

1. The author of the communication is E.I., a Belarus national born in 1969. She submits the communication on behalf of her husband, A.I., born in 1966, also Belarusian, who at the time of submission of the communication was serving a prison sentence. She alleges that her husband is a victim of violation by Belarus<sup>1</sup> of his rights under articles 7; 9, paragraph 1; and 14, paragraphs 1, 2, 3 (c), 3 (g) and 5, of the International Covenant on Civil and Political Rights. The author is unrepresented.

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\* The following members of the Committee participated in the examination of the present communication: 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, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

<sup>1</sup> The Covenant and the Optional Protocol thereto entered into force for Belarus on 23 March 1976 and 30 December 1992, respectively.

### The facts as presented by the author

2.1 The author's husband was arrested on 30 August 2003 on charges of multiple car thefts. The author submits that there were no legal grounds for his arrest under Belarusian law and that documents had been falsified by investigating officers in order to justify his arrest.

2.2 The author submits that at the moment of her husband's arrest, he did not show resistance and no physical force was used against him. According to the author, later on the same day, her husband was beaten up on the premises of the Borisov City Department of the Interior by officers of the Ministry of Interior of the Minsk Regional Executive Committee, who wanted to compel him to testify against himself. On 1 September 2003, the author's husband complained about the beatings in the presence of his lawyer during an interrogation. She submits that the case file contained a medical certificate for her husband, dated 3 October 2003, confirming the infliction of bodily injuries.<sup>2</sup>

2.3 The author claims that her husband was tried with undue delay. She states that at the time of her husband's arrest he had military status and, under the applicable law, he had to be tried by a military court. However, on 13 January 2004, the case was transferred to the civilian district court, where it remained for six months. On 8 June 2004, a judge of the district court established the court's error in admitting the case for consideration, for lack of jurisdiction. The case was then transferred to a military court.

2.4 On 4 August 2004, the author's husband was convicted by the Borisov Inter-Garrison Military Court and sentenced to nine years of imprisonment. The author considers that her husband's right to be presumed innocent was not respected. She submits that the court examined only inculcating evidence against her husband and refused to hear the witnesses who could have testified that her husband had been beaten up, including his counsel and some policemen.

2.5 The author submits that some evidence was declared inadmissible by the court, because it was obtained in violation of the criminal procedure legislation. However, according to her, the court still based its verdict on the above evidence. She also alleges that the court did not resolve contradictions in the testimonies of the witnesses and that the judge "distorted" the testimonies of some witnesses and misrepresented some of the evidence in the verdict. She maintains that the above facts violated the presumption of innocence established in article 14, paragraph 2, of the Covenant.

2.6 The author's husband appealed the first instance judgment before the Belarus Military Court, which, allegedly after a cursory examination only, rejected the appeal on 15 October 2004. The author's husband made several appeals for supervisory reviews to the Supreme Court, which were rejected on 29 December 2004, 25 February 2005 and 19 October 2005, respectively. The appeals included allegations of unfair trial and ill-treatment. The author claims that her husband's appeals were not duly considered. For

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<sup>2</sup> A copy of the medical certificate is not provided. The author however provided copies of the Decisions of the Prosecutor's Office, dated 1 October 2003 and 19 February 2005, in which the Office refused to open a criminal investigation into the acts of the investigating police officers. From the decisions it appears that inquiries into the allegations of the author's husband took place. During the first inquiry a medical examination of A.I. was conducted on 4 September 2003; this established that he had "light" injuries, such as bruises, which did not threaten his health and life. The Prosecutor questioned the author, the arresting police officers, individuals who were in the vicinity of the arrest of the author's husband and his co-defendant and reviewed the journal of the police station where it was recorded that the arresting officers had used "special methods" in order to apprehend A.I. The Prosecutor concluded that A.I.'s injuries were consistent with the police officers' testimony of using force during the arrest and that the latter had lawfully employed the use of force.

instance, she states that the court did not examine her husband's allegations about the use of physical force to make him confess guilt. There were two inquiries into A.I.'s allegations that he had been beaten by the police officers. The first inquiry ended with a decision of the Prosecutor's Office that A.I.'s allegations were not founded and a refusal to initiate criminal prosecution against the arresting police officers. The author claims that when her husband appealed that decision, a second inquiry was conducted, which was led by the same prosecutor who had rejected his claims the first time. The author considers that her husband was thus deprived of his right to have his conviction and sentence being reviewed by a higher tribunal according to law, contrary to article 14, paragraph 5, of the Covenant.

### **The complaint**

3. The author contends that the facts described disclose violations of her husband's rights under articles 7, 9, paragraph 1, and 14, paragraphs 1, 2, 3 (c), 3 (g) and 5, of the Covenant.

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

4.1 On 2 May 2008, the State party submitted that, on 4 August 2004, the author's husband was convicted by the Borisov Inter-Garrison Military Court for theft and attempted theft, committed as a part of an organized group, and that he was sentenced to nine years of imprisonment. The verdict and sentence were confirmed, on appeal, by the Belarus Military Court on 5 October 2004. The State party details the circumstances of the crimes committed by the author's husband, restating the content of the verdict.

4.2 The State party further submits that the arguments of the author that her husband was subjected to physical violence upon arrest are "untenable". Following A.I.'s complaint, a "verification" had been carried out by the Prosecutor's Office. It was established that the author's husband was apprehended while attempting to steal a vehicle; he resisted arrest and the police officers were compelled to employ "special methods" in order to apprehend him, which might have resulted in light injuries. The prosecutor concluded that the use of force by the arresting police officers had been justified and formally refused to start a criminal investigation.

4.3 The State party declares that the trial was conducted in compliance with the applicable legislation, and that there are no indications that the presiding judge had a personal interest in the outcome of the case or that he had falsified evidence or committed any other violations of the criminal procedure. The State party maintains that the guilty verdict was pronounced based on the assessment of the entirety of the evidence examined by the court, which was given "appropriate assessment".

4.4 The State party submits that while the author claims that her husband's rights under articles 7, 9 and 14 of the Covenant were violated, the essence of her complaint is that she disagrees with the finding that her husband is guilty of committing crimes. It maintains that the evaluation of facts and evidence is a sovereign right of each State party and does not fall under the sphere of regulation of the International Covenant on Civil and Political Rights.

4.5 The State party maintains that the author's opinion that the ruling of the court stating that some violations had been committed during the pretrial procedure contradicts the guilty verdict is based on random interpretation and a lack of understanding of the legal terminology, in particular the meaning of "evidence" and "source of evidence". The State party submits that it had been explained to the author and her husband, on several occasions, that the evidence obtained in violation of the criminal procedure did not constitute a basis of the guilty verdict. Therefore, the author's claims that articles 7, 9, paragraph 1, and 14, paragraph 3, of the Covenant were violated are unfounded.

4.6 The State party further attempts to refute the author's claim that her husband was tried with undue delay. While the State party admits that, due to an error, the case was assigned to the wrong court for a certain period of time, it maintains that the additional time spent in custody was credited in the term of his sentence.

4.7 The State party further submits that the author's claims regarding violations of article 14, paragraph 5, of the Covenant are unfounded. All appeals submitted by A.I., including his appeals to the Supreme Court, had been reviewed in accordance with the legislation and he received replies, signed by the officials authorized to do so.

### **Author's comments on the State party's observations<sup>3</sup>**

5.1 On 4 July 2008, A.I. reiterated at length the arguments submitted by his wife in the initial communication. He challenges the assessment of much of the evidence presented in court by the prosecution, such as the meaning of the transcripts of phone conversations between him and his co-defendant. He reiterates that the court based its verdict partially on inadmissible evidence. He maintains that, on 30 August 2004, he was beaten by police officers and was forced to write a confession. He submits that when he appealed the refusal of the Prosecutor's Office to file criminal charges against the police officers who had mistreated him, the case was assigned to the same prosecutor who rejected his complaint the first time.

5.2 A.I. maintains that the six-month delay in the proceedings caused by the assignment of his case to the wrong jurisdiction violated his right to be tried without undue delay.

5.3 He further maintains that the cassation instance that confirmed the verdict had refused to acknowledge the violations of the criminal procedure which took place during the first instance trial. He submits that supervisory review, according to the domestic legislation, is to be conducted by the Supreme Court, but that one of his appeals was rejected by the Head of the Department for Citizens' Complaints rather than the Court itself.

### **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) and (b), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement, and that domestic remedies have been exhausted.

6.3 The Committee notes the author's allegations that in violation of articles 7 and 14, paragraph 3 (g), of the Covenant, her husband was subjected to psychological and physical pressure to make him confess guilt (see paras. 2.2 and 5.1 above). However, the author has failed to provide details on the alleged beatings and, in particular, on the method of the alleged torture or details on the identity of those who committed it. The Committee further notes the State party's contention that A.I.'s complaints had been investigated, on two occasions, and had been found to be groundless. In the circumstances, and in the absence of

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<sup>3</sup> The comments on the State party's observations were provided by A.I. (the alleged victim in this case) and not by his wife ("the author"), who submitted the initial communication to the Committee on her husband's behalf.

any other relevant information before it, the Committee concludes that this part of the communication is insufficiently substantiated for purposes of admissibility, and therefore inadmissible under article 2 of the Optional Protocol.

6.4 The Committee notes the author's submission that in violation of article 9, paragraph 1, of the Covenant, there were no legal grounds for her husband's arrest under Belarusian law and that documents had been falsified by investigating officers in order to justify his arrest. The Committee, however, observes that the author presented no substantiation in that regard and that the State party has indicated that A.I. was arrested while attempting to steal a vehicle. Accordingly, the Committee considers that the author failed to substantiate this claim, for purposes of admissibility, and considers the author's claims relating to violations of article 9, paragraph 1, of the Covenant inadmissible under article 2 of the Optional Protocol.

6.5 With respect to the allegations under article 14, paragraph 1, the Committee observes that those complaints refer primarily to the appraisal of evidence adduced at the trial, a matter falling in principle to the national courts, unless the evaluation of evidence was manifestly arbitrary or constituted a denial of justice.<sup>4</sup> In the present case, the Committee is of the view that the author has failed to demonstrate that the conduct of the criminal proceedings suffered from such defects. Consequently, it considers that this part of the communication has not been sufficiently substantiated, for purposes of admissibility, and thus finds it inadmissible under article 2 of the Optional Protocol.

6.6 The Committee further notes that the author has invoked a violation of her husband's rights under article 14, paragraph 2, of the Covenant, since the verdict was partially based on evidence declared inadmissible by the court. The Committee however observes that the author presented no substantiation in that regard and that the first instance verdict lists a number of other evidences on which the court based its conclusions. Consequently, the Committee considers that this part of the communication is insufficiently substantiated for purposes of admissibility, and it is inadmissible under article 2 of the Optional Protocol.

6.7 The Committee notes the author's contention that her husband's trial was conducted with undue delay, in breach of article 14, paragraph 3 (c), of the Covenant, because the case was transferred to a civil court by mistake and remained there for six months before it was reassigned to the military court, which had jurisdiction according to the domestic legislation. The Committee, however, observes that the author's husband was arrested on 30 August 2003 and convicted by first instance on 4 August 2004, and that his cassation appeal was adjudicated on 15 October 2004. In the specific circumstances of the case, considering the overall duration of the proceedings, and the uncontested fact that the length of this pretrial detention was deducted from his sentence, the Committee considers that the author has failed to sufficiently substantiate her claim, for purposes of admissibility, and therefore this part of the communication is inadmissible under article 2 of the Optional Protocol.

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<sup>4</sup> See 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. 26. See also, inter alia, communications No. 917/2000, *Arutyunyan v. Uzbekistan*, Views adopted on 29 March 2004, para. 5.7; No. 927/2000, *Svetik v. Belarus*, Views adopted on 8 July 2004, para. 6.3; No. 1084/2002, *Bochaton v. France*, decision of inadmissibility adopted on 1 April 2004, para. 6.4; No. 1167/2003, *Ramil Rayos v. Philippines*, Views adopted on 27 July 2004, para. 6.7; and No. 1399/2005, *Cuartero Casado v. Spain*, decision of inadmissibility adopted on 25 July 2005, para. 4.3.



6.8 The Committee notes the author's submission that that her husband was deprived of his right to have his conviction and sentence reviewed by a higher tribunal according to law, contrary to article 14, paragraph 5, of the Covenant. It observes that the verdict against the author's husband has been reviewed on appeal by the Belarus Military Court, and from its judgement it transpires that that body carefully examined the first instance court's assessment of the evidence, including the assessment of the results of the inquiry conducted by the Prosecutor's Office into the ill-treatment allegations. The Committee further observes that A.I.'s case also underwent supervisory reviews by the Supreme Court. The Committee consequently considers that this part of the communication has not been sufficiently substantiated for the purposes of admissibility, and thus finds 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 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 to the General Assembly.]

**B. Communication No. 1627/2007, V.P. v. Russian Federation  
(Decision adopted on 26 March 2012, 104th session)\***

<i>Submitted by:</i>	V.P. (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Russian Federation
<i>Date of communication:</i>	29 June 2006 (initial submission)
<i>Subject matter:</i>	Ill-treatment by police upon arrest and unfair trial
<i>Procedural issue:</i>	Non-substantiation of claims
<i>Substantive issues:</i>	Prohibition of torture, cruel or inhuman and degrading treatment or punishment; right to a fair hearing by an independent and impartial tribunal; right to be informed promptly of the criminal charge; right to adequate time and facilities for the preparation of defence; right to be tried without undue delay; right to legal assistance
<i>Articles of the Covenant:</i>	7; 14, para. 1; 14, para. 3(a), (b), (c), and (d)
<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 26 March 2012,*

*Adopts the following:*

**Decision on admissibility**

1. The author of the communication is Mr. V.P., a citizen of the Russian Federation born in 1951. He claims to be a victim of a violation by the Russian Federation of his rights under article 7; article 14, paragraph 1; article 14, paragraph 3 (a), (b), (c), and (d), 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 not represented.

**The facts as presented by the author**

2.1 The author works as a therapist in Samara, Russian Federation. He claims that, on 21 March 2002, a group of officers of the police department of Samara District Department of Internal Affairs (DDIA) brutally beat him in front of his colleagues and patients at his

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\* The following members of the Committee participated in the examination of the present communication: 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, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

workplace. They punched him in the face, strangled him, twisted his arms behind his back and demanded him to confess to having taken a bribe.

2.2 On the same day, he was taken to Samara DDIA where he was allegedly forced to confess to having taken a bribe of 300 Russian roubles and a bottle of cognac amounting to some 250 Russian roubles from one B., whom the author did not know personally and whom he had never met before. The author asserts that B. and his friend F. acted as police's agents provocateurs, and, without his knowledge and consent, "planted" the cognac and 300 roubles in his office and thereafter framed up a bribe-taking at his office in the hospital. The Prosecutor's Office of Samara district in Samara city initiated criminal proceedings against him under art. 290, of the Criminal Code (bribery) pursuant to the complaint filed by Mr. B. who claimed that the author requested a bribe for the issuance of a false medical document.

2.3 The charge of bribery was formalized by Mr. B.'s above-mentioned complaint, the decision on the conduct of police operation; the planning of police operation; the report regarding receipt of money; the letter addressed to the Prosecutor's Office of Samara district of Samara city and the ruling on the opening of a criminal case against the author, all dated 21 March 2002. The author claims that there is no factual evidence in the criminal case, such as audio or video records, witness testimonies or any other objective proof about the alleged facts. He further submits that the criminal charge against him was based on evidence given by B. and F., who had a personal interest in opening a criminal case against him. On 16 May 2003, the author was sentenced to three years' imprisonment with deprivation of the right to practise medicine for one year. Pursuant to article 73 of the Criminal Code, the deprivation of liberty was changed to suspended sentence with a three-year probation period.

2.4 On 23 March 2002, the author submitted a request to the Samara regional bureau of forensic medicine for documentation of injuries sustained as a result of beatings by police. The medical examination attested several injuries, including abrasions and bruises resulting in a temporary incapacity to work for a period of three weeks.<sup>1</sup>

2.5 On 29 March 2002, the author filed a complaint with the Prosecutor's Office of Samara district of Samara city for abuse of power and use of force against him by police officers. The investigation into his allegations was carried out by the same investigating officer who was in charge of the investigation of the criminal case initiated on 21 March 2002. On 11 April 2002, the investigative officer refused to open a criminal case against the respective police officers on grounds of lack of *corpus delicti*.

2.6 On an unspecified date, the author appealed the decision of 11 April 2002 to the Samara District Court. On 9 July 2002, the court rejected the appeal, stating that the use of force was permissible and lawful under articles 12 and 13 of the Law on Police. Further, the author's cassation appeal was rejected by the Criminal Chamber of the Samara District Court on 23 August 2002.

2.7 On 11 April 2002, 22 April 2002, 17 May 2002, 23 May 2002, 13 June 2002 and 17 July 2002, the author filed complaints to various instances within the Prosecutor's Office, but claims that he received only formal replies. The Ombudsman Office of the Russian Federation and the Ombudsman Office of Samara Region of Samara city also failed to properly examine his complaints.

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<sup>1</sup> The forensic medical report dated 23 March 2002 attested the following injuries: bruises on the face area and on the right forearm; abrasions on the left side of the neck; haemorrhages on the mucous membranes of both cheeks and wounds on the mucous membranes of both cheeks. The sustained bruises, abrasions and haemorrhages did not result in damage to health; the wounds resulted in light damage to health causing short-term health disruptions for a period up to three weeks.

### The complaint

3.1 The author claims that he was ill-treated by police upon arrest, in violation of article 7, of the Covenant. He maintains that his claims are corroborated by witness testimonies and the forensic medical report of 23 March 2002.

3.2 He claims a violation of article 14, paragraph 1, of the Covenant. During the proceedings in the Samara District Court, the judge violated the principles of impartiality and equality of arms. The judge, during the preliminary hearing of the case, assumed the prosecutor's role by attempting to serve him with a copy of the indictment which he had never received from the prosecutor at the completion of the preliminary inquiry, as required under article 222, of the Code of Criminal Procedure. Under article 237 of the Code of Criminal Procedure, the judge should have referred the case back to the prosecutor. Instead, the judge attempted to hand in the respective copy to the author personally. The same judge did not allow him to address questions to the prosecutor and rejected his requests to call witnesses, to conduct forensic examinations and to request the originals of certain documents, whereas all the motions of the prosecution were satisfied. Therefore, the author claims a violation of the principles of impartiality and equality of arms and maintains that he was de facto deprived of the opportunity to prove his innocence. Furthermore, his request for recusal of the judge was rejected on 21 April 2003.

3.3 The author claims a violation of article 14, paragraph 3 (a), as he was not provided with a copy of the indictment. Instead, he was served with two orders issued by the investigating officer, dated 1 July and 15 July 2002, indicating briefly the nature of the charges against him.<sup>2</sup> Since he was not adequately informed about the charges, he could not properly prepare his defence.

3.4 The author claims a violation of article 14, paragraph 3 (b), since neither he nor his counsel were acquainted with all materials of the criminal case at the completion of the preliminary inquiry, and therefore he was not given the opportunity to prepare his defence.

3.5 The author further claims a violation of his right to be tried without undue delay, as guaranteed by article 14, paragraph 3 (c), of the Covenant. His criminal case reached the Samara District Court's registry on 1 October 2002. However, it was only on 25 October 2002 that the judge held a preliminary hearing on the case. Following the hearing, the consideration of the case was scheduled for 8 November 2002, but it was subsequently postponed for unknown reasons. The first court hearing therefore took place only on 1 April 2003. This four-month delay breached article 233, paragraph 1, of the Code of Criminal Procedure, according to which the examination of a criminal case by the court shall be started within 14 days of the date of the preliminary court hearing. There were no objective obstacles to the consideration of the case within the legal deadline and the court provided no reasonable explanation for the delay.

3.6 Finally, the author claims a violation of his rights under article 14, paragraph 3 (d). He submits that he cannot afford a privately retained counsel and, given the complexity of his case both from a factual and a legal point of view, it was in the interest of justice to provide him with legal assistance. The defence counsel assigned to him in 2002, Mr. K., was not actively involved in his defence and did not consult the case file. Thus, the author refused his services and requested the court to assign him a more qualified counsel.

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<sup>2</sup> The order of 1 July 2002 (available on file) by which the investigative officer informed the author of his status as an accused was signed by the author. It specifically indicates that the author is charged with an offence under article 290, paragraph 2 (bribery) of the Criminal Code and lists the procedural rights the author has as an accused. The order of 15 July 2002 (available on file) adds a new charge under article 285, paragraph 1 (abuse of power), of the Criminal Code.

3.7 The second counsel, appointed in 2003, Mr. G., was present during most part of the trial. However, on the sixth day of the court hearing he admitted that he was not familiar with the materials of the case. Furthermore, he did not support the author's motions in court. Consequently, the author refused his assistance.

3.8 The third counsel, Mr. L., refused to support his motions, leaving them "at the discretion of the court". For this reason, the author refused his services as well. As a result, the court hearings of 8 and 12 May 2003 continued in the absence of a counsel. He claims that the passivity of counsels deprived him of the right to defence and argues that the appointment of a defence counsel by the State is not sufficient to ensure to the accused qualified legal aid.

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

4.1 On 21 April 2008, the State party provided its observations. It submits that, on 21 March 2002, the Prosecutor's Office of Samara district of Samara city opened a criminal case against the author for taking a bribe of 300 roubles and a bottle of cognac for the issuance of a false medical certificate to Mr. B. In the course of the preliminary inquiry, the author was charged with an offence under article 290, paragraph 2 (bribe-taking by an official for illegal actions), of the Criminal Code.

4.2 On 16 May 2003, the Samara District Court found the author guilty of bribery and sentenced the author to three years' imprisonment. Pursuant to article 73 of the Criminal Code, the deprivation of liberty was changed to a suspended sentence with a three-year probation period and deprivation of the right to practice medicine for one year. On 27 June 2003, after the review of the author's sentence by the Criminal Chamber of the Samara Regional Court, the reference to the deprivation of the right to practice medicine was also excluded.

4.3 With regard to the author's allegations under article 7 of the Covenant, the State party submits that, during his interrogations, the author stated that he was approached by policemen who, after the presentation of their identification, asked him to return together to his office. When they went upstairs, he got scared, pulled some money<sup>3</sup> from his pocket, put it in his mouth and started chewing it. Since he did not comply with the order to take out what he had in his mouth, one officer, using physical force, pulled the money out of the author's mouth, as a result of which the author's oral mucosa was damaged. This fact was confirmed by Mr. G., Ms. S., Mr. F., Mr. B. and other eyewitnesses.

4.4 On 29 March 2002, the author requested the Prosecutor's Office of Samara District of Samara city to open a criminal case against the police officers for abuse of power and use of force against him. On 11 April 2002, after having investigated the alleged facts, the investigating officer refused to open a criminal case for lack of *corpus delicti*. This decision was upheld by the Prosecutor's office of Samara district on 15 April 2002.

4.5 On 6 May 2002, the author appealed the decision of the investigative officer of 11 April 2002 to the Samara District Court, which rejected the appeal on 9 July 2002. The Court stated that, from the explanations given by persons present during the police operation as well as from the report based on the watching of the video recording of the arrest, it was clear that the author had not been beaten. The use of physical force was

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<sup>3</sup> As it transpires from the materials available on file, the money offered as bribe had been treated in advance with a special solution in order to glow when lightened with an ultraviolet lamp. Moreover, the bills were marked (the number and series of the bills have been registered in a special report and copies of them were made). The three bills of 100 roubles each were found in the possession of the author upon his apprehension.

proportionate and necessary for suppression of a crime, and the actions of the police were in compliance with articles 12 and 13 of the Law on Police. On 23 August 2002, the Samara District Court upheld the decision of 9 July 2002, rejecting the author's cassation appeal.

4.6 As to the author's allegations under article 14, paragraph 1 and paragraph 3 (a), of the Covenant, the State party submits that, on 28 September 2002, the investigative officer offered to the author a copy of the indictment in the presence of two lay witnesses, Ms. R. and Ms. I. He categorically refused to take the copy. The author himself confirmed during the preliminary hearing that the investigative officer came to him accompanied by two women he did not know.<sup>4</sup> Following the author's refusal, a copy of the indictment was sent to him by regular post and another copy was handed to his counsel.<sup>5</sup>

4.7 During the preliminary hearing of 25 October 2002, the author complained that he had not received a copy of the indictment and the judge was ready to provide the respective copy, but he again refused to receive it. The judge did not assume in any way the prosecutor's role; her actions were rather aimed at ensuring that the right of the author to receive a copy of the indictment, as stipulated in article 47, part 4, paragraph 2, of the Code of Criminal Procedure, had been respected. The author's voluntary refusal to take a copy of the indictment does not constitute a violation of his right to be informed promptly and in detail of the charge against him. He was informed promptly and in detail about the charges against him and about his rights and duties as an accused, therefore the procedure stipulated in articles 171 and 172 of the Code of Criminal Procedure has been duly respected. These facts are not refuted by the author.

4.8 The author's allegations that he could not address questions to the prosecutor are unfounded. While the right of the prosecutor to interrogate the accused is set forth in article 275, of the Code of Criminal Procedure, the legislation in force does not guarantee to the accused the right to address questions to the prosecution, and thus there has been no violation of the author's rights in this respect.

4.9 All the motions advanced by the author and his counsel during the court hearing (i.e. to call witnesses, to conduct forensic examinations, to request the originals of certain documents) were duly considered by the court.<sup>6</sup> The fact that the number of prosecution's motions satisfied by the court was greater than the number of satisfied motions advanced by the defence cannot per se be interpreted as a violation of the principles of impartiality and equality of arms. As regards the author's request for recusal of the judge, the State party submits that the recusal filed against the judge examining the criminal case in a single-judge formation shall be considered by the judge concerned by it, as stipulated in article 64,

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<sup>4</sup> This argument is confirmed by the transcript of the hearing of 25 October 2002 (available on file).

<sup>5</sup> According to the transcript of the preliminary hearing of 25 October 2002 (available on file), the prosecutor confirmed that a copy of the indictment was sent to the author via registered mail and a confirmation of delivery was available on file. Moreover, according to the ruling of 17 April 2003, the postal service confirmed that the registered letter addressed to the author was delivered to his home address on 30 September 2002. Since the author was not home, the letter was dropped in his mailbox. The same happened with the additional letters that had been sent on 7, 14, 21 and 28 October 2002.

<sup>6</sup> According to the transcript of the hearing of 21 April 2003 (available on file), the author's request to call several witnesses for testimony was satisfied by the court, and the court provided grounds for the refusal to conduct additional forensic examinations.

paragraph 4, of the Code of Criminal Procedure. The request was duly considered by the judge and reflected in the ruling of the Samara District Court of 8 May 2003.<sup>7</sup>

4.10 The author's arguments on the unlawfulness of his conviction were considered both within cassation as well as supervisory review proceedings and were rejected as unsubstantiated. The author's conviction was based not solely on the testimony of the persons indicated by the author (see para. 2.3 above) but also on the testimonies of other witnesses, and other evidence.

4.11 With regard to the alleged violation of article 14, paragraph 3 (b), the State party submits that, on 16 July 2002, the investigating officer informed the author and his counsel about the termination of the preliminary inquiry and about their right to get acquainted with the materials of the criminal case. On the same day, the inquiry was extended until 21 August 2002. The case consisted of 240 pages, and the author had been previously acquainted with 64 pages (including the indictment, his interrogation reports, his explanations, petitions and requests and the decision to conduct forensic examination). Between 16 July and 24 July 2002, the author could consult the case file every day from 9 a.m. to 6 p.m., but did so only two hours per day.

4.12 On 25 July 2002, the author refused to receive, in the presence of two lay witnesses, a notice to appear to the Prosecutor's Office of Samara district in order to familiarize himself with the case file. On 29 July 2002, the author was summoned again for 9 a.m., but he came at 12 a.m., refused to wait for his counsel and did not consult any materials. He also refused to come to the Prosecutor's Office on 30 and 31 July 2002 giving the reason that he had been summoned to the Samara District Court. On 1 August 2002, he did not consult the case file because of the absence of his counsel. From 2 to 7 August 2002, he failed to appear to the Prosecution's Office without providing any reasons. On 9 August 2002, he consulted the case file from 9.15 a.m. until 10.50 a.m., thereafter refusing to do so due to health problems. The ambulance team concluded that his state was satisfactory. On 26 August 2002, he consulted the case files from 10.20 a.m. until 11.37 a.m. On 27 August 2002, he consulted pages 24 and 25 of the case file.

4.13 The author failed to appear to the Prosecution's Office in order to consult the case file between 28 August and 20 September 2002, and refused to accept any summon without explaining the reasons, although he was well aware of his obligation to appear at the Prosecution's office at the time indicated in the summons. The period to consult the file was terminated on 20 September 2002. Thus, in a period of more than two months (16 July 2002–20 September 2002), the author consulted the case file on only nine days. After 20 September 2002, he never requested additional time for this purpose. However, he could additionally consult the case file, and in fact he did so, from its deposit with the court on 2 October 2002 and until the consideration of the case on the merits on 14 April 2003. Therefore, he had enough time to prepare his defence.

4.14 As regards the author's allegations under article 14, paragraph 3 (c), the State party contends that the criminal case was sent to court on 1 October 2002. On 11 October 2002, the judge set the date of preliminary hearing to 25 October 2002 (according to article 227, paragraph 3, of the Code of Criminal Procedure, the judge shall schedule the preliminary hearing on a case within 30 days from the receipt of the case by the court). The

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<sup>7</sup> On 21 April 2003, the judge issued a ruling explaining the grounds for her decision (available on file). Inter alia, the author was explained that, according to article 231 of the Code of Criminal Procedure, the question regarding the consideration of a case by a single judge or by a panel of judges is decided during the preliminary hearing. Since the author did not object to the consideration of his case by a single judge during the hearings of 1, 14 and 17 April 2003, his request during the trial for consideration of the case by a panel of judges could not be considered.

consideration of the case was scheduled for 8 November 2002, in compliance with the deadline set out in article 233, paragraph 1, of the Code of Criminal Procedure (the examination of a criminal case in a court session shall be started within 14 days from the date of the preliminary hearing). On 8 November 2002, the case was not considered because the author filed a cassation appeal on 28 October 2002 (supplemented on 1 November 2002) against the decision of the judge to proceed with the consideration of the merits of the case.

4.15 On 25 November 2002, the criminal case was referred back to the Samara District Court and its consideration was scheduled for 17 December 2002. On that date, the author submitted a request for suspension of proceedings due to health problems and the court satisfied it.

4.16 A new court session was scheduled for 1 April 2003, when the author again claimed that he had not received a copy of the indictment. The hearing was then postponed to 14 April 2003 in order for the prosecution to obtain the confirmation of delivery of the respective document from the post office. On 14 April 2003, the hearing did not take place because the public prosecutor was replaced and the newly appointed prosecutor requested three days to get acquainted with the case file. The author did not object to this request and the court satisfied it.<sup>8</sup> The consideration of the case started on 17 April 2003. Therefore, the court hearings were postponed based on objective reasons and, on several occasions, upon the author's requests or because of the appeals he filed. Accordingly, there has been no violation of the author's right to be tried without undue delay.

4.17 As to the alleged violation of article 14, paragraph 3 (d), the State party submits that Mr. K. was assigned as counsel during the preliminary inquiry and the preliminary court hearing. The author, however, refused his legal aid on grounds of his "unprofessionalism". The court then appointed another counsel, Mr. G., who was familiar with the case file and participated in all court hearings. Nonetheless, on 28 April 2003, the author refused his assistance. On 7 May 2003, the author declined the legal assistance provided by the third appointed counsel, Mr. L., and requested the court to appoint a competent counsel.

4.18 In the light of the court's unsuccessful attempts to provide the author with legal assistance which he constantly declined on account of the counsels' low level of professionalism, the court proceedings continued in the absence of a counsel. The author has never indicated that he would have liked a particular counsel to represent him. Moreover, he could have himself retain a private defence counsel.

4.19 The court did not have any reasons to doubt the professionalism of the appointed counsels. All of them have actively used their procedural rights under article 53 of the Code of Criminal Procedure, *inter alia* by participating in the examination of evidence, addressing questions to witnesses, submitting motions to court and expressing their opinions thereon. Therefore, the author's allegations are not supported by the case-file materials and are unfounded.

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

5.1 In his comments dated 14 June 2008, the author refutes the State party's arguments that he had "money in the mouth" and that he was not beaten by police officers, claiming that the video records of his arrest indicate the contrary and that his allegations are corroborated by the forensic medical report.

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<sup>8</sup> This fact is confirmed by the trial transcript dated 14 April 2003 (available on file).



5.2 He maintains that the so-called “eye witnesses” were directly involved in the police provocation against him and were not objective witnesses, being “summoned” in advance by police for participation in the “deliberate provocation” against him. He reiterates the information provided in paragraphs 2.2 and 2.3 above. He claims that the criminal charge against him was based solely on the testimony of the police officers and of other participants in their “deliberate provocation”, and refers to the decision of the European Court of Human Rights in *Teixeira de Castro v. Portugal*,<sup>9</sup> where the Court stated that the fact that Mr. Teixeira had been convicted because the police instigated the offence meant that, right from the outset, he was definitively deprived of a fair trial. Therefore, his rights under article 7 and article 14, paragraph 1, of the Covenant, have been violated.

5.3 As regards the argument that a copy of the indictment was sent to him by post and that he refused to receive a copy of it in the presence of lay witnesses, the author claims that he never received the copy by post and no confirmation of receipt signed by him exists in the case file. Furthermore, the so-called “lay witnesses” are fictional, since they have not been summoned for interrogation by the court and their names do not appear in the transcripts of court hearings.<sup>10</sup> He further submits that, since the prosecution has the right to address questions to the accused, the accused has the same right in relation to the prosecution and recalls that the judge did not allow him to address questions to the prosecutor.

5.4 The author further reiterates his claims that the judge violated the principle of impartiality by attempting to serve him with a copy of the indictment. He reiterates that the judge declined his requests to call witnesses for testimony, to conduct forensic examinations and to request the originals of certain documents, whereas all the motions submitted by the prosecution were satisfied. His request for recusal of the judge was rejected without any grounds being provided.<sup>11</sup> Thus, he was deprived of the possibility to prove his innocence, whereas the prosecution was provided with obvious procedural advantages in supporting the criminal charge against him.

5.5 The author further refutes the State party’s information that he has allegedly refused to get acquainted with the case file without explaining the reasons. He recalls his health problems (see para. 4.12 above) and claims that he had time only to familiarize himself with a small part of the case file. He maintains that, according to article 218 of the Code of Criminal Procedure, the only document attesting that the accused and his counsel consulted the case file is the report produced for that purpose, and it should be signed by both the accused and his counsel. Neither he nor his counsel signed the respective report of 15 July 2002. He maintains that he was not acquainted with the materials of the criminal case and that he has never refused to consult them. On 17 July 2002, he requested from the Prosecutor of Samara District a four-month extension to consult the case file. Mr. K., his counsel, was also not familiar with the case file.

5.6 As regards the State party’s observation in relation to the undue delay in consideration of his case (see paras. 4.14–4.16 above), the author maintains that he was sick only for two weeks between 17 December and 31 December 2002, and this circumstance could not have served as a ground to postpone the consideration of the case for more than four months. The consideration of the case should have started not later than 8 November 2002, in conformity with article 233, paragraph 1, of the Code of Criminal Procedure.

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<sup>9</sup> Application No. 25829/94, judgement of the European Court of Human Rights of 9 June 1998.

<sup>10</sup> According to the transcript of the hearing of 21 April 2003 (available on file), the author requested to have these witnesses examined in court. The court satisfied the request; however, it appears that the defence failed to secure their presence in court.

<sup>11</sup> The materials available on file suggest the contrary. See footnote 7 above.

However, this deadline, for unknown reasons, was not respected by the court,<sup>12</sup> in violation of article 14, paragraph 3 (c), of the Covenant.

5.7 As to the State party's contention that he was provided with qualified legal assistance, he reiterates his previous allegations and underlines that the examination of his criminal case on 8 and 12 May 2003 continued in the absence of a counsel. Therefore, there has been a violation of article 14, paragraph 3 (d), of the Covenant.

#### **State party's further observations**

6.1 On 15 July 2011, the State party provided additional observations. It refutes the author's allegations of ill-treatment by police and notes that the forensic medical report invoked by the author refers to the following injuries: bruises on the face area and on the right forearm; abrasions on the right side of the neck; hemorrhages and wounds on the mucous membranes of both cheeks. Since during his arrest the author tried to swallow the money received as bribe, he did not react to the instructions given by police and showed resistance, police officers used force by holding his hands and pressing his cheekbones in order to prevent him from swallowing the money. Physical force was used within the limits necessary for suppression of a crime, and in compliance with articles 12 and 13 of the Law on Police.

6.2 The author's request for opening of a criminal case against the police officers was rejected and this decision was further upheld by courts within cassation and supervisory review proceedings. Moreover, his allegations of ill-treatment were considered by the court during the consideration of his case and were qualified as an attempt to avoid criminal responsibility. Also, in connection with his claims and upon his request, the court heard two witnesses, Ms. Z. and Ms. I., the author's colleagues.

6.3 Furthermore, the court specifically indicated in its ruling that the actions of police officers cannot be regarded as provocation. In this respect, the court referred to the ruling No. 6 of the Plenum of the Supreme Court of 10 February 2000 on the judicial practice regarding cases of bribery and commercial bribery, according to which the carrying out of a police operation pursuant to a complaint of request for bribe cannot be regarded as provocation. Such a complaint was filed by Mr. B. and was duly registered in the register of crimes of the Samara District Department of Internal Affairs on 21 March 2002. On the same day, Mr. B. was offered the money to be used in the course of the police operation.<sup>13</sup>

6.4 As to the alleged personal interest of the witnesses in having the author criminally prosecuted, the State party submits that, as explained by Ms. S., on 21 March 2002 she was invited to participate as lay witness during a police operation against bribe-taking by one of the doctors of the hospital No. 1. Similar explanations were given by Mr. G., another person invited as lay witness. These witnesses testified in court and have been informed about criminal responsibility for perjury. During the questioning of the respective witnesses the author did not claim that they were interested in him being criminally persecuted.<sup>14</sup> He also did not raise this claim in his cassation appeal.

6.5 With regard to the author's allegation that the lay witnesses Ms. R. and Ms. I., in the presence of whom he refused to receive a copy of his indictment, are fictional, the State

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<sup>12</sup> Although the author is silent on the reasons for the delay and refers to "unknown reasons", the State party has provided relevant information refuting his allegations in paragraphs 4.14–4.16 of its observations.

<sup>13</sup> See footnote 3 above.

<sup>14</sup> The information provided by the State party in this paragraph is confirmed by the transcript of hearing of 21 April 2003 (available on file).

party reiterates its previous observations, adding that the author never raised this claim in his cassation appeal.

6.6 As regards the author's claims under article 14, paragraph 3 (b), the State party reiterates its previous observations and adds that the absence of the author's and his counsel's signatures on the report on the familiarization with the case file (dated 15 July 2002) is explained by the fact that they had been informed about the termination of the preliminary inquiry and about their right to consult the case file only on 16 July 2002. This is attested by their signatures on the report informing them that the preliminary inquiry was completed. The author and his counsel have been acquainted with the videotape documenting the author's arrest. Although the report was not signed by any of them at that time, their signatures appear in the timetable of familiarization with the case file, according to which they both watched the videotape on 16 July 2003 from 4 p.m. to 5.45 p.m.

6.7 The State party also reiterates its observations in relation to the author's claim of undue delay in considering his case and notes that the author did not raise this claim in the cassation appeal.

6.8 The State party further reiterates its previous observations with regard to the author's claims that he was not provided with qualified legal assistance and submits that the author refused the assistance of the first counsel, Mr. K., on grounds that he "worked for the investigation and acted against his interests", whereas in the communication before the Committee invokes as a reason the failure of Mr. K. to get acquainted with the case file. However, as confirmed by the materials of the case file, Mr. K., together with the author, consulted the case file materials during five days; he also received a copy of the indictment on 30 September 2002.

6.9 The second appointed counsel, Mr. G., ensured the author's defence during the court proceedings. He supported the author's motions in court and also addressed questions to the parties, which is confirmed by the trial transcript. The author's claims that Mr. G. did not consult the case file and did not support his motions in court are unfounded. For example, the prosecutor requested the court to read out the testimony of a witness, one K., and after familiarization with the respective report, both the counsel and the author agreed to have it read out in court.<sup>15</sup> The court also satisfied the counsel's request for time to consult the case file.<sup>16</sup> However, after Mr. G. consulted the case file, the author refused his legal assistance.

6.10 Based on the above, the State party maintains that the author abused his right to legal aid. It concludes that all the author's allegations under the Covenant are unfounded.

#### **Further comments by the author**

7.1 By letter of 22 August 2011, the author reiterates his previous comments in relation to his allegations of ill-treatment by police and maintains that his claims are corroborated by testimonies of two witnesses, Ms. Z. and Ms. I. In his opinion, the State party acknowledged that the witnesses present during his arrest, i.e. Ms. G., Ms. S., Mr. F. and Mr. B., had been forcibly summoned by police to participate in the "deliberate provocation" against him. Furthermore, the State party presented no evidence confirming the commission of bribery.

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<sup>15</sup> This is confirmed by the transcript of the court hearing of 17 April 2003 (available on file).

<sup>16</sup> This is confirmed by the transcript of the court hearing of 23 April 2003 (available on file), when the court granted time for counsel to consult the case file and postponed the hearing to 7 May 2003.

7.2 The author also reiterates his arguments raised in paragraph 5.3 above, and claims that, since the lay witnesses Ms. R. and Ms. I. are fictional and have never been questioned by the court,<sup>17</sup> he could not refer to them in his cassation appeal.

7.3 With regard to the State party's arguments that he refused to familiarize himself with the case file, the author reiterates his previous comments. He further claims that the State party did not provide any reasons for the undue delay in examining his case<sup>18</sup> and that this allegation was not raised on cassation because the undue delay cannot per se serve as a ground for the reversal or modification of the sentence.

7.4 With regard to inadequate legal assistance, the author reiterates his allegations, adding that none of his defence counsels filed any cassation appeals or supervisory review applications on his behalf.

### **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 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. In the absence of any State party objection, the Committee considers that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have been met.

8.3 The Committee takes note of the author's allegations of ill-treatment upon arrest, as documented by the forensic medical report dated 23 March 2002. It also notes that the State party refutes the allegations, stating that the use of force was proportional and necessary to prevent the author from tampering with evidence (swallow the money received as bribe). The Committee further notes that the author's complaint against the police officers was rejected for lack of *corpus delicti*, the decision being upheld on cassation and supervisory review proceedings. While noting that the versions of events advanced by the parties differ substantially, the Committee observes that the use of force as such is not contested by the State party.

8.4 The Committee observes that the forensic medical report adduced by the author documents bruises on his face and right forearm, abrasions on the right side of his neck, hemorrhages and wounds on the mucous membranes of both cheeks which resulted in light damage. It further takes note of the explanations of the State party that police officers used force by holding the author's hands and pressing his cheekbones in order to prevent him from swallowing the money he received as a bribe. Taking into account the arguments of the State party to justify the degree of force used during the arrest operation and given the contradictory information contained in the file as to the existence of witness testimonies on the facts alleged under this claim, the Committee concludes that the author failed to substantiate this claim, for purposes of admissibility, and declares it inadmissible under article 2 of the Optional Protocol.

8.5 The Committee notes the author's claims under article 14, paragraph 1, that his motion to recuse the judge was rejected and that his requests to call witnesses for testimony

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<sup>17</sup> See footnote 10 above.

<sup>18</sup> This argument is refuted by the State party in its observations, see paras. 4.14–4.16 above.

and to conduct forensic examinations were declined by the court, whereas all the motions of the prosecution had been satisfied. The State party contends that the author's motions to call witnesses were satisfied by the court, as reflected in the transcript of court hearings. As to the author's motions for additional forensic examinations, the court provided grounds for the refusal. Furthermore, the author's request for recusal of the judge was duly considered and rejected by a ruling indicating the legitimate grounds for the rejection.

8.6 The Committee observes that the author's allegations under article 14, paragraph 1, of the Covenant, are linked primarily to the evaluation of facts and evidence and recalls its jurisprudence according to which it is generally not for itself, but for the courts of States parties, to review or to 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.<sup>19</sup> 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, the principle of equality of arms was violated or that the fairness of the author's trial had been otherwise undermined. It therefore concludes that the author failed to substantiate this claim, for purposes of admissibility, and declares it inadmissible under article 2 of the Optional Protocol.

8.7 The Committee notes the author's claims that he was not provided with a copy of the indictment, and therefore was not adequately informed of the nature of criminal charges against him, contrary to article 14, paragraph 3 (a), of the Covenant. In this regard, the Committee takes note of the State party's arguments that the author categorically refused to receive a copy of the indictment in the presence of lay witnesses. Moreover, the respective copy was sent to the author by registered mail on several occasions and a confirmation of delivery was available on file. Furthermore, the Committee observes that the author was served two orders issued by the investigating officer, dated 1 July and 15 July 2002, indicating briefly the nature of the charges against him. The order of 1 July 2002 (available on file) contains a general description of the facts and states specifically that the author was charged with an offence under article 290, paragraph 2 (bribery), of the Criminal Code. The author confirmed with his signature that the charge brought against him was clear and that he was informed of his procedural rights as an accused. In the circumstances, the Committee considers that the author failed to substantiate this claim, for purposes of admissibility, and declares it inadmissible under article 2 of the Optional Protocol.

8.8 As to the author's allegation that he and his counsel were not acquainted with the materials of the criminal case and therefore he was not given the opportunity to prepare his defence, in violation of article 14, paragraph 3 (b), of the Covenant, the Committee notes the detailed information provided by the State party regarding the period of time and facilities given to the author and his counsels to familiarize themselves with the case file (paras. 4.11–4.13). In view of this information, the Committee considers that this claim is insufficiently substantiated, for purposes of admissibility, and is therefore inadmissible under article 2 of the Optional Protocol.

8.9 With regard to the author's allegations of undue delay in considering his case, under article 14, paragraph 3 (c) of the Covenant, the Committee takes note of the argument of the

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<sup>19</sup> 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. 26; see, inter alia, communication No. 541/1993, *Simms v. Jamaica*, inadmissibility decision adopted on 3 April 1995, para. 6.2; communication No. 1616/2007, *Manzano et al. v. Colombia*, inadmissibility decision adopted on 19 March 2010, para. 6.4; communication No. 1532/2006, *Sedljar and Lavrov v. Estonia*, inadmissibility decision adopted on 29 March 2011, para. 7.3.

State party that the consideration of the author's case was postponed based on objective reasons, inter alia because of the cassation appeal filed by the author, his subsequent request for suspension of proceedings due to health problems, and the request by the newly appointed prosecutor to get to know the case file, request to which the author did not object. In the light of these explanations, the Committee considers that that this claim is insufficiently substantiated, for purposes of admissibility, and is therefore inadmissible under article 2 of the Optional Protocol.

8.10 The Committee takes note of the author's allegations that, after he refused the legal assistance provided by the State party, the consideration of his case continued in the absence of a counsel, in violation of article 14, paragraph 3 (d), of the Covenant. It observes that the author rejected the legal assistance provided to him by three State-appointed counsels on account of their failure to familiarize themselves with the materials of the criminal case and to support his motions in court. These arguments are disputed by the State party, which states that the court found no reasons to doubt the professionalism of any of the appointed counsels. As it transpires from the transcripts of court hearings available to the Committee, all three appointed counsels had been acquainted with the materials of the case file and had exercised their duties by, inter alia, addressing questions to witnesses, participating in the examination of evidence and supporting the author's motions in court. In light of the above, the Committee considers that this claim is insufficiently substantiated, for purposes of admissibility, and is therefore inadmissible under article 2 of the Optional Protocol.

9. 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 to the General Assembly.]

**C. Communication No. 1634/2007, *Korneenko v. Belarus*  
(Decision adopted on 26 March 2012, 104th session)\***

<i>Submitted by:</i>	Viktor Korneenko (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	18 April 2007 (initial submission)
<i>Subject matter:</i>	Lack of implementation of the Committee's Views in communication No. 1274/2004
<i>Procedural issue:</i>	Level of substantiation of claims
<i>Substantive issues:</i>	Unfair trial; effective remedy; freedom of association
<i>Articles of the Covenant:</i>	2; 14; 22
<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 26 March 2012,*

*Adopts the following:*

**Decision on admissibility**

1. The author of the communication is Viktor Korneenko, a Belarus national born in 1957. He claims to be a victim of violations by Belarus<sup>1</sup> of his rights under article 2 and article 14, paragraph 1, of the International Covenant on Civil and Political Rights. The author is unrepresented.

**Factual background**

2.1 On 31 October 2006, the Human Rights Committee examined another communication submitted by the author, communication No. 1274/2004, and found that he was a victim of violation, by the State party, under article 22, paragraph 1, of the Covenant. The reason was that, by dissolving the association Civil Initiatives, for which the author was the Chairperson, the State party had imposed unjustified restrictions of his right to freedom of association. The Committee also took note of the unlawfulness of the operation of unregistered associations in Belarus. The Committee considered that the author was entitled to an appropriate remedy, including reestablishment of Civil Initiatives and

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\* The following members of the Committee participated in the examination of the present communication: Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Mr. Rajsoomer Lallah, 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.

<sup>1</sup> The Covenant and the Optional Protocol thereto entered into force for Belarus on 23 March 1976 and 30 December 1992, respectively.

compensation, and that the State party should avoid similar violations in future. The Committee also requested the State party to publish the Committee's Views.

2.2 On 29 November 2006, the author applied to the Prosecutor-General's Office, the Supreme Court, and the Department of Justice of the Gomel Region Executive Committee (Department of Justice), requesting them to comply with the Committee's Views. On 15 December 2006, the Prosecutor's Office replied that he could request a supervisory review of the decision of the Gomel Regional Court on the dissolution of Civil Initiatives. This request, however, should comply with the Belarusian domestic law. On 18 December 2006, the Supreme Court replied that the author's case had been previously reviewed by domestic courts, including under the supervisory review proceedings and clarified that under article 17 of the Constitution, Russian and Belarusian were the only official languages, and that, therefore, all the documents submitted to the Court in other languages, should have been translated into one of these languages.

2.3 On 19 December 2006, the Department of Justice replied that the decision of the Gomel Regional Court to have Civil Initiatives dissolved was enforced. The author could seek supervisory review of the decision on dissolution within three years after its enforcement. Documents produced on the territory of a third State should have been legalized following the procedure established by law and translated into one of the official languages and translations must be duly certified. The Department of Justice stressed that the Committee's Views were of recommendatory, i.e. non-obligatory nature.

2.4 On a later unspecified date, the author requested the Supreme Court to initiate a supervisory review of the decision on the dissolution of Civil Initiatives. On 13 March 2007, the Supreme Court rejected his request on the grounds of expiry of the three-year statutory term established (see paragraph 2.3 above).

2.5 The author recalls that activities of unregistered associations or of associations dissolved by court are prohibited in Belarus. Therefore, if Civil Initiatives resumes its activities in the light of the Committee's Views, he could be criminally prosecuted.

### **The complaint**

3.1 The author claims that under the domestic and international law, every treaty in force for Belarus is binding upon it and must be implemented in good faith. Under articles 26 and 27 of the Vienna Convention on the Law of Treaties, States cannot invoke national law as justification for non-implementing a treaty. The refusal of the Supreme Court of Belarus to comply with the Committee's Views testifies that Belarus is refusing without any explanation to respect the author's rights enshrined in the Covenant and to provide him with a remedy. This, in the author's view, results in violation by the State party of article 2 of the Covenant.

3.2 He claims that the refusal of the Supreme Court to consider the Committee's Views violated his right to equality before the courts, contrary to article 14, paragraph 1, of the Covenant. Leaving the Committee's Views without consideration cannot be considered as a fair trial by an independent and impartial court. The author further claims that the judiciary as such is not independent and impartial in Belarus.<sup>2</sup>

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<sup>2</sup> In this connection, the author refers to the report of the Special Rapporteur on the independence of judges and lawyers, submitted in 2001 to the Commission on Human Rights pursuant to resolution 2000/42 (E/CN.4/2001/65/Add.1, 8 February 2001).



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

4.1 On 2 May 2008, the State party recalls that the association Civil Initiatives was dissolved by a decision of the Gomel Regional Court of 17 June 2003, and this was confirmed on 14 August 2003, on appeal, by the Supreme Court. On 21 November 2003, the Supreme Court rejected the author's request for a supervisory review. In a subsequent "verification" of the lawfulness of the court decisions, the Deputy Prosecutor-General found no grounds to challenge these decisions. The State party explains that according to article 439 of the Civil Procedure Code, the author could have applied again for a supervisory review with the Prosecutor's Office, and given that he failed doing it, available domestic remedies have not been exhausted. According to article 437 of the Code, an application for a supervisory review can be submitted within three years of the entry into force of the appealed court decision and at the time of the State party's submission to the Committee the above deadline had expired.

4.2 The State party further submits that the author had repeatedly abused his right of submission to the Human Rights Committee, including by not exhausting domestic legal remedies. It stresses that the Committee must adopt admissibility decisions in strict accordance with the Optional Protocol.

4.3 The State party declares that the Gomel District Court's decision of 17 June 2003 was lawful and maintains that in the instant case there are no indications that the State party had violated the author's rights under articles 2 and 14, paragraph 1, of the Covenant.

4.4 The State party explains that the principle of separation of powers applies in Belarus. Judicial power, in accordance with the Constitution, is vested in the courts. Organization of the justice system is determined by law; judges are independent and obey only the law when implementing justice. The Code on the Organization of the Judiciary and the Status of the Judges (hereafter the Code) further strengthens the independence of the judiciary. Judicial power is implemented only by judges as established by law. The unity of the judicial system is ensured inter alia through the compliance of all courts with the rules for the application of the judicial proceedings and the financing of the courts from the national budget.

### Authors' comments on the State party's observations

5.1 On 2 February 2010, the author submits that the State party must provide him with an effective remedy, pursuant to article 2 of the Covenant, in order to implement the Committee's Views.<sup>3</sup> He points out that domestic legislation contains no provision regulating implementation of the Committee's Views.

5.2 The author explains that, on 23 April 2009, he was informed by the Ministry of Foreign Affairs that the Committee's Views are of a recommendation nature.

5.3 The author reiterates that the operation of associations dissolved by court constitutes an offence in Belarus. On 23 December 2009, in response to the request of one of the author's collaborators to the Legal Department of the Gomel District Executive Committee to re-establish Civil Initiatives, the latter issued a warning that all activity on behalf of the association could be punishable by up to two years' imprisonment under the Criminal Code.

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<sup>3</sup> The author notes that to date the Belarus failed to implement the Committee's Views not only with regard to his petition, but also in a number of other cases, where the Committee had found violations of article 22, for example communication No 1039/2001, *Zvozkov et al. v. Belarus*, communication No 1296/2004, Views adopted on 17 October 2006 and communication No. 1296/2004, *Belyatsky et al. v. Belarus*, Views adopted on 24 July 2007.

5.4 The author further submits that he had petitioned the Prosecutor-General's office to implement the Committee's Views in communication No. 1274/2004 and that on 15 December 2006 the latter informed him that he has the right to submit an application for a supervisory review only in accordance with the domestic legislation. Under articles 437 and 438 of the Civil Procedure Code, an application for a supervisory review can only be submitted within three years from the entry into force of the appealed court decision. On 5 March 2007, the author filed an application for a supervisory review with the President of the Supreme Court, which was rejected with the same missed deadline argument on 13 March 2007. The absence in the domestic legislation of a legal norm regulating the implementation of the Committee's Views and the refusal of the State bodies to implement these on their own initiative, testifies that Belarus refuses to ensure to citizens the rights recognized in the Covenant and provide them with an effective remedy.

5.5 The author reiterates that the refusal of the courts, including the Supreme Court, to implement the international obligations of the State party gives him the grounds to allege that he was placed in a discriminatory position before the courts. The refusal by the courts to initiate proceedings and to review his application on its merits cannot be considered a fair hearing by an independent and impartial tribunal. He maintains that he was refused a fair hearing because of the dependency and the partiality of the national courts and that the above facts violate his rights under article 14, paragraph 1, 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 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 the author in the present communication, in substance, only submits a complaint about the failure of the State party to give effect to the Committee's Views in communication No. 1274/2004.

6.3 The Committee notes that the issue concerning the measures taken by the State party to give effect to the Committee's Views is a matter for the existing follow-up procedure, as set up by the Committee. It further notes that the author's claim is not based on any new factual developments related to his rights under the Covenant, beyond his unsuccessful attempt to obtain a remedy in respect to a violation already established by the Committee, even if he now invokes articles 2 and 14, paragraph 1, of the Covenant. Under these circumstances, the Committee considers that the author has no separate claim under the Covenant that would go beyond what the Committee has already decided in the author's earlier communication.<sup>4</sup> In the light of these considerations, the Committee concludes that the communication before it is inadmissible under articles 1 and 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under articles 1 and 2, of the Optional Protocol;
- (b) That the decision be transmitted to the State party and to the author.

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<sup>4</sup> See *Kavanagh v. Ireland*, communication No. 1114/2002, inadmissibility decision of 25 October 2002.

[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  
to the General Assembly.]

**D. Communication No. 1749/2008, V.S. v. Belarus  
(Decision adopted on 31 October 2011, 103rd session)\***

<i>Submitted by:</i>	V.S. (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	18 May 2007 (initial submission)
<i>Subject matter:</i>	Denial of access to court to a religious organization
<i>Procedural issue:</i>	Lack of standing ( <i>ratione personae</i> ); lack of substantiation of claims
<i>Substantive issues:</i>	Access to court; suit at law; competent, independent and impartial judicial authority; right to freedom of religion; right to manifest one's religion in worship, observance and practice
<i>Articles of the Covenant:</i>	14, paragraph 1; 18, paragraph 1
<i>Articles of the Optional Protocol:</i>	1; 2

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

*Meeting on 31 October 2011,*

*Adopts the following:*

**Decision on admissibility**

1. The author of the communication is V.S., a Belarusian national born in 1965 and residing in Vitebsk, Belarus, at the time of submission of the communication. He claims to be a victim of violations by Belarus of his rights under article 14, paragraph 1, and article 18, paragraph 1, of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 30 December 1992. The author is not represented.

**Factual background**

2.1 The author is a Secretary of the Consistory of the Religious Union Evangelical-Lutheran Church (the Religious Union) in Belarus, which was registered on 8 January 2001 by the Committee on the issues of religion and nationalities under the Council of Ministers of Belarus and re-registered by the same State body on 16 February 2004. The Religious

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

Union has nation-wide status and covers activities of all religious communities that form part of it.

2.2 On 24 November 2006, the Authorized person on the issues of religion and nationalities under the Council of Ministers of Belarus (the Authorized person) issued a written warning to the Religious Union about a violation of the law “On the freedom of conscience and religious organizations.” The Religious Union was required to inform the registering body within two months about the measures taken by it to address the violations of the law. The last paragraph of the written warning of 24 November 2006 states that it could be appealed to the Supreme Court within a month.

2.3 According to article 37, part 2, of the law “On the freedom of conscience and religious organizations,” if the violations indicated in the written warning are not addressed within six months or are repeated within a year, the registering body can initiate a judicial procedure for the dissolution of the religious organisation. The registering body has a right to suspend the organization’s activities pending the adoption of a court decision.

2.4 On 10 December 2006, the author, acting on behalf of the Religious Union, appealed the written warning of 24 November 2006 to the Supreme Court. On 22 December 2006, the Supreme Court rejected the author’s appeal on the following grounds: (a) according to article 358 of the Civil Procedure Code, juridical persons who consider that unlawful actions (or the omission to act) of public authorities [...] infringe upon their rights, have a right to submit a complaint to court pursuant to the procedure established by the present article and in cases directly provided for by the law. The law “On the freedom of conscience and religious organizations,” however, does not envisage a procedure for appealing a written warning issued to a religious organization; and (b) according to article 245, clause 1, of the Civil Procedure Code, the court shall refuse to initiate proceedings if the applicant does not have a right to file such a suit in court, due to lack of jurisdiction. The Supreme Court therefore refused to initiate proceedings for lack of jurisdiction to examine the author’s complaint.

2.5 On 18 January 2007, the author, acting on behalf of the Religious Union, appealed the written warning of 24 November 2006 to the High Economic Court. On 23 January 2007, the High Economic Court rejected the author’s complaint due to lack of jurisdiction. It further stated that article 37 of the law “On the freedom of conscience and religious organizations,” on the basis of which the written warning was issued, did not provide for the right of religious organizations to appeal such warnings.

2.6 On 15 February 2007, the author, acting on behalf of the Religious Union, requested the President of Belarus, the Council of Ministers and the Commission on Legislation, Judicial and Legal Issues of the House of Representatives of the National Assembly (Parliament) to use their right of legislative leadership and to bring the law “On the freedom of conscience and religious organizations” and other relevant laws in compliance with the Constitution, in order to ensure the constitutional right of religious organizations to appeal written warnings issued to them by public authorities in court.

2.7 On 15 February 2007, the author, acting on behalf of the Religious Union, applied to the Constitutional Court for an interpretation of article 60 of the Belarus Constitution, which stipulates that “everyone shall be guaranteed protection of one’s rights and liberties by a competent, independent and impartial court of law within time periods specified in law”.

2.8 On 27 February 2007, the author was informed by the Chairperson of the Commission on Legislation, Judicial and Legal Issues that the Permanent Commissions of the House of Representatives did not have the right of legislative leadership.

2.9 On 16 March 2007, the author was informed by the Deputy Minister of Justice that the Ministry did not have the right to interpret the laws as far as their applicability to concrete cases was concerned, nor to assess the actions of the public authorities. He was reminded that the law "On the freedom of conscience and religious organizations" did not provide for the possibility of appealing a written warning issued to a religious organization; the procedure for the development of draft laws in Belarus was explained.

2.10 On 27 March 2007, the author was informed by the Chairperson of the Commission on Human Rights, National Relations and Mass Media that the issues raised in his letter of 15 February 2007 were discussed with the Authorized person who was of the opinion that the amendments to the "On the freedom of conscience and religious organizations" were impractical at that point in time.

2.11 On 5 April 2007, the Constitutional Court confirmed that article 60 of the Belarus Constitution guaranteeing the right to judicial protection, should be applied directly, despite the absence of a positive provision in the law "On the freedom of conscience and religious organizations" providing for an appeal in court of a written warning issued to a religious organization. It also referred to the procedure stipulated in chapter 29 of the Civil Procedure Code for appealing the actions of public officials that infringe the rights of juridical persons.

2.12 On 20 April 2007, the Deputy Authorised person replied to the author's letter of 15 February 2007, that was addressed to the President of Belarus and Council of Ministers, and informed the Religious Union that, further to the decision of 5 April 2007 of the Constitutional Court, "the right of everyone, including religious organizations, to judicial protection [was] guaranteed by the direct application of article 60 of the Constitution." Therefore, there was no need to amend the law "On the freedom of conscience and religious organizations."

2.13 On 17 October 2007, the author, acting on behalf of the Religious Union, again appealed the written warning of 24 November 2006 to the Supreme Court, on the basis of the Constitutional Court's decision of 5 April 2007. On 29 October 2007, the Supreme Court again rejected the author's complaint on the following grounds: (a) on 22 December 2006, the Supreme Court refused, under article 245, paragraph 1, of the Civil Procedure Code, to initiate proceedings on the basis of the complaint submitted by the Secretary of the Religious Union and this decision became executory; and (b) according to the ruling of the Plenum of the Belarus Supreme Court No.7 of 28 June 2001, and article 247, paragraph 2, of the Civil Procedure Code, if the court's refusal, under article 245, paragraph 1, of the same Code, to initiate proceedings has already become executory, a repeat recourse to court on the same grounds is not allowed.

2.14 Under the written warning of 24 November 2006, the Religious Union was required, inter alia, to bring its stamp and letterhead in compliance with Instruction No. 157 of the Ministry of Internal Affairs of 25 September 2000. In this regard, the author notes that the existing stamp was approved on 17 June 2002 by the Chairperson of the Committee on Issues of Religion and Nationalities under the Council of Ministers. On 28 June 2007, the author, on behalf of the Religious Union, sent a letter to the Authorized person, attaching a sample design of a new stamp and requesting its approval. In contravention of the law "On citizens' petitions," which establishes a one-month deadline for giving a reply to a citizen's written petition, no reply to the author's petition of 28 June 2007 was received. The author submits that, on the one hand, the Religious Union organization is required by the Authorized person to bring its stamp and letterhead in compliance with the law, while on the other, the very same Authorized person does not reply to the Religious Union's written request to approve the new design. Therefore, according to him, a violation of the law indicated in the written warning of 24 November 2006 cannot be addressed and the

Religious Union can at anytime be subjected to the procedure for the dissolution and suspension of activities described in paragraph 2.3 above.

2.15 On 21 October 2007, the author, acting on behalf of the Religious Union, sent another letter to the Authorized person, this time requesting approval to invite nine members of the “City of His Grace Mission Inc.” to Belarus from 8 to 18 December 2007 in order to participate in the Religious Union’s activities. On 23 November 2007, the author was informed in a letter from the Deputy Authorized person that his request for approval of the invitation cannot be considered for as long as the Religious Union’s stamp does not comply with Instruction No. 157 of the Ministry of Internal Affairs of 25 September 2000.

### **The complaint**

3.1 The author claims that the State party’s authorities unreasonably restrict the right to profess Lutheran beliefs in Belarus in violation of article 18, paragraph 1, of the Covenant. He submits that the Religious Union does not pose any threat to public safety, order, health, morals or the fundamental rights and freedoms of others. At least, none of the above was imputed to the Religious Union in the written warning of 24 November 2006 from the Authorized person.

3.2 The author further submits that, although article 60 of the Constitution guarantees the right to judicial protection, it is impossible to avail oneself of this right due to the absence in article 37 of the law “On the freedom of conscience and religious organizations” of a provision providing for an appeal in court of written warnings issued to religious organizations. Therefore, he claims that, by denying him access to court, the State party’s authorities have violated his right under article 14, paragraph 1, of the Covenant, to a fair and public hearing by a competent, independent and impartial tribunal. The author adds that, should the Religious Union be dissolved,<sup>1</sup> the Lutherans would be deprived of their right to collective and public worship, observance and practice.

### **State party’s observations on admissibility and merits**

4. On 2 May 2008, the State party reiterates the facts summarized in paragraph 2.4 above and adds that the author did not appeal the ruling of the Supreme Court of 22 December 2006 under the supervisory review procedure.

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

5.1 On 14 June 2008, the author submits his comments on the State party’s observations. He reiterates his initial claims in relation to article 14, paragraph 1, of the Covenant and notes that the State party has failed to submit any observations with regard to his claims under article 18 of the Covenant.

5.2 The author submits that, although he disagreed with a number of assertions put forward in the written warning of the Authorized person dated 24 November 2006, he was unable to challenge the contentious issues in court, due to the absence in the law “On the freedom of conscience and religious organizations” of a provision indicating what court would be competent to deal with written warning issued to religious organizations. He adds that despite his numerous requests to the public authorities with the right of legislative leadership to amend the law “On the freedom of conscience and religious organizations,” the ‘conflict of laws’ remains unsolved and it is impossible for religious organizations to avail themselves of the constitutional right to judicial protection.

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<sup>1</sup> As of 15 August 2011, the Religious Union is an officially registered and functioning religious organization with nation-wide status in Belarus.

5.3 The author states that, whereas the State party's courts have rejected his complaints about the written warning of 24 November 2006 on the basis of article 358 of the Civil Procedure Code, they should have equally taken into account the Constitution and relevant international treaties ratified by Belarus.

5.4 The author submits that, judging by the practice, the supervisory review procedure in Belarus is ineffective and, for this reason, he referred to the Constitutional Court with the request to provide for interpretation of article 60 of the Constitution. Despite the Constitutional Court's affirmation on 5 April 2007 that article 60 of the Constitution should be applied directly, the author's repeat complaint of 17 October 2007 was again rejected by the Supreme Court due to lack of jurisdiction.

#### **Further submissions from the State party**

6.1 On 31 July 2008, the State party reiterates the facts summarized in paragraph 2.4 above and submits that pursuant to article 433, part 4, of the Civil Procedure Code, a ruling of the Supreme Court cannot be appealed in the Court of Cassation. At the same time, the civil procedure law does not proscribe the appeal of such rulings through the supervisory review procedure. According to article 436 of the Civil Procedure Code, the only rulings that cannot be appealed through the supervisory review procedure are the rulings of the Presidium of the Supreme Court.

6.2 The Religious Union did not avail itself of the right to appeal the ruling of the Supreme Court under the supervisory review procedure and, therefore, the author's assertion that the supervisory review procedure in Belarus is ineffective is not based on either facts or practice.

#### **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 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.

7.3 The Committee notes that the author has claimed to be a victim of violation of his right under article 14, paragraph 1, to have access to court, because the Supreme Court refused on two occasions to consider the author's appeal, which was submitted by him on behalf of the Religious Union, of the written warning issued by the Authorized person. The Committee considers that the author is essentially claiming violations of rights of the Religious Union. Notwithstanding that he is the Secretary of the Religious Union, the religious organization has its own legal personality. All domestic remedies referred to in the present case were in fact proposed in the name of the Religious Union, and not the author.<sup>2</sup> Given the fact that under article 1 of the Optional Protocol only individuals may submit a communication to the Committee, it considers that the author, by claiming violations of the rights of the Religious Union, which are not protected by the Covenant, has no standing under article 1 of the Optional Protocol.

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<sup>2</sup> See, for example, communications No. 502/1992, *S.M. v. Barbados*, decision of inadmissibility adopted on 31 March 1994, paras. 6.2 and 6.3; No. 737/1997, *Lamagna v. Australia*, decision of inadmissibility adopted on 7 April 1999, para. 6.2.



7.4 With regard to the author's claim that his rights under article 18, paragraph 1, of the Covenant were violated, the Committee notes that the present communication was submitted by the author in his own name, whereas the written warning of the Authorized person was addressed to the Consistory of the Religious Union and not to the author as an individual follower of Lutheran beliefs. The Committee also notes that, in the author's opinion, the refusal of the Deputy Authorized person to consider the request to invite nine members of the "City of His Grace Mission Inc." to Belarus for as long as the Religious Union's stamp does not comply with the specific instruction of the Ministry of Internal Affairs, unreasonably restricts the right to profess Lutheran beliefs in Belarus.

7.5 In this respect, the Committee recalls that a person can only claim to be a victim in the sense of article 1 of the Optional Protocol if he or she is actually affected.<sup>3</sup> It is a matter of degree how concretely this requirement should be taken. It is true that, in some circumstances, restrictions imposed on the religious organizations as juridical persons may produce adverse effects which directly violate the rights of individual believers under the Covenant. In the present case, however, the author of the communication has failed, for example, to explain what concrete consequences for his own freedom to manifest his religion or belief in practice were entailed by the inability of nine members of the "City of His Grace Mission Inc." to visit Belarus. Accordingly, the Committee concludes that the author has not substantiated, for purposes of admissibility, that he has a claim under article 18, paragraph 1, of the Covenant. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

8. The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under articles 1 and 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 to the General Assembly.]

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<sup>3</sup> Communication No. 35/1978, *Shirin Aumeeruddy-Cziffra et al. v. Mauritius*, Views adopted on 9 April 1981, paragraph 9.2.

**E. Communication No. 1752/2008, *J.S. v. New Zealand*  
(Decision adopted on 26 March 2012, 104th session)\***

<i>Submitted by:</i>	J.S. (represented by counsel, Tony Ellis)
<i>Alleged victim:</i>	The author
<i>State party:</i>	New Zealand
<i>Date of communication:</i>	3 October 2007 (initial submission)
<i>Subject matter:</i>	Delay in the judicial review of a patient detention in a psychiatric hospital
<i>Procedural issue:</i>	Failure to exhaust domestic remedies; failure to substantiate allegations; <i>actio popularis</i>
<i>Substantive issues:</i>	Right to access to a court without delay
<i>Articles of the Covenant:</i>	2, paragraphs 2 and 3; 9, paragraph 4; and 14, paragraph 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 26 March 2012*

*Adopts the following:*

**Decision on admissibility**

1. The author of the communication is J.S., a New Zealand national born on 20 November 1964. He claims that his detention in a psychiatric hospital against his will and the proceedings brought before the State party's courts as result violated his rights under articles 2, paragraphs 2 and 3; 9, paragraph 4; and 14, paragraph 1, of the Covenant. He is represented by counsel, Mr. Tony Ellis.

**Facts as presented by the author**

2.1 The author was diagnosed as having a bipolar/schizoaffective disorder that could be controlled by taking prescribed medication. By the time he submitted his communication he had been subject to five admissions to hospital since 2002 and to compulsory treatment order. His mother claimed that he had had behavioural outbursts such as jumping from a balcony, being naked in public places, experiencing hallucinations and abandoning his car on a motorway. On 27 October 2006, she contacted the North Shore Two Community Health team due to her concerns about his behaviour, notably his elevated mood and excessive spending including purchasing two apartments with virtually no deposit.

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\* The following members of the Committee participated in the examination of the present communication: 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, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

2.2 On 28 October 2006, the author accepted to go to the hospital's emergency unit. Upon his arrival, a nurse called the author's mother to inform her of the situation and inquire whether she, or another relative, would come to the hospital to stay with him while he was being assessed, as required by section 9(2)(d) of the Mental Health Compulsory Assessment and Treatment Act 1992 (MHCAT). None of them wished to be involved, and the author was informed accordingly. Then he was informed that he could nominate somebody else. He did not provide any name but confirmed that he wished to get on with the assessment process. The psychiatric assessment concluded that J.S. was mentally disordered and needed further assessment and treatment pursuant to MHCAT. The clinical report highlighted that he had placed others at risk, exhibited poor judgment and his ability to care for himself was compromised. The author refused to accept copies of relevant documents and became irritable, trying to leave the hospital.

2.3 On 29 October 2006, upon a preliminary assessment certificate issued by the psychiatric registrar on duty, the author was admitted to the Tahuratu Mental Health Unit. The author stayed in the hospital until 10 January 2007.

2.4 On 1 November 2006, the author filed an application for judicial review before the District Court, under section 16 of the MHCAT, where he contested the medical report and argued that he was not of unsound mind and there was no emergency in his case. Therefore, he was arbitrarily detained at the hospital.<sup>1</sup> He also held that his request to be assisted by a lawyer was denied and that no family member was present during his examination, in breach of MHCAT. On 1 November 2006, his claim to be released was refused and a medical certificate was issued stating that the author needed a further 14 day period of assessment and treatment. On 8 November 2006, the District Court also refused a second application for review.

2.5 In parallel, on 8 November 2006, the author filed an application for a writ of habeas corpus against the Director of Area Mental Health Services Waitemata District Health Board (the District Health Board), before the High Court, to obtain release. He claimed that the statutory requirements of detention under MHCAT were not being complied with, particularly his right to be informed of the legal requirements that the assessment examination take place in the presence of a family member, a caregiver, or other person concerned with his welfare. Secondly, he was detained unlawfully as he was not mentally disordered as defined in MHCAT. Thirdly, the evidence provided to justify his detention was irrelevant. On 16 November 2006, the High Court stated that the decision to proceed with the assessment without any other person's presence was contrary to MHCAT, but it did not in itself imply the invalidity of the detention. Regarding the mental condition of the author and the lawfulness of his detention, the Court pointed out that the habeas corpus was best suited to simple actions where the issue relates to the lawfulness of the actual act of detention. The issue brought in the author's application was not a matter that was properly raised in an application for habeas corpus, but rather fell within the ambit of judicial review. Thus, the author's application was denied. On 21 November 2006, the author appealed this decision before the Court of Appeal, alleging that the High Court failed to assess whether he was arbitrarily detained and that his release was denied without reasons, in violation of MHCAT and the New Zealand Bill of Rights Act 1990 (NZBORA). The appeal was dismissed on 12 December 2006. On the same day, before he learned about the dismissal, the author applied to the Supreme Court for a leapfrog appeal, seeking to ignore the delayed judgment of the Court of Appeal not issued by that moment and to have the case heard by the Supreme Court before it closed down for vacation.

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<sup>1</sup> The author's application refers to European Court of Human Rights' jurisprudence in *Winterwerp v. The Netherlands* (1979) 2 EHRR 387, p. 402, para. 39.

2.6 On 13 December 2006, the leapfrog appeal was withdrawn and an application for leave to appeal before the Supreme Court was lodged. The author requested urgent and priority hearings,<sup>2</sup> pursuant to section 17 of the Habeas Corpus Act. On 14 December 2006, the Supreme Court issued a minute-setting hearing for 13 February 2007. The Supreme Court pointed out that it was not realistic to require counsels to prepare submissions in a short time frame. In addition, the Supreme Court could not reach the quorum of five judges, because one of them recused himself in view of the fact that his daughter was a member of the District Health Board (the respondent), and no acting judge was available during that period. On 15 December 2006, the author submitted a memorandum, holding that the delay caused by the Supreme Court's Christmas and summer vacations, between 20 December 2006 and 12 February 2007, without arrangement in place for any urgent hearing, would cause an effective denial of access to court. In view of the systematic failure of the State party to provide a meaningful justice system that operated over vacations period, and its inability to examine the lawfulness of his detention in due course, the author requested the Supreme Court to order the Ministry of Justice to award legal costs, i.e. to be reimbursed for the costs he had to pay as a result of the habeas corpus proceedings. Furthermore, the author submitted that the Court of Appeal contributed to the overall delay, not disposing his appeal as a matter of priority and urgency in breach of the State party international obligations and section 17 of the Habeas Corpus Act.

2.7 On 14 February 2007, the Supreme Court dismissed the leave to appeal because it was not possible to consider the habeas corpus insofar as the author had been released from inpatient to outpatient. The decision did not address the author's claim with regard to the legal costs.

2.8 On 1 March 2007, the author filed an application before the Supreme Court and requested to be awarded legal costs. He reminded the Court that he submitted this claim within his application for leave to appeal. He argued that he could not challenge the legality of his detention due to a systematic failure of the Government to guarantee that the judicial system operates over vacation period. Thus, it was held that it did not correspond to the District Health Board, as respondent in this case, but to the Ministry of Justice to cover the legal costs of the Supreme Court proceeding. In addition, the author accepted he had legal aid in the High Court, but he did not request it in the Court of Appeal because he was wrongly advised by his lawyer. Notwithstanding his habeas corpus application was dismissed at these instances, he informed the Supreme Court that he would submit an application to request legal costs due to the extraordinary length of time of the proceedings. On 7 March 2007, his claim for legal costs was dismissed by the Supreme Court. The Court held that the application for costs was against the Ministry of Justice which was not a party to the case and that the primary reason for its delay was the author's counsel request of having the necessary time for preparation before hearings take place.

2.9 The author further argues that, due to be labelled as having a mental illness, he was subjected to unlawful discrimination by the psychiatric services and the judiciary, and that he intends to undertake further domestic action in this respect.

2.10 The author submits that the dismissal of the application for leave to appeal by the Supreme Court, on 14 February 2007, exhausted all domestic remedies.

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<sup>2</sup> The author's counsel informed to Supreme Court that he estimated both parties could be ready in four days.

### The complaint

3.1 The author asserts that articles 2, paragraphs 2 and 3; 9, paragraph 4; and 14, paragraph 1, of the Covenant were violated by the State party, while he was arbitrarily detained in a psychiatric hospital, without speedy access to effective judicial remedies.

3.2 As to article 2, paragraphs 2, and 3 (a) and (b), of the Covenant, the author claims that NZBORA does not fully implement the Covenant, does not have status of “supreme law” and can be displaced by any other Act of Parliament. He further upholds that the Covenant has no direct application into the State party’s legal system and the enjoyment of rights is not effectively assured by the judiciary. Section 6 of NZBORA states that in interpreting an enactment, it shall be preferred an interpretation consistent with the rights and freedoms set out in NZBORA. However, courts are not allowed striking down primary legislation inconsistent with NZBORA or the Covenant,<sup>3</sup> pursuant to section 4 of NZBORA. The author alleges that the State party fails to comply with the requirement under article 2, paragraph 2, of the Covenant. He points out that according to the Committee’s view in its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant,<sup>4</sup> read together with articles 26 and 27 of the Vienna Convention on the Law of Treaties, 1969, the State party cannot justify this failure, by reference to its internal legislation or to political, social, cultural or economic considerations. In consequence, this failure breaches the obligation contained within article 2, paragraphs 2 and 3, of the Covenant.

3.3 The author refers to article 9, paragraph 1, and indicates that the District Court failed twice to assess adequately the arbitrariness of his detention in a psychiatric hospital, in particular, the lack of grounds for his detention and the failure to comply with the requirements established by the law (MHCAT).

3.4 The author submits that the State party’s failure to provide enough resources to the judiciary and make adequate provision for the holiday period to guarantee the normal functioning of the Supreme Court violated his right under article 9, paragraph 4, to request a court to decide without unreasonable delay<sup>5</sup> on the lawfulness of his detention and his right to access to independent judicial bodies. The State party has the duty to ensure that judicial bodies act without delay and cannot use as an excuse that only four Supreme Court judges were available. The three-month length of the habeas corpus proceedings was excessive, and breached his right to access to an effective remedy enshrined in article 9, paragraph 4, of the Covenant.

3.5 As to article 14, paragraph 1, of the Covenant, the author claims that the dismissal of his application for legal costs by the Supreme Court should be seen as part of the violations of his right to access to court. He also argues that the judiciary lacks financial and administrative independence. Independence entails that courts should be perceived as such. However, the Supreme Court ignored totally the author’s memorandum regarding hearing date and judicial independence, failed to take steps to call more judges and blamed the

<sup>3</sup> The author refers to Committee’s concluding observations regarding the third periodic report of New Zealand (A/39/40, para. 185), in which the Committee recommended the State party “that the courts should have the power to strike down legislation inconsistent with the Covenant rights affirmed by the Bill of Rights Act. It also recommended that there should be remedies for all persons whose rights under the Covenant have been violated.”

<sup>4</sup> *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III.

<sup>5</sup> The whole habeas corpus proceedings lasted three months and six days. There were 21 days between the filing of appeal and the Court of Appeal’s judgement and two months and one day, between the filing of the application for leave to appeal and the Supreme Court judgment.

author for the delay. Thus, the author concludes that the Supreme Court cannot be perceived as an independent body or did not show that it was independent. Furthermore, the absence of sufficient Supreme Court judges does not only affect the right to access to court, but also breaches the rule of law itself.

3.6 The author asserts that appeals lodged in December or January receive less favourable treatment than those lodged at other time of the year and recalls in this respect the prohibition of discrimination enshrined in article 26 of the Covenant. He points out that the Supreme Court made no efforts to appoint a fifth judge that could examine his application for leave to appeal and, the same day his application was lodged, it decided that no acting judge were available to complete the quorum, which shows that the Court did not try to find a substitute judge or that its administrative arrangements failed to prevail this kind of situations.

3.7 The author requests the Committee to consider domestic proceedings costs<sup>6</sup> and costs for the proceedings before the Committee as part of the remedies that the Committee may request.

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

4.1 In July 2008, the State party submitted its observations on admissibility and merits. It indicates that, on 28 October 2006, the author was assessed by a psychiatrist upon contacts between his mother and the mental health staff of the local health authority, the Waitemata District Health Board (the Health Board). In addition to the proceedings under the Habeas Corpus Act, the author's status as compulsory patient was subject of scrutiny under the MHCAT. The author applied for judicial review to the District Court twice, on 1 and 8 November 2006. On 15 November 2006, the Health Board applied to the District Court for an order allowing the author's continuing compulsory care, pursuant to the MHCAT. On 22 November 2006, the District Court ordered preparation of a second opinion, upon request of the author. It also ordered that he should remain in the hospital on an interim basis. On 6 December 2006, the District Court reserved its decision pending the outcome of the habeas corpus proceedings at the Court of Appeal and extended again his stay in the hospital on an interim basis. On 18 December 2006, the District Court delivered its judgment granting compulsory treatment. From 22 December 2006 to 10 January 2007, as further medical assessments concluded that his circumstances had changed positively, he was allowed home leaves of approximately five days each.

4.2 The State party upholds that the communication is inadmissible *ratione personae*, for failure to exhaust domestic remedies and insufficient substantiation, pursuant to articles 1, 2, and 3 of the Optional Protocol; and rules 96 (b), (c), and (f) of the Committee's rules of procedure.

4.3 As to the claims of violation of article 2, paragraphs 2 and 3 (a) and (b), of the Covenant, the State party's courts do not apply international obligations directly because it has a dualist legal system. Nevertheless, article 2 of the Covenant does not require a direct application of the Covenant. Secondly, in the author's communication there is no allegation of breach of article 2, in conjunction with violations of substantive rights of the Covenant. Thus, being an *actio popularis*, these claims should be declared inadmissible *ratione personae*, under article 1 of the Optional Protocol.

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<sup>6</sup> The author claims that he spent NZ\$ 23,196.77 in the Court of Appeal and NZ\$ 14,303.00 in the Supreme Court.

4.4 With regard to the claims of violations of articles 9, paragraph 1, and 26<sup>7</sup> of the Covenant, they should be declared inadmissible for failure to exhaust domestic remedies pursuant to article 5, paragraph 2 (b), of the Optional Protocol, insofar as the author has brought allegations before the Committee that either were not pursued in domestic proceedings or that were determined as question of fact by the State party's courts, before which no claim of arbitrary procedure or injustice was made. Alternatively, the claims lack sufficient substantiation. The author was subject to detention pursuant to MHCAT, as a compulsory patient upon a clinical assessment that concluded his mental health condition was a serious danger to himself and others. The measures taken were subjected to clinical and judicial scrutiny and the treatment imposed to the author had legitimate reasons and did not amount to discrimination.

4.5 Regarding the claims of violation of article 9, paragraph 4, they should be declared inadmissible for lack of substantiation, failure to exhaust domestic remedies, and incompatibility with the provisions of the Covenant, pursuant to articles 2 and 3 of the Optional Protocol. The author's allegations do not disclose any instance of unreasonable delay. The primary objective of article 9, paragraph 4, meaning to ensure prompt and ongoing judicial oversight of detention, was readily met. During the 10 weeks the author was under compulsory care, his continuing detention was subjected to independent scrutiny by the courts, which considered and upheld this measure in seven occasions. The author's applications for review were heard and decided on the day they were made. His application for habeas corpus at first instance was heard within six days and decided two days later, whereas the appeal and subsequent application for leave to appeal to the Supreme Court were heard and decided within three weeks and two months, respectively, notwithstanding the complexity of the case and the inclusion of additional grounds in each instance. Therefore, in these circumstances, and taking into account the psychiatric care purpose of the author's detention, the length of the habeas corpus proceedings was reasonable and within the parameters established by the Committee or the European Court of Human Rights.

4.6 In addition, the author had alternative judicial means at his disposal. The author could have sought interim release under section 11 of the Habeas Corpus Act, or filed an application for judicial review pursuant to section 16 of MHCAT, or other civil proceedings with regard to any other allegation of unlawfulness not determined in the habeas corpus proceedings. The Court of Appeal or the Supreme Court could have been able to deal with an application for interim release on an urgent basis. The author could have also made further challenges to his detention as compulsory patient, i.e. when his mental health condition would have improved, by an application for judicial review to the District Court, which, in fact examined two applications for review under MHCAT also on an urgent basis. Hence, the author failed to exhaust domestic remedies. Finally, the State party argues that the Supreme Court assessed the author's application for leave and the prospect of intervention by other interested parties and formed the view that the proposed appeal required substantial preparation time. As a finding of a domestic court and, particularly, the final appellate court for New Zealand, and absent any plausible claim of arbitrariness or injustice, that view does not warrant reconsideration by the Committee.

4.7 As to the claim of violation of article 14, paragraph 1, in respect of the failure to award the legal costs, the State party argues it should be declared inadmissible as incompatible with the provision of the Covenant and/or as ill-substantiated, for failure to exhaust domestic remedies, and *ratione personae*. First, neither article 14, paragraph 1 of the Covenant nor the State party legislation require the award of costs in respect of

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<sup>7</sup> See supra note 1.

unsuccessful proceedings and, in the present case, the author's appeal and application for leave to appeal were both dismissed by Courts. Secondly, the author was provided with public legal aid for his application for habeas corpus before the High Court. Nevertheless, he did not request this aid for the following instances, upon advice of his counsel. Thirdly, the author did not appeal the court decision that refused the costs application. The State party further argues that this claim is based on the claim of unreasonable delay, which is unsubstantiated.

4.8 As to the claim of violation of article 14, paragraph 1, with regard to the failure of the Supreme Court to make a public statement calling for additional judges and its lack of administrative independence, it should be declared inadmissible as incompatible with the provisions of the Covenant and/or not sufficiently substantiated, for seeking to review findings of national courts, and for failure to exhaust domestic remedies. First and foremost, the author's claim is grounded on the premise that the Court required additional judges and this produced an unreasonable delay. However, there was no such delay. Secondly, as to the assertion that the State party's court gave to the author's case a secondary significance and did not weight its urgency, it is recalled that the Committee does not review factual assessments by national courts, unless it is ascertained that a court manifestly violates its obligation of impartiality, acts arbitrarily or their findings amount to denial of justice. Thirdly, the author could have sought interim release pending the hearing of his application for leave, but he decided not to do so.

4.9 With regard to the author's request to the Committee to consider legal costs of the proceedings before it as part of the remedies to be recommended, the State party argues it is inadmissible and without merit. It further alleges that even if some part of the communication were upheld, the inclusion of extensive unmeritorious and/or irrelevant material should bar any such remedy as inappropriate.<sup>8</sup>

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

5.1 As to the State party's observations on article 2, paragraphs 2 and 3 (a) and (b), the breaches to these provisions are to be read in conjunction with the violations suffered by the author of articles 9, paragraph 4, and 14, paragraph 1, of the Covenant. Therefore, they cannot be considered *actio popularis*. The author holds that NZBORA prevents the Appeal and Supreme Courts from applying directly articles 9, paragraph 4, and 14, paragraph 1, of the Covenant and requests the Committee to find that the State party has not fully implemented the Covenant in order to provide individuals with an effective legal remedy.

5.2 As to the State party's observations on articles 9, paragraph 1, and 26, the author clarifies that he referred to these articles only by way of background information, but does not claim violations of them.

5.3 As to the State party's observations on article 9, paragraph 4, and the possibility to apply for an interim release, it is debatable that the Court of Appeal and the Supreme Court have jurisdiction to grant an interim order for release. According to section 11 of the Habeas Corpus Act, only the High Court has jurisdiction to grant such order. It would be pointless to apply for an interim application, which does not examine substantial rights, while a hearing of a final application involving priority and urgency is pending. Regarding the time frame of the habeas corpus proceedings, the author holds that in order to avoid an unreasonable delay, the Supreme Court could proceed without the intervention of any other

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<sup>8</sup> According to the State party, this is the approach followed by the European Court of Human Rights in similar circumstances.



person other than the plaintiff's and respondent's counsels, disposing the final application with priority and urgency.

5.4 As to the State party's observations on article 14, paragraph 1, and its refusal to pay legal costs, the author asserts that when a proceeding becomes unmeritorious simply as direct result of the undue delay caused by the Supreme Court and to a lesser extent the Court of Appeal, the legal costs ought to be awarded against the State party. He submits that he did not request the Supreme Court for a delay of hearing, and informed it that only two–four days of preparation were required. He further clarifies that he sought costs against the party responsible for the unreasonable delay, that is, the Ministry of Justice rather than the respondent, the Health Board, who was not in fault in that respect.

5.5 As to the State party's observations on article 14, paragraph 1, and the Supreme Court's failure to publicly call for appointment of additional judges, the author reaffirms that the primary reason for the delay was the lack of sufficient judges appointed to the Bench of the Supreme Court. The Court itself admitted in its judgment on the author's application for legal costs that "there [were] a limited number of persons permitted by the Supreme Court Act 2003 to perform that function that would have been available at that time".

### **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 article 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 The author holds that the length of the habeas corpus proceedings at the Court of Appeal and Supreme Court, of 21 days and 2 months and 1 day, respectively, is excessive and breached his right to a decision without delay on the lawfulness of his detention under article 9, paragraph 4. He argues that the Supreme Court did not give due priority to such urgent proceedings and was not diligent in guaranteeing its functioning during vacations period. The State party alleges that during the ten weeks the author was under compulsory care, his continuing detention was subjected to independent scrutiny by the courts, which considered this measure on seven occasions. The author's applications for review were heard and decided on the day they were made. His application for habeas corpus at first instance was heard within six days and decided two days later, whereas the appeal was decided within three weeks.

6.4 In the circumstances of the case and in view of the length of time within which the author's applications for judicial review of his detention were dealt with by the District Court, the High Court, the Court of Appeal and the Supreme Court, the Committee considers that the author has failed to substantiate, for purposes of admissibility, his claim under article 9, paragraph 4, of the Covenant. Accordingly, the Committee declares this claim inadmissible under article 2 of the Optional Protocol.

6.5 As to the author's claims that the refusal by the Supreme Court to award him legal costs violated his rights under article 14, paragraph 1, the Committee notes that the author was able to pursue his remedies from the District Court to the Supreme Court, had legal aid in the first instance and did not apply for it in the Court of Appeal or the Supreme Court. In the circumstances, the Committee considers that the author has not substantiated how the

denial of “legal cost” by the Supreme Court constituted an obstacle in his access to the Courts and a breach of article 14, paragraph 1, of the Covenant.

6.6 The Committee notes the author’s claims that the Supreme Court was not independent because it ignored his memorandum requesting to fix the date of hearing in December 2006, failed to take steps to call for more judges, and lacks administrative and financial independence. It also notes the State party’s arguments that the main reason why the Supreme Court did not grant the author’s request was the complexity of the appeal and the Court’s assessment that it was not realistic to require counsels to prepare submissions in a short time frame. In the light of the State party’s observations, the Committee considers that the author failed to sufficiently substantiate his claims under article 14, paragraph 1, concerning the lack of independence of the State party’s courts. Therefore, this claim is declared inadmissible under article 2 of the Optional Protocol.

6.7 Concerning the author’s claims under article 2, paragraphs 2, and 3 (a) and (b), of the Covenant, on the failure of the State party to fully implement the Covenant and the fact that the Covenant has no direct application into the State party’s legal system, the Committee considers that these claims are of very general nature and are not relevant in order to determine the existence of violations of the Covenant with respect to the facts of the case. Accordingly, this claim is declared inadmissible, under article 2 of the Optional Protocol for lack of 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 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 to the General Assembly.]

**F. Communication No. 1789/2008, *G.E. v. Germany*  
(Decision adopted on 26 March 2012, 104th session)\***

<i>Submitted by:</i>	G.E. (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Germany
<i>Date of communication:</i>	17 March 2008 (initial submission)
<i>Subject matter:</i>	Discrimination based on age
<i>Procedural issue:</i>	Exhaustion of domestic remedies/Reservations entered into by the State party
<i>Substantive issue:</i>	Discrimination under article 26 of the Covenant
<i>Articles of the Covenant:</i>	26, 17
<i>Article of the Optional Protocol:</i>	5

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

*Meeting on 26 March 2012,*

*Adopts the following:*

**Decision on admissibility**

1. The author of the communication, dated 17 March 2008, is Mr. G.E., a German national born in 1935. He complains of violations by Germany of articles 1, 2, 26 and 17 of the Covenant. The Covenant and the Optional Protocol thereto entered into force for Germany on 23 March 1976 and 25 November 1993 respectively.<sup>1</sup> The author is not represented by counsel.

\* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, 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.

The texts of two individual opinions by Committee members, Mr. Gerald L. Neuman, Mr. Yuji Iwasawa, Mr. Michael O'Flaherty, Sir Nigel Rodley and Mr. Fabián Omar Salvioli are appended to the text of the present decision.

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

<sup>1</sup> Upon ratification of the Optional Protocol, the State party entered the following reservation: "The Federal Republic of Germany formulates a reservation concerning article 5 paragraph 2 (a) to the effect that the competence of the Committee shall not apply to communications: (a) which have already been considered under another procedure of international investigation or settlement, or (b) by means of which a violation of rights is reprimanded having its origin in events occurring prior to the entry into force of the Optional Protocol for the Federal Republic of Germany; (c) by means of which

### The facts as presented by the author

2.1 The author is a physician, who was licensed as a specialist in internal medicine and provided medical services as a “panel doctor”.<sup>2</sup> He was put on the panel in 1973 by the Licensing Board of North Baden for an indefinite period of time.

2.2 On 31 March 2003, his licence was revoked pursuant to Section 95(7), Book V, of the Social Code (*Sozialgesetzbuch*), which states, in the relevant part:

“The licence of a panel doctor shall terminate upon the death, the effective date of a resignation or the move of the licensed party away from the district of his/her licensed domicile. Moreover, as of 1 January 1999, the licence shall terminate effective the end of the calendar quarter in which the panel doctor completes 68 years of age.”

2.3 The author claims that by this law, doctors are in effect banned from their profession and dispossessed of their income once they reach the age of 68. The provisions of the law do not provide for any compensation for the damages suffered by those concerned.

2.4 Patients covered by private insurance may still be treated by doctors over 68 years of age. Moreover, doctors licensed before 1 May 1999 are entitled to work as panel doctors for at least 20 years, with the result that a 54-year-old doctor licensed in 1992 may work until 2012, i.e. until he is 74 years old.

2.5 On 11 February 2002, the author lodged an application to the Karlsruhe Social Court (*Karlsruhe Sozialgericht*) for provisional relief, which was dismissed as inadmissible on 3 April 2002, since the author had not yet been affected by the provision of the law he challenged. The author did not appeal the decision to the Federal Social Court. The author argues that similar cases had already been rejected by that Court and that there was no real chance of obtaining a correction of the provision by this court in time before the revocation of his licence.

2.6 He challenged the legality of the provision of Section 95(7) with the Federal Constitutional Court on 12 July 2002. The author claims that this was a “permissible” legal alternative. In August 2002, the Federal Constitutional Court rejected the author’s constitutional complaint as inadmissible. The decision of the Federal Constitutional Court was not subject to appeal.

### The complaint

3. The author states that Section 95(7) of the Social Code violates article 26 of the Covenant, as it discriminates on grounds of age. He also claims that his rights under article 17 of the Covenant have been violated, as the law constitutes arbitrary or unlawful interference with his privacy.<sup>3</sup> He states that the law is neither justified nor necessary with respect to public welfare.

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a violation of article 26 of the [said Covenant] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant.”

<sup>2</sup> Panel doctors in Germany enter into a contract with public health insurance companies to provide services to patients who have medical insurance paid by the Government. Under this scheme, so-called “panel doctors” provide services and get paid for treating clients who are covered by public health insurance.

<sup>3</sup> The author also alleges violations of articles 1 and 2 of the Covenant, but presents no arguments to support his claims.

**State party's observations on admissibility**

4.1 On 23 September 2008, the State party submitted its comments on the admissibility of the complaint. The State party challenged the admissibility of the communication on two grounds: its reservation to the Optional Protocol and non-exhaustion of domestic remedies.

4.2 The State party considers letter (c) of its reservation to the Optional Protocol to be applicable to the present communication. By this reservation, the State party submits, the Committee shall not be competent for communications "by means of which a violation of article 26 of the [said Covenant] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant." The complainant basically claims that his right to freely exercise or choose an occupation has been violated. The State party submits that these rights are not protected by the Covenant. Consequently, a complaint based on the alleged violation of article 26 with respect to those rights is inadmissible due to the German reservation.

4.3 Regarding the claim under article 17 (not covered by the reservation), the State party submits that article 17 (1) and (2) of the Covenant protects privacy and family rights. The State party contends that these rights are not affected in the present case, and that the author really wants to obtain protection for his right to freely choose an occupation. As these are not protected by the Covenant, the State party considers the communication inadmissible under article 3 of the Optional Protocol.

4.4 The State Party also challenges the admissibility of the communication based on non-exhaustion of domestic remedies. The State submits that the author's application to the Karlsruhe Social Court for provisional relief was rejected as inadmissible. The court considered that at the time the complaint was filed, there was no need for relief. The State party claims that the author failed to file an admissible appeal to this decision or begin legal proceedings on the merits, and that the author's claim was thus never examined on its merits. Therefore, the State party argues, the author failed to exhaust domestic remedies within the meaning of article 5, paragraph 2(b) of the Optional Protocol.

**Author's comments on the State party's submission**

5.1 In his comments dated 25 October 2008, the author submits that the State party's argument that it has entered into a reservation under article 26 of the Covenant is invalidated by the fact that the Covenant was ratified by Germany in 1973, and thus creates obligations on behalf of the State party to apply the provisions of the Covenant. The author submits that when the State party adopts a law, it must ensure that the law is non-discriminatory.

5.2 As to the State party's claim that he has not exhausted all available domestic remedies, the author submits that all "realistic" domestic remedies were exhausted. The author submits that the complaint which he filed with Karlsruhe Social Court on 11 February 2002 was dismissed on 3 April 2002. The author submits that the date of the withdrawal of his licence was set on 31 March 2003, and therefore he did not have sufficient time to file any further complaints with social courts. The author also claims that various social courts have repeatedly issued decisions rejecting claims similar to that submitted by the author. Therefore, the author submits, he used a "permissible" legal alternative and filed his complaint directly with Germany's Federal Constitutional Court on 12 July 2002.

5.3 The author submits that there was no point in using social courts any further, because all national courts in Germany had come to the conclusion that this provision of Section 95(7) was legal and in conformity with national and supranational law. The author also submits that the provision of Section 95(7) violates European law, but claims that individuals are barred from bringing complaints with the European Court of Justice.

5.4 The author submits that on 12 October 2008, the German parliament repealed the statutory age limit imposed on the panel doctors by the provision of Section 95(7). The author argues that this provision was abolished because it served no public welfare interests and no community purpose.

#### **Further comments by the author**

6. By letter dated 4 February 2010, the author further submits that on 12 January 2010, the European Court of Justice issued a judgment on the statutory age limit contained in the provision of Section 95(7). In that judgment, the European Court of Justice decided that the provision in question was not compatible with European Community law.

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

##### *Consideration of admissibility*

7.1 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.

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 contesting the Committee's competence in this case due to paragraph (c) of its reservation to the Optional Protocol, which provides that the competence of the Committee "shall not apply to communications by means of which a violation of article 26 of the [said Covenant] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant." The State party, in its submission, construes the claim by the author as basically referring to an alleged violation of his right to choose or exercise an occupation, which is indeed not covered by the Covenant on Civil and Political Rights. The Committee, however, considers the present communication as related to an alleged violation of the autonomous rights to equality and non-discrimination enshrined in article 26 of the Covenant. The Committee is thus not precluded from proceeding to examine whether the admissibility requirements have been met.

7.4 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. The author argues that he did not have enough time to appeal the initial decision of the Karlsruhe Social Court before the revocation of his licence. The author also argues that because there were several other decisions with negative outcomes, there was no real chance to obtain a positive judgment on Section 95(7) of the contested law. The author further argues that he challenged the legality of the provision of Section 95(7) with the Federal Constitutional Court, on 12 July 2002, which rejected it as inadmissible in August 2002 on the basis that the relevant legislation was not yet applicable to the author. The Committee notes from the information before it that the author's application for provisional relief was declared inadmissible by the Karlsruhe Social Court as it was presented before the author was affected by the law in question, and that the author failed to file, after the above-mentioned decision of the Federal Constitutional Court, an admissible application to the courts for provisional relief or to begin legal proceedings on the merits. The Committee recalls that in the pursuit of domestic remedies, an author must show due diligence and comply with the requirements of the

procedure.<sup>4</sup> The Committee also recalls its jurisprudence that mere doubts about the effectiveness of available remedies do not absolve an author from availing himself of them.<sup>5</sup> Accordingly, the requirements of article 5, paragraph 2(b), of the Optional Protocol have not been met in this respect.

8. 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 to the General Assembly.]

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<sup>4</sup> See communication No. 433/1990, *A.P.A. v. Spain*, decision of inadmissibility of 25 March 1994, para. 6.3; communication No. 982/2001, *Bhullar v. Canada*, decision of inadmissibility of 31 October 2006, para. 7.3.

<sup>5</sup> See, inter alia, communication No. 550/1993, *Robert Faurisson v. France*, Views adopted 8 November 1996, para. 4.3; communication No. 727/1996, *Paraga v. Croatia*, Views adopted 4 April 2001, para. 5.5.

## Appendix

### **Individual opinion of Committee member Mr. Gerald L. Neuman, joined by members Mr. Michael O’Flaherty, Sir Nigel Rodley and Mr. Yuji Iwasawa (concurring)**

I agree with the Committee that the author’s communication is inadmissible for lack of exhaustion of domestic remedies. That finding provides a sufficient basis for resolving the case. The majority nonetheless takes the occasion, in paragraph 7.3 of its decision, to address one of the State party’s reservations to the Optional Protocol, and gives the reservation an untenable interpretation. I cannot join in that portion of the decision.

Part (c) of Germany’s reservation to the Optional Protocol denies the competence of the Committee with respect to communications “by means of which a violation of article 26 of the [Covenant] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant.” From its language and its context, it is clear that this reservation purports to limit the Committee’s competence over article 26 claims to situations in which an author alleges discrimination with respect to some other right contained in the Covenant, in a provision other than article 26 itself. Thus, the reservation would reduce the Committee’s competence to cases where article 26 serves an “accessory” function,<sup>a</sup> similar to the function of the non-discrimination norm in article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

I fully agree with the majority’s position that the rights to equality and non-discrimination enshrined in article 26 of the Covenant are autonomous, not merely accessory. The Committee correctly held long ago, in the well-known cases of *Broeks* and *Zwaan-de Vries*,<sup>b</sup> that discrimination on the basis of sex with regard to pension rights implicated article 26 of the Covenant, despite the fact that the Covenant on Civil and Political Rights does not guarantee any independent right to a pension.

The Federal Republic of Germany did not make a reservation to article 26 when it ratified the Covenant, and therefore is substantively bound by the full meaning of article 26. When, however, Germany ratified the Optional Protocol to the Covenant in 1993, it sought to prevent communications based on this autonomous character of Article 26 from being brought before the Committee, by articulating the reservation quoted above.

The Committee maintains in paragraph 7.3 of its decision that the reservation does not apply to the author’s claim of age discrimination, because the author’s claim asserts a violation of the autonomous rights to equality and non-discrimination enshrined in article 26. This interpretation not only contradicts the clear meaning of the reservation, but appears to deprive the reservation of any content whatsoever. Every claim of discrimination, including those in *Broeks* and *Zwaan-de Vries*, can be described as relating to the autonomous right enshrined in article 26.

I do not see how such a nullifying interpretation can be justified. To the contrary, the reservation (if permissible) would exclude the author’s claim of age discrimination from the Committee’s competence precisely because the claim is autonomous and not accessory –

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<sup>a</sup> See, for example, the State party’s argument in communication No. 1115/2002, *Petersen v. Germany*, decision on admissibility adopted on 1 April 2004, para. 4.2.

<sup>b</sup> Communication No. 172/1984, *Broeks v. the Netherlands*, Views adopted on 9 April 1987; Communication No. 182/1984, *Zwaan-de Vries v. the Netherlands*, Views adopted on 9 April 1987.



that is what the reservation means. Germany's reservation might be impermissible, but the majority does not address that question, construing the reservation instead as inapplicable to the author's claim, on grounds that would render it inapplicable to every claim.

I will not explore the permissibility of the reservation here, because I do not see sufficient reason to reach that question, given that the communication is already inadmissible on grounds of lack of exhaustion of domestic remedies. In several prior decisions, the Committee has declined to address this reservation, finding the respective authors' claims inadmissible due to lack of exhaustion,<sup>c</sup> or even to lack of substantiation.<sup>d</sup> That course could have been followed here, with regard to both the interpretation and the permissibility of the reservation. Instead, the majority has addressed the question of interpretation, and given an unconvincing answer. Having responded to the majority's interpretation, I would postpone analysis of the more difficult question of the permissibility of the reservation until a communication is presented that genuinely requires it.

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

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<sup>c</sup> Communication No. 1188/2003, *Riedl-Riedenstein v. Germany*, decision on admissibility adopted on 2 November 2004, para. 7.2.

<sup>d</sup> See *ibid.* para. 7.3; communication No. 1516/2006, *Schmidl v. Germany*, decision on admissibility adopted on 31 October 2007, para. 6.2; communication No. 1292/2004, *Radosevic v. Germany*, decision on admissibility adopted on 22 July 2005, para. 7.2; communication No. 1115/2002, *Petersen v. Germany*, decision of inadmissibility of 1 April 2004, paras. 6.8-6.9.

### Individual opinion by Committee member Mr. Fabián Omar Salvioli

1. I am not satisfied with the way in which the Committee has handled the *E. v. Germany* case (communication No. 1789/2008). The Committee has found the complaint inadmissible on the grounds of non-exhaustion of domestic remedies without first having resolved the issue of its competence, which is called into question by the State party on the basis of its reservation to the Optional Protocol.

2. A logical and ordered approach to an individual communication would imply that issues of competence be resolved first if, as in the case in question, they arise. Only when the Committee has declared itself competent may it proceed to the consideration of other questions of admissibility that might be the subject of preliminary objections (such as duplication, the failure to exhaust domestic remedies, wrongful use of the right to submit communications, and so on). Once it has found a matter admissible, the Committee may then go on to consider the merits. In exceptional circumstances, in the light of the nature of a case the Committee may need to examine some aspect of admissibility and the merits at the same time (for example, when a State argues that domestic remedies have not been exhausted and the complaint is based on a denial of justice) but, in any event, the matter of competence must be resolved first.

3. In its decision on the *E. v. Germany* case, the Human Rights Committee concludes (and I agree) that domestic remedies have not been exhausted and points out that article 26 of the Covenant enshrines the stand-alone rights to equality and non-discrimination, in conformity with its admirable and well-established position that the scope of article 26 is not limited to the rights covered by the Covenant.

4. I cannot, however, agree with the line of reasoning that appears at the end of paragraph 7.3 of the decision, in which the Committee concludes that there is no connection between subparagraph (c) of Germany's reservation, formulated when it ratified the Optional Protocol, and the author's complaint, for the reason that the communication refers exclusively to a possible violation of his stand-alone rights to equality and non-discrimination.

5. The paragraph of the reservation in question states that the competence of the Committee shall not apply to communications by means of which a violation of article 26 of the Covenant is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant. It cannot be denied that Mr. G. E.'s complaint refers to a possible violation of article 26 of the International Covenant on Civil and Political Rights resulting from alleged acts of discrimination on the basis of age arising from the application of Section 95 (7) of the Social Code, which in the author's view renders it difficult or impossible for him to work as a doctor.

6. The right to work and other workplace rights are not covered by the International Covenant on Civil and Political Rights (except for the right of everyone to form and join trade unions for the protection of his interests<sup>a</sup>); for that reason, the argument put forward by Mr. G. E. in the communication under consideration is directly related to the reservation formulated by the State party on ratifying the Optional Protocol. The Committee resolved the matter of its competence using an unconvincing line of argument and avoiding what it should have done, which was to consider the case in the light of whether or not Germany's reservation was valid.

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<sup>a</sup> Article 22 of the International Covenant on Civil and Political Rights.

7. The Committee's first competence with regard to individual communications is its "competence with respect to its competence", whereby an international body is deemed competent to decide whether or not it is competent. In my view, therefore, it would not have been right either on the one hand to find that subparagraph (c) of Germany's reservation applies to Mr. G.E.'s case (which is correct though for a different reason from that put forward by the Committee in paragraph 7.3 of its decision) but on the other hand to decide not to examine the validity or otherwise of the reservation simply because the domestic remedies had not been exhausted. The first issue of admissibility to be resolved is that of the Committee's competence, and all the more so when that competence is questioned by the State.

8. It is clear that Germany, through its observations on the G.E. case, calls into question the competence of the Committee, and expressly cites its reservation in doing so, as is recognized in paragraph 4.2 of the decision. Addressing other matters of admissibility ahead of the competence issue may well offer a less thorny path, but runs counter to the legal logic that should guide an international protection body like the Human Rights Committee.

9. The third subparagraph of Germany's reservation states clearly that the competence of the Committee shall not apply to communications "by means of which a violation of article 26 [...] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant".

10. The subparagraph in question constitutes a reservation that directly affects a provision of the Covenant, namely article 26. However, at the time the State ratified the Covenant, in 1973, it formulated no reservation to the aforementioned article. Under article 19 of the Vienna Convention on the Law of Treaties (1969), a State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation.

11. Only in 1993, when it ratified the Optional Protocol, did Germany formulate the reservation in question, which refers to article 26 of the Covenant in the third subparagraph. The Committee, after considering the fifth periodic report of Germany, stated in its concluding observations that it "regrets that Germany maintains its reservations, in particular regarding article 15, paragraph 1, of the Covenant, a non-derogable right, and those made when the Optional Protocol was ratified by the State party which partially limits the competence of the Committee with respect to article 26 of the Covenant."<sup>b</sup>

12. In the instant case, the Committee should have declared itself competent to resolve the matter, but not for the reasons set forth in the last part of paragraph 7.3 of the Views. The competence of the Committee in this case rests on two arguments. Firstly, subparagraph (c) of the German reservation has no validity, as it constitutes a reservation to article 26 of the International Covenant on Civil and Political Rights that was made not when it should have been, at the time of ratification, but 20 years subsequently. A careful reading of the reservation leads one to conclude that it refers in fact not only to the competence of the Committee but also to the actual content of article 26, which it aims to circumscribe.

13. Secondly, the Committee's competence to deal with this case rests on the complementary argument that the reservation in question is also incompatible with the substance of the Protocol, and is thus equally invalid, since it attempts to oblige the Committee to interpret the article, which touches on a fundamental tenet of international

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<sup>b</sup> Human Rights Committee: concluding observations to the fifth periodic report of Germany, adopted on 30 March 2004 (CCPR/CO/80/DEU, para. 10). The State party was invited to consider withdrawing its reservations.

human rights law (nothing less than the principles of equal protection of the law and non-discrimination) in a manner that is restrictive and contrary to the Committee's understanding.

14. Only once the issue of the Committee's competence had been resolved on the grounds of the non-validity of subparagraph (c) of Germany's reservation, should the Committee have proceeded to conclude that the complaint filed by Mr. G. E. was inadmissible because of his failure to exhaust all domestic remedies.

[Done 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 to the General Assembly.]

**G. Communication No. 1800/2008, R.A.D.B. v. Colombia  
(Decision adopted on 31 October 2011, 103rd session)\***

<i>Submitted by:</i>	R.A.D.B. (represented by counsel, Alberto León Gómez Zuluaga)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Colombia
<i>Date of communication:</i>	19 June 2006 (initial submission)
<i>Subject matter:</i>	Trade union privileges; arbitrary dismissal, appeal against enforceable judgement
<i>Procedural issues:</i>	Substantiation of complaint; abuse of the right to submit communications
<i>Substantive issues:</i>	Right to a fair and public hearing by a competent, independent and impartial tribunal; right to form and join trade unions for the protection of their interests; right to equal protection of the law without discrimination
<i>Articles of the Covenant:</i>	2; 14, paragraphs 1, 2; and 5; 22; and 26
<i>Articles of the Optional Protocol:</i>	2 and 3

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

*Meeting on 31 October 2011,*

*Adopts the following:*

**Decision on admissibility**

1. The author of the communication is R.A.D.B., a Colombian national. He alleges he is a victim of a violation by Colombia of article 14, read in conjunction with article 2, paragraphs 2 and 3; as well as articles 22 and 26 of the Covenant. The Covenant and its Optional Protocol entered into force for Colombia on 23 March 1976. The author is represented by counsel, Mr. Alberto León Gómez Zuluaga.

**The facts as submitted by the author**

2.1 The author worked for many years for the State-owned Puertos de Colombia, Terminal Marítimo de Santa Marta (COLPUERTOS),<sup>1</sup> and was also state leader of the

\* The following Committee members participated in the consideration of this communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

<sup>1</sup> According to the documents provided by the author, he was employed by COLPUERTOS from 18 July 1979 to 31 December 1993.

Union of Workers of the Terminal Marítimo de Santa Marta (SINTRATERMAR) and President of the Magdalena section of the Confederation of Colombian Workers (CUT). COLPUERTOS was liquidated under Act No. 01/1991 and, as a result, the author was dismissed on 1 January 1994. In order to assist the liquidation process, the aforementioned Act established the Social Liability Fund for the Liquidation of Puertos de Colombia (FONCOLPUERTOS).

2.2 The author contends that as a result of his position as a trade union leader, he was protected by trade union privileges (*fuero sindical*). This means that persons covered by this protection may be dismissed, transferred or demoted only with the prior authorization of a labour judge.

2.3 The author lodged a claim for reinstatement before the First Labour Court against FONCOLPUERTOS, the entity that for all legal purposes had replaced COLPUERTOS. On 7 June 1996, the judge accepted the author's claim and ordered his reinstatement to the post that he had held at the time of his dismissal and the payment of 75,891.83 Colombian pesos for each day between 1 January 1994 and the effective date of reinstatement. The ruling was not appealed and was declared enforceable by the lower court on 19 June 1996.

2.4 Despite repeated requests from the author, FONCOLPUERTOS did not comply with the ruling. On 1 December 2001, five years after the ruling had been issued, the Labour Chamber of the Superior Court of the Judicial District of Santa Marta took cognizance of the case for consultation purposes, and on 11 December 2001, overturned the lower court's ruling. The author points out that the Labour Chamber itself, against the same defendant (FONCOLPUERTOS) had already issued rulings ordering the reinstatement of workers protected by trade union privileges, of which he became aware during the appeals process.

2.5 According to the author, the review procedure for consultation (*grado de consulta*) was not applicable in his case, since the relevant legislation was the Code of Labour Procedure, a special norm which establishes the need for review only in the case of rulings that were totally prejudicial to the employee and were not appealed.

2.6 The author adds that before and during the liquidation process, cases of corruption came to light in COLPUERTOS, in which employees at different levels of the company were involved. That led to public pressure on the judicial branch, mainly with respect to employees exercising trade union responsibilities. In 2001, several labour judges had been prosecuted by the Prosecutor General's Office for alleged attempts to pervert the course of justice by issuing decisions that favoured FONCOLPUERTOS employees, or for having approved fraudulent settlements. This situation explained the different treatment afforded to similar cases by the Superior Court in 1996 and 2001 without the law having changed.

2.7 The author lodged an application for legal protection (*acción detutela*) against the decision of the Superior Court. This application was rejected by the Labour Cassation Chamber and, on 27 August 2002, on appeal, by the Criminal Cassation Chamber of the Supreme Court.<sup>2</sup>

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<sup>2</sup> According to the rulings enclosed by the author, the Labour Cassation Chamber considered that the judge hearing an application for protection is not empowered to interfere in decisions adopted during judicial proceedings, since this would constitute an arbitrary incursion into the domain of an ordinary court. Furthermore, the Criminal Cassation Chamber considered the question of whether, in the author's particular circumstances, it was compulsory to grant court authorization to the employer as a prior condition of his dismissal. In this regard, the Criminal Cassation Chamber reasoned as follows: "In ruling that it was not necessary to fulfil this requirement, the Labour Chamber of the Superior Court of the Judicial District of Santa Marta did not base its decision on repealed or inapplicable standards. Rather, what it did, in the light of the circumstances, was to interpret the precepts that

2.8 The author applied to the Constitutional Court to review the previous ruling, but his case was not selected for review. The author therefore considers that he has exhausted all domestic remedies.

### **The complaint**

3.1 In the author's view, the events described constituted a violation of article 14, read in conjunction with article 2, paragraphs 2 and 3; as well as articles 22 and 26 of the Covenant.

3.2 With respect to article 14, the author contends that he suffered a violation of his right to justice and due process. He asserts that neither his right to a fair and public hearing by a competent, independent and impartial tribunal, nor his right to be tried without undue delay were respected. He submits that the decision by the Court of First Instance declaring the judgement enforceable, combined with the failure to respond of the defendant (FONCOLPUERTOS), created a legitimate expectation that his rights had been recognized and re-established. If the defendant had considered the decision to declare the ruling of the Court of First Instance enforceable to be arbitrary, it would have been obliged to seek a review of the judge's action. The fact that a second instance decision was issued five years after the first instance ruling constitutes a violation. Moreover, the author contends that the Superior Court misapplied national legislation when it failed to uphold a lawful first instance ruling, thereby creating a situation which favoured the State employer. The author therefore argues that the Court acted not as a guarantor of rights, but rather as a protector of the State, which is contrary to the principles of independence and impartiality. He also asserts that, by failing to protect infringed fundamental rights, the Constitutional Court committed a denial of justice.

3.3 With regard to article 22 of the Covenant, the author contends that the failure to protect statutory union rights constitutes a violation by the State of the right to freedom of association, since it was perpetrated by a State entity, FONCOLPUERTOS, established by law, which had replaced COLPUERTOS, itself a State entity. The Superior Court's decision was the result of a political decision by the majority of the Chamber. The national Government had launched a smear campaign against the COLPUERTOS workers, based on skilful generalizations of the numerous acts of corruption that had come to light. That had led to pressure by public opinion on the judiciary.

3.4 Regarding article 26 of the Covenant, the author maintains that without valid reasons, the Superior Court issued a ruling that was at variance with others it had handed down in similar cases. The author makes reference to similar rulings in which the right to trade union privileges was recognized and reinstatement was ordered in cases of dismissal without court authorization. If it changed its jurisprudence, the Court had to give reasons for such a change.

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govern the issue in order to find a solution to the dispute. Its decision was not unexpected or capricious. It was based on a number of considerations around the application, in the particular circumstances of R.A.D.B., of article 405 of the Substantive Labour Code and article 10, paragraph 3, of the current Collective Agreement. It thus concluded not only that the liquidation of state-owned entities constituted a lawful cause for the termination of the employment relationship that did not require prior authorization from a judicial authority, but also that reinstatement was 'a physical and legal impossibility', given that the enterprise had ceased to exist and that there was no equal or higher post available to reinstate him (...). When it reviewed the situation of R.A.D.B. for consultative purposes, the Labour Chamber of the Court of the Judicial District of Santa Marta did not arbitrarily entirely disregard the condition stipulated in article 405 of the Substantive Labour Code. Between the norm and its application, there was a process of interpretation" (sic).

**State party's observations on admissibility**

4.1 In its note verbale of 6 October 2008, the State party submits that the communication is inadmissible. It denies that the first instance ruling of 7 June 1996, handed down by the First Labour Court, was not subject to review by a higher court (*grado jurisdiccional de consulta*). It was reviewed eventually because the ruling went against the State party, which was directly responsible for the labour liabilities of COLPUERTOS and FONCOLPUERTOS.

4.2 It denies that pressure was brought to bear on COLPUERTOS workers and that the rulings handed down by the judicial authorities in this case did not comply with the law. The position assumed by the Superior Court is concordant with the jurisprudence of the Constitutional Court concerning trade union privileges in the event of the restructuring of public entities. On receiving the application for legal protection (*acción de tutela*) submitted by the author, both the Labour Cassation Chamber and the Criminal Cassation Chamber of the Supreme Court of Justice rejected the application on the grounds that the Superior Court had not acted arbitrarily.

4.3 The State party considers that the communication is not sufficiently substantiated for purposes of admissibility, insofar as it relates to a case where the Committee is expected to re-evaluate facts or evidence that have already been examined by national courts. Referring to the jurisprudence of the Committee and that of the inter-American human rights system, the State party recalls that it is not for the Committee to reconsider decisions of domestic courts with respect to the evaluation of facts and evidence. The author has simply expressed his disagreement with the decision handed down by the Superior Court and expects the Committee to act as a court of appeal to deal with matters that were properly addressed at the domestic level. The only reason the Committee would have for considering the current case would be to show that the rulings handed down were arbitrary or that they violated the due process of the applicant, neither of which occurred. The author had access to several remedies and obtained substantive decisions based on the law, with each decision explaining the reasons why his application could not be accepted.

4.4 The author does not give a convincing explanation to justify the delay of four years and six months between the ruling of the Superior Court and the submission of the case to the Committee, and the State party maintains that such a delay constitutes an abuse of the right to submit communications.

**State party's observations on the merits**

5.1 On 15 July 2008, the State party submitted its observations on the merits.

5.2 According to the State party, Act No. 1/1991, which established the liquidation of the COLPUERTOS enterprise, was declared constitutional by the Constitutional Court in its ruling dated 21 January 1993. Decrees Nos. 035, 036 and 037 of 1992 were issued in order to give effect to the liquidation of the company. In this regard, article 24 of Decree No. 035 of 1992 states that "the liquidation of Puertos de Colombia constitutes just cause for the termination of employment contracts, in accordance with article 5 (e) of Act No. 50 of 1990". The author is currently a pensioner under article 3 of Decree No. 035.<sup>3</sup>

5.3 With respect to article 14 of the Covenant, the State party maintains that the author had a fair trial before an independent and impartial court. He was able to lodge appeals and

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<sup>3</sup> Article 3. The recognition of retirement, disability and old-age pensions, established in existing legislation and in the regulations issued under the special powers contained in Act 1 of 1991, to which public servants are entitled, signifies the termination of their respective employment contracts and legal and established entitlements.



the court rulings were duly substantiated. The question of review by a higher court was resolved by a competent body and was deemed appropriate by the Constitutional Court in its ruling 962/99 of 1 December 1999. The Court confirmed “the need to review first instance decisions that are partially or totally unfavourable to FONCOLPUERTOS, given that the payment of recognized claims would be the liability of the Nation, which is directly responsible for the labour-related obligations and liabilities of COLPUERTOS and FONCOLPUERTOS (...). Factors such as the validity of the principle of protection of the Nation’s financial resources; the defence of the common good through the duty to provide greater protection in view of the damaging effects of corruption; the duty to promote strict observance of administrative morality; and the obligation to safeguard the intangibility of public resources, are all exceptionally important in the case under examination, since the courts and judges cannot ignore the circumstances, nor can they remain indifferent to the cases of scandalous administrative corruption, such as those which arose in the labour complaints against COLPUERTOS and FONCOLPUERTOS”. Furthermore, through a Directive dated 7 November 2002, the Attorney-General (*Procurador General de la Nación*) reiterated the mandatory requirement for review by a higher court in all adverse rulings arising in the affairs of FONCOLPUERTOS.

5.4 The State party also points out that many labour cases were initiated as a result of the liquidation of the enterprise, so that special measures were needed to clear the backlog of the courts involved and, at the same time, avoid unreasonable delays in the settlement of cases. This occurred despite the fact that there is no provision in domestic legislation that limits the time allowed for a review of a ruling by a higher court.

5.5 Since under the rules that govern applications for legal protection, the Constitutional Court is not obliged to review every decision regarding protection, the lack of such a review cannot be deemed to be a denial of justice.

5.6 The State party reiterates that the author is clearly expecting the Committee to act as a court of fourth instance and to reopen the debate on whether or not his dismissal required prior judicial authorization. The fact that the domestic courts did not rule favourably on the appeals lodged by the author does not show a violation of article 14, paragraph 1, of the Covenant.

5.7 With regard to the right to be tried without delay, the State party contends that in the present case the alleged delay did not cause additional harm to the author. Steps were taken to ensure that the time taken to settle internal appeals did not amount to unreasonable delay.

5.8 With respect to article 22 of the Covenant, the State party reiterates that the cancellation of the author’s employment contract was the result of the liquidation of COLPUERTOS, which was established under the provisions of Act No. 1/1991, and cannot be understood as a measure aimed at violating freedom of association. The recognition of retirement, as established in Decree No. 035 of 1992, implementing Act No. 1/1991, meant the termination of the employment contract. Therefore, the dismissal of a person entitled to trade union privileges in the course of a liquidation process cannot be understood as an act of repression against trade union leaders.

5.9 In respect of article 26 of the Covenant, the State party recalls the jurisprudence of the Committee in the sense that not all differences in treatment amount to discrimination, so long as the criteria for such differences are reasonable and objective. It asserts that the Superior Court’s decision was in accordance with the interpretative criterion adopted by the Constitutional Court, which, in its decision dated 26 May 2003, ruled that in the case of actual administrative restructuring, it is not necessary to request judicial authorization prior to abolishing the posts of workers with trade union privileges, since the legal consequences related to the employment relation or link are derived from a general legal definition, and

because the authority to restructure entities is based on actual constitutional norms and includes among others the elimination of posts.

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

6.1 On 10 October 2009, the author submitted comments on the observations made by the State party. He contends that the Constitutional Court has vacillated in its interpretation of the right to trade union privileges. However, since mid-2003, the jurisprudence has consistently held that in processes of restructuring or liquidation of public entities, judicial authorization is required to dismiss public servants who are protected by trade union privileges. For example, in ruling T-235 of 2005, the Constitutional Court decided that when a public entity enters into a process of administrative restructuring or liquidation, it should first consult the labour judge, so that the latter may determine whether such a process may be considered as just cause to dismiss, transfer or demote a worker protected by trade union privileges and if so, grant prior permission for such actions.

6.2 The State party was not unaware that the rules of labour procedure restrict review by a higher court only to rulings that are entirely unfavourable to the worker. However, the effects of that labour rule were annulled by a decision of the Constitutional Court in 1992. The author argues that it is unacceptable that procedural rules should be altered to favour the negligent State.

6.3 The author maintains that violation of due process is justified by:

(a) The fact that more than five years went by without the State, through FONCOLPUERTOS, complying with the ruling of 7 June 1996 ordering the reinstatement of the author. Yet compliance with judicial rulings is a fundamental condition of the rule of law and disregarding judicial decisions constitutes a violation of the rights of due process and access to the administration of justice. The author reiterates that there have been rulings whereby reinstatement has to take place even when the entity against which the ruling is made is in the process of liquidation;

(b) The cognizance of the case assumed by the Superior Court for review five years after the first instance ruling;

(c) The unlawful assumption by the Superior Court that it had the authority to reverse the first instance ruling. According to the law, that ruling was not subject to review. By proceeding to review the ruling, the Court violated the independence of the court of first instance;

(d) The Constitutional Court's failure to rule on the application for legal protection. Although in the Colombian legal system the review of such applications for protection is discretionary, the Court has defined certain applicable criteria, including the need to overturn judicial decisions that disregard the constitutional doctrine.

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

##### *Consideration of the admissibility*

7.1 Before considering any complaint 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 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 notes the argument of the State party that the communication should be considered inadmissible on the grounds that it constitutes an abuse of the right to submit communications, since four years and six months passed between the ruling by the Superior Court and the submission of the communication to the Committee. The Committee observes that, in accordance with the new rule 96 (c) of the Committee's rules of procedure, applicable to communications received by the Committee starting 1 January 2012, the Committee shall ascertain that the communication does not constitute an abuse of the right of submission. An abuse of the right of submission is not, in principle, a basis of a decision of inadmissibility *ratione temporis* on grounds of delay in submission. However, a communication may constitute an abuse of the right of submission, when it is submitted after 5 years from the exhaustion of domestic remedies by the author of the communication, or, where applicable, after 3 years from the conclusion of another procedure of international investigation or settlement, unless there are reasons justifying the delay taking into account all the circumstances of the communication. In the mean time, the Committee shall apply its existing jurisprudence, according to which it may be considered that there is abuse in cases where an exceptionally long period of time has elapsed prior to submission of the communication, without sufficient justification.<sup>4</sup> The Committee observes that, following the ruling by the Superior Court, the author submitted an application for legal protection, which was settled on appeal on 27 August 2002. The Committee considers, in the present case, that the period of time elapsed since the exhaustion of domestic remedies does not constitute an abuse of the right to submit a communication under article 3 of the Optional Protocol.

7.4 With regard to the author's complaints concerning the violation of his right to due process as set out in article 14, the Committee observes that these complaints basically relate to the evaluation of the facts and the application of domestic legislation by the courts of the State party. The Committee recalls its jurisprudence according to which it is incumbent on the courts of the State party to review facts and 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.<sup>5</sup> The Committee has studied the material submitted by the parties, including the rulings on applications for legal protection raised in the complaints lodged by the author with the Committee, and notes the disagreement of the author with the interpretation of domestic legislation arrived at by the courts of the State party. Given the circumstances of the case, the Committee considers that the material submitted does not show that the judicial proceedings reflected the above-mentioned flaws. Accordingly, the Committee finds that the author has failed to provide sufficient substantiation of his complaints of a violation of article 14, and that the communication is therefore inadmissible under article 2 of the Optional Protocol.

7.5 With regard to the alleged violations of articles 22 and 26 of the Covenant, the Committee notes the author's allegations to the effect that his dismissal constitutes a violation of the right of association contained in article 22 of the Covenant and that the domestic courts have issued contrary rulings in cases similar to that of the author, which

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<sup>4</sup> See, for example, communications Nos. 1233/2003, *Tsarjov v. Estonia*, Views adopted on 26 October 2007, para. 6.3; No. 1434/2005, *Fillacier v. France*, decision of inadmissibility adopted on 27 March 2006, para. 4.3; and No. 787/1997, *Gobin v. Mauritius*, decision of inadmissibility adopted on 16 July 2001, para. 6.3.

<sup>5</sup> See the Committee's general comment No. 32 on article 14: 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. 26). See also communication No. 1616/2007, *Manzano v. Colombia*, decision dated 19 March 2010, para. 6.4.

constitutes a violation of article 26 of the Covenant. In this respect, the Committee finds that the author did not sufficiently substantiate, for the purposes of admissibility, to what extent his dismissal was due to his position as trade union leader. Moreover, the rulings that differed from that issued in his case referred to different cases, so that it is not possible to deduce from them reasons for believing that discrimination occurred in any of the forms referred to in article 26 of the Covenant. Therefore, the Committee considers that these complaints are inadmissible as unfounded, by virtue of article 2 of the Optional Protocol.

8. 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, to the author and to counsel.

[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 to the General Assembly.]

**H. Communication No. 1802/2008, *L.O.P. v. Spain*  
(Decision adopted on 31 October 2011, 103rd session)\***

<i>Submitted by:</i>	L.O.P. (represented by counsel, José Luis Mazón Costa)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	15 April 2008 (initial submission)
<i>Subject matter:</i>	Unjustified prison transfers, discrimination
<i>Procedural issues:</i>	Exhaustion of domestic remedies; substantiation of the complaint; abuse of the right to submit a communication
<i>Substantive issues:</i>	Right not to be subjected to arbitrary or unlawful interference with one's privacy and family; right to equal protection of the law without discrimination
<i>Articles of the Covenant:</i>	Article 17, paragraph 1, and article 26
<i>Articles of the Optional Protocol:</i>	Articles 2 and 3

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

*Meeting on 31 October 2011,*

*Adopts the following:*

**Decision on admissibility**

1. The author of the communication, dated 14 April 2008, is L.O.P., a Spanish citizen born in 1946. He claims to be the victim of a violation by Spain of article 17, paragraph 1, and article 26 of the Covenant. The Optional Protocol entered into force for Spain on 25 April 1985. The author is represented by counsel, José Luis Mazón Costa.

**The facts as submitted by the author**

2.1 The author is serving a prison sentence in connection with various drug trafficking convictions and offences against public health. In 2003, while being held in Alcalá Meco prison in the province of Madrid, he was moved without explanation to Zuera prison (Zaragoza). He was subsequently transferred to prisons in Valladolid and Daroca (Zaragoza). The author claims that the transfers failed to take account of his right to family life, as his daughters were living in Guadalajara, near Madrid.

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Raisoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvio, Mr. Krister Thelin and Ms. Margo Waterval.

2.2 The author was placed on the list of prisoners under special observation (FIES list). He maintains that his inclusion on the list was based not on the General Prisons Act but on internal circulars issued by the Directorate-General of Prisons. The consequences of inclusion on the FIES list include transfers between prisons, cell changes, cell searches at any time of the day or night, surveillance of all activities and interception of correspondence.

2.3 With regard to the exhaustion of domestic remedies, the author maintains that the domestic courts reject the contention that prison transfers affect detainees' fundamental right to family life. In this connection, he refers to a judgement issued by the Madrid High Court which upheld this rejection. With regard to inclusion on the list of inmates under special observation, the author says that the Constitutional Court has upheld the constitutionality of FIES status.

2.4 The author maintains that it would have been futile to submit an application for *amparo* in this case. He states that, since the reform of the Constitutional Court Act, an application for *amparo* is appropriate only in cases that have "special constitutional significance". This makes it a procedure with no prospect of success, on a par with an application for extraordinary review of sentence.

### **The complaint**

3.1 The author maintains that the arbitrary transfers to prisons far from his home, which impeded contact with his family, constitute a violation of article 17, paragraph 1, of the Covenant.

3.2 He also contends that his inclusion, without any legal basis, on the FIES list of prisoners under special observation, forcing him to serve his sentence in conditions that are far more stringent than those existing for other inmates, constitutes a violation of article 26 and article 17, paragraph 1, of the Covenant.

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

4.1 In a note verbale dated 15 October 2008 the State party maintains that the communication is inadmissible. It claims that the author provides no explanation or reasoning to support his allegations of a violation of the Covenant and that he did not exhaust all domestic remedies in relation to the complaints raised. The author provided no evidence of having filed a complaint with the prison authorities, the prison inspection judge, the Provincial High Court or the Constitutional Court in relation to any of the complaints raised. It also notes that the author has made repeated submissions to the Committee,<sup>1</sup> always without exhausting domestic remedies and without substantiation, and that his recourse to the Committee is therefore an abuse of the communications system.

4.2 The State party argues that neither the Constitution nor the Covenant recognizes a right to serve a sentence in a particular place or within a given maximum distance from the family home. The author provides no proof that his family home is in Guadalajara. Furthermore, the complaint hinges on his transfer to a prison (i.e. Daroca prison) which is just 146 kilometres from Guadalajara.

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<sup>1</sup> The Human Rights Committee has considered two previous submissions from the author. On 11 August 2006 the Committee declared communication No. 1387/2005 inadmissible, concluding that "the claim under article 14, paragraph 5, is insufficiently substantiated for purposes of admissibility". On 18 April 2008, in its decision on communication No. 1360/2005, the Committee concluded that the facts did not reveal any violation of article 14, paragraph 5, of the Covenant.

4.3 The State party requests that the Committee declare the author's submission inadmissible on the ground of failure to exhaust domestic remedies, in accordance with article 2 of the Optional Protocol, and because the communication is clearly an abuse of the purpose of the Covenant, in accordance with article 3 of the Optional Protocol. Failing that, it asks the Committee to declare that there has been no violation of the Covenant.

#### **Author's comments on the State party's submission**

5.1 The author submitted comments on the State party's observations on 15 February 2009. He claims that the High Courts and the Constitutional Court have rejected appeals against transfers lodged by other prisoners and that domestic remedies are therefore ineffective.

5.2 The author recalls the Committee's jurisprudence according to which it is not necessary to exhaust remedies that have no prospect of success.<sup>2</sup> He also maintains that he has gone to great lengths, which are detailed in his prison record, to obtain transfers to other places of detention in which to serve his sentence.

5.3 With regard to his inclusion on the list of prisoners under special observation, the author reiterates that he was subjected to an inhumane and discriminatory prison regime. He describes the measures imposed upon prisoners whose names appear on this list, which include unscheduled prison transfers, body and cell searches at any time of day, the interception of correspondence (including letters), restricted contact with the outside world as compared to other prisoners, round-the-clock surveillance, and restricted access to work.

5.4 He claims that there is no possibility of challenging the imposition of this status, in view of the case law of the courts of Spain, which have repeatedly upheld the legality of the FIES system. He reiterates that it is no longer possible to file an application for *amparo* before the Constitutional Court as the Court is limited to hearing cases that have "special constitutional significance".

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

6.1 The State party submitted observations on the merits on 10 February 2009.

6.2 The State party reiterates that the author offers no explanation or reasoning to support his allegations of a violation of the Covenant, that he did not exhaust domestic remedies and that his recourse to the Committee is an abuse of the communications system.

6.3 It adds that the author is a known drug dealer with repeated convictions as the leader of a major drug trafficking ring. He served 4 years and 4 months for offences against public health and is currently serving a consolidated sentence of 13 years, 5 months and 25 days for two convictions on charges of illegal drug trafficking and offences against public health, in this case aggravated by his position as ringleader.<sup>3</sup> He was transferred several times, on occasions for judicial reasons (to attend trials and hearings), on others because of his assignment to a specific prisoner category or activity or for regime- or security-related reasons.

6.4 According to the State party, the author has been serving his sentence in Daroca prison since July 2007 and is currently classified as a level-two prisoner, i.e., a prisoner subject to the ordinary prison regime. The distance between his usual home in Guadalajara and the prison in Daroca is under 150 kilometres. By way of example, between 26 January and 26 April 2008, he received two family visits from his daughter and nine visits from his

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<sup>2</sup> See communication No. 1305/2004, *Victor Villalón Ventura v. Spain*, Decision of 31 October 2006.

<sup>3</sup> The State party attaches hereto a summary of the evidence and the text of the convictions.

girlfriend.<sup>4</sup> With regard to the conditions of detention to which the author is subject, the State party indicates that since being admitted to Daroca prison he has never had to change cell and his cell has been searched only as a matter of routine and never during night-time hours.

6.5 The State party reiterates that serving one's sentence in a place of detention close to the family home is not a right recognized as such in the Covenant. It refers to the Standard Minimum Rules for the Treatment of Prisoners, in which it is stated that the different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment.

6.6 It notes that the allocation of prisoners to the different institutions is based on an assessment of procedural and criminal factors and the criminal record, prisoner status and personal situation of each inmate, taking account of the different aims of each facility (social rehabilitation, detention and custody, etc.). The author was placed on the FIES list, and more specifically in the organized crime category, on the basis of his criminal activities and in line with the definition established in article 2 of the United Nations Convention against Transnational Organized Crime, by a decision of the Directorate-General of Prisons which is challengeable in court.

6.7 With regard to the author's status as a prisoner under special observation, the State party explains that a prisoner's inclusion on the FIES list does not give them a status distinct from that of other prisoners with equivalent personal, criminal and criminological characteristics, does not change the prison regime to which they are subject, and is without prejudice to the right to equality before the law established in article 26 of the Covenant. The FIES list is a database that was created to meet the need for extensive information about certain groups of highly dangerous inmates and the need for special protection. Prisoners are assigned to a specific prison or detention regime (closed, ordinary or open) according to criteria established in domestic legislation that are unrelated to whether or not the prisoner is included on the FIES list.

6.8 The State party notes that, in those cases where the prison system fails to respect the rights of inmates, the courts have a duty to remedy any abuse that may have occurred. In the author's case there is no record of abuse having occurred or of the courts having been petitioned.

6.9 The State party therefore reiterates its request that the Committee declare the communication inadmissible on the grounds that the domestic remedies available in the State party have not been exhausted and that the communication is clearly an abuse of the purpose of the Covenant.

#### **Author's comments on the State party's submission**

7.1 The author responded to the State party's observations on 13 August and 14 December 2009.

7.2 He reiterated the comments submitted previously and referred to the Madrid High Court judgement of 8 July 2009 which refutes a prisoner's right to be transferred to a facility close to their family home.<sup>5</sup> The author believes that he has demonstrated that domestic remedies are ineffective.

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<sup>4</sup> Four conjugal visits, three family visits and two ordinary visits.

<sup>5</sup> "The right to be assigned to — or detained in — a specific prison or a prison close to the prisoner's usual place of residence is neither a right recognized to detainees under prison regulations nor, of



7.3 He adds that he has been subjected to further transfers — first to Villena, in the province of Alicante, 360 kilometres from Madrid, and subsequently to Salamanca — since submitting his communication to the Committee. He emphasizes that he endured seven prison transfers between 2003 and 2009 and that all the prisons to which he was taken, except those in Madrid, were a long way from his family home.<sup>6</sup> It is obvious that the prisoner's transfer to prisons far from his family home was detrimental to the free development of his personality. The lack of reasoned justification for the transfers to different places far from the author's family home constitutes abusive or unjustified interference with his family life and for this reason the author maintains that there was a violation of article 17, paragraph 1, of the Covenant.

7.4 With regard to his inclusion on the FIES list, the author reiterates the restrictive measures imposed upon prisoners under special observation and refers to the consideration by the Committee against Torture of Spain's fourth periodic report in 2002.<sup>7</sup> The author notes that inmates are not informed in writing either of their inclusion on the FIES list or of available procedures for appealing against their inclusion, despite the severe consequences.

7.5 The author says that he was subjected to restrictive measures because of his FIES status<sup>8</sup> while being held in Zuera (twice) and Villena prisons. In Daroca and Valladolid prisons he was treated normally. Currently, the author is being held in Topas prison (Salamanca), where he is treated normally as an ordinary prisoner. On 3 September 2008 he filed a complaint with the General Secretariat of Prisons concerning the interception of correspondence from his lawyer.

### **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 87 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the International Covenant on Civil and Political Rights.

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 exhaustion of domestic remedies, the Committee notes the State party's claims that domestic remedies had not been exhausted because the alleged

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course, a right recognized in the Constitution", Madrid High Court, Administrative Division, Eighth Section, No. 1413/2009, rec. 622/2008, of 8 July 2009.

<sup>6</sup> Since 2003, the author has been transferred to the following locations (in chronological order): Alcalá Meco, in the province of Madrid, Zuera, prisons in Madrid, Zuera, Valladolid, Daroca, Villena and Topas (Salamanca).

<sup>7</sup> Document CAT/C/CR/29/3, para. 11 (d): "The Committee also expresses its concern at [...] [t]he severe conditions of imprisonment of some of the prisoners whose names appear on the list of inmates under close observation (FIES). According to information received, prisoners under level one of the close observation regime have to remain in their cells for most of the day, and in some cases are allowed only two hours in the yard, are excluded from group, sports and work activities, and are subjected to extreme security measures. Generally speaking, it would seem that the physical conditions of imprisonment of these prisoners are at variance with prison methods aimed at their rehabilitation and could be considered prohibited treatment under article 16 of the Convention."

<sup>8</sup> While being held in Villena prison, he was subjected to restrictive measures including unscheduled cell searches, being forced to remain naked, cell changes and searches, and opening of correspondence (including correspondence from his lawyer).

violations raised before the Committee had not previously been raised before the domestic courts. The Committee also notes the author's claims that the judicial remedies available had little prospect of success given the existence of settled case law which is at variance with his claims.

8.4 The Committee recalls its jurisprudence that mere doubts about the effectiveness of a remedy do not absolve the author from the obligation to attempt it.<sup>9</sup> The Committee notes that domestic case law, as it appears in the present communication, does not make it clear that an application for judicial or administrative review would be ineffective in his case. The author provides no information about complaints he may have submitted to the authorities in relation to either his separation from his family or the restrictive measures associated with his status as a FIES prisoner. The Committee therefore considers that the communication is inadmissible on the ground of failure to exhaust domestic remedies, in accordance with article 5, paragraph 2 (b), of the Optional Protocol.

9. 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 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 to the General Assembly.]

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<sup>9</sup> See, for example, communication No. 1623/2007, *Guerra de la Espriella v. Colombia*, Views adopted on 18 March 2010; and communication No. 1511/2006, *García Perea v. Spain*, Decision of 27 March 2009, para. 6.2.

**I. Communication No. 1816/2008, *K.A.L. and A.A.M.L. v. Canada*  
(Decision adopted on 26 March 2012, 104th session)\***

<i>Submitted by:</i>	K.A.L. and A.A.M.L. (represented by counsel, Ms. Nataliya Dzera)
<i>Alleged victim:</i>	The authors and their minor sons
<i>State party:</i>	Canada
<i>Date of communication:</i>	17 September 2008 (initial submission)
<i>Subject matter:</i>	Removal of the authors and their sons to Pakistan
<i>Procedural issues:</i>	Failure to exhaust domestic remedies; failure to substantiate allegations
<i>Substantive issues:</i>	Risk of arbitrary deprivation of life, and other human rights violations if returned
<i>Articles of the Covenant:</i>	6, paragraph 1; 7; 9, paragraph 1; 18; 24, paragraph 1; and 27
<i>Articles of the Optional Protocol:</i>	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 26 March 2012,*

*Adopts the following:*

**Decision on admissibility**

1.1 The authors of the communication are K.A.L. and A.A.M.L., Pakistani nationals born in 1970 and 1963 respectively. They submitted the communication on their behalf and on that of their minor sons A.L. and K.L., Pakistani nationals born in 1992 and 1995 respectively. They claim that their deportation from Canada to Pakistan would violate their rights under articles 6, paragraph 1; 7; 9, paragraph 1; 18; 24, paragraph 1; and 27, of the Covenant. They are represented by counsel, Nataliya Dzera.

1.2 On 10 October 2008, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, decided not to issue a request for interim measures under rule 92 of the Committee's rules of procedure.

**The facts as presented by the authors**

2.1 The authors and their minor sons lived in Pakistan until 2001. They are Ismaili Shias, a religious minority within Pakistan. On 25 August 2001, the authors and their two

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

sons arrived in Canada, under a business immigration category (entrepreneur visa regime). Upon their arrival K.A.L. started working as assistant educator in a private day-care centre and A.A.M.L. was hired by a private firm, Bensus International, as person in charge of the shipping department.

2.2 On 3 February 2004, the Immigration Division of the Immigration and Refugee Board issued departure orders against them because they had not met the conditions to stay in Canada as entrepreneurs within the two-year period after arrival prescribed by the Immigration and Refugee Protection Act (IRPA, or the Immigration Act), in force at the time. The authors, pursuant to subsection 63(3) of IRPA, appealed to the Immigration Appeal Division (IAD). The Division considered A.A.M.L.'s investment of Can\$100,000 into Bensus International, in which he was initially an employee, did not make "a significant contribution to the Canadian economy", neither did K.A.L.'s job as an assistant educator. Their appeal and subsequent application for leave to apply for judicial review were dismissed on 22 September 2005 and 13 January 2006 respectively. On 13 April 2006, the authors filed an application for permanent residence on humanitarian and compassionate grounds (H&C), which was refused on 30 April 2007. Further to this, on 21 September 2007, the authors filed an application for leave to apply for judicial review on the H&C refusal, and, on 31 October 2007, a motion to stay their removal to Pakistan. Leave was denied on 10 January 2008. In parallel to these proceedings, in February 2006, the authors filed a first application for a Pre-Removal Risk Assessment (PRRA). They claimed that the "[p]urpose of their application [was] to seek protection from Immigration Canada due to the fact of their investment in Canada".<sup>1</sup> In particular, they highlighted the fact that they had closed their business in Pakistan in order to move to Canada; that they had made an investment four months after the two-year condition had expired; and that this business was creating employment for Canadians. They further noted that their family was well established and integrated into Canadian society. No claim as to a possible risk in Pakistan was made. On 26 April 2006, the application was refused, by a PRRA officer. The officer recalled that the PRRA was not intended to serve as an appeal mechanism to a prior decision, but rather intended to be an assessment based on facts or evidence of the risk of persecution, risk of torture, risk to life, or risk of cruel and unusual treatment or punishment. The officer noted that the authors did not refer to any risk related to returning to Pakistan, limiting their allegations to their wish to stay in Canada and invest in a viable business, so that they could comply with the regulations for entrepreneur migrants.

2.3 In October 2007, a few days after filing the application for leave for review of the H&C refusal, the authors filed a second PRRA application, claiming that their removal to Pakistan would put them at risk of persecution, torture, risk to life or risk of cruel and unusual treatment, due to their religious minority status, and that they would not be able to request the Pakistani authorities to provide them with protection. Therefore, they asked to be recognized as refugees and persons in need of protection based on their fear of return, pursuant to sections 96 and 97 of the IRPA. They explained that they had failed to invoke these reasons within the H&C and the initial PRRA because their first counsel, who was not a lawyer, told them they had no chance for a PRRA on these grounds, as they were not refugee claimants.

2.4 The authors claim that, since they left Pakistan, the situation had deteriorated with regard to religious minorities and to the safety of young women. The situation of the Ismail Shia community had deteriorated in 2006 and 2007, as victims of discrimination and lack of protection by the Pakistani authorities. Women were not only discriminated against by the law, but also faced serious risk of rape or other forms of violence, even while in police

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<sup>1</sup> Letter from M.P. Consulting Inc., the authors' first advisors, dated 28 February 2006.

detention. They described some forms of discrimination they had experienced before arriving in Canada. They had been called “Kaaafir” by Sunnis, a derogatory word meaning “infidels”, and treated like inferiors, and were at risk of becoming involved in fights if they tried to defend their faith. A.A.M.L. was also harassed for money at his business and was threatened that his sons would be kidnapped. When she was eight months pregnant with her first son, K.A.L. had to run from someone following her on a street in a neighbourhood in Karachi where many Ismailis lived, as it was close to their mosque. As a result, she decided never to go out alone on the street. The authors also referred to an incident that took place on 23 April 2007, when four armed men stormed into the house of A.A.M.L.’s mother and stole a number of valuable articles, threatening to kidnap her grandchildren if they did not obtain all the valuables inside the house. This indicates the difficulties they faced in relation to professing their religious belief. They note that the house is located in an Ismaili neighbourhood, that their mosque was close by and that three other Ismaili families had also been victims of robberies. The authors provided reports about the deteriorating situation for religious minorities in Pakistan, in particular, on the authorities’ failure to take action to control hostile acts against those who practised a minority faith, and the inability of the police and the judiciary to protect them.<sup>2</sup> They stated that there was therefore no safe place for Ismaili Shias in Pakistan.

2.5 On 31 October 2007, the refusal of the second PRRA was communicated to the authors, giving them a departure date of 25 January 2008. In his report the PRRA officer indicated, *inter alia*, that the authors had not shown that they had been particularly targeted as members of a religious minority and that the incidents they described were not serious enough to constitute “persecution”. Accordingly, the authors postponed the hearing of the motion to stay removal in the application for review of the H&C refusal and, on 12 November 2007, filed an application for leave to appeal and judicial review of the PRRA decision at the Federal Court of Canada, pursuant to subsection 72(1) of IRPA. On 21 January 2008, the authors lodged an application for stay of removal that was granted by the Federal Court of Canada, on 22 January 2008, until a final decision was rendered on the application for leave and judicial review of the PRRA. On 26 May 2008, the Federal Court dismissed the application of judicial review of the PRRA, stating that “[t]he incidents in question were not serious enough to constitute a fundamental violation of the applicants’ human dignity, nor did they demonstrate that the applicants were targeted as members of a religious minority.” The Court also added that it was not the role of the Court on judicial review to reweigh the evidence provided, in particular “to address the issue of State protection in Pakistan, as it is not a determinative element of the PRRA officer’s reasons for dismissing the PRRA application.”

### **The complaint**

3.1 The authors assert that articles 6, paragraph 1; 7; 9, paragraph 1; 18; 24, paragraph 1; and 27, of the Covenant would be violated by Canada, if they were forced to return to Pakistan.<sup>3</sup>

3.2 The authors claim that the State party failed to assess adequately their fear of persecution, the risk to life and to safety and thus the irreparable harm that a removal to Pakistan would inflict on them.

<sup>2</sup> U.S. Department of State, US Country Report on Human Rights Practice – Pakistan 2006 and International Religious Freedoms Report – Pakistan 2007; Amnesty International Report – Pakistan 2007.

<sup>3</sup> They do not link each of these articles with specific allegations.

3.3 The authors highlight that the State party's authorities, including the second PRRA officer, found their arguments and evidence credible, notably the fact that they belonged to a minority religious community, their explanation of the reasons why they did not invoke these circumstances in their first PRRA and H&C, the events described in the affidavit of the author's mother, as well as those in which they were victims before coming to Canada, and the risk of rape for a young woman in Pakistan, especially while in police detention.

3.4 The authors hold that the second PRRA officer's decision relied too heavily on the fact that they had come to Canada under the entrepreneurs visa regime and had omitted to invoke fear of persecution within their first PRRA application. The decision put an exaggerated emphasis on the need for the incidents that had occurred to them to have been repeated in order to consider that they would be at real and serious risk in Pakistan. They further note that the officer did not take into consideration the deteriorating situation of religious minorities and women in Pakistan by 2006–2007, on the basis of a document dated 1 April 2004 in which the situation in Pakistan was considered to be one of generally peaceful coexistence among groups with the exception of some instances of violence. They conclude that the PRRA failed to assess adequately the gravity of the incidents and the danger that they would face in case of returning to their home country.

3.5 The authors argue that the reasoning in the decision of the Federal Court of Canada, dated 22 January 2008, granting provisional stay of removal and the subsequent decision on judicial review led to an absurd result.

3.6 After receiving the dismissal of their second H&C application, on 9 September 2008, the authors did not submit any application to contest it before the Canadian courts but lodged a communication with the Human Rights Committee, on 17 September 2008. They point out that, even if they had filed another application before the Federal Court for a stay of removal, for instance, until their second H&C was studied, the application would have been denied, as a final decision had already been taken by the Federal Court on their application for protection, and the same matter cannot be presented to the Court twice.

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

4.1 On 6 April 2009, the State party submitted its comments on admissibility and merits. It remarks that on 22 May 2008, the authors made a second application for permanent residence on the basis of humanitarian and compassionate (H&C) considerations, based on the same allegations of risk argued in their second PRRA application of 2007, that is, risk of persecution, torture, risk to life, risk of cruel and unusual treatment or punishment, due to their faith and their belonging to a minority religious community. They also based their application on their integration into Canadian society. On 9 September 2008, the H&C application was denied. The Canadian authorities did not find evidence to conclude that the authors would face unusual, undeserved, or disproportionate hardship if they had to apply for a permanent residence visa from outside Canada.

4.2 The authors could have filed applications for leave to apply for judicial review of the negative PRRA decision of 26 April 2006, and of the negative H&C decision of 9 September 2008. They failed to do so and, instead, submitted their communication to the Committee. Therefore, the whole communication should be declared inadmissible for failure to exhaust domestic remedies pursuant to articles 2 and 5, paragraph (2)b, of the Optional Protocol.<sup>4</sup> The State party recalls that in the past the Committee has declared

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<sup>4</sup> The State party asserts that judicial review is widely recognized to be an effective remedy that must be exhausted for the purpose of admissibility of a communication. Its submission refers to the Committee's jurisprudence in communication No. 654/1995, *Adu v. Canada*, Views adopted on 18 July 1997, para. 6.2; communication No. 603/1994, *Badu v. Canada*, Views adopted on 18 July 1997,

communications inadmissible for non-exhaustion of domestic remedies when the authors had failed to seek leave to apply for judicial review at the Federal Court;<sup>5</sup> and that the Committee Against Torture has referred to the effectiveness of judicial review by the Federal Court to ensure the fairness of the refugee determination system.<sup>6</sup> It also denies that the two decisions of its Federal Court would lead to an absurd result. The tests applied for a temporary stay of removal and for a judicial review responded to different purposes and, therefore, may lead to different results, which does not make these proceedings incoherent or absurd. It finally holds that the judicial review dismissal of the second PRRA can have no impact, in fact or in law, on the Federal Court's potential review of the H&C decision and its effectiveness. It recalls the Committee's jurisprudence that mere doubt about the effectiveness of a domestic remedy is not an excuse for not exhausting it.

4.3 As to the claims of violations of articles 6; 7; and 9, paragraph 1, of the Covenant, these should be declared inadmissible for lack of sufficient substantiation, pursuant to article 2 of the Optional Protocol and rule 96(b) of the Committee's rules of procedure. With regard to articles 6 and 7 of the Covenant, the State party argues that in cases of extradition or deportation, it is its responsibility to ensure that individuals will not be exposed to real risk of a violation of their rights. It upholds that there is no evidence to show that the authors would be at real risk beyond that of mere suspicion, meaning that the necessary and foreseeable consequence of the deportation would be that they would be killed, tortured or suffer inhuman or degrading treatment or punishment, or that the Pakistani State could not protect them. The main reports on the human rights situation in Pakistan did not indicate that the Ismaili Shia minority were at personal risk and that the existence of human rights abuses per se was not sufficient to ground the authors' allegations. The 2007 U.S. Department of State Country Report on Human Rights Practices, for instance, referred only to an isolated attack against an Ismaili worship place in 2006 and sectarian violence between Sunnis and Shias in areas other than Karachi – mostly in the Federally Administered Tribal Areas. As to the situation of women, the U.S. Department of State Report showed that there has been a high incidence of rape, including by police; sometimes rape is used for punishment. Nevertheless, the Pakistani authorities enacted the Women's Protection Bill, which could be expected to reduce the incidence of rape. Concerning compliance with article 9, paragraph 1, of the Covenant, it is submitted that the author did not specify how this right would be violated, nor did they refer to any risk of detention upon arrival in Pakistan. The State party holds that even if the authors' allegations refer to the right to security of the person, which exists outside the formal deprivation of liberty,<sup>7</sup> they lack substantiation. It is also upheld that the authors have not

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para. 6.2; communication No. 604/1994, *Nartey v. Canada*, Decision on admissibility adopted on 18 July 1997, para 6.2; communication No. 939/2000, *Dupuy v. Canada*, Decision on admissibility adopted on 18 March 2005, para. 7.3; and communication No. 982/2001, *Bhullar v. Canada*, Decision on admissibility adopted on 31 October 2006.

<sup>5</sup> The State party's submission refers to the Committee's jurisprudence in communication No. 1580/2007, *F.M. v. Canada*, Decision on admissibility adopted on 30 October 2008, para. 6.3; and communication No. 1578/2007, *Dastgir. v. Canada*, Decision on admissibility adopted on 30 October 2008, para. 6.2.

<sup>6</sup> The State party's submission refers to the jurisprudence of the Committee against Torture in communication No. 66/1997, *P.S.S. v. Canada*, Decision on admissibility adopted on 13 November 1998, para. 6.2; communication No. 86/1997, *P.S. v. Canada*, Decision on admissibility adopted on 18 November 1999, para. 6.2; communication No. 42/1996, *R.K. v. Canada*, Decision on admissibility adopted on 20 November 1997, para. 7.2; communication No. 95/1997, *L.O. v. Canada*, Decision on admissibility adopted on 19 May 2000, para. 6.5; communication No. 183/2001, *B.S.S. v. Canada*, Decision adopted on 12 May 2004, para. 11.6; and communication No. 273/2005, *T.A. v. Canada*, Decision adopted on 15 May 2006, para. 6.3.

<sup>7</sup> The State party's submission refers to the Committee's jurisprudence in communication No.

proved that they could not be relocated to another part of their country.<sup>8</sup> The State party further points out that the authors have based their communication on the same facts and evidence provided to the Canadian authorities in the domestic proceedings to prove their real and personal risk. It recalls that it is not the role of the Committee to re-evaluate the facts and evidence assessed by the State party's domestic bodies unless it is manifest that the domestic tribunal's evaluation was arbitrary or amounted to a denial of justice.

4.4 As to compliance with articles 18; 24, paragraph 1; and 27, of the Covenant, the State party submits that the authors' claims should be declared inadmissible for lack of substantiation. With regard to article 18, it relies on its arguments with respect to the authors' allegations regarding articles 6; 7; and 9, paragraph 1, of the Covenant. It notes that the authors had never complained to the police that their rights under article 18 had been violated by extremist members of the Sunni religion. In addition, it recalls the Committee's jurisprudence in *Dawood Khan v. Canada*,<sup>9</sup> submitting that the authors in the present case have never provided evidence to establish the absence or unavailability of protection by the Government of Pakistan. Regarding articles 24, paragraph 1, and 27, the authors fail to specify how these rights would be violated upon their return to Pakistan. The H&C proceedings carefully considered the particular situation of the authors' children and the impact of their return to Pakistan. Furthermore, article 24 has no role independent of articles 6, 7 and 9(1). Hence, if the latter rights were not violated, the former were similarly not violated.<sup>10</sup> In addition, the State party argues that the claims of violations of articles 18; 24, paragraph 1; and 27, of the Covenant, are incompatible with the Covenant and, therefore, should be declared inadmissible *ratione materiae*, pursuant to article 3 of the Optional Protocol and Rule 96(d) of the Committee's rules of procedure. First of all, the extraterritorial application of the Covenant is exceptional and the rights guaranteed therein are essentially of a territorial nature. Secondly, the Committee's general comment No. 31 (2004), which clarifies the scope of application of the Covenant, limits the State party's obligation with regard to persons who are not nationals and are subject to removal, to situations where there would be a real risk of irreparable harm, which may raise issues as to articles 6 and 7 of the Covenant.<sup>11</sup> Nonetheless, articles 18, 24, paragraph 1, and 27 do not ban a State party from removing a person to another State that may not adequately adhere to their protection; otherwise, giving extraterritorial power to all articles of the Covenant would effectively deny a State's sovereignty over removal of foreigners from its territory.

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195/1985, *Delgado Paez v. Colombia*, Decision on admissibility adopted on 4 April 1998, para. 5.5 and communication No. 711/1996, *Dias v. Angola*, Views adopted on 20 March 2000, para. 8.3.

<sup>8</sup> The State party's submission refers to the jurisprudence of the Committee against Torture in communication No. 183/2001; *B.S.S. v. Canada*, Views adopted on 12 May 2004; and communication No. 245/2004, *S.S.S. v. Canada*, Decision adopted on 16 November 2005, in which it was laid down that resettlement to another part of a country, although causing hardship, was not found to amount to torture.

<sup>9</sup> Communication No. 1302/2004, *Khan v. Canada*, Views adopted on 25 July 2006, para. 5.6, in which the Committee held, in relation to article 18, that "even if non-State agents were motivated to subject the author to coercion in Pakistan that would impair his enjoyment of the freedom to have or adopt a religion or belief of his choice, he has not demonstrated that State authorities were unable or unwilling to protect him."

<sup>10</sup> The State party submission refers to general comment No. 17 (1989) on article 24: Rights of the child; and to the Committee's jurisprudence in communication No. 1069/2002, *Bakhtiyari v. Australia*, Views adopted on 29 October 2003, para. 9.7.

<sup>11</sup> General comment No. 31 (2004) on article 2 of the Covenant: The nature of the general legal obligation imposed on States parties to the Covenant. The State party's submission also refers to the European Court of Human Rights case law in *Soering v. United Kingdom*, Application no. 14038/88 (1989), para. 86; *Z and T v. United Kingdom*, Application no. 27034/05 (2006).



5. Despite a request to counsel for comments on the State party's submission, dated 17 April 2009, as well as three subsequent reminders, dated 23 February 2010, 17 December 2010, and 15 June 2011, the authors did not comment on the State party's observations.

### **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 article 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 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 authors failed to apply for judicial review of the negative PRRA decision of 26 April 2006 and of the negative H&C decision of 9 September 2008. It also notes the authors' claim that an application for judicial review of the H&C decision of 9 September 2008 and another application for stay of removal would be denied because the Federal Court has already set out a decision on the alleged risk and the need for protection in its dismissal of their application of judicial review of the second PRRA, issued on 26 May 2008.

6.4 With regard to the authors' failure to make an application for judicial review of the negative PRRA decision of 26 April 2006, the Committee notes that the authors' application was not based on the same allegations brought to the Committee, but on their wish to stay in Canada and on K.A.L.'s situation concerning the obligations of making investments in Canada according to paragraph 23.1(1)(a) to (d) of the former Immigration Act. The Committee takes note that, according to the State party, a PRRA is not meant to serve as an appeal mechanism to a prior decision, but rather is intended as an assessment to determine whether the applicant is at risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment; and that within a judicial review "the Federal Court needs only to consider that the PRRA officer's decision was "reasonable", meaning that it falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law." It also notes that the authors filed a second PRRA application in which they alleged that their removal to Pakistan would put them at personal risk of persecution, torture, risk to life, or risk of cruel and inhuman treatment or punishment. This application was denied by the PRRA officer, on 31 October 2007. An application for judicial review was rejected by the Federal Court, on 26 May 2008. No argument based on non-exhaustion of domestic remedies has been submitted by the State party with respect to the decision of the Federal Court.

6.5 Regarding the authors' failure to apply for a judicial review of the 9 September 2008 negative H&C decision, the Committee observes that this second H&C application was based on the risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment. It also notes that the authors believed that an application for judicial review of this decision by the Federal Court would be dismissed after the court's denial of judicial review of the second PRRA, on 26 May 2008. In view of the discretionary feature of the H&C proceedings<sup>12</sup> the Committee does not consider it necessary, for the purposes of

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<sup>12</sup> See communication No. 1959/2010, *Jama Warsame v. Canada*, Views adopted on 21 July 2011, para.

article 5, paragraph 2 (b), of the Optional Protocol, that the authors make an application for judicial review of the 9 September 2008 negative H&C decision. Accordingly, the Committee concludes that the requirements under this provision have been met.

6.6 The Committee notes that the State party challenged the admissibility of the communication on the authors' failure to sufficiently substantiate their claims under articles 6, paragraph 1; 7; 9, paragraph 1; 18; 24, paragraph 1; and 27; of the Covenant. As to the three latter articles, it also notes that the State party contested their admissibility as incompatible with the Covenant pursuant to article 3 of the Optional Protocol.

6.7 The Committee recalls that States parties are under an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.<sup>13</sup> The Committee notes the authors' allegations on the deteriorating situation in Pakistan with regard to religious minorities, the risk of rape or other forms of violence against women, and the lack of effective protection by the authorities. It also notes the events that affected the authors before leaving Pakistan. These claims were examined by the Canadian authorities, who concluded that the authors did not face a real risk of persecution, torture, risk to life, or risk of cruel and inhuman treatment or punishment. In the circumstances and in the absence of comments by the authors on the State party's observations, the Committee considers that the authors have failed to provide sufficient evidence in support of their claims to the effect that they would be exposed to a real risk if they were removed to Pakistan. Consequently, in accordance with article 2 of the Optional Protocol, the Committee considers that the authors' claims under articles 6, paragraph 1; 7; 9, paragraph 1; 18; 24, paragraph 1; and 27, of the Covenant, are not sufficiently substantiated for the purpose of admissibility.

7. The Committee hence 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, through counsel.

[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 to the General Assembly.]

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7.4. See also communication No. 333/2007, *T.I. v. Canada*, Committee against Torture, decision adopted on 15 November 2010, para. 6.3; and communication No. 304/2006, *L.Z.B. v. Canada*, Committee against Torture, decision adopted on 8 November 2007, para. 6.4.

<sup>13</sup> General comment No. 31 (2004) on article 2 of the Covenant: The nature of the general legal obligation imposed on States parties to the Covenant (2004), para. 12.

**J. Communication No. 1819/2008, A.A. v. Canada  
(Decision adopted on 31 October 2011, 103rd session)\***

<i>Submitted by:</i>	A.A. (represented by counsel, Mai Nguyen)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Canada
<i>Date of communication:</i>	23 September 2008 (initial submission)
<i>Subject matter:</i>	Author's removal to Iran, where she would be at a risk of stoning or forced marriage
<i>Procedural issue:</i>	Substantiation of allegations
<i>Substantive issues:</i>	Risk of being subjected to acts of torture or to cruel, inhuman or degrading treatment or punishment in the event of removal; risk of arrest and arbitrary detention; equality before the courts and tribunals; restrictions on freedom of expression; and discrimination against the author as a woman
<i>Articles of the Covenant:</i>	2 and 26; 7; 9, para. 1; 13; 14, para. 1; and 19, paras. 1 and 2
<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 2011,*

*Adopts the following:*

**Decision on admissibility**

1.1 The author of the communication, dated 23 September 2008, is A.A. She is an Iranian national born in 1973, who alleges she is a victim of violations by Canada of the rights recognized in articles 2 and 26, 7, 9, paragraph 1, 13, 14, paragraph 1, and 19, paragraphs 1 and 2, of the International Covenant on Civil and Political Rights, as well as articles 2 (d), 3, 15 and 16, paragraph 1 (b), of the Convention on the Elimination of All Forms of Discrimination against Women. The Optional Protocol entered into force for the State party on 19 August 1976. The author is represented by Mai Nguyen, member of the Bar of Quebec.

1.2 On 24 October 2008, the Committee, acting through its Special Rapporteur for New Communications, requested the State party not to return the author to the Islamic Republic of Iran while her case was being examined by the Committee.

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\* The following members of the Committee took part in the consideration of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

**The facts as submitted by the author**

2.1 The author declares that between September 2003 and February 2004 she conducted a relationship in Iran with a man whom she believed to be divorced but who was in fact married. In March 2004, she was arrested by the Iranian police for conducting an “unlawful relationship” with a married man. She was consequently detained for four days and subjected to threats of violent punishment, such as stoning, in an attempt to induce her to confess to the aforementioned relationship.

2.2 While she was in detention, the author’s father attempted to secure her release by requesting the intervention of her cousin, in view of the latter’s position and influence as a high-ranking colonel in the Sepah.<sup>1</sup> In exchange for his intervention, the cousin demanded that the author be given to him in marriage, as his second wife, failing which the proceedings against her would be reopened. The author’s father, although opposed to this proposal of forced marriage, led the cousin to believe that he consented in order to secure his daughter’s release. Following her cousin’s intervention, the author was released after four days’ detention.

2.3 In order to avoid a forced marriage to her cousin, the author attempted to obtain a visa to visit Canada, where her sister was living. However, her application was turned down in the summer of 2004. Meanwhile the author’s cousin began to exert growing pressure on her and on her family and expressly threatened to reopen criminal proceedings against her if she did not marry him. On 26 May 2005, the author finally succeeded in leaving Iran and travelled to Austria with the help of an individual, to whom she paid a substantial sum of money in return for a visa. In Austria, the author was able to join her brother, who was resident in the country, and two weeks later she filed for refugee status.

2.4 On 28 June, the author’s sister, who was resident in Canada, received a telephone call from a man demanding in a threatening tone to know the author’s whereabouts. In July 2005, the author’s brother received a similar call from a man who said that he worked for the Iranian Embassy in Austria and gave the brother to understand that he was in a position to cause the author harm. In the meantime, the author had also heard from her parents who had stayed in Iran that, on the orders of her cousin, the Iranian security services had been exerting pressure on them to reveal her whereabouts. Her cousin had also told them that he knew where she was and that colleagues of his had been sent to cause her harm.

2.5 The author maintains that, as she no longer felt safe in Austria, she left the country and travelled to Canada on 20 August 2005 on a false passport. Six days after arriving in Canada, she filed for refugee status with the Canadian Immigration and Refugee Board (IRB). On 12 April 2006, IRB rejected the author’s application on the grounds that her allegations lacked credibility regarding the existence of her cousin, her supposed delay in leaving Iran and claiming asylum in Canada, and the absence of any document corroborating her asylum applications in Austria and in Canada.

2.6 In May 2006, the author lodged an application with the Federal Court of Canada to authorize a judicial review of the IRB decision, which was rejected on 19 July 2006.

2.7 In December 2006, the author applied to Citizenship and Immigration Canada (CIC) for a Pre-Removal Risk Assessment (PRRA), and on 15 January 2007 this application was also rejected on the grounds that the author’s allegations lacked credibility.

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<sup>1</sup> The Sepah or Islamic Revolutionary Guard Corps is a paramilitary organization of the Islamic Republic of Iran which reports directly to the Leader of the Revolution, the Iranian Head of State.

2.8 In January 2007, the author submitted an application to CIC for permanent residence on humanitarian grounds. On 6 February 2007, an order was issued for her removal to Iran, which was to take effect on 11 March 2007.

2.9 On 21 February 2007, the author lodged an application with the Federal Court of Canada to authorize a judicial review of the PRRA decision. On 27 February 2007, she also submitted an application to the Federal Court for a stay of removal. On 6 March 2007, the Federal Court agreed to a stay of removal pending a decision on her application for judicial review of the PRRA decision. On 27 February 2007, the author also lodged an application with the Federal Court for stay of removal. On 6 March 2007 the Federal Court granted a stay of removal pending its decision on the application for judicial review of the PRRA decision. On 27 June 2007, the Federal Court granted the request for judicial review of the PRRA decision. On 13 December 2007, however, the Court rejected the application for judicial review of the PRRA decision on the merits. According to the author, following that decision the stay of removal ceases to be valid.

2.10 On 20 March 2008, the author asked CIC to have her application for permanent residence on humanitarian grounds examined by a different officer from the one initially assigned, on the grounds that she feared he might be biased because he had already rejected her PRRA request. On 1 and 16 April 2008, CIC informed the author that, despite her objection, the officer in question would remain in charge of examining her application. On 27 June 2008, the author's application for permanent residence on humanitarian grounds was rejected by CIC.

2.11 On 25 July 2008, the author lodged an application with the Federal Court to authorize a judicial review of the decision handed down on her application for permanent residence on humanitarian grounds. This application was rejected on 25 February 2009. In July 2008, the author also lodged a complaint against the decision rendered on her application for permanent residence on humanitarian grounds and submitted a request for intervention to the Minister of Citizenship and Immigration, asking the Minister to use her discretionary powers to have the author granted permanent residence in Canada. On 1 August 2008, the Minister rejected the request to intervene in the author's case. The author was subsequently summoned to appear before the Canada Border Services Agency (CBSA) on 30 September 2008 and ordered to be in possession of a plane ticket and valid travel documents with a view to her return to Iran by 31 October 2008. The author maintains that she has thereby exhausted all available domestic remedies.

2.12 In the meantime, in June 2006, a summons ordering the author to appear in court in Iran on charges of conducting an "unlawful relationship" was allegedly delivered to her parents' home.

2.13 During her stay in Canada, the author joined the Association of Iranian Women in Montreal. According to the author, this organization works to support women of Iranian origin in Montreal, as well as to promote equality and basic rights for women.

### **The complaint**

3.1 The author maintains that the facts described above reveal a violation by the State party of rights guaranteed under articles 2 and 26; 7; 9, paragraph 1; 13; 14, paragraph 1; and 19, paragraphs 1 and 2, of the Covenant, as well as under articles 2 (d), 3, 15, and 16, paragraph 1 (b), of the Convention on the Elimination of All Forms of Discrimination against Women. The author asserts that if returned to Iran she risks arrest, detention, persecution and torture owing to the outstanding charge against her in that country of conducting an "unlawful relationship" and the threat posed by her cousin. She also cites her activities in Canada within the Association of Iranian Women in Montreal — especially her

political opinions, her opposition to the present regime in Iran and her feminist views — as well as her fragile state of health.

3.2 The author contends that the IRB decision of 12 April 2006 to refuse her asylum application is flawed in fact and in law. She draws the Committee's attention to the fact that IRB had not expressed any doubts regarding the fact that she, an unmarried woman, had conducted an unlawful relationship with a married man, and that in Iran the penalties for such conduct may include torture or cruel treatment such as stoning. She adds that sentencing so-called "adulterous" women to death by hanging or stoning, as provided for under Islamic criminal law, remains a widespread practice in Iran, despite having been repeatedly condemned by independent organizations that monitor the status of women's rights. Such practices are made even worse according to the author by the enforced waiting on death row, which in itself constitutes cruel treatment. The author maintains that the mere fact that she is an Iranian woman exposes her to the risk of being convicted of adultery, and therefore to the form of public chastisement inflicted upon women. According to the author, IRB failed to look into the risks to which, as a woman, she is exposed in the specific circumstances of the case.

3.3 The author points out that as the Iranian authorities monitor the overseas activities of opponents of Islam very closely in other countries, they may easily be aware of the fact that she participates in the activities of the Association of Iranian Women in Montreal, and that this places her at risk of persecution and detention in Iran. According to the author, all political opposition to the regime is severely punished in Iran, where women's rights are violated in many ways, such as stoning, flogging, arbitrary detention for prolonged periods, summary executions, disappearances and the routine use of torture. The author affirms that her political activities in Canada constitute new facts which have arisen subsequently to the IRB decision and which the deciding officer failed to take into account in either the PRRA or the application for permanent residence on humanitarian grounds decisions. The officer in question ruled that the correspondence from the Association of Iranian Women in Montreal that had been submitted in evidence did not prove that the organization was perceived as an opposition group by the Iranian authorities, whereas the said letters expressly stated that the author's participation in the activities of the association raised fears for the author's life in Iran, a country where demands for equality between men and women are deemed a threat to national security. The author is therefore justified in considering that the deciding officer violated her right to equality before the law without any discrimination on the ground of sex (articles 2 and 26 of the Covenant) and her right to freedom of opinion and expression without fear of reprisal (articles 7, 9, paragraph 1, 13 and 19 of the Covenant), in addition to the violation of article 14, paragraph 1, of the Covenant, due to the bias shown by the CIC deciding officer. The author justifies her allegation of bias by the fact that it was that same officer who had refused the applications for both PRRA and permanent residence on humanitarian grounds. The officer was prejudiced against the author and female opponents of the Iranian regime, which had led him to draw unreasonable and biased conclusions that were contrary to the evidence.

3.4 Furthermore, the author considers that the PRRA decision of 15 January 2007 and the Federal Court judgement rejecting her application for judicial review of that decision were handed down without due account being taken of the evidence submitted. Consequently, the PRRA procedure was in violation of her right to be heard before an independent and impartial tribunal. The author adds that neither PRRA requests nor applications for permanent residence on humanitarian grounds are effective remedies. Under the Immigration and Refugee Protection Act, the evidence admissible in PRRA applications was limited to items arising after the rejection of the asylum application. In the application for permanent residence on humanitarian grounds, on the other hand, the decision was taken by a minister on purely humanitarian and not therefore legal grounds.

3.5 Lastly, the author points out that her removal to Iran would entail a severe risk of deterioration of her already fragile state of health. The psychological assessment report of February 2008 certifies that the author suffers from post-traumatic stress, anxiety and depression symptoms due to her arrest in Iran, aggravated by the threat of removal. According to the author, the deciding officer in the case of her application for permanent residence on humanitarian grounds arbitrarily rejected the psychological assessment report, which raises a reasonable suspicion of bias on his part.

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

4.1 In a note verbale dated 30 April 2009, the State party argues that it is under no obligation to refrain from returning the author to Iran even if there is a risk of a violation by Iran of the rights referred to in articles 9, 19 and 26 of the Covenant, read in conjunction with article 2. States parties to the Covenant should not be held responsible for violations that do not have the degree of gravity and irrevocability of a violation of articles 6 or 7 of the Covenant. The State party therefore maintains that the allegations of violations of articles 2, 9, 19 and 26 of the Covenant fall outside the Committee's subject-matter jurisdiction, pursuant to article 3 of the Optional Protocol. The State party adds that the author has at all events failed to demonstrate a prima facie violation of the articles in question.

4.2 The State party recalls that article 2 of the Covenant does not establish an independent right to reparation but merely defines the scope of States parties' legal obligations.

4.3 The State party contends that the communication is inadmissible under article 2 of the Optional Protocol with regard to the author's allegation related to article 7 of the Covenant, since the author has failed to demonstrate that she faces a real and personal risk of being tortured or subjected to cruel, inhuman or degrading treatment if returned to Iran. More specifically, the author's allegation that she was facing charges of maintaining an unlawful relationship was not deemed credible and she failed to demonstrate that she had criticized the Iranian regime either before or after leaving the country. Thus the author was unable to provide basic information to corroborate either the existence of her cousin, her arrest in Iran or the charges brought against her, given that it was not possible to verify the authenticity of the photocopy of the summons to appear in court in Iran. Furthermore, the author failed to provide a reasonable explanation for her delay in leaving Iran, despite the fact that she was in possession of a valid passport and an exit visa. The Canadian authorities have ascertained that, in any event, conducting an unlawful relationship in Iran is punishable by flogging, not stoning, which applies only to adultery. However, the author fails to demonstrate that she runs a personal risk of flogging if returned. With regard to the author's activities with the Montreal Association of Iranian Women in Canada, the Canadian authorities have concluded that there is nothing to suggest that the Montreal Association of Iranian Women as a group is opposed to the regime in Iran: rather its objective is to promote the integration and rights of Iranian women in Canada. Moreover, there appears to be no evidence to confirm that the author has taken part in activities opposed to the Iranian regime. The State party concludes that the fact that discrimination and violence against women are widespread in Iran does not mean that the author is personally at risk of being subjected to the treatment or punishment to which article 7 of the Covenant refers. The State party adds that the author holds a university degree, that she held a job in Iran prior to departing and that she has liberal parents who are still living there. According to the State party, there would be nothing to prevent the author from returning to live in Iran.

4.4 With regard to article 13, the State party argues that the author had the opportunity to challenge her expulsion on three occasions: firstly, before IRB (including the opportunity

to be heard by IRB members), and then when submitting her PRRA request and her application for permanent residence on humanitarian grounds. The State party points out that the deciding officers dealing with the asylum, PRRA and permanent residence on humanitarian grounds applications considered all the evidence submitted by the author but concluded that the author's allegations lacked credibility.

4.5 The State party recalls that the purpose of the PRRA process is to determine the risks to which a person subject to a removal order is exposed by examining any fresh items of evidence that might substantiate those risks. The State party recalls that the Committee has concluded on several occasions that the PRRA process does constitute a useful and effective remedy. In the event, after considering all the items of evidence submitted by the author, the officer dealing with the PRRA application concluded that they did not constitute grounds for refuting the IRB decision.

4.6 The State party points out that it is well established in Canadian case law that the fact that a same officer makes the decisions in both a PRRA and a permanent residence on humanitarian grounds application is not grounds to suspect bias in the treatment of the applications. In the case of the latter application, the officer carefully considered all the evidence, including the items of evidence initially submitted and the documentary evidence regarding the status of women in Iran, and concluded that the author did not face a substantiated risk to her safety and liberty in Iran.

4.7 With regard to the request for leave to apply for judicial review of the IRB decision, the State party points out that, as the Committee against Torture has recognized,<sup>2</sup> this remedy is not a mere formality, since the Court looks at the substance of a case so long as the applicant can show that the case is defensible, which the author has not succeeded in doing. The State party maintains that the author is seeking to obtain a review of the Canadian authorities' decisions; however, unless decisions handed down in domestic courts are patently unreasonable, it is not for the Committee to review them. The State party concludes that the author's complaint under article 13 is inadmissible under article 2 of the Optional Protocol, given the absence of a prima facie violation.

4.8 According to the State party, the communication is inadmissible under article 2 and article 3 of the Optional Protocol with respect to article 14 of the Covenant, since it is not the latter article, but article 13, which applies to proceedings involving the removal of an alien, besides which the author fails to establish a prima facie violation.

4.9 With regard to the alleged violations of the provisions of the Convention on the Elimination of All Forms of Discrimination against Women, the State party points out that the Committee is not competent to rule on such violations.

4.10 For all the reasons set out above, the State party requests that the Committee find the communication inadmissible and, subsidiarily, unfounded.

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

5.1 The author commented on the State party's observations on 21 September 2009. She notes firstly that the deportation officer instructed her to go to the Iranian Embassy in Canada to request travel documents, despite her justifiable fears for her safety if she appeared at the Embassy in person.

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<sup>2</sup> The State party cites the decisions of the Committee against Torture in *T.A. v. Canada*, communication No. 273/2005, decision of 15 May 2006, para. 6.3; and *L.Z.B. v. Canada*, communication No. 304/2006, para. 6.6.



5.2 The author affirms that she is not asking the Committee to act as a fourth jurisdiction to review the facts and evidence. Rather, she is challenging the serious irregularities that were committed in her case due to manifest errors, abuse of process and bias on the part of the deciding officers.

5.3 The author recalls that Canadian case law expressly establishes that asylum-seekers benefit from a presumption of credibility, which is rebuttable only if there are reasons to doubt it. According to that case law, IRB should not cite a lack of corroborating evidence as grounds to conclude that the allegations of an asylum-seeker are not credible. The author adds that the request for authorization to apply for judicial review of the decision not to grant her permanent residence on humanitarian grounds, handed down on 27 June 2008, was rejected by the Federal Court without reasons. She contends that the officer considering the request for PRRA is not bound by the IRB conclusions regarding credibility and can re-examine the entire file, which was not done in the case in hand.

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

6.1 On 17 September 2010, the State party informed the Committee that it had undertaken additional research through the Canadian Embassy in Iran to verify the authenticity of the photocopy of the Iranian court summons submitted by the author, and it turns out that there is no section 14 within the region 2 court in Fardis, to which, according to the document, the author had been summoned to appear, nor was there one in 2006 when the summons was issued. This finding corroborates the conclusions reached by CIC, namely that its research showed that in criminal proceedings in Iran summons are never addressed to a family but only to the individual concerned. CIC research also showed that if a person summoned does not appear in court on the specified date the court may pass sentence in absentia.

6.2 The State party points out that it agreed not to remove the author while her case was being considered by the Committee and that no attempt was made to induce her to visit the Iranian Embassy to request travel documents.

6.3 The State party reiterates its initial reservations regarding the admissibility and merits of the communication.

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

##### *Consideration of admissibility*

7.1 Before considering a complaint 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 on Civil and Political Rights.

7.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement and that all available domestic remedies have been exhausted. Accordingly, the Committee considers that the requirements of article 5, paragraphs 2 (a) and (b), of the Optional Protocol are met.

7.3 The Committee must decline jurisdiction with regard to the author's submission under the Convention on the Elimination of All Forms of Discrimination against Women and finds it inadmissible under article 3 of the Optional Protocol.

7.4 With regard to the alleged violation of article 2 of the Covenant, the Committee takes note of the State party's argument that this allegation is inadmissible since article 2 may not be invoked independently. In this case, the Committee is of the view that the alleged violations which relate solely to article 2 of the Covenant are inadmissible under

article 2 of the Optional Protocol. However, it notes that the author invoked this article in relation to article 26 and will therefore consider the alleged violation of article 2 read in conjunction with article 26.

7.5 The Committee notes that the author submits she is a victim of a violation of article 26 owing to the alleged discrimination she was subjected to as a woman during asylum proceedings, but without substantiating this allegation. She has failed to show in what way the process used to determine whether or not she was eligible for refugee status was discriminatory due to the fact that she was a woman. The Committee is therefore of the opinion that the allegation is inadmissible under article 2 of the Optional Protocol.

7.6 The Committee also notes that the author has not substantiated her application under articles 9 and 19 of the Covenant and therefore finds it inadmissible under article 2 of the Optional Protocol.

7.7 With regard to the author's allegations under articles 13 and 14, the Committee recalls that the guarantees of impartiality, fairness and equality enshrined in article 14, paragraph 1, and article 13 of the Covenant must be respected by all bodies exercising a judicial function.<sup>3</sup> However, the Committee takes note of the State party's observations that the author had the opportunity to make representations challenging her removal on three occasions, including in the course of a hearing. The Committee further observes that both IRB and CIC considered the facts and the items of evidence submitted by the author in detail and that the decisions of both bodies were in turn reviewed by the Federal Court. The Committee therefore considers that the author has not substantiated this part of her complaint for purposes of admissibility and finds it inadmissible under article 2 of the Optional Protocol.

7.8 With regard to article 7 of the Covenant, the Committee recalls that States parties must not expose individuals to the risk of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by virtue of their extradition, expulsion or refoulement.<sup>4</sup> The Committee recalls that, generally speaking, it is for the organs of States parties to the Covenant to review or evaluate facts and evidence in order to determine whether such a risk exists.<sup>5</sup> In the case in hand, the Committee observes that both IRB and CIC examined all written and oral evidence provided by the author in detail but concluded that this evidence was insufficient to substantiate the facts on which the risks invoked were based and that the author's allegations therefore lacked credibility. This conclusion was confirmed by extensive verifications conducted on both the author's past experience in Iran and her activities in Canada with the Montreal Association of Iranian Women. The Canadian authorities consequently concluded that the author did not face a real risk of being subjected to the treatment to which article 7 refers. Moreover, the Committee considers that the author has failed sufficiently to substantiate her submission based on allegations that the proceedings suffered from evident flaws and therefore finds it inadmissible under article 2 of the Optional Protocol.

8. The Human Rights Committee therefore decides:

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<sup>3</sup> See general comment No. 32 (art. 14), decision of 23 August 2007, para. 7; and the Committee's decision on admissibility in *Everett v. Spain*, communication No. 961/2000, decision of 9 July 2004, para. 6.4.

<sup>4</sup> See general comment No. 20 (art. 7), decision of 10 March 1992, para. 9; see also the Committee's decisions on admissibility in *A.C. v. the Netherlands*, communication No. 1494/2006, decision of 22 July 2008, para. 8.2; *Khan v. Canada*, communication No. 1302/2004, decision of 25 July 2006, para. 5.4; and *P.K. v. Canada*, communication No. 1234/2003, decision of 20 March 2007, para. 7.2.

<sup>5</sup> See the Committee's decision in *Pillai et al. v. Canada*, communication No. 1763/2008, decision of 25 March 2011, para. 11.2.

(a) That the communication is inadmissible under article 2 and article 3 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 to the General Assembly.]

**K. Communication No. 1850/2008, *S.L. v. Czech Republic*  
(Decision adopted on 26 October 2011, 103rd session)\***

<i>Submitted by:</i>	S.L. (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	The Czech Republic
<i>Date of communication:</i>	14 March 2006 (initial submission)
<i>Subject matter:</i>	Discrimination on the basis of citizenship with respect to restitution of property
<i>Procedural issues:</i>	Abuse of the right to submit a communication; inadmissibility <i>ratione temporis</i> ; non-exhaustion of domestic remedies
<i>Substantive issues:</i>	Equality before the law; equal protection of the law
<i>Article of the Covenant:</i>	26
<i>Articles of the Optional Protocol:</i>	1; 3

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

*Meeting on 26 October 2011,*

*Adopts the following:*

**Decision on admissibility**

1. The author of the communication, dated 14 March 2006, is S.L., a naturalized American citizen residing in the United States of America and born on 6 April 1927 in Hradec Králové, 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.<sup>1</sup> She is not represented by counsel.

**The facts as submitted by the author**

2.1 In August 1968, the author and her husband, P.L., left Czechoslovakia for the United States of America, where they were granted refugee status. On 23 June 1970, they were sentenced in absentia to 7 months imprisonment and confiscation of their property by the Municipal Court of Prague for having unlawfully left the country. In 1970, the property was

\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

<sup>1</sup> The Optional Protocol entered into force for the Czech Republic on 1 January 1993, as a consequence of the Czech Republic's notification of succession to the ratification of the Optional Protocol by the Czech and Slovak Federal Republic on 12 March 1991.

sold by the State to Mr. I.P., then Deputy Minister of International Trade. It was inherited by his daughter and then sold. In 1977, the author and her husband became U.S. citizens, thereby losing their Czechoslovakian citizenship.

2.2 In 1991, the author's husband contacted a lawyer but was told that, due to Law 87/1991, there was no legal means to obtain his property back as he had lost his Czech citizenship. He then wrote to the new owner of the property, asking for it to be returned as he was the legal owner, which was refused. P.L. died, and the son of the couple contacted another lawyer enquiring about restitution of their property. On 20 May 2003, he received a letter explaining that they had no options to get their property back as the restitution laws did not apply to Czechs who had lost their citizenship. The author and her husband never applied to have their Czech citizenship renewed as they thought this would not make a difference.

2.3 The author argues that no effective domestic remedies remained for her to exhaust because of the decision of June 1997 of the Constitutional Court of the Czech Republic, in which the court refused to strike out the condition of citizenship in the restitution laws in a case similar to hers.

### **The complaint**

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

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

4.1 On 21 May 2009, the State party submitted its observations on the admissibility and merits. It clarifies the facts as submitted by the author.

4.2 The State party submits that the communication should be found inadmissible under article 5(2)(b) of the Optional Protocol as the author did not exhaust domestic remedies.

4.3 The State party also considers that the communication should be found inadmissible under article 3 of the Optional Protocol taking into account that the author only provides minimum information about the property confiscated in 1970, the surrender of which she claims almost forty years after the confiscation. Despite acknowledging the jurisprudence of the Committee according to which the Optional Protocol does not set forth any fixed time limits for submitting a communication and delay in submitting does not amount to an abuse, the State party considers the forty years delay as an abuse of the right of submission of a communication to the Committee.

4.4 The State party also considers that the situation must be analysed in light of another delay, starting from the date of the latest legally relevant fact in the absence of any decision of domestic courts in the author's case. In this case, the State party considers that the latest legally relevant fact is "the moment of expiry of the time limit granted by restitution laws for delivering the request to the liable person who owned the property in dispute," and it argues that the author presented her case to the Committee 11 years after the expiry of the normal time limits for the steps to be taken when using restitution laws, and that the author does not mention any fact justifying the delay in the submission of her communication to the Committee.

4.5 The State party adds that the referred house and land parcel became the property of the State in 1970, i.e. a long time before the Czechoslovak Socialist Republic ratified the Optional Protocol.

4.6 On the merits, the State party recalls the Committee's jurisprudence on article 26, which asserts that a differentiation based on reasonable and objective criteria does not

amount to prohibited discrimination within the meaning of article 26 of the Covenant.<sup>2</sup> The State party argues that the author failed to comply with the legal citizenship requirement and her application for property restitution was therefore not supported by the legislation in force.

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

5.1 On 21 March 2011, the author submitted her comments regarding the State party's observations on the admissibility and merits. With regard to the author's belated submission of her communication, she argues that the time limits imposed on filing a claim before the national authorities were unreasonable and that the delays were also the result of the time required in order to gather the necessary information and to get the case ready, managing the process from abroad. The author also refers to family circumstances at the time when the procedure was started.

5.2 The author also recalls the steps taken with lawyers on two occasions by her family, with the purpose of initiating legal actions before the domestic courts and thereby exhausting domestic remedies. On both occasions, the author, her husband and her son were advised not to pursue their case under Czech law, as it did not give them any likelihood of success.

5.3 With regard to the merits, the author submits that she claims a violation of her rights under the Covenant since she was not able to claim restitution of her family's property due to the citizenship requirement.

#### **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 As required by 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 State party's arguments that the author has not exhausted domestic remedies and that the communication should be considered inadmissible as an abuse of the right of submission of a communication under article 3 of the Optional Protocol, in view of the delay in submitting the communication to the Committee. The author argues that no effective domestic remedies were available, and that the 11-year delay referred to by the State party was caused by the time taken by the lawyers contacted by the family before telling them not to initiate any proceedings; the lack of available information; and the delays involved in accessing and providing information and documentation from abroad.

6.4 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 the author's family was advised in 1991 and again in 2003 that, as a result of the preconditions of Law No. 87/1991, the author could not claim restitution because she and her husband no longer

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<sup>2</sup> See for example, communication No. 182/1984, *Zwaan-de Vries v. the Netherlands*, Views adopted on 9 April 1987, paras. 12.1 to 13.

had 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 challenges, in June 1997, the Constitutional Court upheld the constitutionality of the Restitution Law No. 87/1991.<sup>3</sup> The Committee concludes that no effective remedies were available to the author.<sup>4</sup>

6.5 The Committee observes that the Optional Protocol does not establish time limits within which a communication should be submitted. The Committee observes that according to its new rule of procedure 96 (c), applicable to communications received by the Committee after 1 January 2012, the Committee shall ascertain that the communication does not constitute an abuse of the right of submission. An abuse of the right of submission is not, in principle, a basis of a decision of inadmissibility *ratione temporis* on grounds of delay in submission. However, a communication may constitute an abuse of the right of submission when it is submitted 5 years from the exhaustion of domestic remedies by the author of the communication, or, where applicable, after 3 years from the conclusion of another procedure of international investigation or settlement, unless there are reasons justifying the delay, taking into account all the circumstances of the communication. In the meantime, 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.<sup>5</sup>

6.6 The period of delay before the author's submission of the present communication cannot be calculated from the date of exhaustion of domestic remedies, because the author never availed herself of the domestic remedies considered as ineffective. It is to be noted that the author does not suggest that she and her husband were deterred from proceeding in the domestic courts for fear of retaliation or similar considerations. The author submitted this communication in March 2006. That submission occurred some 15 years after the author and her husband were advised that no effective domestic remedy existed, nearly 11 years after the Committee adopted its Views in the *Simunek* case,<sup>6</sup> and nearly 9 years after the decision of the Constitutional Court of the State party that established the absence of a domestic remedy. The author identifies as causes of the delay her difficult family circumstances and the logistical problems of conducting legal proceedings from abroad. In comparable situations of delay *after* the exhaustion of domestic remedies, the Committee has found an abuse of the right of submission.<sup>7</sup> The Committee concludes in the present circumstances that the delay has been so unreasonable and excessive as to amount to an abuse of the right of submission, which renders the communication inadmissible under article 3 of the Optional Protocol.

<sup>3</sup> Pl. US 33/96-41, decision of the Constitutional Court of the Czech Republic, June 4, 1997.

<sup>4</sup> The Committee reached a similar conclusion in communications No. 1484/2006, *Lněnička v. the Czech Republic*, Views adopted on 25 March 2008, para. 6.3; No. 1497/2006, *Preiss v. the Czech Republic*, Views adopted on 17 July 2008, para. 6.5; No. 1742/2007, *Gschwind v. the Czech Republic*, Views adopted on 20 August 2010, para. 6.4.

<sup>5</sup> See for example, communications No. 1223/2003, *Tsarjov v. Estonia*, Views adopted on 26 October 2007, para. 6.3; 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.

<sup>6</sup> Communication No. 516/1992, *Simunek et al. v. the Czech Republic*, Views adopted on 19 July 1995.

<sup>7</sup> See communications No. 1582/2007, *Kudrna v. the Czech Republic*, decision of inadmissibility adopted on 21 July 2009, para. 6.3; No. 1583/2007, *Jahelka v. the Czech Republic*, decision of inadmissibility adopted on 25 October 2010, para. 6.4.

7. 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 to the General Assembly.]



**L. Communication No. 1858/2009, *Y.M. v. Russian Federation*  
(Decision adopted on 26 March 2012, 104th session)\***

<i>Submitted by:</i>	Y.M. (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Russian Federation
<i>Date of communication:</i>	20 October 2007 (initial submission)
<i>Subject matter:</i>	Illegal arrest and ill-treatment by customs officers due to ethnic discrimination
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; non-substantiation of claims
<i>Substantive issues:</i>	Right to remedy; prohibition of torture, cruel or inhuman and degrading treatment or punishment; arbitrary arrest and detention; right to compensation for unlawful arrest or detention; right to humane treatment and respect for dignity; right to a fair hearing by an independent and impartial tribunal; right to recognition everywhere as a person before the law; prohibition of discrimination
<i>Articles of the Covenant:</i>	2, paragraph 3; 7; 9, paragraphs 1, 3 and 5; 10, paragraph 1; 14, paragraph 1; 16 and 26
<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 26 March 2012,*

*Adopts the following:*

**Decision on admissibility**

1. The author of the communication dated 20 October 2007 is Mr. Y.M., a Russian citizen of Chechen origin, born in 1949. He claims to be a victim of violation by the Russian Federation of his rights under article 2, paragraph 3; article 7; article 9, paragraphs 1, 3 and 5; article 10, paragraph 1; article 14, paragraph 1; article 16 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 not represented.

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\* The following members of the Committee participated in the examination of the present communication: 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, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

### Factual background

2.1 The author lived in Grozny, Chechen Republic, Russian Federation. On an unspecified date, his house was destroyed by the Russian Air Forces and he had to leave the Chechen Republic and settle in the Altai Territory of the Russian Federation. On 19 June 1998, the author purchased dry milk in Kulunda settlement with the aim of selling it in the future for a better price. He and one A. were transporting the dry milk in a truck in the direction of Altai Territory customs. However, they were arrested by customs officers and officers of the Border Guard of Altai Territory in the surroundings of Znamenka settlement, approximately 50 metres away from the customs and State border of the Russian Federation. The author claims that all the officers carried guns and once the officers found out that they were of Chechen origin, they arrested them.

2.2 At gunpoint, the author and his companion were forced to unload the bags of dry milk from the truck and to reload it again.<sup>1</sup> As a result of the effort, the author claims that his blood pressure increased and he had heart pain. All his requests for medical assistance were ignored. He was under arrest from 19 to 25 June 1998,<sup>2</sup> and throughout this period, he was subjected to torture and pressured to confess to having committed a number of terrorist attacks.<sup>3</sup> He was released without having made any confession.

2.3 Because of his Chechen origin, the authorities fabricated a case against him under article 276 of the Customs Code (“Movement of goods and/or vehicles across the customs border of the Russian Federation eluding customs control”).<sup>4</sup> By a ruling of 10 July 1998 issued by the Head of the Kulunda Customs Post, he was sentenced to a fine of 519.50 Russian roubles.<sup>5</sup>

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<sup>1</sup> According to the author’s complaint of 20 March 2002, addressed to the Oktyabrsk District Court of Barnaul (available on file), the customs officers asked him and his companion to unload the truck in order to check whether they were transporting weapons under the bags with dry milk. After the inspection was carried out, the officers themselves loaded the truck (this contradicts the author’s claim that he was forced to load the truck himself).

<sup>2</sup> There are no materials available on file in support of the author’s allegation that he was held in custody from 19 to 25 June 1998. It seems that these claims were never raised in court either.

<sup>3</sup> The author has never raised this claim about torture in court. It appears from the author’s numerous complaints to the courts, that he considered as torture the fact that he was asked by the customs officers to unload the truck, an activity which, he claims, caused him to feel unwell and which affected his physical health and his psychological state. The author has never referred to any specific forms of torture or ill-treatment (such as beatings or other forms of physical abuse) inflicted on him by the customs officers.

<sup>4</sup> Article 276 of the Customs Code of 18 June 1993 reads as follows: “Movement of goods and/or vehicles across the customs border of the Russian Federation without customs control, that is, outside of certain places established by the customs authorities of the Russian Federation for that purpose or outside the time specified for customs clearance, in the absence of any indication of smuggling – is punishable by a fine of one hundred to three hundred per cent of the value of goods and/or vehicles which are direct objects of the offense; with the confiscation of the items or the recovery of their value or involves the confiscation of goods and/or vehicles which are direct objects of the offense; with confiscation of vehicles used for the transportation of such commodities or involves the recovery of the value of the goods and vehicles which are the direct object of the offense and confiscation of vehicles on which such goods are transported.

<sup>5</sup> According to the ruling of 10 July 1998 (available on file), the author was found in breach of article 276 of the Customs Code (see footnote 4 above). The official who issued the ruling took into account several mitigating circumstances (such as the fact that the author had committed the breach for the first time, had cooperated with the authorities in the course of investigation and had consented to the conduct of a merchandise customs valuation). Accordingly, the authorities confiscated the dry milk (1,229 kg) and imposed a fine equivalent to 10 per cent of the value of his car (519.50 Russian

2.4 Customs authorities ordered his expulsion from the Russian Federation to Kazakhstan and, by doing so, de facto deprived him of his Russian citizenship.<sup>6</sup> He was registered with the Immigration Service of Kazakhstan as a Russian citizen, but the ruling of 10 July 1998 referred to him as to a Kazakh citizen. The author contends that, because of the above-mentioned ruling, he is denied entry into the Russian Federation.

2.5 On an unspecified date, the author appealed the ruling to the Altai Customs Service, however, it was rejected on 10 August 1998. On an unspecified date, the author filed an appeal to the Kulunda District Court. On 29 December 1998, the Court reversed the decision of the Head of the Kulunda Customs Post and ordered the closure of the author's case. However, on 29 June 1999, the Presidium of the Altai Territory Court overturned the decision of the Kulunda District Court and referred the author's case for a new examination. On 17 December 1999, the Kulunda District Court upheld the decision of the Head of the Kulunda Customs Post of 10 July 1998.

2.6 In June 1999, the author filed another complaint to the Oktyabrsk District Court of Barnaul against the Altai Customs Service and the Ministry of Finance of the Russian Federation, requesting award of compensation for material and moral damages. The complaint was rejected by the Oktyabrsk District Court on 1 August 2001 and 27 December 2001.

2.7 On an unspecified date, the author appealed the decision of the Oktryabrsk District Court to the Judicial Chamber on Civil Cases of the Altai Territory Court, which, on 13 February 2002, reversed the decision and referred the case to the first instance court for a new examination.

2.8 On 2 April 2002, the Oktyabrsk District Court of Barnaul rejected the author's request for compensation. On 3 April 2002, the author appealed the decision to the Judicial Chamber on Civil Cases of the Altai Territory Court, which, on 15 May 2002, upheld the decision of the Oktyabrsk District Court of 2 April 2002. The author's supervisory review applications were rejected by the Altai Territory Court on 16 October 2003, 27 November 2003 and 1 March 2006; and by the Supreme Court of the Russian Federation on 21 July 2004.

2.9 The author submitted complaints alleging a violation of his rights guaranteed by the Russian Constitution<sup>7</sup> and the International Covenant on Civil and Political Rights<sup>8</sup> by officers of the Kulunda Customs Post to the Oktyabrsk District Court (21 January 2006), the Presidium of the Altai Territory Court (10 February 2006) and the Supreme Court of the Russian Federation (3 January 2006). However, the Oktyabrsk District Court and the Supreme Court of the Russian Federation rejected his complaints on 1 March 2006 and 9 February 2006, respectively.

2.10 On 10 February 2009, that is, after the registration of his initial communication by the Committee (12 January 2009), the author submitted to the Committee new allegations, unrelated to the facts initially reported.<sup>9</sup> He claimed that, on 14 August 2006, in accordance

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roubles), without confiscating it.

<sup>6</sup> The author has provided copies of two passports issued by the Russian Federation in his name on 15 March 2003 and 19 March 2004.

<sup>7</sup> See Constitution of the Russian Federation, articles 6 (citizenship of the Russian Federation); 21 (prohibition of torture and ill-treatment); 22, paragraph 2 (freedom of liberty); 19, paragraph 2 (equality and non-discrimination); 27 (freedom of movement) and 45 (state protection of rights and freedoms of individuals).

<sup>8</sup> See International Covenant on Civil and Political Rights, articles 2; 7; 14, paragraph 1; 16 and article 26.

<sup>9</sup> This second submission was transmitted to the State party on 25 April 2009.

with the schedule of citizens' reception by the Staropromyslovsk District Court of Grozny, he came to the Court in order to see a judge. However, he was prevented from entering the premises by court's bailiffs. He was about to leave when the secretary of the court approached him and invited him inside. When he entered the court building, bailiffs attacked him, snatched his bag and seized his passport. They ignored his explanations that he was invited inside by the secretary of the court, that he had come to see a judge and that he had a heart condition.

2.11 Notwithstanding his explanations, some ten bailiffs surrounded him, said he looked suspicious and threatened him with 15 days' imprisonment if he did not leave the building. One of the bailiffs grabbed his neck and waist, lifted him off the ground and flung him off the court's premises, during which his chest (heart side) got caught on the door handle. As a result, he was in a state of shock, had a heart attack and began to lose consciousness. He was thereafter dragged into the court building and taken to the chief of bailiffs. He asked for medical assistance, but his request was ignored. He remained under arrest for a few hours. Upon release, he immediately went to a medical institution which issued a report documenting the injuries he sustained.

2.12 On 18 August 2006, the author filed a complaint to the Prosecutor's Office of the Chechen Republic, and on 28 August 2006 was informed that his complaint was forwarded to the Supreme Court. On 30 August 2006, the author was informed by the Vice Chairman of the Supreme Court that an investigation into his allegations would be carried out and that he would be informed of the outcome by 11 September 2006. Since the author did not receive any response by that date, he resubmitted his complaint to the Vice Chairman of the Supreme Court on 25 September 2006, and on 29 September 2006. On 15 September 2006, the author complained of ill-treatment to the Staropromyslovsk District Court of Grozny. He claims that all his complaints remained unanswered. On 22 April 2008, the Prosecutor's Office of the Chechen Republic informed the author that his complaint has been referred to the inter-district Investigative Department of Grozny. On 19 July 2008, after the examination of the materials produced during the investigation, the Lenin inter-district Investigative Committee, under the Prosecutor's Office of Russian Federation for the Chechen Republic, refused to open a criminal case against the bailiffs for lack of *corpus delicti*.

### **The complaint**

3.1 The author claims a violation of his rights under article 2 of the Covenant, as his rights under the Russian Constitution were not guaranteed because of his Chechen origin and current events in the Chechen Republic.

3.2 The author submits that he was subjected to treatment contrary to article 7 of the Covenant. As a consequence, he suffers from, and was diagnosed with, obsessional neurosis and astheno-depressive syndrome, as documented by medical reports, *inter alia*, the reports of 26 June 1998 and 9 August 1999 issued by the Omsk Diagnostic Centre and the report of 30 November 2004 issued by the Ekibastuz Psychoneurological Centre (Kazakhstan).

3.3 The author claims to be a victim of a violation of article 9, paragraph 5, of the Covenant. He was unlawfully arrested and detained and, therefore, is entitled to compensation.

3.4 In violation of article 10, paragraph 1, customs officers subjected him to torture, in order to compel him to confess to having committed a number of terrorist attacks.

3.5 The author claims a violation of his rights under article 14, paragraph 1, as he was not provided with the right to a fair trial guaranteed under the Russian Constitution to the citizens of the Russian Federation. In addition, the author claims that his right to defense

was also violated, because the Oktyabrsk District Court of Barnaul (Russian Federation) rejected his motion to examine Mr. A. as a witness in court while considering his case on 2 April 2004.

3.6 The author claims that his right to recognition as a person before the law, as stipulated in article 16 of the Covenant, was violated by the ruling of the Head of the Kulunda Customs Post of 10 July 1998 and its subsequent affirmation by the State party's courts.

3.7 The author claims that, due to his origin, his rights under article 26 of the Covenant were not respected. Unlike other citizens of the Russian Federation, he was not allowed to purchase dry milk and transport it on the territory of the Russian Federation. He states that article 276 of the Customs Code concerns responsibility for the movement of goods and vehicles across the customs border of the Russian Federation. However, he was arrested on the territory of the Russian Federation.

3.8 In connection with his second set of allegations, regarding the incidents at the Staropromyslovsk District Court, the author claims a violation of article 2, paragraph 3, of the Covenant, since the Russian Federation failed to respect and to ensure his rights under the Covenant, on account of his Chechen origin. The State party also failed to ensure his right to judicial remedy by competent authorities when he lodged complaints with the courts.

3.9 He claims that he was subjected to inhuman treatment by bailiffs, in violation of article 7 of the Covenant, which put his life at risk. Following the events, he suffered a heart attack, as confirmed by the medical report issued by the Bakulev Scientific Center of Cardiovascular Surgery under the Russian Academy of Medical Sciences.<sup>10</sup> The author also claims that the above facts constitute a violation of his rights under article 9, paragraphs 1 and 3, of the Covenant.

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

4.1 On 29 June 2009, the State party provided its observations. It submits that, on 25 June 2006, the Kulunda Customs Post of the Altai Customs Service initiated a case against the author for violation of customs rules for the movement of goods and vehicles across the customs border outside of places established by the customs authorities for that purpose. Based on the materials on file, on 10 July 1998, the head of the Kulunda Customs Post issued a ruling by which the author was fined and his goods were confiscated. The author repeatedly appealed against the ruling. However, the courts, including the Supreme Court, rejected his claims.

4.2 On 27 October 2001, his complaint was rejected by the Oktyabrsk District Court of Barnaul city. On 13 February 2002, the Judicial Chamber on Civil Cases of the Altai Territory Court reversed the decision of the Oktyabrsk District Court and referred the case for a new examination. On 2 April 2002, the Oktyabrsk District Court rejected the author's complaint for the second time. This decision was upheld by the Judicial Chamber on Civil Cases of the Altai Territory Court on 15 May 2002. The author's further applications under supervisory review procedure were rejected by the Altai Territory Court on 27 November 2003, and by the Supreme Court of the Russian Federation on 21 July 2004.

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<sup>10</sup> According to the medical report, the author underwent treatment from 28 February to 12 March 2008. The author complained of heart pains, rapid heartbeat and dyspnoea (difficult breathing). The hospital diagnosis was coronary atherosclerosis, stenocardia and post-infarct cardiac sclerosis. The report does not mention beatings or other injuries.

4.3 According to the State party, the author failed to adduce any evidence to support his allegations that he was held responsible for violation of customs rules due to his origin. Therefore the courts found his claims unfounded. The State party further submits that it is impossible to study the materials of the author's case, since they were destroyed in 2005 by the Altai Customs Service at the expiration of the term for their retention. Taking into account that more than ten years elapsed since the events reported by the author had taken place, it is impossible to verify the information about the physical and psychological pressure towards the author by the officers of the Kulunda Customs Post. Although the author has exhausted all available domestic remedies, in the absence of any basis for concluding that his rights have been violated by the State party, his communication should be declared inadmissible.

4.4 As to the author's second submission regarding his ill-treatment by bailiffs of the Staropromyslovsk District Court of Grozny city, the State party submits that the investigation into his allegations was carried out by the Lenin inter-district Investigative Committee under the Prosecutor's Office of Russian Federation for the Chechen Republic. Based on its results, the authorities repeatedly refused to initiate criminal proceedings due to lack of *corpus delicti*. The last ruling on this matter was issued on 25 December 2008. However, the author failed to appeal it in accordance with the criminal procedure norms of the Russian Federation. Accordingly, his claims should be declared inadmissible for failure to exhaust domestic remedies, as required under article 5 of the Optional Protocol.

4.5 On 27 August 2009, the State party submitted additional observations. It considers the medical documents adduced by the author with blurred seals to be of doubtful origin. The State party recalls that the author had not filed an appeal against the ruling refusing initiation of criminal proceedings and therefore contends that the claims contained in his second submission are inadmissible for failure to exhaust domestic remedies.

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

5.1 The author provided his comments on 1 October 2009. He claims that his allegation that he was held liable for violation of customs rules due to his Chechen origin is confirmed by the fact that the ruling of 10 July 1998 refers to him as to a Kazakhstani national (and not a national of the Russian Federation). The fact that the materials of his case were destroyed in 2005 cannot serve as a basis for declaring his communication inadmissible. The author also claims that the State party's argument about the doubtful origin of the medical reports is unfounded.

5.2 As regards the ruling of 25 December 2008 by which the authorities refused to initiate criminal proceedings against bailiffs, the author claims that he has no knowledge of it and has never seen or signed it. He submits that he seized the Staropromyslovsk District Court of the matter of ill-treatment on 15 September 2006 (which remains unanswered), and recalls his subsequent complaints lodged with the Supreme Court in 2006. Therefore, he has exhausted all domestic remedies.

5.3 On 25 October 2009, the author provided further comments, recalling his complaints lodged in 2006 with the Staropromyslovsk District Court, the Prosecutor's Office of Chechen Republic and the Supreme Court. He claims that on 19 July 2008, the Lenin inter-district Investigative Committee under the Prosecutor's Office of Russian Federation for the Chechen Republic, without his knowledge, considered the materials of the investigation into his allegations of ill-treatment and refused to open a criminal case for lack of *corpus delicti*. The author reiterates his arguments that he has never seen or signed a similar ruling dated 25 December 2008. Consequently, he could not appeal it to the Staropromyslovsk District Court. Furthermore, the requirement of exhaustion of domestic remedies should not apply in his case, because the remedies were unreasonably prolonged.

## 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 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 With regard to the author's initial claims under articles 7; 9, paragraph 5; 10, paragraph 1; 14, paragraph 1; 16 and 26 of the Covenant, the Committee takes note of the State party's acknowledgment that the author has exhausted all domestic remedies. It considers therefore that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have been met as regards this part of his communication.

6.4 The Committee notes the author's allegations that he was subjected to torture and ill-treatment by customs officers, in violation of article 7 of the Covenant. Although the author provided some medical reports that, in his opinion, corroborate his allegations, the Committee observes that none of them mention the existence of a link between the author's medical condition and symptoms (i.e. obsessional neurosis, astheno-depressive syndrome, heart problems and hypertension) and his claims of ill-treatment. Moreover, none of the reports refer to injuries that would be indicative of beatings or other forms of ill-treatment or torture. Therefore, and in the absence of other evidence in support of his allegations, the Committee concludes that the author failed to substantiate this claim, for purposes of admissibility, and declares it inadmissible under article 2 of the Optional Protocol.

6.5 The Committee takes note of the author's claims under article 9, paragraph 5, of the Covenant, that he is entitled to compensation for his unlawful arrest and detention. The Committee observes that nothing in the information before it — either complaints by the author or court decisions on the matter — attests that the author was detained for six days, as alleged, or that he had raised his claims of unlawful arrest and detention in court. In the absence of any information indicating that the author was a victim of unlawful arrest and detention, his claim under article 9, paragraph 5, of the Covenant is not sufficiently substantiated for purposes of admissibility, and is therefore inadmissible under article 2 of the Optional Protocol. In light of the above conclusion, the author's allegation under article 10, paragraph 1, is also inadmissible under article 2 of the Optional Protocol due to insufficient substantiation.

6.6 The Committee notes the author's claim under article 14, paragraph 1 of the Covenant that he did not benefit from a fair trial, but observes that the author does not provide any information or evidence in support of his allegations. Accordingly, this claim is insufficiently substantiated, and therefore inadmissible under article 2 of the Optional Protocol.

6.7 In view of the fact that the author was able to file and pursue in court his numerous complaints, the Committee considers that he has failed to substantiate the claim that he was not recognized as "a person before the law," as provided for under article 16 of the Covenant. Therefore, this claim is inadmissible under article 2 of the Optional Protocol.

6.8 As to the author's claim under article 26 of the Covenant, the Committee notes that the author does not provide any information in support of his claim that his sanctioning by customs authorities and the consideration of his case by domestic courts was based on discriminatory grounds, namely, his Chechen origin. Therefore, this claim is inadmissible under article 2 of the Optional Protocol due to insufficient substantiation.

6.9 The Committee further notes the author's additional claims under articles 7 and 9, paragraphs 1 and 3, of the Covenant, raised in his second submission of 10 February 2009, in relation to the alleged ill-treatment by bailiffs of the Staropromyslovsk District Court of Grozny on 14 August 2006. The Committee observes that the State party objects to the admissibility of the author's allegation under article 7 on the grounds that he failed to appeal in court the ruling of 25 December 2008, in which the authorities refused to initiate criminal proceedings against the respective bailiffs for lack of *corpus delicti*. The author claims that he has no knowledge about said ruling; he claims that he never received it and thus could not appeal against it. In the absence of any information to the contrary from the State party in this regard, the Committee considers that it is not precluded by article 5, paragraph 2 (b), of the Optional Protocol from considering this part of the author's communication.

6.10 However, the Committee also observes that the author failed to provide clear information and evidence in support of his allegation under article 7 of the Covenant. The medical report adduced by the author, dated 15 August 2006, does not establish a link between his heart condition (see para. 3.9 and footnote 10 above) and the alleged ill-treatment by bailiffs. Furthermore, the State party has challenged the authenticity of the medical reports adduced by the author. In the circumstances, and noting that the medical report dated 15 August 2006 does not establish a link between the author's medical condition and his allegations, the Committee considers that this claim is inadmissible under article 2 of the Optional Protocol, due to insufficient substantiation.

6.11 In the absence of any information or evidence in support of the author's claim that he was arrested and detained on 14 August 2006, and taking into account that this claim has never been raised in court, the Committee concludes that the author has failed to substantiate, for purposes of admissibility, his claims under article 9, paragraphs 1 and 3, of the Covenant, and thus declares them 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 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 to the General Assembly.]



**M. Communication No. 2058/2011, *O.D. v. the Russian Federation*  
(Decision adopted on 26 March 2012, 104th session)\***

<i>Submitted by:</i>	O.D. (represented by the Konsul Law firm)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Russian Federation
<i>Date of communication:</i>	13 January 2011 (initial submission)
<i>Subject matter:</i>	The author's conviction for a traffic offence
<i>Procedural issue:</i>	Incompatibility of claims with the Covenant
<i>Substantive issue:</i>	Right to a fair hearing by an impartial tribunal
<i>Article of the Covenant:</i>	14
<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 26 March 2012,*

*Adopts the following:*

**Decision on admissibility**

1. The author of the communication is O.D., a Russian Federation national born in 1968. He claims to be a victim of violations by the Russian Federation of his rights under article 14 of the International Covenant on Civil and Political Rights.<sup>1</sup> The author is represented by the "Konsul" law firm.

**The facts as presented by the author**

2.1 The author submits that, on 28 May 2009, he entered into conflict with a certain officer of the State Inspectorate for Road Traffic Safety, because he criticized the latter's work and told him that he was blocking the traffic for no reason. In response, the officer accused the author of hitting him with his vehicle and leaving the scene of the accident, actions which constitute separate administrative offences according to domestic legislation. Charges were brought against the author and, on 7 July 2009, he was convicted of committing an administrative offence under article 12.27, paragraph 2, of the Code of Administrative Proceedings of the Russian Federation, namely leaving the scene of an accident, by the Peace Judge of the 79th District in Krasnoyarsk. He was sentenced to 13 days' imprisonment.

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

<sup>1</sup> The Optional Protocol entered into force for the Russian Federation on 1 October 1991.

2.2 The author appealed the verdict before the Federal Court of the Soviet District of Krasnoyarsk, which, by a decision dated 21 July 2009, amended the verdict and reduced the author's sentence to five days' imprisonment. The author filed for a supervisory review of that decision before the Krasnoyarsk Region Court and the Supreme Court of the Russian Federation, which rejected the appeals on 4 February 2010 and 4 July 2010 respectively.

2.3 The author submits that the decisions of the courts were based on the arguments, statements and evidence presented by the law enforcement agents, namely the officers of the State Inspectorate for Road Traffic Safety, and that his own and his lawyer's explanations were rejected without grounds. The author points out that he was convicted only of leaving the scene of an accident, not of committing the said accident, and that the fact of the accident was not investigated or established. The author maintains that no accident ever took place. He attempts at length to rebut the evidence of the Traffic Safety Inspectorate (such as smears on his vehicle's bumper and their origin, etc.), claims that there were no witness statements confirming the fact of the accident; and points out alleged discrepancies between the officer's statement and the medical certificate that the latter presented to the court.

2.4 The author contends that he has exhausted all available and effective domestic remedies.

### **The complaint**

3. The author claims to be a victim of violations by the Russian Federation of his rights to a fair hearing, as protected by 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 With regard to the author's claims that his rights under article 14, paragraph 1, have been violated by the State party, the Committee observes that these allegations relate primarily to the evaluation of facts and evidence by the State party's courts. The Committee recalls its jurisprudence in this respect and reiterates that, generally speaking, it is for the relevant domestic courts to review or evaluate facts and evidence.<sup>2</sup> Based on the material before it the Committee considers that the author has not shown sufficient grounds to support his argument that there was such arbitrariness or denial of justice. The Committee, therefore, concludes that the communication must be declared inadmissible pursuant to 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 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 to the General Assembly.]

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<sup>2</sup> See, inter alia: Communication No. 541/1993, *Simms v. Jamaica*, decision of inadmissibility adopted on 3 April 1995, para. 6.2; communication No. 1212/2003, *Lanzarote v. Spain*, decision of inadmissibility of 25 July 2006, para. 6.3; communication No. 1537/2006, *Gerashchenko v. Belarus*, decision of inadmissibility of 23 October 2009, para. 6.5.

## Annex 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. Mr. Krister Thelin has been the Special Rapporteur since March 2010 (101st session).
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; 764 Views out of the 916 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 104th session (12 to 30 March 2012), 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 (see chap. V (vol. I) of the present report). 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/66/40) is set out in chapter VI (vol. I) of the present report.

<i>State party and number of cases with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>		<i>No response</i>	<i>Follow-up dialogue ongoing</i>
		<i>Satisfactory response</i>	<i>Unsatisfactory response</i>		
Algeria (15)	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
	1780/2008, <i>Aouabdia et al.</i> A/66/40			X	X
	1781/2008, <i>Berzig</i> A/67/40				X
	1811/2008, <i>Djebbar and Chihoub</i> A/67/40				X

State party and number of cases with violation	Communication number, author and relevant Committee report	Follow-up response received from State party		Follow-up dialogue ongoing
		Satisfactory response	Unsatisfactory response	
Algeria ( <i>cont'd</i> )	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
Australia (25)	560/1993, <i>A.</i> A/52/40	X A/53/40, A/55/40, A/56/40	X	X
	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

State party and number of cases with violation	Communication number, author and relevant Committee report	Follow-up response received from State party		Follow-up dialogue ongoing
		Satisfactory response	Unsatisfactory response	
Australia ( <i>cont'd</i> )	1014/2001, <i>Baban et al.</i> A/58/40	X	X	X
	1020/2001, <i>Cabal and Pasini</i> A/58/40	X	X*	X
	1036/2001, <i>Faure</i> A/61/40	X		X
	1050/2002, <i>Rafie and Safdel</i> A/61/40	X		X
	1069/2002, <i>Bakhitiyari</i> A/59/40	X	X	X
	1157/2003, <i>Coleman</i> A/61/40	X		X A/62/40
	1184/2003, <i>Brough</i> A/61/40	X		X A/62/40
	1255, 1256, 1259, 1260, 1266, 1268, 1270 and 1288/2004, <i>Shams, Atvan, Shahrooei, Saadat, Ramezani, Boostani, Behrooz and Sefed</i> A/62/40	X		X
	1324/2004, <i>Shafiq</i> A/62/40	X		X A/62/40
	1347/2005, <i>Dudko</i> A/62/40	X		X A/63/40

*\*Note:* The State party's response is set out in CCPR/C/80/FU/1. The State party submits that it is unusual for two persons to share cells and that it has asked the Victoria police to take the necessary steps to ensure that a similar situation does not arise again. It does not accept that the authors are entitled to compensation. The Committee considered that this case should not be considered any further under the follow-up procedure.

State party and number of cases with violation	Communication number, author and relevant Committee report	Follow-up response received from State party		Unsatisfactory response	No response	Follow-up dialogue ongoing
		Satisfactory response				
Australia ( <i>cont'd</i> )	1442/2005, <i>Kwok</i> A/65/40	X	A/67/40			
	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
	1557/2007, <i>Nystrom et al.</i> A/66/40				X	X
	1635/2007, <i>Tillman</i> A/65/40	X	A/66/40, A/67/40	X		X
Austria (5)	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*		
*Note: Although the State party has made amendments to its legislation as a result of the Committee's findings, the legislation is not retroactive and the author himself has not been provided with a remedy. At its 102nd session, the Committee decided to close the follow-up scrutiny of the case, with a partly satisfactory resolution in the light of the measures taken so far by the State party.						
	965/2001, <i>Karakurt</i> A/57/40	X	A/58/40, CCPR/C/80/FU/1, A/61/40			X
	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



<i>State party and number of cases with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>		<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
		<i>Satisfactory response</i>				
Austria ( <i>cont'd</i> )	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
Belarus (29)	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
	1047/2002, <i>Sinitsin, Leonid</i> A/62/40				X	X
1100/2002, <i>Bandazhewsky</i> A/61/40	X	A/62/40			X	

<i>State party and number of cases with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>		<i>Un satisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
		<i>Satisfactory response</i>	<i>Un satisfactory response</i>			
Belarus ( <i>cont'd</i> )	1178/2003, <i>Smantser</i> A/64/40	X	A/65/40	X		X
	1207/2003, <i>Malakhovsky</i> A/60/40	X	A/61/40	X		X
	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
	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
	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

State party and number of cases with violation	Communication number, author and relevant Committee report	Follow-up response received from State party		Unsatisfactory response	No response	Follow-up dialogue ongoing
		Satisfactory response				
Belarus ( <i>cont'd</i> )	1750/2008, <i>Sudalenko</i> A/67/40					X
	1772/2008, <i>Belyazeka</i> A/67/40					X
	1820/2008, <i>Krassovskaya</i> A/67/40					X
	1838/2008, <i>Tulzhenkova</i> A/67/40					X
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
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	X		X
Canada (11)	1813/2008, <i>Akwanga</i> A/66/40				X	X
	27/1978, <i>Pinkney</i> Fourteenth session Selected Decisions, vol. 1				X	X

State party and number of cases with violation	Communication number, author and relevant Committee report	Follow-up response received from State party			Follow-up dialogue ongoing
		Satisfactory response	Unsatisfactory response	No response	
Canada ( <i>cont'd</i> )	167/1984, <i>Ominayak et al.</i> A/45/50	X A/59/40,* A/61/40, A/62/40			X A/62/40
	*Note: According to this report, information was provided on 25 November 1991 (unpublished). It appears from the follow-up file that, in this response, the State party stated that the remedy was to consist of a comprehensive package of benefits and programmes valued at Can\$ 45 million and a 95 square mile reserve. Negotiations were still ongoing as to whether the Lubicon Lake Band should receive additional compensation.				
	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
	*Note: The Committee decided that it should monitor the outcome of the author's situation and take any appropriate action.				
	1051/2002, <i>Ahani</i> A/59/40	X A/60/40, A/61/40		X	X* A/60/40
	*Note: 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			X
	1544/2007, <i>Hamida</i> A/65/40	X A/66/40			X
	1763/2008, <i>Pillai et al.</i> A/66/40	X A/67/40			X
	1792/2008 <i>Dauphin</i> A/64/40	X A/65/40		X A/65/40	X
	1959/2010, <i>Warsame</i> A/66/40				X X

State party and number of cases with violation	Communication number, author and relevant Committee report	Follow-up response received from State party		Unsatisfactory response	No response	Follow-up dialogue ongoing
		Satisfactory response				
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*			X
	<i>*Note:</i> In this case, the Committee recommended that the State party should take the necessary measures to compensate the husband of Ms. Maria Fanny Suárez de Guerrero for the death of his wife and to ensure that the right to life is duly protected by amending the law. The State party replied that the Ministerial Committee set up pursuant to enabling legislation No. 288/1996 had recommended that compensation be paid to the author.					
	46/1979, <i>Fals Borda</i> Sixteenth session Selected Decisions, vol. 1	X	A/52/40*	X		X
	<i>*Note:</i> In this case, the Committee recommended adequate remedies and for the State party to adjust its laws in order to give effect to the right set forth in article 9, paragraph 4, of the Covenant. The State party responded that, given the absence of a specific remedy recommended by the Committee, the Ministerial Committee set up pursuant to enabling legislation No. 288/1996 did not recommend that compensation should be paid to the victim.					
	64/1979, <i>Salgar de Montejo</i> Fifteenth session Selected Decisions, vol. 1	X	A/52/40*	X		X
	<i>*Note:</i> In this case, the Committee recommended adequate remedies and for the State party to adjust its laws in order to give effect to the right set forth in article 14, paragraph 5, of the Covenant. Given the absence of a specific remedy recommended by the Committee, the Ministerial Committee set up pursuant to Act No. 288/1996 did not recommend that compensation be paid to the victim.					
	161/1983, <i>Herrera Rubio</i> Thirty-first session Selected Decisions, vol. 2	X	A/52/40*			X
	<i>*Note:</i> The Committee recommended effective measures to remedy the violations that Mr. Herrera Rubio has suffered and further to investigate said violations, to take action thereon as appropriate and to take steps to ensure that similar violations do not occur in the future. The State party provided compensation to the victim.					
	181/1984, <i>Sanjuán Arévalo brothers</i> A/45/40	X, A/64/40	A/52/40*	X		X

State party and number of cases with violation	Communication number, author and relevant Committee report	Follow-up response received from State party		Unsatisfactory response	No response	Follow-up dialogue ongoing
		Satisfactory response				
Colombia ( <i>cont'd</i> )	<i>*Note:</i> The Committee takes this opportunity to affirm that it would welcome information on any relevant measures taken by the State party in respect of the Committee's Views and, in particular, invites the State party to inform the Committee of further developments in the investigation of the disappearance of the Sanjuán brothers. Given the absence of a specific remedy recommended by the Committee, the Ministerial Committee set up pursuant to Act No. 288/1996 did not recommend that compensation be paid to the victim.					
	195/1985, <i>Delgado Páez</i> A/45/40	X	A/52/40*			X
	<i>*Note:</i> In accordance with the provisions of article 2 of the Covenant, the State party is under an obligation to take effective measures to remedy the violations suffered by the author, including the granting of appropriate compensation, and to ensure that similar violations do not occur in the future. The State party provided compensation.					
	514/1992, <i>Fei</i> A/50/40	X	A/51/40*	X		X
	<i>*Note:</i> The Committee recommended that the State party provide the author with an effective remedy. In the Committee's opinion, this entails guaranteeing the author regular access to her daughters, and that the State party ensure that the terms of the judgements in the author's favour are complied with. Given the absence of a specific remedy recommended by the Committee, the Ministerial Committee set up pursuant to Act No. 288/1996 did not recommend that compensation be paid to the victim.					
	612/1995, <i>Arhuacos</i> A/52/40				X	X
	687/1996, <i>Rojas García</i> A/56/40	X	A/58/40, A/59/40			X
	778/1997, <i>Coronel et al.</i> A/58/40	X	A/59/40			X
	848/1999, <i>Rodríguez Orejuela,</i> A/57/40	X	A/58/40, A/59/40	X		X
	859/1999, <i>Jiménez Vaca</i> A/57/40	X	A/58/40, A/59/40, A/61/40	X		X
	1298/2004, <i>Becerra</i> A/61/40	X	A/62/40			X A/62/40
	1361/2005, <i>Casadiego</i> A/62/40	X	A/63/40			X

State party and number of cases with violation	Communication number, author and relevant Committee report	Follow-up response received from State party			Follow-up dialogue ongoing
		Satisfactory response	Unsatisfactory response	No response	
Colombia ( <i>cont'd</i> )	1611/2007, <i>Bonilla Lerma</i> A/66/40				X
	1641/2007, <i>Calderón Bruges</i> A/67/40				X
Côte d'Ivoire (1)	1759/2008, <i>Traoré</i> A/67/40				X
Croatia (2)	727/1996, <i>Paraga</i> A/56/40	X			X
	1510/2006, <i>Vojnović</i> A/64/40	X	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			X
	<i>*Note:</i> One author confirmed that the Views were partially implemented. The others claimed that their property was not restored to them or that they were not compensated.				
	586/1994, <i>Adam</i> A/51/40	X			X
	747/1997, <i>Des Fours Walderode</i> A/57/40	X			X
	757/1997, <i>Pezoldova</i> A/58/40	X			X
	765/1997, <i>Fábryová</i> A/57/40	X			X

<i>State party and number of cases with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>			<i>Follow-up dialogue ongoing</i>
		<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	
Czech Republic ( <i>cont'd</i> )	823/1998, <i>Czernin</i> A/60/40	X			X
	857/1999, <i>Blazek et al.</i> A/56/40	X			X
	945/2000, <i>Marik</i> A/60/40	X			X
	946/2000, <i>Patera</i> A/57/40	X			X
	1054/2002, <i>Kriz</i> A/61/40	X			X
	1445/2006, <i>Polacek</i> A/62/40			X	X
	1448/2006, <i>Kohoutek</i> A/63/40	X			X
	1463/2006, <i>Gratzinger</i> A/63/40			X	X
	1479/2006, <i>Persan</i> A/64/40			X	X
	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



State party and number of cases with violation	Communication number, author and relevant Committee report	Follow-up response received from State party		Follow-up dialogue ongoing
		Satisfactory response	Unsatisfactory response	
Czech Republic (cont'd)	1508/2006, Amundson A/64/40			X
	1586/2007, Lange A/66/40			X
	1533/2006, Ondracka A/63/40			X
	1563/2007, Jünglingová A/67/40			X
	1581/2007, Drda A/66/40			X
	1615/2007, Zavrel A/65/40			X
	1742/2007, Gschwind A/65/40			X
	1847/2008, Klain and Klain A/67/40			X
Democratic Republic of the Congo (14)*	*Note: See A/59/40 for details of follow-up consultations.			
	16/1977, Mbenge Eighteenth session Selected Decisions, vol. 2			X
	90/1981, Luyeye Nineteenth session Selected Decisions, vol. 2			X A/61/40
	124/1982, Muteba Twenty-second session Selected Decisions, vol. 2			X A/61/40
	138/1983, Mpandanjila et al. Twenty-seventh session Selected Decisions, vol. 2			X A/61/40

State party and number of cases with violation	Communication number, author and relevant Committee report	Follow-up response received from State party		Un satisfactory response	No response	Follow-up dialogue ongoing
		Satisfactory response				
Democratic Republic of the Congo ( <i>cont'd</i> )	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
	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

State party and number of cases with violation	Communication number, author and relevant Committee report	Follow-up response received from State party		Follow-up dialogue ongoing
		Satisfactory response	Unsatisfactory response	
Ecuador (2)	277/1988, <i>Terán Jijón</i> A/47/40	X	X	X
		A/59/40*		
	*Note: According to this report, information was provided on 11 June 1992, but was not published. It appears from the follow-up file that in this response, the State party merely forwarded copies of two reports of the national police on the investigation of the crimes in which Mr. Terán Jijón was involved, including the statements he made on 12 March 1986 concerning his participation in such crimes.			
	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
	468/1991, <i>Oló Bahamonde</i> A/49/40	A/62/40*		X
	1152 and 1190/2003, <i>Ndong et al. and Mic Abogo</i> A/61/40	A/62/40*		X
	* The State party has not replied but it has met several times with the Special Rapporteur.			
Finland (1)	779/1997, <i>Äärelä et al.</i> A/57/40	X		X
		A/57/40, A/59/40		
France (4)	1620/2007, <i>J.O.</i> A/66/40	X	X	X
	1760/2008, <i>Cochet</i> A/66/40			X
	1876/2009, <i>Singh</i> A/66/40			X
	2002/2010, <i>Casanovas</i> A/66/40			X
Georgia (3)	626/1995, <i>Gelbekhiani</i> A/53/40	X	X	X
		A/54/40		

State party and number of cases with violation	Communication number, author and relevant Committee report	Follow-up response received from State party		Unsatisfactory response	No response	Follow-up dialogue ongoing
		Satisfactory response				
Georgia ( <i>cont'd</i> )	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 (3)	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
	1799/2008, <i>Georgopoulos et al.</i> A/65/40	X	A/66/40, A/67/40			X
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
	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

State party and number of cases with violation	Communication number, author and relevant Committee report	Follow-up response received from State party		Unsatisfactory response	No response	Follow-up dialogue ongoing
		Satisfactory response				
Guyana ( <i>cont'd</i> )	913/2000, <i>Chan</i> A/61/40	A/60/40* A/62/40			X	X
	* The State party has not replied but it has met several times with the Special Rapporteur.					
Hungary (3)	410/1990, <i>Párkányi</i> A/47/40	X*		X		X
	*Note: Follow-up information referred to in the State party's reply, dated February 1993 (unpublished), indicates that compensation cannot be paid to the author due to a lack of specific enabling legislation.					
	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	X A/63/40, A/64/40, A/67/40				
	Follow-up dialogue closed, with a partly satisfactory implementation of the recommendation (see A/67/40, chap. VI).					
Italy (1)	699/1996, <i>Maleki</i> A/54/40	X A/55/40		X		X
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

State party and number of cases with violation	Communication number, author and relevant Committee report	Follow-up response received from State party		Follow-up dialogue ongoing
		Satisfactory response	Unsatisfactory response	
Jamaica ( <i>cont'd</i> )	792/1998, <i>Higginson</i> A/57/40			X
	793/1998, <i>Pryce</i> A/59/40			X
	796/1998, <i>Reece</i> A/58/40			X
	797/1998, <i>Lobban</i> A/59/40			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
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
	1369/2005, <i>Kulov</i> A/65/40	X A/66/40		X
	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, Rakhimov, Tashbaev, Pirmatov</i> A/63/40	X A/65/40		X

<i>State party and number of cases with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>		<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
		<i>Satisfactory response</i>				
Kyrgyzstan ( <i>cont'd</i> )	1470/2006, <i>Toktakunov A/66/40</i>	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 A/66/40</i>	X	A/67/40	X		X
	1545/2007, <i>Gunan A/66/40</i>	X	A/67/40	X		X
	1547/2007, <i>Torobekov A/67/40</i>					X
	1756/2008, <i>Moidunov and Zhumbaeva A/66/40</i>	X	A/67/40	X		X
Latvia (2)	884/1999, <i>Ignatane A/56/40</i>	X	A/57/40			
	1621/2007, <i>Raihman A/66/40</i>				X	X
Libya (11)	440/1990, <i>El-Megreisi A/49/40</i>				X	X
	1107/2002, <i>El Ghar A/60/40</i>	X	A/61/40, A/62/40			X A/62/40
	1143/2002, <i>Dernawi A/62/40</i>				X	X
	1755/2008, <i>El Hagog Jumaa A/67/40</i>					X
	1782/2008, <i>Aboufaied A/67/40</i>					X

State party and number of cases with violation	Communication number, author and relevant Committee report	Follow-up response received from State party		Follow-up dialogue ongoing
		Satisfactory response	Unsatisfactory response	
Libya ( <i>cont'd</i> )	1880/2009, <i>Nenova et al.</i> A/67/40			X
	1295/2004, <i>El Awani</i> A/62/40			X
	1422/2005, <i>El Hassy</i> A/63/40			X
	1640/2007, <i>El Abani</i> A/65/40			X
	1751/2008, <i>Aboussedra et al.</i> A/66/40			X
	1776/2008, <i>Ali Bashasha and Hussein Bashasha</i> A/66/40			X
Madagascar (4)	49/1979, <i>Marais</i> Eighteenth session Selected Decisions, vol. 2	A/52/40		X*
	<i>*Note:</i> According to the annual report (A/52/40), the author indicated that he had been released. No further information provided.			
	115/1982, <i>Wight</i> Twenty-fourth session Selected Decisions, vol. 2	A/52/40		X*
	<i>*Note:</i> 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	A/52/40		X
	155/1983, <i>Hammel</i> A/42/40 Selected Decisions, vol. 2	A/52/40		X



State party and number of cases with violation	Communication number, author and relevant Committee report	Follow-up response received from State party			Follow-up dialogue ongoing
		Satisfactory response	Unsatisfactory response	No response	
Nepal (3)	1469/2006, <i>Sharma</i> A/64/40	X			X
	1761/2008, <i>Giri et al.</i> A/66/40	X			X
	1870/2009, <i>Sobhraj</i> A/65/40	X			X
Netherlands (5)	786/1997, <i>Vos</i> A/54/40	X		X	X
	976/2001, <i>Derksen</i> A/59/40	X			X
	1238/2003, <i>Jongenburger Veerman</i> A/61/40			X	X
	1564/2007, <i>X.H.L.</i> A/66/40			X	X
	1797/2008, <i>Mennen</i> A/65/40			X	X
New Zealand (2)	1368/2005, <i>Britton</i> A/62/40	X			X
	1512/2006, <i>Dean</i> A/64/40	X		X	X
Nicaragua (1)	328/1988, <i>Zelaya Blanco</i> A/49/40	X			X
Norway (2)	1155/2003, <i>Leirvag</i> A/60/40	X	X*		X
		A/61/40	(A/61/40)		
	*Note: Additional follow-up information expected.				
	1542/2007, <i>Aboushanif</i> A/63/40	X			X
		A/65/40			

State party and number of cases with violation	Communication number, author and relevant Committee report	Follow-up response received from State party			Follow-up dialogue ongoing
		Satisfactory response	Unsatisfactory response	No response	
Panama (2)	289/1988, <i>Wolf</i> A/47/40	X			X
	473/1991, <i>Barroso</i> A/50/40	X			X
Paraguay (3)	1407/2005, <i>Asensi</i> A/64/40	X			X
	1828/2008, <i>Domínguez</i> A/67/40				X
	1829/2008, <i>Benítez Gamarra</i> A/67/40				X
Peru (14)	202/1986, <i>Ato del Avellanal</i> A/44/40	X			X
	203/1986, <i>Muñoz Hermosa</i> A/44/40	X			X
	263/1987, <i>González del Río</i> A/48/40	X			X
	309/1988, <i>Orihuela Valenzuela</i> A/48/40	X			X
	540/1993, <i>Celis Laureano</i> A/51/40	X			X
	577/1994, <i>Polay Campos</i> A/53/40	X			X
	678/1996, <i>Gutiérrez Vivanco</i> A/57/40	X			X
	906/1999, <i>Vargas-Machuca</i> A/57/40				X

State party and number of cases with violation	Communication number, author and relevant Committee report	Follow-up response received from State party			Follow-up dialogue ongoing
		Satisfactory response	Unsatisfactory response	No response	
Peru ( <i>cont'd</i> )	981/2001, <i>Gómez Casafranca</i> A/58/40	X			X
		A/59/40			
	1058/2002, <i>Vargas</i> A/61/40	X			X
		A/61/40 and A/62/40			
	1125/2002, <i>Quispe</i> A/61/40	X			X
		A/61/40			
	1126/2002, <i>Carranza</i> A/61/40	X			X
		A/61/40, A/62/40			
	1153/2003, <i>K.N.L.H.</i> A/61/40	X			X
		A/61/40, A/62/40 and A/63/40			
	1457/2006, <i>Poma Poma</i> A/64/40	X			X
		A/65/40			
Philippines (11)	788/1997, <i>Cagas</i> A/57/40	X			X
		A/59/40, A/60/40, A/61/40			
	868/1999, <i>Wilson</i> A/59/40	X		X	X
		A/60/40, A/61/40, A/62/40		A/62/40	
	869/1999, <i>Piandiong et al.</i> A/56/40	X			X
		N/A			
	1089/2002, <i>Rouse</i> A/60/40			X	X
	1320/2004, <i>Pimentel et al.</i> A/62/40	X			
		A/63/40, A/64/40, 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).				

State party and number of cases with violation	Communication number, author and relevant Committee report	Follow-up response received from State party			Follow-up dialogue ongoing
		Satisfactory response	Unsatisfactory response	No response	
Philippines ( <i>cont'd</i> )	1421/2005, <i>Larrañaga</i> A/61/40			X	X
	1466/2006, <i>Lumanog and Santos</i> A/63/40	X			X
	1559/2007, <i>Hernandez</i> A/65/40			X	X
	1560/2007, <i>Marcellana and Gumanoy</i> A/64/40			X	X
	1619/2007, <i>Pestaño</i> A/65/40	X			X
	1815/2008, <i>Adonis</i> A/67/40				X
Portugal (1)	1123/2002, <i>Correia de Matos</i> A/61/40	X			X
Republic of Korea (119)	518/1992, <i>Sohn</i> A/50/40	X			X
	574/1994, <i>Kim</i> A/54/40	X			X
	628/1995, <i>Park</i> A/54/40	X			X
	878/1999, <i>Kang</i> A/58/40	X			X
	926/2000, <i>Shin</i> A/59/40	X			X
	1119/2002, <i>Lee</i> A/60/40	X			X

State party and number of cases with violation	Communication number, author and relevant Committee report	Follow-up response received from State party			Follow-up dialogue ongoing
		Satisfactory response	Unsatisfactory response	No response	
Republic of Korea (cont'd)	1321 and 1322/2004, <i>Yoon, Yeo-Bzum and Choi, Myung-Jin</i> A/62/40	X			X
	1593 to 1603/2007, <i>Jung et al.</i> A/65/40	X			X
	1642-1741/2007, <i>Jeong et al.</i> A/66/40	X	X		X
Romania (1)	1158/2003, <i>Blaga</i> A/60/40			X	X
Russian Federation (16)	712/1996, <i>Smirnova</i> A/59/40	X			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			X
	815/1997, <i>Dugin</i> A/59/40	X			X
	889/1999, <i>Zheikov</i> A/61/40	X			X
	1218/2003, <i>Platanov</i> A/61/40	X			X
	1232/2003, <i>Pustovalov</i> A/65/40	X	X		X
1278/2004, <i>Reshnetnikov</i> A/64/40			X	X	

State party and number of cases with violation	Communication number, author and relevant Committee report	Follow-up response received from State party		Unsatisfactory response	No response	Follow-up dialogue ongoing
		Satisfactory response				
Russian Federation (cont'd)	1304/2004, <i>Khoroshenko</i> A/66/40				X	X
	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
	1447/2006, <i>Amirov</i> A/64/40	X	A/65/40, A/66/40			X
	1577/2007, <i>Usaev</i> A/65/40	X	A/66/40			X
	1605/2007, <i>Zyuskin</i> A/66/40				X	X
	1866/2009, <i>Chebotareva</i> A/67/40					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	X		X
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 (22)	493/1992, <i>Griffin</i> A/50/40	X	A/59/40,* A/58/40			X

State party and number of cases with violation	Communication number, author and relevant Committee report	Follow-up response received from State party			Follow-up dialogue ongoing
		Satisfactory response	Unsatisfactory response	No response	
Spain ( <i>cont'd</i> )	<i>*Note:</i> According to this report, information was provided in 1995, but was not published. It appears from the follow-up file that, in this response, dated 30 June 1995, the State party challenged the Committee's Views.				
	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
	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
	1104/2002, <i>Martínez Fernández</i> A/60/40			X A/61/40	X

State party and number of cases with violation	Communication number, author and relevant Committee report	Follow-up response received from State party		Unsatisfactory response	No response	Follow-up dialogue ongoing
		Satisfactory response				
Spain ( <i>cont'd</i> )	1122/2002, <i>Lagunas Castedo</i> A/64/40				X	X
	1211/2003, <i>Oliveró</i> A/61/40				X	X
	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				X
	1364/2005, <i>Carpintero</i> A/64/40					X
	1381/2005, <i>Hachuel</i> A/62/40				X	X
	1473/2006, <i>Morales Tornel</i> , A/64/40	X				X
	1493/2006, <i>Williams Lecraft</i> A/64/40	X	X			
1531/2006 <i>Cunillera Arias</i> A/66/40					X	
Sri Lanka (14)	916/2000, <i>Jayawardena</i> A/57/40	X				X
	950/2000, <i>Sarma</i> A/58/40	X				X



State party and number of cases with violation	Communication number, author and relevant Committee report	Follow-up response received from State party		Unsatisfactory response	No response	Follow-up dialogue ongoing
		Satisfactory response				
Sri Lanka ( <i>cont'd</i> )	909/2000, <i>Kankanamge A/59/40</i>	X	A/60/40			X
	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
	1406/2005, <i>Weerawanza A/64/40</i>				X	X
	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	X A/65/40
	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 cases with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>			<i>Follow-up dialogue ongoing</i>
		<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</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			X
Sweden (2)	1416/2005, <i>Alzery</i> A/62/40	X			X
	1833/2008, X. A/67/40				X
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			
	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			
	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).				

<i>State party and number of cases with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Follow-up response</i>			<i>Follow-up dialogue ongoing</i>
			<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</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				
* The State party has not replied but it has met several times with the Special Rapporteur.						
	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				

State party and number of cases with violation	Communication number, author and relevant Committee report	Follow-up response received from State party	Follow-up response			Follow-up dialogue ongoing
			Satisfactory response	Unsatisfactory response	No response	
Tajikistan ( <i>cont'd</i> )	1117/2002, <i>Khomidova</i> A/59/40	X A/60/40, 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).					
	1195/2003, <i>Dunaev</i> A/64/40				X	X
	1200/2003, <i>Sattorova</i> A/64/40	X A/65/40, 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).					
1208/2003, <i>B. Kurbanov</i> A/61/40	X A/62/40, 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).						
1209/2003, 1231/2003 and 1241/2004, <i>Rakhmatov, Safarov and Salimov, and Mukhammadiev</i> A/63/40	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).						

<i>State party and number of cases with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>	<i>Follow-up response</i>			<i>Follow-up dialogue ongoing</i>
			<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	
Tajikistan ( <i>cont'd</i> )	1263/2004 and 1264/2004, <i>Khuseynov and Butaev</i> A/64/40	X A/65/40, 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).					
	1276/2004, <i>Idiev</i> A/64/40	X A/65/40, 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).					
	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					

State party and number of cases with violation	Communication number, author and relevant Committee report	Follow-up response received from State party			Follow-up dialogue ongoing
		Satisfactory response	Unsatisfactory response	No response	
Tajikistan ( <i>cont'd</i> )	1519/2006, <i>Khostikoev</i> A/65/40  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/66/40, A/67/40			
Togo (4)	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
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

<i>State party and number of cases with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>			<i>Follow-up dialogue ongoing</i>
		<i>Satisfactory response</i>	<i>Unsatisfactory response</i>	<i>No response</i>	
Trinidad and Tobago ( <i>cont'd</i> )	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
	684/1996, <i>Sahadath</i> A/57/40			X	X
	721/1996, <i>Boodoo</i> A/57/40			X	X
	752/1997, <i>Henry</i> A/54/40			X	X
	818/1998, <i>Sextus</i> A/56/40			X	X
	845/1998, <i>Kennedy</i> A/57/40			X A/58/40	X
	899/1999, <i>Francis et al.</i> A/57/40			X A/58/40	X

State party and number of cases with violation	Communication number, author and relevant Committee report	Follow-up response received from State party		Unsatisfactory response	No response	Follow-up dialogue ongoing
		Satisfactory response				
Trinidad and Tobago (cont'd)	908/2000, <i>Evans</i> A/58/40				X	X
	928/2000, <i>Sooklal</i> A/57/40				X	X
	938/2000, <i>Siewpersaud et al.</i> A/59/40				X A/51/40, A/53/40	X
Turkey (2)	1853/2008 and 1854/2008, <i>Atasoy and Sarkut</i> A/67/40					X
Turkmenistan (4)	1450/2006, <i>Komarovsky</i> A/63/40				X	X
	1460/2006, <i>Yklymova</i> A/64/40					X
	1530/2006, <i>Bozbey</i> A/66/40					X
	1883/2009, <i>Orazova</i> A/67/40					X
Ukraine (3)	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
	1535/2006, <i>Shchetka</i> A/66/40				X	X



State party and number of cases with violation	Communication number, author and relevant Committee report	Follow-up response received from State party			Follow-up dialogue ongoing
		Satisfactory response	Unsatisfactory response	No response	
Uruguay (39)	<p><b>A.</b> [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>Dermit Barbató</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]</p> <p><b>B.</b> [103/1981, <i>Scarone</i> 73/1980, <i>Izquierdo</i> 92/1981, <i>Nieto</i> 85/1981, <i>Romero</i>]</p> <p><b>C.</b> [63/1979, <i>Antonaccio</i> 80/1980, <i>Vasiliskis</i> 123/1982, <i>Lluberas</i>]</p>	X	X		X

State party and number of cases with violation	Communication number, author and relevant Committee report	Follow-up response received from State party	Satisfactory response	Unsatisfactory response	No response	Follow-up dialogue ongoing
Uruguay ( <i>cont'd</i> )	<b>D.</b> [4/1977, Ramirez Fourth session 6/1977, Sequeiro Sixth session 25/1978, Massiotti Sixteenth session 28/1978, Weisz Eleventh session 32/1978, Touron Twelfth session 33/1978, Carballal Twelfth session 37/1978, De Boston Twelfth session 44/1979, Pietraroia Twelfth session 52/1979, Lopez Burgos Thirteenth session 56/1979, Celiberti Thirteenth session 66/1980, Schweizer Seventeenth session 70/1980, Simones Fifteenth session 74/1980, Estrella Eighteenth session 110/1981, Viana Twenty-first session 139/1983, Conteris Twenty-fifth session 147/1983, Gilboa Twenty-sixth session 162/1983, Acosta Thirty-fourth session]					

State party and number of cases with violation	Communication number, author and relevant Committee report	Follow-up response received from State party			Follow-up dialogue ongoing
		Satisfactory response	Unsatisfactory response	No response	
Uruguay ( <i>cont'd</i> )	<b>E.</b> [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 <b>A:</b> 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>B:</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 <b>C:</b> these individuals were released on 14 March 1985; their cases were included under Act 15.737. On cases under <b>D:</b> 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 <b>E:</b> 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

State party and number of cases with violation	Communication number, author and relevant Committee report	Follow-up response received from State party		Unsatisfactory response	No response	Follow-up dialogue ongoing
		Satisfactory response				
Uruguay ( <i>cont'd</i> )	1637/2007, 1757/2008, and 1765/2008, <i>Canessa Albareda et al.</i> A/67/40					X
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		X
	931/2000, <i>Hudoyberganova</i> A/60/40	X	A/60/40	X		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 cases with violation</i>	<i>Communication number, author and relevant Committee report</i>	<i>Follow-up response received from State party</i>		<i>Unsatisfactory response</i>	<i>No response</i>	<i>Follow-up dialogue ongoing</i>
		<i>Satisfactory response</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

State party and number of cases with violation	Communication number, author and relevant Committee report	Follow-up response received from State party		Unsatisfactory response	No response	Follow-up dialogue ongoing
		Satisfactory response				
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
Venezuela (Bolivarian Republic of) (1)	156/1983, <i>Solórzano</i> A/41/40 Selected Decisions, vol. 2	X	A/59/40*	X		X
*Note: According to this report, information was provided in 1995 (unpublished). In its response, the State party stated that it had failed to contact the author's sister and that the author had not initiated proceedings for compensation from the State party. It made no reference to any investigation carried out by the State, as requested by the Committee.						
Zambia (5)	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
	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
	1859/2009, <i>Kamoyo</i> A/67/40					X