



# International Covenant on Civil and Political Rights

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## Human Rights Committee

### Communication No. 2202/2012

#### Views adopted by the Committee at its 108th session (8 to 26 June 2013)

<i>Submitted by:</i>	Rafael Rodríguez Castañeda (represented by Graciela Rodríguez Manzo)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Mexico
<i>Date of communication:</i>	25 October 2012 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 92/97 decision, transmitted to the State party on 31 October 2012 (not issued in document form)
<i>Date of adoption of Views:</i>	18 July 2013
<i>Subject matter:</i>	Access to the ballot papers used in the presidential election
<i>Procedural issue:</i>	Other procedures of international investigation or settlement
<i>Substantive issue:</i>	Right of access to information
<i>Articles of the Covenant:</i>	Articles 2 (paras. 1, 2 and 3 (a) and (c)), 14 (para. 1) and 19 (para. 2)
<i>Articles of the Optional Protocol:</i>	Articles 3 and 5 (para. 2 (a))

## Annex

### **Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (108th session)**

concerning

#### **Communication No. 2202/2012\***

*Submitted by:*

Rafael Rodríguez Castañeda (represented by  
Graciela Rodríguez Manzo)

*Alleged victim:*

The author

*State party:*

Mexico

*Date of communication:*

25 October 2012 (initial submission)

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

*Meeting on 18 July 2013,*

*Having concluded* its consideration of communication No. 2149/2012, submitted to the Human Rights Committee by Mr Rafael Rodríguez Castañeda 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 Rafael Rodríguez Castañeda, a Mexican national, born on 11 June 1944. The author claims that he is the victim of violations by Mexico of his rights under article 19 (para. 2) and article 2 (paras. 2 and 3 (a) and (b)), read in conjunction with article 14 (para. 1) and article 2 (para. 1), of the Covenant. The author is represented by Ms. Graciela Rodríguez Manzo.

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

The text of two individual opinions (concurring) by Committee members Mr. Neuman and Mr. Shany are appended to the present Views.

1.2 On 31 October 2012, the Special Rapporteur on new communications and interim measures, acting on behalf of the Human Rights Committee and in accordance with rule 92 of the Committee's rules of procedure, requested the State party to suspend the destruction of the ballot papers used in the election of 2 July 2006 while the Committee considered the communication.

1.3 On 14 November 2012, the General Council of the Federal Electoral Institute decided to suspend the destruction of the ballot papers used in the election of 2 July 2006, in compliance with the Committee's request for interim measures.

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

2.1 On 2 July 2006, a presidential election was held in the State party. According to the initial ballot count, the candidate who was ultimately acknowledged as the winner of the election obtained 15,000,284 votes, or 35.89 per cent of the vote, and the runner-up obtained 14,756,350 votes, or 35.31 per cent of the vote. Several political parties challenged the results before the district councils of the Federal Electoral Institute, and a partial recount of the votes was arranged by the specialized agency and court of final appeal for electoral matters, the Electoral Tribunal of the Federal Judiciary, which declared that, according to the definitive results, the top two candidates had obtained 35.89 per cent and 35.33 per cent of the 41,557,430 votes cast in total. The author states that the gap between the two candidates, initially reported at 243,934 votes, narrowed after the recount arranged by the Electoral Tribunal, to 233,831 votes, and the number of spoilt votes also shrank, from 904,604 to 900,373 votes. Despite the recount, one group continued to challenge both the election results and the vote counts due to various things that happened in the hours immediately after the polls closed. The quick-count results, for example, were not made public, and the figures published under the Federal Electoral Institute's preliminary election results programme for the number of votes cast in the presidential and senate elections did not tally.

2.2 It was against this background that, on 28 July 2006, immediately after the Electoral Tribunal had ruled on the validity of the presidential election, the author, who works as a journalist for the magazine *Proceso*, contacted the Liaison Office for Transparency and Access to Information of the Federal Electoral Institute to request access under the Federal Act on Transparency and Access to Public Government Information to all the used, unused and spoilt ballot papers from the polling stations set up for the election of 2 July 2006. He accordingly requested access to the offices of the country's 300 electoral districts so that the ballots cast in the presidential election could be counted again.<sup>1</sup>

2.3 On 1 September 2006, the Executive Directorate for the Organization of Elections informed the Information Committee of the Federal Electoral Institute that the author could not be granted access to the ballot papers because the electoral process was not over and was being reviewed by the Electoral Tribunal. Moreover, pursuant to article 234, paragraph 4, of the Federal Code of Electoral Institutions and Procedures in force at the time, the packets of ballot papers could not be opened unless an order to the contrary was issued by the Electoral Tribunal in accordance with the exceptions set forth in article 247 of the Code,

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<sup>1</sup> The Committee notes that, according to the copy of the request submitted to the Federal Electoral Institute and the author's application for *amparo*, of 18 September 2006, attached by the author to his communication of 28 July 2006, the author filed two additional petitions with the Liaison Office of the Federal Electoral Institute requesting copies of the election-day records and of the final ballot paper accounts issued by the 130,477 polling stations set up around the country for the presidential election, as well as the detailed records of the ballot paper dispatches, the detailed records of the vote-counting sessions, and the records of the vote counts of the country's 300 electoral districts.

which, like article 234, was a generally applicable government regulation (as established in article 1 of the Code). As to the validity of the presidential election, the Executive Directorate decided that the Federal Electoral Institute did not have the authority to address that part of the author's request since it fell to the Electoral Tribunal to declare the winner of the election and to respond to any challenges to the results.

2.4 On 5 September 2006, the Information Committee of the Federal Electoral Institute denied the author's request to access the ballot papers. However, to uphold the author's right to access electoral information, it ordered that the various records issued by the Institute in connection with the presidential election of 2006 be made available to him. The Information Committee indicated that it was unable to comply with the author's request because the electoral laws did not provide for general access to ballot papers; on the contrary, pursuant to articles 234 and 254 of the Federal Code of Electoral Institutions and Procedures, the inviolability of the requested electoral documents had to be respected and the documents destroyed once the Electoral Tribunal had dealt with all formal objections filed in relation to the election and had declared the winner. The electoral laws were based on preserving the secrecy of the vote, which meant that access to ballot papers could be arranged only in exceptional cases and only for the authorities of the Electoral Tribunal to allow them to corroborate any objections that might arise. The Information Committee also pointed out that, under the Federal Act on Transparency and Access to Public Government Information and the Federal Electoral Institute's rules of procedure on transparency and access to public information, ballot papers were not public documents, but material expressions of the electoral preference of voters. As far as access to election-day information was concerned, it should be considered sufficient to provide the interested party with access to the official records issued by the authorities of the Federal Electoral Institute when the polls closed. These records indicate, *inter alia*, the nature of the votes cast in each ballot box and how they add up; they are prepared and signed by the returning officers of the polling stations and endorsed by representatives of the political entities participating in the election.

2.5 On 20 September 2006, the author filed an application for *amparo* with the Fourth Administrative District Court of the Federal District (the Fourth Court) against the ruling of the Executive Directorate for the Organization of Elections of 1 September 2006, the decision of the Information Committee to deny his request to access the ballot papers, and the provisions of article 254, paragraph 2, of the Federal Code of Electoral Institutions and Procedures, according to which the envelopes containing electoral material, including ballot papers, must be destroyed once an election is over. The author claimed that the denial of his request violated his right to information, as set forth, *inter alia*, in the Constitution of the State party and article 19 of the Covenant. By that right, the general rule should be to publish information held by public bodies and to provide access to that information, subject only to the restrictions established by law, in order to satisfy an overriding public interest in a democratic society. Since they were not explicitly classified as restricted or confidential information, once the election was over, the ballot papers became documents that had not been made public. The author alleged that article 254, paragraph 2, of the Federal Code of Electoral Institutions and Procedures, was unconstitutional and violated the right to information, since the destruction of electoral material made it impossible to exercise the right to seek and receive information held by public bodies, and limiting that right could not be justified for the protection of national security or public order, or of public health or morals, or public peace. Finally, he stated that granting access to the polling station records neither justified the denial of access to the ballot papers nor fully satisfied his right of access to information, since his request referred to different information that would enable him to analyse how accurately the contents of the ballot papers had been recorded in the polling station records and identify any discrepancies that may have arisen during that

process, merely with the intention of ensuring the transparency of public administration and evaluating the performance of the electoral authorities.

2.6 On 21 September 2006, the Fourth Court rejected the author's application for *amparo* on the grounds that he was using it to challenge actions that could not be called into question through *amparo* proceedings but through the procedures for contesting election results established in the electoral laws.

2.7 On 5 October 2006, the author filed an application with the First Collegiate Administrative Court of the First Circuit (the First Collegiate Court) for the Fourth Court's decision to be subjected to a judicial review, claiming that the aim of his request was not to challenge any of the Federal Electoral Institute's resolutions or decisions on electoral matters, but to protect his fundamental right of access to information held by the State.

2.8 On 31 October 2006, the First Collegiate Court asked the Supreme Court of Justice to consider the application for judicial review filed by the author, which the Supreme Court agreed to do.

2.9 On 11 March 2008, the Supreme Court rejected the author's *amparo* application and confirmed the Fourth Court's decision that it was inadmissible. The Supreme Court ruled that article 254 of the Federal Code of Electoral Institutions and Procedures, on which the Federal Electoral Institute's decision to deny the author's request to access the ballot papers was based, was an electoral regulation since its purpose was to regulate an aspect of electoral procedure. Specifically, the article established what was to be done with the envelopes containing the used, unused and spoilt ballot papers, namely that they should be destroyed after the corresponding election. The application of the regulation that denied access to the envelopes containing the ballot papers was, by the same measure, an electoral matter. The author's request was therefore inadmissible, since regulations, acts and resolutions that were essentially electoral in nature could not be subject to *amparo* procedures.

2.10 On 24 April 2008, the author submitted a complaint and a request for precautionary measures to the Inter-American Commission on Human Rights, alleging a violation of his rights, under the American Convention on Human Rights (Pact of San José, Costa Rica), of access to information (arts. 13.1 and 13.2) and to an effective remedy (art. 25.1), both in conjunction with his right to judicial guarantees (art. 8.1) and the general obligations (arts. 1.1 and 2) established in the Convention. On 2 July 2008, the Commission asked the State party to adopt urgent measures to suspend the destruction of the ballot papers used in the presidential election of 2 July 2006.

2.11 On 2 November 2011, the Commission declared the author's complaint to be inadmissible for failing to present facts that might constitute a violation of the rights guaranteed by the Pact of San José, Costa Rica. The Commission found that the ballot paper accounts drawn up at each polling station, which had been made available to the author, systematically reflected the information contained in the ballot papers. Since, according to its jurisprudence, access to information covered both access to processed data and access to raw data, the Commission concluded that the information made available by the State party satisfied or could have satisfied the author's need for access to information and that the author had not provided any explanation of why that information would not have served his purpose.

2.12 On 3 October 2012, the General Council of the Federal Electoral Institute issued General Decision No. CG 660/2012 authorizing the ballot papers used in the 2006 presidential election to be destroyed between 12 and 26 November 2012.

2.13 The author claims that all effective domestic remedies were exhausted after the Supreme Court's ruling on the matter on 11 March 2008. Also, although he had previously

submitted a complaint to the Inter-American Commission on Human Rights, no complaint was being examined under another procedure of international investigation or settlement when he submitted his communication to the Human Rights Committee. In that regard, the author claims that although the Spanish version of article 5, paragraph 2 (a), of the Optional Protocol differs from the other language versions in that it establishes that the Committee shall not consider any communication from an individual unless it has ascertained that (...) the same matter “has not been examined” (“*no ha sido sometido*” in the Spanish) under another procedure of international investigation or settlement, the subparagraph has to be aligned with the English version, since that is the prevalent interpretation in the Committee’s jurisprudence and the one that is most favourable to the person. In other words, the subparagraph must be understood as meaning that the Committee “shall not consider any communication from an individual unless it has ascertained that the same matter *is not being examined* under another procedure of international investigation or settlement”. Moreover the Commission did not examine the merits of his complaint since it was declared inadmissible under article 47, paragraph (b), of the American Convention on Human Rights on the grounds that “there was no *prima facie* evidence of a violation of the rights protected by the Convention”. The communication therefore meets the admissibility criteria established in article 5, paragraphs 2 (a) and (b), of the Optional Protocol.

### **The complaint**

3.1 The author claims to be the victim of violations by the State party of his rights under article 19 (para. 2) and article 2 (paras. 2 and 3 (a) and (b)), read in conjunction with article 14 (para. 1) and article 2 (para. 1) of the Covenant.

3.2 In relation to the alleged violation of article 19, paragraph 2, the author contends that the Federal Electoral Institute’s denial of his request to access, once the election was over, the used, unused and spoilt ballot papers from all the polling stations set up for the 2006 presidential election violated his right to seek, receive and impart information. He was thus denied the right to learn what had happened in that election and hence his right to question, investigate and consider whether public functions were being performed adequately by the Federal Electoral Institute. As a general rule, all information in the possession of any State body is public information, and access to it may only be restricted temporarily and on an exceptional basis. The State party is thus obliged to provide information that is of public interest regarding any of its activities, unless the restrictions permitted by the Covenant have been applied.

3.3 The Federal Electoral Institute’s denial of his request constituted an excessive restriction of his right of access to the information held by the State without there being reasonable or sufficiently serious grounds for imposing that restriction, given that the purpose of his request did not pose a threat to national security, public order or the rights of third parties. The State party cannot, therefore, invoke any of the grounds set forth in article 19, paragraph 3, of the Covenant to justify that decision. Restrictions must have a legitimate purpose and must be necessary in a democratic society, that is, they must be geared towards serving the public interest. Any restrictions imposed must, consequently, be proportional to the interest that justifies them, further the legitimate purpose for which they are imposed and infringe as little as possible on the effective exercise of human rights.

3.4 The decision of the Supreme Court of Justice that rejected the author’s appeal and upheld the ruling of the Fourth Court constituted a violation of the right to an effective remedy, established in article 2, paragraphs 3 (a) and (b), read in conjunction with article 14, paragraph 1, of the Covenant, since it arbitrarily denied the author legal protection of his rights and prevented his case from being heard with all due judicial guarantees. The Supreme Court violated the principle of legality in departing from its own precedents and declaring the subject of the author’s request to be an electoral matter. The provision

regulating the destruction of the ballot papers used in the presidential election, set forth in article 254 of the Federal Code of Electoral Institutions and Procedures, should not be considered an electoral regulation since, pursuant to article 170 of that same Code, the electoral process ended the moment the Electoral Tribunal declared the election valid and announced the winner. Moreover, in an *amparo* procedure, the strictest interpretation must be applied when determining what is to be understood as an essentially electoral matter.

3.5 The author maintains that filing the *amparo* application was the only appropriate way to defend his right of access to information. Under the legislation in force at the time, filing an appeal for transparency with the Federal Electoral Institute, through which he could try to have the decision denying him access to the ballot papers overturned, was neither an adequate nor an effective remedy since it would not allow him to challenge the constitutionality of article 254 of the Federal Code of Electoral Institutions and Procedures. The procedure established for defending electoral-political rights through the judicial authorities for electoral matters would also be inadequate in his case because the request for information he had filed with the Federal Electoral Institute did not pursue any electoral purpose and the procedure would not allow him to request the suspension of the destruction of the ballot papers either.

3.6 As to article 2, paragraph 2, of the Covenant, the author alleges that the State party failed to adopt timely measures to bring its national legislation into line with the Covenant and give effect to the rights recognized therein. Article 302 of the new Federal Code of Electoral Institutions and Procedures of 2008 in fact retains the provision ordering the destruction of ballot papers once an election is over instead of ordering that they be preserved in archives that are accessible to all interested persons to protect the right of access to public information.

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

4.1 On 12 November 2012, the State party submitted its observations on the admissibility and merits of the communication and requested that the Committee declare the communication inadmissible under article 5, paragraph 2 (a), or else under article 3, of the Optional Protocol. The State party adds that the submission of its observations should not be understood or interpreted in any way as acceptance of the Committee's competence to rule on the admissibility or merits of the communication.

4.2 The State party argues that the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol since the same matter has been submitted by the author for examination under another procedure of international investigation or settlement, namely that of the Inter-American Commission on Human Rights. The Commission is an international, public, quasi-judicial, independent body that meets the criteria for classification as a procedure of international investigation or settlement, as referred to in article 5, paragraph 2 (a), of the Optional Protocol.

4.3 Although the Committee has acknowledged the existence of discrepancies between the English, French and Spanish versions of article 5, paragraph 2 (a), of the Optional Protocol,<sup>2</sup> the Protocol does not establish any hierarchy, preference or priorities among the versions since, according to article 14, paragraph 1, all the texts are equally authentic. Pursuant to the 1969 Vienna Convention on the Law of Treaties, a text must 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. Furthermore, according to article 33, paragraph 3, of the Convention, the authentic Spanish version and its contents are

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<sup>2</sup> The author refers to communication No. 986/2001, *Semey v. Spain*, Views adopted on 30 July 2003.

presumed to have the same meaning as the other language versions. In this context, since Spanish is the official language of the State party, the State party's accession to the Protocol was based on the Spanish text and the State party assumed its obligations under the Protocol in accordance with the wording of that text. The State party is therefore in no way bound by the authentic texts of the Protocol that exist in other languages.

4.4 The author's claim that the Spanish version of the Protocol has been aligned with the English version has no legal basis in the law of treaties. The State party submits that, moreover, the interpretation given by the Committee to the Spanish text of article 5, paragraph 2 (a), of the Optional Protocol during its fourth session, when it decided that the term "*sometido*" in the Spanish version should be interpreted in the light of the other versions, i.e. that it should be understood as meaning "is being examined" by another procedure of international investigation or settlement,<sup>3</sup> was a unilateral decision that was in no way binding on the States parties to the Optional Protocol. Furthermore, this matter has not been addressed in the meetings of the State parties or on any other occasion in such a way that would make it possible to suppose or infer that the States parties, directly or indirectly, agree with or assent to the interpretation decided on by the Committee. Therefore, the authentic Spanish text is the valid version of the Optional Protocol for the State party and for all the States that ratified it in Spanish.

4.5 When it acceded to the Optional Protocol, the State party did not enter a reservation to article 5, paragraph 2 (a), to deny the Committee jurisdiction when a matter has been submitted to another procedure of international investigation or settlement, since its accession was based on the Spanish version of the text, whose terms it accepted and by whose terms it agreed to be bound. It would have been absurd to formulate a reservation to ensure that what was already clearly established in the text of the Protocol was understood.

4.6 The State party disputes the author's allegation that the most favourable provision must be applied since what is under discussion is not the application of two different provisions but whether the equally authentic Spanish text of an international treaty must be applied. The State party also points out that the decision of the Inter-American Commission on Human Rights to reject the author's complaint was based on an examination not only of procedural matters, but also of the merits of the complaint, and that the Commission found no evidence of a violation of the author's human rights.

4.7 In relation to the merits of the communication, the State party points out that the complaint filed by the author with the Commission referred to the same facts and legal issues that he now brings before the Committee. The Commission assessed the merits of his allegations regarding the right to information and concluded that the information contained in the polling station records of the 2006 election that were made available to the author satisfied his right of access to information. The State party reiterates the arguments it presented to the Commission at the time, especially the argument that the right of access to information of the author and of citizens in general in the 2006 election was guaranteed through the electoral results information system. The contents of the ballot papers were reflected in the ballot paper accounts that present the outcome of the vote, as recorded by randomly selected citizens. All the polling station records of the 2006 election, as well as the district vote counts, are public and accessible. These records reflect the will of the voters inasmuch as they record the number of votes cast for each candidate, the number of spoilt ballot papers and the number of unused ballot papers. Moreover, the scrutiny of the ballot papers is carried out in the presence of representatives of the political parties and, in some cases, election observers.

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<sup>3</sup> *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 40 (A/34/40), 1979*, para. 584 (see CCPR/C/SR.88 of 24 July 1978).

4.8 The public dissemination and transparency of election results is guaranteed by the relevant provisions of the Federal Code of Electoral Institutions and Procedures. The public has access to the election results even before the definitive results have been computed. Once the scrutiny and counting of votes has been completed, the election results are published in notices, which are displayed in the offices of the returning officers and local and district councils. The results are also recorded in the ballot paper accounts.

4.9 The ballot papers themselves are not made available to the public, and the Federal Code of Electoral Institutions and Procedures stipulates that they must be destroyed once the electoral process has concluded. The election laws of other States in the region also establish specific procedures for destroying ballot papers. The destruction of ballot papers cannot be considered an infringement on the right of access to information: it is a rational measure that reflects the definitive nature of elections and eliminates the costs of handling and storing ballot papers.

4.10 Although neither the Optional Protocol nor the Covenant establish time limits for the submission of communications, the submission of this case six years after the last domestic remedy was exhausted, without any explanation for the delay, constitutes an abuse of the right of submission and grounds for declaring the communication inadmissible under article 3 of the Optional Protocol. Moreover, considering that the right that the author alleges has been violated is essentially identical under the American Convention on Human Rights and the Covenant, it is clear that the submission of the communication to the Committee was made not to seek the application of a provision that afforded greater protection, but to have the Committee serve as a review body for a substantive decision taken in the inter-American human rights system. The aim of the Optional Protocol, however, is not to convert the Committee into a review body for other procedures of international investigation or settlement. Nor is it to duplicate procedures by examining a case on the basis of provisions whose content is essentially identical.

4.11 As to the Committee's request for interim measures, transmitted to the State party on 31 October 2012, the State party submits that the Committee exceeded its authority in making such a request, first, because the case before the Committee did not involve a threat to a person's life, physical integrity or security and, second, because the Committee did not indicate the objective parameters or criteria on the basis of which it was able to conclude that irreparable harm to the author's right was imminent, let alone provide evidence of the existence of a serious or urgent situation.

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

5.1 On 21 January 2013, the author submitted comments on the State party's observations. With regard to the admissibility of the communication, it would seem the State party does not consider there to be other grounds for declaring the matter inadmissible than those invoked under article 3 and article 5, paragraph 2 (a), of the Optional Protocol.

5.2 In relation to article 5, paragraph 2 (a), of the Optional Protocol, the author submits that the State party's arguments on the scope and interpretation of the authentic Spanish text are not supported by the Vienna Convention on the Law of Treaties. The State party cites article 33 of the Convention but does not seem to accept that, when the text of a treaty is authentic in several language versions, all of them are presumed to have the same meaning unless a difference arises that cannot be resolved in accordance with articles 31 and 39 of the Convention.

5.3 The discrepancies between the authentic texts, including the Spanish one, must be resolved by reconciling the texts in accordance with the object and purpose of the Covenant and the Optional Protocol, and in the light of the principle of good faith, the need to serve a useful purpose and the *pro persona* principle. Although the Optional Protocol establishes a

procedure that in itself is a means, albeit one among many, for ensuring that persons have an effective remedy for claiming their rights, these discrepancies must be resolved in a way that favours the admissibility of communications related to the protection of persons and their rights.

5.4 The author claims that his position with regard to article 5, paragraph 2 (a), of the Optional Protocol is in keeping with the prevailing interpretation of that provision, i.e., that it may only be cited as grounds for declaring a communication inadmissible when the matter is being examined under another procedure of international investigation or settlement, unless a declaration or reservation stating otherwise is made at the appropriate time. Several States parties from other regions, for example, including two whose official language is Spanish, have made such reservations or declarations in relation to the provision in question.

5.5 Subsequent practice in the implementation of the Optional Protocol confirms the interpretation outlined above, particularly the acceptance of the Committee's jurisprudence regarding communications on matters previously considered by another international body and the acceptance of rule 96 (e) of the Committee's rules of procedure. It is up to the Committee to determine its own jurisdiction.

5.6 With regard to the State party's observations in relation to article 3 of the Optional Protocol, the author contends that, as far as the admissibility of a communication is concerned, whether the matter has been previously submitted to another international procedure is irrelevant since the Committee has the authority to consider such cases according to its own rules on jurisdiction. Also, the submission of the communication does not constitute an abuse of a right under rule 96, paragraph (c), of the Committee's rules of procedure, since the domestic remedies were not exhausted until 11 March 2008, when the Supreme Court of Justice declared the application for *amparo* to be inadmissible. Furthermore, the international procedure undertaken with the Inter-American Commission on Human Rights ended only on 2 November 2011.

5.7 The State party argues that the communication is inadmissible under article 3 of the Optional Protocol because it has been previously examined by another procedure of international investigation or settlement under substantially identical provisions, but that is not a reason established in the Optional Protocol for declaring a communication inadmissible. The similarity between the rights contained in different international human rights treaties cannot prevent alleged victims of rights violations from seeking reparation. On the contrary, according to the *pro persona* principle, no provision of an international human rights treaty may be used as a pretext for limiting access to higher standards of protection in other forums, which includes the procedures put in place to safeguard those rights.

5.8 The Commission did not rule on the merits of the author's complaint, but merely performed a basic analysis to conclude that it was inadmissible, without prejudging its merits.

5.9 As to the merits of the communication, the author reiterates his allegations and submits that these have not been refuted by the State party.

5.10 The distinction drawn between raw and processed data by the Commission in its consideration of the alleged violation of the right of access to information is irrelevant since article 6, paragraph A, section I, of the Constitution of the State party states that all information in the possession of any public body is, as a general rule, to be considered public information, without drawing a distinction between information comprising raw data and that comprising processed data.

5.11 Furthermore, the author cannot be required to provide evidence to demonstrate why access to the processed information presented in the voting records was insufficient or of no use, since, pursuant to article 6, paragraph A, section III, of the Constitution, there is no need for those who request access to public information to explain their interest or justify the use they intend to make of the information.

5.12 It is pointless to speculate whether access to the polling station records or the election results would or might satisfy the author's right of access to the information he requested out of his professional interest as a journalist, since those results and the requested ballot papers are different documents. Such a position is particularly untenable if based on the supposed risk that the raw information might be altered, as was argued by the Commission. The destruction of the ballot papers constitutes an infringement of the right of access to information established in article 19, paragraph 2, of the Covenant. According to the Committee's general comment No. 34 on freedoms of opinion and expression (article 19 of the Covenant) (CCPR/C/GC/34), the right of access to information covers all documentation regardless of the form in which the information is stored, its source and the date of production. Moreover, the State party's own Constitution acknowledges that the duty to preserve documentation held by public bodies is a cornerstone of that right, regardless of whether raw or processed data are involved.

### **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 takes note of the arguments put forward by the State party that the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol, given that the same matter was submitted by the author to the Inter-American Commission on Human Rights, which declared it inadmissible since it contained no *prima facie* evidence of a violation of rights protected by the American Convention on Human Rights.

6.3 The Committee considers that the Spanish version of article 5, paragraph 2 (a), of the Optional Protocol, which states that the Committee shall not consider any communication from an individual unless it has ascertained that the same matter "has not been examined already" ("*no ha sido sometido ya*" in the Spanish) under another procedure of international investigation or settlement, can result in the Spanish version of this paragraph being interpreted differently from the other language versions.<sup>4</sup> The Committee considers that this difference must be resolved in accordance with article 33, paragraph 4, of the 1969 Vienna Convention on the Law of Treaties by adopting the meaning which best reconciles the authentic texts, having regard to the object and purpose of the treaty. The Committee recalls its jurisprudence, which states that the phrase *ha sido sometido* in the Spanish version must be interpreted in the light of the other versions, i.e. understood as meaning "is being examined" under another procedure of international investigation or settlement.<sup>5</sup> The Committee considers that this interpretation reconciles the meaning of

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<sup>4</sup> The authentic English text states: "The same matter is not being examined under another procedure of international investigation or settlement"; the authentic French text states: "La même question n'est pas déjà en cours d'examen devant une autre instance internationale d'enquête ou de règlement"; and the authentic Russian text states: "этот же вопрос не рассматривается в соответствии с другой процедурой международного разбирательства или урегулирования".

<sup>5</sup> Communication No. 986/2001, *Semey v. Spain*, Views adopted on 30 July 2003, para. 8.3.

article 5, paragraph 2 (a), of the authentic texts referred to in article 14, paragraph 1, of the Optional Protocol. The Committee therefore finds that there is no obstacle to the admissibility of the communication under article 5, paragraph 2 (a), of the Optional Protocol.

6.4 With regard to the requirement to exhaust domestic remedies, the Committee takes note of the author's claim that, when the Supreme Court's ruling of 11 March 2008 declared his application for *amparo* inadmissible, all domestic remedies were exhausted. In the absence of any observations by the State party on this subject, the Committee finds that there is no obstacle to the admissibility of the communication under article 5, paragraph 2 (b), of the Optional Protocol.

6.5 The Committee takes note of the State party's arguments that the communication must be declared inadmissible under article 3 of the Optional Protocol because it constitutes an abuse of the right to submit a communication inasmuch as it was submitted six years after the last domestic remedy had been exhausted and because it seeks to establish the Committee as a review body for a decision handed down by the Inter-American Commission on Human Rights. The Committee notes that the Commission declared the author's complaint inadmissible on 2 November 2011 and that the author subsequently submitted his communication to the Committee on 25 October 2012. Consequently, since the communication was submitted within three years of the conclusion of another procedure of international investigation or settlement, the Committee considers that, pursuant to rule 96 (c) of its rules of procedure, the timing of the submission of the communication in relation to the exhaustion of domestic remedies and to the decision of another international body does not constitute an abuse of the right to submit communications.

6.6 The Committee takes note of the author's claim that the Federal Electoral Institute's denial of his request to access the used, unused and spoilt ballot papers from all the polling stations established for the 2006 presidential election, together with the legal provisions that require the destruction of ballot papers once the election process is over, violate his right of access to information under article 19, paragraph 2, of the Covenant; that the denial of his request is not justified under article 19, paragraph 3, of the Covenant; and that, contrary to the State party's assertion, access to the polling station records was no substitute for access to the information requested. The Committee considers that, for the purpose of admissibility, the author has sufficiently substantiated his claim under article 19 of the Covenant.

6.7 As regards the author's claim under article 2, paragraphs 3 (a) and (b), read in conjunction with article 14, paragraph 1, the Committee takes note of his allegations that the decision of the Supreme Court of Justice that rejected the author's appeal constituted a violation of the right to an effective remedy. The Committee considers that this claim has been insufficiently substantiated for purposes of admissibility and declares it inadmissible under article 2 of the Optional Protocol.

6.8 The Committee also takes note of the author's allegation under article 2, paragraph 2, that the State party failed to adopt timely measures to bring its national legislation concerning the destruction of ballots papers once an election is over instead of ordering that they be preserved in archives that are accessible to all interested persons to protect the right of access to public information. The Committee recalls its jurisprudence in this connection, which indicates that the provisions of article 2 of the Covenant, which lay down general obligations for States parties, cannot, in and of themselves, give rise to a claim in a

communication under the Optional Protocol.<sup>6</sup> The Committee therefore considers that the author's contentions in this regard are inadmissible under article 2 of the Optional Protocol.

*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 under article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee takes note of the State party's arguments that the author's right of access to information was guaranteed by placing at his disposal the ballot paper accounts; that all these records reflect the will of the voters; that the public dissemination and transparency of election results is guaranteed by the relevant provisions of the Federal Code of Electoral Institutions and Procedures as once the scrutiny and counting of votes has been completed, the election results are published in notices and also recorded in the ballot paper accounts. However, the State party indicates that the ballot papers themselves are not made available to the public; that by law they must be destroyed once the electoral process has concluded; that the destruction of ballot papers cannot be considered an infringement on the right of access to information; and that it is a rational measure that reflects the definitive nature of elections and eliminates the costs of handling and storing ballot papers.

7.3 The Committee also notes the author's claim that his right to seek information enshrined in article 19, paragraph 2 of the Covenant was violated by the State party as the denial to access to the used, unused and spoilt ballot papers from all the polling stations set up for the 2006 presidential election constituted an excessive restriction of this right by the State party without there being reasonable or sufficiently serious grounds for imposing that restriction, given that all information in the possession of any State body is public information, and access to it may only be restricted temporarily and on an exceptional basis. In his case, the purpose of his request did not pose a threat to national security, public order or the rights of third parties. Therefore, it could not be restricted under article 19, paragraph 3, of the Covenant. Further, the author holds that there is no need for those who request access to public information to explain their interest or justify the use they intend to make of the information.

7.4 The Committee recalls that the right of access to information held by public bodies includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production (CCPR/C/GC/34, para. 18), and that States parties must make every effort to ensure easy, prompt, effective and practical access to such information (*ibid.*, para. 19).

7.5 The Committee refers to its jurisprudence that any restriction on the right to freedom of expression must cumulatively meet the following conditions set out in article 19, paragraph 3, of the Covenant: it must be provided for by law, it must serve one of the aims enumerated in article 19, paragraph 3 (a) and (b), and it must be necessary to achieve one of these purposes.<sup>7</sup>

7.6 The Committee observes the author claims that he requested access to the ballot papers to analyse how accurately their contents had been recorded in the polling station records and to identify any discrepancies that may have arisen during that process, merely with the intention of ensuring the transparency of public administration and evaluating the

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<sup>6</sup> See communications No. 1834/2008, *A.P. v. Ukraine*, decision adopted on 23 July 2012, para. 8.5, and No. 1887/2009, *Juan Peirano Basso v. Uruguay*, Views adopted on 19 October 2010, para. 9.4.

<sup>7</sup> Communication No. 1128/2002, *Marques de Morais v. Angola*, Views adopted on 29 March 2005, para. 6.8.

performance of the electoral authorities. The Committee also notes that the Information Committee of the Federal Electoral Institute rejected the author's request to access the ballot papers. The Institute did, however, place at his disposal the ballot paper accounts drawn up by randomly selected citizens at each polling station of the country's 300 electoral districts. According to the national legislation, those accounts list the number of votes cast for each candidate, the number of spoilt ballot papers and the number of unused ballot papers. By law, votes are scrutinized in the presence of representatives of the political parties, as well as by accredited election observers in some cases, and the results returned by each polling station may be challenged and submitted for review by higher authorities, as indeed occurred in the 2006 presidential election when the initial results were partially reviewed by the Electoral Tribunal.

7.7 Given the existence of a legal mechanism for verifying the vote count, which was used in the election in question; the fact that the author was provided with the ballot paper accounts drawn up by randomly selected citizens at each polling station of the country's 300 electoral districts; the nature of the information and the need to preserve its integrity; and of the complexity of providing access to the information requested by the author, the Committee finds that the denial of access to the requested information, in the form of physical ballot papers, was intended to guarantee the integrity of the electoral process in a democratic society. This measure was a proportionate restriction by the State party necessary for the protection of public order in accordance with the law and to give effect to electors' rights, as set forth in article 25 of the Covenant. In the circumstances, the Committee therefore considers that the facts before it do not reveal a violation of article 19, paragraph 2, 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 do not reveal a breach of any provision of the Covenant.

[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 Committee's annual report to the General Assembly.]

## Appendix

### I. Individual opinion by Committee member Mr. Gerald L. Neuman (concurring)

I fully concur with the Committee's Views on this communication. I write separately to add a few observations about how, in my opinion, the Committee's analysis sheds light on the right of access to information held by government.

The central paradigm of the right to freedom of expression under article 19, paragraph 2, of the Covenant is the right of communication between a willing speaker and a willing listener. The Committee further interprets article 19, paragraph 2, in the light of article 25, as embracing an auxiliary right of access to information held by public bodies that would prefer not to disclose it (see CCPR/C/GC/34, paragraph 18). This right is not derived from a simple application of the words "right ... to receive information" in article 19, paragraph 2, which articulate the more highly protected right to receive voluntary communications.<sup>a</sup>

The Committee's present Views refer, among other factors, to the complexity of arranging access to the voluminous information that the author requested, and the problems of integrity raised by the author's request for originals rather than copies. Such factors are often relevant to the reasonableness and proportionality of limitations on access to information.

In the circumstances of the present case, another important factor concerns the integrity of the electoral process and the confusion that would result if every citizen were entitled to conduct a private recount. Taken with other factors, these considerations outweigh the author's right of access. But the Committee is certainly not saying that article 19 would permit a State party to censor criticism of the conduct of an election, based on information that had already been released.

[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 Committee's annual report to the General Assembly.]

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<sup>a</sup> See communication No. 1470/2006, *Toktakunov v. Kyrgyzstan*, Views adopted on 28 March 2011 (individual opinion by Committee member Mr. Gerald L. Neuman (concurring)).

## II. Individual opinion by Committee member Mr. Yuval Shany (concurring)

1. I concur with the Committee that, under the circumstances of the case, denial by the State party of the author's request to access all of the election ballot papers did not violate the Covenant in view of the exceptionally broad nature of the request, on the one hand, and I share the real concerns that accommodating such a request might impose an excessively heavy burden on the State and complicate its ability to finalizing the election results.

2. I am concerned, however, about the language used in paragraph 7.7 of the Committee's Views, which appears to attribute weight to "the existence of a legal mechanism for verifying the vote count, which was used in the election in question" in reaching the conclusion that no violation of the Covenant has occurred. This may suggest, erroneously to my mind, that the freedom to seek and receive publicly available information generally depends on an individual's ability to prove the social benefits of his exercise of freedom, or that this freedom does not apply to election-related information held by public authorities if other election-monitoring mechanisms are available.

3. Article 19, paragraph 2, of the Covenant protects the "freedom to seek, receive and impart information and ideas of all kinds". According to the Committee's general comment No. 34 on freedoms of opinion and expression (article 19 of the Covenant), such information comprises "records held by a public body, regardless of the form in which the information is stored" (CCPR/C/GC/34, para. 18). There is no reason to doubt that ballot papers are generally covered by article 19, paragraph 2. Ballot papers constitute a particular form of record held by a public body, which contains important information on the voting preferences of the electorate. In conjunction with the ballot paper accounts and the results returned from the polling stations, access to the information derived from the ballot papers would have allowed the author to evaluate the actions of the Mexican federal election bodies (whose operation supports the implementation of article 25 of the Covenant).

4. The author's request to obtain the ballot papers is thus consistent with his freedom to seek and receive information under article 19, paragraph 2, of the Covenant and, like other ways of exercising freedom of expression, it does not need to be *prima facie* justified or motivated in order to be exercised (subject to possible limitations under article 19, paragraph 3). Furthermore, it appears that in the circumstances of the case, the information sought by the author could have provided him with socially valuable information about the actions of the federal election authorities and of the various guarantees of impartiality they offered. Thus, freedom to seek and impart information about election results is generally protected under article 19 of the Covenant; moreover, given the importance of fostering an informed public debate about the mechanisms through which elections are conducted and monitored, the author's freedom to access the ballot papers should have received a high degree of protection from the State party.

5. Nevertheless, like other Covenant rights, the freedom to seek and receive information pursuant to article 19, paragraph 2, is not absolute, even when it seeks to promote important public interests. Indeed, it may be subject, pursuant to article 19, paragraph 3, to restrictions provided by law and necessary: (a) for respect of the rights or reputation of others; (b) for the protection of national security, public order (*ordre public*), or public health or morals. Such restrictions may include the imposition of fees, which do

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not constitute an unreasonable impediment to access to information (see CCPR/C/GC/34, in particular paragraph 19), and must always be necessary and proportionate in nature.<sup>a</sup>

6. In the circumstances of the case, I agree with the rest of the Committee that the sweeping nature of the author's request to review all the ballot papers makes it exceptionally difficult for the State party to accommodate it in a logically feasible way that would protect the confidentiality of the election. The serious practical problems associated with the need to provide access to ballot papers in a way that would not harm the integrity of the process (e.g. under State supervision) and the legitimate interest of the State party in finalizing the election results within a relatively short period of time after the election, render the restriction of the author's freedom to access all of the ballot papers reasonable and proportionate, and thus compatible with the public order exception specified in article 19, paragraph 3. As a result, I am also of the view that no violation of article 19 of the Covenant has occurred in the circumstances of the present case.

[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 Committee's annual report to the General Assembly.]

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<sup>a</sup> See communication No. 633/95, *Gauthier v. Canada*, para. 13.6.