



United Nations

Report of the Human Rights Committee

Volume II (Part One)

**100th session
(11–29 October 2010)**

**101st session
(14 March – 1 April 2011)**

**102nd session
(11–29 July 2011)**

**General Assembly
Official Records
Sixty-sixth session
Supplement No. 40 (A/66/40)**

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United Nations • New York, 2011

Note

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**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. 1304/2004, *Khoroshenko v. Russian Federation*
(Views adopted on 29 March 2011, 101st session)***

<i>Submitted by:</i>	Andrei Khoroshenko (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Russian Federation
<i>Date of communication:</i>	15 June 2003 (initial submission)
<i>Subject matter:</i>	Right to life; torture; cruel, inhuman and degrading treatment; arbitrary detention; fair trial; right to retroactive application of the law with lighter penalty; discrimination; effective remedy
<i>Procedural issue:</i>	None
<i>Substantive issue:</i>	Degree of substantiation of claims
<i>Articles of the Covenant:</i>	2, paragraphs 1 and 3; 6, paragraphs 1 and 2; 7; 9, paragraphs 1-4; 10, paragraph 1; 14, paragraphs 1, 2 and 3 (a)-(e) and (g); 15, paragraph 1; 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 29 March 2011,

Having concluded its consideration of communication No. 1304/2004, submitted to the Human Rights Committee by Mr. Andrei Khoroshenko 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,

* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Helen Keller, 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. Krister Thelin and Ms. Margo Waterval.
The text of an individual opinion signed by Committee member Mr. Rafael Rivas Posada is appended to the present Views.

Adopts the following:

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

1. The author of the communication is Mr. Andrei Anatolyevich Khoroshenko, a national of the Russian Federation, born in 1968. He claims to be a victim of violations by the Russian Federation of his rights under article 2, paragraphs 1 and 3, article 6, paragraphs 1 and 2, article 7, article 9, paragraphs 1-4, article 10, paragraph 1, article 14, paragraphs 1, 2, and 3 (a)-(e) and (g), article 15, paragraph 1, 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 facts as presented by the author

2.1 On 21 November 1994, the author was arrested on suspicion of membership in a criminal gang involved in a series of armed attacks on drivers of motor vehicles during 1993, in which several drivers were killed, and their cars stolen and sold. He was convicted of multiple murders, banditry and armed robbery by the Perm Regional Court on 13 October 1995 and sentenced to death. His cassation appeal to the Supreme Court of the Russian Federation was dismissed on 18 January 1996. On 20 March 1996, the Presidium of the Supreme Court overruled the cassation decision. On 5 June 1996, the cassation appeal was rejected for a second time and the verdict was confirmed. A further appeal to the Presidium of the Supreme Court resulted in a 15 January 1997 decision of the Presidium of the Supreme Court, which re-qualified one of the crimes under a different article, but confirmed the death sentence. On 19 May 1999, his death sentence was commuted to life imprisonment by a Presidential pardon.

2.2 The author submits that upon his arrest he was not informed of the reasons for the arrest or of any charge. He was not brought before a judicial officer for the purpose of determining the lawfulness of his arrest. After two days in detention, his arrest was endorsed by a prosecutor, a non-judicial officer. The author maintains that there were no grounds that would justify his arrest under article 122 of the Criminal Procedure Code. He was not brought before the prosecutor, and had no opportunity to present arguments on the lawfulness of his arrest. He was detained for over 20 days without being formally charged, which occurred only in mid-December 1994. The author maintains that, according to article 90 of the Criminal Procedure Code, detention without charges was allowed only in exceptional circumstances and that in his case there were no such exceptional circumstances. The author also submits that while in detention, he was repeatedly beaten by investigators in order to extract a confession, and forced to make certain statements (not a confession) which he later retracted at the court hearing. He was not advised of his rights, such as his right not to testify against himself. The author also submits that, despite the fact that his relatives hired a lawyer to assist him a few days after his arrest, the latter was granted only limited access to him, and on numerous occasions he was interrogated in the absence of his lawyer. The author also submits that the investigating officer Mr. Sedov instructed the Head of the detention centre, in writing, not to allow the author any visitors other than members of the investigating team. The author maintains that the above treatment violated his rights under articles 7, 9, 10 and 14 of the Covenant. The author also complains that although he was entitled by law to a jury trial, the investigating officer told him after the end of the pretrial investigation that in the Perm region no jury panels had been established and therefore he must agree to be tried by a panel of professional judges, or the court would consider that he was attempting to prolong the proceedings.

2.3 The author submits that initially he was charged with one murder and that the decision regarding the charges was not reasoned, in violation of the requirements of articles

143 and 144 of the Criminal Procedure Code. He also submits that he was charged with four other murders only at the end of the preliminary investigation and that the investigators failed to inform him in a timely manner of the amended charges, in violation of article 154 of the Criminal Procedure Code. He submits that the above violated his rights under article 9, paragraph 2, and article 14, paragraph 3 (a), of the Covenant.

2.4 Throughout the proceedings the author maintained that he was innocent and that all he did was to assist a friend in moving several vehicles, without knowing that these were stolen. The author submits that in court he requested and was denied the opportunity to examine several important witnesses, in violation of his rights under article 14, paragraph (3) (e), of the Covenant. He considers that neither his version of events, nor any of the evidence that would or could have supported it, were taken into account by the court and that the latter only looked into the evidence confirming the “official” version of the events, thus violating its impartiality obligation under article 14, paragraph 1, of the Covenant. He maintains that the verdicts were based mostly on the “confessions” of the accused, which were extracted under duress. Further, prior to his conviction, newspaper articles and television programmes announced that those guilty of the crimes in question had been apprehended. The author considers that some of the information referred to in these features suggested police officials had assisted in their preparation and that the above violated the presumption of innocence.

2.5 The author also maintains that the courts did not evaluate on the substance or investigate his claims that he was tortured, but instead chose to “compare” these with evidence presented by the prosecution, and rejected them as a defence strategy, which also violated his right to a fair trial. Moreover, the refusal of the courts to initiate an investigation into his allegations of torture, according to the author violated his rights under article 7 of the Covenant.

2.6 The author submits that during the trial relatives of the deceased made threatening and abusive comments towards the accused and his wife, that his brother was beaten by some of the relatives on the first day of the trial and that the trial judge did nothing to address the hostile atmosphere in the court room. The author also submits that the judge ordered the author’s and other defendants’ relatives to leave the court room, and they were only readmitted when the verdict was read out. He considers the above actions to constitute violations of his rights under article 14, paragraph 1, of the Covenant.

2.7 The author submits that the very fact that he was on death row for a period of time, following an unfair trial, violated his rights under article 6 of the Covenant. He further states that, prior to the moratorium on death sentences in Russia in 1999, the punishment for the crimes he was convicted of was either death or 15 years imprisonment and after the moratorium, the crimes became punishable by life imprisonment. He considers this situation to be discriminatory and in violation of his rights under articles 15 and 26 of the Covenant and maintains that his sentence should have been commuted to 15 years of imprisonment.

2.8 The author submits that after the first instance verdict he was not afforded the possibility to adequately prepare for his appeal: all his notes from the trial were confiscated; he was not given a copy of the trial records; he was given a limited amount of paper, so that he could not even make a copy of the appeal for himself and was forced to write a draft on the back of the verdict. The author submits that the above violated his rights under article 14, paragraphs 3 (b) and 5, of the Covenant.

The complaint

3.1 The author contends that he has exhausted all available and effective domestic remedies.

3.2 He claims to be a victim of violations by the Russian Federation of his rights under article 2, paragraphs 1 and 3, article 6, paragraphs 1 and 2, article 7, article 9, paragraphs 1, 2, 3 and 4, article 10, paragraph 1, article 14, paragraphs 1, 2, 3 (a)-(e) and (g), article 15, paragraph 1, and article 26 of the Covenant.

State party's observations on admissibility and merits

4.1 On 17 January 2005, the State party submits that, on 13 October 1995, the author was convicted by the Perm Regional Court for the following crimes: banditry (sentenced to death), premeditated murder with aggravating circumstances (sentenced to death) and robbery committed by an organized criminal group (sentenced to 15 years of imprisonment).¹ For the totality of these crimes he was sentenced to death in accordance with article 40 of the Criminal Code of the Russian Federation. On 18 January 1996, the Criminal Panel of the Supreme Court amended the verdict for robbery to 15 years of imprisonment, but confirmed the cumulative death sentence against the author. Following a protest of the Deputy President of the Supreme Court, the Presidium of the Supreme Court on 20 March 1996 revoked the above decision and returned the case for a new cassation procedure. On 5 June 1996, the Criminal Panel of the Supreme Court confirmed the original verdict and sentence. On 15 January 1997, the Criminal Panel of the Supreme Court, following a review of the trial, re-qualified the acts of the author from article 77 to article 209, paragraphs 1 and 2, of the Criminal Code and sentenced him to 15 years of imprisonment for that crime. The Court again confirmed the death sentence for the totality of the crimes. On 19 May 1999, the author was included in a Presidential pardon and his death sentence was commuted to life imprisonment. On 18 April 2001, the Presidium of the Supreme Court amended the judgment, excluding the convictions under article 209, paragraph 2, and article 102 (e) and confirming the remaining convictions.

4.2 The State party submits that originally a criminal investigation against the author was initiated upon the discovery of the dead body of Mr. Minosjan, under article 103 of the Criminal Code (premeditated murder), and that other charges were added subsequently. On 21 November 1994, the author was arrested in Yekaterinburg, where he was hiding in order to avoid prosecution. He was taken to Perm on 23 November 1994 and detained based on Presidential Decree No. 1226 of 14 June 1994 "Regarding urgent measures for protection of the population from banditry and other organized crime". The above Decree was never declared unconstitutional and therefore the detention of the author was in accordance with the requirements of the law. On 19 December 1994, the Perm Prosecutor approved the author's detention, based on the gravity of the "crimes committed by him", as well as to prevent him from avoiding justice. On 20 January 1995, the detention was extended by the same prosecutor to four months and nine days, based on the same grounds. On 13 March 1995, the detention was further extended to seven months and nine days by the Deputy General Prosecutor. The State party submits that there is no information in the case files that judicial appeals against the detention orders were ever filed.

4.3 The State party submits that the author was not notified of the charges until 16 December 1994, 24 days after his arrest, which was within the lawful 30-days limit established by the Presidential Decree No 1226.² On 19 June 1995, following the discovery of new circumstances, the author was notified of additional charges, which was in accordance with article 154 of the Criminal Procedure Code. The State party submits that it is not possible to verify whether the author was informed of his rights upon arrest, since the arrest protocol was not found in the case files. On 24 and 28 November 1994, 8 February

¹ Articles 77, 102 and 146 (2) of the Criminal Code of the Russian Federation.

² The State party notes that this provision of the Decree was revoked by Presidential Decree No. 593 of 14 June 1997.

and 1 June 1995 the author was questioned as a suspect and as an accused in the absence of his attorney. In the interrogation protocols it is noted that he was informed of his right to have an attorney and he waived that right, which is confirmed by his signature in the protocols. The State party submits that, on 29 November 1994, the Perm Prosecutor's office received information from the local Bar association that an agreement for the defence of Mr. Khoroshenko was concluded with the attorney Orlov and issued an order for the appointment of the latter as a defence attorney as of 7 December 1994. The State party maintains that the above disproves the author's statements that the attorney was foisted on him by the investigation.

4.4 The State party confirms that upon the presentation of the charges to the author on 16 December 1994, he was not informed of his right not to testify against himself, as provided in article 51 of the Constitution. However, he was informed of his rights under article 46 of the Criminal Procedure Code, namely not to testify, to present evidence and to make motions. After being informed of his rights, he utilized his right to make a statement, as evidenced by the interrogations' protocols. On 7 December 1994, the author was questioned in the presence of his attorney. In the protocol there is a note that he was refused the possibility to have a confidential consultation with his attorney. On 12 January 1995 the author was questioned as an accused in the absence of his attorney. The protocol notes that he agreed to give a personal statement in the absence of his lawyer. Investigatory actions took place in the presence of his attorney on 23 February 1995 and on 29 April 1995, as noted in the protocols, but the latter did not sign the protocols for unknown reasons. All other investigative activities took place in the presence of the author's attorney. Between 23 June and 9 August 1995 the author and his lawyer familiarized themselves with the case materials, as confirmed by a protocol. The author did not complain regarding the performance of his lawyer, he did not request additional investigation, nor did he complain regarding unlawful methods of investigation.

4.5 The State party submits that the trial took place between 25 September and 13 October 1995 and the hearings were public; nothing in the case file confirms that the relatives and friends of the accused were removed from the court room at any point. During the trial the author was represented by the same attorney, who participated actively in the proceedings, asked numerous questions to witnesses, made legal statements and later submitted a cassation appeal. The author never complained regarding the quality of the defence, nor did he ask for the lawyer to be replaced.

4.6 The State party rejects the author's claim that his right to defence was violated since the court refused to question some witnesses and maintains that neither the accused, nor his attorney made such requests either prior to or during the trial. It also submits that in the case file there is no request from the author to allow him to familiarize himself with the protocol of the court hearing. The State party also submits that the law in force at the time provided for the death penalty for the crimes under articles 77 and 102 of the Criminal Code and therefore the sentencing was lawful. A Constitutional Court Ruling of 2 February 1999 abolished the use of the death penalty, but it did not constitute a ground for review of the criminal case against the author.

4.7 The State party also rejects the author's claim that the court panel that tried him was unlawful. In 1995, when the trial took place, article 15 of the Criminal Procedure Code provided a possibility for such cases to be heard by a panel of three professional judges, but only upon a decision of the respective court and with the agreement of the accused. Trials by panels of professional judges in capital punishment cases became mandatory only after 21 December 1996. In addition, from the case file it appears that the author did not submit a motion requesting that he should not be tried by a panel of professional judges.

4.8 The State party submits that, on 13 March 2001, the Head of the Department for Investigation of Premeditated Murders and Banditry rejected the author's request to open a

criminal investigation against police officers who allegedly applied illegal investigative methods in relation to him. On 28 April 2001, the author filed a complaint against the refusal, which was granted on 17 June 2002 by a decision of the Lenin District Court of Perm. On 5 September 2002, the Criminal Division of the Perm District Court confirmed the decision granting the author's request.

4.9 On 22 July 2002, the author submitted a complaint to the Lenin District Court of Perm, requesting that the court mandate the Prosecutor's office to reopen his case based on newly discovered circumstances. The Court granted his request by a judgment dated 29 July 2002. The prosecution filed a cassation appeal against that judgment, which, on 5 September 2002, was rejected by the Criminal Division of the Perm District Court.

4.10 On 5 August 2002, the author submitted a complaint to the Lenin District Court of Perm against the refusal of the Prosecutor's office to initiate criminal proceedings against the police officers in his case, since the prosecutor considered that their acts did not constitute crimes. On 12 September 2002, the Court granted the author's request to appoint his mother and brother as his representatives. On 15 October 2002, the author's brother was approved as a representative and was allowed to familiarize himself with the case file. On the same date the Court rejected the author's complaint against the Prosecutor's office's inaction. The Criminal Division of the Perm District Court confirmed the rejection on 10 December 2002.

4.11 On an unspecified date, the author filed a complaint in the Lenin District Court of Perm against the refusal of the Prosecutor's office to review his request for re-opening the criminal investigation in his case on the ground of newly discovered circumstances. The Court rejected his complaint on 16 October 2003 and the Criminal Division of the Court confirmed the rejection on 25 November 2003. Both courts reasoned their findings on procedural grounds.

4.12 On 2 October 2003, the author submitted to the Lenin District Court of Perm an appeal against the lack of action by the Prosecutor's office on his complaint of 7 January 2003, regarding possible crimes committed by some of its staff in relation to the author's trial. On 16 October 2003, the Court decided not to review the appeal, since according to a letter from the Prosecutor's office the latter had not received such appeal. The author did not appeal that court decision.

4.13 On 10 November 2002, the author submitted to the same court a complaint that he was not allowed by the Prosecutor's office to examine the case files upon the reopening of the case in relation to newly discovered circumstances. On 15 November 2002, the Court rejected his complaint. The Criminal Division of the Court overruled that decision and, on 9 January 2003, put an end to the proceedings on procedural grounds.

4.14 The State party rejects the author's claims that his right to a defence was violated since in 2000-2002 he was not allowed to familiarize himself with the entire case file and his relatives were not allowed to participate as defenders. The State party maintains that the domestic procedural legislation at the time did not provide for a right of the sentenced person to examine the case file while he was serving his sentence. It further maintains that according to article 47 of the Criminal Procedure Code only members of the Bar and representatives of the trade unions were allowed as defenders. The court also had the discretion to allow relatives, legal representatives or other person to participate as defenders in the trial phase of the proceedings. The law did not allow for relatives to be appointed as defenders of a convicted person.

4.15 The State party submits that according to the new Criminal Procedure Code, which entered into force on 1 July 2002, the prosecutor has the right to re-open proceedings if there are newly discovered circumstances, as well as to close the reopened proceedings in case he/she considers that the grounds are insufficient. The prosecutor's decision may be

appealed in court. On 11 November 2002, the author submitted to the Supreme Court a complaint against the 11 October 2002 decision of the prosecutor to put an end to the proceedings initiated in relation to newly discovered circumstances. The complaint was reviewed by the Supreme Court as an appeal in the order of supervision against the verdict and the subsequent court decisions. At the time of the State party's submission, the above complaint was pending an examination on its merits before the Presidium of the Supreme Court.

Authors' comments on the State party's observations and further submissions

5.1 On 11 April 2005, the author challenged the State party's submission that he was arrested while he was hiding from prosecution. He maintains that he was living with his family in a one-room apartment in a student dorm, that he was registered with the local authorities at that address and that he never attempted to hide his whereabouts from the police. He maintains that in the period when the crimes with his alleged participation took place, he was attending classes and sports events in the university and that could be confirmed by numerous witnesses. Accordingly, he challenges the lawfulness of his arrest, since the grounds on which it was justified were non-existent. He notes that the State party does not address his claim that after his arrest he was not brought before a judge or at least a prosecutor, nor was he given the possibility to challenge the lawfulness of his arrest, in violation of his rights under article 9, paragraph 3, of the Covenant.

5.2 The author notes that the State party does not address his claim that he was beaten by the arresting police officers. The author maintains that all action and omissions that he made during the pretrial investigation were explainable by his lack of knowledge regarding criminal proceedings, as well as by his constant fear of physical violence from the police officers. He maintains that he was systematically beaten by the detaining officers, either with the aim to extract information or confessions, or with the view to punish him when he provided "wrong" testimony, refused to speak or submitted complaints.

5.3 The author submits that even though Presidential Decree No. 1226, on the basis of which he was detained for the first 30 days, was never declared unconstitutional, its provisions are not compatible with the Russian Federation Constitution. He maintains that according to article 15 of the 1993 Constitution, it is the supreme law of the land and if another legislative act contradicts its provisions, these should not be applied, but rather the Constitutional provisions should be applied directly. The transitional provisions of the Constitution also read that, until a new Criminal Procedure Code is adopted, the previous regime regarding arrest and detention should be applied. The above regime only authorized detention for up to 10 days prior to presentation of the charges. The Presidential Decree did not constitute criminal procedure legislation and therefore it should have not been applied, since it contradicted the Constitution. The author reiterates that his detention under that Decree violated his rights under article 9 of the Covenant.

5.4 The author points out that the State party in its submission justifies his detention by the gravity of the crimes that he "had committed", therefore confirming that the authorities had decided that he was guilty long before he was even charged with any criminal offences. He maintains that the above violated the presumption of innocence, guaranteed in article 14, paragraph 2, of the Covenant.

5.5 The author further reiterates that he was initially charged with one murder, but between December 1994 and June 1995 he was interrogated as a suspect in another four murders, without being notified of the additional charges. He also maintains that the absence of the protocol from his arrest, as attested to by the State party, confirms that he was not informed of his rights upon arrest in violation of his rights under article 9, paragraph 2, of the Covenant. The author also notes that the State party confirmed that he was not informed of his rights under article 51 of the Constitution - namely the right to

remain silent – and maintains that the State party erroneously states that article 46 of the Criminal Procedure Code contained the above right and that he was therefore informed of it. The author submits that he was forced to utilize his “right” to make a statement and was forced to make confessions which were then used against him by the investigation.

5.6 The author notes that the State party confirmed the absence of his lawyer during some of the investigative actions and maintains that according to the domestic law the participation of a lawyer was mandatory in all investigative activities. The author maintains that article 49 of the Criminal Procedure Code provided that a lawyer may not participate if that is requested by the accused and that he never requested his lawyer to be absent, but merely was forced to sign that he agreed with his absence under threat of ill-treatment by the police officers. He also maintains that the protocols which were not signed by him or his lawyer, as confirmed by the State party, should not have been admitted as evidence according to the domestic criminal procedure.

5.7 The author notes that the State party confirmed that he was denied a confidential meeting with his lawyer on at least one occasion (before the 7 December 1994 interrogation); that it failed to comment on his claims that he was deprived of legal defence for the first 16 days after his arrest; that the investigator requested the Head of the detention centre not to allow him any visits; and that his first meeting with his lawyer was not permitted until seven days after his relatives hired Mr. Orlov to defend him. He maintains that the above facts violated his right to defence.

5.8 The author reiterates that he did not chose to be represented by Mr. Orlov and that his relatives were only offered one lawyer by the local Bar association when they wanted to hire a defender for him. He maintains that he was prohibited from meeting or corresponding with his relatives until 1997 and could not complain regarding the inadequate performance of the lawyer and request his relatives to look for another defender. The author also maintains that the lawyer failed to provide him with an adequate defence, that throughout the investigation and the trial phases the latter did not submit a single motion, with the exception of a cassation appeal and that he only asked a few questions during the trial which did not relate to the most important issues in the author’s opinion. The author maintains that he was forced to accept his “services” since he was not consulted at any point whether he wanted to be represented by him or whether he was satisfied by his work. He alleges that he requested orally another lawyer, but the Prosecutor’s office ignored his request and that the investigator told him to hire one, which he could not do because he was in detention and did not have contact with his relatives. He also maintains that since he was not properly notified of his rights, he did not know that he had the right to insist on having another defender.

5.9 The author confirms that he did not complain regarding beatings inflicted on him until the trial and maintains that he did not have the opportunity to do so earlier. His attorney, rather than submitting a complaint during the pretrial proceedings, advised him to endure it. When he attempted to file a written complaint, instead of transmitting it to the prosecutor, the staff of the detention centre gave it to the investigator and afterwards the police officers “beat out” of the author any desire to complain further. The author submits that he complained about torture during the investigative phase and his confession being extracted by force to all court instances and presented as evidence among others a video recording of the 7 December 1994 interrogation, where traces of violence were visible on his face, and protocols of interrogations dated 13 January, 16 February, 19 and 21 June 1995, where were noted his refusals to state that he gave statements voluntarily. His claims and evidence were ignored by the courts. The author submits that one of the individuals originally charged with the same crimes, his co-accused, Mr. Krapivin, died as a result of torture during the pretrial investigation and that he was afraid of a similar fate.

5.10 In response to the State party's statement that the author's requests to access the first instance court hearings' protocols, the author maintains that he made such requests twice; on 16 October 1995 and again when submitting his cassation appeal. He maintains that he is not responsible for the fact that the above requests were not only ignored, but were not even included in the files.

5.11 The author reiterates his claim that at the time of his trial, in some regions of the Russian Federation, accused were tried by panels of professional judges and in others by panels with the participation of jurors. He maintains that he was discriminated against based on geographic location, in violation of article 26 of the Covenant, since in the Perm region he could not get a jury trial. He makes reference to the Russian Federation Constitutional Court ruling No. 3-P, of 2 February 1999, which in a similar case recognized the existence of "temporary legal inequality of opportunities for persons subject to criminal prosecution for serious crimes against human life, for which the federal law prescribes the death penalty" in relation to the impossibility for the accused in some regions to get a jury trial. The author also maintains that the above Constitutional Court ruling created a situation in which individuals tried before its entry into force could be sentenced to death and those convicted after its entry into force could no longer be sentenced to death. He maintains that the Constitutional Court ruling should have led to automatic review of his case and to the lightening of the penalty. He considers that his rights under article 15, paragraph 1, and article 26 of the Covenant were violated.

5.12 The author submits that, on 23 March 2005, his appeal against the 11 October 2002 decision of the prosecutor to put an end to the proceedings initiated in relation to newly discovered circumstances was granted by the Supreme Court. The author maintains, however, that he had not received a copy of that court decision, nor had the prosecutor complied with it by the date the author submitted his complaint to the Committee.

5.13 On 23 May 2005, the author submitted additional comments, pointing out that the protocol of his arrest was listed among the case materials and therefore the State party should have been able to verify that he was not informed of his rights upon arrest. He maintains that the State party's officials have either destroyed that document or are refusing to make it available to the Committee, because it would confirm his claim.

State party's additional observations

6.1 On 26 December 2005, the State party confirmed that on 23 March 2005, the Presidium of the Supreme Court revoked the 11 November 2002 decision of the prosecutor to close the proceedings opened on the basis of new circumstances in the case of the author. The State party submits that the Prosecutor's office reopened the proceedings and that the latter were still pending, since the author was held in Moscow, in relation with his appearance at the hearing before the Supreme Court.

6.2 The State party confirms that the original warrant was issued by the investigator for a search for Khoroshenko, Nikolay Nikolayevich and not Khoroshenko, Andrei Anatolyevich (the author). It submits that a search warrant for the author is not available in the case file. It also reiterates that the author was arrested on 21 November 1994 and that the protocol of his arrest was not available in the case file. The State party submits, however that the "stub" of the protocol was "available in the case file", which allegedly meant that "the protocol had been prepared" and, possibly, a "copy could be found" in the prosecutor's files.

6.3 The State party submits that at the time of the author's arrest, the officer competent by law to authorize detentions was the prosecutor, who had the discretion to decide whether to remand into custody with or without questioning the detainee. The State party maintains that in the instant case the prosecutor did not deem it necessary to question the author

before authorizing the remand into custody and that his decision was in accordance with the Criminal Procedure Code. The State party denies that the author was questioned as an accused in four murders before he was formally notified of the additional charges.

6.4 The State party reiterates that written requests from the author to access the court hearings' protocols are not available in the case file. The State party reiterates that the author complained for the first time of being ill-treated by police officers only at the first instance trial. Simultaneously he filed requests with the Prosecutor's office to open investigation into the ill-treatment. The State party reiterates that the Prosecutor's office twice refused to open an investigation and that the first of these decisions was subsequently revoked by the courts. Regarding the author's claims that he was not allowed visits from and correspondence with his relatives, the State party submits that the relatives did not submit written complaints to the Prosecutor's office in that regard, nor did the author submit written complaints regarding his conditions of detention to the Presidents of the Lenin District Court of Perm and the Perm City Court.

Further submissions by the parties

7.1 On 5 September 2005, the author submitted a letter from the wife of one of his co-accused, confirming that she and the wife of another co-accused were removed from the courtroom during the first day of the trial immediately after the charges were read and that they were not allowed to return until the verdict was read.

7.2 On 25 February 2006, the author submitted comments on the State party's observations, reiterating that his arrest was illegal under the domestic law and therefore his rights under article 9 of the covenant were violated. He reiterates that the absence of the protocol of his arrest confirmed that he was not informed of his rights and that the State party was attempting to hide that fact from the Committee. He reiterates that in the period between 16 December 1994, when he was notified of the initial murder charge and 19 June 1995 (when he was notified of the additional charges), he was questioned as an accused in relation to four murders, banditry and robbery.

7.3 The author reiterates that he complained to the Committee regarding the torture he was subjected to during the pretrial investigation and regarding the first instance court's and the Prosecutor's office's failures to investigate his claims in 1994-1995. He reiterates that he was not complaining to the Committee regarding the refusal to allow visits of his relatives per se, but that the lack of contact with them prevented him from obtaining adequate legal assistance, since he could not communicate his wishes and address the problems with the lawyer hired to represent him. The author submits that he received a copy of the 23 March 2005 decision of the Supreme Court and stresses that the Court had recognized that the lower courts failed to assess some of the evidence relevant to the author's guilt and failed to question some witnesses which could have confirmed the author's alibi.

7.4 On 24 May 2006, the State party reiterated facts related to the author's conviction and sentencing and submitted that his allegations regarding unlawful methods used by the investigating officers and falsification of evidence had been evaluated by the Prosecutor's office three times, and the latter issued refusals to start a criminal investigation respectively on 28 June 2000, 7 May 2004 and 11 May 2004. The above decisions have been appealed by the author and confirmed by the courts.

7.5 On 27 July 2006, the author reiterated that the fact that his death sentence was not automatically subjected to a review following the 2 February 1999 Constitutional Court decision, declaring the death sentence anti-constitutional, constituted a violation of his rights under articles 15, paragraph 1, and 26 of the Covenant. He refers to a case, similar to his, where the Zlatoustov City Court reviewed a 1993 verdict of the Krasnodar court and,

on 29 January 2001, commuted the 25 years sentence to 15 years, based on the said Constitutional Court's ruling.

7.6 On 29 September 2006, the State party resubmitted its observations, previously sent to the Committee on 26 December 2005.

7.7 On 1 November 2006, the author submitted that he was finally provided with copies of some documents, which he had repeatedly requested before, inter alia: "stubs" from arrest protocols, dated 21 and 23 November 1994, which do not specify whether he was informed of his rights; the first sheet of an interrogation protocol, dated 24 November 1994, specifying that the author was informed of the right to "give explanations, file requests and demand recusations, and file complaints against acts of the investigation and the prosecution and have a lawyer from the moment of his arrest"; a copy of a note signed by the Senior investigator Mr. Sedov, requesting the Head of the Perm detention centre not to allow any visitors to the author with the exception of investigators, dated 1 December 1994; copies of the first and the last pages of interrogation protocols, dated 7 December 1994 and 12 January 1995, with handwritten notes, signed by the author that he was refused the permission to consult confidentially with his lawyer; a copy of the protocol of the presentation of the charges, dated 16 December 1994, confirming that he was detained without charges for 25 days; copies of interrogation protocols, dated 13 January and 16 February 1995, in which the author refused to respond to the question whether he made statements voluntarily; protocols of eight investigative actions, which took place in the absence of the lawyer of the author. The author notes that the protocol's "stubs" explicitly list as reasons for his arrest that he had "committed heavy crimes" and was hiding from prosecutions, which prior to a conviction, violated the presumption of innocence. The author also submits a copy of his cassation appeal, evidencing that he had raised all of the above issues in the domestic courts.

7.8 On 9 May 2007, the author submitted that the review of his case, (following the discovery of new circumstances), which the Supreme Court ordered the prosecution to conduct on 23 March 2005, was first postponed for nine months and then concluded with another decision of the prosecution to terminate the proceedings, dated 29 December 2005. The author submits that he was not given a copy of the decision, and therefore could not appeal it until four months later. He submitted an appeal to the Presidium of the Supreme Court on 17 May 2006. The Court returned the appeal six months later, requesting a copy of the prosecutor's decision, which the author supplied. By 9 May 2007, there was no response to the appeal.

7.9 On 22 January 2008, the author reiterated some of the facts of his complaint and submitted a letter signed by one of his classmates confirming that the author was with him when one of the murders for which the latter was convicted took place.

7.10 On 19 March 2008, the State party submitted that complaints of the author regarding his inability to access case files were reviewed on numerous occasions by the Perm courts in the period 2001-2004; that the case files related to those complaints had been destroyed after the expiration of the files conservation period and that for that reason it is not possible to ascertain if and why the author had not been informed in a timely manner of the dates of the court hearing and what were the reasons for the lengthy review of the complaints. The State party also submits that the appeal of the author against the 29 December 2005 decision of the prosecution to terminate the proceedings arrived in the Supreme Court on 28 November 2006. On 15 May 2007, the Court granted the author's request to participate in its hearing. On 12 September 2007, the Supreme Court rejected the author's appeal and on 5 October 2007 a copy of its decision was sent to the author.

7.11 On 2 May 2008, the author submitted that, according to the State party's submission, his appeal arrived on 28 November 2006 and the court hearing took place on

12 September 2007, while the article 406, 407 and 416 of the Criminal Procedure Code prescribe that such appeals should be reviewed within two months.

7.12 On 17 June 2008, the author reiterated the facts related to his attempts to obtain a review of his case based on newly discovered circumstances. He maintains that the lengthy proceedings (over seven years) and the controversial actions of the prosecutor's office and the courts led to systematic violations of his rights under article 14, paragraph 3 (c) and of article 2, paragraph 3, in conjunction with article 14, paragraph 3 (c) of the Covenant. The author maintains also that the lengthy periods when he had to wait for procedures to start or for decisions to be issued led to moral suffering, since he was suspended for years between hope and desperation and that violated his rights under article 7 and article 10, paragraph 1, of the Covenant.

7.13 The author maintains that the courts were well aware that letters of convicts are subjected to mandatory censorship, which delays the delivery of all correspondence by at least 10 days. Nevertheless, he was never informed of the dates of the court hearings sufficiently early, to allow him to inform his relatives or human rights defenders of the hearings' dates. The author maintains that that was done deliberately so that interested individuals and organizations could not attend the court hearings and that the above violated his rights under article 14, paragraph 1, of the Covenant.

7.14 The author also submits that according to articles 917 and 918 of the Criminal Procedure Code, a case can be re-opened based on new circumstances only if the Prosecutor's office submits to the court a conclusion that such new circumstances exist. He maintains that the above violates the principle of procedural equality, since even if a convict has new evidence, he/she is not entitled to submit it to the court, but must request the prosecution, which is a party to the trial, to do so. The author submits that in his case he had new evidence, which could have exonerated him, but the prosecution repeatedly refused to acknowledge that because they did not want to admit that their officers had made mistakes or even committed crimes during the period 1993-1995. The author maintains that the above violates his rights under article 14, paragraph 1, of the Covenant.

7.15 The author submits that, during the proceeding related to the re-opening of his case, in accordance with article 47 of the Criminal Procedure Code, he retained his status as an accused and therefore should have been entitled to free legal assistance. He maintains that not only did the State party not provide him with free legal assistance, but that, as a prisoner convicted to life imprisonment, he was not allowed to work, nor did he receive any pension or social assistance and therefore it was impossible for him to hire a lawyer. He maintains that the above violates his rights under article 14, paragraph 3 (b) and (d), of the Covenant.

7.16 The author submits that at the Supreme Court hearings on 23 March 2005 and 12 September 2007, as well as in his motions to the prosecution, he requested a number of witnesses to be summoned, in order to confirm the new circumstances based on which he requested the reopening of his case. His motions were ignored by the Court and the prosecution and the author maintains that the above violated his rights under article 14, paragraph 3 (b) and (e) of the Covenant. He submits that, despite his request to participate, the prosecution questioned some of these witnesses without his participation and that the above violates the principle of equality between the parties as established in article 14, paragraphs 1 and 3 (b) and (e), of the Covenant.

7.17 The author submits that during the hearing in the Supreme Court on 12 September 2007, the judges interrupted him repeatedly and did not allow him to explain his arguments. He also submits that following the hearing the judges deliberated for seven minutes, before announcing their decision. He maintains that he alone had submitted hundreds of pages of material and that the length of the deliberation indicated that the judges did not examine the

material, but had decided in advance on the outcome of the case. The author maintains that the proceedings were not fair, nor did they constitute an effective legal remedy and therefore his rights under article 14, paragraph 1, and under article 2, paragraph 3, in conjunction with article 14, were violated.

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 article 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 international procedure of investigation or settlement.³ 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.

8.3 The Committee notes the author's claims that the presumption of innocence with regard to him was violated, since there were publications and broadcasts in the media during the first instance trial declaring that he was guilty of the crimes he was convicted of later and since the State party's authorities referred to him as having "committed" crimes already at the pretrial stage of the proceedings. The Committee, however, observes that these claims do not appear to have been raised at any point in the domestic proceedings. The part of the communication relating to the alleged violations of article 14, paragraph 2, of the Covenant is accordingly inadmissible for failure to exhaust all domestic remedies in accordance with article 5, paragraph 2 (b), of the Optional Protocol.

8.4 The Committee notes the author's claim that he did not choose to be represented by the lawyer Mr. Orlov, that the latter was foisted on him and his relatives by the local Bar association and that he did not provide the author with adequate legal assistance. The Committee, however, observes that this claim does not appear to have been raised at any point in the domestic proceedings. Accordingly the Committee considers that the above claim is inadmissible for failure to exhaust all domestic remedies in accordance with article 5, paragraph 2 (b), of the Optional Protocol.

8.5 The Committee has noted the author's claim under article 15 of the Covenant (see paragraph 2.7 above). In the absence of any further pertinent information on file in this connection, 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.

8.6 The Committee notes the author's claim that he had been discriminated against since in some regions of the Russian Federation accused were tried by panels with the participation of jurors and that in the Perm region he could not have a jury trial. Based on the material before it, the Committee considers that the author has not shown sufficient

³ In his initial submission, the author stated that he had filed applications with the European Court of Human Rights (ECHR), and maintained that these related to a different matter than the petition submitted to the Human Rights Committee (namely to the refusal of the State party to reopen proceedings in his case in 2001-2002). The State party did not challenge that assertion. According to the registry of ECHR the author's applications were joined and then declared inadmissible according to articles 34 and 35 of the European Convention for the Protection of Human Rights and Fundamental Freedoms by a Committee of three judges on 16 December 2005.

grounds to support his argument that the above facts resulted in a violation of his rights under article 26 of the Covenant. Accordingly, the Committee considers that this part of the communication is unsubstantiated, for purposes of admissibility, and is therefore inadmissible under article 2 of the Optional Protocol.

8.7 In the Committee's view, the author has sufficiently substantiated, for purposes of admissibility, his claims under article 2, paragraphs 1 and 3, in conjunction with article 14, article 6, article 7, article 9, paragraphs 1-4, article 10, paragraph 1, article 14, paragraphs 1 and 3 (a)-(e), and (g), of the Covenant and therefore proceeds to their 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 submitted by the parties, in accordance with article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee notes the author's claims that upon his arrest he was not informed of the reasons for the arrest or of any charge; that upon arrest he was not advised of his rights, such as his right not to testify against himself or to have legal aid free of charge; that he was never brought before a judicial officer for the purpose of determining the lawfulness of his arrest; that there were no grounds that would justify his arrest under article 122 of the Criminal Procedure Code, nor were there in his case exceptional circumstances to justify his detention without charges in accordance with article 90 of the Criminal Procedure Code. The Committee observes that the State party does not refute the allegations that the author was not informed of his rights upon arrest, that he was not informed of any charges until 25 days later, that the detention was sanctioned by a prosecutor, who was not a judicial officer, and that the author did not have the opportunity to challenge the lawfulness of the arrest in front of the prosecutor. Accordingly, the Committee concludes that the author's rights under article 9, paragraphs 2, 3 and 4, of the Covenant were violated.

9.3 On the question of whether the authors' placement in custody was carried out in conformity with the requirements of article 9, paragraph 1, of the Covenant, the Committee notes 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 it is not arbitrary. In other words, the first issue before the Committee is whether the authors' deprivation of liberty was in accordance with the State party's relevant laws. The Committee also observes that the State party justified the lawfulness of the arrest and the detention without charges, stating that it was in compliance with the Presidential Decree No. 1226 "Regarding urgent measures for protection of the population from banditry and other organized crime". The Committee, however, observes that the Decree authorizes detention for up to 30 days when there is sufficient evidence of the involvement of a person in a gang or other organized criminal group suspected of committing serious crimes. Considering that, according to the State party's own submission, the original search warrant was issued against another person; that the Presidential decree did not in itself revoke the general criminal procedure rules regarding the grounds for arrest; that no judicial authority ever reviewed whether there was sufficient evidence that the author belonged to the said category of suspects; and in the absence of further justification by the State party, the Committee concludes that the authors' deprivation of liberty was not in accordance with the State party's relevant laws. Consequently, the Committee finds a violation of article 9, paragraph 1, of the Covenant.

9.4 The author claims that he was beaten and tortured by the police immediately after his arrest, during the 25 days when he was detained without charges, and throughout the pretrial investigation, and he was thus forced to make statements confirming the version of the events promoted by the investigation. The author provides information regarding his ill-

treatment, and claims the complaints made to this effect were ignored by the prosecution and the courts.

9.5 The Committee recalls that once a complaint about ill-treatment contrary to article 7 has been filed, a State party must investigate it promptly and impartially.⁴ Although the Perm District Court, in its verdict of 13 October 1995, mentions Mr. Khoroshenko's torture allegations, it rejects these with a blanket statement that the evidence in the case confirms the guilt of the accused. The Committee observes that, according to the State party's submission, the Prosecutor's office issued decisions refusing to open an investigation into the author's torture allegations on three occasions and that the above decisions ultimately had been confirmed by the courts. At the same time the Committee observes that neither the verdict and the decisions of the Prosecutor's office, nor the State party's numerous submissions in the present proceedings provide any detail as to the concrete steps taken by the authorities to investigate the author's allegations. The Committee considers that in the circumstances of the present case, the State party has failed to demonstrate that its authorities did address the torture allegations advanced by the author expeditiously and adequately, in the context of both domestic criminal proceedings and the present communication. Accordingly, due weight must be given to the author's allegations. The Committee, therefore, concludes that the facts before it disclose a violation of the rights of Mr. Khoroshenko under articles 7 and 14, paragraph 3 (g), of the Covenant.⁵ In the light of this conclusion, it is not necessary to examine separately the author's claim under article 10, paragraph 1, of the Covenant.

9.6 The Committee notes the author's claim that he was not informed of some of the charges against him until 25 days after his arrest and that he was informed of the rest of the charges at the end of the pretrial investigation. The Committee observes that the State party has confirmed the above facts. In this respect, the Committee finds a violation of article 14, paragraph 3 (a), of the Covenant.

9.7 The Committee notes the author's claims that he was not given adequate time and facilities to prepare his defence in that he did not have the opportunity to always freely and privately meet with his lawyer during the pretrial proceedings, that he did not receive a copy of the trial's records immediately after the first instance verdict was issued, that despite numerous requests, he was not given some documents he considered relevant for his defence, and that he was even limited in the amount of paper he was given to prepare his appeal to the second instance. The Committee observes that these allegations are confirmed by the materials submitted to it by the author and some are not refuted by the State party. In this respect, the Committee finds a violation of article 14, paragraph 3 (b), of the Covenant.

9.8 The Committee notes the author's claim that upon his arrest he was not informed of his rights to have legal assistance and to remain silent and observes that the State party did not refute this claim, but merely stated that the protocol of the arrest was missing and that the author was informed of his rights when he was notified of the initial charges, 25 days after the arrest. In this respect, the Committee finds a violation of article 14, paragraph 3 (d) and (g), of the Covenant.

⁴ 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. 14.

⁵ See, for example, communications No. 328/1988, *Zelaya Blanco v. Nicaragua*, Views adopted on 20 July 1988, para. 10.6; No. 1096/2002, *Kurbanov v. Tajikistan*, Views adopted on 6 November 2003, para. 7.4; No. 330/1988, *Berry v. Jamaica*, Views adopted on 7 April 1994, para. 11.7.

9.9 The Committee notes the author's claim that during the first instance trial the court refused to hear several witnesses which could have confirmed his innocence and that the court only accepted and evaluated evidence that supported the prosecution's version of the events. The Committee also notes the State party's objection that neither the accused nor his attorney made requests to question witnesses either prior to or during the trial. The Committee also observes that according to the author's own submission, in its decision of 23 March 2005 the Supreme Court ordered the prosecution to reopen the proceedings and question some of these witnesses. The Committee recalls its jurisprudence and reiterates that, generally speaking, it is for the relevant domestic courts to review or evaluate facts and evidence, unless their evaluation is manifestly arbitrary or amounts to a denial of justice.⁶ The Committee accordingly concludes that the material before it is insufficient to reach a finding of a violation of article 14, paragraph 3 (e), of the Covenant.

9.10 Having examined the author's claims under article 14, paragraph 3 (a), (b), (d) and (g), of the Covenant, the Committee finds that the above violations of the author's rights also constitute a violation of article 14, paragraph 1, read in conjunction with article 14, paragraphs 3 (a), (b), (d) and (g), of the Covenant.

9.11 The Committee notes the author's claims that the public and in particular his relatives and the relatives of other accused were excluded from the main trial. The Committee observes that the State party does not refute this claim, other than stating that nothing in the case file confirms the author's claim and notes that, according to the State party's own observations, the case files appear to be incomplete. The Committee recalls that all trials in criminal matters must in principle be conducted orally and publicly and that the publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large. Article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice.⁷ The Committee observes that no such justifications have been brought forward by the State party in the instant case. In this respect, the Committee finds a violation of article 14, paragraph 1, of the Covenant. In the light of this conclusion, and given that the author had been sentenced to death following a trial held in violation of the fair trial guarantees, the Committee concludes that the author is also a victim of a violation of his rights under article 6, read in conjunction with article 14, of the Covenant.

9.12 The Committee notes the author's claims that his attempts to obtain a review of his case based on newly discovered circumstances led to proceedings of excessive length (over seven years) and that the above delay caused him moral suffering, which he equates with torture and ill-treatment. The Committee observes that the State party does not dispute the alleged duration of the proceedings, but simply notes that about 11 months passed between the decision of the prosecution not to reopen the case and the date when the author's appeal arrived in the Supreme Court. In the absence of any other pertinent information on file, the Committee considers that, in the present case, the facts before it do not permit it to

⁶ See, for example, communication No. 1212/2003, *Lanzarote v. Spain*, decision on inadmissibility adopted on 25 July 2006, para. 6.3.

⁷ See the Human Rights Committee, 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, paras. 28 and 29 and communication No. 215/1986, *van Meurs v. The Netherlands*, Views adopted on 13 July 1990, paras. 6.1-6.2.

conclude to a violation of the author's rights under article 2, paragraph 3 (a), in conjunction with article 14, paragraph 3 (c), 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 6 read together with article 14; article 7; article 9, paragraphs 1-4; article 14, paragraphs 1 and 3 (a), (b), (d), and (g), 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 the author with an effective remedy including: conducting full and thorough investigation into the allegations of torture and ill-treatment and initiating criminal proceedings against those responsible for the treatment to which the author was subjected; a retrial in compliance with all guarantees under the Covenant; and providing the author with adequate reparation including 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 party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. In addition, it requests the State party to publish the Committee's Views.

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

Appendix

Individual opinion of Committee member Mr. Rafael Rivas Posada (partially dissenting)

The Human Rights Committee, in paragraph 10 of its Views on communication No. 1304/2004, *Khoroshenko v. the Russian Federation*, was of the view that the State party had [directly] violated article 6 [of the Covenant] read together with [several paragraphs of] article 14 of the Covenant. In my opinion, there was no direct violation of article 6, in view of the fact that the author was not subjected to the death penalty to which he had been sentenced, since his sentence was commuted to life imprisonment. I believe that the correct interpretation of article 6 of the Covenant consists in considering that direct violation of that article occurs only if the victim is deprived of life, which did not occur in this case.

The Committee took the view, quite rightly, that the State party had violated several provisions that guarantee the right to due process to which all accused are entitled. According to the jurisprudence it developed recently, it considered that if there has been a violation of the guarantees enshrined in article 14 of the Covenant and the trial leads to the death penalty, there is a direct violation of article 6 “read together with article 14”. I do not agree with this formulation, although I would agree with the formulation whereby there was a violation of article 14 “read together with article 6 of the Covenant”. That would have been in conformity with the meaning and scope of article 6, without any need to extend its interpretation unduly to cases where the victim has not been deprived of life.

I agree with all the other conclusions contained in paragraph 10 of those 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.]

**B. Communication No. 1346/2005, *Tofanyuk v. Ukraine*
(Views adopted on 20 October 2010, 100th session)***

<i>Submitted by:</i>	Vyacheslav Tofanyuk (represented by his mother, Tamara Shulzhenko)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Ukraine
<i>Date of communication:</i>	5 November 2004 (initial submission)
<i>Subject matter:</i>	Retroactive application of an interim law
<i>Procedural issue:</i>	Non-substantiation
<i>Substantive issue:</i>	Right to retroactive application of the law with lighter penalty
<i>Article of the Covenant:</i>	15, 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 20 October 2010,

Having concluded its consideration of communication No. 1346/2005, submitted to the Human Rights Committee on behalf of Mr. Vyacheslav Tofanyuk 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. Vyacheslav Tofanyuk, a Russian-speaking national of Ukraine born in 1974, who is serving a life sentence in Ukraine. He claims that his rights have been violated by the State party, but invokes no specific articles of the Covenant. However, the communication may raise issues under articles 7, 14, and 15, paragraph 1, of the Covenant. The Optional Protocol entered into force for Ukraine on 25 October 1991. He is represented by his mother, Ms. Tamara Shulzhenko.

The facts as presented by the author

2.1 On 10 April 1998, the Kyiv City Court found the author guilty under section 93 of the Criminal Code of 1960 for premeditated murder and sentenced him to death. His cassation appeal was dismissed by the Supreme Court on 2 July 1998.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Mr. Mahjoub El Haiba, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Fabián Omar Salvioli.

2.2 On 29 December 1999, the Constitutional Court declared that capital punishment was unconstitutional. From that date, the most severe punishment, with capital punishment removed, under the old Criminal Code of 1960 was 15 years of imprisonment or 20 years of imprisonment in case of a pardon. The author contends that following the decision of the Constitutional Court, he was entitled to have his sentence reviewed and his punishment changed to 15 years imprisonment under sections 6 and 54 of the Criminal Code and section 58 of the Constitution.

2.3 On 22 February 2000, the Parliament (Verhovnaya Rada) adopted the Law on amendments to the Criminal Code, the Criminal Procedure Code and the Correctional Labour Code, which entered into force on 4 April 2000. Under this Law the death sentences were commuted to life imprisonment. The commutation of the author's death sentence to life imprisonment was confirmed on 23 August 2000. The author submits that he was unaware of the commutation of his sentence and that the new penalty means that he was convicted twice for the same crime in violation of section 61 of the Constitution. He claims that the new law increased the penalty for the offence which he committed, vis-à-vis the penalty under the "transitional law" – the Criminal Code, which was in force between 29 December 1999, when the decision of the Constitutional Court was adopted, and 4 April 2000, when the law on amendments to the codes entered into force.

2.4 The author adds that there were several mistakes in his indictment and judgment in relation to his employment status and educational background as well as discrepancies in witness testimonies. He contends that the judges were not impartial and that the sentence was based only on his confession and did not take into account the mitigating circumstances. He adds that the well argued cassation appeal prepared by his lawyer was replaced by another one, which was inconsistent and vague, also prepared by the same lawyer.

2.5 The author argues that he submitted a petition to the Kyiv City Court on 20 January 2000 under section 74, parts 2 and 3, of the Criminal Code. He claims that under section 411 of the Criminal Procedure Code the court had an obligation to invite him to the court proceedings and re-examine his case. However, the court secretly commuted his death sentence to life imprisonment and responded to his petition only in 2004. He claims that his petition was submitted before the law on amendments to the Criminal Code was adopted, and that the court should have responded within the time limits established by law.

2.6 The author adds that, after his arrest on 29 June 1997, he was subjected to ill-treatment during the interrogations by the police. In particular, he was beaten with a rubber truncheon and, as a result, he lost consciousness.

The complaint

3.1 The author claims that his right to retroactive application of the law with lighter penalty was violated as the court did not apply the "transitional law" when commuting his death sentence.

3.2 The author claims that there were factual mistakes in his indictment and judgment and that the judges were not impartial. Furthermore, his conviction was based only on his confession and did not take into account the mitigating circumstances.

3.3 He claims that his right to re-examination of his sentence in his presence was not respected and that the imposition of the new penalty meant that he was convicted twice for the same crime.

3.4 He claims that he was subjected to ill-treatment during the interrogations by the police.

3.5 As stated, the author does not invoke any articles of the Covenant. However, as noted, the communication may raise issues under articles 7, 14, and 15, paragraph 1, of the Covenant.

State party's observations on admissibility and merits

4.1 On 28 April 2005, the State party submitted that the author and his accomplice were found guilty of premeditated murder and sentenced to death on 10 April 1998. The author's guilt was proven by witness statements, forensic and medical expertise.

4.2 During the pretrial investigation, the author confessed his guilt and gave a full description of the circumstances of the crime, including those that could only be known by the person who committed the crime. He did not complain of any unlawful methods applied during the investigation. His confession served as a basis for his conviction. The court assessed the evidence, qualified his actions and issued the sentence correctly. The cassation appeals by the author and his lawyer were rejected by the Supreme Court on 2 July 1998.

4.3 On 23 August 2000, the author's death sentence was commuted to life imprisonment under the Law on amendments to the Criminal Code, the Criminal Procedure Code and the Correctional Labor Code of Ukraine. This law removed section 24 of the Criminal Code on death penalty and replaced it by section 25, which establishes life imprisonment. Under chapter 2 of this law, death sentences which had not been executed at the time of its entry into force, should be brought in compliance with it. Therefore, the author's death sentence was commuted to life imprisonment.

4.4 The State party refers to the author's claim that he was sentenced twice for the same crime and argues that the claim is unfounded, as there was no violation of the criminal procedure law.

Author's comments on the State party's observations

5.1 On 11 July 2005, the author argued that the State party's comments are unfounded and false, provide only general information and fail to address the violations occurred during the investigation process.

5.2 The author adds that he was not provided with legal assistance for 10 days after his arrest. The lawyer appointed after this period did not defend his interests and his participation was a mere formality. On the first day after his arrest he was subjected to ill-treatment and was forced to testify against his accomplice in the crime. His lawyer also convinced him to do that in order to receive a lighter punishment. He later found out that his lawyer was also defending his accomplice, despite the conflicting interests. His requests to change his lawyer were denied by the court. He adds that his lawyer did not plead to change the charges or to obtain any expertise.

5.3 The author contends that the indictment and judgment do not contain important evidence, such as the number of wounds inflicted on the victim by each individual, as it is not clear who caused the wounds and who finally killed the victim. He adds that the judgment does not mention the intention of each accused persons, instead, the sentence generalized their actions and made a general conclusion.

5.4 The author adds that after his death sentence his lawyer refused to defend his interests at the cassation level, thus he had to ask another lawyer for help with the cassation appeal. However, later he found out that his initial lawyer had in fact submitted a cassation appeal on his behalf again for mere formality. Therefore, he explains that his case file contains two cassation appeals. He claims that this means that he did not have any legal assistance either during investigation or during court proceedings.

5.5 The author adds that the court proceedings were not impartial. His request to invite his witness, whose testimonies would have been important, was rejected. This witness was not examined during the pretrial investigation either, despite his requests. He claims that his request was not recorded in the court transcript therefore he has no evidence to prove other than a note written by this witness. He argues that the court transcript is not complete and contains false information in relation to testimonies given by witnesses. He adds that the court also ignored the extenuating circumstance under section 40 of the Criminal Code such as his confession and assistance to the investigation.

5.6 The author argues that all his case materials are in Ukrainian language, which he does not understand. He claims he was not provided with the assistance of a translator. The court transcript states that he chose the documents to be in Ukrainian language, which he claims is a false statement.

Further comments by the parties

6 On 28 November 2005, the State party reiterated the facts from its previous submission and added that the author's claims of unlawful methods of investigation involving physical pressure have not been confirmed. The author has been serving his sentence in Vinnits prison since 2001. During this time, he has not complained of detention conditions to either the prison administration or other State agencies.

7.1 On 1 March 2006, the author referred to the research study of a post-graduate student according to which a moratorium to the execution of the death penalty was adopted in 1996, when the commission to abolish the death penalty was created, but no legislative acts were adopted. The decision of the Constitutional Court of 1999 found section 24 and other sections of the Criminal Code regarding death penalty unconstitutional. It also obliged the Supreme Court to bring the Criminal Code in compliance with its decision. The decision of the Constitutional Court in itself introduces changes to the criminal law. Under section 152 of the Constitution, the provisions of laws that are declared unconstitutional are void from the moment of the adoption of the decision by the court. Accordingly, the changes in the Criminal Code were introduced already on 30 December 1999. In particular, section 24 and 23 other sections regarding the death penalty became null. The law in Ukraine does not require Parliament's confirmation for the amendments to enter into force. The Parliament only duplicates the decision of the Constitutional Court. He considers that the Parliament is responsible for introducing changes that have not yet been introduced by the Constitutional Court, but that are the natural consequence of changes made by the court.

7.2 The author refers to the above-mentioned study and suggests that life imprisonment contradicts current section 23, part 1, of the Criminal Code, which establishes that the most severe punishment is imprisonment for a definite period of time and suggests that the nature of life imprisonment violates several provisions of the Constitution and the Universal Declaration of Human Rights.

7.3 The author claims that the amendments to the Criminal Code made by the Parliament set a heavier penalty than the one resulting from the decision of the Constitutional Court. The latter should be the one applicable to his case, as under section 6 of the Criminal Code, the law which provides a lighter penalty is retroactive. He suggests that, inter alia, the persons who were sentenced to death before 29 December 1999 (Constitutional Court decision), but whose death sentence has not yet been executed, should benefit from the same procedure as established under section 405 of the Criminal Procedure Code. He suggests that the provision of the above "transition law" should be based on section 58, part 2, of the Constitution which stipulates that the law with the lighter penalty should be retroactive, despite the fact that it was not yet in force when the penalty was established.

7.4 On 16 July 2007, 4 June 2008, 2 December 2008 and 26 December 2008 the author submitted copies of his appeals to courts and to the Ombudsperson, all of which were refused. He also attached copies of newspaper articles and a legal analysis prepared by the Institute of State and Law on the subject of the abolition of the death penalty and its effect on convicts.

8.1 On 7 February 2008 and 21 November 2009, the State party submitted that the General Prosecutor's office has not found any basis on which to react to judicial decisions regarding the author. It refers to section 6 of the Criminal Code of 1960, which states that the crime and punishment is determined by the law which is in force at the time of commitment of a crime. A law that annuls punishment for an act of crime or that extenuates the punishment is retroactive and applies from the moment of its enactment even to those acts that were committed prior to its adoption. A law that establishes the punishment for an act of crime or establishes a heavier penalty cannot be applied retroactively. It submits that the decision by the Kyiv City Court fully complies with this provision of the code. The penalty for the author's acts established under section 93 (a) of the Criminal Code of 1960, which was in force at the time of commitment of the crime, was 8 to 15 years imprisonment or death penalty with confiscation of property. With the adoption of the above-mentioned decision of the Constitutional Court all provisions of the Criminal Code that were considered unconstitutional became void from the date of its adoption. In part 3 of the decision the Constitutional Court recommended that the Parliament bring the Criminal Code into compliance with its decision. The law on amendments to the Criminal Code including to the section 93 was adopted by the Parliament on 22 February 2000. However, after the decision of the Constitutional Court and prior to the amendments to the Criminal Code by the Parliament, there was no law that would annul the penalty or extenuate the punishment for the acts of crime under section 93 of the Criminal Code of 1960.

8.2 The State party further stated that, according to the Ministry of Justice, the provision of section 24 of the Criminal Code of 1960 establishing death penalty was temporary and exceptional. It was applied only when the crime was exceptionally severe and when the circumstances did not allow applying lighter punishment. Chapter 2 of the law on amendments to the Criminal Code adopted by the Parliament establishes that review of sentences in relation to persons sentenced to death penalty but whose sentence was not yet executed should be done by the same court that issued the sentence in the first place.

8.3 On 27 May 2009, the State party submitted that under section 85 of the Constitution, only Parliament has a right to adopt laws and introduce amendments to laws. Under sections 6 and 54, paragraph 3 of the Criminal Code of 1960 and section 405 of the Criminal Procedure Code, which were in force when the decision of the Constitutional Court was adopted, the punishment for an act of crime which exceeds the punishment for the same act of crime under the new law should be decreased to the maximum extent provided under the new law. The same provisions also exist in section 5 and section 74 of the Criminal Code.

9.1 On 3 August 2009, the author submitted that the State party's observations are unfounded and that it omitted to address the period between 29 December 1999 and 22 February 2000. He reiterates that, during this time, the death penalty was abolished and the maximum penalty was 15 years imprisonment. The State party's reference to the Law on amendments to the Criminal Code, which was adopted on 22 February 2000 and entered into force on 4 April 2000, is not relevant to his case as it was adopted after the Constitutional Court's decision. He claims that sections 6 and 54, paragraph 3, of the Criminal Code of 1960 and section 405 of the Criminal Procedure should be applied in his case, as he is asking for the maximum penalty for the crime he committed under the Criminal Code of 1960, which is 15 years imprisonment and not life imprisonment, a penalty that was established much later.

9.2 On 28 October 2009, the author submitted a letter from the Supreme Court in relation to another convicted person and stated that the person who committed a crime between 29 December 1999 and 4 April 2000 for which the previous Code established the death penalty could be given the punishment of 15 years of imprisonment as it was the maximum punishment under the old code during that time. He also submitted a letter from the centre on law research which stated that the decision of the Constitutional Court recommended changes in the legislation but did not postpone its own implementation, as well as a letter from a law professor stating that persons whose death sentence was commuted to life imprisonment could ask for a pardon.

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 it 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 matter is not being examined under another procedure of international investigation or settlement.

10.3 The Committee notes the author's claims, that there were factual mistakes in his indictment and sentence, which allegedly also lacked evidence, that the trial was not impartial and the sentence was based only on his confession and did not take into account the mitigating circumstances; his request to invite a witness was also denied. The State party, on the other hand, argues that the court assessed the evidence, qualified his actions and issued the sentence correctly. The Committee observes that the author's claims relate to the evaluation of facts and evidence by the State party's courts. It recalls 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.¹ The material before the Committee does not contain enough elements to demonstrate that the court proceedings suffered from such defects. Accordingly, the Committee considers that the author has failed to substantiate the claims under article 14, paragraphs 1 and 3 (e), and declares them inadmissible under article 2 of the Optional Protocol.

10.4 Furthermore, the Committee notes the author's claims, that his right to re-examination of his sentence in his presence was violated, that with the establishment of the new penalty he was convicted twice for the same crime, that he was subjected to ill-treatment during the interrogations by the police, that his right to an effective legal assistance were violated and that he was not provided with the assistance of a translator. However, the Committee considers that the author did not provide sufficient details or documentation on any of these claims. Accordingly, the Committee concludes that the claims under articles 7 and 14, paragraphs 3 (b) and (d) and 7, are insufficiently substantiated for purposes of admissibility and declares them inadmissible under article 2 of the Optional Protocol.

10.5 Finally, the Committee finds that, the author's claim that his right to retroactive application of the law with lighter penalty was violated, is sufficiently substantiated as

¹ See, inter alia, communication No. 541/1993, *Simms v. Jamaica*, decision on inadmissibility adopted on 3 April 1995, para. 6.2.

raising issues under article 15, paragraph 1, of the Covenant. It therefore considers this part of the communication admissible and proceeds to the examination thereof on its 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 provided for under article 5, paragraph 1, of the Optional Protocol.

11.2 The Committee notes the author's claim under article 15, paragraph 1, that he should have benefited from the "transitional law", i.e. the old Code as it read with the unconstitutional capital punishment provisions removed, which was in force between 29 December 1999, when the decision of the Constitutional Court was adopted, and 4 April 2000, when the law on amendments to the codes entered into force. The State party argues that, after the decision of the Constitutional Court and prior to the amendments to the Criminal Code by the Parliament, there was no law which would annul the penalty or extenuate the punishment for the acts of crime under section 93 of the Criminal Code of 1960. It argues that under section 85 of the Constitution, only Parliament has a right to adopt laws and introduce amendments to laws and that chapter 2 of the law on amendments to the Criminal Code adopted by the Parliament establishes that review of sentences in relation to persons sentenced to death penalty but whose sentence was not yet executed should be done by the same court that issued the sentence in the first place.

11.3 According to article 15, paragraph 1, last sentence, of the Covenant, if, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. In the current case, the Committee notes that the penalty of life imprisonment established by the Law on amendments to the Criminal Code, the Criminal Procedure Code and the Correctional Labor Code of Ukraine fully respects the purpose of the Constitutional Court's decision, which was to abolish the death penalty, a penalty which is more severe than life imprisonment. The Court's decision in itself does not imply commutation of the sentence imposed on the author nor does it establish a new penalty which would replace the death sentence. Furthermore, there were no subsequent provisions made by law for the imposition of any lighter penalty from which the author could benefit, other than the above-mentioned amendment on life imprisonment. In such circumstances, the Committee cannot conclude that the State party, by substituting life imprisonment for capital punishment for the crimes committed by the author, has violated the author's rights under article 15, paragraph 1, 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 do not reveal a breach of any provision of the Covenant in connection with 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.]

**C. Communication No. 1354/2005, *Sudalenko v. Belarus*
(Views adopted on 19 October 2010, 100th 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>	10 November 2004 (initial submission)
<i>Subject matter:</i>	Denial of possible candidacy for the lower chamber of Belarus Parliament
<i>Procedural issue:</i>	None
<i>Substantive issues:</i>	Right to equality before the courts; right to a fair hearing by an independent and impartial tribunal; right to take part in the conduct of public affairs; right to be elected without unreasonable restrictions and without distinction; right to the equal protection of the law without any discrimination
<i>Articles of the Covenant:</i>	2; 14, paragraph 1; 25, subparagraphs (a) and (b); 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 19 October 2010,

Having concluded its consideration of communication No. 1354/2005, 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, residing in Gomel, Belarus. He claims to be a victim of violations by Belarus of article 2; article 14, paragraph 1; article 25, subparagraphs (a) and (b); and article 26 of

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

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 describes himself as an opponent of the current regime in Belarus. Since 2001, he has been a member of the United Civil Party; 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 consisting of 57 people 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). The author claims that the District Electoral Commission was biased toward him from the very early stage of the election process when his initiative group was collecting signatures of voters in support of his nomination as a candidate. The author explains that members of his initiative group were discriminated against by State officials and the District Electoral Commission failed in its duty to act in a timely manner to ensure compliance with election legislation.

2.3 The author refers to the following incidents in support of his claim:

(a) On 14 August 2004, the author was informed in writing by a member of his initiative group, Ms. N.K., that she and the other members of the author's initiative group, in particular, Ms. N.T. and Ms. M.S., were pressured by officials of the Bragin District Executive Committee to refuse to collect signatures of voters in support of the author's nomination as well as threatened with dismissal and other "problems". On 16 August 2004, the author complained about the pressure exerted on the members of his initiative group to, inter alia, the District Electoral Commission, the Central Electoral Commission on Elections and Conduct of Republican Referendums (the Central Electoral Commission) and the Bragin District Executive Committee. On 18 August 2004, the author was informed by the Central Electoral Commission that his complaint was transmitted to the Prosecutor's Office. On 13 September 2004, the Prosecutor's Office of the Gomel Region transmitted the author's complaint to the Prosecutor of the Bragin District. On 23 September 2004, the Prosecutor of the Bragin District transmitted the author's complaint to the acting Head of the Department of Internal Affairs of the Bragin District. No reply from the Department of Internal Affairs of the Bragin District was received. On 2 September 2004, the author was informed by the District Electoral Commission that two of its members had met with officials of the Bragin District Executive Committee who stated that the allegation of members of the author's initiative group did not "correspond to reality". The District Electoral Commission acknowledged that it could not meet with Ms. N.T. or Ms. N.K. but nonetheless came to the conclusion that their allegations did not "correspond to reality";

(b) On 31 August 2004, a member of the author's initiative group, Ms. A.L., sought from the Khoyniki District Executive Committee a stamp and certification of the lists of signatures of voters collected in support of the author's nomination. The Deputy Chairperson of the Khoyniki District Executive Committee, who was at the same time the Chairperson of the District Electoral Commission, stamped the lists of signatures but refused to return them to Ms. A.L. On the same day, Ms. A.L. complained to the District Electoral Commission about this refusal to return the list of signatures as did the author to the Prosecutor of the Khoyniki District. In particular, the author claimed that the election of

the Deputy Chairperson of the Khoyniki District Executive Committee as the Chairperson of the District Electoral Commission was contrary to article 11, second paragraph,¹ of the Electoral Code. On 3 September 2004, the Prosecutor of the Khoyniki District transmitted the author's complaint to the Chairperson of the District Electoral Commission. On an unspecified date, the author complained to the Central Electoral Commission about the refusal to return the list of signatures. On 7 September 2004, the author was informed by the Central Electoral Commission that the lists of signatures had already been returned to Ms. A.L. prior to the submission of the author's complaint to the Central Electoral Commission and that the election of the Deputy Chairperson of the Khoyniki District Executive Committee as the Chairperson of the District Electoral Commission was not contrary to any provisions of the Electoral Code. The author refers to article 11, first paragraph,² of the Electoral Code and submits that in practice the executive branch exercises control over the Electoral Commissions.

2.4 On an unspecified date, the author's initiative group collected a sufficient number of signatures of voters in support of him and he was nominated as a candidate for the 2004 elections to the House of Representatives as a representative of the Khoyniki electoral constituency No. 49.

2.5 On 16 September 2004, the District Electoral Commission refused to register the author as a candidate. It referred to article 45, seventh paragraph;³ article 48, ninth and tenth paragraphs;⁴ and article 68, sixth paragraph,⁵ of the Electoral Code, and found that the

¹ Article 11 of the Electoral Code: Ensuring of Holding of Elections of the President of the Republic of Belarus, Deputies of the House of Representatives, Deputies of Local Councils of Deputies, Referendum, Recall of Deputies by Commissions, second paragraph.
During preparation and holding of elections, referendum, and recall of Deputies, and within the limits of their powers established by the legislation of the Republic of Belarus, the [electoral] commissions shall be independent from state bodies and bodies of local self-government.

² Ibid., first paragraph.
Holding of elections of the President of the Republic of Belarus, Deputies of the House of Representatives, Deputies of local Councils of Deputies, referendum, and recall of Deputies shall be ensured by commissions consisting of representatives of political parties, other public associations, labour collectives, as well as representatives of citizens nominated as members of the commission by submission of an application. Commissions shall exercise control over compliance with the election legislation.

³ Article 45 of the Electoral Code: Pre-election Agitation, Agitation on Referendum, Recall of Deputy, Member of the Council of the Republic (seventh paragraph).
Local executive and administrative bodies together with the relevant commissions are obliged to create conditions for holding meetings of the candidates for President of the Republic of Belarus and for deputies with the voters. Commanders of military units (establishments) shall create conditions for the meetings of personal staff with the candidates at out-of-service time. The state bodies and organization provide premises for those purposes free of charge.

⁴ Article 48 of the Electoral Code: Expenses on Preparation and Holding of Elections, Referendum, Recall of Deputy, Member of the Council of the Republic (ninth and tenth paragraphs).
Political parties, other public associations, organisation, citizens of the Republic of Belarus have no right to render other material aid for preparation and holding of elections, referendum, except for depositing monetary assets into the extra-budgetary fund, envisaged by clause one of the present Article.
Direct or indirect participation of foreign states, enterprises, organisations, foreign citizens, international organisations, enterprises of the Republic of Belarus with foreign investments in financing and other material aid for preparation and holding of elections, referendum, recall of a Deputy, Member of the Council of the Republic, is forbidden.

⁵ Article 68 of the Electoral Code: Registration of Candidates for President of the Republic of Belarus, for Deputies (sixth paragraph).

author provided personal data that “did not correspond to reality”. The second ground cited for refusing registration was the circulation of leaflets with information about the activities of the electoral block known as “V-Plus” (Five Plus), which was supposed to be a platform for activities of a prospective candidate for a Deputy of the House of Representatives. The leaflets contained the author’s photograph and information about him.

2.6 On an unspecified date, the author appealed the refusal of registration to the Central Electoral Commission. On 23 September 2004, the Central Electoral Commission dismissed the appeal by upholding the finding of the District Electoral Commission that the author had provided false information about his place of work. The Central Electoral Commission noted that the author had indicated in the questionnaire that he was working as a legal adviser for Lokon and concluded that this was only his secondary job, since the author’s main place of work was the Civil Initiatives where he was heading the Gomel City Section. The Central Electoral Commission, however, dismissed the second ground for registration refusal, the dissemination of campaign materials, as unfounded.

2.7 The author submits that the Central Electoral Commission erred in its finding that, since he was hired by Lokon for a secondary job, there should necessarily be another main place of work. He adds that the Civil Initiatives could not be considered a place of work, because he did not conclude any labour contract with this association, there was no schedule of work and he received no remuneration for this work.

2.8 On an unspecified date, the author appealed the ruling of the Central Electoral Commission to the Supreme Court. He specifically argued that, on 30 January 2003, the Partisan District Electoral Commission refused to register another member of the United Civil Party, Ms. L.S., as a candidate for the 2003 elections to the Local Council of Deputies, because she indicated in the questionnaire that she was the Chairperson of the Women’s Alliance public association, without providing information about her income for this work. The Partisan District Electoral Commission referred to the written explanation of the Ministry of Labour and Social Protection of 27 January 2003. It reasoned that, if an individual was not remunerated for his or her work, such work could not be considered contractual or “a place of work”. For this reason and on the basis of article 68, sixth paragraph, of the Electoral Code, the Partisan District Electoral Commission decided that Ms. L.S. provided personal data that “did not correspond to reality”. This decision was upheld by the Minsk City Court on 10 February 2003 and became executory.

2.9 On 30 September 2004, the author’s appeal was dismissed by the Supreme Court; this decision was final and could not be appealed on cassation. The Supreme Court referred to article 68, sixth paragraph, of the Electoral Code,⁶ and upheld the finding of the District and Central Electoral Commissions that the author had provided biographic data that did not “correspond to reality”. In particular, the Supreme Court established that the author had not indicated in the questionnaire that his job at Lokon was a secondary one and had failed to indicate his main place of work. It based its decision on the following evidence: (a) the author’s application for a secondary job addressed to Lokon; (b) the order to hire the author for a secondary job as a legal adviser as of 11 June 2002; (c) the letter from the Deputy Chairperson of the Gomel City Section of the Civil Initiatives dated 5 June 2002, attesting to the fact that the organization did not object to the author’s gainful employment with

At submission in documents on nomination of a candidate for President of the Republic of Belarus, for Deputies of data that is not corresponding to reality, including biographic data and information on income and property, accordingly, the Central Commission, the district, territorial electoral commission has the right to refuse a registration of the candidate for President, for Deputies or to cancel the decision about its registration.

⁶ Ibid.

Lokon as a secondary job; and (d) the author's schedule of work as a legal adviser hired for a secondary job, approved by the Chief Executive Officer of Lokon on 21 June 2004.

2.10 On an unspecified date, the author appealed the decision of the Supreme Court to the Chairperson of the Supreme Court through the supervisory review procedure. This appeal was dismissed by the Deputy Chairperson of the Supreme Court on 15 October 2004. The Deputy Chairperson set aside the author's argument that his employment by Lokon should be considered his main place of work because it was duly reflected in his service record. The Deputy Chairperson explained that a secondary job could also be reflected in the service record upon the employee's request and on the basis of the order to hire him or her for a secondary job, as in the author's case. He referred to article 343 of the Labour Code, according to which a secondary job is gainful employment on a contractual basis with the same or a different employer during the time not taken by one's main place of work.

The complaint

3.1 The author is of the view that there has been a breach of article 68, eleventh paragraph, of the Electoral Code,⁷ since the District Electoral Commission's refusal to register him as a candidate was not based on a reasoned decision explaining what personal data did not "correspond to reality". He submits that this lack of explanation was deliberate and intended to prevent him from submitting counter evidence on appeal to the Central Electoral Commission. The author claims, therefore, that this refusal to register him as a candidate, which was upheld by the Central Electoral Commission, violated his rights, guaranteed under article 25, subparagraphs (a) and (b), of the Covenant to take part in the conduct of public affairs and to run for the office of Deputy of the House of Representatives without any of the distinctions mentioned in article 2.

3.2 The author claims that the District Electoral Commission's biased attitude towards him as a candidate from the opposition violated the legal prohibition against discrimination on the ground of one's political opinions under article 26 of the Covenant. He adds that Mr. V.K., who was already a Deputy of the House of Representatives at the time in question and was nominated as a candidate "from the authorities" for the 2004 elections to the House of Representatives as a representative of the same electoral constituency as the author, was using administrative resources for his election campaign in violation of article 47, second and third paragraph,⁸ of the Electoral Code. When the author complained to the

⁷ Article 68 of the Electoral Code: Registration of Candidates for President of the Republic of Belarus, for Deputies (eleventh paragraph).

The Central Commission, the respective district, territorial electoral commission shall verify the conformity of the nomination procedure for President of the Republic of Belarus, for Deputies to the requirements of the present Code and take a decision on registration of candidates for President, for Deputies, or a reasoned decision to deny registration. Decision of the commission to deny registration of the candidate shall be issued not later than on the following day after the decision is taken.

⁸ Article 47 of the Electoral Code: Inadmissibility of Abuse of the Right for Making Election Agitation and Agitation for Referendum (second and third paragraphs).

Candidates for the position of the President of the Republic of Belarus and candidates for deputies, their proxies, organizations and persons agitating for election of candidates, for or against questions offered for the referendum shall have no right to distribute among citizens monetary funds, gifts or other material values, make discount sales of commodities or render free-of-charge any services and commodities except for agitation printed materials specially made for the election campaign or for the holding of the referendum with the observance of the requirements of this Code. In carrying out election agitation or agitation for a referendum it shall be prohibited to influence citizens by promises of transfer to them of monetary funds or material values.

In case of violation of the requirements of this article the respective commissions shall take measures for stopping abuse of the right for election agitation and agitation for the referendum and the

Central Electoral Commission about Mr. V.K.'s use of administrative resources for his election campaign, he was informed by its Chairperson that Mr. V.K.'s actions were part of "his work with the electorate as a Deputy of the House of Representatives elected in 2000", rather than his election campaign for the 2004 elections to the House of Representatives.

3.3 The author maintains that, in violation of article 14, paragraph 1, and article 26 of the Covenant, he was denied by the Supreme Court the right to equality before the courts and the right to a fair hearing by an independent and impartial tribunal.

State party's failure to cooperate

4. By notes verbales of 1 February 2005, 1 December 2006, 16 January 2008 and 21 January 2009, the Committee requested the State party to submit to it information 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 authors' 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 provided. In the absence of a reply from the State party, due weight must be given to the authors' allegations, to the extent that these have been properly substantiated.

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

5.3 As to the author's claim under article 14, paragraph 1, that he was denied by the Supreme Court the right to equality before the courts and the right to a fair hearing by an independent and impartial tribunal, the Committee notes that it relates primarily to issues directly linked to those falling under article 25, subparagraphs (a) and (b), of the Covenant, that is, the author's rights to take part in the conduct of public affairs and to run for the office of Deputy of the House of Representatives. It also notes that there are no obstacles to the admissibility of the communication under article 25, subparagraphs (a) and (b), of the Covenant, and declares it admissible. Having come to this conclusion, the Committee decides that it is not necessary to separately consider the claims arising under article 14, paragraph 1, of the Covenant.

5.4 The Committee considers that the author has sufficiently substantiated, for purposes of admissibility, his claims under article 2 and article 26 of the Covenant that he was deprived of his right to take part in the conduct of public affairs and to run for the office of Deputy of the House of Representatives because of his political opinions, and declares the communication admissible.

commission on elections of the President of the Republic of Belarus and electoral commissions shall also have the right to cancel the decision on registration of the candidate.

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

6.2 The issue before the Committee is whether the author's rights under article 25, subparagraphs (a) and (b), of the Covenant, including the right to take part in the conduct of public affairs, to vote and to be elected to public office, were violated by the refusal to register him as a candidate for the 2004 elections to the House of Representatives.

6.3 The Committee recalls that, in the present case, the registration of the author was refused by the District Electoral Commission on the ground that he provided personal data that "did not correspond to reality" but without indicating what specific data was impugned by this finding. It further recalls that, according to the ruling of the Central Electoral Commission, the author has incorrectly indicated working as a legal adviser for Lokon rather than heading the Gomel City Section of the Civil Initiatives as his "main place of work" in the questionnaire. Furthermore, the Supreme Court found that the author did not indicate in the questionnaire that his job at Lokon was a secondary one and that he failed to indicate his main place of work.

6.4 In this regard, the Committee recalls its general comment No. 25 (1996) on the right to participate in public affairs, voting rights and the right of equal access to public service, according to which the exercise of the rights protected by article 25 may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable.⁹ The Committee notes that article 68, sixth paragraph, of the Electoral Code, gives electoral commissions a right to refuse registering a candidate when he or she submits data that does not "correspond to reality", including biographic data and information on income and property.

6.5 The Committee notes that the author's gainful employment on a contractual basis by Lokon was corroborated by evidence examined by both the Central Electoral Commission and the Supreme Court and is, therefore, uncontested, irrespective of whether it was effectively his main or secondary place of work. As to the status of the author's legal relationship with the Civil Initiatives, the Committee notes his argument that, according to the decision of the Partisan District Electoral Commission of 30 January 2003 on the refusal to register Ms. L.S. as a candidate for the 2003 elections to the Local Council of Deputies and the written explanations of the Ministry of Labour and Social Protection of 27 January 2003 (see para. 2.8 above), the Civil Initiatives could not be considered his "place of work" because it was unpaid. In other words, even if the author had indicated that Civil Initiatives was his main place of work in the questionnaire of the District Electoral Commission, the Commission could have still refused to register him as a candidate on the basis of the same article 68, sixth paragraph, of the Electoral Code, but this time with reference to the written explanations of the Ministry of Labour and Social Protection of 27 January 2003. The Committee regrets the lack of response by the State party authorities to this specific argument raised by the author both before the Supreme Court and in his communication to the Committee. The fact that the reasons given for refusing to register the author's candidacy for the House of Representatives contrasted with those given in the case of Ms. L.S. (see paragraph 2.8 above) indicates that the provisions of the relevant domestic law can be exploited to unreasonably restrict the rights protected by article 25, subparagraphs (a) and (b), of the Covenant.

⁹ *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40*, vol. I (A/51/40 (Vol. I)), annex V, para. 4.

6.6 The Committee notes the author's uncontested claim that the District Electoral Commission was biased towards him because he was a candidate from the opposition (see paras. 2.2 and 2.3 above). The Committee also notes the author's claim of bias arising from the Central Electoral Commission's alleged failure to discipline a competing candidate "from the authorities" for violating election legislation (see para. 3.2 above). In this regard, the Committee notes that article 25 of the Covenant secures to every citizen the right and the opportunity to be elected at genuine periodic elections without any of the distinctions mentioned in article 2, paragraph 1, including political opinion.

6.7 In the light of the information before the Committee, and in the absence of any explanations from the State party, it concludes that the refusal to register the author as a candidate for the 2004 elections to the House of Representatives was not based on objective and reasonable criteria and is, therefore, incompatible with the State party's obligations under article 25, subparagraphs (a) and (b), read in conjunction with article 2, paragraph 1, and article 26 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 facts before it disclose a violation by the State party of article 25, subparagraphs (a) and (b), read in conjunction with article 2, paragraph 1, and article 26 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, including compensation, as well as to consider any future application for nomination of the author as a candidate for the elections in full compliance with the Covenant. The State party is also under an obligation to prevent similar violations 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 when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. In addition, it requests the State party to publish the Committee's Views.

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

**D. Communication No. 1383/2005, *Katsora et al. v. Belarus*
(Views adopted on 25 October 2010, 100th session)***

<i>Submitted by:</i>	Vladimir Katsora, Leonid Sudalenko and Igor Nemkovich (not represented by counsel)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Belarus
<i>Date of communication:</i>	25 February 2005 (initial submission)
<i>Subject matter:</i>	Freedom of association
<i>Procedural issue:</i>	None
<i>Substantive issues:</i>	Degree of substantiation of claims
<i>Articles of the Covenant:</i>	Articles 14, paragraph 1, 22 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 25 October 2010

Having concluded its consideration of communication No. 1383/2005, submitted to the Human Rights Committee on behalf of Mr. Vladimir Katsora, Mr. Leonid Sudalenko and Mr. Igor Nemkovich 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. The authors of the communication are Mr. Vladimir Katsora, born in 1957, Mr. Leonid Sudalenko and Mr. Igor Nemkovich, all Belarus nationals. They claim to be victims of violations by Belarus of articles 14, paragraph 1, 22 and 26 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force in relation to Belarus on 30 December 1992. Mr. Katsora is submitting the communication on his own behalf and on behalf of Mr. Sudalenko and Mr. Nemkovich.

Facts as submitted by the authors

2.1 Mr. Katsora is the leader of an unregistered regional public association called Civil Alternative. Mr. Sudalenko and Mr. Nemkovich are holders of other offices in the association. On 1 December 2003, the authors submitted an application for registration of

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

Civil Alternative with the Ministry of Justice. The registration process is governed by a Presidential Decree of 26 January 1999 and an Ordinance of the Minister of Justice of 1 December 2000.

2.2 According to article 7 of the Presidential Decree, after studying the application for registration, the registration body (i.e. the Ministry of Justice) must direct it to the Republican Commission on the Registration of Public Associations. The latter should issue a conclusion on feasibility of the registration and return the file to the Ministry within five days. The registration body must issue a decision within one month from the date of the application.

2.3 Since the authors did not receive a reply within the legislative deadline, on an unspecified date, they inquired with the Justice Department of the Gomel Regional Executive Committee as to the reasons for the delay. On 29 January 2004, the first author was informed that the application was directed to the Ministry of Justice for decision. Since the authors did not receive a decision for another month, on an unspecified date, the first author filed a complaint to the Minister of Justice and the General Prosecutor of the Republic. On 12 March 2004, the Prosecutor's Office informed him that his complaint was directed to the Ministry of Justice. On 19 March 2004, the Ministry of Justice informed him that they could not issue a decision because of the absence of a Conclusion by the Republican Commission on the Registration of Public Associations. He was also advised that the Commission reviewed the application on 11 March 2004 and that he would be informed of the final decision by the Gomel Regional Executive Committee.

2.4 On 29 March 2004, the authors were informed that their application for registration had been rejected. As motivation the authorities cited non-compliance with certain legal provisions: the fact that the organization's goals included entering into associations with other "local and international organizations" was incompatible with section 3.4 in the relevant Presidential Decree, according to which organizations can only enter in association with other Belorussian organizations of the same type; the organization's stated purposes were described in one place as "humanitarian" and later as "humanist", which was seen to be contradictory; the application had failed to specify the particular room of the stated building which would be used as the organization's Head Office; and different dates of birth had been given for one particular member.

2.5 On 22 April 2004, the authors appealed the denial of registration to the Gomel Regional Court. They claimed that the organization's application had been wrongly and unfairly dealt with. In particular, they referred to the Statute of a registered, pro-government (and Government financed) organization, the Belarusian Republican Youth Union, which contained the same goal of entering into associations with "local and international associations", as mentioned in the application of Civil Alternative, and which was registered by the authorities. The authors argued that in any event, none of the conditions for registration were justifiable under the State party's Constitution, or under article 22 of the Covenant, which, as a "recognized principle of international law", has direct and peremptory effect in Belarus. The Regional Court rejected these arguments, and on 14 May 2004 dismissed the authors' appeal.

2.6 The authors subsequently filed a cassation appeal to the Supreme Court, which was dismissed on 28 June 2004. The Supreme Court reiterated some of the motivation of the Regional Court namely: that the organization's stated purposes were described in one place as "humanitarian" and later as "humanist", which was seen to be contradictory; that the Statute of the organization declared that in case of its liquidation, issues related to its funds and property shall be resolved by its Assembly and by a court decision, which was seen to be in contradiction with provisions of the Civil Code; that the address of the Head Office of the organization listed a wrong room number; that the birth date of one of the founders of the organization was different in the list of the founders and in the list of the members of

the Central Council of the organization; that article 5.1 of the Statute of the organization stated that its highest organ with competency to take certain decisions was its General Assembly, but its article 5.5.8 gave competency for some of these decisions to the organization's Central Council, which was seen as contradictory.

2.7 On 12 July 2004, the authors filed a further application for supervisory review by the Supreme Court, which was rejected by its Deputy President on 17 August 2004.

The complaint

3.1 The authors contend that they have exhausted all available and effective domestic remedies.

3.2 The authors claim that the State party violated their rights under articles 14, paragraph 1, 22 and 26 of the Covenant.

3.3 The authors submit that one of the manifestations of the freedom of association in Belarus is the creation of public associations. Activities in the name of organizations that are not registered in the established manner are forbidden. The authors maintain that the denial to register their association by the State party's authorities led to violation of their right under article 22 of the Covenant.

3.4 The authors submit that in Belarus freedom of association is applied selectively and is guaranteed only to supporters of the official power. In support they point out that the statute of the pro-government Belarusian Republican Youth Union was considered lawful by the registration body and the statute of Civil Alternative was declared unlawful, even though they contained similar provisions.

3.5 The authors submit that the Republican Commission on the Registration of Public Associations, which according to the domestic procedure must issue a mandatory Conclusion on the feasibility of each registration, is part of the Administration of the President of the Republic. The Commission has no separate legal personality and no judicial or administrative appeal against its Conclusion is possible. The authors also refer to a letter of the Minister of Justice, addressed to the Head of the Commission, which according to them evidences that decisions on the registration are taken at a very high level, by an official in the President's administration, upon personal recommendation by the Minister of Justice. The authors claim that decisions to allow registration are biased and that freedom of association is guaranteed only to individuals loyal to the authorities.

3.6 The authors also claim that they were denied judicial protection of their freedom of association, since the courts did not issue decisions based on the Constitution of Belarus and on the international human rights treaties. They submit that they were denied a fair hearing by an independent and impartial tribunal, that they were treated unequally before the law and in that way they were denied their right to freedom of association.

State party's observations on admissibility and merits

4.1 The State party confirms that the authors' appeal against the denial of registration of the Civil Alternative organization to the Gomes Regional Court was rejected on 11 May 2004. The State party submits that the authors filed a cassation appeal against the Regional Court decision and that on 28 July 2004, the Supreme Court amended it to exclude some of the motivation of the first instance court, but confirmed the rest. The State party also confirms that the attempt of the authors to have the decision reviewed in the order of supervision was rejected on 17 August 2004 by the Deputy President of the Supreme Court.

4.2 The State party submits that in accordance with article 439 of the Civil Procedure Code expostulations for a supervisory review can be brought forward not only by the Deputy President of the Supreme Court, but by the President of the Supreme Court, as well

as by the General Prosecutor and his deputies. Since the authors did not submit applications for initiation of a supervisory review to the Prosecutor's Office or to the President of the Supreme Court, the State party maintains that they have not exhausted the available domestic remedies.

4.3 The State party disagrees with the authors' claim that they have not been granted a fair hearing. The decision to refuse the registration was taken in accordance with article 11 of the Presidential Decree, which establishes as one of the grounds for refusal the inconsistency of the organization's Statute with the requirements of the law. The Court established that some of the provisions of the organization's Statute are contrary to the domestic law and therefore the refusal was lawful, well founded and delivered following full analysis of the evidence presented by the parties. The State party further submits that the Courts were under no legal obligation to give the authors a deadline within which the latter could correct the organization's statute to bring it into compliance with the domestic legislation. The State party also submits that the authors are not precluded from bringing the statute of Civil Alternative in line with the requirements of the law and reapplying for registration.

Authors' comments

5.1 The authors reiterate that they have exhausted all available and effective domestic legal remedies. They did not submit an application for supervisory review to the Supreme Court nor to the Prosecutor's Office, since they believe that they have exhausted the necessary domestic remedies, by appealing first to the Regional Court, then to the Supreme Court both in cassation and by requesting a supervisory review.

5.2 The authors also dispute the State party's submission that the Regional Court's decision in their case was taken on the basis of full and comprehensive analysis of the evidence presented in accordance with the domestic legislation. They submit that according to article 32 of the law "Regarding Public Associations", in case of discrepancy between a domestic law and an international treaty that Belarus is a party to, the international treaty provisions should be applied. They maintain that in their case the Court should have applied the Covenant. They also maintain that none of the alleged discrepancies between the statute of Civil alternative and the domestic legislation falls under article 22, paragraph 2, of the Covenant.

State party's additional observations

6. On 8 February 2006, the State party reiterated its observations on the merits of the case, as submitted previously.

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 article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 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.

7.3 The Committee takes note of the State party's challenge of the admissibility of the communication on the grounds of non-exhaustion of domestic remedies, namely the authors' failure to petition the President of the Supreme Court and the General Prosecutor for supervisory review of the court decisions denying the registration of their organization.

The Committee recalls its previous jurisprudence,¹ according to which supervisory review procedures against court decisions which have entered into force constitute an extraordinary mean of appeal which is dependent on the discretionary power of a judge or prosecutor. When such review takes place, it is limited to issues of law only and does not permit any review of facts and evidence. It does, therefore, not meet the requirements of article 14, paragraph 5, of the Covenant. Consequently, the Committee finds that article 5, paragraph 2 (b), of the Optional Protocol does not preclude it from considering the communication.

7.4 The Committee takes note of the authors' claim that their right to fair hearing under article 14, paragraph 1, of the Covenant has been violated. They also claim that the refusal of the State party's authorities to register Civil Alternative was discriminatory and violated their rights under article 26 of the Covenant. However, the Committee considers these claims to be insufficiently substantiated, for purposes of admissibility, and declares them inadmissible under article 2 of the Optional Protocol. Regarding the claim of violation of the freedom of association under article 22 of the Covenant, the Committee finds it sufficiently substantiated for the purposes of admissibility, declares it admissible and proceeds to its examination 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 received, in accordance with article 5, paragraph 1, of the Optional Protocol.

8.2 The issue before the Committee is whether the refusal of the Belarus authorities to register Civil Alternative unreasonably restricted the authors' right to freedom of association. In this regard the Committee recalls that its task under the Optional Protocol is not to assess in the abstract laws enacted by State parties, but to ascertain whether the implementation of such laws in the case in question gives rise to a violation of the authors' rights.² In accordance with article 22, paragraph 2, of the Covenant, any restriction on the right to freedom of association must cumulatively meet the following conditions: (a) it must be provided for by law; (b) may only be imposed for one of the purposes set out in paragraph 2; and (c) must be "necessary in a democratic society" for achieving one of these purposes.³ The reference to "democratic society" in the context of article 22 indicates, in the Committee's opinion, that the existence and operation of associations, including those which peacefully promote ideas not necessarily favourably viewed by the government or the majority of the population, is a cornerstone of any society.

8.3 In the present case, the State party has refused to permit the registration of Civil Alternative on the basis of a number of stated reasons. These reasons must be assessed in the light of the consequences which arise for the authors and their association. The Committee notes that even though such reasons were prescribed by the relevant law, the

¹ 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. 50: "A system of supervisory review that only applies to sentences whose execution has commenced does not meet the requirements of article 14, paragraph 5, regardless of whether such review can be requested by the convicted person or is dependent on the discretionary power of a judge or prosecutor." See also, for example, communication No. 836/1998, *Gelazauskas v. Lithuania*, Views adopted on 17 March 2003.

² See communication No. 550/1993, *Faurisson v. France*, Views adopted on 8 November 1996, para. 9.3.

³ See, inter alia, *Zvozkov et al. v. Belarus*, communication No. 1039/2001, Views adopted on 17 October 2006, para. 7.2.

State party has not advanced any argument as to why they are *necessary*, 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. The Committee also notes that the refusal of registration led directly to the unlawfulness of operation of the unregistered organization on the State party's territory and directly precluded the authors from enjoying their freedom of association. Accordingly, the Committee concludes that the refusal of registration does not meet the requirements of article 22, paragraph 2 in relation to the authors. The authors' rights under article 22, paragraph 1, of the Covenant have thus been violated.

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 violation by the State party of article 22, paragraph 1, of the Covenant.

10. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the authors are entitled to an appropriate remedy, including the reconsideration of the application for registration of Civil Alternative, based on criteria compliant with the requirements of article 22 of the Covenant, and adequate compensation. 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 there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. In addition, it requests the State party to publish the Committee's Views.

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

**E. Communication No. 1390/2005, *Koreba v. Belarus*
(Views adopted on 25 October 2010, 100th session)***

<i>Submitted by:</i>	Anna Koreba (not represented by counsel)
<i>Alleged victim:</i>	Dmitry Koreba (the author's son)
<i>State party:</i>	Belarus
<i>Date of communication:</i>	10 December 2004 (initial submission)
<i>Subject matter:</i>	Conviction of a juvenile person in violation of fair trial guarantees
<i>Procedural issue:</i>	None
<i>Substantive issues:</i>	Effective remedy; torture, cruel, inhuman or degrading treatment or punishment; segregation of juvenile offenders from adults; right to be presumed innocent; right to obtain the attendance and examination of witnesses; right not to be compelled to testify against oneself or to confess guilt
<i>Articles of the Covenant:</i>	2, paragraph 3; 7; 10, paragraph 2 (b); 14, paragraphs 2, 3 (e), (3) (g) and 4
<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 25 October 2010,

Having concluded its consideration of communication No. 1390/2005, submitted to the Human Rights Committee on behalf of Mr. Dmitry Koreba 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 Ms. Anna Koreba, a Belarusian national born on 31 July 1954. She submits the communication on behalf of her son, Mr. Dmitry Koreba, a Belarusian national born on 20 July 1984, who at the time of submission of the communication was serving his sentence in colony No. 19 in Mogilev, Belarus. Although the author does not claim a violation by Belarus of any specific provisions of the

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Ahmed Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Motoc, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

International Covenant on Civil and Political Rights, the communication appears to raise issues under article 2, paragraph 3; article 7; article 10, paragraph 2 (b); article 14, paragraphs 2, 3 (e), (3) (g) and 4, of the Covenant. The Optional Protocol entered into force for the State party on 30 December 1992. The author is not represented.

Factual background

2.1 On 24 May 2001, the dead body of Mr. R.B. was found with numerous stab wounds in the courtyard of the secondary school No. 2 in Gomel. On 17 September 2001, officers of the Crime Detection Department asked Dmitry Koreba to accompany them to the emergency unit of the Novobelitsk District Department of Internal Affairs for a “conversation”. He went there together with his father. The author and her elder son came to the emergency unit later that evening, where they were informed that Dmitry was arrested on suspicion of having murdered Mr. R.B. The author was not allowed to see her son.

2.2 At 12.30 a.m. on 18 September 2001, Dmitry was interrogated by an investigator, Mr. R.Y., in the presence of a lawyer and a social worker. After the interrogation, the Head of the Crime Detection Department, Mr. V.S., informed the author that her son would be immediately transferred to a temporary detention ward (IVS). Instead, he was kept in the emergency unit of the Novobelitsk District Department of Internal Affairs for another 24 hours, where he was interrogated without his lawyer, legal representative and a social worker, subjected to threats (including threats of reprisals against his mother), humiliation and beating by police officers, including the Head of the Crime Detection Department, for the purpose of extracting a confession from him. He was also forced to drink strong alcohol and hot tea was poured over him.

2.3 During this time, he was brought on numerous occasions from the “cage” in which he was sitting in the squatting position to the investigation section for interrogation. When the next day he informed the author and the lawyer about the beating, they requested that a forensic medical examination be carried out. On 20 September 2001, the author’s son was brought for such an examination by the Head of the Crime Detection Department in the absence of the lawyer. The author submits that, predictably, the forensic medical expert concluded that there were no injuries on her son’s body. The author submits that she as his legal representative, the lawyer and a social worker became witnesses of the pressure being exerted on her son to make him confess. The Head of the Crime Detection Department pressured Dmitry to confess guilt in exchange for which he would support that the crime was committed in self defence. The Head of the Crime Detection Department invited the author to persuade her son to confess guilt. When she refused, he threatened to “lock her son up in a way that he would never be able to leave a prison and that she would be bringing food parcels to him until the end of her days”.

2.4 On 20 September 2001, the car in which the author’s son was transported to the IVS by the Head of the Crime Detection Department and another officer stopped next to a bar, Mr. V.S. handcuffed Dmitry to the car’s door and went into the bar. When he returned, he started to pressure Dmitry again to make him confess. When Dmitry insisted that he did not kill Mr. R.B., Mr. V.S. started to beat him and requested the car driver to drive in the direction of the railway. At some point the car stopped and he ordered Dmitry to leave it, threatening to shoot him and present the incident as an escape. The author’s son was crying, clutching at the car seat. Mr. V.S. continued to beat him with his fists and ordered the car driver to drive them to the IVS.

2.5 After the author's son was formally remanded in custody on 20 September 2001, he was kept in the IVS with adults, some of whom had committed serious crimes. He was held there for 11 days¹ before being transferred to the investigation detention centre (SIZO). During this time he was not allowed to meet with his lawyer and a legal representative. The Head of the Crime Detection Department and his officers continued to interrogate him in the IVS, using the same methods, on 21 and 24 September 2001. They beat him, forced him to drink strong alcohol and threatened to put him in a situation where he might face sexual aggression and to imprison his mother.

2.6 On 24 September 2001, under the influence of alcohol Dmitry signed a confession report written by a police officer Ms. N.C. in the absence of a lawyer or a legal representative. During an interrogation on 26 September 2001, which was conducted in the author's presence, her son retracted his confession and stated that he had signed it under pressure. After that, the author was deprived of her procedural status as a legal representative under the pretext that she was obstructing the investigation. This procedural status was reinstated at a later stage by the court.

2.7 On 5 April 2002, the Judicial Chamber for Criminal Cases of the Gomel Regional Court ("the Gomel Regional Court") convicted the author's son on counts of murder with particular cruelty (article 139, part 2, para. 6, of the Criminal Code) and attempted theft committed more than once (article 14, part 2, and article 205, part 2). The count of attempted theft was related to the event that took place on 11 June 2001 when the author's son tried to steal a wallet from the office of a sports teacher at his secondary school. The Gomel Regional Court took into account the previous conviction of the author's son² and sentenced him to 12 years' imprisonment to be served in the educational colony. The Court examined his complaints about being subjected to ill-treatment but concluded that they were unfounded and used as a tactic to escape criminal liability. The Gomel Regional Court found admissible as evidence the confession of 24 September 2001.

2.8 The author claims that her son is innocent, his trial was unfair and his guilt has not been established. Thus:

(a) Her son's previous conviction played a key role in his conviction for murder of Mr. R.B. and that her son was an easy target;

(b) Her son's alibi was not properly considered. The author submits that, on 24 May 2001, Dmitry came home from school at approximately 3 p.m. and spent the rest of the day with his parents. On 25 and 26 May 2001, he went to school and did not show unusual behaviour;

(c) Her son testified in court that he learned about the murder of Mr. R.B. on 25 May 2001 from Mr. A.R., who told him during a break between classes that the day before he saw two adult men fighting in the courtyard of the secondary school No. 2. Mr. A.R., in turn, denied in court that he attended any classes in school on that day, without however clarifying whether or not he was present in the school on that day even if he did not attend the classes;

(d) Her 17-year-old son could scarcely have overpowered the victim, who was a physically fit man twice as old as her son and aggressive;

¹ In the appeal for a supervisory review of 29 December (year not indicated) addressed to the Chair of the Supreme Court, the author's son complained about being kept in the IVS for seven days.

² On 23 January 2001, the Novobelitsk District Court convicted the author's son on the count of large-scale theft (article 205, part 3, of the Criminal Code) and sentenced him to 3 years' imprisonment with the deferral of two years.

(e) According to the expert opinion examined by the Gomel Regional Court, there were no traces of blood on her son's clothes;

(f) The court did not take into account that the parents of Mr. A.R., the main witness in the case, were friends of an officer of the Crime Investigation Department who was in charge of investigating the murder of Mr. R.B.;

(g) The court did not objectively examine numerous witness statements (names are available on file), attesting that between 4 p.m. and 5 p.m. on 24 May 2001, Mr. R.B. was seen in a state of a heavy intoxication together with two other adults not far from the place where he was later found dead. The three men were arguing and pushing each other;

(h) Several witnesses made contradictory depositions that have not been properly addressed by the court. Thus, there were contradictions about the time when Mr. R.B. was last seen alive and about whether Mr. A.R. and Dmitry had been together in the afternoon of 24 May 2001 at the courtyard of the secondary school No. 2;

(i) On 29 March 2002, that is, on the last day of court hearing, the prosecution requested the examination as witness of an undercover agent, Mr. M.T. The author, her son and the social worker were asked to leave the courtroom when the undercover agent, who wore a mask, testified. He stated that for one day he was detained in the same cell as Dmitry and that the latter had confessed to him about the murder. The author submits that contrary to the requirements of article 438 of the Criminal Procedure Code, her son, after he was allowed to return to the courtroom, was not given an opportunity to question the undercover agent. Moreover, the prosecution did not present any evidence that the undercover agent was indeed detained with her son and, if he had been, under what name. The author submits, therefore, that her son's right to defence was violated;

(j) No expert examination was carried out to establish whether the stab wounds on the body of Mr. R.B. had been inflicted by only one person and with one murder weapon;

(k) The court ignored a request of the author's son to verify his testimony with the help of a lie detector.

2.9 On 9 August 2002, the Judicial Chamber for Criminal Cases of the Supreme Court upheld the conviction of the author's son and dismissed the cassation appeal. The court concluded, inter alia, that the use of unlawful methods of investigation had not been established.

2.10 On numerous occasions the author and her son complained about his ill-treatment by officers of the Crime Detection Department and unjust conviction to the Gomel Regional Prosecutor's Office, to the Supreme Court, to the General Prosecutor's Office, to the Deputy Minister of Internal Affairs and to the Presidential Administration. These complaints basically remained unanswered.

The complaint

3. Although the author does not claim a violation of any specific provisions of the Covenant, the communication appears to raise issues under article 2, paragraph 3; article 7; article 10, paragraph 2 (b); and article 14, paragraphs 2, 3 (e), (3) (g) and 4.

State party's observations on admissibility and merits

4.1 On 12 July 2005, the State party submits its observations on the admissibility and merits of the communication. The State party confirms that, on 5 April 2002, the Gomel Regional Court convicted the author's son on counts of murder with particular cruelty (article 139, part 2, para. 6, of the Criminal Code) and attempted theft committed more than

once (article 14, part 2, and article 205, part 2). This conviction was upheld by the Supreme Court on 9 August 2002. On 4 February 2004, the Presidium of the Supreme Court lowered the sentence to 11 years and 6 months' imprisonment.

4.2 The State party points out that the author's son did not challenge his conviction for attempted stealing and that his arguments about his innocence and unjust conviction under article 139, part 2, paragraph 6, of the Criminal Code have been examined by the State party authorities and found to be groundless. The murder of Mr. R.B. by the author's son was witnessed by Mr. A.R. who described the circumstances in which the crime was committed to his acquaintance, Mr. M.L. The witness Mr. M.T. (see paragraph 2.8 (i)) testified that for one day he was detained in the same cell as the author's son and that the latter confessed to him having murdered a man with a knife. Classmates of the author's son gave testimonies confirming that he carried a knife to the school, including in May 2001. One of the classmates stated that the author's son did not give him back a knife which he borrowed in the autumn of 2000. According to the expert opinion, one could not exclude that a knife of that type could have been used as a murder weapon.

4.3 The State party adds that in his confession report of 24 September 2001 the author's son admitted having stabbed Mr. R.B. with a knife. A combination of the above-mentioned evidence allowed the court to conclude that the author's son was guilty. This conclusion was upheld by the highest judicial instance, the Presidium of the Supreme Court.

4.4 The State party submits that the prosecutorial authorities examined numerous complaints in relation to this case and concluded that there were no grounds for further action. In particular, the claims of the author's son about being subjected to unlawful methods of investigation have been thoroughly considered and found to be groundless. There was no evidence in the case file to corroborate the allegations about biased investigation or about fabricated accusations against the author's son that could have had an impact on the court's conclusion in relation to his guilt. The State party concludes that in her communication to the Committee, the author has provided her own subjective evaluation of the evidence collected against her son.

Author's comments on the State party's observations

5. On 14 June 2007, the author submitted her comments on the State party's observations. She reiterates her initial claims and adds that one of the witnesses in her son's case, Mr. M.L., is currently serving a sentence in relation to another crime, whereas the main witness, Mr. A.R., is wanted by the police. She submits that one cannot exclude that the two of them were somehow involved in the murder of Mr. R.B. and gave false testimonies against her son to escape criminal liability.

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. 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.

6.3 The Committee considers that the author has sufficiently substantiated her claims, raising issues under article 7; article 10, paragraph 2 (b); article 14, paragraphs 2, 3 (e), 3 (g) and 4, of the Covenant, and declares them admissible.

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 notes the author's allegations that her son was subjected to beatings, threats and humiliation by officers of the Crime Detection Department, for the purpose of extracting a confession from him, and identifies the alleged perpetrators of these acts. The Committee also notes the State party's affirmation that these allegations had been examined by the courts and were found to be groundless. In this respect, the Committee recalls that once a complaint about treatment contrary to article 7 has been filed, a State party must investigate it promptly and impartially.³ The Committee considers that the information contained in the file does not demonstrate that the State party's competent authorities gave due consideration to the alleged victim's complaints of ill-treatment made both during the pretrial investigation and in court.

7.3 Furthermore, it recalls its jurisprudence that the wording, in article 14, paragraph 3 (g), that no one shall "be compelled to testify against himself or confess guilt", must be understood in terms of the absence of any direct or indirect physical or psychological coercion by the investigating authorities on the accused with a view to obtaining a confession of guilt.⁴ In cases of forced confessions, the burden is on the State to prove that statements made by the accused have been given of their own free will.⁵ In the circumstances, and in the absence of sufficient information in the State party's response about the measures taken by the authorities to investigate the claims made by the author's son, the Committee concludes that the facts before it amount to a violation of article 2, paragraph 3, read in conjunction with articles 7 and 14, paragraph 3 (g), of the Covenant.

7.4 The author has claimed that, despite the fact that at the time of his arrest and conviction her son was 17 years old, he was kept for 11 days in the IVS with adults, some of whom had committed serious crimes, and interrogated in the absence of his lawyer, legal representative or a social worker. The State party has not commented on these allegations, which raise issues under article 10, paragraph 2 (b), and article 14, paragraph 4, of the Covenant. The Committee recalls that accused juvenile persons are to be separated from adults and to enjoy at least the same guarantees and protection as those accorded to adults under article 14 of the Covenant.⁶ In addition, juveniles need special protection in criminal proceedings. They should, in particular, be informed directly of the charges against them and, if appropriate, through their parents or legal guardians, be provided with appropriate assistance in the preparation and presentation of their defence. In the present case, the

³ See, for example, communication No. 781/1997, *Aliiev v. Ukraine*, Views adopted on 7 August 2003, para. 7.2. See also Human Rights Committee general comment No. 20 (1992) on the prohibition of torture and cruel treatment or punishment, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A, para. 14.

⁴ Communications No. 330/1988, *Berry v. Jamaica*, Views adopted on 7 April 1994, para. 11.7; No. 1033/2001, *Singarasa v. Sri Lanka*, Views adopted on 21 July 2004, para. 7.4; and No. 912/2000, *Deolall v. Guyana*, Views adopted on 1 November 2004, para. 5.1.

⁵ See, Human Rights Committee 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. 41.

⁶ *Ibid.*, paras. 42-44.

author's son was not separated from adults and did not benefit from the special guarantees prescribed for criminal investigation of juveniles. In the circumstances, and in the absence of any other pertinent information, the Committee concludes that the rights of the author's son under article 10, paragraph 2 (b), and article 14, paragraph 4, of the Covenant have been violated.

7.5 The Committee further notes the author's claim that her son was not given the opportunity to question one of the two main witnesses of the prosecution, the undercover agent Mr. M.T. The Committee recalls that, as an application of the principle of equality of arms, the guarantee of article 14, paragraph 3 (e), is important for ensuring an effective defence by the accused and their counsel and guaranteeing the accused the same legal power of compelling the attendance of witnesses relevant for the defence and of examining or cross-examining any witnesses as are available to the prosecution.⁷ In the present case, the Committee notes the absence of information in the file as to the reasons for refusing the presence of the author's son in the court room during the questioning of the undercover agent Mr. M.T. and not allowing him to question this witness. In the absence of information from the State party in that respect, the Committee concludes that the facts, as reported, amount to a violation of the right of the author's son under article 14, paragraph 3 (e).

7.6 In relation to the author's claim that her son's trial was unfair and that his guilt has not been established, the Committee notes that the author points to many circumstances which she claims demonstrate that her son did not benefit from the presumption of innocence. The Committee recalls its jurisprudence that it is generally not for itself, but for the courts of States parties, to review or to evaluate facts and evidence, or to examine the interpretation of domestic legislation by national courts and tribunals, unless it can be ascertained that the conduct of the trial or the evaluation of facts and evidence or interpretation of legislation was manifestly arbitrary or amounted to a denial of justice.⁸ However, in the present case, given the above findings and in the absence of a sufficient response by the State party on the author's specific allegations, the Committee is of the opinion that the author's son did not benefit from the principle of presumption of innocence, in violation of article 14, 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 disclose a violation by the State party of article 2, paragraph 3, read in conjunction with articles 7 and 14, paragraph 3 (g); article 10, paragraph 2 (b); article 14, paragraphs 2, 3 (e), 3 (g) and 4, 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's son with an effective remedy, including initiation and pursuit of criminal proceedings to establish responsibility for his ill-treatment, as well as his release 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 and to provide an effective and enforceable 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

⁷ Ibid., para. 39.

⁸ See, inter alia, communication No. 541/1993, *Simms v. Jamaica*, decision on inadmissibility adopted on 3 April 1995, para. 6.2.

measures taken to give effect to the Committee's Views. In addition, it requests the State party to publish the Committee's Views.

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

**F. Communication No. 1402/2005, *Krasnov v. Kyrgyzstan*
(Views adopted on 29 March 2011, 101st session)***

<i>Submitted by:</i>	Tatyana Krasnova (represented by counsel, Independent Human Rights Group)
<i>Alleged victim:</i>	Mikhail Krasnov (the author's son)
<i>State party:</i>	Kyrgyzstan
<i>Date of communication:</i>	23 March 2005 (initial submission)
<i>Subject matter:</i>	Conviction of a juvenile person in violation of fair trial guarantees
<i>Procedural issue:</i>	Lack of substantiation of claims
<i>Substantive issues:</i>	Torture, cruel, inhuman or degrading treatment or punishment; right to be informed, at the time of arrest, of the reasons for arrest; right to humane treatment and respect for dignity; fair hearing; right to adequate time and facilities for the preparation of his defence; right to be tried without undue delay; right not to be compelled to testify against oneself or to confess guilt; procedure against juveniles shall take into account their age; arbitrary interference; privacy
<i>Articles of the Covenant:</i>	7; 9, paragraphs 2 and 3; 10, paragraph 1; 14, paragraphs 1, 3 (b), 3 (c), 3 (g) and 4; 17
<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 29 March 2011,

Having concluded its consideration of communication No. 1402/2005, submitted to the Human Rights Committee on behalf of Mr. Mikhail Krasnov 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:

* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, 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 Ms. Tatyana Krasnova, a Kyrgyz national born on 4 January 1962. She submits the communication on behalf of her son, Mr. Mikhail Krasnov, also a Kyrgyz national, born on 20 May 1985, whose whereabouts were unknown at the time of submission of the communication. She claims a violation by Kyrgyzstan of her son's rights under article 7; article 9, paragraphs 2 and 3; article 10, paragraph 1; article 14, paragraphs 1, 3 (b), 3 (c), 3 (g) and 4; and article 17 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, Independent Human Rights Group.

The facts as presented by the author

2.1 At around 4.30 p.m. on 28 October 1999, the dead body of 14-year-old D.M. was found in the stair landing of a block of flats situated on Sovetskaya street in Bishkek. The body had numerous stab wounds and a constriction mark on the throat. The same day, an investigator of the Department of Internal Affairs of the Sverdlovsk District of Bishkek (Department of Internal Affairs), Mr. M.K., initiated criminal proceedings to investigate the death of D.M.

2.2 At around 8 p.m. on 28 October 1999, officers of the Department of Internal Affairs visited the author's apartment and told her that her 14-year-old son had to be taken to the Department of Internal Affairs. Neither the author nor her son were informed, at that time, of the reasons for his arrest. After the author reminded officers that Mikhail was a minor, she was allowed to go with him to the Department of Internal Affairs. Mikhail was then taken to one of the rooms for interrogation; the author was not allowed to be present while her son was interrogated, nor was a lawyer provided to him. The author was told by officers of the Department of Internal Affairs that it was sufficient that a juvenile inspector was present during her son's interrogation. She left the Department of Internal Affairs at 2 a.m. on 29 October 1999, without being allowed to see her son and without being informed of the reasons for his arrest.

2.3 At 10 a.m. on 29 October 1999, the author met with the Head of the Department of Internal Affairs and requested information as to the reasons for Mikhail's arrest. He responded that officers of the Department of Internal Affairs were investigating the death of a minor and identifying individuals who had been involved in the murder.

2.4 At 9 p.m. on 29 October 1999, the author's son was released. Mikhail was not provided with a copy of his arrest report and the author doubts that such a report was ever drawn up. While at home, Mikhail told the author that he was beaten on his head during the interrogation by numerous individuals who entered the interrogation room and was forced to confess to the murder of D.M., his classmate. Officers of the Department of Internal Affairs poked a blood-stained shirt into Mikhail's face, asking whether it was him who had killed D.M. The author's son replied that he had learned about the death of his friend from the officers themselves and was deeply shocked by this news. Mikhail also told the author that he was detained overnight in a cell with an adult man and was deprived of food for 24 hours.

2.5 On 29 October 1999, Mr. U.A. and Mr. R.A. were arrested on suspicion of the murder of D.M. and taken to the Department of Internal Affairs. In the course of pretrial investigation, they confessed to the murder of D.M. and gave testimonies against the author's son, implicating him in the murder.

2.6 At around 10 a.m. on 30 October 1999, three individuals in civilian clothes visited the author's apartment and told her that Mikhail had to go to the Department of Internal Affairs. No further explanation was provided. Upon arrival to the Department of Internal

Affairs, the author and her son were taken to one of the rooms, where they saw one of the suspects, Mr. R.A. When the author asked for an explanation as to why her son had to be taken to the Department of Internal Affairs, one of the officers replied that her son was a murderer. Then the author was requested to leave the room, whereas her son was escorted to yet another room for interrogation. Again, she was not allowed to see Mikhail and be present while he was interrogated. An ex officio lawyer, however, was present during the interrogation of the author's son. On the same day, the author was requested by the investigator, Mr. M.K., to be present during the confrontation between her son and both suspects, allegedly because of the inability of the ex officio lawyer to take part in the proceedings. As a result, the confrontation took place in the absence of a lawyer.

2.7 At around 9.30/10 p.m. on 30 October 1999, officers of the Department of Internal Affairs carried out a personal search of the author's son and seized a pair of yellow jogging shoes that he was wearing. The personal search and seizure of Mikhail's personal belongings took place in the absence of a lawyer and the author, in her capacity as her son's legal representative. The personal search report was signed only by Mikhail, the investigator and two identifying witnesses. On the same day, an officer of the crime detection unit, Mr. A.B., drew up a seizure report that was signed by him, Mikhail and two identifying witnesses, who, as transpired at a later stage, have never lived at the addresses indicated by them in the report in question. According to this report, a pair of "jogging shoes, size 45, with yellow and blue inserts made of a leather-substitute and produced by Sprandi company" was seized from the author's son, packed and sealed. The author submits that the seizure of Mikhail's footwear was carried out by an officer of the crime detection unit in violation of the criminal procedure law, namely, in the absence of a written ordinance by the investigator and without indicating an exact time of the seizure. Furthermore, the author, as her son's legal representative, has never been provided with a copy of the personal search and seizure reports.

2.8 According to the material evidence examination report drawn up by the investigator, Mr. M.K., on 30 October 1999, a pair of "jogging shoes of black-yellow-blue colour" was seized. The report did not mention, however, whether the seized footwear was packed and sealed. The author submits that, on 10 November 1999, the jogging shoes in question were added to the criminal case file as material evidence and the respective investigator's ordinance referred to them for the first time as "jogging shoes 'Sprandi' with the stains of reddish-brown colour". She adds that all expert examinations in her son's criminal case, such as forensic psychiatric, narcomania and biological examination, have been carried out in the absence of a lawyer and herself, as Mikhail's legal representative. Mikhail himself was informed about the investigator's ordinance of 1 November 1999, requesting to carry out a biological examination of the seized jogging shoes, only on 6 December 1999. An investigator's ordinance of 5 November 1999, requesting that an additional biological examination of the seized jogging shoes be carried out, was made available to the author's son only on 26 December 1999.

2.9 On 31 October 1999, Mikhail was transferred to a temporary detention ward (IVS), where he was detained with adults, and then, on 2 November 1999, was taken back to the Department of Internal Affairs in order for a prosecutor to authorize a restraint measure to be imposed on him. During an encounter with the Deputy Prosecutor of the Sverdlovsk District, Mikhail and the two suspects complained about being subjected to physical pressure, which prompted the prosecutor to request a forensic medical examination. According to the forensic medical report of 3 November 1999, neither Mikhail nor the two suspects had any visible bodily injuries at the time of examination. According to the author's son, however, the medical examination in question was carried out by a doctor while all three of them remained fully dressed.

2.10 On 2 November 1999, a restraint measure was imposed on the author's son by the Deputy Prosecutor of the Sverdlovsk District and Mikhail gave a written undertaking not to leave his usual place of residence. Despite this fact, he was released only at around 10 p.m. on 3 November 1999. According to the author, her son was detained in the Department of Internal Affairs and the IVS for more than 72 hours without any legal grounds. While in detention, Mikhail had contracted an acute viral respiratory infection, and had to be treated at home for two weeks after his release. For fear of reprisals and further arrests of her son, the author decided not to complain about his unlawful detention which had exceeded 72 hours.

2.11 On 1 November 1999, that is, three days after the murder of D.M. and while the investigation was still ongoing, the *Evening Bishkek* newspaper, with country-wide distribution, published an article entitled "Unchildish games" with a photograph of the author's son. Although the article did not refer to him by his family name, it did mention that "a 14-year-old Mikhail K., who was a classmate of D.M." was arrested on suspicion of murder. The author submits that this information directly leads to the identification of her son, which, in turn, violates Rule 8 of United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("Beijing Rules").¹

2.12 On 4 November 1999, the author's apartment was searched by the investigator and three officers of the Department of Internal Affairs on the basis of a search warrant issued by the prosecutor. According to the search protocol, nothing was found in the apartment.

2.13 On 26 December 1999, the investigation into the death of D.M. was completed and the criminal case was transmitted to the prosecutor's office. The criminal case file contained a copy of the charge against the author's son, which was dated 26 December 1999 but authorized by the prosecutor only on 30 December 1999. The author submits that Mikhail was initially given a copy of this document that was dated 26 December 1999 and was not yet authorized by the prosecutor and then made to sign a backdated copy with the prosecutor's authorization of 30 December 1999.

2.14 On 29 May 2000, Mr. U.A. and Mr. R.A. retracted their confessions in the court of first instance, the Sverdlovsk District Court of Bishkek, stating that they had had to testify against themselves and to implicate the author's son in the murder, because of the physical pressure exercised on them on 29 October 1999 by officers of the Department of Internal Affairs. The author submits that her son has consistently pleaded innocent throughout the pretrial investigation and in court. The Sverdlovsk District Court of Bishkek heard oral testimonies of four officers of the Department of Internal Affairs, who stated that they had exerted no physical pressure on any of the defendants.

2.15 On 29 May 2000, the Sverdlovsk District Court of Bishkek acquitted the author's son of aggravated murder (article 97, part 2, paragraphs 6 and 15, of the Criminal Code), stating that his guilt had not been proven. The court took into account Mikhail's alibi, proven by witness statements of 22 individuals (including his teachers, classmates and a school principle), that, from 8 a.m. to 3.30 p.m. on 28 October 1999 he had been present in school, except for a 10-minute lunch break at 1 p.m. when he had gone home and was seen there by his mother; and that he had spent the rest of that day at a friend's place helping with the home repairs. The court also noted that Mikhail could not explain the origin of the blood stains on the jogging shoes that had been seized from him and concluded that "no

¹ General Assembly resolution 40/33, annex, rule 8:

8.1 The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling.

8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published.

other evidence either proving him guilty of having committed the murder or exonerating him has been presented to the court". The author's son was requested to give a written undertaking not to leave his usual place of residence prior to the judgment being effective.

2.16 On an unspecified date, the mother of the deceased and a senior aide to the Prosecutor of the Sverdlovsk District appealed against the judgment of the Sverdlovsk District Court of Bishkek of 29 May 2000 to the Judicial Chamber for Criminal Cases of the Bishkek City Court (Bishkek City Court). The prosecution requested that the author's son be found guilty on the basis of the testimony given by Mr. U.A. and Mr. R.A. during the pretrial investigation and the existence of the blood stains on the jogging shoes that had been seized from him. Mikhail's lawyer refuted the arguments of the prosecution and recalled that Mr. U.A. and Mr. R.A. had subsequently retracted their confessions in court and that at the time of the seizure of the jogging shoes, there were no stains on them, let alone ones of reddish-brown colour. On 6 September 2000, the Bishkek City Court quashed the judgment of the Sverdlovsk District Court of Bishkek of 29 May 2000 and sent the case back to the same court for a retrial.

2.17 On 26 June 2001, the Sverdlovsk District Court of Bishkek requested an additional biological examination of the blood stains on the jogging shoes in order to establish the exact time they had appeared and whether their origin corresponded to the circumstances of the case. The author's son was requested to continue to respect his undertaking not to leave his usual place of residence.

2.18 On 19 December 2001, the Sverdlovsk District Court of Bishkek returned the criminal case to the prosecutor's office, for it to add to the criminal case file a certification, confirming that one of the co-accused, Mr. R.A., had already served an earlier sentence for murder, of which he had been convicted in the Russian Federation.

2.19 On 10 June 2002, the Sverdlovsk District Court of Bishkek found the author's son guilty of the aggravated murder of D.M. (article 97, part 2, paragraphs 6 and 15, of the Criminal Code) and sentenced him to 12 years' imprisonment (without the seizure of property) to be served in a juvenile colony. Mikhail was remanded into custody directly in the courtroom. The court based its judgment, *inter alia*, on the medical examination report of 3 November 1999 (see, para. 2.9 above) and did not take into account Mikhail's claims that he had been subjected to physical pressure and the numerous witness statements establishing his alibi. The court heard an oral testimony of an expert in biology, who stated that it was impossible either to confirm or definitely exclude that the blood stains on the jogging shoes belonged to the deceased. The court also referred to the report of the additional biological examination of the jogging shoes dated 23 July 2001 (see para. 2.17 above), according to which it was impossible to establish the exact time the blood stains had appeared due to the lack of "reliable methodology".

2.20 From 10 June 2002 to 29 August 2002, the author's son was detained at the investigation detention centre (SIZO-1) in a cell for juveniles. The cell was overcrowded and, due to the shortage of plank beds, inmates had to sleep in turns. Due to the high humidity and heat, the author's son, as the rest of the inmates, had to stay in the cell half-naked and was often sick.

2.21 On 14 June 2002, Mikhail's lawyer appealed the judgment of the Sverdlovsk District Court of Bishkek of 10 June 2002 to the Bishkek City Court. She argued, in particular, that:

(a) Mr. U.A. and Mr. R.A. had retracted their confessions, stating that they had to testify against themselves and to implicate the author's son in the murder of D.M., because of the physical pressure exercised on them on 29 October 1999 by officers of the Department of Internal Affairs;

(b) Mikhail's alibi was proven by witness statements of 22 individuals, including his teachers, classmates and a school principle, who saw him at school on 28 October 1999 at the time when the murder of D.M. had presumably been committed;

(c) According to the self-incriminating testimonies of Mr. U.A. and Mr. R.A. and those implicating the author's son in the murder of D.M., given by them during the pretrial investigation, Mikhail was strangling D.M. with an elbow, whereas a forensic medical expert heard by the Sverdlovsk District Court of Bishkek testified that a constriction mark on the deceased's throat could not have appeared from a strangulation by a hand or an elbow. The court, however, failed to clarify these conflicting testimonies;

(d) According to the forensic biological examination, it could not be excluded that the blood stains found on Mikhail's jogging shoes belonged to D.M. The lawyer refers to the seizure report (see, para. 2.7 above), that was drawn up on the basis of a visual examination of the jogging shoes and does not mention any stains, let alone of reddish-brown colour. She also refers to an expert statement, according to which a blood group of the stains found on the jogging shoes could have matched with, aside from the deceased, some 20 per cent of the population. Given the fact that the seizure of the jogging shoes was carried out two days after the actual detention of the author's son, the lawyer did not exclude the possibility that law-enforcement officers had tampered with the evidence and added blood from the clothes of the deceased to Mikhail's jogging shoes.

2.22 On 29 August 2002, the Bishkek City Court quashed the judgment of the Sverdlovsk District Court of Bishkek of 10 June 2002 and acquitted the author's son of the murder charge, stating that his guilt had not been established. Mikhail was released from custody directly in the court room. The court based its judgment on, inter alia, Mikhail's alibi that had not been refuted either by the prosecution or the court, and on its doubts related to the origin of the stains on the jogging shoes, given that the latter had been seized without any visible stains and then added to the criminal case file as evidence with the "suddenly appeared stains of reddish-brown colour".

2.23 On 21 October 2002, the Deputy Prosecutor of Bishkek appealed against the judgment of the Bishkek City Court of 29 August 2002 to the Supreme Court, requesting that it be reviewed through the supervisory review procedure. On 14 January 2003, the Supreme Court quashed the judgment of the Bishkek City Court of 29 August 2002 and sent the case back to the same court for a retrial. The Supreme Court requested the Bishkek City Court to verify, in particular, whether experts in biology could be more precise with regard to the origin of the stains on the jogging shoes and whether the time of death of D.M. and the specific role of each of the accused in his murder could be determined more thoroughly.

2.24 On 21 April 2003, the Bishkek City Court found the author's son guilty of the murder of D.M. and sentenced him to 8 years' imprisonment (without the seizure of property) to be served in a juvenile colony. Mikhail was taken into custody directly in the courtroom. This time, the court had established that the murder of D.M. had occurred between 3 and 4 p.m. on 28 October 1999, that the author's son deliberately appeared in public places on that day to provide himself with an alibi, and that he had strangled D.M. from behind with a clothesline.

2.25 On the same day, the Bishkek City Court issued a privy ruling with regard to the investigator Mr. M.K. and drew the attention of the authorities of the Ministry of Internal Affairs to the following violations of the procedural law that have been identified by the court in the present criminal case:

(a) An officer of the crime detection unit, Mr. A.B., seized a pair of jogging shoes from a minor suspect in the absence of his legal representative and had not indicated in the seizure report that there were some stains on the seized footwear. According to the

court, “it gave a pretext to challenge the evidence collected” and resulted in the red tape in the consideration of this criminal case by the courts;

(b) The confrontation of the author’s minor son with Mr. U.A. and Mr. R.A. on 30 October 1999 took place in the absence of their respective lawyers, even though “their presence was necessary in this particularly serious crime”.

2.26 On 23 June 2003, Mikhail’s lawyer appealed the judgment of the Bishkek City Court of 21 April 2003 to the Supreme Court, requesting that it be reviewed through the supervisory review procedure. On 15 October 2003, the Judicial Chamber for Criminal Cases and Administrative Offences of the Supreme Court quashed the judgment of the Bishkek City Court of 21 April 2003 and sent the case back to the same court for a retrial. The court established that the judgment in question had been handed down in violation of article 352 of the Criminal Procedure Code, since the original of the judgment in question was initially signed by an unknown person and was subsequently altered with a signature of a judge who took part in the court hearing of the case.

2.27 On 30 December 2003, the Bishkek City Court acquitted the author’s son of murder, stating that his participation in the commission of the crime had not been proven. Mikhail was released from custody directly in the courtroom.

2.28 On an unspecified date, the Prosecutor’s Office appealed the judgment of the Bishkek City Court of 30 December 2003 to the Supreme Court, requesting that it be reviewed through the supervisory review procedure. On 26 August 2004, the Judicial Chamber for Criminal Cases and Administrative Offences of the Supreme Court quashed the judgment of the Bishkek City Court of 30 December 2003 and upheld the judgment of the Sverdlovsk District Court of Bishkek of 10 June 2002 that found the author’s son guilty of having committed the murder of D.M. and sentenced him to 12 years’ imprisonment (without the seizure of property) to be served in a juvenile colony. According to article 83 of the Constitution and article 382 of the Criminal Procedure Code, the ruling of the Judicial Chamber for Criminal Cases and Administrative Offences of the Supreme Court of 26 August 2004 is final and cannot be appealed. The court has not issued any decision as to whether the author’s son should be remanded into custody directly in the courtroom. Mikhail has gone into hiding since then.

The complaint

3.1 The author claims that, in violation of article 7 and article 14, paragraph 3 (g), her son and the other two co-accused, who had testified against Mikhail during the pretrial investigation, were physically and psychologically pressured to testify against themselves and to confess guilt. She further submits that protracted and unconscionable court proceedings to which her minor son was subjected for almost five years, being acquitted three times and three times found guilty in the same criminal case, have had a negative impact on his studies, behaviour and societal development, and amounted to a form of psychological torture in violation of article 7 of the Covenant.

3.2 The author submits that her son’s rights under article 9, paragraph 2, have been violated, since neither him nor her, as Mikhail’s legal representative, were informed for more than 24 hours of the reasons for his arrest which took place on 28 October 1999.

3.3 The author argues that, contrary to the provisions of article 9, paragraph 3, her son was detained for more than 72 hours (from 10 a.m. on 30 October 1999 to 10 p.m. on 3 November 1999) without any legal grounds.

3.4 The author submits that the conditions of her son’s detention in SIZO-1 from 10 June 2002 to 29 August 2002 (see, para. 2.20 above) amounted to a violation of article 10, paragraph 1, of the Covenant.

3.5 The author claims that her son's rights under article 14, paragraph 1, of the Covenant were violated, because the State party's courts were partial in the evaluation of his alibi, as well as of the crucial facts and evidence in his case.

3.6 She adds that her son's rights under article 14, paragraph 3 (b), were violated, because most of the investigative actions in his case have been carried out in the absence of a lawyer. Given his minor age (14) and absence of a lawyer, he was effectively deprived of an opportunity to prepare for his defence and to present effective evidence.

3.7 The author further claims that article 14, paragraph 3 (c), of the Covenant was violated, because court proceedings in her minor son's case lasted for almost five years without any objective reasons for such a delay. She adds that Mikhail did not in any way obstruct the course of the proceedings, and no new evidence establishing his guilt or witnesses against him have been brought to the courts during this period. The author also refers to the Committee's general comment No. 13 (1984) on equality before the courts and the right to a fair and public hearing by an independent court established by law,² according to which a guarantee of article 14, paragraph 3 (c), relates not only to the time by which a trial should commence, but also the time by which it should end and judgement be rendered; all stages must take place "without undue delay". To make this right effective, a procedure must be available in order to ensure that the trial will proceed "without undue delay", both in first instance and on appeal.

3.8 The author claims that the practice of examining cases of juveniles by the State party's courts does not comply with the requirements of article 14, paragraph 4, of the Covenant. She submits that cases of juveniles are examined by the same judges who deal with the ordinary criminal cases, juveniles are seated behind metal bars during trial and are under escort of officers of the criminal corrections directorate.

3.9 The author claims a violation of article 17 of the Covenant, since a search warrant was issued by the prosecutor and not by the court (see para. 2.12 above).

State party's observations on admissibility and merits

4. On 28 July 2005, the State party recalls the chronology of the facts as summarized in paragraphs 2.19, 2.22–2.24 and 2.26–2.28 above. It refers to the proposal by the Ministry of Internal Affairs to establish a commission consisting of the representatives of the General Prosecutor's Office, Supreme Court, Main Investigation Department of the Ministry of Internal Affairs and a lawyer representing the author's son, in order to ensure that decisions taken in Mikhail's case were appropriate and to hand down a legal decision in his regard (see para. 6.1 below). The Ministry of Internal Affairs made such a proposal due to the "numerous and contradictory court decisions" adopted in relation to the criminal charges brought against the author's son.

Author's comments on the State party's observations

5.1 On 14 October 2005, the author submitted her comments on the State party's observations. She contends that the State party did not address any of the arguments she raised in the communication to the Committee. Instead, it confined itself to reiterating the chronology of the facts. The author draws the Committee's attention to article 384 of the Criminal Procedure Code, which allows the Supreme Court to review, on the basis of newly discovered evidence, its own rulings that have already become effective.

² *Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 40 (A/39/40)*, annex VI, para. 10.

5.2 The author states that, on 28 September 2004, 19 November 2004 and 13 January 2005, her son's lawyer filed motions to the General Prosecutor's Office, with the request to reopen proceedings in Mikhail's case on the basis of newly discovered evidence. On 19 October 2004, 22 December 2004 and 10 February 2005, Mikhail's lawyer received written replies from the General Prosecutor's Office, informing him that there were no grounds to reopen proceedings in Mikhail's case on the basis of newly discovered evidence. The author argues that, further to the requirements of articles 387 and 388 of the Criminal Procedure Code, the General Prosecutor's Office was supposed to reply to the lawyer's motions with a reasoned ruling rather than a mere written reply which has no value in judicial proceedings.

5.3 On 3 May 2005, Mikhail's lawyer appealed the written reply of the Deputy Prosecutor General of 10 February 2005 to the Pervomai District Court of Bishkek. On 11 May 2005, the Pervomai District Court of Bishkek granted the lawyer's appeal and held that the letter of the Deputy Prosecutor General "was not in conformity with the law" and sent the case file to the General Prosecutor's Office for a "lawful decision" to be taken. On 27 May 2005, the Prosecutor of the Pervomai District appealed the decision of the Pervomai District Court of Bishkek of 11 May 2005 to the Bishkek City Court. On 23 June 2005, the Bishkek City Court rejected the prosecutor's appeal and upheld the decision of the Pervomai District Court of Bishkek of 11 May 2005. On 17 August 2005, the Deputy Prosecutor General appealed the decision of the Bishkek City Court of 23 June 2005 to the Supreme Court under the supervisory review procedure. On 5 September 2005, Mikhail's lawyer filed objections to the appeal of the Deputy Prosecutor General. At the time of submission of the author's comments, the Supreme Court had not yet adjudicated on the matter.

Additional information from the author

6.1 On 18 February 2011, the author submitted additional information and drew the Committee's attention to the fact that an inter-ministerial commission referred to in the State party's observations on the merits of 28 July 2005 (see para. 4 above) has not been established.

6.2 The author adds that, on 18 October 2005, the Judicial Chamber for Criminal Cases and Administrative Offences of the Supreme Court rejected the prosecutor's appeal submitted under the supervisory review procedure (see para. 5.3 above) and upheld the decision of the Pervomai District Court of Bishkek dated 11 May 2005 and the ruling of the Bishkek City Court dated 23 June 2005. On 10 May 2006, the Deputy Prosecutor General decided to reopen proceedings in Mikhail's case on the basis of newly discovered evidence. On 16 May 2006, the Deputy Prosecutor General submitted his findings to the Supreme Court with the request to quash the decision of the Pervomai District Court of Bishkek dated 11 May 2005, the ruling of the Bishkek City Court dated 23 June 2005 and the decision of the Judicial Chamber for Criminal Cases and Administrative Offences of the Supreme Court dated 18 October 2005, and to send the materials back to the Pervomai District Court of Bishkek for a new examination of the appeal submitted by Mikhail's lawyer in relation to the written reply of the Deputy Prosecutor General of 10 February 2005. On 4 July 2006, the Judicial Chamber for Criminal Cases and Administrative Offences of the Supreme Court quashed the decision of the Pervomai District Court of Bishkek dated 11 May 2005, the ruling of the Bishkek City Court dated 23 June 2005 and the decision of the Judicial Chamber for Criminal Cases and Administrative Offences of the Supreme Court dated 18 October 2005, and rejected the appeal submitted by Mikhail's lawyer in relation to the written reply of the Deputy Prosecutor General of 10 February 2005.

6.3 The author submits that, on 25 December 2007, the Judicial Chamber for Criminal Cases and Administrative Offences of the Supreme Court reduced her son's sentence from 12 to 10 years' imprisonment on the basis of an amendment to article 82 of the Criminal Code introduced on 25 June 2007. According to this amendment, which has a retroactive effect, a sentence for an individual who was below the age of 18 at the time of commission of the crime shall not exceed, for a particularly serious crime, 10 years' imprisonment.

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. 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.

7.3 With regard to the author's allegations under article 9, paragraph 3; article 10, paragraph 1; article 14, paragraph 4; and article 17 of the Covenant, the Committee considers that she has not substantiated the claims, for the purposes of admissibility. It further remains unclear whether these allegations were raised at any time before the domestic courts. Hence, this part of the communication is inadmissible under article 2 of the Optional Protocol.

7.4 As to the author's claim under article 7, that protracted and unconscionable proceedings to which her minor son was subjected for almost five years amounted to a form of psychological torture, the Committee notes that it relates primarily to issues directly linked to those falling under article 14, paragraph 3 (c), of the Covenant, that is, the right to be tried without undue delay. It also notes that there are no obstacles to the admissibility of the communication under 14, paragraph 3 (c), of the Covenant, and declares it admissible. Having come to this conclusion, the Committee decides that it is not necessary to separately consider the same claim under article 7 of the Covenant.

7.5 The Committee considers that the author has sufficiently substantiated the remaining claims under article 7; article 9, paragraph 2; article 14, paragraphs 1, 3 (b), 3 (c) and 3 (g), of the Covenant, and declares them admissible.

Consideration of the merits

8.1 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.

8.2 The Committee notes the author's allegations that her 14-year-old son was beaten on his head and physically pressured by officers of the Department of Internal Affairs, for the purpose of extracting a confession from him, and that Mikhail identified in court the alleged perpetrators of these acts. The Committee also notes that these allegations had been examined by the courts and were found to be groundless on the basis of the medical examination report of 3 November 1999 (see paras. 2.9 and 2.19 above) and testimonies of the alleged perpetrators, who stated that they had exercised no physical pressure on any of the defendants (see para. 2.14 above). The Committee further notes that the author's son has disputed the conclusions of the medical examination report on the ground that the medical examination was carried out by a doctor while he and the other two co-accused

were fully dressed. In this respect, the Committee recalls that once a complaint about treatment contrary to article 7 has been filed, a State party must investigate it promptly and impartially.³

8.3 The Committee also recalls its jurisprudence⁴ that the burden of proof cannot rest alone on the author of the communication, especially considering that the authors 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 violation of the Covenant made against it and its authorities, and to provide to the Committee the information available to it. The State party, however, did not provide any information as to whether any inquiry was undertaken by the authorities to address the detailed and specific allegations advanced by the author in a substantiated way. In these circumstances, due weight must be given to these allegations. The Committee considers, therefore, that the information contained in the file does not demonstrate that the State party's competent authorities gave due consideration to the complaints of the author's son about being subjected to physical pressure, and concludes that the facts before it amount to a violation of the rights of the author's son under article 7 of the Covenant.

8.4 In the light of this conclusion and the author's own affirmation that her son has consistently pleaded innocent throughout the pretrial investigation and in courts (see para. 2.14 above) and, therefore, has not testified against himself or confessed guilt, the Committee does not consider it necessary to deal separately with the author's claim under article 14, paragraph 3 (g), of the Covenant.

8.5 The Committee notes the author's claim that neither her son nor she, as Mikhail's legal representative, were informed of the reasons for his arrest which took place on 28 October 1999. The State party does not dispute this claim. For this reason, the Committee concludes that the rights of the author's son under article 9, paragraph 2, of the Covenant were violated.

8.6 The author has also claimed that her son's rights under article 14, paragraph 3 (b), were violated, as most of the investigative actions in his case, particularly during the time when he was subjected to psychological pressure and when the crucial material evidence of the prosecution (the jogging shoes) had been seized from him, had been carried out in the absence of a lawyer. The Committee notes that these allegations were presented both to the State party's authorities and in the context of the present communication. In this regard, the Committee recalls that a privy ruling of the Bishkek City Court of 21 April 2003 specifically referred to the fact that the presence of a lawyer during the confrontation of the author's son with Mr. U.A. and Mr. R.A. "was necessary in this particularly serious crime" (see para. 2.25 (b) above). In the light of the recognition by the State party's own courts that the author's son was not represented by a lawyer during one of the most important investigative actions and given his particularly vulnerable situation as a minor, the Committee considers that the facts before it reveal a violation of the rights of the author's son under article 14, paragraph 3 (b), of the Covenant.⁵

³ See, for example, communication No. 781/1997, *Aliev v. Ukraine*, Views adopted on 7 August 2003, para. 7.2. See also Human Rights Committee, general comment No. 20 (1992) on the prohibition of torture and cruel treatment or punishment, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A, para. 14.

⁴ Communications No. 30/1978, *Bleier v. Uruguay*, Views adopted on 29 March 1980, para. 13.3; No. 84/1981, *Dermitt Barbato v. Uruguay*, Views adopted on 21 October 1982, para. 9.6.

⁵ See, for example communication No. 537/1993, *Kelly v. Jamaica*, Views adopted on 17 July 1997, para. 9.2.

8.7 As to the claim under article 14, paragraph 3(c), of the Covenant, the Committee recalls⁶ that the right of the accused to be tried without undue delay is not only designed to avoid keeping persons too long in a state of uncertainty about their fate, but also to serve the interests of justice. What is reasonable has to be assessed in the circumstances of each case, taking into account mainly the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the administrative and judicial authorities. A guarantee of article 14, paragraph 3 (c), relates not only to the time between the formal charging of the accused and the time by which a trial should commence, but also the time until the final judgement on appeal.⁷ All stages, whether in first instance or on appeal must take place “without undue delay”. The Committee notes that, in the present case, court proceedings lasted for almost five years during which the author’s minor son was acquitted three times and three times found guilty on the basis of the same evidence, witness statements and testimonies of the co-accused. It further notes that none of the delays in the case can be attributed to the author or to his lawyers. In the absence of any explanation from the State party justifying a delay of almost five years between the formal charging of the author’s minor son and his final conviction by the Supreme Court, the Committee concludes that the delay in his trial was such as to amount to a violation of article 14, paragraph 3 (c), of the Covenant.

8.8 In relation to the author’s claim that the State party’s courts were partial in the evaluation of her son’s alibi, as well as of the crucial facts and evidence in his case, and that his guilt was not established, the Committee notes that the author points to many circumstances which she claims demonstrate that her son did not benefit from a right to a fair hearing by a competent, independent and impartial tribunal. The Committee recalls its jurisprudence that it is generally not for itself, but for the courts of States parties, to review or to evaluate facts and evidence, or to examine the interpretation of domestic legislation by national courts and tribunals, unless it can be ascertained that the conduct of the trial or the evaluation of facts and evidence or interpretation of legislation was manifestly arbitrary or amounted to a denial of justice.⁸ The Committee notes, however, that the State party’s authorities have conceded that court decisions in the present case were “numerous and contradictory” and even suggested the establishment of an inter-ministerial commission tasked with handing down a “legal decision” in relation to the author’s son. In the light of the above and given the Committee’s findings of a violation of article 7, and article 14, paragraphs 3 (b) and 3 (c), of the Covenant, the Committee is of the opinion that the author’s son did not benefit from a right to a fair hearing, in violation of article 14, paragraph 1, 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 by the State party of article 7; article 9, paragraph 2; and article 14, paragraphs 1, and 3 (b) and 3 (c), 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’s son with an effective remedy, including a review of his conviction taking into account of the provisions of the Covenant, and

⁶ See Human Rights Committee 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. 35.

⁷ See also communications No. 1089/2002, *Rouse v. The Philippines*, Views adopted on 25 July 2005, para. 7.4; and No. 1085/2002, *Taright et al. v. Algeria*, Views adopted on 15 March 2006, para. 8.5.

⁸ See, inter alia, communication No. 541/1993, *Simms v. Jamaica*, decision on inadmissibility adopted on 3 April 1995, para. 6.3.

appropriate compensation. The State party is also under an obligation 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 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 it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. In addition, it requests the State party to publish the Committee's Views.

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

G. Communication No. 1410/2005, *Yevdokimov and Rezanov v. Russian Federation*
(Views adopted on 21 March 2011, 101st session)*

<i>Submitted by:</i>	Denis Yevdokimov and Artiom Rezanov (not represented by counsel)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Russian Federation
<i>Date of communication:</i>	20 March 2004 (initial submission)
<i>Subject matter:</i>	Deprivation of the right to vote
<i>Procedural issue:</i>	None
<i>Substantive issues:</i>	Right to vote, right to effective remedy
<i>Articles of the Covenant:</i>	2, paragraphs 1 and 3, 25
<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 21 March 2011,

Having concluded its consideration of communication No. 1410/2005, submitted to the Human Rights Committee on behalf of Mr. Denis Yevdokimov and Mr. Artiom Rezanov 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. The authors of the communication are Mr. Denis Yevdokimov, born in 1972, and Mr. Artiom Rezanov, born in 1977, both nationals of the Russian Federation who, at the time of submission, were serving prison terms in the Russian Federation. The authors claim violations of articles 2, paragraphs 1 and 3, and article 25, of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the Russian Federation on 1 January 1992. The authors are unrepresented.

* 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. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.
 The texts of three individual opinions signed by Committee members Mr. Krister Thelin, Mr. Michael O'Flaherty, Mr. Gerald L. Neuman, Ms. Iulia Motoc and Mr. Fabián Omar Salvioli are appended to the present Views.

The facts as presented by the authors

2.1 On 19 February 2001, the authors were found guilty of various crimes related to the organization of a criminal group dealing with drug trafficking, illegal deprivation of liberty, extortion and abuse of official powers. The conviction was confirmed by the decision of the Collegium of the Supreme Court on criminal cases of 3 October 2001.

2.2 On 7 December 2003, while the authors were already in detention, the Russian Federation held Parliamentary elections and on 14 March 2004, it held presidential elections. The authors submit that they were not allowed to vote during these elections as section 32, paragraph 3, of the Constitution restricts the right of persons deprived of liberty under court sentence to vote and to be elected. They claim that there is no remedy to challenge the provisions of the Constitution domestically.

The complaint

3.1 The authors claim that section 32, paragraph 3, of the Constitution¹ which restricts the right of persons deprived of liberty to vote contradicts article 25 of the Covenant.

3.2 They claim that the said provision of the Constitution is discriminatory on the grounds of social status, and violates their rights under article 2, paragraph 1, of the Covenant.

3.3 The authors invoke article 2, paragraph 3, of the Covenant, as they claim there is no effective remedy to challenge the provision of the Constitution domestically.

State party's observations on admissibility and merits

4.1 On 23 November 2005, the State party indicated that under section 32, paragraph 3, of the Constitution of the Russian Federation, persons deprived of their liberty under court sentence do not have a right to vote or to be elected. The authors' claim that such provision contradicts article 25 of the Covenant is unfounded, as their interpretation of the provision of the Covenant is biased and subjective. It contests that article 25 of the Covenant allows limitations to the right to participate in state affairs directly and through elected representatives. In the present case, the authors are confusing "violation of rights" with "limitations to rights". The latter concerns justified restrictions by the State on its citizens' rights in relevant circumstances.

4.2 The State party refers to article 21, paragraph 1, of the Universal Declaration of Human Rights concerning the right of each person to take part in the government of his country directly or through chosen representatives. It refers to article 29 of the Declaration which stipulates limitations to rights and freedoms such as "determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".

4.3 In the Russian Federation, the rights of persons deprived of their liberty by court sentence to vote and to be elected are limited by the Constitution. Criminal punishment is the strictest form of legal responsibility, which amounts to withdrawal of and restrictions on rights and freedoms of convicted persons. Under section 55, paragraph 3, of the Constitution the rights and freedoms of persons and citizens can be restricted by federal laws to the extent necessary for the protection of constitutional order, morality, health,

¹ Section 32, paragraph 3, of the Constitution reads as follows: "Citizens who have been found by a court of law to be under special disability, and also citizens placed in detention under a court verdict, shall not have the right to elect or to be elected".

rights and lawful interests of others, and the country's security. Execution of sentences is linked to the temporary restrictions on such rights as right to freedom of movement, freedom of communication, right to privacy, including personal privacy and privacy of correspondence. Withdrawal of such rights and their restrictions are determined by the Constitution, criminal law, criminal procedure and other legislation. As such, under section 32, paragraph 3, of the Constitution, persons deprived of liberty under court sentence do not have a right to vote or to be elected. The said provision of the Constitution is established to avoid abuse of rights and freedoms and such a limitation to the right of the persons deprived of their liberty by court sentence does not intervene with the principle of equality.

4.4 The present case does not concern a violation of the right by the State, but the required temporary limitation to the right of a certain category of persons, isolated from the society for acting against the interests of society. Therefore, the limitation under section 32 of the Constitution is temporary, as the rights are restored upon the completion of the prison term. This provision is therefore in full compliance with the international norms on human rights.

4.5 The State party refers to the decision of the European Court of Human Rights in the case of *Mathieu-Mohin and Clerfayt v. Belgium*, 9267/81 of 2 March 1987, as well as the decision on *Gitonas and others v. Greece*, 18747/91, 19376/92, 19379/92, 28208/95, 27755/95 of 1 July 1997. The European Court concluded that the right to vote and to be elected are not absolute and thus, the legal systems of States can establish proportionate limitations to such rights.

Author's comments on the State party's observations

5.1 On 19 December 2005, the authors argued that the limitation established by the Constitution does not meet the requirements of necessity, does not pursue a legitimate aim and is not based on reasonable grounds.

5.2 They refer to article 29 of the Universal Declaration of Human Rights and claim that granting persons deprived of liberty the right to vote cannot be considered against respect for the rights and freedoms of others, morality, public order and general welfare in a democratic society and it does not undermine the constitutional order and the country's security. Thus, the restriction provided under section 32 of the Constitution does not pursue a legitimate aim, and therefore cannot be acceptable in a democratic society. On the same grounds, such a restriction is neither necessary nor can it be justified as required by society.

5.3 The authors argue that such a limitation imposed on the rights of persons deprived of their liberty is not based on reasonable grounds, as such persons become more vulnerable and are not in a position to lobby for the adoption of legislative acts in their interest, in particular, the laws improving conditions of detention, laws directed at the humanization of punishments, etc. They claim that they cannot influence the decisions by the State agencies which can have negative consequences during their imprisonment and after their release. Thus, they are deprived of the right to attract the attention of authorities to their long-standing problems such as overcrowded prisons, torture, degrading treatment etc. They claim that such a limitation is additional to those that they are subjected to due to their status. They are considered as persons of "second category", therefore their opinion does not matter in adopting essential decisions for the society and the State. It causes them additional moral sufferings and affects their human dignity.

5.4 They refer to the Committee's general comment No. 21 (1992) on humane treatment of persons deprived of liberty, which states that "not only may persons deprived of their liberty not be subjected to treatment that is contrary to article 7, [...] but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of

liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons”.²

5.5 They refer to the State party’s observation that the provision of the Constitution is established to avoid abuse of rights and freedoms, and argue that “right to vote” does not empower to abuse this right to the detriment of the rights of others. Such a statement would make sense if persons deprived of liberty had a right to be elected. However, they are contesting only their right to elect and not the right to be elected. The argument by the State party is not relevant and does not explain the reasons for the restriction of their right to vote. The State party does not provide any arguments as to how the convicted persons’ right to vote can affect respect for the rights and freedoms of others and can pose danger to society and the State. Thus, the State party’s statements are unfounded, as no grounds for restrictions of the human rights established under article 29 of the Universal Declaration have been put forward.

5.6 The authors also refer to the State party’s argument that the execution of sentences is linked to the temporary restriction on such rights as right to freedom of movement, freedom of communication, right to privacy etc..., including the right to vote. They refer to the State party’s argument that such a restriction is “required” and question whether this would mean that the restriction of the convicted person’s right to vote is an integral and essential part of such punishment as deprivation of liberty. They argue that such restriction of the right to vote is neither essential nor natural nor a required condition of life in prison. Such limitation cannot be placed at the same level as restrictions on freedom of movement and others, which are a natural, integral part of the essence of such punishment as deprivation of liberty. Therefore, they claim that the restriction contradicts the principle established in general comment No. 21, which states “persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment” (para. 3). They reiterate that forfeiture of the right to vote in the Constitution is neither necessary nor reasonable nor does it pursue a legitimate aim.

Issues and proceedings before the Committee

Consideration of admissibility

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

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. It notes that the State party has not raised any issues in relation to exhaustion of domestic remedies and considers that there are no obstacles under article 5, paragraph 2 (b) to declare the communication admissible.

6.3 The Committee concludes that the authors have sufficiently substantiated their claims under article 2, paragraphs 1 and 3, and article 25 of the Convention, for purposes of admissibility, declares the communication admissible and proceeds to its examination on the merits.

² *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40), annex VI, sect. B, para. 3.*

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 Committee notes the authors' claims of violation of article 25 and article 2, paragraph 1 and 3, of the Covenant in that section 32, paragraph 3, of the Constitution which restricts the right to vote of persons deprived of liberty under court sentence contradicts the Covenant is discriminatory on the grounds of social status and there is no effective domestic remedy to challenge it. The authors argued that disenfranchisement established in the Constitution is not necessary, does not pursue a legitimate aim and is not based on reasonable grounds. Disenfranchisement cannot be put at the same level as restrictions on freedom of movement and others, which are a natural, integral part of the essence of such punishment as deprivation of liberty.

7.3 The Committee also notes the State party's submission that the rights and freedoms of persons and citizens can be restricted by federal laws to the extent necessary for the protection of constitutional order, morality, health, rights and legal interests of others, and the country's security. It argued that the present case raises issues related to required temporary limitation to rights, such as right to freedom of movement, freedom of communication etc., of a certain category of persons, isolated from the society for acting against the interests of the society.

7.4 The Committee recalls its general comment No. 25 (1996) which states that the right to vote and to be elected is not an absolute right, and that restrictions may be imposed on it provided they are not discriminatory or unreasonable.³ It also states that if conviction for an offence is a basis for suspending the right to vote, the period for such suspension should be proportionate to the offence and the sentence.⁴ The Committee notes that, in the present case, the deprivation of the right to vote is coextensive with any prison sentence and recalls that, according to article 10, paragraph 3, of the Covenant, the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. It also recalls the Basic Principles for the Treatment of Prisoners. Principle 5 indicates that "except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party (...) the International Covenant on Civil and Political Rights (...)".

7.5 The Committee notes the State party's reference to earlier decisions of the European Court of Human Rights. However, the Committee is also aware of the Court's judgment in the case *Hirst v United Kingdom*⁵, in which the Court affirmed that the principle of proportionality requires a sufficient link between the sanction and the conduct and circumstances of the individual concerned. The Committee notes that the State party, whose legislation provides a blanket deprivation of the right to vote to anyone sentenced to a term of imprisonment, did not provide any arguments as to how the restrictions in this particular case would meet the criterion of reasonableness as required by the Covenant. In the circumstances, the Committee concludes there has been a violation of article 25 alone and in conjunction with article 2, paragraph 3, of the Covenant. Having come to this conclusion, the Committee does not need to address the claim regarding the violation of article 2, paragraph 1, of the Covenant.

³ *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40*, vol. I (A/51/40 (Vol. I)), annex V, para. 15.

⁴ *Ibid.*, para. 14.

⁵ *Hirst v United Kingdom*, application 74025/01, adopted on 6 October 2005, para. 71.

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 article 25 alone and in conjunction with article 2, paragraph 3, of the International Covenant on Civil and Political Rights.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to amend its legislation to comply with the Covenant and provide the authors with an effective remedy. The State party is also under an obligation 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 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.]

Appendix

Individual opinion by Committee members Mr. Krister Thelin and Mr. Michael O'Flaherty (dissenting)

The majority has found a violation in the present case. We respectfully disagree. In our view the reasoning and the disposition of the majority from paragraph 7.4 and onward is flawed.

General comment 25 states that the right to vote and to be elected is not an absolute right and that restrictions may be imposed on it, provided they are not discriminatory or unreasonable. It also states that if conviction for an offence is a basis for suspending the right to vote, the period for such suspension should be proportionate to the offence and the sentence. The norm which follows from general comment 25 should be used in interpreting whether a violation of the Covenant has occurred in the case before us, instead of some form of extended proportionality test, as might be inferred from the European Court of Human Rights in the case *Hirst v. United Kingdom* and which seemingly has inspired the majority. In the circumstances of the present case, where the authors were found guilty of abuse of power and of organizing a criminal group dealing with drugs, kidnapping and racketeering, we consider that the restriction, which is limited only to the duration of the prison sentence, cannot be considered unreasonable or disproportionate. In such circumstances, we cannot conclude there has been a violation of article 25 either alone or in conjunction with, article 2, paragraphs 1 and 3, of the Covenant.

(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.]

Individual opinion by Committee members Mr. Gerald L. Neuman and Ms. Iulia Antoanella Motoc (concurring)

We join in the Committee's finding of a violation of Article 25 of the Covenant, and we write separately in the hope of averting any public misunderstanding of what the Committee has done.

Article 25 provides that all citizens have the right to vote at genuine periodic elections by universal and equal suffrage without unreasonable restrictions.

The State party denies the right to vote to all convicted prisoners for the entire period of their imprisonment. It does not matter how long or short the sentence is, or what the nature of the crime had been. We agree with the Committee that this restriction on the right to vote is not reasonable.

The mere fact that the authors are detained does not justify denial of the right to vote. The Committee has previously pointed out that persons who are detained but have not yet been convicted should enjoy the right to vote.^a Even as to convicted prisoners, diverse societies have found it feasible to organize voting procedures, such as absentee ballots, for some categories of citizens in prison.^b

The Committee does not say that all convicted prisoners must be permitted to vote, or that a particular category of convicted prisoners must be permitted to vote. Article 25 is consistent with a wide range of reasonable approaches to this question.

The Committee does not even take a position on whether the authors of the present communication should be permitted to vote under legislation that the State party adopts in the future. It concludes only that the State party has denied them the right to vote without identifying any reasonable legal basis for its action.

We agree with this conclusion.

(Signed) Gerald L. Neuman

(Signed) Iulia Antoanella Motoc

[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.]

^a General comment No. 25 (1996) on the right to participate in public affairs, voting rights and the right of equal access to public service, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40 (A/51/40)*, Vol. I, annex V, para. 14.

^b See, for example, *Roach v. Electoral Commissioner*, [2007] HCA 43, paras. 9-10 (High Court of Australia 2007) (opinion of Gleeson, C.J.); *Minister of Home Affairs v. National Institute for Crime Prevention and the Re-Integration of Offenders*, 2004(5) BCLR 445, paras. 47-51 (Constitutional Ct. of South Africa 2004) (opinion of Chaskalson, C.J.). Other examples of non-European States parties where some categories of convicted prisoners have the right to vote include Bangladesh, Belize, Canada, Ghana, Papua New Guinea, and Trinidad and Tobago; one could also take note of practice in the states of Maine and Vermont in the United States of America. Meanwhile, the European Court of Human Rights has continued to develop its own approach to issues of voting rights, in cases such as *Frodl v. Austria*, App. No. 20201/04 (2010) (regarding convicted prisoners), and *Kiss v. Hungary*, App. No. 38832/06 (2010) (regarding persons with mental disabilities).

**Individual opinion of Committee member Mr. Fabián Omar Salvioli
(concurring)**

1. I have gone along with the Committee's decision in the case of *Yevdokimov and Rezanov v. Russian Federation* (communication No. 1410/2005); however, I wish to set out some thoughts because, although I do not disagree with the settlement of the case, I consider that the right to vote of persons deprived of their liberty warrants further examination within human rights bodies, including the Committee.

2. The International Covenant on Civil and Political Rights is a human rights instrument. As a general rule, States must guarantee the rights contained within it; restrictions may be placed on any right only when the Covenant expressly so permits. The extent of such restrictions must be as narrow as possible and must meet standards of necessity, proportionality, purpose, non-discrimination and minimum impact.

3. There are three fundamental provisions to consider in the present case, namely article 5, paragraph 1, and articles 10 and 25 of the International Covenant on Civil and Political Rights. Article 5, paragraph 1, prohibits States from limiting any rights to a greater extent than is provided for in the Covenant.

4. Article 25 of the Covenant refers to the rights of citizens, which, it expressly states, are to be enjoyed "without unreasonable restrictions". The question, then, is which restrictions can be applied without violating that provision.

5. General comment No. 25, adopted in 1996, expressly indicates that "if conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence" (para. 14). I think that the Committee must revise this opinion and also take into account general comment No. 21, adopted in 1992, on humane treatment of persons deprived of liberty (article 10 of the Covenant), which indicates that such persons "may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty", and that they must "enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment" (para. 3).

6. The human rights system is a whole. Taking a fragmented approach to it may reduce the scope for protection of rights below its maximum. This matters for the "useful effect" of the Covenant that must be guaranteed in every interpretation of it, either by the Committee or by a State party.

7. It is hard to see how deprivation of the right to vote could ever constitute, in the terms of the aforementioned general comment No. 21, a "restriction that is unavoidable in a closed environment". The criminal justice system, and all public policy, must be understood from a human rights perspective; within this context, punishment must never involve measures that are not intended to rehabilitate convicted persons, and I cannot understand how deprivation of the right to vote used as a form of punishment can have a rehabilitative effect.

8. Hence, in the outcome of its consideration of the present communication the Committee could have indicated that the violation of article 25 should be read not only in conjunction with article 2 but also with article 10, paragraph 3, of the International Covenant on Civil and Political Rights.

(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.]

**H. Communication No. 1412/2005, *Butovenko v. Ukraine*
(Views adopted on 19 July 2011, 102nd session)***

<i>Submitted by:</i>	Aleksandr Butovenko (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Ukraine
<i>Date of communication:</i>	28 March 2005 (initial submission)
<i>Subject matter:</i>	Sentence of life imprisonment after torture and unfair trial.
<i>Procedural issue:</i>	Lack of substantiation of claims.
<i>Substantive issues:</i>	Effective remedy; no derogation from article 7; torture, cruel, inhuman or degrading treatment or punishment; right to humane treatment and respect for dignity; 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 heard in person or through legal assistance; right to obtain the attendance and examination of witnesses; right not to be compelled to testify against oneself or to confess guilt; prohibition of imposition of a heavier penalty than the one that was applicable at the time when the criminal offence was committed; retroactive application of the law with lighter penalty.
<i>Articles of the Covenant:</i>	2; 7; 9, paragraph 1; 10, paragraph 1; 14, paragraphs 1, 2, 3 (b), (d), (e) and (g); and 15, 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 19 July 2011,

Having concluded its consideration of communication No. 1412/2005, submitted to the Human Rights Committee by Mr. Aleksandr Butovenko under the Optional Protocol to the International Covenant on Civil and Political Rights,

* 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, Ms. Helen Keller, 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. Fabian Omar Salvio, Mr. Krister Thelin and Ms. Margo Waterval.

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. Aleksandr Butovenko, a Ukrainian national born in 1975, who is currently serving a life sentence in Ukraine. He claims a violation by Ukraine of his rights under article 2; article 7; article 9, paragraph 1; article 10, paragraph 1; article 14, paragraphs 1, 2, 3 (b), (d), (e) and (g); and article 15, paragraph 1, of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 25 October 1991. The author is not represented.

The facts as presented by the author

Inquiry and pretrial investigation

2.1 On 24 December 1999, the author on his own initiative came to the district police department of Vasilkov city, where he was arrested on suspicion of having committed a murder of two individuals on 13 December 1999. Shortly thereafter, he was interrogated by the police inquiry officers, in the absence of a lawyer and investigator and without having been explained his rights. During this interrogation, the author described what he knew about the crime in question. He was then placed in a punishment cell of the temporary confinement ward (IVS) located in the same building.

2.2 The author submits that there was no lawful reason for placing him in a punishment cell; moreover, the cell in which he was kept was totally inappropriate for human beings. Despite winter temperatures, there was no glass in the windows and no heating in the cell; as a result, its walls were covered with frost and ice. Cold water was constantly dripping from the faucet and it was impossible to close the tap. There was no bed and bedding in the cell and the author had to sleep on the floor wrapped in his own clothes. He could sleep only for very short periods of time, as he had to frequently stand up and move not to freeze. The author spent three days in this punishment cell from which he was taken for interrogations both during the day and at night.

2.3 The author submits that he was placed in the punishment cell to force him to confess that he was the mastermind and the actual perpetrator of the murder. The interrogations by the police inquiry officers continued in the absence of a lawyer and investigator, and no reports of interrogations were drawn up. The author was subjected to physical and psychological pressure. He was beaten with fists, cables from electric appliances, rubber truncheons and hammers, and kicked. The blows were extremely painful and targeted those bodily parts where the traces were the least visible. The blows on the head were delivered only when the author's head was wrapped in clothes. The police inquiry officers also used suffocating techniques on him. As for the psychological pressure, the author was frequently brought for interrogations, detained in the punishment cell in the above-described conditions, prevented from eating and sleeping and threatened with reprisals against his father and a younger brother. To make the threats real, the inquiry officer would make the author listen to the cries of his brother in the nearby room. The author submits that his

brother was released after three days and underwent a medical examination to document the injuries on his body.¹

2.4 The author submits that, unable to withstand the torture, he had to incriminate himself in the murder. He was then “passed on” to an investigator of the prosecutor’s office for an “official interrogation”. The author was warned by the police inquiry officers that he should give the same self-incriminating testimony, otherwise the torture would continue as soon as the lawyer and investigator left.

2.5 On 27 December 1999, the author was allowed to see a lawyer for the first time and was interrogated by the investigator as a suspect. He submits that, according to article 107 of the Criminal Procedure Code, the suspects are to be interrogated promptly or at least not later than 24 hours after the arrest.

2.6 The author submits that he was introduced to a lawyer, Mr. L.K., by the investigator shortly before the interrogation. It was not explained to him whether he was expected to pay for this lawyer’s services. He told the lawyer that he was subjected to beatings to make him confess and showed the lawyer visible injuries on his body. The lawyer, however, refused to request a medical examination and advised the author to say what the inquiry officers wanted him to say, otherwise they would continue beating him until he gave the “necessary” testimony to the investigator in the lawyer’s presence. The author states that he was so shocked by the lawyer’s advice and felt so powerless, that he could not tell the truth to the investigator and repeated what he was instructed to say by the inquiry officers and the lawyer. Shortly thereafter, he was transferred from the punishment cell to an ordinary cell.

2.7 The author states that the ordinary cell was much warmer and he was finally able to sleep and eat. Only half of the ordinary cells in the IVS had metal beds, therefore, in the remaining cells the inmates had to sleep on the floor. No bedding was provided, in some cells inmates were distributed a few dirty stinking mattresses and, in the absence of such mattresses, inmates had to wrap themselves in their own clothes. More than ten inmates at a time were kept in a cell that was meant for two to three persons, there was no other furniture in the cell, and the lighting and the fresh air supply was insufficient. While being detained in the IVS, the author was not taken for an outdoor walk even once; he was not allowed to see his family members and to exchange correspondence with them. The author submits that it was unthinkable to complain about the beatings to which he had been subjected, and the conditions of detention and to renounce the services of the lawyer, Mr. L.K., while he was detained in the IVS, as it would have been “equal to a suicide”.

2.8 On 11 January 2000, the author was transferred to the Kiev detention centre (SIZO). He submits that, according to the law,² he was supposed to be transferred to the SIZO within three days but he had to remain in the IVS for 19 days for the marks of beatings to disappear.

2.9 On 17 February 2000, the author requested a meeting with the Head of the SIZO, described the beatings to which he had been subjected in the IVS of Vasilkov city and requested not to be transferred back to that IVS. On 17 February 2000, the author submitted a written complaint to the Kiev Regional Prosecutor’s Office, describing the “unlawful investigation methods” to which he was subjected in the IVS of Vasilkov city, and stating that his co-accused, Mr. R.K., had committed suicide in that place of detention as a result of torture.

¹ A copy of the medical certificate dated 29 December 1999 and issued in the name of the author’s brother, Mr. V.B., is available on file.

² Reference is made to article 155, part 4, of the Criminal Procedure Code.

2.10 On 22 February 2000, the author was transferred back to the IVS of Vasilkov city and he seriously feared for his life while being transported there from the SIZO. This time, however, he was not subjected to beatings and remained in the IVS until 21 March 2000. As before, the author was not taken outdoors even once; he was not allowed to see his family members or to exchange correspondence with them.

2.11 On 10 March 2000, a senior assistant of the Vasilkov Inter-District Prosecutor questioned the investigator in charge of the author's criminal case and a number of officers of the IVS of Vasilkov city, who stated that the author had not been subjected to any physical pressure, had not requested medical assistance and had not complained about the police inquiry officers. When questioned by the senior assistant of the Vasilkov Inter-District Prosecutor, the author described the place, methods and duration of the beatings to which he had been subjected. Although he did not know the names of the officers who beat him and could not name them, the author confirmed that he would be able to recognize them. No further actions, however, were undertaken by the senior assistant of the Vasilkov Inter-District Prosecutor. There was no confrontation with the officers who had allegedly beaten the author, no medical examination was carried out and no cellmates were questioned who could have attested that he had been subjected to beatings. Instead, on 10 March 2000, the senior assistant of the Vasilkov Inter-District Prosecutor took a decision not to initiate criminal proceedings with regard to the unlawful actions of the police inquiry officers.

2.12 On 21 March 2000, the author was transferred to the Kiev SIZO. On an unspecified date, the author renounced the services of the lawyer, Mr. L.K., and requested his parents to hire another lawyer who subsequently represented him at the remaining period of the pre-trial investigation and in court. In the presence of a new lawyer, the author retracted his self-incriminating testimony obtained under physical and psychological pressure and effectively in the absence of a lawyer, and repeated his initial testimony given orally at the time of his arrest.

Death in custody of the co-accused

2.13 The author's co-accused, Mr. R.K., was arrested by the police inquiry officers at home on the same day as the author, i.e. 24 December 1999, and brought to the district police department of Vasilkov city. On the same day, he allegedly confessed, in writing, to have committed the murder in question and stated that the author was the mastermind and the actual perpetrator of the murder. On 1 January 2000, Mr. R.K. died in custody. The author submits that he does not believe in the official version that Mr. R.K. had committed suicide and argues that it was used to cover up the interrogation methods used on him.

2.14 The author submits that, according to the report of 1 January 2000, the only injury found on the body of Mr. R.K. was a constriction mark on his neck. An internal investigation into the death of Mr. R.K. was carried out on 4 January 2000. A report of this internal investigation referred to the report of 1 January 2000 and concluded that Mr. R.K. was not subjected to any physical or psychological pressure by the police inquiry officers while being detained in the IVS. The author states that, according to the forensic medical report of the Kiev Regional Bureau of Forensic Medical Examination of 3 January 2000, there were numerous bodily injuries, such as scratches and bruises, on the body of Mr. R.K.; these injuries were inflicted by blunt objects at least four to seven days before the death of Mr. R.K. and were unrelated to the cause of the death. The author argues that the injuries in question were in fact the marks of beatings by the police inquiry officers, since on the day of his death, Mr. R.K. had already been in detention for eight days.

2.15 The author refers to a handwriting examination report of 14 June 2001 ordered by the author's mother, according to which the text of the "confession" written by Mr. R.K. on 24 December 1999, as well as of his interrogation report, were written by Mr. R.K. in co-

authorship and as dictated by someone with more developed writing and speaking skills than Mr. R.K. and with well-developed skills of collecting and documenting information of probative value. According to the same report, the above-mentioned documents were written by Mr. R.K. in a state of stress, which might have been caused, *inter alia*, by an extreme situation, psychological threats, serious sickness or physical pain. The author claims that, according to the report, the testimony of Mr. R.K. in the part implicating the author in the murder had been dictated to Mr. R.K. by the police inquiry officers.

2.16 The author submits that Mr. R.K. was planning to feign a suicide in order to be brought to the hospital and to undergo a medical examination to document the injuries on his body. He claims that Mr. R.K. was still alive when he was found on 1 January 2000 and that he was 'finished off' by the police inquiry officers to cover up the interrogation methods used by them.

*Preliminary consideration of the criminal case*³

2.17 On 27 August 2000, the pretrial investigation was completed and the author's criminal case was transmitted to the court. On 15 September 2000, the Kiev Regional Court conducted a preliminary consideration of the author's criminal case and resolved that there were no grounds for dismissing or suspending proceedings, the indictment corresponded to the facts of the case and was drawn up in compliance with the Criminal Procedure Code and the measures of restraint imposed on the author (placement in custody) should remain.

2.18 Only a judge of the Kiev Regional Court, two assessors and a prosecutor took part in the preliminary hearing. The author submits that, although the court effectively considers the criminal case in full, i.e. on points of law and on the merits, the Criminal Procedure Code does not allow for the participation of either the accused or his/her lawyer in the preliminary hearing. According to article 239 of the Criminal Procedure Code, the prosecutor has a right to take part in the preliminary hearings and the prosecutor did participate in the preliminary hearing of his criminal case. The author adds that, whereas article 252 of the Criminal Procedure Code gave a right to the prosecutor to make an objection against the court ruling issued at the end of the preliminary hearings, the author himself was not even provided with a copy of that ruling and, therefore, could not appeal it.

Proceedings in trial court

2.19 On 3 October 2000, the first public hearing of the author's criminal case by the Kiev Regional Court took place. The trial chamber included the same judge and two assessors who conducted a preliminary consideration of the author's criminal case on 15 September 2000. In court, the author and the other co-accused, Mr. A.K. and Mr. G.D., stated on numerous occasions that they were subjected to unlawful investigation methods, i.e. torture, by the police inquiry officers at the pretrial investigation. The author also drew the court's attention to the contradictions between the conclusions of the internal investigation and the forensic medical report in relation to the death in custody of Mr. R.K.

2.20 On 16 October 2000, the Kiev Regional Court issued a ruling, requesting the Kiev Regional Prosecutor's Office to conduct an additional investigation into the injuries on the body of Mr. R.K. that, according to the forensic medical report, were unrelated to the cause of his death. The Kiev Regional Prosecutor commissioned with the requested additional investigation the same investigator who was in charge of the author's criminal case and drew up the report of 1 January 2000. On 31 October 2000, this investigator took a decision

³ According to the Criminal Procedure Code of Ukraine (chap. 23), the first stage of the proceedings in trial court is a preliminary consideration of the criminal case.

not to initiate criminal proceedings with regard to the death in custody of Mr. R.K. The author submits that, unsurprisingly, the additional investigation was conducted in a biased and superficial manner, was based on the materials of the internal investigation of 4 January 2000 and did not provide any explanations with regard to the circumstances that led to the appearance of numerous bodily injuries on the body of Mr. R.K. while he was in custody.

2.21 The Kiev Regional Court continued to consider the author's case as soon as it received the conclusions of the additional investigation and dismissed all the motions that were submitted by the author and his lawyer with the aim to exclude the inculpatory evidence that was obtained unlawfully and in violation of article 62 of the Constitution, including the "confession" written by Mr. R.K. on 24 December 1999. The Court stated that the evidence was obtained in full compliance with all requirements of the criminal procedure law. A challenge to the court submitted by the author's lawyer was also dismissed.

2.22 On 21 December 2000, the Kiev Regional Court convicted the author on counts of robbery with violence (art. 142, part 3, of the 1960 Criminal Code) and premeditated murder under aggravated circumstances (art. 93, clauses (a), (d), (f), (g) and (k)). He was sentenced to life imprisonment, and the seizure of his property. The Kiev Regional Court heard witness testimonies of five police inquiry officers. These officers testified that they had not drawn up any reports of interrogations and had not subjected the accused to any physical or psychological pressure. The court concluded that these officers did not produce any procedural documents and did not carry out any procedural actions that could be used as evidence in court. The court also took into account that neither the author nor any of the co-accused complained about the use of unlawful investigation methods by the investigators that were in charge of the pretrial investigation. The court concluded that the author decided to change his testimony after he had learned about the death of Mr. R.K. with the aim to avoid criminal liability.

Objections to the trial transcript

2.23 On an unspecified date, the author submitted to the Kiev Regional Court, pursuant to article 88 of the Criminal Procedure Code, his objections to the trial transcript of the first instance court. The author complained that the trial transcript was incomplete and inaccurate and that substantial parts of the statements and remarks were missing altogether, other statements were distorted and most of the motions submitted by the author and his lawyer, including a challenge to the court, were not reflected at all. On 2 February 2001, these objections were examined by the same trial chamber that had handed down the judgment of 21 December 2000 and were dismissed as "not corresponding to reality" and "invented". Neither the author nor his lawyer took part in the court hearing, because the court had failed to notify the author about the date of the hearing and a participation of the lawyer was not provided for by law. The author submits that the same prosecutor who took part in the consideration of his criminal case by the first instance court, also participated in examination of the author's objections to the trial transcript. The author adds that he was unable to appeal the court ruling of 2 February 2001 for the lack of the relevant procedure in the State party's law.

Cassation proceedings

2.24 On an unspecified date, the author submitted a cassation appeal to the Supreme Court against the judgment of the Kiev Regional Court of 21 December 2000. On 10 March 2001, he submitted an additional cassation appeal. He complained, inter alia, that the first interrogation and the first meeting with a lawyer took place more than 72 hours after his arrest. He also complained about the use of unlawful interrogation methods (torture),

lengthy detention in the IVS in inhuman conditions, biased investigation into the death of Mr. R.K., dismissal of all the motions submitted by him and his lawyer, imposition of a heavier penalty than the maximum penalty allowed under the State party's law, lack of impartiality of the first instance court and dismissal of his objections to the trial transcript. On unspecified dates, the author's lawyer also submitted a cassation appeal and an additional cassation appeal to the Supreme Court. The author was represented at the cassation proceedings by his lawyer, since the court decided, pursuant to article 358 of the Criminal Procedure Code, that his participation was not "worthy". On 22 March 2001, the Supreme Court withdrew article 93, clause (g), of the Criminal Code from the author's judgment of 21 December 2000 and upheld it in the remaining part.

2.25 On an unspecified date, the author unsuccessfully appealed the decision of the Supreme Court through the supervisory review procedure.

Sentence of life imprisonment

2.26 The author submits that, at the time when the crime for which he was sentenced to life imprisonment had been committed, the heaviest penalty that could have been imposed in Ukraine was 15 years' imprisonment. He explains that, the new Constitution entered into force on 21 June 1996 and that article 27 of the Constitution proclaimed an inalienable right to life of every person. Article 93 of the Criminal Code, however, provided for two types of punishment for murder at that time: between 8 and 15 years' imprisonment and the death penalty. According to clause 1 of the transitional provisions of the Constitution, from the moment of its adoption the laws remained in force to the extent that they did not contradict the Constitution. According to clause 2 of the decision of the Plenum of the Supreme Court of 1 November 1996, the courts were instructed to evaluate the compatibility of provisions of every law with the Constitution while they were considering cases and, whenever necessary, to directly apply the provisions of the Constitution. The author argues, therefore, that all provisions of the Criminal Code that envisaged an imposition of the death penalty, such as article 93, should have been considered unconstitutional from the entry into force of the Constitution. In other words, the author continues, at the time when the crime for which he was convicted had been committed (13 December 1999), the death penalty could no longer be applied.

2.27 The author adds that, due to the moratorium on the *execution*⁴ of death sentences proclaimed by the President of Ukraine on 11 March 1997, the death penalty de facto ceased to exist in Ukraine. Imposition of the death penalty in 1999 would have also breached a pledge to abolish the death penalty undertaken by Ukraine at the time of its accession to the Council of Europe on 9 November 1995.

2.28 On 29 December 1999, the Constitutional Court declared the death penalty unconstitutional. On 22 February 2000, the Parliament (Verhovnaya Rada) adopted a law "On amendments to the Criminal Code, the Criminal Procedure Code and the Correctional Labour Code", which entered into force on 4 April 2000. The law introduced a new type of punishment into the Criminal Code, i.e. life imprisonment. The author states that, according to the "transitional law" that was in force from 29 December 1999 to 4 April 2000, the heaviest penalty that could be imposed was 15 years' imprisonment.⁵ The author argues that, if the applicable law has changed more than once between the time when the crime was committed and the conviction of the alleged perpetrator, this person should benefit from the version of the law that ensures the most favourable legal consequences for him. In

⁴ Emphasis added.

⁵ In support of his claim the author provides a copy of a letter dated 30 October 2000 from the First Vice-Chancellor of the State Legal Academy of Ukraine to the Deputy Chair of the Supreme Court.

other words, the State party's courts should have applied the most favourable version of the Criminal Code – the “transitional law” – in imposing the penalty on the author. The author submits that the law of 22 February 2000, that introduced life imprisonment, should not be applied retroactively to him, because it provided for a heavier penalty than the one under the “transitional law”.⁶

The complaint

Articles 7 and 10 of the Covenant

3.1 The author submits that a cumulative effect of unlawful detention, beatings, threats of reprisals against his family, placement in a punishment cell, lengthy detention in inhuman conditions (from 24 December 1999 to 11 January 2000 and from 22 February 2000 to 21 March 2000), incommunicado detention, lack of legal assistance and the death of Mr. R.K. caused him very strong physical and psychological suffering, as well as a feeling of fear, vulnerability, depression and inferiority. Given the fact that the above-mentioned unlawful investigation methods were deliberately used against him with the aim of compelling him to testify against himself, the author submits that they should be qualified as torture. He further submits that in light of its obligations under article 2 of the Covenant, the State party has to investigate allegations of treatment contrary to articles 7 and 10 of the Covenant promptly and impartially. The author claims that a *pro forma* and superficial investigation into his allegations of being subjected to physical and psychological pressure that resulted in unfounded and erroneous decision of 10 March 2000 not to initiate criminal proceedings did not fulfil the requirements of articles 7 and 10 of the Covenant, read in conjunction with article 2.

Article 9, paragraph 1, of the Covenant

3.2 The author submits that at the time of his arrest by the police inquiry officers on 24 December 1999, none of the grounds for arrest enumerated in article 106, parts 1 and 2, of the Criminal Procedure Code were applicable. Therefore, his deprivation of liberty was not based on the grounds established by law and resulted in a violation of article 9, paragraph 1, of the Covenant. In addition, the police inquiry officers failed to comply with the following procedural requirements set forth by the Criminal Procedure Code:

(a) Prior to interrogating the author for the first time in his capacity of a suspect, to explain his right to be represented by a lawyer and to draw up a respective report (art. 21 of the Criminal Procedure Code);

(b) To provide the author with access to a lawyer from the moment of detention (art. 44, part 2, of the Criminal Procedure Code);

(c) To interrogate the author promptly in his capacity of a suspect (art. 107, part 2, of the Criminal Procedure Code);

(d) To explain the author's rights as a suspect (art. 43-1 of the Criminal Procedure Code);

(e) To provide the author with an opportunity to defend himself pursuant to the procedure established by law (art. 21, part 2, of the Criminal Procedure Code);

⁶ In support of his claim the author provides a copy of a letter dated 13 November 2000 from the Chancellor of the Bar Institute affiliated with the Kiev State University to the Deputy Chair of the Supreme Court.

(f) To indicate in the arrest report, inter alia, the explanations provided by the arrested person and to explain to him, pursuant to article 21, part 2, of the Criminal Procedure Code his right to have a meeting with a lawyer (art. 106, part 3, of the Criminal Procedure Code).

Article 14 of the Covenant

3.3 The author submits that the fair trial guarantees of article 14 of the Covenant also apply to the pretrial investigations carried out by the police and prosecutor's office.⁷ He claims, therefore, a violation of article 14, paragraph 3 (g), of the Covenant, as he was subjected to unlawful interrogation methods from 29 December 1999 to 11 January 2000 to compel him to give a self-incriminating testimony and to confess guilt. He adds that subsequently and in violation of article 14, paragraphs 1 and 2, of the Covenant, he was found guilty by the court, primarily on the basis of this testimony that was obtained illegally.

3.4 The author submits that he did not have access to any lawyer for 72 hours and to a lawyer of his choice for more than two months; he was deprived of the right to remain silent; he was imposed an ex officio lawyer who was taking part in the proceedings only *pro forma* and he was not explained his rights to defence after his arrest on 24 December 1999. He claims, therefore, a violation of his rights under article 14, paragraphs 3 (b) and (d), of the Covenant.

3.5 The author submits that, contrary to the rule of law principle that every accused should be given an opportunity to take part in all stages of the proceedings against him, neither he nor his lawyer were allowed to take part in the preliminary consideration of his criminal case by the Kiev Regional Court. Furthermore, contrary to the principle of the equality of arms, the prosecutor did participate in this preliminary hearing. He adds that the Kiev Regional Court did not eliminate any defects of the inquiry and pretrial investigation, which in turn demonstrates that the court was biased and did not comply with the requirements of the law of criminal procedure. The author also submits that, due to the fact that the preliminary hearing of his criminal case was not public and he was not given a copy of the court ruling of 15 September 2000, he was deprived of the opportunity to adequately prepare for his defence at the next stage of the proceedings in the trial court. He claims, therefore, that the above facts demonstrate that there was a violation of his rights under article 14, paragraphs 1, 3 (b) and (d), read in conjunction with article 2, paragraph 3(a), of the Covenant.

3.6 The author claims a separate violation of article 14, paragraph 1, of the Covenant, since the same judge and two assessors who conducted a preliminary consideration of his criminal case on 15 September 2000 participated in the proceedings of the first instance court.⁸

3.7 The author submits that the facts summarized in paragraphs 2.3, 2.5, 2.13, 2.14 and 2.19 above, demonstrate that his conviction is based to a considerable extent on the evidence obtained illegally by torture and other unlawful investigation methods and the State party's courts failed to recognize what is perceived by the author as a clear violation of his right to defence and other violations of the law of criminal procedure at the inquiry and pre-trial investigation stage. Hence, he claims that there was a violation of article 14, paragraphs 1 and 3 (g), of the Covenant.

⁷ The author refers to ECtHR 8 February 1996, 18731/91, *Murray v. the United Kingdom*.

⁸ Reference is made to the individual opinion submitted by Ms. Christine Chanet, Messrs. Kurt Herndl, Francisco José Aguilar Urbina and Bertil Wennergren in relation to communication No. 240/1987, *Collins v. Jamaica*, Views adopted on 1 November 1991.

3.8 The author submits that, despite the fact that there were serious grounds to believe that the only other eyewitness of the murder of two persons on 13 December 1999, Mr. R.K., was subjected to unlawful investigation methods to compel him to write a “confession” on 24 December 1999 and, due to his death in custody, he was unable to testify in court, it was that very same “confession” of Mr. R.K. that was used by the court as key evidence in finding him guilty. The author claims, therefore, that there was a violation of his rights under article 14, paragraphs 1 and 3 (e), of the Covenant.

3.9 The author submits that the facts summarized in paragraph 2.23 above demonstrate that there was a separate violation of article 14, paragraphs 1 and 3 (d), of the Covenant, as far as the examination of his objections to the trial transcript on 2 February 2001 is concerned.

3.10 The author states that the facts summarized in paragraph 2.24 above demonstrate that there was a separate violation of article 14, paragraphs 3 (b) and (d), read in conjunction with article 14, paragraph 1, and article 2, paragraph 3 (c), of the Covenant, since he was not allowed to take part in the cassation proceedings and could not, therefore defend himself in person.

3.11 The author submits that, by not explaining the legal grounds for sentencing him to life imprisonment, the Kiev Regional Court has effectively deprived him of the possibility to prepare for and to defend himself fully in the court of cassation, which in turn resulted in a separate violation of article 14, paragraphs 1 and 3(b), of the Covenant.

Article 15, paragraph 1, of the Covenant

3.12 The author claims that, by sentencing him to life imprisonment, the State party’s courts have imposed a heavier penalty than the one that was applicable at the time when the crime was committed and the one that was applicable under the “transitional law”, i.e. 15 years’ imprisonment. The author argues that if the relevant penalty has changed more than once between the time when the crime was committed and his conviction, he should benefit from the version of the law that ensures the most favourable legal consequences for him.

State party’s observations on the merits

4.1 On 20 February 2006, the State party submitted its observations on the merits of the communication. It adds that the fact that it does not deal with every single claim raised by the author does not imply that the claims are conceded.

Article 2 of the Covenant

4.2 As for the alleged violation of article 2 of the Covenant at the stage of preliminary consideration of the criminal case, the State party concedes that there is no remedy for the accused at this stage of the proceedings to appeal the court’s refusal to consider his or her petitions. It adds that consideration of the case is limited to the procedural issues enumerated in article 242 of the Criminal Procedure Code and does not touch upon the merits. The State party refers to the commentary on article 240 of the Criminal Procedure Code, according to which “a refusal to uphold a petition is not subject to appeal, though this in no way prevents the petitioner from submitting the same petition at the merits stage”⁹ where the remedy in fact exists. It submits that there is no violation of article 2 of the Covenant, since the ruling of the Kiev Regional Court of 15 September 2000 did not

⁹ *Scientific and Practical Commentary to the Criminal Procedure Code of Ukraine* (eds. Boyko V.F. and Goncharenko V.G.), 1997, Kiev, Jurincom Inter, commentary on article 240, p. 294.

“affect the author’s position of an accused before the court” (the court dealt exclusively with procedural issues) and a fortiori there existed a remedy at the merits stage.

Article 7 of the Covenant

4.3 With regard to the alleged violation of article 7 of the Covenant, the State party refers to the facts of the communication summarized in paragraphs 2.3 and 2.14 above and submits that the author did not provide any evidence in support of his allegations of being subjected to beatings and other physical and/or psychological pressure. It argues that the author’s reference to the medical documents issued for other individuals cannot be considered by analogy as an evidence of the same treatment of the author himself and, therefore, these documents should not be interpreted by the Committee as corroborating his allegations under article 7. The State party refers to the decision on admissibility of the European Court of Human Rights (ECHR) in *Chizhov v. Ukraine*, concluding that “in the absence of any substantiation whatsoever, the complaint [of beatings] is manifestly unfounded”.¹⁰

4.4 As for the author’s claims about inhuman conditions of detention, the State party submits that he failed to exhaust domestic remedies in relation to these allegations. Complaints about “inadequate” conditions of detention are to be submitted under articles 248¹-248⁹ of the Civil Procedure Code.

4.5 With regard to the author’s claims that his incommunicado detention from 24 December 1999 to 11 January 2000 and from 22 February 2000 to 21 March 2000 amounted to torture within the meaning of article 7 of the Covenant, the State party notes the distinction between “torture” and “inhuman or degrading treatment” made by the ECtHR.¹¹ It submits that it can hardly be imagined that the incommunicado detention has caused sufficiently serious and cruel suffering to the author for it to be considered as torture. The State party argues that the author’s detention was not incommunicado. Firstly, he was not detained “without means of communication”, since he had at least formally communicated with his lawyer. The State party adds that it has fulfilled its obligation to provide free legal assistance in criminal cases and notes that a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes.¹² Secondly, the author was not detained in solitary confinement, since in his communication to the Committee he complained about the investigator’s failure to question his cellmates who could have attested that he had been subjected to beatings.

Article 9 of the Covenant

4.6 As for the author’s claim that his arrest was arbitrary and in violation of article 9, paragraph 1, of the Covenant, the State party refers to article 106, part 1, clause 2, of the Criminal Procedure Code, according to which a suspect can be arrested “if the eye-witnesses or victims point at that very individual as having committed a crime he/she is suspected of”. It recalls that in the present case, the author came to the district police department of Vasilkov city on his own initiative to confess and, therefore, statements of eyewitnesses or victims should be substituted by his own testimony. In any case, the investigator had to check at least prima facie the trustworthiness of the author’s testimony prior to requesting the prosecutor’s authorization. The State party respectively submits that the author’s arrest on 24 December 1999 complied with the requirements of article 106 of the Criminal Procedure Code.

¹⁰ ECtHR 6 May 2003, 6962/02, *Chizhov v. Ukraine*.

¹¹ ECtHR 18 January 1978, *Ireland v. the United Kingdom*, Series A No. 25, pp. 66-67, para. 167.

¹² ECtHR 13 May 1980, *Artico v. Italy*, Series A No. 37, p. 18, para. 36.

4.7 As to the author's allegations summarized in paragraph 3.2 (a), (d) and (f) above, the State party refers to the report of 27 December 1999 preceding the author's first interrogation as a suspect, which bears the author's signature and has the following text written by him: "I was explained my rights as a suspect. I wish to have a lawyer, Mr. L.K., as my representative. My rights set forth in article 63 of the Constitution are clear to me. I wish to testify in relation to this crime". The State party adds that the above-mentioned report was signed a fortiori by the lawyer, which proves that the author was represented and his right to defence was respected. Although this report does not mention the time when it was drawn up, the State party maintains that the author was explained his rights as a suspect and had a meeting with the lawyer before his first interrogation. It adds that the author did not provide any evidence to corroborate his allegations to the contrary (see para. 3.2 (b) above).

4.8 The State party submits that it has complied with the requirement to promptly interrogate the author in his capacity of a suspect (see para. 3.2 (c) above). It submits that the State party's law allows detaining the suspects for 72 hours during which a decision has to be taken on whether to place them into custody or to release them. In the present case, the author was interrogated three days after being detained and as soon as his placement into custody was authorized by the prosecutor.

4.9 With regard to the author's allegations summarized in paragraph 3.2 (e) above, the State party refers to the commentary on article 21 of the Criminal Procedure Code,¹³ according to which the right to defence is guaranteed if the law provides the author as a participant in the process with a set of procedural rights enabling him to defend his interests; provides him with a right to have a lawyer; and obliges the investigator, prosecutor and the court to respect these rights. The State party submits that in the present case, the author was acknowledged to be a participant in the process, he was provided with a lawyer and his procedural rights were respected by the respective state bodies and courts.

Article 10 of the Covenant

4.10 Since the author's allegations under article 10 of the Covenant are linked to his allegations under article 7, the State party refers the Committee to its observations summarised in paragraphs 4.3 to 4.5 above.

Alleged violations of article 14 of the Covenant

4.11 As for the author's claim under article 14, paragraph 1, of the Covenant (see paras. 3.5 and 3.6 above), the State party explains that the preliminary consideration of the criminal case is a separate stage of the proceedings where a court or an individual judge – depending on the gravity of the crime – considers whether the pretrial investigation is sufficiently complete for a trial court to examine the merits of the case.¹⁴ As far as participation of the accused or his/her lawyer in the preliminary consideration of the criminal case is concerned, the commentary on article 240 of the Criminal Procedure Code states that at this stage the court or an individual judge meet in private and the circle of participants is limited to the judge(s), a prosecutor and a court secretary. The accused or his lawyer can be subpoenaed at the court's or judge's discretion for this hearing following their respective petitions.¹⁵ No such petitions were submitted (those submitted were either dismissed or irrelevant) in the present case and, therefore, the Kiev Regional Court had no reason to subpoena the author or his lawyer. The State party maintains that the preliminary

¹³ See *Scientific and Practical Commentary* (note 9 above), commentary on article 21, p. 50.

¹⁴ *Ibid.*, commentary on article 237, p. 289.

¹⁵ *Ibid.*, commentary on article 240, p. 293.

consideration of the criminal case had no impact on establishing the author's guilt and, therefore, there was no violation of his right under article 14, paragraph 1, of the Covenant.

4.12 With respect to the alleged violation of the author's right under article 14, paragraph 3 (b), of the Covenant, the State party refers to the Committee's jurisprudence¹⁶ and submits that the author has failed to indicate what actions were taken by him and his lawyer in order to get access to the case file materials or to request an adjournment. It concludes, therefore, that there was no violation of the author's right to have adequate time and facilities for the preparation of his defence.

4.13 As for the author's claim that he was not represented by a lawyer the first three days after being arrested and that the ex officio lawyer failed to represent him in good faith, the State party confirms that indeed the ex officio lawyer was assigned to the author on 27 December 1999 but argues that his first interrogation also took place on the same day and that the author was represented by a lawyer during that interrogation. It adds that no procedural measures were taken with regard to the author during the three-day period when he was not represented by a lawyer. The State party refers to the Committee's jurisprudence¹⁷ and submits that the author was represented by a lawyer at every stage of the proceedings against him and, accordingly, the absence of a lawyer from 24 to 27 December 1999 did not result in a violation of his right under article 14, paragraph 3 (d), of the Covenant.

4.14 As regards the effectiveness of the legal aid rendered by the ex officio lawyer, the State party refers to the position of the ECHR in that "mere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes may [...] shirk his duties" but "[i]f they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations".¹⁸ The State party submits that in his communication to the Committee, the author does not claim that he had notified the State authorities about the ineffectiveness of the ex officio lawyer. It concludes that the State party's authorities cannot be held responsible for the conduct of an ex officio lawyer, since the author failed to notify them about his ineffectiveness.

4.15 As for the author's claim under article 14, paragraph 3 (g), of the Covenant, the State party refers to the Committee's general comment No. 13¹⁹ and recalls its observations in relations to the author's claims under article 7 and article 10 of the Covenant summarized in paragraphs 4.3 to 4.5 and 4.10 above. It concludes that there was no violation of the author's right not to be compelled to testify against himself or to confess guilt.

Article 15 of the Covenant

4.16 As for the author's claims under article 15, paragraph 1, of the Covenant, the State party submits that the problem raised by the author is of purely juridical character and concerns the effect of law in time. The author's contention that there was a moratorium on the death penalty per se since 11 March 1997 when the President of Ukraine issued his decree, is erroneous in as far as the President cannot amend the law (in particular, the

¹⁶ Reference is made to communication No. 610/1995, *Henry v. Jamaica*, Views adopted on 20 October 1998, para 7.5.

¹⁷ Communication No. 704/1996, *Shaw v. Jamaica*, Views adopted on 2 April 1998, para. 7.5.

¹⁸ See ECtHR, *Artico v. Italy* (note 12 above), p. 16, para. 33. The State party also refers to ECtHR 19 December 1989, 9783/82, *Kamasinski v. Austria*.

¹⁹ General comment No. 13 (1984) on equality before the courts and the right to a fair and public hearing by an independent court established by law, *Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 40 (A/39/40)*, annex VI, para. 14.

Criminal Code) by his decrees and, therefore, the death penalty continued to exist until 29 December 1999 when the Constitutional Court declared unconstitutional the provisions of the Criminal Code on the death penalty. Thus, at the time when the crime was committed, article 93 of the Criminal Code provided for two types of punishment for murder: between 8 and 15 years' imprisonment and the death penalty.

4.17 On 21 December 2000, the Kiev Regional Court convicted the author on counts of premeditated murder of two individuals under aggravated circumstances for which the courts generally impose the death penalty. Thus, bearing in mind the requirement that the court shall apply the penalty that was in effect at the time when the crime was committed, the Kiev Regional Court would have imposed the death penalty with regard to the author. However, since this type of penalty was declared unconstitutional and replaced by life imprisonment, which seems to be a more lenient one, the court sentenced the author to life imprisonment.²⁰ The State party submits that the courts have imposed a lawful penalty and, therefore, there was no violation of the author's rights under article 15, paragraph 1, of the Covenant.

Author's comments on the State party's observations

5.1 On 30 April 2006, the author submitted his comments on the State party's observations and suggested that his claims that were not addressed in these observations should be taken by the Committee as proven.²¹

Article 2 of the Covenant

5.2 The author notes that the State party itself has conceded that there was no remedy for the author at the stage of the preliminary consideration of his criminal case to appeal the court's refusal to consider his petitions. He reiterates that his claim of a violation of article 2 should be examined in conjunction with his claims under article 14, paragraphs 1, 3 (b) and (d), of the Covenant.

Articles 7 and 10 of the Covenant

5.3 The author reiterates his initial claim about the cumulative effect of a number of factors that caused very strong physical and psychological suffering to him and insists that the unlawful investigation methods deliberately used against him with the aim of compelling him to give self-incriminating testimony should be qualified as torture.²²

5.4 As to the State party's claim that the author failed to substantiate his claims under article 7 and 10 of the Covenant, he refers to the judgment of the ECHR, recognizing that allegations of torture in police custody are extremely difficult for the victim to substantiate if he has been isolated from the outside world, without access to doctors, lawyers, family or friends who could provide support and assemble the necessary evidence.²³ Given the fact that the State party has failed to carry out a thorough and effective investigation into his allegations of being subjected to unlawful investigation methods, as well as into the injuries of his brother, a witness in his criminal case, and Mr. R.K, a co-accused, the author asks the Committee to make a finding of a violation of articles 7 and 10 of the Covenant.

²⁰ The State party also refers to ECtHR 22 June 2000, 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, *Coëme and others v. Belgium*, para. 145.

²¹ Reference is made to communication No. 529/1993, *Edwards v. Jamaica*, Views adopted on 28 July 1997, para. 8.3.

²² See *Artico v. Italy* (note 11 above), p. 66, para. 167.

²³ ECtHR 18 December 1996, 21987/93, *Aksoy v. Turkey*, para. 97.

5.5 The author urges the Committee to apply the standard “beyond reasonable doubt” when evaluating the material before it.²⁴ The author recalls that he, his brother, Mr. R.K. and the other two co-accused, Mr. A.K. and Mr. G.D., were detained in the same IVS during the same period of time and subjected to unlawful interrogation methods by the same police inquiry officers. In addition to the author’s attempts to complain about the use of unlawful investigation methods described in his initial submission to the Committee, he provides a copy of the interrogation reports of 19 April 2000 and 14 June 2000 in which he explained that the self-incriminating testimony was obtained by the police inquiry officers under physical and psychological pressure.

5.6 As to the author’s claims about inhuman conditions of detention in the IVS of Vasilkov city from 24 December 1999 to 11 January 2000 and from 22 February 2000 to 21 March 2000, he submits that these claims should be considered in the context of deliberate use of unlawful investigation methods against him. The author recalls that these claims have not been thoroughly, promptly and impartially investigated by the State party’s authorities despite his numerous complaints to the prosecutor’s office, the Kiev Regional Court and the Supreme Court. As for the State party’s argument that domestic remedies have not been exhausted in relation to these allegations, the author submits that it is incumbent on the State party claiming non-exhaustion to show that the remedy was an effective one available in theory and in practice.

5.7 The author acknowledges that he did not initiate civil proceedings to challenge his conditions of detention but he notes that the State party failed to explain how such proceedings could have provided redress in his situation and to give any examples of judicial proceedings on this matter by a convicted person to prove that such remedy offered reasonable prospects of success.

5.8 As for the author’s claims in relation to the incommunicado detention, he reiterates his argument about the cumulative effect of numerous factors, including incommunicado detention, which caused very strong physical and psychological suffering to him. The author insists that he was kept in solitary confinement for the first three days of his detention and was transferred to the ordinary cell only after he gave a self-incriminating testimony. He adds that he was de facto without any means of communication with the outside world, since the ex officio lawyer who was imposed on him by the investigating authorities was representing him only *pro forma* and was collaborating with the investigating authorities in covering up their unlawful actions.

Article 9 of the Covenant

5.9 The author rejects the State party’s argument that he was arrested on 24 December 1999 in full compliance with the requirements of article 106 of the Criminal Procedure Code and submits that he indeed came to the district police department of Vasilkov city on his own initiative but notes that he did not confess to having committed a murder. He adds that, contrary to the requirements of article 96 of the Criminal Procedure Code, his initial oral testimony given at the time of his arrest was not documented in a report. Moreover, his explanations about the circumstances in which the crime had been committed were not reflected in the arrest report of 24 December 1999 and the protocol does mention that his rights were explained to him.

5.10 The author explains in great detail that, at the time of his arrest, the State party’s authorities failed to comply with the requirements of article 106, part 4, of the Criminal Procedure Code. He submits that the State party has acknowledged that he was assigned a

²⁴ See *Artico v. Italy* (note 11 above), para. 161.

lawyer and interrogated for the first time in his capacity of a suspect only three days after his arrest, i.e. on 27 December 1999. The author recalls that, under article 107, part 2, of the Criminal Procedure Code, a suspect is to be promptly interrogated and, under article 44, part 2, of the Criminal Procedure Code, he or she has to be assigned a lawyer within 24 hours after the arrest. He adds that pursuant to article 46, part 3, clause 3, of the Criminal Procedure Code, the participation of a lawyer was mandatory in his case. The author concludes that the State party's authorities violated provisions of the domestic law in relation to his arrest and subsequent detention and, therefore, there was also a violation of his rights under article 9, paragraph 1, of the Covenant.

Article 14 of the Covenant

5.11 With regard to the State party's arguments summarized in paragraph 4.11 above, the author recalls that at the time of the preliminary consideration of his criminal case, the Criminal Procedure Code did not allow for the participation of either the accused or his or her lawyer in the preliminary hearing and, therefore, they could not have petitioned the court to subpoena them. The author also recalls that the Criminal Procedure Code in force at the time of the preliminary hearing did not provide for a possibility of being provided with a copy of the respective ruling and of appealing it. Moreover, he was provided with a copy of the indictment only after the preliminary consideration of his criminal case by the Kiev Regional Court. The author maintains that there was a violation of his right under article 14, paragraph 1, of the Covenant.

5.12 As for the State party's argument that the preliminary consideration of the criminal case had no impact on establishing his guilt, the author submits that in fact the Kiev Regional Court did consider on 15 September 2000 a number of issues which are of crucial importance for the merits of his criminal case, inter alia, whether his right to defence at the inquiry and pretrial investigation stage was duly ensured, whether there were grounds for dismissing or suspending the proceedings, whether there was sufficient evidence for the examination of a case by the court, whether all individuals in relation to whom incriminating evidence were gathered had been charged.²⁵ The author submits, therefore, that the preliminary hearing of his criminal case by the Kiev Regional Court went far beyond the procedural issues and amounted in fact to a consideration of the case in full. He reiterates his initial claim that the participation of the same judge and two assessors who conducted a preliminary consideration of his criminal case on 15 September 2000 in the proceedings of the first instance court resulted in a separate violation of his right under article 14, paragraph 1, of the Covenant.

5.13 The author rejects the State party's argument that he has failed to indicate what actions were taken by him and his lawyer in order to get access to the case file materials or to request an adjournment and submits that the preliminary hearing of his case by the Kiev Regional Court was not public and, therefore, he could not submit any petitions or appeal the ruling of 15 September 2000. He asks the Committee to declare that there was a violation of article 14, paragraph 3 (b), of the Covenant.

5.14 The author recalls his claims summarized in paragraph 3.4 above, rejects the State party's arguments summarized in paragraphs 4.12 to 4.14 above and submits that the lack of a lawyer for 72 hours and a failure to explain to him the right to defence have as such resulted in a separate violation of his right under article 14, paragraphs 3 (b) and (d), of the Covenant. Moreover, it was within these 72 hours that the author was compelled to testify against himself and to confess guilt – a confession that became a basis for his indictment and subsequent conviction.

²⁵ Reference is made to articles 6, 242, 244, 245, 246, 248 and 253 of the Criminal Procedure Code.

5.15 The author states that, according to article 14, paragraph 3(d), of the Covenant, free legal assistance must be assigned when an individual does not have sufficient means to pay for it. In his case, he never requested the investigating authorities to assign him an ex officio lawyer and his family has sufficient means to hire a lawyer. In fact, his family did hire a lawyer, as soon as he managed to contact them through unofficial channels, since he was deprived of official means of communication with the outside world. The author submits that the State party cannot reproach him for not notifying the respective authorities about the ineffectiveness of the ex officio lawyer. Firstly, this lawyer was imposed on him by the investigating authorities through the use of torture and other unlawful investigation methods. Secondly, the author refers to the interrogation report of 14 June 2000 in support of his claim that he did complain to the State party's authorities, including the prosecutor's office, about the ineffectiveness of the ex officio lawyer.

Article 15 of the Covenant

5.16 The author reiterates his initial claims under article 15, paragraph 1, of the Convention.²⁶ He maintains that he should have benefited from the version of the law that ensures the most favourable legal consequences for him,²⁷ i.e. the "transitional law".

5.17 As to the penalty applicable at the time when the crime was committed, the author submits, on 13 February 2011, that further to the signature by Ukraine of Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms on 5 May 1997, it was obliged to refrain from the imposition and /or execution of the death sentences, i.e. acts which would defeat the object and purpose of the treaty.²⁸ He submits that the same legal stance was taken by the Constitutional Court of the Russian Federation in its ruling of 19 November 2009.²⁹ The author, therefore, reiterates his initial claim that, on 13 December 1999, i.e. the time of the crime for which the author has been convicted, the heaviest penalty that could have been imposed in Ukraine was 15 years' imprisonment.

5.18 As to the State party's argument that, in the light of the requirement that the court shall apply the penalty that was in effect at the time when the crime was committed, the Kiev Regional Court would have imposed the death penalty with regard to the author, he submits that there is nothing in the court decisions issued in his case by the State party's courts to support this argument. He adds that, under article 24 of the Criminal Code the death penalty was considered an exceptional punishment, whereas under article 23, paragraph 1-1, of the Criminal Code, life imprisonment is treated as an ordinary punishment. The author refers to the principle of legal certainty of the criminal law, guaranteed under article 15, paragraph 1, of the Covenant.³⁰

²⁶ The author refers to a ruling of the Supreme Court of Ukraine dated 13 February 2009, in which the Supreme Court established that the heaviest penalty that could be imposed for a crime committed on 6 January 2000, i.e. when the "transitional law" was in force, was 15 years' imprisonment. He also refers to a ruling of the Supreme Court of Ukraine dated 11 December 2009, in which the Supreme Court established that the heaviest penalty that could be imposed for a crime committed at 10 p.m. on 4 April 2000, i.e. when the "transitional law" was in force, was 15 years' imprisonment.

²⁷ The author also refers to ECtHR 17 September 2009, 10249/03, *Scoppola v. Italy* (no. 2), paras. 100-109 and 119-121.

²⁸ The author refers to article 18 of the 1969 Vienna Convention on the Law of Treaties and ECtHR 19 October 2004, 17707/02, *Melnichenko v. Ukraine*, para. 64 (in relation to the 1951 Geneva Convention).

²⁹ See the ruling of the Constitutional Court of the Russian Federation No. 1344-0 of 19 November 2009, para. 4.3 (available, in Russian, from www.ksrf.ru/Decision/Pages/default.aspx).

³⁰ See *Scoppola v. Italy* (note 27 above), paras. 101-102. In support of his claims the author submits a copy of the ruling of the Military Chamber of the Supreme Court of the Russian Federation dated 25

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 Pursuant to article 5, paragraph 2 (b), of the Optional Protocol, the Committee is precluded from considering any communication unless it has been ascertained that all available domestic remedies have been exhausted; this rule does not, however, apply if it is established that the application of domestic remedies has been or would be unreasonably prolonged or would be unlikely to bring effective relief.

6.4 The State party has argued that the author failed to exhaust domestic remedies in relation to his allegations about inhuman conditions of detention at the IVS of Vasilkov city, and stated that complaints about “inadequate” conditions of detention were to be submitted under articles 248¹-248⁹ of the Civil Procedure Code. In this regard, the Committee has consistently held that the State party must describe in detail which legal remedies would have been available to an author in the specific case and provide evidence that there would be a reasonable prospect that such remedies would be effective.³¹ A general description of rights and remedies available is insufficient. The Committee notes that the State party failed to explain how civil proceedings could have provided redress in the present case. The Committee further notes that the author complained about inhuman conditions of detention in his cassation appeal to the Supreme Court. The Committee therefore considers that the requirements of article 5, paragraph 2 (a), of the Optional Protocol, have been met and concludes that the claims in relation to conditions of detention at the IVS of Vasilkov city submitted by the author under articles 7 and 10 of the Covenant are admissible.

6.5 The Committee notes the author’s claims under article 14, paragraphs 1, 3 (b) and (d), read in conjunction with article 2, paragraph 3 (a), of the Covenant, in relation to the preliminary consideration of his criminal case, and the State party’s observations thereon. The Committee observes that the author has not provided any substantiation in support of his claim that the Kiev Regional Court had considered his criminal case on the merits at the preliminary hearing. In these circumstances, the Committee considers that the author has failed to substantiate, for purposes of admissibility, that his and his lawyer’s non-participation in the preliminary hearing of his criminal case resulted in a violation of his rights under article 14, paragraphs 1, 3 (b) and (d), read in conjunction with article 2, paragraph 3 (a), of the Covenant. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

December 2006, which found that in establishing a penalty under article 102 of the Criminal Code of the Russian Federation for the premeditated murder of two individuals, one could not be sentenced to either the death penalty or life imprisonment, since the latter did not exist in the law in question and there was a moratorium on the application of the death penalty in the Russian Federation. The Court, therefore, established that the maximum term of imprisonment under article 102 of the Criminal Code of the Russian Federation was 15 years’ imprisonment.

³¹ See, for example, communication No. 6/1977, *Sequeira v. Uruguay*, Views adopted on 29 July 1980, paras. 6 (c) and 9 (b).

6.6 In the light of the above, the Committee further considers that the author has failed to substantiate, for purposes of admissibility, his claim that the participation of the same judge and two assessors who conducted a preliminary consideration of his criminal case on 15 September 2000 in the proceedings of the first instance court resulted in a violation of his right under article 14, paragraph 1, of the Covenant. Therefore, this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.7 The Committee also notes the author's argument that he is a victim of a violation of article 14, paragraphs 1 and 3 (d), of the Covenant, because neither he nor his lawyer took part in the examination of his objections to the trial transcript of the first instance court on 2 February 2001, whereas, contrary to the principle of the equality of arms, the prosecutor did participate in the hearing in question. 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.

6.8 With regard to the author's claims that he was not allowed to take part in the cassation proceedings and could not, therefore defend himself in person, the Committee notes that, as transpires from the copy of the ruling of the Supreme Court of 22 March 2001 provided by the author, he was represented at that hearing by his privately hired lawyer and his mother. The Committee further notes the author's own affirmation that he and his lawyer submitted their respective cassation appeals and additional cassation appeal to the Supreme Court. In these circumstances, the Committee considers that the author has failed to substantiate, for purposes of admissibility, that his non-participation in the cassation hearing resulted in a violation of his rights under article 14, paragraphs 3 (b) and (d), read in conjunction with article 14, paragraph 1, and article 2, paragraph 3 (c), of the Covenant. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.9 The Committee considers that the author's remaining claims under article 2; article 7; article 9, paragraph 1; article 10; article 14, paragraphs 1, 2, 3 (b), (d), (e) and (g); and article 15, paragraph 1, of the Covenant, are 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 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 author claims that he was beaten, threatened with reprisals against his family, placed in a punishment cell by the police inquiry officers at the IVS of Vasilkov city to make him confess guilt, contrary to article 7 and article 14, paragraph 3 (g), of the Covenant. The Committee notes that, on 17 February 2000, the author submitted a written complaint to the Kiev Regional Prosecutor's Office, describing the unlawful investigation methods to which he was subjected and that the Prosecutor's Office decided neither to initiate criminal proceedings nor to undertake any further investigation. The Committee further notes that the author retracted his confession in court, asserting that it had been made under torture, and that his challenge to the voluntariness of the confession was dismissed by the court, after having heard testimonies of five police inquiry officers. No other witnesses were called. The Committee also notes that the State party has argued that the author did not provide any evidence in support of his allegations of being subjected to beatings and other physical and/or psychological pressure.

7.3 In this regard, the Committee reaffirms its jurisprudence³² 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 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.

7.4 Furthermore, as regards the claim of a violation of the author's rights under article 14, paragraph 3 (g), in that he was forced to sign a confession, the Committee must consider the principles that underlie this guarantee. It recalls its jurisprudence that the wording, in article 14, paragraph 3 (g), that no one shall "be compelled to testify against himself or confess guilt", must be understood in terms of the absence of any direct or indirect physical or psychological coercion by the investigating authorities of the accused with a view to obtaining a confession of guilt.³³ The Committee recalls that in case of alleged forced confessions, the burden is on the State to prove that statements made by the accused have been given of their own free will.³⁴ The Committee observes that the State party did not provide any arguments corroborated by relevant documentation to refute the author's claim that he was compelled to confess guilt. In these circumstances, the Committee concludes that the facts before it disclose a violation of article 7, and article 14, paragraph 3 (g), of the Covenant.

7.5 The Committee also recalls that a State party is responsible for the security of any person in detention and, when an individual claims to have received injuries while in detention, it is incumbent on the State party to produce evidence refuting these allegations.³⁵ Moreover, complaints of ill-treatment must be investigated promptly and impartially by competent authorities.³⁶ The Committee notes that the author provided a detailed description of the treatment to which he was subjected and that the State party failed to investigate. In the circumstances of the present case, the Committee is of the view that the requisite standard was not met and concludes that the facts as presented disclose a violation of article 7, read in conjunction with article 2, paragraph 3, of the Covenant.

7.6 On the question of whether the author's arrest on 24 December 1999 and subsequent detention were carried out in conformity with the requirements of article 9, paragraph 1, of the Covenant, the Committee notes that deprivation of liberty is permissible only when it

³² See, for example, communications No. 30/1978, *Bleier v. Uruguay*, Views adopted on 29 March 1982, para. 13.3; No. 139/1983, *Conteris v. Uruguay*, Views adopted on 17 July 1985, para. 7.2; and No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.3.

³³ Communications No. 330/1988, *Berry v. Jamaica*, Views adopted on 4 July 1994, para. 11.7; No. 1033/2001, *Singarasa v. Sri Lanka*, Views adopted on 21 July 2004, para. 7.4; and No. 912/2000, *Deolall v. Guyana*, Views adopted on 1 November 2004, para. 5.1.

³⁴ Human Rights Committee, 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. 49.

³⁵ Communications No. 907/2000, *Siragev v. Uzbekistan*, Views adopted on 1 November 2005, para. 6.2; and No. 889/1999, *Zheikov v. Russian Federation*, Views adopted on 17 March 2006, para. 7.2.

³⁶ Human Rights Committee, general comment No. 20 (1992) on the prohibition of torture and cruel treatment or punishment, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A, paragraph 14.

takes place on such grounds and in accordance with such procedure as are established by domestic law and when this is not arbitrary. In other words, the first issue before the Committee is whether the author's deprivation of liberty was in accordance with the State party's relevant laws. The author claimed that none of the grounds for arrest enumerated in article 106, parts 1 and 2, of the Criminal Procedure Code were applicable at the time of his arrest and that the police inquiry officers failed to comply with a number of procedural requirements set forth by the Criminal Procedure Code, including a right to have access to a lawyer from the moment of arrest, to be promptly interrogated as a suspect by an investigator and to be explained his rights. While the State party argued that the author's arrest on 24 December 1999 complied with the requirements of article 106 of the Criminal Code, it acknowledged that the author was assigned a lawyer and interrogated as a suspect for the first time three days after being arrested. The Committee notes the author's argument that, under article 107, part 2, of the Criminal Procedure Code, a suspect is to be promptly interrogated and, under article 44, part 2, of the Criminal Procedure Code, he or she has to be assigned a lawyer within 24 hours after the arrest. The Committee also notes the author's claim, which has not been specifically contested by the State party, that he was de facto interrogated by the police inquiry officers for three days after his arrest in the absence of a lawyer and investigator, and without having been explained his rights. In the circumstances, the Committee finds a violation of article 9, paragraph 1, of the Covenant.

7.7 The Committee has noted the author's allegations, that the conditions of detention at the IVS of Vasilkov city, where he was held from 24 December 1999 to 11 January 2000 and from 22 February 2000 to 21 March 2000, were inappropriate, and that the cells were overcrowded, wet, dirty and not equipped with beds, mattresses and other basic items; that, in general, the temperature, lighting and air supply in the cells were insufficient. The State party has not specifically addressed the author's allegations that were described by the author in great detail. The Committee recalls that persons deprived of their liberty must be treated in accordance with minimum standards.³⁷ It appears from the author's submissions, which were not refuted by the State party, that these standards were not met. Consequently, the Committee finds that the facts before it disclose a violation by the State party of the author's rights under article 10, paragraph 1, of the Covenant.

7.8 The Committee notes the author's claims that he did not have access to any lawyer for 72 hours and to a lawyer of his choice for more than two months, that he was imposed an ex officio lawyer who was taking part in the proceedings only *pro forma* and that there were no legal grounds for assigning him an ex officio lawyer. The State party partly rejected these claims by stating that no procedural measures were taken with regard to the author during the three-day period when he was not represented by a lawyer and that the author failed to notify the State party authorities about the ineffectiveness of the ex officio lawyer. The author responded to the State party's arguments by submitting that it was during the three-day period during which he was not represented by the lawyer when he was compelled to give self-incriminating testimony. In addition, he provided a copy of an interrogation report of 14 June 2000 in support of his claim that he did complain to the State party authorities about the ineffectiveness of the ex officio lawyer. In the circumstances, the Committee concludes that the facts before it disclose a violation of article 14, paragraphs 3 (b) and (d), of the Covenant.

7.9 The Committee notes the author's claim that his trial was unfair, as the court was biased and did not comply with the requirements of the law of criminal procedure. In addition, the author points to circumstances which he claims demonstrate that he did not

³⁷ General comment No. 21 (1992) on the 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, paras. 3 and 5.

benefit from the presumption of innocence. The Committee has noted the author's contention that he and his lawyer requested the court, inter alia, to examine the claim that he and the other co-accused were subjected to unlawful investigation methods by the police inquiry officers at the pretrial investigation stage to compel them to confess guilt; to exclude the inculpatory evidence that was obtained unlawfully, including the "confession" written by Mr. R.K. on 24 December 1999 who could no longer be summoned as a witness. These requests were dismissed by the Kiev Regional Court. The Supreme Court that examined the author's criminal case on cassation did not eliminate any defects of the proceedings in the trial court.

7.10 In this regard, the Committee recalls its jurisprudence that it is generally not for the Committee, but for the courts of States parties, to review or to evaluate facts and evidence, or to examine the interpretation of domestic legislation by national courts and tribunals, unless it can be ascertained that the conduct of the trial or the evaluation of facts and evidence or interpretation of legislation was manifestly arbitrary or amounted to a denial of justice.³⁸ In the present case, the facts presented by the author, which were not specifically addressed by the State party, show that the evaluation of inculpatory evidence against the author by the State party's courts reflected their failure to comply with the guarantees of a fair trial, as established by the Committee earlier regarding article 14, paragraphs 3 (b), (d) and (g), of the Covenant. In the circumstances, the Committee, therefore, concludes that the facts before it disclose a violation also of article 14, paragraphs 1 and 3 (e), of the Covenant.

7.11 In the light of this conclusion, the Committee does not consider it necessary to deal separately with the author's claim under article 14, paragraph 2, of the Covenant.

7.12 The Committee notes the author's claim under article 15, paragraph 1, that, by sentencing him to life imprisonment, the State party's courts have imposed a heavier penalty than the one that was applicable at the time when the crime was committed and the one that was applicable under the "transitional law", i.e. 15 years' imprisonment. The Committee also notes the author's further argument that, if the relevant penalty has changed more than once between the time when the crime was committed and his conviction, he should benefit from the version of the law that ensures the most favourable legal consequences for him. The Committee, however, observes as submitted by the State party that the death penalty continued to exist until 29 December 1999 when the Constitutional Court declared unconstitutional the provisions of the Criminal Code on the death penalty. The Committee also notes that, according to the decision of the Constitutional Court of 29 December 1999 itself, provisions of the Criminal Code on the death penalty became void from the date of the adoption of the decision in question. Thus, at the time when the crime was committed on 13 December 1999, article 93 of the Criminal Code provided for two types of punishment for murder: between 8 and 15 years' imprisonment and the death penalty.

7.13 The Committee further notes with regard to the period when the law in effect was determined on the basis of the Constitutional Court's decision of 29 December 1999 that this law was applicable to a very specific category of cases, namely, those where the crime in question was committed between 29 December 1999 and 4 April 2000 and those where respective judgments were handed down during the above-mentioned period. In this regard, the Committee refers to its jurisprudence in *Tofanyuk v. Ukraine*,³⁹ where it concluded that the Constitutional Court's decision did not establish a new penalty which would replace the

³⁸ See, inter alia, communication No. 541/1993, *Simms v. Jamaica*, decision on inadmissibility adopted on 3 April 1995, para. 6.2.

³⁹ Communication No.1346/2005, *Tofanyuk v. Ukraine*, Views adopted on 20 October 2010, para. 11.3.

death penalty. It considers, therefore, that in the author's case the law in effect between 29 December 1999 and 4 April 2000 does not constitute a "provision [...] made by law for the imposition of a lighter penalty" within the meaning of the last sentence of article 15, paragraph 1, of the Covenant. The Committee further notes that the penalty of life imprisonment established by the law of 22 February 2000 fully respects the purpose of the Constitutional Court's decision, which was to abolish the death penalty, a penalty which is more severe than life imprisonment. Consequently, there were no other provisions made by law for the imposition of a lighter penalty from which the author could benefit, other than the above-mentioned amendment on life imprisonment.⁴⁰ In such circumstances, the Committee cannot conclude that the State party's courts, by sentencing the author to life imprisonment, have violated his rights under article 15, 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 before it disclose a violation by the State party of article 7; article 7, read in conjunction with article 2, paragraph 3; article 9, paragraph 1; article 10, paragraph 1; and article 14, paragraphs 1, 3 (b), (d), (e) and (g), 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. The remedy should include a review of his conviction that would comply with fair trial guarantees of article 14 of the Covenant, impartial, effective and thorough investigation of the author's claims under article 7, prosecution of those responsible, 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 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 it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. In addition, it requests the State party to publish the Committee's Views.

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

⁴⁰ Ibid.

**I. Communication No. 1449/2006, *Umarov v. Uzbekistan*
(Views adopted on 19 October 2010, 100th session)***

<i>Submitted by:</i>	Indira Umarova (represented by counsels Bartram Brown and Geoffrey Baker)
<i>Alleged victim:</i>	Sanjar Giyasovich Umarov
<i>State party:</i>	Uzbekistan
<i>Date of communication:</i>	20 January 2006 (initial submission)
<i>Subject matter:</i>	Torture; cruel, inhuman and degrading treatment; arbitrary detention; access to lawyer; fair trial; unlawful interference with privacy, family, home, correspondence; freedom of information; discrimination
<i>Procedural issue:</i>	None
<i>Substantive issue:</i>	Degree of substantiation of claims
<i>Articles of the Covenant:</i>	7; 9, paragraphs 1, 3 and 4; 10, paragraph 1; 17; 19, paragraph 2; 26 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 19 October 2010,

Having concluded its consideration of communication No. 1449/2006, submitted to the Human Rights Committee on behalf of Mr. Sanjar Giyasovich Umarov 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 Ms. Indira Umarova, an Uzbek national. She submits the communication on behalf of her husband, Mr. Sanjar Giyasovich Umarov, also an Uzbek national, born in 1956, following his detention at the Tashkent Prison Facility in Tashkent. The author claims her husband to be a victim of violations of article 7, article 9, paragraphs 1, 3 and 4, article 10, paragraph 1, article 17, article 19, paragraph 2, article 26, and article 2 of the International Covenant on Civil and Political Rights. The author is represented by counsels, Mr. Bartram Brown and Mr. Geoffrey Baker.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

1.2 Following a 14 April 2006 request of the author, on 18 April 2006, the Committee's Special Rapporteur on new communications and interim measures, pursuant to rule 92 of the Committee's rules of procedure, requested the State party to adopt all necessary measures to protect Mr. Umarov's life, safety and personal integrity, in particular by providing him with the necessary and appropriate medical care and by abstaining from administering any drugs detrimental to his mental or physical health, so as to avoid irreparable harm to him, while the case was under consideration of the Committee.

Facts as presented by the author

2.1 The author's husband is a businessman living in Tashkent and a part-time resident of the United States of America. In March and April of 2005, along with other concerned citizens and leaders of various social, democracy and human rights organizations, he established the political formation Sunshine Coalition of Uzbekistan. The purpose of the Sunshine Coalition was to assist and work towards the development of peaceful and democratic reform programmes.

2.2 On 27 July 2005, the Sunshine Coalition of Uzbekistan registered with the Ministry of Justice. In July, 2005, the Prosecutor's Office of Uzbekistan (Прокуратура Республики Узбекистана), the tax commission and other bodies began investigations into the companies operated by the leaders of the Sunshine Coalition. Many members and supporters of the Sunshine Coalition, relatives and individuals associated with companies affiliated with the author's husband and his family, were forced to seek asylum outside of Uzbekistan for fear of arrest and prosecution by the State party's authorities.

2.3 On 11 August 2005, the author's husband filed a libel suit against the Tashkent weekly *Zerkalo XXI* for publication of an article that slandered his honour, dignity and business reputation. The *Zerkalo XXI* belongs to the State-owned publishing house, which prints school textbooks. On 18 October 2005, the author's husband attended a hearing related to the libel suit against *Zerkalo XXI*.

2.4 On the evening of 22 October 2005, the Tashkent police raided the offices of the Sunshine Coalition, seized documents, files, computer disks, and records, and ransacked the offices. At approximately 1 a.m. on 23 October 2005, the author's husband came to the office to investigate, and was immediately taken into custody. He was taken to Tashkent City Department of Internal Affairs (ГУВД города Ташкента) and put in an isolated temporary holding cell in the basement of the building, where he was kept for 19 days. He was charged with embezzlement related to an oil company in which he formerly had an ownership interest and with grand larceny.

2.5 On 25 October 2005, Mr. Umarov's lawyer arrived at the police department for his interrogation, but realized on arrival that the interrogation could not take place as the author's husband showed signs of deteriorating health, psychiatric problems or hypertension, was naked on the floor of the cell, and his face was covered with his hands while he rocked back and forth. Mr. Umarov, who had known his lawyer previously, did not react to his presence and only muttered unintelligible words.

2.6 On the same day and while still in the building, Mr. Umarov's lawyer filed an official petition requesting a medical examination by court order and to be notified of the results of the examination, since he suspected that psychotropic drugs had been forcibly administered to his client. He was not contacted about his client's condition for many days and his repeated requests for information were ignored. On 26 October 2005, Mr. Umarov's lawyer wrote to the Senior Investigator of the Department for Fighting Economic Crimes and Corruption (Управления по борьбе с экономическими преступлениями и коррупцией) of the General Prosecutor's office requesting again a medical-psychiatric examination of his client and the permission to be present while the examination was

conducted. He did not receive an answer. On 28 October 2005, Mr. Umarov's lawyer filed a complaint with the Head of the Tashkent Department of Internal Affairs demanding a response in writing to his request for a judicial psychiatric evaluation of his client. On 28 October 2005, the lawyer also filed a petition to the Head of the Department for Fighting Economic Crimes of the General Prosecutor's Office, which contained a request for a meeting with the author's husband, access to documents related to the case and notification of the results of a psychiatric examination. On 1 November 2005, Mr. Umarov's lawyer filed a complaint with the General Prosecutor of Uzbekistan asking for a personal meeting with the accused, requesting that his client's rights be upheld and demanding information in regard to the basis of the latter's arrest and detention.

2.7 On 2 November 2005, Mr. Umarov's lawyer was allowed to meet with him. During the meeting the latter complained of severe headaches, nausea, fever and faintness, and high blood pressure. He was wearing the same clothes that he had when arrested and had not been given any elementary personal hygiene items such as soap, toothpaste or comb. Upon the lawyer's request, a paramedic examined the author's husband and detected that his blood pressure was 140/100.

2.8 On 3 November 2005, the Organization for Security and Cooperation in Europe (OSCE) issued Statement No. 576, regarding the arrest and detention of Mr. Umarov, and expressed concern over his treatment. On 4 November 2005, the United States Mission to the OSCE raised its concern over the "arrest, detention, and possible abuse of [the author's husband]..." On 8 November 2005, the European Union issued a statement expressing alarm at the reports regarding the "unacceptable conditions" in which the author's husband was held.

2.9 On 6 November 2005, the author filed another petition with the General Prosecutor, stating concerns about her husband's health, requesting a medical examination and asking that he be released pending the trial in view of his deteriorating condition. On 7 November 2005, during a medical examination of the author's husband, based upon his lawyer request, it was noted that his blood pressure was 150/90. The medics conducted a cardiogram, but did not perform any other medical tests and did not conduct a full evaluation of the author's husband's health condition. On 14 November 2005, during an interrogation, the author's husband had another crisis and an "emergency" medic had to be summoned to attend to him. The author's husband received medical treatment, consisting of one shot of painkillers and a sedative. On 15 November 2005, Mr. Umarov's lawyer filed a petition to require the investigators to conduct a "standard medical evaluation of the overall health" of the author's husband.

2.10 On 7 November 2005, the Head of the Department for Fighting Economic Crimes of the General Prosecutor's Office sent a letter to Mr. Umarov's lawyer in response to his petitions and complaints, in which he stated that the author's husband had refused legal assistance in writing, that on 25 October 2005, he had violated the internal order in the detention facility by removing all his clothes and throwing them out of the cell and that he had simulated psychiatric illness. The letter stated that the lawyer was permitted to visit Mr. Umarov on 25 October, despite the fact that the latter had refused legal assistance, and that during that meeting the author's husband had stated that he did not know the lawyer and requested the investigator not to bring any lawyer without his explicit request. The letter also stated that, as far as the Prosecutor's Office was concerned, it was only from 2 November that Mr. Umarov's lawyer was officially acting on his behalf, following an authorization issued by his wife and son.

2.11 On 9 November 2005, Mr. Umarov's lawyer filed a statement with the General Prosecutor of the Republic, challenging and refuting the statements made in this letter. In particular, the lawyer specified that Mr. Umarov had not refused all legal assistance, but rather that of a Mr. Shodiev, who was recommended to him by the investigating officers.

He maintained that his client was denied the right to contact his relatives and a lawyer of his choice.

2.12 On 12 November 2005, after being held for 19 days in a temporary holding cell in the basement of the Tashkent City Police Department, Mr. Umarov was transferred to the Tashkent City Jail.

2.13 On 18 November 2005, the author sent to the General Prosecutor a letter complaining about the treatment of her husband, noting that he had never shown signs of bad health prior to his arrest and that his current condition was the result of the treatment while in police custody. On 21 November 2005, she sent a letter to the President of the Republic requesting the protection of her husband's constitutional rights.

2.14 On 22 November 2005, the Senior Investigator denied the petitions for examination of Mr. Umarov's medical condition. On 28 November 2005, Mr. Umarov told his lawyers that he had requested for medical attention on five occasions, and that his requests were ignored each time. All the oral petitions and written complaints calling upon the authorities to conduct a proper medical examination to evaluate Mr. Umarov's health condition were dismissed.

2.15 On 2 December 2005, Mr. Umarov's lawyers filed a petition requesting that he be released on bail pending trial for health reasons in view of the fact that he had no previous criminal record and had never attempted to avoid judicial proceedings. On 7 December 2005, the lawyers again wrote to the General Prosecutor complaining that on several occasions they had been denied access to their client by the investigating officers.

2.16 On 6 March 2006, the author's husband was sentenced to 14 years and 6 months imprisonment and prohibited from engaging in economic activities for five years, for crimes under articles 167, 184 and 209 of the Criminal Code of Uzbekistan.

The complaint

3.1 On the issue of exhaustion of domestic remedies, the author submits that numerous attempts have been made to remedy the above-mentioned violations, including petitions and complaints made by Mr. Umarov's lawyers. Nevertheless, the violations persisted. This continues to cause unreasonable delay and irreparable harm and prevents the author's husband from exhausting domestic remedies. In particular, the author submits that, as may be observed from prior case law, domestic remedies in Uzbekistan do not offer a real possibility of remedying the infringement of article 9, paragraph 3, of the Covenant. Mr. Umarov's arrest occurred on 23 October 2005, and by 20 January 2006 he still had not been brought before a judge.¹

3.2 According to the author, the State party has consistently delayed each step in the processing of this case. The author invokes the State party's history before the Human Rights Committee, which according to her presents further evidence that exhaustion of remedies will cause undue delay and irreparable harm to the author's husband. In the four complaints brought before the Committee² against the State party, the latter did not respond

¹ The author refers to communication No. 911/2000, *Nazarov v. Uzbekistan*, Views adopted on 6 July 2004, where the Committee found that detention for a period as short as five days without being presented before a judge discloses a violation of article 9, paragraph 3 (para. 6.2). In that case, Mr. Nazarov attempted to exhaust all domestic remedies, but found no remedy available for this violation. Similarly, the author is unable to find a domestic remedy for a violation of article 9, paragraph 3.

² The author refers to communications No. 971/2001, *Arutyuniantz v. Uzbekistan*, Views adopted on 30 March 2005; No. 931/2000, *Hudoyberganova v. Uzbekistan*, Views adopted on 5 November 2004;

to the Committee's requests. Moreover, the Government of Uzbekistan subsequently has not undertaken to ensure to 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 of a violation. To ask the author's husband to exhaust all domestic remedies will cause him similar irreparable damage as occurred in each of the prior complaints: loss of years of his life, loss of time with his family, loss of freedom and loss of health.

3.3 The author claims that the State party has violated article 7, article 9, paragraphs 1, 3 and 4, article 10, paragraph 1, article 17, article 19, paragraph 2, and article 26, and, therefore, article 2 of the Covenant.

3.4 She claims that the State party violated article 7 of the Covenant, as her husband was subjected to torture and cruel, inhuman and degrading treatment. He was held naked without provision of elementary personal hygiene items for several days. During this time, he displayed effects of having been administered psychotropic drugs.

3.5 The author claims a violation of article 9, paragraph 1, of the Covenant, for arbitrary detention since her husband was held in a temporary holding cell for 19 days in violation of the domestic Criminal Rules of Procedure, which requires transfer from a temporary holding cell within a period of 72 hours.

3.6 The author claims a violation of article 9, paragraph 3, of the Covenant, since her husband was held in detention for more than two months from 23 October 2005.³ He has not been given the option of release with guarantee of appearance at trial. The State party has not taken any steps to move this case towards trial, aside from formally charging him. The author's husband was held without a real opportunity to speak with his lawyer for 11 days, from 23 October 2005 until 2 November 2005. While his lawyer was allowed a visit on 25 October, the author's husband was physically unable to communicate with him at that time due to the ill-treatment he received during his detention.⁴ The denial of communication between Mr. Umarov and his lawyer during this critical time adversely affected his right to a fair trial.

3.7 The author claims a violation of article 9, paragraph 4, of the Covenant, as the State party denied her husband the right to take proceedings before a court challenging the lawfulness of his detention. He was prevented from challenging the lawfulness of his detention while being detained since he was unable to communicate with his lawyer until 2 November 2005.

3.8 The author claims a violation of article 10, paragraph 1, of the Covenant, as her husband was held in a holding cell with no clothing, no personal hygiene items and no bed for several days. At the time of his lawyer's first visit, Mr. Umarov was naked and incoherent on the floor of his cell. Consequently, the lawyer was unable to sustain any form of communication with him. The author's husband's poor condition, resulting from the ill-treatment received during his detention, rendered him unable to effectively communicate with the lawyer. Upon witnessing Mr. Umarov's condition in the holding cell, his lawyer

Nazarov v. Uzbekistan; Communication No. 917/2000, *Arutyunyan v. Uzbekistan*, Views adopted on 16 March 2004.

³ The author refers to *Nazarov v. Uzbekistan*, where the Committee found that holding a person for a period as short as five days without being presented before a judge is a violation of article 9, paragraph 3.

⁴ The author refers to communication No. 1128/2002, *Marques de Morais v. Angola*, Views adopted on 29 March 2005, para. 6.3, where the Committee found that a 10-day incommunicado detention, without access to a lawyer, adversely affected the defendant's right to be brought before a judge.

immediately requested medical attention. The fulfilment of this request was unnecessarily delayed for many days by the State party's authorities.

3.9 The author claims that the State party has engaged in a pattern of targeted arrests and persecution of political dissidents as noted in statements issued by the European Union and OSCE. The author claims a violation of her husband's right to be free from discrimination on the grounds of political opinion. The Government discriminated against Mr. Umarov by arresting him in violation of article 26 of the Covenant.

3.10 Furthermore, the author claims that the State party had violated her husband's right not to be subjected to unlawful attacks on his honour and reputation, in accordance with article 17 of the Covenant. His reputation was unlawfully attacked in an article in the *Zerkalo XXI*, a State-owned news media.

3.11 The State party is alleged to have violated the author's husband's freedom of expression, in particular, his freedom to seek, receive, and impart ideas and information of all kinds (article 19, paragraph 2, of the Covenant). She claims that her husband was targeted for arrest after exercising his freedom of expression due to his leadership position in the Sunshine Coalition, and submits various articles and statements in support of her view.

State party's observations on admissibility and merits

4.1 On 14 April 2006, the State party challenged the admissibility of the communication pursuant to article 5, paragraph 2, of the Optional Protocol, maintaining that the available domestic remedies were not exhausted. The State party submits that, according to the Criminal Procedural Code, a resolution of the Appellate instance can be appealed by the convict or his defence lawyer to the Supreme Court under a supervisory review procedure ("надзор"). Since neither Mr. Umarov, nor his defence lawyer submitted such an appeal to the Supreme Court, the State party is of the opinion that available domestic remedies were not exhausted.

4.2 On the facts of the case, the State party notes that on 6 March 2006, the author's husband was sentenced by the Tashkent City Court (Ташкентский городской суд) to 14 years and 6 months of imprisonment for embezzlement of property in particularly large amounts by the organized criminal group he headed; official forgery and bribing; premeditated evasion of taxes and laundering of income obtained through criminal activity. Mr. Umarov's lawyers submitted an appeal while the prosecutor submitted a protest on appeal. During the period 10 to 13 April 2006, the Appellate instance of the Tashkent City Court sentenced him to 10 years and 6 months imprisonment with the prohibition to engage in business activities for 5 years. On the basis of the Resolution of the Senate of Oliy Majlis (Upper Chamber of the Parliament) "On amnesty dedicated to the 13th anniversary of the Constitution", this sentence was further decreased by one quarter. The State party lists the names of four lawyers that represented the author's husband during the court hearings of the first instance and on appeal. The court hearing on appeal was conducted according to the procedure applicable to the hearing in first instance, with the participation of both parties. The hearing was public, with the participation of the representatives of the diplomatic missions in Uzbekistan and human rights defenders.

4.3 The State party submits that the arguments of the author and the defence lawyers on use of physical and psychological pressure, detention under improper conditions were addressed during the first instance hearings and on appeal and were considered unfounded. The State party lists the names of four staff members of the Isolator of Temporary Confinement of the Tashkent City Department of Internal Affairs (ИВС ГУВД) who were heard in the court as additional witnesses and who stated that neither unlawful methods of investigation nor pressure were applied to the author's husband and that he himself had not

submitted any complaints or petitions in relation to any illegal actions. The Isolator's doctor stated that he conducts daily check-ups and discussions with the detainees. When he conducted a check-up of the author's husband, he did not notice any injuries and Mr. Umarov did not complain that anybody had ill-treated him or applied moral or psychological pressure.

Author's comments on admissibility and merits

5.1 On 14 April 2006, the author, on behalf of her husband, submitted to the Committee a request for interim measures, stating that his health had severely deteriorated during the seven months of his detention prior to and during the criminal trial. She alleged that, according to witnesses who saw her husband during the trial, he appeared psychologically stressed, experienced strong heart palpitations and overall physical weakness and could not adequately assess his surroundings. His lawyer had expressed concern regarding the possible forced administration of psychotropic agents to Mr. Umarov.

5.2 On 18 April 2006, the Committee's Special Rapporteur on new communications and interim measures, pursuant to rule 92 of the Committee's rules of procedure, requested the State party to adopt all necessary measures to protect Mr. Umarov's life, safety and personal integrity, in particular by providing him with the necessary and appropriate medical care and by abstaining from administering any drugs detrimental to his mental or physical health, so as to avoid irreparable harm to him, while the case was under consideration of the Committee. The Special Rapporteur also requested that the State party allow Mr. Umarov's lawyer to have access to him and to inform the Committee on the measures taken to comply with the above decision within 30 days.

5.3 On 19 April 2006, Mr. Umarov's lawyer again requested in writing to be allowed to visit him and to receive information about his state of health, since neither he, nor Mr. Umarov's family, had been allowed a visit since 28 March 2006. The author provided copies of numerous complaints and petitions to the State party's authorities on this matter. On 24 April 2006, Human Rights Watch submitted a letter with observations on Mr. Umarov's appeal hearings, which took place on 12 and 13 April, corroborating the claim that he looked unwell and disoriented in the court room.

5.4 The author submits that according to the State party's Criminal Procedural Code, the supervisory review procedure is one of an extraordinary nature, since it is only available at the discretion of a limited number of high-level judicial officers. Even if such review were granted, it takes place without a hearing and is only allowed on questions of law. Therefore, the author maintains that domestic remedies were exhausted.

5.5 On 28 August 2006, the author made an additional submission, informing the Committee that, for the first time since his arrest, her husband was permitted a visit by a direct relative at the end of June 2006. During the visit he complained that he had been in a critical medical condition during April and May 2006 and that his requests for medical treatment had been denied. Mr. Umarov also stated that immediately after he was transferred to a penal colony to serve his sentence (date not specified), he was placed in solitary confinement and that he was provided with medical care only after he announced a hunger strike. The author also alleged that by 26 August 2006, her husband had been denied visits by his lawyers for five months. The two latest attempts to visit Mr. Umarov by his attorney, on 14 and 24 August 2006, were rejected by the prison authorities alleging that he was in solitary confinement. The State party did not submit any comments on the additional submission by the author, nor on the merits of her previous submission.

5.6 On 20 September 2006, the author informed the Committee that she received a letter, dated 8 September 2006, informing her that on 30 May 2006 the Supreme Court had rejected a petition for review of her husband's conviction (submitted on 8 May 2006).

Additional observations by the State party

6. On 23 April 2008, the State party, in response to the Committee's request for interim measures of 18 April 2006 and subsequent reminders of 2 June 2006, and 1 December 2006, submitted information on the state of health of Mr. Umarov. According to the information, since his placement in the penal colony, where he is serving his sentence, Mr. Umarov has been under regular medical observation. On 25 May 2006, he was tested for syphilis and HIV and both tests were negative. General blood and urine tests, conducted on 16 September 2007, did not demonstrate any irregularities; neither did his blood tests conducted on 6 January 2008. The State party submits that Mr. Umarov's general health condition was "satisfactory"; that he had been diagnosed with coronary disease, stenocardia and hypertension; that he had repeatedly been treated for his illnesses; and that at the time of the submission his blood pressure was 140/95. The State party also submits that Mr. Umarov will be allowed to meet with his lawyers if he personally files a written request to the administration of the colony, in accordance with article 10 of the Criminal Correctional Code of Uzbekistan and that the rights of convicts, including Mr. Umarov's, are ensured in accordance with the existing legislation.

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, 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 takes note of the State party's submission that the author's husband did not attempt to have his sentence overturned through a supervisory review procedure. The Committee, however, recalls its jurisprudence that a supervisory review is a discretionary review process, which does not constitute an effective remedy for the purposes of exhaustion of domestic remedies.⁵ The Committee also notes that a supervisory review of Mr. Umarov's sentence could not have provided a remedy for the alleged violations of his rights.

7.4 The Committee takes note of the author's claim that the State party has violated her husband's right under article 17 of the Covenant not to be subjected to unlawful attacks on his honor and reputation, by the publication of an article in a State-owned news media that slandered his honor, dignity and business reputation. The Committee, however, concludes that the author has failed to sufficiently substantiate this claim for purposes of admissibility, and declares it inadmissible under article 2 of the Optional Protocol.

7.5 The Committee notes the author's claims that she and her husband's lawyers had unsuccessfully attempted to complain, before several authorities, about his deteriorating health, possible mistreatment and administration of psychotropic drugs, the conditions of his initial detention, and the denial of access to his lawyers. These claims were not refuted by the State party. The Committee considers that these claims raise issues under articles 7, 9, paragraphs 1, 3 and 4, 10, paragraph 1, 19, paragraph 2 and article 26 of the Covenant,

⁵ See, for example, communication No. 836/1998, *Gelazauskas v. Lithuania*, Views adopted on 17 March 2003.

not finding any obstacles to their admissibility, it declares them admissible and proceeds to a consideration of its 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 for under article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee notes that, while the State party has provided comments regarding the communications' admissibility, it has provided almost no information about the merits of the specific claims made by the author. The State party merely contends in general terms that Mr. Umarov was tried and convicted in compliance with Uzbek laws, that the charges and evidence were thoroughly assessed, that his guilt was proven, and that his rights were respected in accordance with the domestic legislation.

8.3 The author has claimed that the State party violated article 7 of the Covenant, as her husband was held naked and without provision of elementary personal hygiene items for several days. He displayed effects of having been administered psychotropic drugs. Upon witnessing the author's husband's condition in the holding cell, during his first visit, his lawyer immediately requested medical attention. However compliance with this request was unnecessarily delayed for many days by the State party's authorities. In this connection, the Committee notes the State party's submission that four officers working in the Isolator of Temporary Confinement testified during the trial that no ill-treatment took place and that the doctor of the Isolator testified that when examining the author's husband he did not notice any bodily injuries, nor did the latter complain to him regarding any ill-treatment. The Committee, however, notes that the author has presented numerous statements indicating that her husband's condition deteriorated rapidly after his arrest; that he displayed effects of having been administered psychotropic drugs throughout the investigation and the trial; and that her requests and those of her husband's lawyer that prompt medical examinations be carried out had been repeatedly ignored. The Committee notes that the State party has provided no documentary evidence of any specific inquiry into the numerous allegations of ill-treatment. The Committee considers that in the circumstances, the State party has failed to demonstrate in any satisfactory manner how its authorities adequately addressed the allegations of torture and ill-treatment made by the authors in any meaningful way, both in the context of the domestic criminal proceedings and in the context of the present communication. It recalls that the burden of proof in regard to torture or ill-treatment cannot rest alone on the author of a communication, especially in view of the fact that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to the relevant information. Moreover 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. In these circumstances, the Committee considers that due weight must be given to the authors' allegations of torture and ill-treatment. Accordingly, the Committee concludes that the facts as presented by the author reveal a violation of Mr. Umarov's rights under article 7 of the Covenant.

8.4 The author has also claimed a violation of article 9, paragraph 1, of the Covenant, regarding the arbitrary detention of her husband, since he was kept in a temporary holding cell for 15 days in violation of the domestic Criminal Rules of Procedure, which require transfer from a temporary holding cell within a period of 72 hours. The State party has not refuted this allegation. Accordingly, the Committee concludes that the facts as presented reveal a violation of the author's husband's rights under article 9, paragraph 1, of the Covenant.

8.5 The author has claimed a violation of article 9, paragraph 3, of the Covenant, since her husband was held without a real opportunity to speak with his lawyer for 11 days while in pretrial detention, which adversely affected his ability to prepare his legal defence. In its submission to the Committee, the State party has not refuted these allegations. The Committee must accordingly conclude that the facts as presented by the author reveal a violation of the author's husband's rights under article 9, paragraph 3, of the Covenant.

8.6 The author has further claimed a violation of article 9, paragraph 4, of the Covenant, as the State party denied her husband the right to challenge the lawfulness of his detention and prevented him from having contact with his lawyer between 23 October and 2 November 2005. In its submission to the Committee, the State party has not refuted these allegations. The Committee has previously observed that the State party's criminal procedure law provides that decisions regarding arrest/pretrial detention have to be approved by a prosecutor, are subject to appeal only before a higher prosecutor and cannot be challenged in court. In the Committee's view this procedure does not satisfy the requirements of article 9 of the Covenant.⁶ In the present case the author's husband was arrested on 22 October 2005, and there was no subsequent judicial review of the lawfulness of his detention until he was convicted on 6 March 2006. The Committee therefore concludes that there has been a violation of article 9, paragraph 4, of the Covenant.

8.7 The author has claimed a violation of article 10, paragraph 1, of the Covenant, as her husband was held in a holding cell without clean clothing, no personal hygiene items and no bed for several days and his lawyer's requests for immediate medical attention were delayed without justification by the State party's authorities. Further, the author has claimed that her husband was not allowed to be visited by his family for months after his arrest and that throughout the serving of his sentence he was systematically denied visits from family members. The Committee notes that the State party has provided information about the author's husband's health in September 2007 and January 2008, almost two years after his initial detention. The information only indicated that his condition was "satisfactory" and that his health was being regularly monitored. In the absence of a more detailed explanation from the State party, the Committee concludes that the author's husband was treated inhumanely and without respect for his inherent dignity, in violation of article 10, paragraph 1, of the Covenant.⁷

8.8 The Committee notes the State party's submission that the author's husband was convicted under the domestic legislation on economic crimes. The Committee, however, observes that Mr. Umarov was one of the leaders of the Sunshine Coalition, a political opposition group that had emerged in Uzbekistan, that he was arrested during a police search of the offices of the Coalition, and that the State party has failed to explain the purpose of the above search. The Committee also observes that, according to the information submitted by the author, other leaders of the Coalition were arrested on similar charges around the same time and that a number of companies belonging to members of the Coalition were subjected to investigation by different branches of the State party's authorities immediately following the establishment of the Sunshine Coalition. The Committee, as notified by the author, takes note in particular of the 3 November 2005 Statement of the Permanent Council of the European Union and of the 8 November 2005 Declaration by the Presidency on behalf of the European Union on the human rights situation in Uzbekistan, both of which describe Mr. Umarov as an opposition leader, express concern regarding his treatment by the authorities and request independent

⁶ See communication 959/2000, *Bazarov v. Uzbekistan*, Views adopted on 14 July 2006, para. 8.2.

⁷ See for instance communications No. 590/1994, *Bennett v. Jamaica*, Views adopted on 25 March 1999, paras. 10.7 and 10.8; No. 695/1996, *Simpson v. Jamaica*, Views adopted on 31 October 2001, para. 7.2; and No. 704/1996, *Shaw v. Jamaica*, Views adopted on 2 April 1998, para. 7.1.

assessment of his condition. The Committee further notes, that the State party has not addressed the allegation that Mr. Umarov was arrested and imprisoned in order to prevent him, as a member of a political formation, from expressing his political views. The Committee considers that the arrest, trial and conviction of Mr. Umarov resulted in effectively preventing him from expressing his political views. Accordingly the Committee finds that the State party violated Mr. Umarov's rights under article 19, paragraph 2, and article 26 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 reveal violations of article 7, article 9, paragraphs 1, 3 and 4, article 10, paragraph 1, article 19, paragraph 2, and 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 Mr. Umarov with an effective remedy. The State party is under an obligation to take appropriate steps to (a) institute criminal proceedings, in view of the facts of the case, for the immediate prosecution and punishment of the persons responsible for the ill-treatment to which Mr. Umarov was subjected, and (b) provide Mr. Umarov with appropriate reparation, including adequate compensation. The State party is also under an obligation 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 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.

[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.]

**J. Communication No. 1458/2006, *González v. Argentina*
(Views adopted on 17 March 2011, 101st session)***

<i>Submitted by:</i>	Ramona Rosa González (represented by counsel, Carlos Varela Alvarez)
<i>Alleged victims:</i>	The author and her deceased son, Roberto Castañeda González
<i>State party:</i>	Argentina
<i>Date of communication:</i>	9 February 2006 (initial submission)
<i>Subject matter:</i>	Irregularities in the proceedings relating to the disappearance of the author's son
<i>Procedural issue:</i>	Insufficient substantiation
<i>Substantive issues:</i>	Violation of the right to life and to an effective remedy
<i>Articles of the Covenant:</i>	2, paragraph 3; and 6, 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 17 March 2011,

Having concluded its consideration of communication No. 1458/2006, submitted to the Human Rights Committee by Ramona Rosa González 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 9 February 2006, is Ramona Rosa González, an Argentine national, who submits this communication on her own behalf and on behalf of her deceased son Roberto Castañeda González, born on 25 May 1964. She claims to be the victim of violations by Argentina of articles 2; 3; 6; 7; 9; 9, paragraph 5; 14, paragraph 1; and 26 of the Covenant. The Optional Protocol entered into force for the State party on 8 November 1986. The author is 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. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Krister Thelin and Ms. Margo Waterval.

In accordance with article 90 of the Committee's rules of procedure, Mr. Fabián Omar Salvioi did not participate in the examination of the present communication.

The facts as submitted by the author

2.1 Roberto Castañeda González was last seen on 10 September 1989 in Mendoza. The van he owned, together with his personal effects, were found burned out in a location known as “el Pastal de Lavalle” that same day. A charred body was also found inside the van. Forensic tests carried out to identify the body did not yield positive results but did confirm the presence of multiple skull fractures and of a bullet presumed to have been the cause of death prior to carbonization. Police Station No. 17 carried out a preliminary investigation and reported the facts to the Fifth Examining Court of the province of Mendoza. The judicial investigation concluded that the fire had been set intentionally.

2.2 The author informed the court that, three months prior to her son’s disappearance, a lawyer had told her that he should leave, as his name was on a list of people that the Mendoza police were going to cause to disappear. The author also stated that, two months earlier, Roberto Castañeda had been detained in the company of W.L. and that, when the latter’s father had gone to collect W.L. at the Directorate of Investigation, the police officers present had warned him not to let his son mix with Mr. Castañeda. In May of that year, Mr. Castañeda was again detained for illicit car racing. The author maintains that on that occasion, a police officer said to Mr. Castañeda in her presence, “This time you walk away, but next time we’ll kill you.” Two months after the disappearance, W.L. was detained again and threatened with the same fate that had befallen Mr. Castañeda. The judge also heard the testimony of a police officer who claimed that the perpetrators of the offence against Mr. Castañeda were three civilians belonging to a criminal gang that had been infiltrated by that particular police officer. The judge initiated proceedings against them. However, according to a note in the case file, on 5 August 2002 the case was closed pending the apprehension of those responsible for the acts in question and/or expiration of the statute of limitation for criminal proceedings.

2.3 The case file also contains statements from several police officers who identify other officers as having caused the death of Mr. Castañeda.

2.4 According to the author, the following irregularities occurred during the trial:

- The evidence was not protected. Roberto Castañeda’s father said that when the burned-out vehicle was returned to him, he found various body parts inside, which he himself had to take to the forensic medical examiners.
- Months after locating the vehicle, the police themselves said that the traces found had no evidentiary value.
- At the crime scene there were prints left by footwear used by the police, fingerprints, a bullet and traces of blood, none of which were taken into account.
- The preliminary investigation pointed to the possible involvement in the crime of police officers belonging to the Directorate of Investigation or the Commando Unit. However, this hypothesis was not thoroughly investigated by the judge or the prosecutor.
- The judge decided not to pursue the investigation, closing the case and awaiting the expiration of the statute of limitation.
- Two police commissions were appointed for the investigation. Ironically, one of these included the police officer who was on duty at the police station on the night of the events, and who was later identified as a key suspect by police witnesses.
- The police presented false witnesses, some of whom stated that they had seen Roberto Castañeda alive and well in various places.

2.5 With regard to the exhaustion of domestic remedies, the author states that she had claimed damages in the criminal proceedings and had appealed against the decision to dismiss the case. However, her appeal was rejected because, as a civil claimant, she lacked the legal capacity to appeal the criminal aspects of the case. Furthermore, on 14 August 2001 she had submitted an application for habeas corpus to the Third Examining Court, on the grounds of enforced disappearance, since there was no certainty that the charred remains found in the vehicle were those of her son. This application was rejected by both the lower court and the Appeal Court as it did not meet the requirements of the remedy provided for by law.

The complaint

3. The author states that these acts constitute a violation of articles 2; 3; 6; 7; 9; 9, paragraph 5; 14, paragraph 1; and 26 of the Covenant. She states that both her son's right to life and physical integrity and her own right of access to justice were violated, obstructing truth and equal treatment before the law in arbitrary and biased proceedings that had, after 17 years, still failed to reach a conclusion.

State party's observations

4. In a note verbale dated 5 September 2006, the State party suggested to the Committee and the author that they should set up a dialogue with a view to finding a solution that would uphold the rights protected by the Covenant.

Author's comments on the State party's submission

5.1 In a letter dated 19 September 2007, the author transmitted to the Committee a copy of a memorandum on negotiations for a friendly settlement signed by her counsel and the Ministry of the Interior of the province of Mendoza. In the memorandum, both parties agreed to a procedure to reach an amicable settlement including the following points:

(a) In view of the existing statements of fact leading to the international complaint and the other evidence adduced during the dialogue process, and in particular the explicit recommendation from the Ministry of Foreign Affairs that an amicable solution should be found, the Government of the Province of Mendoza finds that there is sufficient evidence to engage the *objective responsibility* of the Province in the case and accordingly accepts responsibility for these acts and their legal consequences;

(b) This responsibility arises under the Covenant to the extent that the competent authority has not been able to make a determination in accordance with the principles of due process of criminal law, and in particular because more than 18 years have elapsed since proceedings began."

5.2 The memorandum also states that the Government of Mendoza undertakes to compensate the family for the material and moral damages suffered. In this connection, the parties agree to the following:

(a) To accept the proposal for compensation drawn up by the author's counsel;

(b) To form an ad hoc arbitration tribunal to approve the compensation awarded for Mr. Castañeda's disappearance and other non-monetary measures ordered, and to determine the fees for counsel in the international case;

(c) The tribunal should be established no more than 30 days following the signing of the provincial government decree ratifying the agreement;

(d) The procedure to be followed shall be defined by parties and recorded in a memorandum, a copy of which shall be forwarded to the Human Rights Committee. To that end, the parties shall each appoint a representative to participate in the deliberations on the procedure;

(e) The decision of the arbitration tribunal shall be final and without appeal. The tribunal shall approve the amount, modalities and beneficiaries of the monetary compensation, and shall determine appropriate fees for participation by counsel in the international and arbitration proceedings;

(f) The petitioners agree to refrain from any civil action in the case before the domestic courts and to renounce finally and irrevocably all other monetary claims against the province or the State in this case.

5.3 As further compensation, a proposal put forward by the author's counsel was accepted, namely acknowledgement by the State party of its international responsibility, a public apology, notification of the courts and the police and guarantees of non-recurrence.

5.4 On 30 December 2008, the author informed the Committee that the government of Mendoza had taken no concrete steps to bring the amicable settlement procedure to a conclusion since it began on 28 August 2006. Therefore, the author had decided to withdraw from the procedure.

Additional observations by the State party

6. On 6 March 2009, the State party informed the Committee that discussions to explore the possibility of a friendly settlement had resumed. Consequently, the provincial Office of the Attorney General was evaluating the factual background of the case in order to expedite the payment of compensation and other agreed reparative measures.

Additional comments by the author

7.1 On 24 June 2009, the author asked the Committee to take a decision on the admissibility and merits of the communication. The author informed the Committee that during her discussions with the provincial authorities she had not mentioned suspending or abandoning the case before the Committee. These comments were transmitted to the State party on 26 June 2009.

7.2 In a letter dated 27 October 2010, the author reiterated her request to the Committee. She stated that there had been no change in the situation regarding the complaint and that the judicial investigations had ground to a halt. She said that the State had acknowledged the seriousness of the case and the facts surrounding it and that the actions of the provincial authorities had been dilatory.

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 author's claims that both her son's right to life and physical integrity and her own right of access to justice were violated, contrary to articles 2;

3; 6; 7; 9; 9, paragraph 5; 14, paragraph 1; and 26 of the Covenant. The Committee considers that these claims fall primarily within the scope of article 6, paragraph 1, and article 2, paragraph 3, that they have been sufficiently substantiated for the purposes of admissibility and that domestic remedies have been exhausted. In the absence of other impediments to admissibility, these claims should be considered on the merits. On the other hand, the Committee considers that the claims of violations of articles 3; 7; 9; 14, paragraph 1; and 26 have been insufficiently substantiated for the purposes of admissibility and finds them inadmissible under article 2 of the Optional Protocol.

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 provided in article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee takes note of the author's allegations relating to the disappearance of her son Roberto Castañeda González on 10 September 1989 and the uncertainties regarding the identification of the body found in the vehicle he owned. The author also claims that there is circumstantial evidence indicating that the police were responsible for depriving her son of the right to life, notably threats allegedly made to him before the events in question. She also states that a police officer who might have been involved in the disappearance had been a member of one of the police commissions investigating the events. Finally, the case was closed on 5 August 2002 as those responsible had not been identified. The Committee also notes that the State party has not commented on the author's allegations, merely informing the Committee of the negotiations for an amicable solution, which were never concluded. In these circumstances, the Committee believes that due weight should be given to the information provided by the author.

9.3 The Committee also notes that, although it cannot be concluded from the information submitted that Mr. Castañeda was detained, the information does confirm the existence of the corpse of a person who apparently died a violent death, along with indications that it may have been Mr. Castañeda's. While the judicial proceedings failed to explain these facts or identify those responsible, the State party has not refuted the version of the facts submitted by the author, notably with respect to State responsibility.

9.4 The Committee recalls that, under article 2, paragraph 3, of the Covenant, States parties must ensure that individuals have accessible, effective and enforceable remedies to uphold Covenant rights. The Committee refers to its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, according to which States parties must establish appropriate judicial and administrative mechanisms for addressing claims of rights violations.¹ A failure by the State party to investigate alleged violations could give rise to a separate violation of the Covenant.² In the present case, the information before the Committee indicates that neither the author nor her son had access to such remedies. The Committee also observes that the friendly settlement proceeding initiated between the parties was not concluded. In view of the foregoing, the Committee concludes that the facts before it reveal a violation of article 6, paragraph 1, of the Covenant in respect of the author's son, and of article 2, paragraph 3, of the Covenant, read in conjunction with article 6, paragraph 1, in respect of the author and her son.

¹ *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III, para. 15.

² Communication No. 1295/2004. *El Alwani v. Libyan Arab Jamahiriya*, Views adopted on 11 July 2007, para. 6.9.

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 6, paragraph 1, in respect of Mr. Roberto Castañeda González, and of article 2, paragraph 3, of the Covenant, read in conjunction with article 6, paragraph 1, in respect of the author and her son.

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 a thorough and diligent investigation of the facts, the prosecution and punishment of the perpetrators and adequate 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 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.]

**K. Communication No. 1470/2006, *Toktakunov v. Kyrgyzstan*
(Views adopted on 28 March 2011, 101st session)***

<i>Submitted by:</i>	Nurbek Toktakunov (not represented by counsel)
<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>	Denial of access to State-held information of public interest
<i>Procedural issue:</i>	Level of substantiation of claim
<i>Substantive issues:</i>	Right to seek and receive information; effective remedy; access to court; right to a fair hearing by an independent and impartial tribunal
<i>Articles of the Covenant:</i>	2, read together with 14, paragraph 1; 19, paragraph 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 28 March 2011,

Having concluded its consideration of communication No. 1470/2006, submitted to the Human Rights Committee by Mr. Nurbek Toktakunov 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. Nurbek Toktakunov, a Kyrgyz national born in 1970. He claims to be a victim of violations by Kyrgyzstan of his rights under article 2, read together with 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 7 January 1995. The author is not represented.

* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval. An individual opinion signed by Committee member Mr. Gerald L. Neuman is appended to the text of the present Views.

The facts as presented by the author

2.1 On 3 March 2004, the Youth Human Rights Group, a public association for which the author works as a legal consultant, requested the Central Directorate of Corrections of the Ministry of Justice to provide it with information on the number of individuals sentenced to death in Kyrgyzstan as of 31 December 2003, as well as on the number of individuals sentenced to death and currently detained in the penitentiary system. This request was made pursuant to article 17.8 of the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe (29 June 1990) (Copenhagen Document), according to which the participating States have agreed to make available to the public information regarding the use of the death penalty. On 5 April 2004, the Central Directorate of Corrections refused to provide this information, due to its classification as “confidential” and “top secret” by the by-laws of Kyrgyzstan.

2.2 On 26 June 2004, the author filed a complaint with the Ministry of Justice challenging the Central Directorate of Corrections’ refusal to provide information, relying on article 5 of the Law on protection of State secrets of 14 April 1994. Under this provision, classification as “confidential” and “top secret” applies to information constituting State, military and service secrets:

“[...] Information, the divulging of which may entail serious consequences for defence capability, safety, economic and political interests of the State, shall be classified as a State secret.

The restriction stamps ‘very important’ and ‘top secret’ shall be conferred on information which is classified as the State secret.

Information of a military character, the divulging of which may be to the detriment of the armed forces and interests of the Kyrgyz Republic, shall be classified as a military secret.

The restriction stamps ‘top secret’ and ‘confidential’ shall be conferred on information classified as a military secret.

Information, the divulging of which may have a negative impact on defence capability, safety, or economic and political interests of the Kyrgyz Republic, shall be classified as a service secret. This information contains some data falling within the category of State or military secrets but does not disclose such secret in its entirety.

The restriction stamp ‘confidential’ shall be conferred on information classified as a service secret [...].”

2.3 The author argued that the information on individuals sentenced to death had to do with human rights and fundamental freedoms and that its disclosure could not have had any negative impact on defence capability, safety or economic and political interests of the State. Therefore, it did not fulfil the criteria in article 5 of the Law on protection of State secrets for it to be classified as a State secret. The author further referred to resolutions 2003/67 and 2004/60 (sic.) of the Commission on Human Rights on the question of the death penalty, which call upon all States that maintain the death penalty to make available to the public information on the imposition of the death penalty and any scheduled execution.¹ Finally, he referred to article 17.8 of the Copenhagen Document (see para. 2.1

¹ See resolution 2003/67 (para. 5 (c)); see also resolution 2004/67 of the Commission on Human Rights on the question of the death penalty.

above) and recalled that, pursuant to article 10.1 of that document, the participating States have agreed to respect the right of everyone, individually or in association with others, to seek, receive and impart freely views and information on human rights and fundamental freedoms. On an unspecified date, the author's complaint of 26 June 2004 was transmitted by the Ministry of Justice to the Central Directorate of Corrections for action.

2.4 On 9 September 2004, the Central Directorate of Corrections reiterated its previous position. On 7 December 2004, the author filed a complaint with the Bishkek Inter-District Court about a violation of his right to seek and receive information, referring to article 19, paragraph 2, of the Covenant. In his complaint, the author argued that he requested the information on behalf of a public association and on his own behalf, as a Kyrgyz citizen. He cast doubt on whether the by-laws on the secret nature of information on the number of individuals sentenced to death comply with article 16, paragraph 9, of the Constitution and the Law on guarantees and free access to information of 5 December 1997. According to article 3 of this law, any restrictions on access to and dissemination of information shall be provided by law. On the basis of articles 262-266 of the Civil Procedure Code, the author requested the Bishkek Inter-District Court to instruct the Ministry of Justice to provide him with the requested information and to bring by-laws and other statutory acts of the Central Directorate of Corrections into compliance with the laws of Kyrgyzstan.

2.5 On 17 December 2004, the Bishkek Inter-District Court dismissed the author's complaint on the grounds that the subject matter fell outside of its jurisdiction to adjudicate civil proceedings. On 25 December 2004, the author filed a privy motion in the Bishkek City Court, challenging the decision of the Bishkek Inter-District Court. In addition to reiterating his claim about the right to seek and receive information, he referred to article 262 of the Civil Procedure Code, which provides for the right to challenge in court an action/omission of a State body or State official if one considers that his or her rights and freedoms have been violated. In particular, the author challenged the Ministry of Justice's omission to act, since it failed to direct the Central Directorate of Corrections to provide him with the requested information and to bring by-laws and other statutory acts into compliance with the laws of Kyrgyzstan. The author also submitted that he could not challenge the compatibility of the by-laws with Kyrgyz laws directly, because article 267, paragraph 5, of the Civil Procedure Code requires an applicant to provide a copy of the contested statutory act, which was not possible in his case due to the confidentiality of the by-laws in question.

2.6 On 24 January 2005, the Bishkek City Court upheld the decision of the Bishkek Inter-District Court, on the grounds that the information on individuals sentenced to death was made secret by the Ministry of Interior and access to such information was restricted. Therefore, the actions of the Ministry of Justice in relation to the refusal to provide information could not be appealed within the framework of administrative and civil proceedings. According to article 341 of the Civil Procedure Code, a decision of the appeal court adopted on the basis of a privy motion is final and cannot be appealed further.

2.7 The author's repeated request of 7 June 2005 for information on the individuals under the sentence of death was again refused by the Ministry of Justice on 27 June 2005. The Ministry referred to article 1 of the Law on protection of State secrets, according to which information constituted a State secret if it was "controlled by the State and restricted by the special lists and regulations elaborated on the basis and in compliance with the Kyrgyz Constitution". The Ministry further explained that, in compliance with the provisions of Governmental Resolution No. 267/9 of 7 July 1995 on the approval of the List of the most important data constituting State secret, and the Instruction on the procedure of establishment of the level of secrecy of data contained in papers, documents and goods (a document itself classified as "top secret"), the Ministry of Interior adopted a confidential internal decree on the approval of the List of data within the system of the

Ministry of Interior which is subject to classification as secret. This decree was endorsed by the National Security Service.

2.8 The Ministry of Justice further explained that, according to the above-mentioned confidential decree of the Ministry of Interior, any information on the number of individuals sentenced to capital punishment was classified as “top secret”. According to the Resolution of the Government No. 391 of 20 June 2002, the penitentiary system was transferred from the Ministry of Interior to the Ministry of Justice. Therefore, the decree of the Ministry of Interior was in force for the Ministry of Justice for as long as there was no decree on this matter drafted and adopted by the latter. The Ministry of Justice further stated that at that time, it was drafting a number of new by-laws concerning the penitentiary system, which included a list of data within the system of the Ministry’s Central Directorate of Corrections that would be subject to classification as secret. This new list was expected to be endorsed at a later stage by relevant State bodies. Thus, the Ministry of Justice concluded that the refusal to provide information on the number of individuals sentenced to death was justified and in compliance with the law in force.

The complaint

3.1 The author submits that the refusal by the authorities to provide the Youth Human Rights Group with information on the number of individuals sentenced to death also affected him, as a member of the public association in question, and resulted in the restriction of his individual right of access to information. Furthermore, in his complaint to the Bishkek Inter-District Court of 7 December 2004, he specifically stated that he was interested in the requested information not only as a member of a public association but also as a citizen. The author claims that by denying him access to information of public interest, the State party violated his right to seek and receive information guaranteed by article 19, paragraph 2, of the Covenant. For the reasons advanced by the author at the domestic level (see paras. 2.3–2.4 above), the author argues that the restriction of his right to seek and receive information is not justified under article 19, paragraph 3, of the Covenant, because the classification of information on the number of individuals sentenced to death as “secret” is not provided by the laws of Kyrgyzstan and is unnecessary. The author adds that the by-laws governing access to this type of information are also classified as confidential and for this reason cannot be challenged in courts.

3.2 The author further claims that, by failing to provide him with an effective judicial remedy for a violation of his right of access to information, the State party’s authorities have also violated his rights under article 2, read together with article 14, paragraph 1, of the Covenant.

State party’s observations on the merits

4.1 On 26 July 2006, the State party submits that, according to the information provided by the Central Directorate of Corrections of the Ministry of Justice, general data on the mortality rates in the penitentiary system, as well as data on individuals sentenced to death, has been declassified and pursuant to the by-laws it can now be used exclusively “for service purposes”. This information remains confidential for the press.

4.2 The State party provides the Committee with the following statistical data made available by the Central Directorate of Corrections: (a) as of 20 June 2006, 164 individuals have been sentenced to death; (b) 16 individuals were sentenced to death in 2003, 23 individuals in 2004, 20 individuals in 2005 and 6 individuals in 2006; and (c) 309 individuals have died in the penitentiary system in 2003, 233 individuals in 2004, 246 individuals in 2005 and 122 individuals in 2006.

Author's comments on the State party's observations

5.1 On 25 September 2006, the author submitted his comments on the State party's observations. He refers to rule 97 of the Committee's rules of procedure and notes that the State party was supposed to submit its observations on the admissibility and merits of his communication. Instead, it confined itself to transmitting to the Committee highly contradictory information provided by the Central Directorate of Corrections of the Ministry of Justice.

5.2 The author argues that the data on individuals sentenced to death cannot be considered declassified as long as the access of the general public and the press to such data is restricted by the by-laws. He submits that, pursuant to article 9 of the Law on protection of State secrets, decisions on declassification of information are adopted by the Government on the basis of proposals put forward by relevant State bodies. The author argues that there is no information about the adoption by the Government of such decisions in the database of statutory acts adopted by the Kyrgyzstan. He adds that, in its observations of 26 July 2006, the State party also does not provide any reference information of such a decision that would enable the Committee to identify it. The author concludes that either the Central Directorate of Corrections provided the Committee with unreliable information or it is deliberately trying to cloud the situation.

5.3 The author submits that the State party did not address his allegations, namely: (a) that information on the number of individuals sentenced to death had to do with human rights and fundamental freedoms and could not have had any negative impact on defence capability, safety, or economic and political interests of Kyrgyzstan and, therefore, should not be classified as secret; (b) that he was not granted an effective judicial remedy to contest a violation of the right of access to State-held information and that by denying him judicial protection, the State party has restricted his access to justice.

5.4 The author concludes that by not refuting any of his allegations, the State party has effectively accepted them. He adds that by merely submitting to the Committee statistical data on the number of individuals sentenced to death, the State party did not provide him with an effective remedy because the by-laws that classify this data as secret are still in force and his right to access to justice has not been vindicated.

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. 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.

6.3 As to the author's locus standi under article 1 of the Optional Protocol, the Committee notes that the specific information sought by him, i.e. the number of individuals sentenced to death in Kyrgyzstan, is considered to be of public interest in resolutions Nos. 2003/67 and 2004/67 of the Commission on Human Rights on the question of the death

penalty, and in the Copenhagen Document, which was signed by the State party.² In this respect, the Committee notes that the Copenhagen Document imposes a special obligation on the authorities to provide information on the use of death penalty, and that this was accepted by the State party. It also notes that, in general, judgements rendered in criminal cases, including those imposing death penalty, are public. The Committee further notes that the reference to the right to “seek” and “receive” “information” as contained in article 19, paragraph 2, of the Covenant, includes the right of individuals to receive State-held information, with the exceptions permitted by the restrictions established in the Covenant. It observes that the information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied. The Committee also recalls its position in relation to press and media which includes a right for the media actors to have access to information on public affairs³ and the right of the general public to receive media output.⁴ It further notes that among the functions of the press and media are the creation of forums for public debate and the forming of public or, for that matter, individual opinions on matters of legitimate public concern, such as the use of the death penalty. The Committee considers that the realization of these functions is not limited to the media or professional journalists, and that they can also be exercised, for example, by public associations or private individuals. With reference to its conclusions in *S.B. v. Kyrgyzstan*,⁵ the Committee also notes that the author in the present case is a legal consultant of a human rights public association, and as such, he can be seen as having a special “watchdog” functions on issues of public interest. In the light of the considerations listed above, in the present communication, the Committee is satisfied, due to the particular nature of the information sought, that the author has substantiated, for purposes of admissibility, that he, as an individual member of the public, was directly affected by the refusal of the State party’s authorities to make available to him, on request, the information on use of the death penalty.

6.4 The Committee has further noted the author’s claim that his rights under article 2, read together with article 14, paragraph 1, of the Covenant, have been violated. It considers, however, that the author has failed to sufficiently substantiate his allegations, for purposes of admissibility. Accordingly, this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.5 The Committee further considers that the remaining part of the author’s allegations under article 19, paragraph 2, as he was denied access to information of public interest, have been sufficiently substantiated, for purposes of admissibility, and declares this part of the communication admissible.

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 notes that, in its submission on the author’s allegations, the State party has not addressed any of the arguments raised by him in the communication to the Committee with regard to article 19, paragraph 2, of the Covenant. The State has merely stated that “data on individuals sentenced to death had been declassified” and that “pursuant

² Article 17.8 of the Copenhagen Document (see para. 2.1 above).

³ Communication No. 633/1995, *Gauthier v. Canada*, Views adopted on 7 April 1999, para. 13.4.

⁴ Communication No. 1334/2004, *Mavlonov and Sa’di v. Uzbekistan*, Views adopted on 19 March 2009, para. 8.4.

⁵ Communication No. 1877/2009, decision on inadmissibility adopted on 30 July 2009.

to the by-laws it could be used exclusively for service purposes” but remained confidential for the press. In the absence of any other pertinent information from the State party, due weight must be given to the author’s allegations, to the extent that they have been properly substantiated.

7.3 With regard to article 19, the author claimed that the refusal by the State party’s authorities to provide him with information on the number of individuals sentenced to death resulted in a violation of his right to seek and receive information guaranteed by article 19, paragraph 2, of the Covenant. He specifically argued that the classification of information on the number of individuals sentenced to death as “secret” is not “provided by law” and is unnecessary to pursue any legitimate purpose within the meaning of article 19, paragraph 3. The first issue before the Committee is, therefore, whether the right of the individual to receive State-held information, protected by article 19, paragraph 2, of the Covenant, brings about a corollary obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Covenant, the State is allowed to restrict access to the information in a specific case.

7.4 In this regard, the Committee recalls its position in relation to press and media freedom that the right of access to information includes a right of the media to have access to information on public affairs⁶ and the right of the general public to receive media output.⁷ The Committee considers that the realization of these functions is not limited to the media or professional journalists, and that they can also be exercised by public associations or private individuals (see para. 6.3 above). When, in the exercise of such “watchdog” functions on matters of legitimate public concern, associations or private individuals need to access State-held information, as in the present case, such requests for information warrant similar protection by the Covenant to that afforded to the press. The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information, which also clearly includes the two dimensions, individual and social, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State. In these circumstances, the Committee is of the opinion that the State party had an obligation either to provide the author with the requested information or to justify any restrictions of the right to receive State-held information under article 19, paragraph 3, of the Covenant.

7.5 The next issue before the Committee is, therefore, whether in the present case such restrictions 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.

7.6 The Committee notes the author’s argument, corroborated by the material contained on file, that the by-laws governing access to the information requested by him are classified as confidential and, therefore, inaccessible to him as an individual member of the general public and legal consultant of a human rights public organization. It also notes the State party’s assertion that “data on individuals sentenced to death had been declassified” and that, “pursuant to the by-laws it could be used exclusively for service purposes” but remained confidential for the press. The Committee considers that in the circumstances, the regulations governing access to information on death sentences in the State party cannot be

⁶ *Gauthier v. Canada* (note 3 above), para. 13.4.

⁷ *Mavlonov and Sa’di v. Uzbekistan* (note 4 above), para. 8.4.

seen as constituting a “law” meeting the criteria set up in article 19, paragraph 3, of the Covenant.

7.7 The Committee has noted the author’s claim that information on the number of individuals sentenced to death could not have had any negative impact on defence capability, safety, or economic and political interests of Kyrgyzstan and, therefore, it did not fulfil criteria spelled out in the Law on protection of State secrets for it to be classified as a State secret. The Committee regrets the lack of response by the State party authorities to this specific argument raised by the author both at the domestic level and in his communication to the Committee. The Committee reiterates the position set out in resolutions 2003/67 and 2004/67 of the Commission on Human Rights and in the Copenhagen Document (see para. 6.3 above) that the general public has a legitimate interest in having access to information on the use of the death penalty and concludes that, in the absence of any pertinent explanations from the State party, the restrictions to the exercise of the author’s right to access information on the application to the death penalty held by public bodies cannot be deemed necessary for the protection of national security or of public order (*ordre public*), public health or morals, or for respect of the rights or reputations of others.

7.8 The Committee therefore concludes that the author’s rights under article 19, paragraph 2, of the Covenant, have been violated in the present case, for the reasons exposed in paragraphs 7.6 and 7.7 above.

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 by the State party of article 19, paragraph 2.

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. The Committee considers that in the present case, the information provided by the State party in paragraphs 4.2 above constitutes such a remedy to the author. The State party should also take all necessary measures so as to prevent occurrence of similar violations in the future and to guarantee the accessibility of information on death penalty sentences imposed in Kyrgyzstan.

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 when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee’s Views. In addition, it requests the State party to publish the Committee’s Views.

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

Appendix

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

I agree with the Committee that the State party has violated the author's rights under article 19, paragraph 2, with regard to the requested information. I would prefer, however, to explain that conclusion in a slightly different manner.

In *Gauthier v. Canada*, the Committee found that the exclusion of a journalist from the press facilities of the legislature violated his right to seek, receive and impart information under article 19, paragraph 2. The Committee observed that the right to take part in the conduct of public affairs, protected by article 25, read together with article 19, implied "that citizens, in particular through the media, should have wide access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members".^a At the same time, the Committee recognized "that such access should not interfere with or obstruct the carrying out of the functions of elected bodies, and that a State party is thus entitled to limit access", so long as the restrictions on access were compatible with the provisions of the Covenant.^b In response to Canada's argument that a balance needed to be achieved between the right of access and "the effective and dignified operation of Parliament and the safety and security of its members", the Committee agreed "that the protection of Parliamentary procedure can be seen as a legitimate goal of public order" within the meaning of article 19, paragraph 3.^c But restrictions for this purpose must be "necessary and proportionate to the goal in question and not arbitrary".^d The criteria determining access "should be specific, fair and reasonable, and their application should be transparent".^e The restrictions at issue in *Gauthier* did not satisfy that standard. Neither do the restrictions at issue in the present communication.

The Committee observes in paragraph 7.4 of its present Views that "the right of access to information includes a right of the media to have access to information on public affairs and the right of the general public to receive media output". While I do not object to this formulation, I would add that the right of journalists to have access to information held by government and the right of the general public to read what newspapers print have different bases in the Covenant.

I believe that the right of access to information held by government arises from an interpretation of article 19 in the light of the right to political participation guaranteed by article 25 and other rights recognized in the Covenant. It is not derived from a simple application of the words "right ... to receive information" in article 19, paragraph 2, as if that language referred to an affirmative right to receive all the information that exists.

The central paradigm of the right to freedom of expression under article 19, paragraph 2, is the right of communication between a willing speaker and a willing listener. Article 19 protects strongly (though not absolutely) the right of individuals to express information and ideas voluntarily, and the correlative right of the audience to seek out

^a Communication No. 633/1995, *Gauthier v. Canada*, Views adopted on 7 April 1999, para. 13.4.

^b *Ibid.*

^c *Ibid.*, para. 13.6.

^d *Ibid.*

^e *Ibid.*

voluntary communications and to receive them. Too often this essential right has been violated by government efforts to suppress unwelcome truths and unorthodox ideas. Sometimes governments accomplish this suppression directly by blocking communications transmitted through old or new technologies. Sometimes they punish citizens who possess forbidden texts or who receive forbidden transmissions. Article 19 protects the right of individuals to read written works even when the author of the work is beyond the jurisdiction of the State party, including authors who live in other States.^f That is one of the reasons why the Covenant, like the Universal Declaration of Human Rights, refers explicitly to a right to “seek, receive and impart information and ideas ... regardless of frontiers”.

The traditional right to receive information and ideas from a willing speaker should not be diluted by subsuming it in the newer right of access to information held by government. This modern form of “freedom of information” raises complexities and concerns that can justify limitations on the satisfaction of the right, based on considerations such as cost or the impairment of government functions, in circumstances where the suppression of a similar voluntary communication would not be justified. In explaining and applying the right of access, it is important to observe this distinction, and to be careful not to undermine more central aspects of freedom of expression.

(Signed) Gerald L. Neuman

[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.]

^f It also includes the right to read works by authors who are no longer living.

**L. Communication No. 1478/2006, *Kungurov v. Uzbekistan*
(Views adopted on 20 July 2011, 102nd session)***

<i>Submitted by:</i>	Nikolai Kungurov (represented by counsel, Morris Lipson)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Uzbekistan
<i>Date of communication:</i>	17 March 2006 (initial submission)
<i>Subject matter:</i>	Denial of registration of human rights association by the State party's authorities
<i>Procedural issue:</i>	<i>Actio popularis</i>
<i>Substantive issues:</i>	Right to freedom of expression; right to freedom of association; permitted restrictions
<i>Articles of the Covenant:</i>	2; 19 and 22
<i>Article of the Optional Protocol:</i>	1

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

Meeting on 20 July 2011,

Having concluded its consideration of communication submitted to the Human Rights Committee on behalf of Mr. Nikolai Kungurov 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 Mr. Nikolai Kungurov, an Uzbek national born in 1962, residing in Yangiyul, Uzbekistan. He claims to be a victim of violations by Uzbekistan of his rights under article 19 and article 22, read in conjunction with article 2, of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 28 December 1995. The communication is submitted by counsel, Mr. Morris Lipson, acting in cooperation with the non-governmental organization Article 19.

* 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. Helen Keller, 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. Krister Thelin and Ms. Margo Waterval.

The text of an individual opinion signed by Committee member Mr. Fabián Omar Salvioli is appended to the present Views.

1.2 On 11 October 2006, the State party requested the Committee to examine the admissibility of the communication separately from its merits, in accordance with rule 97, paragraph 3, of the Committee's rules of procedure. On 17 October 2006, the Special Rapporteur on new communications and interim measures decided, on behalf of the Committee, to examine the admissibility of the communication together with the merits.

The facts as presented by the author

2.1 On 4 June 2003, the author, together with 11 other individuals, held the constituent assembly of a non-governmental organization (NGO) Democracy and Rights which adopted its statutes. According to the statutes, the aims and objectives of Democracy and Rights included the promoting and strengthening of the rule of law, protecting equality, and protecting the rights and freedoms of all individuals living in Uzbekistan. Activities foreseen in pursuit of these objectives, and listed in paragraph 2.1 of the statutes, included monitoring legislative and legal practice, preparing recommendations relating to human rights for bodies of government, monitoring human rights abuse and assisting victims of such abuse, and disseminating information relating to the protection of human rights throughout the country.

2.2 On approximately 5 August 2003, in preparation for the submission of a registration application for Democracy and Rights, the author visited the Ministry of Justice (MoJ) to consult on what he would need to include in the application. The officials with whom he met quoted him information from a set of outdated registration rules. The author pointed out to the officials that a new set of rules had recently come into effect, and was told that the old rules were still being used by the MoJ. Shortly thereafter, another member of Democracy and Rights visited the MoJ to obtain further information on registration, and was informed that no NGO proposing to work on human rights would be granted registration.

First registration application

2.3 On 7 August 2003, the author submitted application materials to the MoJ in Tashkent, along with a registration fee of 20 minimum monthly salaries (approximately US\$ 160). The application was for registration as a national NGO, which would have allowed Democracy and Rights to carry out the information-dissemination aspect of its proposed activities throughout the country.

2.4 Applicable law sets a two-month deadline for official responses to registration applications; therefore, there should have been an official response by 7 October 2003. Not having heard any response by that date, the author visited the MoJ on 13 October 2003. An official informed him that a decision had been taken on the application, but he refused to give the author a copy of the decision. The following day, a courier arrived at the author's workplace with a copy of a letter from the MoJ dated 8 October 2003.

2.5 The letter from the MoJ (first denial letter) stated that the registration application was being returned "without consideration".¹ In this regard, the author submits that article 23 of the Law on Non-governmental Non-profit Organisations (the NGO Law) is explicit in setting out only two possible responses to a registration application, providing that "the justice organ ... *shall* consider and make a decision regarding *granting or denial* of state registration to" NGOs (emphases added). Despite this, rule 3(3) of the Rules for Considering Applications Pertaining to Registration of Statutes of Public Associations

¹ The author provides a detailed description of the registration regime in Uzbekistan, including an explanation of returns "without consideration". He notes that that such returns amount in effect to a denial of registration.

Functioning on the Territory of the Republic of Uzbekistan (Public Association Registration Rules)² provides for a third category of response by the registering authority: such authority, in the case of applications for registration as a public association, may leave an application “without consideration”. Applications may be left “without consideration” where some of the documents are missing or “upon circumstances mentioned” in rule 2 (regarding the contents of documents to be submitted in an application) or where the name applied for is already in use by another registered public association. The author refers to the legal opinion of the Head of the Tashkent City Branch of the Association of Advocates of Uzbekistan (legal opinion), concluding, *inter alia*, that, given the explicit provisions of the NGO Law and the Law on Public Associations in the Republic of Uzbekistan (Public Associations Law), returns of registration applications “without consideration” are illegal.

2.6 The author further submits that it may make a considerable difference whether an application for registration is left “without consideration”, rather than denied. While article 26 of the NGO Law guarantees recourse to the courts for *denials* of registration applications, and rule 7 of the Public Association Registration Rules is in accord, rule 8 of the latter goes on to provide that the appropriate recourse, in the event of an application being left without consideration, is to resubmit the application “after eliminating the shortcomings”. He adds, therefore, that the decision to leave an application “without consideration” is not necessarily appealable in court.³

2.7 The first denial letter listed 26 different “defects” in the registration materials. The “defects” varied widely in substance. Some were stylistic or grammatical shortcomings, others related to alleged difficulties regarding how the organization had been structured, and yet others related to problems with certain proposed activities. The main “defects” were that: (a) the title of the statutes should have been typed in Latin letters and the word “societal” needed to be changed to “public”; (b) the dates of birth of the initial members of Democracy and Rights were missing from the submitted list containing their names; (c) certain abbreviations needed to have been written out in full; (d) the name “Uzbekistan Committee for the protection of individual rights” was unlawful according to article 46 of the Civil Code, and needed to be stricken from paragraphs 6.1 and 6.2 of the statutes; (e) “relevant parts of the statutes need[ed] proofreading to rectify grammar and stylistic errors”; (f) the scope of competence of the general meeting should have included the right of amending the statutes and other constituent documents; (g) “the words ‘court of arbitration’ and ‘tribunal’ need[ed] to be eliminated from [paragraph] 1.3 of the statutes, because the current legislation of Uzbekistan does not provide for arbitration courts or tribunals”; (h) every activity outlined in paragraph 2.1 of the statutes, which is the principal provision relating to the proposed activities of Democracy and Rights, was “within the scope of competence of state organs and therefore should [have been] re-edited entirely”; and (i) in alleged violation of a condition of being a national (rather than a local) NGO, the application materials contained no showing that Democracy and Rights functioned in certain parts of the country, including the Republic of Karakalpakstan, as well as “in the city of Tashkent and provinces”.

2.8 On 5 November 2003, the author appealed this return of the registration application directly to the Supreme Court. A right to appeal a denial of registration to the Supreme Court is explicitly provided for in article 12 of the Public Associations Law. The author

² The Public Association Registration Rules were endorsed by Resolution No. 132 of the Council of Ministers on 12 March 1993.

³ The author notes that, on the one hand, the text of these Rules suggests that such returns “without consideration” may not be appealed, and he is unaware of other attempts to appeal such returns; on the other hand, his appeal was in fact heard – though the permissibility of the appeal was not raised as an issue by the authorities.

submitted, as part of his appeal materials, a brief (the November 2003 brief). The Supreme Court, in a decision dated 12 November 2003, advised the author that he should “file a complaint with [his] arguments and testimonies to the appropriate inter-district civil court”.

2.9 On 14 December 2003, the author applied to the Mirzo-Ulugbek Inter-District Court of Tashkent City (the Inter-District Court), to which he submitted the November 2003 brief. In that brief, he argued comprehensively that none of the substantive objections in the first denial letter had merit in law. In particular, he argued in detail that no law requires NGOs wishing to be registered as national to show a presence in every region of the country. He refers to the legal opinion, confirming, *inter alia*, the author’s argument that this latter requirement is actually illegal under Uzbek law.

2.10 The author did acknowledge in the November 2003 brief that the application materials had contained three technical errors. These were errors that could have been corrected in a matter of minutes; and their occurrence did not justify the effective refusal to grant Democracy and Rights registration, which the brief described as “unlawful”. The author also argued in the November 2003 brief that the return of the application “without consideration” was in violation of the NGO Law, which provides only for approvals or express denials of registration applications. He refers to the legal opinion, confirming that returns of applications “without consideration” are illegal under Uzbek law. Finally, the November 2003 brief asserted that the failure to register Democracy and Rights as a national NGO violated article 22 of the Covenant.

2.11 At the hearing held by the Inter-District Court, the representative of the MoJ asserted that even a single “shortcoming” would suffice to justify the return of a registration application “without consideration”, and that the author had admitted himself that the application had contained certain “shortcomings”. The Inter-District Court held against the author, in a decision dated 12 February 2004. Its grounds were (a) that the author had failed to “submit the list of the initiative group with dates of birth in three copies, certified by a notary” – this, notwithstanding that the author had explained that he had included such a list in the original application submission, and had attached a copy of the list, notarized and containing the dates of birth of all members of the initiative group, to the November 2003 brief; and (b) that the statutes “contained clauses that contradicted the current legislation,” including that (i) it referred to courts of arbitration even though none existed in Uzbekistan – notwithstanding that the November 2003 brief had made it clear that these references had been inserted to provide for arbitration in third countries, such as the Russian Federation, in the event that Democracy had dealings with Russian NGOs or other entities; (ii) “a separate public organisation may not put the protection of rights and freedoms of all citizens of the Republic of Uzbekistan as an aim”; and (iii) the statutes contradicted themselves, providing in paragraph 1.1 that Democracy and Rights would act in the territory of the Republic of Uzbekistan, while providing in paragraph 4.1 that Democracy and Rights may create “affiliates of the society in various districts of Tashkent without mentioning other territories [...]”.

2.12 The court also said it had taken “into account” the fact that the author had “partially admit[ted] the correctness of comments made on the statutes” by the officials who had written the first denial letter and it added that Democracy and Rights had “submitted a repeated application”. Finally, the court did not respond to the author’s argument that the failure to register Democracy and Rights violated article 22 of the Covenant. The author notes that, indeed, no other court, in any subsequent proceeding, responded to his argument on this score.

2.13 On an unspecified date, the author appealed the decision of the Inter-District Court to the Judicial Chamber for Civil Cases of the Tashkent City Court (the Tashkent City Court). On 30 March 2004, the Tashkent City Court upheld the decision of the first instance court, effectively repeating it. This court too noted that the author had “partially

acknowledge[d]” the correctness of the Ministry of Justice’s view of the statutes. The court noted that the author’s second application for registration had been rejected, and it observed that he was “eligible to file a complaint to court with regard to the review of the decision upon new circumstances of the case”.

2.14 On 12 April 2004, the author appealed to the Supreme Court for supervisory review of the decisions of the Inter-District and Tashkent City Courts. On 20 April 2004, the Supreme Court forwarded this appeal to the Chair of the Tashkent City Court. The latter court rendered its decision on 26 April 2004, holding that “the court decisions on the case [were] justified and [they did] not see grounds to file a protest against the decisions”. The court repeated its earlier remark that the author had agreed that the initial application had had “shortcomings”, and observed that he was free to submit yet another application for registration “provided [the application] is brought in compliance with norms of the effective legislation”.

2.15 On 3 September 2004, the author again applied to the Supreme Court for supervisory review of the decisions of the Inter-District and Tashkent City Courts. Once again, however, the Supreme Court forwarded the complaint back to the Tashkent City Court, which responded on 11 November 2004, in full, as follows: “Your complaint sent by the Supreme Court has been examined. Be notified that you were given a detailed response to the complaint of similar contents [on] 26 April 2004”. At this point, and in view of the fact that the Supreme Court had twice declined to consider his application for supervisory review, the author concluded that further attempts to obtain a thorough review of the earlier proceedings were futile, and he pursued no further legal action.

Second registration application

2.16 On 27 December 2003, the author submitted a second “corrected” registration application to the MoJ, with three “technical” adjustments, and with no other changes. He included in the application a detailed argument refuting the first denial letter’s assertions that the initial application’s “substantive defects” were defective in law.

2.17 On 1 March 2004, the MoJ responded with a letter leaving the application, again, “without consideration”. After remarking generally that “[t]he shortcomings indicated in the [first denial letter] have not been rectified in full”, the letter listed three specific “shortcomings”: (a) the “existence of branches” in regions other than Tashkent had not been demonstrated; (b) paragraph 1.1 of the statutes, providing that Democracy and Rights would act in the territory of the Republic of Uzbekistan, “contradict[ed]” paragraph 4.1, providing that Democracy and Rights may create “affiliates of the society in various districts of Tashkent without mentioning other territories”, and was in violation of article 21 of the NGO Law; and (c) the “Human Rights Protection Ministry”, mentioned in part 3 of the statutes, did not exist.

2.18 The author did not try for a third time to obtain registration for Democracy and Rights, as he believes that such effort would be doomed to fail and, despite the fact that Democracy and Rights failed in its attempts to obtain registration as a national NGO, the author and approximately six other members of Democracy and Rights have continued to engage in many of the activities envisaged in the statutes. They do so even though engaging in such activities as an unregistered group puts them at risk of criminal and administrative liability. The author submits that a failure to register as an NGO while carrying out as a group activities falling under the definition of article 2 of the NGO Law results in potential legal liability for NGO members. For example, article 37 of the NGO Law provides that persons responsible for violation of the NGO Law will be “liable in accordance with the law”. Moreover, article 216 of the Criminal Code prohibits “active participation in the activities [of illegal public associations]” – and any “public association” engaged in activities without registration is illegal. Penalties include imprisonment for up to five years,

“arrest up to six months”, or fines as high as 50 to 100 minimum monthly salaries. A set of provisions adopted in 2005 increased the maximum amount of certain of the above-mentioned administrative fines to 150 minimum salaries and created, among other new offences, one of “soliciting of participation in the activity of illegal NGOs, movements, and sects”.⁴

Freedom of information request

2.19 Believing that he would find solid evidence that the vast proportion of local NGOs that proposed to engage in human rights activities had been denied the right to register, the author submitted a freedom of information request to the MoJ on 1 August 2005, pursuant to his right under the Law on Principles and Guarantees for Freedom of Information. In this request, the author asked for access to records indicating the names of all NGOs that had submitted applications for registration to the MoJ, along with the names and contact details of all NGOs whose applications had been denied and the reasons for their denials. Additionally, he requested a copy of the “unified state register containing the names and spheres of activities of all registered NGOs”.

2.20 According to article 9 of the Law on Principles and Guarantees for Freedom of Information, the MoJ was required to respond to the request in 30 days. In fact, however, it only responded in a letter dated 14 October 2005 (more than a month late), but date-stamped 25 November 2005 (nearly three months late). In that letter, the MoJ indicated that the author could obtain the information he requested from the Ministry’s Department of Public Associations and Religious Organisations. Shortly thereafter, the author contacted the Head of that Department, requesting an appointment to come in to access the materials he had requested. He was told by the Head that he had no time for such requests, and that the author could not come in to examine the materials. At that point, the author concluded that the MoJ had no intention of granting him access to the materials, and that it would be pointless to litigate the matter. Accordingly, he abandoned his efforts in this regard.

The requirement to exhaust all available domestic remedies

2.21 With reference to the facts described above, the author argues that all available domestic remedies have been exhausted and that further attempts to exhaust domestic remedies would have been futile. The author submits that the second registration application did not constitute an admission that the first application had been illegal; and even if it did, this would not vitiate the argument of the communication. While believing that the first application complied fully with applicable law, the author made certain trivial adjustments to the materials before submitting them a second time, simply to show good faith in the application process in the hope of achieving the registration of Democracy and Rights.

2.22 The author argues that, even if the Committee takes the second application, with its correction of a few technical points, as an acknowledgement of certain domestic legal flaws in the first application, this acknowledgement should in no way vitiate his claim that certain of his rights under the Covenant were violated by the denial of the first application. As the communication shows, it is the application of the registration regime itself to the first request for registration of Democracy and Rights— regardless of whether that request had been “legitimate” under local law – that resulted in a violation of the author’s Covenant rights.

⁴ Article 202 of the Code of Administrative Liability, Law on the introduction of amendments to the Criminal Code and Code of Administrative Liability, signed into law by the President on 28 December 2005.

2.23 The author states that Democracy and Rights wished to disseminate information on human rights widely throughout the country, but would collect the information only in the capital. It could not afford to have regional offices, and in any event did not need to have any for these purposes. Nevertheless, the letter returning the second application reiterated the charge made in the return “without consideration” of the first application, that the author had failed to show that Democracy and Rights had a presence in all regions of the country. He recalls that he had argued before the domestic courts with respect to the first application, that the requirement of regional presence had no basis in domestic law, and was in direct violation of articles 22 and 19 of the Covenant. However, those arguments were rejected by both the Inter-District Court and the Tashkent City Court. The Supreme Court effectively affirmed these findings. The author argues, therefore, that if he had challenged the second return “without consideration”, the result would have been exactly the same.

2.24 The author refers to the Committee’s jurisprudence, affirming that the domestic remedies rule does not require resort to appeals that objectively have no prospect of success⁵ and that a prior decision on a point of law against the position of a complainant renders the submission by the complainant of the same claim futile.⁶ He submits, therefore, that an attempt to litigate the second registration denial would have been futile in view of the fact that he had already fully litigated – and lost – the propriety of requiring a presence in all regions as a condition of being registered as a national NGO.

The complaint

The State party’s law and practice of NGO registration

3.1 The first of the author’s principal claims is that the State party’s NGO registration regime is open to great abuse by virtue of the fact that officials are given very broad discretion to deny or to return “without consideration” registration applications. That grant of discretion is not only evident in the open-ended list of documents required for registration, but also, in the vagueness of some of the grounds for denying registration applications. The author submits that there are also rules and regulations (for example, providing for the new category of return “without consideration,” or requiring a proof of presence in all regions of the country as a condition of obtaining registration as a national NGO) that are without foundation in law and suggest that the regulation process itself imposes virtually no formal restrictions on officials’ inclinations to deny registration requests.

3.2 The second of the author’s principal claims, made on the basis of interviews conducted by “Article 19” in preparation of this communication with 15 aspirant NGOs that wish to engage in human rights activities, is that the State party has engaged in a pattern and practice of abuse of the registration process, effectively ensuring that the vast majority of those persons wishing to assert their right to associate together in formal groups to monitor and report to the public at large on the human rights situation in their country simply cannot do so. The author claims that, in effect, as his communication and testimonies of the other unsuccessful applicants show, the overbroad grant of discretion to registration officials by the registration regime amounts in practice to a grant to them of unfettered discretion, which they employ without hesitation, to reject registration applications as and when they like.

⁵ Reference is made to communications Nos. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989, para. 12.3.

⁶ Reference is made to communication No. 550/1993, *Faurisson v. France*, Views adopted on 8 November 1996, para. 6.1.

3.3 In support of his claims the author submits an in-depth analysis of the State party's law and practice in relation to NGO registration, copies of the relevant legislation and testimonies of the other NGOs with the detailed and documented description of their unsuccessful efforts to obtain or to retain NGO registration [53-page-long initial submission and two large folders with supporting materials].

3.4 The author recognizes that the Committee "is not called upon to criticise in the abstract laws enacted by States parties. The task of the Committee under the Optional Protocol is to ascertain whether the conditions of the restrictions imposed on the right to freedom of expression are met in the communications which are brought before it".⁷ On the other hand, however, the Committee has not hesitated to remark on the per se incompatibility of certain laws with the Covenant, and has urged their repeal or amendment in such cases.⁸

Article 22 of the Covenant

3.5 The author claims that the NGO registration regime operated by the State party is in violation of article 22 of the Covenant, both as a general matter and as applied specifically to foreclose the registration of Democracy and Rights as a national NGO. He states that the Committee has recognized the critical role of NGOs that are involved in human rights activities.⁹ The author adds that the Committee has frequently voiced its concern that NGO registration regimes may impose restrictions on freedom of association that may fail the strict test of justification set out in the Committee's jurisprudence¹⁰ and case-law of the European Court of Human Rights (ECtHR).¹¹ He submits that the Committee has expressed its concerns with the Uzbek regime at issue in this communication on two different occasions.¹²

3.6 The author submits that the Committee has made its view very clear that NGO registration regimes that function as prior authorization systems, as the Uzbek regime does, violate article 22 of the Covenant: "The State party should review its legislation and practice in order to enable non-governmental organizations to discharge their functions without impediments which are inconsistent with the provisions of article 22 of the Covenant, *such as prior authorisations* [...]"¹³ Particularly pertinent to the present communication is the Committee's awareness that even "innocent-seeming" registration regimes can be operated by officials in such a way as to effectively amount to prior authorization systems: as the Committee has written, "while legislation governing the incorporation and status of associations is on its face compatible with article 22 ... *de facto*

⁷ Ibid, para. 9.3.

⁸ Reference is made to communication No. 1119/2002, *Lee v. Republic of Korea*, Views adopted on 20 July 2005, para. 9.

⁹ Concluding observations: Belarus (CCPR/C/79/Add.86), para. 19. See also concluding observations: Nigeria (CCPR/C/79/Add.65), para. 289.

¹⁰ See *Lee v. Republic of Korea* (note 8 above), paras. 7.2 – 7.3.

¹¹ Reference is made to ECtHR 10 July 1998, 57/1997/841/1047, *Sidiropoulos and others v. Greece*, para. 20.

¹² In 2005, the Committee took note of "the legal provisions [in Uzbek legislation] and their application that restrict the registration of [...] public associations", and went on to indicate that such provisions raised concerns, inter alia, under article 22 – see concluding observations: Uzbekistan (CCPR/CO/83/UZB), para. 21. In 2001, it observed that the Uzbek "legal requirement for registration, subject to the fulfilment of certain conditions, provided for in ... the Public Associations [Law] ... operates as a restriction on the activities of non-governmental organizations" – see concluding observations: Uzbekistan (CCPR/CO/71/UZB), para. 22.

¹³ Concluding observations: Egypt (CCPR/CO/76/EGY), para. 21 (emphasis added).

State party practice has restricted the right to freedom of association through a process of prior licensing and control”.¹⁴

- a. The author’s freedom of association was restricted

3.7 The author refers to the Committee’s conclusion in relation to the State party that the “legal provisions that [...] *restrict* the registration of [...] public associations” pose potential difficulties under, inter alia, article 22 of the Covenant,¹⁵ and argues that there can be no doubt that the refusal to register Democracy and Rights as an NGO constituted a restriction on the members’ freedom of association, and on the author’s right in particular.¹⁶ In view of the fact that engaging in the activities outlined in the statutes of Democracy and Rights as an unregistered group puts its members at risk of criminal and administrative liability, the registration regime constituted (and still constitutes) a particularly severe restriction on the right of the author, and indeed on the members of any local human rights NGO, to associate.

- b. The restriction was not prescribed by law

3.8 The author claims that the return of the registration application of Democracy and Rights “without consideration” was not prescribed by law. As the Committee has made clear, to be prescribed by law, a restriction must not be unduly vague.¹⁷ He submits that in order for a law to satisfy the “prescribed by law” standard, its language must be clear enough that ordinary persons can understand what is required of them and a law that vests effectively unfettered discretion in officials as to its application cannot meet the standard of “prescribed by law”.¹⁸ The author states that, while the Committee does not have a considerable article 22 jurisprudence with respect to the granting of discretion to officials, it has had occasion to remark on such objectionable grants in the closely-related area of freedom of expression.¹⁹ Specifically, it has expressed its concern that registration or licensing regimes (for the media) that vest too much discretion in officials to deny or revoke registrations or licenses may be in violation of article 19 of the Covenant.²⁰ The author adds that, as the pattern and practice of abuse of the Uzbek registration system shows, it is simply impossible for anyone at all to know what must be contained in a registration application to ensure its acceptance by the MoJ.

3.9 The author submits that the reasons employed to deny the registration application of Democracy and Rights were not reasonably foreseeable²¹ (see paras. 2.7 and 2.9 above). In particular, it was unforeseeable that Democracy and Rights would have to show physical presence in all the regions, when the applicable legislation only contemplates, for national NGOs, that their activities (for instance, the dissemination of information) might implicate many regions. Again, it could not have been foreseen that the human rights activities that Democracy and Rights proposed to engage in could not be included in its statutes, because the first denial letter did not specify which activities by which state organs might have clashed with those proposed activities.

¹⁴ Concluding observations: Lebanon (CCPR/CO/79/Add.78), para. 27 (emphasis added).

¹⁵ See CCPR/CO/71/UZB (note 12 above), para. 21 (emphasis added).

¹⁶ See also *Sidiropoulos and others v. Greece* (note 11 above), para. 31.

¹⁷ Reference is made by analogy to general comment No. 27 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. 13.

¹⁸ *Ibid.*

¹⁹ Concluding observations: Lesotho (CCPR/C/79/Add.106), para. 23.

²⁰ *Ibid.*

²¹ Reference is made to ECtHR 14 March 2002, 26229/95, *Gawęda v. Poland*.

3.10 The author requests the Committee to conclude that the employment of unfettered discretion by the MoJ officials in their return “without consideration” of the registration application of Democracy and Rights was not prescribed by law. The author also urges the Committee to consider holding more generally that any grant of overbroad discretion to officials to grant or deny registration requests by NGOs is in violation of the “prescribed by law” requirement of article 22 of the Covenant, no matter how benign the registration regime would appear to be. Should the Committee, however, decline to decide the issue as broadly as this, the author urges it to find (in addition to finding that the denial of the registration application of Democracy and Rights in particular was not prescribed by law), that virtually every rejection of an NGO registration application by Uzbek officials has the high probability of not being prescribed by law, and thus that the Uzbek registration regime itself is not prescribed by law.

c. The denial of registration application was not in pursuit of a legitimate aim

3.11 The author submits that nothing in the applicable legislation, and equally, nothing in any of the court decisions relating to Democracy and Rights gives any hint as to what aim the registration regime is supposed to be in service of. He adds that, even if the Committee were prepared to accept that some kind of NGO regime of general application could be in service of some aim deemed legitimate by article 22, it is manifest that a great many of the actual requirements in the Uzbek registration regime are not, and cannot be, in service of any such legitimate aim.

3.12 The author recalls that Democracy and Rights was told that it could not engage in the human rights activities that it proposed, because these were within the remit of certain (unspecified) state entities. He argues that the Committee has foreclosed this argument by explaining that “the free functioning of non-governmental organizations is essential for protection of human rights and dissemination of information in regard to human rights among the people [...],” and for this reason, State parties must provide for the “establishment and free operation [of such NGOs] [...] in accordance with article 22 of the Covenant.”²² The author states that neither public morals nor public health could be damaged when human rights abuses are brought to the light of day by NGOs. He, therefore, requests the Committee to conclude that this aspect of the Uzbek regime, which effectively prohibits any human rights activities by NGOs where such activities might also be engaged in by the State, violates article 22 of the Covenant, and that the return “without consideration” of the registration application of Democracy and Rights, in part because of its proposed human rights activities, violated the author’s rights under article 22.

3.13 The author states that it is impossible to see how a requirement to have a presence in every region as a condition of registration as a national NGO, which goes far beyond the requirement merely that an NGO identify itself, could ever be said to be in service of any aim deemed legitimate under article 22, paragraph 2, of the Covenant. Accordingly, he requests the Committee to find that the requirement of presence in all regions is per se in violation of article 22 of the Covenant in failing to pursue any legitimate aim, and that a violation of article 22 occurred in the application of the State party’s regime to deny registration to Democracy and Rights based on its failure to have shown a presence in all regions.

3.14 The author also requests the Committee to conclude that the operation of the entire Uzbek registration system, as applied to local human rights NGOs generally and to Democracy and Rights in particular, is in the service of a single illegitimate aim and is in

²² See CCPR/C/79/Add.86 (note 9 above), para. 19.

violation of article 22 of the Covenant, as it prevents the registration of human rights NGOs.

- d. The denial of the registration application was not necessary to achieve any legitimate purpose

3.15 The author refers to the Committee's jurisprudence²³ and submits that the State party has the burden of showing that a restriction on the freedom to associate is "necessary to avert a real, and not only a hypothetical danger to [one or more of the legitimate aims set forth in article 22, paragraph 2, or to the democratic order itself] and that less intrusive measures would be insufficient to achieve this purpose". He submits that the Uzbek registration regime cannot satisfy this burden.

Article 19 of the Covenant

3.16 The author claims that he and the other members of Democracy and Rights wished to use their combined efforts to gather information about the human rights situation in Uzbekistan, and then to impart that information to the public.²⁴ The return "without consideration" of the registration application effectively prohibited them from engaging in these core freedom of expression activities and amounted to a violation of the author's rights under article 19 of the Covenant. With reference to the Committee's jurisprudence,²⁵ the author argues that his rights under article 19 of the Covenant have been violated by the State party, since the return "without consideration" of the registration application of Democracy and Rights was not provided by law, did not pursue any legitimate article 19 aim and was not in any event necessary in the pursuit of any such aim.

- a. The author's freedom of expression was restricted

3.17 The author submits that, while the return "without consideration" of the registration application of Democracy and Rights did not directly affect the rights of any of the members to gather and disseminate this information on their own, some communication efforts are much more effective, and much more correspond to the rightful wishes of the communicators, when they are done as a group rather than individually. He notes the Committee's view that only individuals, and not associations (including NGOs) can submit communications under the Optional Protocol.²⁶ He submits, however, that this does not constitute an impediment in the present communication, since the Committee has already explicitly recognized that the freedom of expression rights of individuals were implicated in their efforts to communicate through groups.²⁷ The author claims, therefore, that his efforts to cooperate with others to gather and disseminate human rights information, through attempting to associate with them in Democracy and Rights, directly implicated his right to freedom of expression protected under article 19 of the Covenant. Accordingly, the

²³ See *Lee v. Republic of Korea* (note 8 above), para. 7.2.

²⁴ Reference is made to communication No. 780/1997, *Laptsevich v. Belarus*, Views adopted on 20 March 2000, para. 8.1.

²⁵ *Ibid.*, at para. 8.2. Reference is also made to communication No. 1022/2001, *Velichkin v. Belarus*, Views adopted on 20 October 2005, para. 7.3.

²⁶ Reference is made to communication No. 104/1981, *J.R.T. and the W.G. Party v. Canada*, decision adopted on inadmissibility adopted on 6 April 1983, para. 8(a).

²⁷ Reference is made to communication No. 1249/2004, *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v. Sri Lanka*, Views adopted on 21 October 2005, para. 7.2; and CCPR/CO/71/UZB (note 12 above), para. 21. See also *Sidiropoulos and others v. Greece* (note 11 above), para 52.

refusal by the State party to register Democracy and Rights constituted a restriction of that right.

- b. The restriction was not provided by law

3.18 The author submits that the pattern and practice of abuse of the NGO registration system shows that he had no chance of knowing what he needed to do to succeed in registering Democracy and Rights; equally, that pattern and practice proves that officials do have unfettered discretion under the Uzbek registration regime to arbitrarily reject registration applications, and that Democracy and Rights was a victim of that abusive discretion. Accordingly, the authors requests the Committee to conclude that the return “without consideration” of his registration application was not provided by law for the purposes of article 19.

- c. The restriction was not in pursuit of any legitimate aim

3.19 The author requests the Committee to find, based on the pattern and practice of abuse of the State party’s NGO registration system that the return “without consideration” of the registration application of Democracy and Rights was not in pursuit of any aim deemed legitimate under article 19.

- d. The restriction was not necessary for the pursuit of any legitimate aim

3.20 As to the alleged substantive “defects” in the registration application, the author submits that the wholesale restriction of his right to communicate on human rights issues through Democracy and Rights cannot have been necessary in the pursuit of any governmental aim to promote or protect human rights due to its disproportionality. Moreover, the State party’s authorities have failed to provide a detailed and specific justification, required under article 19 of the Covenant, for prohibiting communication activity of Democracy and Rights relating to human rights. As to the alleged technical “defects”, the author refers to the Committee jurisprudence²⁸ and submits that the return “without consideration” of the registration application of Democracy and Rights was arbitrary and, therefore, not necessary in the pursuit of an article 19 legitimate aim.

State party’s observations on admissibility and merits

4.1 On 11 October 2006, the State party challenged the admissibility of the communication, without, however, advancing any specific arguments under articles 1 to 5, paragraph 2, of the Optional Protocol.

4.2 On the merits, the State party reiterates the facts of the case summarized in paragraphs 2.3, 2.9, 2.11 and 2.13 above and adds that the following defects have been identified during the examination of the statutory documents submitted by Democracy and Rights: (a) they contain no indication of the Board’s term of office; (b) the proposed business activities violate the Public Associations Law, the NGO Law and paragraph 1.1 of its own statutes; (c) the submitted list of the organization’s initial members had not been certified by a notary and omitted the initial members’ dates of birth, thus contravening the requirements of the Public Association Registration Rules; (d) according to paragraph 1.1 of the statutes, Democracy and Rights functions in the regions of Uzbekistan without providing the documents required of the regional branches of public associations, thus contravening the requirements of the Public Association Registration Rules; (e) paragraph 1.1 contradicts paragraph 4.1 of the statutes, as the letter signed by the author on 10

²⁸ See, inter alia, communication No. 633/1995, *Gauthier v. Canada*, Views adopted on 7 April 1999.

December 2003 states that Democracy and Rights does not have local branches. According to article 21 of the NGO Law, a public association of this type cannot be granted a national status; and (f) paragraph 8.5 of the statutes does not comply with articles 53 – 56 of the Civil Code and article 36 of the NGO Law. On 8 October 2003, the MoJ informed the author that his registration application was left without consideration and advised of his right to re-apply once the defects have been corrected.

4.3 The State party submits that the author requested the Inter-District Court to revoke the decision of the MoJ to leave the registration application of Democracy and Rights without consideration on the ground that it had reached him as late as 13 October 2003 and, therefore, exceeded the deadline for consideration of the application. The State party refers to the decision of the Inter-District Court of 12 February 2004, in which it was explained that under article 11 of the Public Associations Law and rule 3 of the Public Association Registration Rules, the application to register the statutes of a public association was to be considered within two months of its receipt. The registration body was to take one of the following decisions, depending on the results of its consideration: to grant the registration, to deny the registration or to leave the application without consideration.

4.4 The State party submits that, as transpires from the materials of the respective civil case, the draft statutes contained a number of provisions that did not comply with existing legislation, namely: paragraphs 1.1 and 4.1 of the statutes did not contain a clear description of the legal status of the association and did not clearly define its aims, furthermore, paragraph 1.3 used the term the “courts of arbitration” which was not provided for in the Uzbek legislation.

4.5 The State party notes that by the time the Inter-District Court rendered its decision, the author had submitted a second registration application, without, however, having corrected the above-mentioned defects. As a result, this application was also left without consideration by the decision of the Board of the MoJ of 27 February 2004.

4.6 The State party states that, according to the author’s explanation provided at the time of consideration of his appeal by the Tashkent City Court, he disagreed with the decision of the MoJ on his second registration application. These new claims, however, could not be considered by the Tashkent City Court, since they have not been raised before the first instance court.²⁹ The Tashkent City Court upheld the decision of the first instance court and justifiably declined the author’s appeal. At the same time, he was explained his right to petition the court for review of the court decisions that already became executory, in the light of the newly discovered circumstances.

4.7 For the above reasons and further to the provisions of the Optional Protocol, the State party deems it inadmissible for the Committee to consider this communication.

Author’s comments on the State party’s observations

5.1 On 11 December 2006, the author submits his comments on the State party’s observations. He states that there are possibly two arguments that the State party might be making against his communication.

5.2 First, the author submits that it is possible that the State party is saying that he himself had argued before the Tashkent City Court that the return of the second registration application was improper. The State party would appear to be arguing on this point that since the author had not challenged the return of the second application in the first instance

²⁹ Reference is made to paragraph 22 of the Plenum of the Supreme Court on the Procedures for Dealing with Appeals in Civil Cases.

court, the challenge was not properly before the court of appeal. Consequently, the return of that application cannot be before the Committee, since there has not been an exhaustion of domestic remedies as to it. Second, he submits that it is possible that the State party is arguing that the decision of the Tashkent City Court in relation to the first registration application was correct as a matter of domestic law. Since the decision of the first instance court was “justified”, i.e. correct as a matter of domestic law, the Committee should decline to consider the communication.

5.3 As to the first argument raised by the State party, the author recalls that before the domestic courts and in the context of the present communication he challenged the first return “without consideration” only and that all available remedies have been exhausted in relation to his first registration application. Furthermore, he argued throughout the domestic court proceedings that the effective denial of the first registration application based on any of the alleged “defects”, including the ones technically defective under the domestic Rules, was in violation of the Covenant. Even though the return of the second registration application is not before the Committee, the author notes that it would have been futile for him to challenge that return in court, because two of the three reasons given by the State party’s authorities for denying the second application were exactly the same as the reasons approved by both the Inter-District Court and the Tashkent City Court (and not objected to by the Supreme Court) as correct bases for returning the first application.

5.4 As to the second argument raised by the State party, the author submits that even if the return of the first registration application was proper from the point of view of Uzbek registration law, that return was not in compliance with the Covenant. He claims that the restriction of his rights of association and expression, resulting from the return of the first registration application, was illegal under the Covenant, because: (a) it was not “prescribed by law” as understood under article 22, paragraph 2, of the Covenant; (b) it was not “provided by law” as understood under article 19, paragraph 3; (c) it pursued no aim deemed legitimate under either article 22, paragraph 2, or article 19, paragraph 3; and (d) it was not “necessary” for the protection of a legitimate aim, as required under both article 22, paragraph 2, or article 19, paragraph 3. The author notes that the State party’s observations are silent as to any of the communication’s substantive arguments on these matters and fail to make any substantive argument to show that the return of the first registration application was proper under the Law of the Covenant.

Further submissions from the author

6. On 26 February 2007, the author submits a comparison between the facts and decisions of the Committee in *Zvozkov et al. v. Belarus*³⁰ and *Korneenko et al. v. Belarus*³¹ and the facts and arguments presented by him in the present communication. He argues that the Belarusian registration regime operates very similarly to the Uzbek regime which he is challenging in his communication. The author submits that the facts of the present communication compel exactly the same conclusion in relation to the “necessity” test as in the two above-mentioned communications, i.e. that the denial of the registration application of Democracy and Rights violated article 22 in that it was not necessary in the service of any aim deemed legitimate under article 22, paragraph 2, of the Covenant. At the same time, the author requests the Committee to consider expanding its jurisprudence on abusive NGO registration regimes beyond these two decisions. In particular, given the egregious and systematic abuse of the Uzbek registration system by Uzbek officials, the Committee should decide, based on the arguments in the present communication, that (a) the actual

³⁰ Communication No. 1039/2001, *Zvozkov et al. v. Belarus*, Views adopted on 17 October 2006.

³¹ Communication No. 1274/2004, *Korneenko et al. v. Belarus*, Views adopted on 31 October 2006.

operation of the Uzbek registration system as applied to human rights NGOs is not prescribed by law, and (b) that the system pursues no aim deemed legitimate under article 22, paragraph 2.

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 State party has challenged the admissibility of the communication, without, however, advancing any specific arguments under articles 1 to 5, paragraph 2, of the Optional Protocol. It also notes the author's affirmation that the present communication challenges the first return "without consideration" only. In the absence of any objection by the State party in relation to the exhaustion of domestic remedies by the author on his first registration application for Democracy and Rights, the Committee considers that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have been met as far as this part of the communication is concerned.

7.4 The Committee considers, therefore, that the author has sufficiently substantiated his claims under article 19 and article 22 of the Covenant, for purposes of admissibility, and proceeds to their examination on the merits.

Consideration of the merits

8.1 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.

8.2 The key issue before the Committee is whether the refusal of the State party's authorities to register Democracy and Rights amounts to a restriction of the author's right to freedom of association, and whether such restriction was justified. The Committee notes that domestic law outlaws the operation of unregistered public associations on the territory of Uzbekistan and establishes criminal and administrative liability for the individual members of such unregistered associations who carry out the activities envisaged in their respective statutes. In this regard, the Committee observes that the right to freedom of association relates not only to the right to form an association, but also guarantees the right of such an association freely to carry out its statutory activities. The protection afforded by article 22 extends to all activities of an association, and the denial of state registration of an association must satisfy the requirements of paragraph 2 of that provision.

8.3 In the present case, the decision of the MoJ to return the author's first registration application "without consideration", as upheld by the Inter-District Court and the Tashkent City Court, is based on the perceived non-compliance of the application materials of Democracy and Rights with two substantive requirements of the State party's domestic law that: (a) Democracy and Rights not engage in any human rights activities that any official body is engaged in; and (b) it be physically present in every region of Uzbekistan, as well as technical "defects" in the association's application materials. Given the fact that even a single "shortcoming" would suffice, according to the State party's authorities, to justify the return of a registration application "without consideration", these substantive and technical

requirements constitute de facto restrictions and must be assessed in the light of the consequences which arise for the author and Democracy and Rights.

8.4 The Committee observes that, in accordance with article 22, paragraph 2, any restriction on the right to freedom of association must cumulatively meet the following conditions: (a) it must be provided by law; (b) may only be imposed for one of the purposes set out in paragraph 2; and (c) must be “necessary in a democratic society” for achieving one of these purposes. The reference to “democratic society” in the context of article 22 indicates, in the Committee’s opinion, that the existence and operation of associations, including those which peacefully promote ideas not necessarily favourably viewed by the government or the majority of the population, is a cornerstone of a democratic society.³²

8.5 As to the substantive requirements, the Committee firstly notes that the State party’s authorities did not specify which activities by which state organs might have clashed with the proposed statutory activities of Democracy and Rights in the field of human rights. Secondly, it notes that the author and the State party disagree on whether domestic law indeed requires showing of physical presence in every region of Uzbekistan in order for a public association to be granted a national status, authorizing it to disseminate information in all parts of the country. The Committee considers that even if these and other restrictions were precise and predictable and were indeed prescribed by law, the State party has not advanced any argument as to why such restrictions would be necessary, for purposes of article 22, paragraph 2, to condition the registration of an association on a limitation of a scope of its human rights activities to the undefined issues not covered by state organs or on the existence of regional branches of Democracy and Rights.

8.6 As to the technical requirements, the Committee notes that the parties disagree over the interpretation of domestic law and the State party’s failure to advance arguments as to which of the numerous “defects” in the association’s application materials triggers the application of the restrictions spelled out in article 22, paragraph 2, of the Covenant. Even if the application materials of Democracy and Rights did not fully comply with the requirements of domestic law, the reaction of the State party’s authorities in denying the registration of the association was disproportionate.

8.7 Taking into account the severe consequences of the denial of state registration of Democracy and Rights for the exercise of the author’s right to freedom of association, as well as the unlawfulness of the operation of unregistered associations in Uzbekistan, the Committee concludes that such denial does not meet the requirements of article 22, paragraph 2, of the Covenant. The author’s rights under article 22, paragraph 1, have thus been violated.

8.8 With regard to article 19 of the Covenant, the author claims in great detail that the return “without consideration” of the registration application effectively prohibited the author and other members of Democracy and Rights from engaging in core freedom of expression activities, i.e. gathering information about the human rights situation in Uzbekistan, and then imparting that information to the public. He argues that the denial of registration amounted to a violation of his rights under article 19, in its failure to be “provided by law” and to pursue any legitimate aim, as understood under article 19, paragraph 3. In this regard, the Committee recalls its jurisprudence³³ that the freedom of expression rights of individuals are implicated in their efforts to communicate through associations and are thus protected by article 19. The Committee observes that article 19 allows restrictions only as provided by law and necessary (a) for respect of the rights and

³² Ibid., para. 7.3. See also *Zvozkov et al. v. Belarus* (note 30 above), para. 7.2.

³³ See *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v. Sri Lanka* (note 27 above), para. 7.2.

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 the right to freedom of expression is of paramount importance in any society, and any restrictions to its exercise must meet a strict test of justification.³⁴

8.9 In the present case, the Committee is of the opinion that the application of the procedure of registration of Democracy and Rights did not allow the author to practise his right to freedom of expression, in particular, to seek, receive and impart information and ideas, as defined in article 19, paragraph 2. The Committee notes that the State party has not made any attempt to address the author's specific claims nor has it advanced arguments as to the compatibility of the requirements, which are de facto restrictions on the right to freedom of expression, which are applicable to the author's case, with any of the criteria listed in article 19, paragraph 3, of the Covenant.³⁵ The Committee therefore considers that the return "without consideration" of the registration application of Democracy and Rights also resulted in a violation of the author's right under article 22, paragraph 1, read together with article 19, paragraph 2, 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 the author's rights under article 22, paragraph 1, read alone and in conjunction with article 19, paragraph 2, 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, including compensation amounting to a sum not less than the present value of the expenses incurred by him in relation to the registration application of Democracy and Rights as a national NGO and any legal costs paid by him. It should reconsider the author's registration application in the light of article 19 and article 22, and ensure that the laws and practices that regulate the NGO registration and restrictions imposed are compatible with the Covenant. The State party is also under an obligation 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 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 it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. In addition, it requests the State party to publish the Committee's Views.

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

³⁴ See, inter alia, communication No. 574/1994, *Kim v. the Republic of Korea*, Views adopted on 3 November 1998 and communication No. 628/1995, *Park v. the Republic of Korea*, Views adopted on 20 October 1998.

³⁵ See communication No. 1334/2004, *Mavlonov and Sa'di v. Uzbekistan*, Views adopted on 19 March 2009, para. 8.4.

Appendix

Individual opinion of Committee member Mr. Fabián Salvioli

1. I concur with the views of the Human Rights Committee in finding violations of article 22, paragraph 1, read alone and in conjunction with article 19, paragraph 2, of the International Covenant on Civil and Political Rights in the case of *Kungurov v. Uzbekistan* (communication No. 1478/2006).

2. I nonetheless consider, for reasons explained below, that in this case the Committee ought to have concluded that the State party is also in violation of article 2, paragraph 2, of the Covenant and, in the section on reparations, should have urged the State party to amend its legislation to bring it into line with the Covenant.

3. Ever since I became a member of the Committee, I have maintained that possible violations of article 2, paragraph 2, of the Covenant can be found in the context of an individual complaint, in accordance with current standards governing the international responsibility of States in respect of human rights. I have no reason to depart from the observations I made in paragraphs 6 to 11 of the individual opinion which I formulated in communication No. 1406/2005 regarding the possibility of incurring international responsibility through legislative acts, the Committee's capacity to apply article 2, paragraph 2, in the context of individual complaints, the interpretative criteria which should guide the Committee's work when finding and considering possible violations and, lastly, the consequences in terms of reparation. I would draw attention to these guiding principles.^a

4. In the present case, we have an instance of the application, to the detriment of Mr. Nikolai Kungurov, of legislation that is clearly incompatible with the Covenant. As indicated in paragraph 3.5 of the Views of the Committee as set forth in the communication: "*the author claims that the NGO registration regime operated by the State party is in violation of article 22 of the Covenant, both as a general matter and as applied specifically*". For this reason, it is also stated, in paragraph 1.1, that the author "*claims to be a victim of violations by Uzbekistan of his rights under article 19 and article 22, read in conjunction with article 2, of the International Covenant on Civil and Political Rights*" (emphasis added).

5. The finding of a violation of article 2, paragraph 2, in a specific case has practical consequences in terms of reparations, especially as regards the prevention of any recurrence. The fact that the present case concerns a victim of the application of a legal standard incompatible with the Covenant vitiates any interpretation relating to a possible ruling *in abstracto* by the Human Rights Committee.

6. The Committee is not a court, but it is responsible for monitoring implementation of the Covenant. Once the Covenant is ratified, all branches of government (executive, legislative and judicial) must review their compliance with the Covenant in order to ensure that the State does not incur international responsibility by violating the rights of persons subject to its jurisdiction through the application of domestic legislation that is clearly incompatible with the Covenant.

7. The Committee has a duty to apply the law but does not necessarily have to take the parties' legal observations into account. Irrespective of this fact, in the present case the

^a See the partially dissenting opinion of Mr. Fabián Salvioli in the case of *Anura Weerawansa v. Sri Lanka*, communication No. 1406/2005.

author invoked possible violations of article 2 of the Covenant, read in conjunction with article 22, and challenged the legal regime applied per se. However, although the allegations made by the victim on this point are very clear, the Committee remains inexplicably silent on the matter. The legal provisions contained in both the Public Association Registration Rules and the Act on Non-Governmental Non-Profit Organizations are in outright contradiction to the Covenant in that they grant the State authorities decision-making powers which, as demonstrated in the case under review, are entirely arbitrary.

8. Because the Committee did not express a view on the possible violation of article 2 of the Covenant, the reparation indicated in the communication is insufficient. Ensuring that “the laws and practices that regulate ... NGO registration and restrictions ... are compatible with the Covenant” is important, but it does not resolve the problem that arose in the present case. If, as the Committee affirmed, “*the State party is also under an obligation to prevent similar violations in the future*”, an obligation to amend its legislation on NGO registration to bring it into line with the Covenant provisions should also be established, and on the merits of the case a violation of article 2 of the International Covenant on Civil and Political Rights should be found.

(Signed) Fabián **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.]

**M. Communication No. 1499/2006, *Iskandarov v. Tajikistan*
(Views adopted on 30 March 2011, 101st session)***

<i>Submitted by:</i>	Temur Toshev (not represented by counsel)
<i>Alleged victim:</i>	The author's brother, Mukhammadruzi Iskandarov
<i>State party:</i>	Tajikistan
<i>Date of communication:</i>	11 April 2006 (initial submission)
<i>Subject matter:</i>	Conviction to prison term after an unlawful detention in isolation, in the absence of a lawyer, forced confessions, and unfair trial
<i>Procedural issue:</i>	None
<i>Substantive issues:</i>	Torture, cruel, inhuman or degrading treatment; arbitrary detention; habeas corpus; forced confessions; unfair trial
<i>Articles of the Covenant:</i>	7; 9; 10; and 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 30 March 2011,

Having concluded its consideration of communication No. 1499/2006, submitted to the Human Rights Committee on behalf of Mr. Mukhammadruzi Iskandarov 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. Temur Toshev, a Tajik national born in 1965, on behalf of his brother, Mr. Mukhammadruzi Iskandarov, also a Tajik national born in 1954, who, at the time of the initial submission was imprisoned in Dushanbe. The author claims that his brother is a victim of violations, by Tajikistan, of his rights under article 7; article 9, paragraphs 1 and 3; article 14, paragraphs 1 and 3 (d), (e) and (g), of the International Covenant on Civil and Political Rights. Although the author does not invoke it specifically, the communication also appears to raise issues under article 14, paragraph

* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Iulia 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.

3 (b), of the Covenant. The author is unrepresented. The Covenant and the Optional Protocol entered into force in relation to Tajikistan on 4 April 1999.

The facts as presented by the author

2.1 Mr. Iskandarov was a member of the Democratic Party of Tajikistan since its establishment - no precise date is provided - and he was the head of the party in one of the districts of Dushanbe from 1990 to 1992. In 1997, following the signature of the Peace Agreement by the Government and the United Tajik Opposition, Mr. Iskandarov became the Chairman of the State Committee on Extraordinary Situations and Civic Defence. He worked there from 1997 to 1999, and obtained the rank of Major-General. In 1999, by Presidential Decree, he was appointed as Director-General of the State enterprise Tajikcommunservice, where he worked until 2001. From 2001 to November 2003, he was the Director-General of the State enterprise Tajikgaz.

2.2 At the sixth Congress of the Democratic Party of Tajikistan, in September 2003, Mr. Iskandarov was elected as the party's leader. The eighth Congress of the Democratic Party of Tajikistan re-elected him as the party's leader, and it was planned that he would stand for President of Tajikistan in the 2006 elections. In February 2005, Mr. Iskandarov headed the party's list of candidates at the Parliamentary elections.

2.3 In the meantime, on 9 January 2003, a criminal case was initially opened against Mr. Iskandarov, for unlawful possession of firearms. The case was subsequently closed, for lack of evidence. On 27 August 2004, the Prosecutor's Office of the Tadjikadad district of Dushanbe was attacked. Mr. Iskandarov was accused of having been one of the assailants, even if, according to the author, when the attack in question was committed, his brother was in the Russian Federation.

2.4 On 25 November 2004, the Office of the Prosecutor-General of Tajikistan charged Mr. Iskandarov in absentia for crimes such as terrorism, banditry, unlawful possession of firearms, and misappropriation of State property. On 26 November 2004, the Office of the Prosecutor-General ordered Mr. Iskandarov's arrest and issued an international arrest warrant. On this basis, Mr. Iskandarov was arrested, in the Russian Federation. His case was examined by the Babushkinsk Inter-district Prosecution Office of Moscow. The Prosecution Office rejected the Tajik request for extradition, and Mr. Iskandarov was released, on 4 April 2005.

2.5 On 15 April 2005, Mr. Iskandarov was unlawfully apprehended by unknown individuals in Moscow, and was kept in secret detention for two days. On 17 April 2005, he was unlawfully brought to Tajikistan by plane, and was immediately placed in custody at the Detention centre of the Ministry of Security in Dushanbe. He was kept there in isolation for 10 days, and was provided only with bread and water during this period. He contracted a skin disease, but his requests for medical care were ignored, as were his requests to be represented by a lawyer.

2.6 On 26 April 2005, the Prosecutor-General announced, during a Press Conference, the recent arrest, in Tajikistan, of Mr. Iskandarov, and that was how his relatives became aware of his arrest. The following day, the family inquired about his whereabouts at the Ministry of Security, but was informed that he was not there, but that there was another individual detained, one Mr. R.S. The relatives asked for a food parcel to be given to Mr. R.S. and to be provided with a receipt to this effect signed by the detainee. The confirmation receipt they were provided with was signed by Mr. Iskandarov. On 28 April 2005, the family retained a private lawyer to represent Mr. Iskandarov, but the lawyer was not allowed to meet with his client. The lawyer complained immediately to the Office of the Prosecutor-General, but never received a reply.

2.7 On 28 April 2005, Mr. Iskandarov was interrogated, in the absence of a lawyer. The author explains that his brother signed a disclaimer prior to the interrogation, to the effect that he waived the right to be represented by a lawyer. During this interrogation, Mr. Iskandarov confessed guilt to all charges against him.

2.8 On 30 April 2005, he confirmed his confessions during his “official” interrogation as an accused, in the presence of his lawyer. The same day, the lawyers of Mr. Iskandarov announced at a press conference that their client had been unlawfully abducted in the Russian Federation, that he was being kept at the Ministry of Security, and that his lawyers were unable to meet with him in private. According to the author, following that press conference, the lawyers began receiving threats.

2.9 While in detention at the Ministry of Security, Mr. Iskandarov was kept awake and interrogated every night. During the day, he was constantly questioned. Thus, he was not in his normal state, he was extremely weak, and could not react adequately. The administration of the Detention Centre refused to provide him with the medical products required for his skin disease, and only gave him sedatives. His lawyer complained to the Prosecutor’s Office and the administration of the Detention Centre demanding that the night interrogations be stopped and that delivery of adequate medication be authorized. As a result, the night interrogations stopped for few days but were resumed shortly afterwards.

2.10 During the preliminary investigation of Mr. Iskandarov’s criminal case, the Supreme Court was examining the criminal cases of three other individuals suspected of having been Mr. Iskandarov’s accomplices and of having committed various crimes under his leadership. Mr. Iskandarov’s lawyers requested the Supreme Court to postpone the examination of these cases and to merge them with that of Mr. Iskandarov as the facts were identical, but their request was ignored, and the cases were examined separately.

2.11 The preliminary investigation ended on 1 June 2005, and the lawyers of Mr. Iskandarov, after having studied the content of the case file, requested that the case be put on hold pending the formulation of their written comments. When they submitted their comments on 4 June 2005, however, the lawyers understood that the case had already been transmitted to the court.

2.12 Mr. Iskandarov’s criminal case was examined at first instance by the Criminal Panel of the Supreme Court. When the trial started, Mr. Iskandarov retracted his initial confession and contended that it had been obtained under threats of physical reprisals, but the court ignored this. The lawyers complained on several occasions in court about the irregularities which had occurred during the preliminary investigation. In particular, they pointed out that Mr. Iskandarov was unlawfully apprehended in the Russian Federation and transferred to Tajikistan; that he was kept unlawfully at the premises of the Ministry of Security under another identity; that his lawyers were not allowed to see him in a timely manner; also that, later on, the lawyers were only able to meet with their client in the presence of officials; and that all their claims during the preliminary investigation were ignored. The court, however, rejected most of these claims, explaining that Mr. Iskandarov’s lawyers had been present every time when investigation acts were carried out.

2.13 One of the charges against the author’s brother related to the fact that he had hired his own private guards. According to the author, this was done with the explicit authorization of the President of Tajikistan. In court, Mr. Iskandarov’s lawyers requested to have the President, the Minister of Security, the Prosecutor General, the Prosecutor of Dushanbe, the Prime Minister and other officials questioned. This request remained simply unaddressed by the court. The lawyers also asked to have questioned the officials who allegedly apprehended Mr. Iskandarov with a false Russian passport in Dushanbe, as well as other witnesses of the scene. The court, however, stated that as it had been unable to locate these individuals and that their interrogation was impossible.

2.14 On 5 October 2005, the court found Mr. Iskandarov guilty of several crimes and sentenced him to a prison term of 23 years, with the deprivation of his rank of Major-General. On 18 January 2006, the Appeal Panel of the Supreme Court upheld the sentence.

The complaint

3.1 The author claims that his brother's detention for 10 days after his unlawful transfer from Russia, in complete isolation at the Ministry of Security, where he was provided only with bread and water, and without adequate medical care for the disease he contracted during that period of time, amounts to a violation of Mr. Iskandarov's rights under article 7 of the Covenant.¹

3.2 The author further claims that his brother's rights under article 9, paragraph 1, of the Covenant were violated, because Mr. Iskandarov was unlawfully apprehended and brought to Tajikistan, and was unlawfully detained, in isolation at the premises of the Ministry of Security for 10 days.

3.3 According to the author, Mr. Iskandarov's rights under article 9, paragraph 3, of the Covenant were also violated, as the decision for his arrest and placement in custody was taken by a prosecutor, i.e. a member of an organ which cannot be seen as having the necessary objectivity and impartiality in dealing with such matters.

3.4 The author further claims that his brother's rights under article 14, paragraph 1, were violated. According to him, the court was biased and acted in an accusatory manner, and several of the lawyers' requests were not given due consideration. In addition, a number of witnesses could not be questioned; the court ignored the fact that Mr. Iskandarov was kept unlawfully isolated at the premises of the Ministry of Security and confessed guilt under pressure, in the absence of a lawyer. Also, at the beginning of the trial, Mr. Iskandarov retracted his confession on the counts of terrorism, banditry, and illegal possession of fire-arms, explaining that initially, he had confessed guilt under threats of physical reprisals, but the court ignored his statements. Mr. Iskandarov and his defence lawyers could only examine the trial transcript 41 days after his conviction. The defence's written objections to the content of the trial transcript were ignored by the appeal body of the Supreme Court.

3.5 The author further claims that his brother's rights under article 14, paragraph 3 (d), of the Covenant have been violated. In spite of the Constitutional provisions to the effect that all persons deprived of liberty have the right to be assisted by a lawyer, and in spite of Mr. Iskandarov's requests to this effect, he only was represented by a lawyer starting as of 30 April 2005, despite having been apprehended already on 17 April 2005 and interrogated in the meantime. Throughout the preliminary investigation, Mr. Iskandarov could only meet with his lawyers in the presence of law-enforcement officials, and his lawyers' complaints in this connection were ignored. Although the author has not invoked it specifically, the communication appears also to raise issues under article 14, paragraph 3 (b), of the Covenant.

¹ The author quotes the Committee's general comment No. 20 (1992) on the prohibition of torture and cruel treatment or punishment, with regard to the prohibition against having detainees isolated (*Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A); general comment No. 21 (1992) on humane treatment of persons deprived of liberty, with regard to incommunicado detention as factor which could facilitate torture and with regard to long detentions in isolation (*Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. B); and the Committee's decision in communication No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994.

3.6 The author claims that his brother's rights under article 14, paragraph 3 (e), of the Covenant were also violated, as the court failed to ensure the presence and the questioning of important witnesses which, according to the author, could have contributed to the establishment of the objective truth.

3.7 Finally, the author claims that his brother's rights under article 14, paragraph 3 (g), of the Covenant were violated, as during his unlawful stay at the premises of the Ministry of Security, Mr. Iskandarov was forced, with the use of threats of physical reprisals, to confess guilt to a number of crimes, and his complaints thereon were disregarded.

State party's observations

4. By notes verbales of 4 October 2006, 21 November 2007, 26 February 2009, 23 February 2010, and 13 September 2010, the State party was requested to submit to the Committee information on the admissibility and the merits of the communication. The Committee notes that this information has still not been received. It regrets the State party's failure to provide any information with regard to the author's claims, and recalls² that it is implicit in the Optional Protocol that States parties make available to the Committee all information at their disposal. In the absence of any observations on the admissibility and merits of the communication from the State party, due weight must be given to the author's allegations, to the extent that these have been sufficiently substantiated.

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 it is required to do 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.³ Concerning the requirement of exhaustion of domestic remedies, the Committee has noted that according to the information submitted by the author, all available domestic remedies have been exhausted. 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 also been met.

5.3 The Committee has noted, first, the author's claims of a violation of his brother's rights under article 7, of the Covenant, in the light of his detention, isolated, at the Ministry of Security. It also noted the author's claims as to the lack of medical care and the inadequate food his brother was provided with during this period of time. Accordingly, it declares this part of the communication admissible under article 7 of the Covenant.

² See, for example, communications No. 1117/2002, *Khomidov v. Tajikistan*, Views adopted on 29 July 2004, para. 4; No. 973/2001, *Khalilov v. Tajikistan*, Views adopted on 30 March 2005 para. 5; and No. 985/2001, *Aliboev v. Tajikistan*, Views adopted on 18 October 2005, para. 4.

³ The Committee has noted that on 23 September 2010, the European Court of Human Rights rendered a judgment in relation to the author's arbitrary detention in the Russian Federation on 15 April 2005 and unlawful transfer to Tajikistan the next day, concluding that a violation of the author's rights had occurred, by the Russian Federation, under articles 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment"), and 5, paragraph 1 ("Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) ..."), of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

5.4 The Committee has noted further the author's claim of a violation of his brother's rights under article 14, paragraph 3 (d), of the Covenant. It considers that the author's claim raises also issues under article 14, paragraph 3 (b), of the Covenant. Accordingly, it declares this part of the communication admissible under article 14, paragraph 3 (b) and (d), of the Covenant.

5.5 The Committee considers that the author's remaining claims have been sufficiently substantiated, for purposes of admissibility, and declares them admissible, as raising issues under article 9, paragraphs 1 and 3; and article 14, paragraphs 1 and 3 (e) and (g), of the Covenant.

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 has noted the author's claim that his brother has been subjected to inhuman and degrading treatment by the authorities, since after having been unlawfully apprehended in the Russian Federation, on 15 April 2005, and unlawfully transferred to Tajikistan on 17 April 2005, Mr. Iskandarov was kept in isolation at the Detention Centre of the Ministry of Security for 10 days, until 30 April 2010. During this time, according to the author, his brother was provided insufficient food, and contacted a skin disease without being provided with any medical treatment. In the absence of any observations on these specific claims, the Committee considers that due weight must be given to the author's claims. Accordingly, the Committee concludes that in the circumstances of the present case, the facts as submitted disclose a violation of Mr. Iskandarov's rights under article 7 of the Covenant.

6.3 The author has also claimed that the rights to liberty and security of his brother were violated, as on 15 April 2005, his brother was unlawfully apprehended in the Russian Federation and illegally brought to Tajikistan two days later. The State party has not presented any information in this connection. The Committee notes, first, that the author does not impute direct responsibility for his unlawful arrest and transportation to Dushanbe to the Tajik authorities. In addition, it considers that the material on file does not allow it to assess the extent to which the State party's authorities were involved in Mr. Iskandarov's apprehension in Moscow and transportation to Dushanbe.

6.4 The Committee considers that what remains undisputed, however, in the light of the information on file, is the fact that the brother of the author was placed in complete isolation, for 10 days, at the premises of the Ministry of Security of Tajikistan immediately after his arrival in Dushanbe on 17 April 2005, in the absence of a lawyer. 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.⁴ In the absence of any information by the State party to refute the author's specific allegations, and in the absence of any other pertinent information on file, the Committee considers that due weight must be given to this part of the author's allegations. Accordingly, it concludes that the facts as presented amount to a violation of Mr. Iskandarov's rights under article 9, paragraph 1, of the Covenant.

⁴ See, for example, communications Nos. 1461/2006, 1462/2006, 1476/2006 and 1477/2006, *Maksudov, Rakhimov, Tashbaev and Pirmatov v. Kyrgyzstan*, Views adopted on 16 July 2008, para. 12.2.

6.5 The author has further claimed that, later on, the decision to have his brother officially arrested and placed in custody was taken by a prosecutor, i.e. an official who cannot be seen as having the necessary objectivity and impartiality, for the purposes of article 9, paragraph 3. In the absence of any reply by the State party on this particular issue, the Committee decides that due weight must be given to the author's allegations. The Committee recalls that paragraph 3 of article 9 entitles a detained person charged with a criminal offence to judicial control of his/her detention, and that it is inherent in 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.⁵ In the circumstances of the present case, the Committee is not satisfied that the public prosecutor can 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 concludes, therefore, that there has been a violation of this provision.

6.6 The Committee has noted the author's claims that his brother's rights under article 14, paragraph 1, have been violated as the court was biased and acted in an accusatory manner, and that several of the lawyers' requests were not given due consideration. The author has also explained that the court has failed to ensure the presence and the questioning of important witnesses; the court also failed to take into consideration the fact that Mr. Iskandarov was kept unlawfully isolated at the premises of the Ministry of Security and confessed guilt under threats of physical reprisals there, in the absence of a lawyer, and that his complaints on this subject were disregarded. The author further claimed that at the beginning of the court trial, Mr. Iskandarov retracted his confession and explained that he had confessed guilt initially under threat of violence, but this was simply ignored; and that the lawyers' objections to the content of the trial transcript were disregarded on appeal. In the absence of any information from the State party refuting these detailed allegations, the Committee considers that due weight must be given to the author's claim. Accordingly, in the circumstances of the present case, the Committee concludes that the facts as presented amount to a violation of the author's brother's rights under article 14, paragraph 1, and 3 (e) and (g), of the Covenant.

6.7 The Committee has further noted the author's claim that despite the provisions in national law to the effect that all persons deprived of liberty have the right to be assisted by a lawyer, and in spite of Mr. Iskandarov's requests to this effect, the latter was only represented by a lawyer as of 30 April 2005, whereas his actual apprehension took place on 17 April 2005 and he was interrogated during this period, including as an accused, on 28 April 2005, and was forced to confess guilt to serious charges. The author has also explained that after the announcement made by Mr. Iskandarov's lawyers, on 30 April 2005, to the effect that the author's brother had been unlawfully arrested and forced to confess guilt, the lawyers started receiving threats (see para. 2.8 above). The Committee has also noted the author's claim that throughout the preliminary investigation, his brother could only meet with his lawyers in the presence of law-enforcement officials, and that their complaints on this subject were ignored. The Committee considers that in the absence of a reply by the State party on these allegations, due weight must be given to the author's allegations. It concludes that by denying the author's brother access to the legal counsel of his choice for 13 days, and by conducting investigative acts with his participation during this period of time, including interrogating him as a person accused of very serious crimes,

⁵ See, inter alia, communications No. 1348/2005, *Rozik Ashurov v. Tajikistan*, Views adopted on 20 March 2007, para. 6.5; 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.

the State party has violated Mr. Iskandarov's rights under article 14, paragraph 3 (b) and (d), of the Covenant.⁶

7. 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 disclose violations of the rights of the author's brother under article 7; article 9, paragraphs 1 and 3; and article 14, paragraphs 1, and 3 (b), (d), (e) and (g), 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 brother of the author with an effective remedy, including either Mr. Iskandarov's immediate release or a retrial with all the guarantees enshrined under the Covenant, and also including appropriate compensation. The State party is under an obligation to prevent similar violations in the future.

9. Bearing in mind that, by becoming a party to the Optional Protocol, Tajikistan has recognized the competence of the Committee to determine whether 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 in case a violation has been established, the Committee wishes to receive, within 180 days, information from the State party about the measures taken to give effect to the Committee's Views. The State party is requested also to give wide publicity to 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.]

⁶ See, for example, communications No. 537/1993, *Kelly v. Jamaica*, Views adopted on 17 July 1997, para. 9.2; and No. 770/1997, *Gridin v. the Russian Federation*, Views adopted on 20 July 2000, para. 8.5.

**N. Communication No. 1503/2006, Akhadov v. Kyrgyzstan
(Views adopted on 25 March 2011, 101st session)***

<i>Submitted by:</i>	Otabek Akhadov (represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Kyrgyzstan
<i>Date of communication:</i>	18 October 2006 (initial submission)
<i>Subject matter:</i>	Right to life; torture; cruel, inhuman and degrading treatment; arbitrary detention; fair trial; effective remedy; if provision is made for a lighter penalty, the offender shall benefit hereby
<i>Procedural issue:</i>	None
<i>Substantive issue:</i>	Degree of substantiation of claims
<i>Articles of the Covenant:</i>	6; 7; 9; 10, paragraph 1; 14, paragraph 1; 14, paragraph 3 (b) in conjunction with article 2, paragraph 3; 14, paragraph 3 (g); and 15, 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 25 March 2011,

Having concluded its consideration of communication No. 1503/2006, submitted to the Human Rights Committee on behalf of Mr. Otabek Akhadov 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. Otabek Akhadov, a national of Uzbekistan, born in 1979. He claims to be a victim of violations by Kyrgyzstan of his rights under article 6; article 7; article 9; article 10, paragraph 1; article 14, paragraph 1; article 2, paragraph 3, together with article 14, paragraph 3 (b); article 14, paragraph 3 (g); and article 15, paragraph 1, of the International Covenant on Civil and Political Rights. The

* 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. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanela Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

The text of an individual opinion signed by Committee member Mr. Rafael Rivas Posada is appended to the present Views.

Optional Protocol entered into force for the State party on 7 January 1995. The author is represented by counsel.

The facts as presented by the author

2.1 On 28 March 2000, Mr. Nigmat Bazakov, president of the Uigur society Ittipak, was shot and killed in the street near his home on Musa Dzhahilil Street in Bishkek. On 29 March 2000, the investigative bodies initiated a criminal case relating to his murder. On 25 May 2000, an act of terrorism occurred in Bishkek, which resulted in the death of the Chinese citizen Mr. Abdukadir Gulam and injuries to several members of a Chinese delegation as well as to some Kyrgyz citizens. The author was arrested on 6 July 2000, on suspicion of having committed the above crimes.

2.2 The arrest of the author was not formally recorded until 7 July 2000. In the period between his apprehension and 21 July 2000, the author was kept in the Investigation Detention Center (SIZO) of the Department of Internal Affairs of the city of Bishkek. During that period the author was subjected to torture and cruel treatment by the criminal investigation officers. He was tortured at different times of the day, sometimes between 9 a.m. and noon, other times in the afternoons or between 5 and 11 p.m. in the evenings. The author's hand were tied and police officers beat him with fists and kicked him in the sensitive parts of his body (such as his head, his back, and in the areas of his kidneys, lungs and liver); they also beat him on the soles of his feet and on the head with weights, pressed his chest against the table, hit the back of his head with objects filled with water, and burned his arms with cigarettes. He bled often and still has scars from the beatings. The author was also forced to take psychotropic substances. The author also provides the names of two high-ranked officials, who, according to him were aware of the fact that he had been tortured.

2.3 On 7 July 2000, after the papers regarding the author's arrest were formalized, the investigators assigned him a lawyer whom he did not choose. The latter did not take any steps to protect him. On 9 July 2000, unable to support the beatings and threatened with further ill-treatment, the author signed a confession admitting the commission of the crimes he was accused of by the investigators. On 10 July 2000, acquaintances of the author commissioned another lawyer, Ms. Golisheva, to represent the author. On the same date the lawyer filed a complaint regarding the ill-treatment of the author and requested a medical examination of the author in order to establish that he had been tortured. The Senior Investigator, based on that lawyer's request, issued an order for a medical examination to be conducted, but the examination did not take place until 10 August 2000. The medical expert provided an expertise, concluding that the traces on the author's body were consistent with the type of injuries he described and the timing of those injuries. The lawyer did not make any further complaints and did not submit any motions, because, according to the author, she was afraid of reprisals.

2.4 The author submits that he was not informed of his right to appeal against his detention and that he did not have the opportunity to do so, since he was never brought before of a court.

2.5 On 22 January 2001, the Senior Investigator of the Head Investigative Department of the Ministry of Internal Affairs formally charged the author with several criminal offences, including the murders of Mr. Bazakov and Mr. Gulam. On 1 March 2001, the charges were approved by the Deputy General Prosecutor. In February 2001, without specifying a date, the investigators issued an act declaring that the investigation was completed and transmitting the case to court. In April 2001, the case file was returned to the Prosecutor's office with instructions to fill gaps in the investigation. The case was eventually re-sent to the Sverdlovsk District court, which, on 31 December 2001, convicted the author of having committed several crimes, imposing the following punishment: for

crimes under article 97, part 2, paragraphs 1, 4, 5, 8, 9, 16 and 17 of the Criminal Code, convicted and sentenced the author to death for the murders of Mr. Bazakov and Mr. Gulam; for crimes under article 294 of the Criminal Code, convicted and sentenced the author to death for attempted murder of a State or public official; for crimes under article 350 of the Criminal Code, convicted and sentenced the author to two years of imprisonment for the forgery and use of forged documents; convicted and sentenced the author to 10 years of imprisonment for participating in a joint criminal enterprise; convicted and sentenced the author to 15 years of imprisonment for kidnapping a Chinese citizen; convicted and sentenced the author to 20 years of imprisonment for terrorism; and convicted and sentenced the author to 7 years of imprisonment for illegal possession of weapons. As joint punishment for all the crimes the Court imposed the death penalty on the author.

2.6 Throughout the court proceedings the author denied his guilt. In his written testimony, submitted to the Bishkek City court on 22 July 2002, he complained that the confession he made during the investigation was extracted under torture and proclaimed his innocence. On an unspecified date in July 2002, the author also complained to the President of the Republic that he had been subjected to torture. Neither complaint was investigated.

2.7 The author appealed the verdict before the Bishkek City court, which on 30 July 2002 rejected the appeal. A subsequent appeal in the order of supervision to the Supreme Court was also rejected on 22 June 2006. According to the domestic legislation, the Supreme Court decisions taken in the order of supervision are final and are not subject to any further appeals.

2.8 In 2007 all death sentences were commuted to life imprisonment, following the abolition of the death penalty in the domestic legislation of Kyrgyzstan. The author's sentence was commuted by the Supreme Court on 26 December 2007. On 11 February 2010, the parliament of Kyrgyzstan ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. Effective 6 December 2010, Kyrgyzstan acceded to the Second Optional Protocol.

2.9 The author contends that he has exhausted all available domestic remedies.

The complaint

3.1 The author claims to be a victim of violations by Kyrgyzstan of his rights under article 6; article 7; article 9; article 10, paragraph 1; article 14, paragraph 1; article 2, paragraph 3, together with article 14, paragraph 3 (b); article 14, paragraph 3 (g); and article 15, paragraph 1, of the Covenant.

3.2 The author submits that his rights under article 2, paragraph 3, together with article 14, paragraph 3 (b) were violated by the State party since he was not informed of his rights to refuse to testify and not to testify against himself. He was not represented by a lawyer from the moment of his arrest; he was not informed of his right to have legal assistance assigned to him despite the fact that he requested to be provided with such assistance from the moment of his detention.

3.3 The author submits that his rights under article 14, paragraph 3 (g), article 7 and article 10, paragraph 1, were violated by the State party, since the investigative officers subjected him to torture in order to force him to sign a confession.

3.4 The author submits that his rights under article 14, paragraph 1, were violated, since he was denied a fair trial in the determination of the criminal charges against him. There were significant contradictions in the testimonies of some witnesses and the court did not take into consideration the evidence (medical expertise) presented that the confession of the author was extracted by torture.

3.5 The author submits that his rights under article 6, paragraph 1, were violated since he was sentenced to death following an unfair trial, during which significant violations of the domestic criminal and criminal-procedure legislation occurred, as well as using a confession extracted by torture.

3.6 The author submits that his rights under article 9 were violated since he was not informed of his right to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention, nor was he given the opportunity to contest his detention in court.

3.7 The author submits that his rights under article 15, paragraph 1, were violated, since when the Supreme Court decided his case (22 June 2006), the death penalty was no longer the penalty prescribed by the Criminal Code for an attempted murder of a State or public official and the Supreme Court failed to replace the death penalty with imprisonment.

State party's observations on admissibility and merits

4.1 On 22 March 2007, the State party submits that the complaint of the author had been "scrupulously and thoroughly" checked by the Office of the Prosecutor-General in respect of the "legitimacy and the validity of the judicial verdicts to convict Mr. Akhadov". It submits that on 31 December 2001, the author was sentenced to death by the Sverdlovsk District Court for committing a number of grave and especially grave crimes, such as terrorism, attempted murder and the murder of a public official. His guilt had been indisputably proven by the materials in the criminal case and by "its deliberations in judicial sittings".

4.2 The State party submits that author's allegations on the unlawful methods used by the law enforcement authorities, resulting in a forced confession and that he has been "deprived the right to appeal against the decision of the court and that his right to protection has not been provided, mismatch the validity". The State party maintains that the complaint submitted by the author's lawyer had been considered on appeal by the Bishkek City Court, which confirmed the verdict of the first instance court without amendments. The State party also submits that according to the current legislation a revision of the guilty verdict upon a request of the convicted person, "not deteriorating the position of the convicted, is not limited by the time frame." Therefore the author has the right to appeal against his verdict in the order of supervision to the Supreme Court six years from the issuance of the judgment.

Authors' comments and further submissions

5.1 On 10 August 2007, the author challenges the State party's submission that his complaint had been "scrupulously and thoroughly" checked by the Office of the Prosecutor-General in respect of the "legitimacy and the validity of the judicial verdicts". The author submits that articles 3 and 8 of the Law on the Prosecutor's Office of the Kyrgyz Republic do not give the Prosecutor's Office the competencies to conduct reviews of the lawfulness and correctness of court decisions on sentencing. Such competency is given exclusively to the higher court instances.

5.2 The author also disputes that his guilt was proven beyond doubt by the evidence in the case and that his torture allegations were false. The author maintains that the evidence against him was inconsistent with the accusations. He also points out that the observations of the State party fail to refute any of his arguments regarding the unlawfulness of the verdict against him.

5.3 The author submits that on 17 and 23 March 2001, he had filed complaints to the Prosecutor's Office that he had been submitted to physical and psychological violence by the criminal investigators and that the above complaints were never considered on their

merits, in violation of the domestic Criminal Procedure Code. The author reiterates that his complaints were supplemented by medical expert's conclusions of 10 August 2000, which evidenced that he had been subjected to violence.¹ The author points out that there is no decision by any investigative body or any court addressing the torture allegations. According to article 156 of the Criminal Procedure Code, the complaint of the lawyer regarding the application of physical violence against her client should have been investigated, but that did not happen. If an investigation had taken place, one of the following two documents would have been issued: a refusal to open a criminal investigation or a decision to open a criminal investigation. No such documents exist. The fact that the prosecution and the court ignored the complaints of the author would suggest that they were in agreement with the torture.

5.4 The author further disputes the State party's argument that he has not been deprived of the right to appeal the court decision and that his right to a defence was respected, since the fact that his attorney submitted an appeal does not mean that his right to a defence was ensured at all stages of the investigation and during pretrial proceedings. The author reiterates that he was not allowed to have a lawyer from the moment of his arrest, which constitutes a grave violation of his rights under article 40 of the Kyrgyz Criminal Procedure Code. He was not informed of the right to have an attorney free of charge, despite the fact that he requested that an attorney should be appointed to assist him. The author submits that the absence of an attorney immediately after the arrest is of particular importance for the detainee, because it is during that period that cruel treatment is applied by the police in order to obtain confessions.

5.5 The author submits that he fails to understand the basis of the State party's assertion that he has the right to request the review of his case by the Supreme Court six years after the verdict. The Supreme Court already reviewed the decisions of the lower courts and rejected the author's appeal on 22 June 2006. According to article 11 of the Law amending the Criminal and Criminal Procedure Codes,² which entered into force on 3 July 2007, the Supreme Court was mandated to conduct a review of all criminal cases, where the death penalty had been replaced by life imprisonment within six months. However, the above article does not oblige the Supreme Court to review cases, such as the author's case, on their merits, concerning violations of the right to be represented by a lawyer, to submit explanations etc. The author submits that the above observation of the State party contradicts numerous provision of the domestic legislation.

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 article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

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

¹ See para 2.3, above.

² The author refers to the Law on introducing amendments and additions to the Criminal Code of the Kyrgyz Republic, to the Criminal Procedure Code of the Kyrgyz Republic and to the Criminal Execution Code of the Kyrgyz Republic, in the Law regarding the Supreme Court of the Kyrgyz Republic and the domestic courts, adopted on 26 April 2007 and which entered into force on 3 July 2007.

the Committee considers that the requirements of article 5, paragraph 2(b), of the Optional Protocol have been met.

6.3 The Committee notes the State party's submission that the author has the opportunity to file a request for a review of his verdict in the order of supervision before the Supreme Court. The Committee recalls its previous jurisprudence,³ according to which supervisory review procedures against court decisions which have entered into force constitute an extraordinary appeal which is dependent on the discretionary power of a judge or prosecutor. When such review takes place, it is limited to issues of law only and does not permit any review of facts and evidence. Consequently, the Committee finds that article 5, paragraph 2 (b), of the Optional Protocol does not preclude it from considering the communication.

6.4 The Committee notes the author's claim that his rights under article 2, paragraph 3 together with article 14, paragraph 3(b) were violated by the State party. The author, however, has provided no details regarding the lack of adequate time and facilities for the preparation of his defence, nor in what way was he prevented from communicating with a counsel of his own choosing. In the circumstances, the Committee considers that this part of the communication is unsubstantiated, for purposes of admissibility, and is therefore inadmissible under article 2 of the Optional Protocol.

6.5 In the Committee's view, the author has sufficiently substantiated, for purposes of admissibility the claims under articles 6, 7, 9, 10, paragraph 1, 14, paragraph 1, 14, paragraph 3 (g), and 15, paragraph 1, of the Covenant and therefore proceeds to their examination 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 submitted by the parties, in accordance with article 5, paragraph 1, of the Optional Protocol.

7.2 The author claims that he was beaten and tortured by the police immediately after his arrest during two weeks' detention in the hands of the investigating authorities, and he was thus forced to confess guilt. The author provides detailed information regarding his ill-treatment, and claims the complaints made to this effect were ignored by the prosecution and the courts. The State party does not refute these allegations specifically, but rather limits itself to contending that the guilt of the author was fully established.

7.3 The Committee recalls that once a complaint about ill-treatment contrary to article 7 has been filed, a State party must investigate it promptly and impartially.⁴ Although the decision of the Bishkek City court of 30 July 2002 mentions Mr. Akhadov's torture allegations, the latter rejects these with a blanket statement that the evidence in the case confirms the guilt of the accused. The Committee considers that in the circumstances of the present case, the State party has failed to demonstrate that its authorities did address the

³ 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. 50: "A system of supervisory review that only applies to sentences whose execution has commenced does not meet the requirements of article 14, paragraph 5, regardless of whether such review can be requested by the convicted person or is dependent on the discretionary power of a judge or prosecutor." See also, for example, communication No. 836/1998, *Gelazauskas v. Lithuania*, Views adopted on 17 March 2003, para. 7.2.

⁴ General comment No. 20 (1992) on the prohibition of torture and cruel treatment or punishment, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40* (A/47/40), annex VI, sect. A, para. 14.

torture allegations advanced by the author expeditiously and adequately, in the context of both domestic criminal proceedings and the present communication. Accordingly, due weight must be given to the author's allegations. The Committee therefore concludes that the facts before it disclose a violation of the rights of Mr. Akhadov under articles 7 and 14, paragraph 3 (g), of the Covenant. In the light of this conclusion, it is not necessary to examine separately the author's claim under article 10 of the Covenant.

7.4 The Committee notes the author's allegations that he was arrested and held for two weeks in the Department of Internal Affairs before being brought before a court and given the opportunity to challenge the lawfulness of his detention. In the absence of a reply from the State party on this particular issue, the Committee finds that they should be given due weight, and that the facts described disclose a violation of the author's right to liberty and security of person and specifically the right not to be arbitrarily detained and imprisoned. Consequently, the Committee finds that article 9 of the Covenant has been violated in the present case.

7.5 The Committee considers that in the present case, the courts, and this was uncontested by the State party, failed to address properly the victim's complaints related to his ill-treatment by the police. The Committee considers that as a consequence, the criminal procedures in Mr. Akhadov's case were vitiated by irregularities, which casts doubts on the fairness of the criminal trial as a whole. In the absence of any pertinent observations from the State party in this respect, and without having to examine separately each of the author's allegations in this connection, the Committee considers that in the circumstances of the case, the facts as presented reveal a separate violation of the author's rights under article 14, paragraph 1, of the Covenant. In the light of this conclusion, and given that the author has been sentenced to death following a trial held in violation of the fair trial guarantees, the Committee concludes that the author is also a victim of a violation of his rights under article 6, read in conjunction with article 14, of the Covenant.

7.6 The Committee notes the author's claim under article 15, paragraph 1, of the Covenant that, at the time when the Supreme Court decided his case (22 June 2006), the death penalty was no longer the penalty set by the Criminal Code for an attempted murder of a State or public official and that the Supreme Court failed to replace the death penalty. In the light of the State party's abolition of the death penalty and consequent commutation of his death sentence, as well as of the Committee's finding in paragraph 7.5, the Committee considers it unnecessary to make a finding on this aspect of the author's complaint.

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 article 6, read in conjunction with article 14; article 7 and article 14, paragraph 3 (g); article 9; and article 14, paragraph 1, of the International Covenant on Civil and Political Rights.

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: conducting full and thorough investigation into the allegations of torture and ill-treatment and initiating criminal proceedings against those responsible for the treatment to which the author was subjected; considering his retrial in conformity with all guarantees enshrined in the Covenant or his release; and providing the author with appropriate reparation, including compensation. The State party is also under an obligation to take steps to prevent similar violations occurring 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 remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. In addition, it requests the State party to publish the Committee's Views.

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

Appendix

Individual opinion of Committee member Mr. Rafael Rivas Posada (partially dissenting)

In paragraph 8 of its decision on communication No. 1503/2006, the Human Rights Committee concludes that the State party has [directly] violated article 6 of the Covenant on Civil and Political Rights, in view of the fact that the State has violated the guarantees of due process enshrined in article 14 of the Covenant. The communication in question concerns a sentence of death handed down in violation of article 14, but which was not carried out because the victim's death sentence was commuted following the State party's abolition of the death penalty in 2007. In my opinion there is no direct violation of article 6, since the victim was not deprived of life, and I disagree with the extended interpretation of that article, whereby, like the Committee concluded, the direct violation of article 14 implies the direct violation of article 6. In my opinion, the wording of the Committee's decision in paragraph 8, stating that it is "of the view that the State party has violated article 6, read in conjunction with article 14", should be replaced by the reverse formulation, whereby the Committee is "of the view that the State party has violated article 14, read in conjunction with article 6".

I agree with the Committee's conclusions regarding the violations of the other articles of the Covenant, with the exception of the wording referred to above.

(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.]

**O. Communication No. 1507/2006, *Sechremelis et al. v. Greece*
(Views adopted on 25 October 2010, 100th session)***

<i>Submitted by:</i>	Panagiotis A. Sechremelis, Loukas G. Sechremelis and Angeliki, widow of Ioannis Balagouras (represented by counsel, Evangelia I. Stamouli)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Greece
<i>Date of communication:</i>	25 April 2006 (initial submission)
<i>Decision on admissibility</i>	21 October 2008
<i>Subject matter:</i>	Enforcement of a judgement against another State
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; same matter examined under another procedure of international investigation or settlement; abuse of the right to submit a communication
<i>Substantive issues:</i>	Effective remedy; right to a fair hearing
<i>Articles of the Covenant:</i>	2, paragraph 3; 14, paragraph 1
<i>Articles of the Optional Protocol:</i>	3; 5, paragraph 2 (a); 5, paragraph 2 (b)

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

Meeting on 25 October 2010,

Having concluded its consideration of communication No. 1507/2006, submitted to the Human Rights Committee on behalf of Mr. Panagiotis A. Sechremelis, Mr. Loukas G. Sechremelis and Ms. Angeliki, widow of Ioannis Balagouras, 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:

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin. The text of an individual opinion signed by Committee member Mr. Ivan Shearer concerning the decision on admissibility adopted on 21 October 2008 is appended to the text of the present Views. The text of an individual opinion signed by Committee members Mr. Lazhari Bouzid, Mr. Rajsoomer Lallah and Mr. Fabián Omar Salvioli concerning merits is appended to the text of the present Views.

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

1.1 The authors of the communication are Mr. Panagiotis A. Sechremelis, Mr. Loukas G. Sechremelis and Ms. Angeliki, widow of Mr. Ioannis Balagouras, who are Greek nationals. They allege that they are victims of violations by Greece of article 2, paragraph 3, read together with article 14, paragraph 1, of the International Covenant on Civil and Political Rights. They are represented by counsel, Ms. Evangelia I. Stamouli. The Optional Protocol came into force for the State party on 5 August 1997.

1.2 On 4 April 2007, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, decided that the admissibility of the communication would be considered separately from the merits.

The facts as submitted by the authors

2.1 The authors are relatives of the victims of the massacre perpetrated by the German occupation forces in Distomo, Greece, on 10 June 1944. On 27 November 1995, the authors brought an action for damages against Germany before the Livadia Court of First Instance. In the absence of representatives of Germany, the court found for the applicants on 30 October 1997 and ordered Germany to pay them various sums in compensation for their pecuniary and non-pecuniary loss (Decision No. 137/1997), with interest payable from the day the action had been initiated, namely 16 January 1996.

2.2 The ruling was notified to the German State in accordance with the provisions of the German-Greek agreement of 11 May 1938 on mutual legal assistance in civil and commercial matters. On 24 July 1998, the defendant declined to oppose or appeal against the ruling handed down by default and, in a subsequent application to the Court of Cassation for judicial review of the case, called for the ruling by the Livadia Court of First Instance to be annulled. The application was rejected by the Court of Cassation on 4 May 2000 (Decision No. 11/2000). Accordingly, Decision No. 137/1997 became final.

2.3 On 26 May 2000 the applicants brought proceedings under the Code of Civil Procedure to recover their debt, and counsel served the prosecutor of the Livadia Court of First Instance with the first executory copy of the ruling and a claim for payment, according to which the German State was ordered to pay the legal costs awarded in addition to the claims of each of the authors. The Greek Consulate in Berlin, pursuant to the above-mentioned German-Greek agreement, informed the President of the Berlin Court of Major Jurisdiction of the terms of the ruling. Despite the service of the judgement and the order to pay, the German State did not comply with its obligations.

2.4 Counsel then transmitted the order to the Athens Court of Major Jurisdiction, which, in accordance with the terms of record 1069/11.7.2000, seized property located in Athens belonging to the German State. Following the seizure, the German State filed an objection with the Athens Court of First Instance on 25 July 2000 requesting annulment of the executory ruling issued against it, citing article 923 of the Greek Code of Civil Procedure, according to which "the prior consent of the Minister of Justice is a precondition for enforcing a decision against a foreign State". On 10 July 2001 the Court of First Instance (by decisions Nos. 3666 and 3667/2001) dismissed the objection on the grounds that article 923 was incompatible with article 2, paragraph 3, of the Covenant which, in conjunction with article 14, ensured the right to proceed with the enforcement of decisions relating to civil law, with the added proviso that under article 2 of the Covenant such provisions applied equally to persons acting in an official capacity. According to the court, article 923 of the Code of Civil Procedure was incompatible with these provisions and, since the Covenant was an integral part of Greek law, was therefore considered invalid.

2.5 The German State lodged an appeal against the ruling with the Athens Court of Appeal. On 14 September 2001, the Court of Appeal found that article 923 of the Code of Civil Procedure was compatible with the Covenant (decision No. 6848/2001). On 2 October 2001 the applicants filed an appeal for judicial review with the Court of Cassation challenging this decision. On 28 June 2002 the Court of Cassation, sitting in plenary, upheld decision No. 6848/2001 of the Athens Court of Appeal. The Court of Cassation considered that article 923 of the Code of Civil Procedure restricted the right of enforcement by making it subject to the prior authorization of the Minister (decision No. 37/2002). The Minister may refuse consent in the light of his assessment of circumstantial factors, including the maintenance of good relations with another State. Following this decision, the authors did not receive the sums in question, as the German State refused to pay them and the Minister of Justice refused to authorize enforcement.

2.6 The authors were also part of a group of 257 complainants who brought the case before the European Court of Human Rights, which declared it inadmissible on 12 December 2002.¹

The complaint

3. The authors accuse the State party of violating article 2, paragraph 3, of the Covenant on the grounds that article 923 of the Code of Civil Procedure was maintained in force and that the Minister of Justice refused to authorize enforcement. Furthermore, the authors consider that the State party is duty bound, under article 14 of the Covenant, to fulfil its obligation under article 2, paragraph 3, and to ensure proper enforcement of the ruling of the Livadia Court of First Instance and the ruling of the Court of Cassation dated 4 May 2000.

State party's observations on admissibility

4.1 On 19 January 2007, the State party challenged the admissibility of the communication. It recapitulated the facts and noted that, in response to a complaint filed by the authors, the Livadia Court of First Instance had issued its ruling No. 137/1997 by default. An appeal for legal review was subsequently brought by the German State against that ruling. According to the German State, the Greek courts were not competent to hear the case under customary international law because the German State enjoyed immunity. The Court of Cassation, in the light of international customary law and the provisions of international conventions concerning the principle of immunity, found that the Greek courts did have jurisdiction over the case. The authors therefore initiated proceedings seeking enforcement of the final decision of the Court of First Instance. The German State refused to pay the sums concerned.

4.2 Under article 923 of the Code of Civil Procedure, the enforcement of a decision against a foreign State requires the prior consent of the Minister of Justice. The authors applied for such consent from the Minister, who did not respond. Despite the lack of consent, the authors initiated enforcement proceedings against the German State and in particular concerning the property owned by the Goethe Institute in Greece.

4.3 On 17 July 2000 the German State filed a complaint with the Athens Court of First Instance requesting the annulment of the writ of attachment handed down against it, on the grounds that there had been no consent on the part of the Ministry of Justice. The Court of First Instance dismissed the complaint, on the grounds that article 923 of the Code of Civil

¹ *Kalogeropoulou and others v. Greece and Germany* (dec.), Application No. 59021/00, ECHR 2002-X.

Procedure was incompatible with article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and article 2, paragraph 3, of the Covenant. On appeal, the Athens Court of Appeal found that article 923 was not in breach of either the Covenant or the European Convention on Human Rights. Specifically, the Court of Appeal considered that the limitation imposed by article 923 pursued an aim that was in the public interest, namely to avoid disturbances in relations between States, and was proportionate to that aim. The Court also found that article 923 did not affect the right to effective legal protection, as it did not provide for an outright prohibition on the enforcement of decisions against a foreign State, but only acquired the prior consent of the Minister of Justice, and therefore of the Government, which bore sole responsibility for foreign policy. If a private individual could have a judicial decision enforced against a foreign State without that prior consent, the country's national interests could be compromised, as its foreign policy would be placed in the hands of individuals. In any event, the right to enforcement could be exercised at a later date or in another country.

4.4 The authors filed an application for judicial review against that ruling. The Court of Cassation, referring to the case law of the European Court of Human Rights,² held that the limitation arising from article 923 was compatible with article 6 of the European Convention on Human Rights and with article 1 of Protocol No. 1 thereto.

4.5 The authors filed a complaint with the European Court of Human Rights, which found the case inadmissible.³ In particular, that Court considered that the right of access to the courts was not absolute, but could be subject to limitations, adding that a limitation was compatible with article 6, paragraph 1, of the European Convention on Human Rights if it pursued a legitimate aim and if there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. In the case in question, the European Court considered that the restriction pursued a legitimate aim, since the immunity granted to sovereign States in civil proceedings was intended to comply with international law in order to promote comity and good relations between States. As for the proportionality of the measure, the European Court considered that the European Convention on Human Rights had to be interpreted in the light of the rules set out in the Vienna Convention on the Law of Treaties of 23 May 1969, which states in article 31, paragraph 3 (c), that account is to be taken of "any relevant rules of international law applicable in the relations between the parties". The European Convention should be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity. Furthermore, "it follows that measures taken by a High Contracting Party which reflect generally recognized rules of public international law on State immunity cannot generally be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in article 6, paragraph 1". Lastly, the European Court considered that "although the Greek courts ordered the German State to pay damages to the applicants, this did not necessarily oblige the Greek State to ensure that the applicants could recover their debt through enforcement proceedings in Greece. Referring to judgement No. 11/2000 of the Court of Cassation, the applicants appeared to be asserting that international law on crimes against humanity was so fundamental that it amounted to a rule of *jus cogens* that took precedence over all other principles of international law, including the principle of sovereign immunity. The Court

² *Al-Adsani v. the United Kingdom* [GC], No. 35763/97, ECHR 2001-XI; *McElhinney v. Ireland* [GC], No. 31253/96, ECHR 2001-XI.

³ *Kalogeropoulou and others v. Greece and Germany* (note 1 above). The State party also points out that the European Court of Human Rights followed this case law in other cases (*Treska v. Albania and Italy* (dec.), Application No. 26937/04, ECHR 2006; *Manoilescu and Dobrescu v. Romania* (dec.), Application No. 60861/00, ECHR 2005).

does not find it established, however, that there is acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages brought against them in another State for crimes against humanity.⁴ The Government of Greece cannot therefore be required to override the rule of State immunity against their will. This is true at least as regards the current rule of public international law, as the Court found in the aforementioned case of *Al-Adsani*, but does not preclude a development in customary international law in the future. Accordingly, the Minister of Justice's refusal to give the applicants leave to apply for expropriation of certain German property situated in Greece cannot be regarded as an unjustified interference with their right of access to a tribunal, particularly as it was examined by the domestic courts and confirmed by a judgement of the Greek Court of Cassation.

4.6 As for the authors' allegation that their right to peaceful enjoyment of their possessions has been violated, the European Court of Human Rights considered that "the Greek courts' refusal to authorize the enforcement proceedings which could have secured the recovery of the applicants' debt did not upset the relevant balance that should be struck between the protection of the individual's right to peaceful enjoyment of his or her possessions and the requirements of the general interest". The European Court also found that "the Minister of Justice's refusal to authorize enforcement proceedings did not amount to a disproportionate interference with the applicants' right of access to a tribunal", and that "the Greek Government could not be required to override the principle of State immunity against their will and compromise their good international relations in order to allow the applicants to enforce a judicial decision delivered at the end of civil proceedings". The European Court therefore dismissed the complaint as being manifestly ill-founded.

4.7 The European Court also considered that "the applicants could not have been unaware of the risk they were taking in bringing enforcement proceedings against the German State without first obtaining the consent of the Minister of Justice. Having regard to the relevant applicable legislation, namely, article 923 of the Code of Civil Procedure, their only realistic hope was that Germany would pay the amounts determined by the Livadia Court of First Instance of its own accord. In other words, by instituting enforcement proceedings, the applicants must have known that, without the prior consent of the Minister of Justice, their application was bound to fail. The situation could not therefore reasonably have founded any legitimate expectation on their part of being able to recover their debt". Lastly, the European Court considered that "they might be able to enforce it later, at a more appropriate time, or in another country, such as Germany".

4.8 The State party points out that the communication should be seen against the more general background of complaints and requests for the payment of damages submitted by Greek citizens whose families suffered as a result of the invasion by German troops during the Second World War. The Greek courts had heard other similar cases: in one such case the Special Supreme Court (by decision No. 6/2002) had found that "in cases of execution of unarmed population during wars, State immunity is not set aside for the State whose military forces violate *jus cogens* rules".⁵ Furthermore, the Supreme Court had considered that the Greek courts did not hold jurisdiction over the matter. The Council of State had had occasion to issue a ruling in a similar case submitted by the same authors. In respect of the authors' application for the Minister of Justice's refusal to be overturned, the Council of State considered that such refusal constituted a governmental act and that the matter fell outside its jurisdiction (decision No. 3669/2006). The Council of State considered in particular that the Minister's intervention depended entirely on his appraisal of the situation

⁴ See *Al-Adsani v. United Kingdom* (note 2 above), para. 66.

⁵ English translation by the State party.

and the wish to avoid any disturbance in good relations between States. Such decisions were taken in the light of the consequences they might have on relations between countries, which lay within the domain of the executive.

4.9 A similar case had been brought before the Court of Justice of the European Communities (case C-292/05) by other persons,⁶ represented by the same counsel as was acting for the authors of the present communication, relating to the actions of German troops in another part of Greece. In that case the Court of First Instance had held that it was not competent in view of the immunity enjoyed by the German State, and the Court of Appeal had applied for a preliminary ruling by the Court of Justice of the European Communities. The State party notes that according to the Advocate General's conclusions, sovereign acts performed by the State (*acta jure imperii*), in this case military action in wartime, fall outside the scope of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.⁷

4.10 Concerning the admissibility of the communication, the State party notes that the act (or omission) in question is the refusal by the Ministry of Justice to issue an authorization for enforcement proceedings against the German State. It considers that this refusal is a governmental act, subject to the application of the rules of international law and to an appraisal of the requirements of foreign policy and the need to maintain good relations between States, and not an act of a civil nature. The State party considers that the refusal does not fall within the scope of the Covenant. Furthermore, the communication is incompatible with the principles of international customary law and the international obligations of the State party. Lastly, the same matter has been and is currently being examined under another procedure of international investigation or settlement. Not only has the same case been presented to and ruled upon by the European Court of Human Rights, but a practically identical case has been brought before the Court of Justice of the European Communities.⁸

4.11 The State party also notes that the authors submitted their communication to the Committee five years after the last decision was issued by a domestic court and four years after the decision was handed down by the European Court of Human Rights. The authors are aware that the same complaint has just been filed again with the Greek courts, and that the Supreme Court has considered that State immunity cannot be waived for acts committed by States in time of war (decision No. 6/2002). The authors are also aware that a similar case has been brought before the Court of Justice of the European Communities. Lastly, the State party addresses only the allegation of the violation of article 2, paragraph 3, of the Covenant. It rejects counsel's reference to article 14, paragraph 1, of the Covenant and contends that insofar as the authors complain of violations of other articles of the Covenant, domestic remedies have not been exhausted because such violations have not yet been raised before any courts.

⁶ *Eir. Lechouritou, V. Karkoulas, G. Pavlopoulos, P. Brátsikas, D. Sotiropoulos, G. Dimopoulos v. Dimosio tis Omospondiakis Dimokratias tis Germanias*, reference for a preliminary ruling submitted by Efeteio Patron (Greece).

⁷ Signed on 27 September 1968.

⁸ The State party points out that the matters before the Court of Justice of the European Communities concern not only the application of the 1968 Convention, but also the issues of State immunity and the right of States not to accept liability for sovereign acts (*acta jure imperii*) before the courts of other States.

Authors' comments on the State party's observations on admissibility

5.1 On 4 June 2007 counsel maintained that the grounds for inadmissibility put forward by the State party had no legal foundation. In reply to the State party's argument that the decision by the Minister of Justice does not fall within the scope of the Covenant, counsel contends that in respect of the incriminated acts of the German forces, the German State is not covered by immunity from legal proceedings under article 11 of the European Convention on State Immunity, signed in Basel on 16 May 1972⁹ (even though the case concerns *jure imperii* acts, here the killing of civilians). The incriminated acts constitute a violation of human rights provisions that take precedence over any rules of treaty law or customary law. Those provisions do not allow States against which action for compensation has been brought to plead immunity from legal proceedings.

5.2 The debt owed to the authors is a civil debt according to the judgement handed down by the European Court of Human Rights, which qualified the case as a civil one.¹⁰ Hence the Minister's refusal to authorize enforcement proceedings against the German State arises in the context of civil litigation and cannot constitute a governmental act. The Minister's refusal is based on a provision of the Code of Civil Procedure (art. 923), which comes in the chapter dealing with the enforcement of the decisions of civil courts and therefore falls within the scope of the Covenant.

5.3 As for the State party's contention that the matter is being or has been considered by other international bodies, the rule to which the State party refers requires "that the same matter is not being examined" (not that it has not been examined) "under another procedure of international investigation or settlement" (rule 96 of the Committee's rules of procedure). The fact is that the matter before the Committee is not currently being examined under another international procedure. The Court of Justice of the European Communities issued its judgement on 15 February 2007,¹¹ following a reference for preliminary ruling on the interpretation of the 1968 Brussels Convention on jurisdiction and the enforcement of judgements in civil and commercial matters, and not on the Minister's refusal, which is the subject of the present complaint. Furthermore, the procedures under which the case was examined were judicial and not related to international investigation or settlement.

Decision of the Committee on admissibility

6.1 At its ninety-fourth session, on 21 October 2008, the Committee considered the admissibility of the communication.

6.2 Without needing to determine whether the "same matter" has been examined under another procedure of international investigation or settlement, the Committee rejected the State party's inadmissibility plea based on the argument that the Committee was not competent because the present communication had already been examined by the European Court of Human Rights and the Court of Justice of the European Communities. On the one hand, article 5, paragraph 2 (a), of the Optional Protocol applied only when the same matter as that raised in a communication is "being examined" under another procedure of

⁹ "A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred."

¹⁰ *Kalogeropoulou and others v. Greece and Germany*, (note 1 above).

¹¹ Case C-292/05, *Lechouritou et al.*, judgement of 15 February 2007.

international investigation or settlement. On the other, Greece had entered no reservation to article 5, paragraph 2 (a), of the Optional Protocol.

6.3 The Committee took note of the arguments of the State party whereby the authors filed their communication with the Committee five years after the last decision had been issued domestically and four years after the decision of the European Court of Human Rights. The State party appeared to allege that the communication should be considered inadmissible insofar as it amounted to an abuse of the right to submit communications under article 3 of the Optional Protocol, in view of the time that had elapsed between the last domestic ruling and the decision by the European Court and the submission to the Committee. The Committee observed that the Optional Protocol does not establish any deadline for the submission of communications, and that the period of time elapsing before such a submission does not of itself constitute an abuse of the right to submit a communication, other than in exceptional cases. Neither had the State party duly substantiated why it considered that a delay of more than five years would be excessive in this case. The Committee considered that in the present case, having regard to its particular circumstances, and considering that the authors had in the meantime lodged other complaints, namely with the Council of State it was not possible to consider that so much time had elapsed prior to the filing of the communication as to make the complaint an abuse of the right of submission.

6.4 Regarding the scope of the Covenant, the Committee noted the State party's argument that the Minister's refusal was a governmental act, not an act of a civil nature, and thus fell outside the scope of the Covenant. The Committee recalled its general comment No. 32 (2007), on the right to equality before courts and tribunals and to a fair trial,¹² and reaffirmed that the concept of the determination of rights and obligations in a suit at law was formulated differently in the various languages of the Covenant that, according to article 53 of the Covenant, were equally authentic. The concept was based on the nature of the right in question rather than on the status of one of the parties or the particular forum provided by domestic legal systems for the determination of particular rights.¹³ The concept was a broad one, and encompassed not only judicial procedures aimed at determining rights and obligations pertaining to the areas of contract, property and torts in the area of private law, but also equivalent notions in the area of administrative law. It might also cover other procedures which had to be assessed on a case-by-case basis in the light of the nature of the right in question.

6.5 In any event, in the view of the Committee the determination of rights and obligations in a suit at law, as protected under article 14, paragraph 1, of the Covenant, would be meaningless if the law of a State party permitted a judicial determination in favour of a victim to become unenforceable, especially given the State party's further obligations under paragraph 3 (a) and (c) of article 2 of the Covenant to ensure, in the first place, that any person whose Covenant rights are violated shall have an effective remedy and, secondly, that when such a remedy is granted it shall be enforced.¹⁴

¹² *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI, para. 16.

¹³ Communications No. 112/1981, *Y.L. v. Canada*, decision on inadmissibility adopted on 8 April 1986, paras. 9.1 and 9.2; No. 441/1990, *Casanovas v. France*, Views adopted on 19 July 1994, para. 5.2; No. 1030/2001, *Dimitrov v. Bulgaria*, decision on admissibility adopted on 28 October 2005, para. 8.3.

¹⁴ See communication No. 1320/2004, *Pimentel et al. v. Philippines*, Views adopted on 19 March 2007, referring to the enforcement in the Philippines of a judgement obtained in the United States of America, considered in the light of article 14 and article 2, paragraph 3, of the Covenant. Furthermore, according to the translation of Court of Cassation decision No. 37/2002 submitted by

6.6 The Committee noted that the State party did not challenge the exhaustion of remedies in respect of the violation of article 2, paragraph 3, but that it considered the communication to be inadmissible on the grounds that domestic remedies had not been exhausted in respect of article 14, paragraph 1, of the Covenant. However, it also noted that the Court of Cassation considered the authors' grievances (see decision No. 37/2002), including in the light of article 14 of the Covenant. The Committee therefore concluded that domestic remedies had been exhausted in that regard and that the claim alleging the violation of article 14 was admissible.

7. The Committee therefore decided that the communication was admissible insofar as it raised issues with respect to article 2, paragraph 3, read together with article 14, paragraph 1, of the Covenant.

State party's observations on the merits

8.1 On 30 April 2009, the State party submitted observations on the merits. It recalls the decision of the Athens Court of Appeal which considered that article 923 of the Code of Civil Procedure, under which the prior consent of the Minister of Justice is a precondition for enforcing a decision against a foreign State, was not contrary to article 2, paragraph 3 of the Covenant.¹⁵ It adds that the findings of the national courts are neither arbitrary nor unsubstantiated and cannot be considered as contrary to any provision of the Covenant or the Optional Protocol.

8.2 The right to a fair trial, although of paramount importance for every democratic society, is not absolute in every aspect. Certain limitations can be imposed and tolerated since, by implication, the right of effective judicial protection, by its very nature, calls for regulation by the State. To this extent, the contracting States enjoy a certain margin of appreciation. Still, it has to be secured that any limitation applied does not restrict or reduce the judicial protection left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, any limitation imposed has to pursue a legitimate aim and keep a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

8.3 In the instant case, should the State's refusal to allow the authors to bring enforcement proceedings against Germany be considered as a restriction to their right to an effective remedy and to their right to enforcement of a judgment, this restriction pursued a legitimate aim and was proportionate to the aim pursued. First of all, the Covenant has to be interpreted in the light of the rules set out in the Vienna Convention of 1969 on the Law of Treaties, article 31, paragraph 3 (c), of which indicates that account is to be taken of any relevant rules of international law applicable in the relations between the parties. The Covenant, including articles 2, paragraph 1, and 14, paragraph 1, cannot be interpreted in a vacuum and should so far as possible be interpreted in harmony with other rules of international law, including those relating to State immunity. Apart from immunity of jurisdiction, immunity from execution is also recognized, that is the lack of ability to institute measures of execution against the property (all property, or at least property that is intended for diplomatic or military use, that forms part of cultural heritage, etc.) of a foreign state.

8.4 All international legal documents governing State immunity set forth the general principle that, subject to certain strictly delimited exceptions, foreign States enjoy immunity

counsel, the Court found that the enforcement of court decisions in a suit at law is expressly guaranteed by the Contracting States by virtue of article 2, paragraph 3 (c), and article 14 of the Covenant.

¹⁵ See para. 4.3 above.

from execution in the territory of the forum State. For example, article 5 of the resolution of the Institute of International Law on immunity of foreign States in relation to questions of jurisdiction and enforcement (1954) indicates that no measures of constraint or preventive attachment may be carried out in respect of property which belongs to a foreign State and is used for the performance of government activities not connected with any form of economic exploitation. Furthermore, article 22 of the Vienna Convention on Diplomatic Relations stresses that the premises of missions are immune from search, requisition, attachment or execution. Similar provisions are to be found in the European Convention on State Immunity, article 23 of which states that “no measures of execution or preventive measures against the property of a Contracting State may be taken in the territory of another Contracting State except where and to the extent that the State has expressly consented to the measures in writing”.

8.5 It is also to be noted that article 19 of the United Nations Convention on Jurisdictional Immunities of States and Their Property provides that no post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with proceedings before a court of another State unless and except to the extent that the State has expressly consented or it has been established that the property is specifically in use or intended for use by the State for other than non-commercial government purposes. Finally, provisions establishing immunity from execution are included in all legal texts of the States that have laws dealing with State immunity.

8.6 The State party considers that the grant or in any case the regulation of immunity from execution in proceedings instituted against a foreign state constitutes a well established rule of international customary law and therefore pursues the legitimate aim of complying with international law, in order to promote comity and good relations between States, through the respect of another State’s sovereignty. It is thus obvious that the Greek authorities refused to give permission to the authors to execute the judgment against the German state’s property on “public interest” grounds directly linked to observance of the principle of State immunity.

8.7 The State party recalls the jurisprudence of the European Court of Human Rights according to which measures taken by a State which reflect generally recognized rules of international law on State immunity cannot generally be regarded as imposing a disproportionate restriction on the right to a fair trial, as embodied in article 6, paragraph 1, of the European Convention of Human Rights. The Court is also of the view that, just as the right of access to a court is an inherent part of the fair-trial guarantee in that article, so some restrictions on access and generally on the right to a fair trial must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity. The Court has repeatedly rendered that it does not find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages brought against them in another State for crimes against humanity. The State party considers that there is nothing in the present communication to warrant departing from this view. Accordingly, neither the Minister’s refusal to grant the author permission to take measures of constraint with regard to the property occupied by the German State in Greece, nor the courts’ decisions that upheld this refusal can be regarded as an unjustified restriction on the author’s rights.

8.8 The State party indicates that the above-mentioned limitation does not impair the very essence of the authors’ right to an effective judicial protection. It cannot be ruled out that the national court’s decision may be enforced at a later date, for example if the foreign State enjoying immunity from execution gave its consent to the taking of measures of constraint by the authorities of the forum State, thereby voluntarily waiving the application

of the international provisions in its favour, a possibility expressly provided for by the relevant provisions of international law. In this connection, the State party reiterates its arguments referred to in paragraph 4.5 above.

8.9 As to the authors' submission that they had no effective remedy at their disposal, the State party argues that, since it was established that the authors did not have an "arguable claim" to be the victims of a violation of the Covenant (i.e. of their right to enforcement of a judgment) there is no applicability of the relevant provisions. In any case, the authors, in all the procedures that took place before the national courts, had the benefit of adversarial proceedings conducted in public, were represented by a lawyer of their choosing, put before the courts without obstruction all their arguments, claims and objections, presented evidence, refuted the arguments of the opposing party and generally enjoyed all guarantees of a fair and effective trial.

Authors' comments on the State party's observations on merits

9. In a letter dated 28 June 2009, the authors referred to their previous submissions on the case, where all relevant issues had been fully addressed. They indicated that no further comments on the State party's observations were necessary.

Issues and proceedings before the Committee

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

10.2 At the origin of the present communication is Decision No. 137/1997, by which the Livadia Court of First Instance ordered Germany to pay compensation to the relatives of the victims of the massacre perpetrated by the German occupation forces in Distomo on 10 June 1944. On 4 May 2000, the Court of Cassation rejected an application for judicial review and, therefore, the Decision became final. On 26 May 2000, the authors initiated proceedings under the Code of Civil Procedure to execute the Decision. On 17 July 2000, Germany filed a complaint with the Athens Court of First Instance alleging that, under article 923 of the Code of Civil Procedure, the prior consent of the Minister of Justice is a precondition for enforcing a decision against a foreign State and that such consent had not been given. The Court dismissed the complaint on the grounds that article 923 was incompatible with article 6 of the European Convention on Human Rights and article 2, paragraph 3, of the Covenant. However, on appeal, the Athens Court of Appeal found that article 923 was not in breach of the European Convention or the Covenant. The Court held that the limitation imposed by this provision did not provide for an outright prohibition on the enforcement of decisions against a foreign State; that it pursued an aim that was in the public interest, namely to avoid disturbances in relations between States; that it did not affect the right to effective legal protection; and that the right to enforcement could be exercised at a later date or in another country. On 28 June 2002, the Court of Cassation upheld the decision of the Athens Court of Appeal, following which Germany refused the payment and the Minister of Justice refused to authorize enforcement.

10.3 The issue before the Committee is whether the refusal of the Minister of Justice to authorize enforcement of Decision 137/1997, on the basis of article 923 of the Code of Civil Procedure, constitutes a breach of the right to effective remedy as provided under article 2, paragraph 3, with reference to the right to a fair hearing enshrined in article 14, paragraph 1 of the Covenant.

10.4 The Committee considers that the protection guaranteed by article 2, paragraph 3 and article 14, paragraph 1 of the Covenant would not be complete if it did not extend to the enforcement of decisions adopted by courts in full respect of the conditions set up in article

14. In the instant case, the Committee notes that article 923 of the Code of Civil Procedure, by requiring the prior consent of the Minister of Justice for the Greek authorities to enforce Decision 137/1997, imposes a limitation to the rights to a fair hearing and to effective remedy. The question is whether this limitation is justified.

10.5 The Committee notes the State party's reference to relevant international law on State immunity as well as the Vienna Convention of 1969 on the Law of Treaties. It also notes the State party's statement that the limitation does not impair the very essence of the authors' right to an effective judicial protection; that it cannot be ruled out that the national court's decision may be enforced at a later date, for example if the foreign State enjoying immunity from execution gave its consent to the taking of measures of constraint by the Greek authorities, thereby voluntarily waiving the application of the international provisions in its favour; and that this is a possibility expressly provided for by the relevant provisions of international law. The Committee also notes the authors' contention that Germany is not covered by immunity from legal proceedings. In the particular circumstances of the present case, without prejudice to future developments of international law as well as those developments that may have occurred since the massacre perpetrated on 10 June 1944, the Committee considers that the refusal of the Minister of Justice to give consent to enforcement measures, based on article 923 of the Code of Civil Procedure, does not constitute a breach of article 2, paragraph 3, read together with article 14, paragraph 1, of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of the International Covenant on Civil and Political Rights.

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

Appendix A

Individual opinion on the Committee's decision on admissibility

Individual opinion by Committee member Mr. Ivan Shearer (dissenting)

In my opinion this communication should have been declared inadmissible by the Committee. The Committee has confined its decision to declare this communication admissible to a rejection of the formal grounds of inadmissibility invoked by the State party. However, the Committee has overlooked the more general ground of inadmissibility implicit in the State party's recounting of the proceedings in the Greek courts and the considerations of State immunity which impelled the Minister of Justice to refuse consent to the enforcement of the decision against the German State. Faced with such a clear rule of customary international law, the Minister could not have acted otherwise. Further proceedings would be futile. It would be more appropriate, in my view, if the Committee had the express power, like the European Court of Human Rights, to declare a communication to be "manifestly ill-founded". However, it is possible for the Committee, even at the stage of admissibility, to declare a communication unsubstantiated under article 2 of the Optional Protocol in order to achieve the same result. In that sense I believe this communication to be unsubstantiated and thus inadmissible.

(Signed) Ivan Shearer

[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.]

Appendix B

Individual opinion on the Committee's decision on the merits

Individual opinion by Committee members Mr. Rajsoomer Lallah, Mr. Lazhari Bouzid and Mr. Fabián Salvioli (dissenting)

1. The Minister of Justice of the State party, relying on article 923 of its Code of Civil Procedure, had refused to give his consent to the execution of the decision of the Livadia Court of First Instance (decision No. 137/97). The Court had granted damages to the authors. The decision of the Court had become final, following the Court of Cassation's refusal to annul the decision (see paras. 2.1 and 2.2 of the Views).

2. The issue before the Committee is, as properly stated in the majority opinion at paragraph 10.3 of the Views, whether the refusal of the State Party, through its Minister of Justice, to authorize the enforcement of the Court decision constitutes a violation of the right of the authors of the communication to an effective remedy as provided in articles 2, paragraph 3, and 14, paragraph 1, of the Covenant.

3. We are unable to agree with the opinion of the majority that the refusal of the State party does not constitute a violation of those provisions of the Covenant.

4. We note that, when considering the admissibility of the complaint of the authors, the Committee had correctly analysed the significant obligations assumed by a State party under articles 14, paragraph 1, and 2, paragraph 3, of the Covenant. The Committee, relying on previous case law, then gave its view that "the determination of rights and obligations in a suit at law, as protected under article 14 paragraph 1, of the Covenant, would be meaningless if the law of a State party permitted a judicial determination in favour of a victim to become unenforceable, especially given the State party's further obligations under paragraph 3 (a) and (c) of article 2 of the Covenant to ensure, in the first place, that any person whose Covenant rights are violated shall have an effective remedy and, secondly, that when such a remedy is granted it shall be enforced" (para. 6.5 of the Views).

5. Indeed, in paragraph 10.4 of its Views, the majority confirms that the protection guaranteed under those articles of the Covenant "would not be complete if it did not extend to the enforcement of decisions adopted by courts in full respect of the conditions set up in article 14". However, the majority then goes on to consider that article 923 of the Greek Code of Civil Procedure does impose what it qualifies as a *limitation* on the protection thus guaranteed and proceeds to consider whether that limitation is justified.

6. The reasoning of the majority, as is evident from paragraph 10.5 of the Views, that the limitation is justified would appear largely to coincide with that of the State party and to be based on three main grounds which, in substance, are the following:

- Customary international law on State immunity, as interpreted in accordance with the provisions of the Vienna Convention on the Law of Treaties, supersedes in its effects the relevant provisions of the Covenant and requires a limitation on the provisions of article 14, paragraph 1, of the Covenant.
- Future developments of international law as well as *those developments that may have occurred since the massacre perpetrated on 10 June 1944* may have an impact on the precedence or otherwise of State immunity over Covenant provisions.
- The limitation rendered necessary by a foreign State's immunity does not, in any event, impair the very essence of the authors' right to effective judicial protection as

the foreign State against which damages had been awarded by the Court to the victims may waive its immunity.

7. It seems to us that all of the three grounds are misconceived. We begin with the last ground.

8. The term “limitation” is somewhat of a euphemism in the context of the obligations assumed by the State party under the mandatory provisions of articles 14 and 2 of the Covenant in relation to individual victims. “Negation” might more correctly describe the effect of the power exercised by the State party under article 923 of its Code of Civil Procedure, in its present form, since its effect is to transform those obligations of the State party under the Covenant into a mere exercise of discretionary good will over a timeless period, not anymore by the State party which had assumed obligations under the Covenant, but by a foreign State to which the obligations of these two provisions do not apply in the communication directed by the authors against the State party under the Optional Protocol.

9. Nor can a remedy required under the Covenant be considered to be effective or prompt when it is suggested that the victims may possibly enforce their remedy elsewhere or at some indeterminate time in the future by the unilateral and discretionary good will of a foreign State. A remedy is not a real remedy when it depends on the unilateral discretion of a third party. Such a suggestion also does violence to the true aims of article 14, which prescribes that trials must be prompt and which inherently requires that, when remedies are given, they should be promptly satisfied. The popular aphorism “justice delayed is justice denied” cannot be elevated to a practice permissible under the Covenant.

10. The first two grounds relied upon by the majority are closely related and they are best considered together. Two observations may be made before considering how, in cases where a foreign State’s immunity poses an apparent obstacle to the direct enforcement of the judgment of the judicial authorities of a State party, the State party may nevertheless provide a remedy to victims in the discharge of its own obligations under articles 14 and 2 of the Covenant.

11. Our first observation is that it is evident that the object and purpose of a foreign State’s immunity is a matter of public interest, both nationally and internationally, in that it avoids disturbances in relations between States. The Vienna Convention on the Law of Treaties evidently does have its relevance in this regard with a view to ascertaining whether, given its object and purpose, another generally accepted rule of international law, whether customary or treaty based, has an impact, if any, on other international instruments.

12. The Covenant, however, is also a multilateral treaty and equally has its own object and purpose, thus attracting in its turn the interpretative guidance of the Vienna Convention. It seems to us that, where two equally binding treaties or provisions of international law apparently conflict with each other, some endeavour has to be made in the search for the most appropriate measures to give effect to their respective objects and purposes, with a view to preserving the essential integrity of both. In our view, there is no indication in the majority opinion to suggest that such an endeavour has been embarked upon. Customary law is not sacrosanct and can, as does treaty based international law, also evolve. Which brings us to the second observation.

13. Our second observation is that, in paragraph 10.5 of its Views, the majority does not rule out the possible effects of developments in international law but does not go on to ascertain whether, in relation to the possible precedence of State immunity over articles 2 and 14 of the Covenant, there have been any such developments. In this regard, the majority simply refers to “those developments that may have occurred”, without mentioning or analysing any of them in particular.

14. Clearly, it is the primary function of the Committee itself under the Covenant (and not simply that of other fora or jurisdictions) to interpret and apply the Covenant. It is of some significance that, when faced with the stand of Israel that its obligations under article 2 of the Covenant is limited to its own territory, the International Court of Justice,^a in support of its own interpretation of that article, referred with approval to the interpretation given to that article by the Human Rights Committee and the jurisprudence it had developed by its constant practice as evidenced by its case law^b and its concluding observations on the periodic report of Israel in 1998 (CCPR/CO/78/ISR, para. 11). It would be odd if the Committee were to seek to delegate this primary responsibility elsewhere and wait for other jurisdictions to effect developments in the universality and effective protection of Covenant rights, when it is the Committee itself which has primary responsibility, at least for questions which are expressly mandated to it under the Covenant and the Optional Protocol.

15. It is perhaps necessary, therefore, to mention what developments have in fact taken place since 1944, which the majority could possibly have considered. Indeed, developments of considerable significance have occurred over the latter half of the last century regarding the universality of the obligations of States to protect and promote the basic rights of individual human beings. Among those developments that may be, briefly, mentioned are the following:

- The adoption of the Charter of the United Nations itself, with particular reference to the second paragraph of its preamble and its Articles 1, paragraph 3, and 55 (c)
- The adoption of the Universal Declaration of Human Rights, followed by a large number of implementing multilateral binding human rights treaties, including the Covenant, to which not less than 165 States are now parties
- The creation of regional human rights mechanisms with adjudicating functions in the case of individual victims and, lastly
- The increasing number of States which have given entrenched status to human rights in their Constitutions or other basic laws, for better protection by their judicial authorities

16. Be that as it may, in our view, articles 2, paragraph 3, and 14, paragraph 1, of the Covenant, as we interpret them and without affecting the operation of any other treaty or international or bilateral obligation arising from international law, constitute a core principle which the Covenant has, as one of its central objects and purposes, obligated States parties to implement: that principle is the establishment of the rule of law in the determination of Covenant rights by independent and impartial judicial authorities, to provide an effective remedy in the case of violations and to ensure its enforcement.

17. There is no limitation or other derogation, either express or implied, detracting from the efficacy of those provisions for the purpose of ensuring a foreign State's immunity. Were it otherwise, State immunity would, in substance and effect, virtually become State impunity, exercisable according to the will of another State. The question of any tension between State immunity and articles 2, paragraph 3 (c), and 14, paragraph 1, of the Covenant simply does not arise. The reason is simple enough: there is nothing in international law on the immunity of a foreign State preventing a State party to the

^a Advisory Opinion on The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, I.C.J. Reports 2004, paras. 109 and 110.

^b Communications No. 52/1979, *Lopez Burgos v. Uruguay*, Views adopted on 29 July 1981; No. 56/1979, *Celiberti de Casariego v. Uruguay*, Views adopted on 29 July 1981; No. 106/1981, *Pereira Montero v. Uruguay*, Views adopted on 31 March 1983.

Covenant and the Optional Protocol from itself satisfying the judgment of its judicial authorities and seeking compensatory reparation from the foreign State, in circumstances where the foreign State resists enforcement.

18. The exercise of power under article 923 of the Code of Civil Procedure, in its inadequate present form, by the State party in the discharge of its obligations under international law towards another State cannot be at the expense of the victims of violations of their rights under a different set of obligations assumed by the State party towards human beings under its own protection and jurisdiction. The latter obligations are as much part of public interest as are its other international obligations. Article 923 of the Code of Civil Procedure contains no countervailing provisions requiring the State party itself to satisfy the remedy decided upon by its judicial authorities and to seek reparation from the relevant foreign State.

19. In our view, article 4, paragraph 2, of the Optional Protocol does contain provision enabling the Committee to ascertain whether a State party has provided a remedy with regard to the violations complained of in a communication directed against it by a victim. It is within the competence of the Committee to determine whether any remedy provided by the State party compensates, in a given set of circumstances, the violation of a victim's Covenant rights.

20. For the above reasons, it is clear to us that the State party has provided no effective remedy to the authors. Nor has it provided for a countervailing remedy in either article 923 of its Code of Civil Procedure or elsewhere in its laws. Consequently, in our view, the State party has violated its obligations under articles 14, paragraph 1, and 2, paragraph 3 (c) of the Covenant towards the authors.

(Signed) Rajsoomer **Lallah**

(Signed) Lazhari **Bouzi**

(Signed) Fabián Omar **Salvioli**

[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.]

**P. Communication No. 1517/2006, *Rastorguev v. Poland*
(Views adopted on 25 March 2011, 101st session)***

<i>Submitted by:</i>	Tatyana Rastorgueva (not represented by counsel)
<i>Alleged victim:</i>	Maxim Rastorguev (author's nephew)
<i>State party:</i>	Poland
<i>Date of communication:</i>	25 September 2006 (initial submission)
<i>Decision on admissibility</i>	8 July 2009
<i>Subject matter:</i>	Detention and conviction for murder and robbery after an alleged unfair trial
<i>Procedural issues:</i>	Representation of the alleged victim; non-exhaustion of domestic remedies; same matter being examined under another procedure of international investigation or settlement
<i>Substantive issues:</i>	Ill-treatment, right to be promptly informed of charges, right to be immediately brought before a judge or other authorized official; right to fair trial; right to legal defence; non-discrimination
<i>Articles of the Covenant:</i>	7; 9, paragraphs 2 and 3; 14, paragraphs 1 and 3 (b); and 26
<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 28 March 2011,

Having concluded its consideration of communication No. 1517/2006, submitted to the Human Rights Committee on behalf of Mr. Maxim Rastorguev, 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 author of the communication is Ms. Tatyana Rastorgueva, a citizen of Belarus born in 1953, who submits the complaint on behalf of her nephew, Mr. Maxim Rastorguev,

* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Iulia Motoc, Mr. Gerald L. Neuman, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

also a citizen of Belarus, born in 1976, currently serving a prison sentence in Poland. The author claims that her nephew is a victim of violations by Poland of articles 7; 9, paragraphs 2 and 3; 14, paragraphs 1 and 3 (b); and 26 of the Covenant. She is not represented by counsel. The Optional Protocol entered into force for the State party on 7 February 1992.

1.2 On 7 July 2009, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided to examine the issue of the admissibility of the communication separately from that of the merits.

The facts as presented by the author

2.1 On 18 March 2000, the author's nephew was detained by Polish border guards at the border between Poland and Belarus. He was informed that he was wanted by the Polish police, but not told why. For about eight hours after his arrest, he was kept in the town of Terespol. Thereafter, he was taken to Bjala-Podljaska, where he was detained for six days. The author claims that her nephew was not informed of the charges against him during this period; he only overheard policemen saying that they were transferring a "murderer". On 24 March 2000, he was taken to Chelm, where, for the first time, he appeared before a court. He was informed that he was a suspect in a robbery and in the murder of one Ruslan Tsorojev and his detention was prolonged. The same day, he was interrogated by a prosecutor in the absence of a lawyer, but in the presence of an interpreter, as he did not speak Polish. During the preliminary investigation, he was questioned several times without the presence of a lawyer.

2.2 Mr. Rastorguev allegedly saw his court-appointed lawyer for the first time only on 13 December 2000, shortly before the beginning of the trial. The author claims that he could not talk to his lawyer nor prepare his defence as he was not provided with an interpreter and could not communicate with the lawyer because of the language barrier. His lawyer allegedly stayed with him for no more than five minutes, and policemen were close enough to overhear their conversation. He saw the lawyer twice more before the court proceedings started on 8 February 2001 and again on 23 April 2001, both times without an interpreter and only for a very short period of time.

2.3 On 4 July 2001, the District Court of Lublin sentenced the author's nephew to 25 years' imprisonment for murder and robbery. His lawyer appealed without consulting him. On 20 December 2001, the Appeal Court of Lublin upheld the sentence of the District Court. His lawyer decided not to file a cassation appeal, arguing that the prerequisites for such an appeal were not met. He did not inform his client of this decision, and, as a consequence, the author's nephew missed the deadline to lodge a cassation appeal.

2.4 Mr. Rastorguev's case was then transmitted to another lawyer, who lodged a cassation appeal. The new lawyer only communicated with him by telephone. On 1 October 2002, the Supreme Court upheld the decisions of the other courts.

2.5 The author claims that her nephew had no opportunity to submit an appeal himself against the violations of his rights under the Covenant due to the compulsory requirement in Poland for appeals to be submitted by lawyers. She argues that the lawyers who represented her nephew during the different stages of the criminal proceedings did not raise violations of the Covenant. Therefore, she claims her nephew did not have access to effective domestic remedies.

2.6 In 2003, the author's nephew submitted a complaint to the European Court of Human Rights. The author claims that his case was discontinued, as the Registry of the European Court could not contact him.

The complaint

3.1 The author claims that by detaining her nephew for six days without informing him of the charges against him, the State party violated his rights under article 9, paragraph 2. She claims this also amounts to a violation of article 7, as during those six days, he was subjected to inhuman treatment since he was kept unaware of the reasons for his situation. She adds that her nephew was only brought before a judge after six days' detention, which is said to amount to violation by the State party of his rights under article 9, paragraph 3, of the Covenant.

3.2 She claims that her nephew was questioned several times without the presence of a lawyer and his rare meetings with his lawyer who spoke only Polish, were held without an interpreter and only for very brief periods of time, in violation of his rights under article 14, paragraph 3 (b), of the Covenant.

3.3 The author claims that her nephew was discriminated against by the court on the basis of his nationality and that during the proceedings the court's attitude was biased against him and therefore the State party violated articles 14, paragraph 1, and article 26, of the Covenant.

State party's observations on admissibility

4.1 On 22 January 2007, the State party argued that the communication was submitted by a close relative of the alleged victim, in violation of the rules of procedure of the Committee. It argues that the fact that Mr. Rastorguev is currently in a Polish prison does not make it impossible for him to submit his case to the Committee personally. Polish law guarantees such a right under section 103, paragraph 1, of the Criminal Executive Code. It submits that the author provided no evidence of her relationship to the alleged victim. She was not a party to the facts raised in the communication and did not have access to the court case files. The State party argues that the alleged victim is best placed to submit a communication himself as he knows the domestic proceedings and has access to his case file.

4.2 The State party recalls that in 2003, Mr. Rastorguev lodged a complaint with the European Court of Human Rights, raising the same allegations that are raised in the present complaint. Although the author suggests that the case was not considered by the European Court, the State party argues that the same matter is being examined under another international procedure of international investigation or settlement.

4.3 As to the claim that Mr. Rastorguev was detained for six days without being informed of charges against him, the State party submits that the investigation in the murder case was initiated several months before his detention. On 9 February 2000, the Chelm District Court ordered his detention for seven days. The court decision was prompted by the fact that the investigators did not know the whereabouts of Mr. Rastorguev, as he did not live in Poland. The arrest warrant was issued on the basis of this decision, and he was arrested when crossing the border between Poland and Belarus.

4.4 On 24 March 2000, six days after his arrest, the District Court decided to prolong his custody for three months. Mr. Rastorguev's custody was subsequently prolonged on several occasions, always after a court hearing. At no time was Mr. Rastorguev detained without a court order. He had the possibility to challenge the decisions and was informed of his rights on many occasions. He was provided with an interpreter and with the translation of crucial documents at all stages of the proceedings. Mr. Rastorguev was questioned for the first time on 21 March 2000. During the interrogation he was informed of his right not to testify against himself and his right to file the pertinent motions. He also participated in the visit to the scene of crime in the presence of an interpreter. It submits that on 24 March 2000 he was again questioned as a suspect in the presence of an interpreter, when he stated that he

testified of his own free will and that he had no objections to the way the prosecutor was conducting the proceedings. He was questioned on several more occasions, always in the presence of an interpreter,¹ and he was duly informed of his procedural rights. Mr. Rastorguev was acquainted with the content of his case file.² He was at all times informed in writing (in Russian) of all the details concerning the proceedings, for example he was informed that a bill of indictment was lodged with the District Court and he was provided with the translation into Russian.³ In accordance with article 72 of the Code of Criminal Procedure, Mr. Rastorguev was at all stages of the proceedings provided with appropriate translations of all crucial documents,⁴ as well as assisted by an interpreter. Accordingly, he was properly informed of all his rights and obligations.

4.5 Mr. Rastorguev did not apply for release on bail; nor were complaints about the way the proceedings were conducted filed, or any interlocutory appeal against decisions about the prolongation of his detention, although he was informed of the possibility of doing so. He merely made requests on two occasions (in letters dated 29 March 2000 and 9 June 2000), to the prosecutor in charge of the preliminary investigation, asking for an audition and inviting him to “come to his prison”. The investigative authorities commissioned the translation of the above-mentioned letters⁵ in order to be able to understand his requests.

4.6 As to the author’s allegations that her nephew was not properly represented, the State party submits that on 24 March 2000, the Chelm District Prosecutor requested the District Court to appoint a defence counsel for Mr. Rastorguev, in view of the fact that he did not speak Polish. On the same day, Z.Ch. was appointed as counsel. On 24 November 2000, a new counsel, J.Z., was appointed to defend Mr. Rastorguev.

4.7 This lawyer was present during all court hearings. Mr. Rastorguev could have contacted his counsel *inter alia* by mail, as provided for under section 73 of the Code of Criminal Procedure, and have requested him to file a complaint and/or appeal on his behalf, or ask questions concerning his procedural rights or the course of the proceedings. He did not do so. He could also have requested a change of his defence counsel under Section 81 of the Criminal Procedure Code, which he did not do.

4.8 Mr. Rastorguev could have also requested that certain judges recuse themselves from the proceedings if he had any doubts as to their impartiality, but he did not raise any objections about the composition of the court.

4.9 With respect to the argument that he was not able to file a cassation appeal to the Supreme Court, the State party submits that on 22 December 2001, he requested the Supreme Court to grant him legal aid for the purpose of initiating cassation proceedings. Following this request, the Lublin Court of Appeal appointed a defence counsel for him on 14 January 2002. However, this lawyer refused to lodge a cassation appeal with the Supreme Court, as he considered that the prerequisites for a cassation appeal were not met.

¹ All available interrogation reports on file, including the reports dated 7 and 26 June 2000, are signed by an interpreter and by Mr. Rastorguev, who acknowledged that the content of the reports was read and translated to him into Russian.

² The State party provided a copy of the document, signed by the interpreter and by Mr. Rastorguev, who acknowledged that he was acquainted with the case file.

³ A copy of the translation into Russian is available on file.

⁴ The following documents are translated: decisions to extend Mr. Rastorguev’s detention dated 4 September and 28 November 2001; the judgment of the District Court of Lublin (first instance court); the copy of the indictment dated 29 June 2000; the judgment of the Appeal Court; the statement of reasoning of the judgment of the Appeal Court; the letter dated 29 March 2000 sent by Mr. Rastorguev to the prosecutor.

⁵ The copy of the letter dated 29 March 2000 is provided (the translation into Polish).

On 11 March 2002, Mr. Rastorguev was informed about this decision and the fact that, under domestic law, a cassation appeal had to be prepared and signed by a lawyer. Mr. Rastorguev did not avail himself of this opportunity and did not appeal against the decision of 11 March 2002. Neither did he request the court to appoint another counsel who could lodge a cassation appeal.

4.10 The State party submits that Mr. Rastorguev finally did find a legal counsel who filed a cassation appeal on his behalf in the Supreme Court. The Court dismissed the appeal on 1 October 2002 as manifestly ill founded.

4.11 The State party argues that Mr. Rastorguev did not exhaust all available domestic remedies, in view of the fact that he did not avail himself of the possibility of filing motions or interlocutory appeals, did not request the appointment of different defence counsel and did not complain about the partiality of trial judges. The author's claim that her nephew was unable to lodge a cassation appeal to the Supreme Court is groundless, as he did file such an appeal.

Author's comments on State party's observations

5.1 On 23 March 2009, the author refuted the arguments of the State party. She recalls that she is a sister of Mr. Rastorguev's mother. Her birth certificates prove this close relation. She also points out that due to the fact that her nephew's contact with the European Court of Human Rights was lost, her nephew decided to ask her, as his closest available relative, to lodge a complaint with the Committee on his behalf. The author has also attached the power of attorney by which Mr. Rastorguev authorizes the author to represent his interests.

5.2 As to the State party's argument that the communication should be inadmissible because it is being examined under another international procedure, the author submits that, indeed, in 2003, her nephew submitted a complaint to the European Court of Human Rights. For unknown reasons his subsequent correspondence to the Court was not received by the Court's Secretariat. Correspondence from the European Court addressed to him also did not reach him. Consequently, her nephew's case was discontinued, and the European Court did not examine his case either on admissibility or on the merits. She refers to the Committee's practice that inadmissibility decisions by the European Court on the basis of the fact that the complaint was not lodged within six months of exhaustion of domestic remedies should not be considered as a ground for inadmissibility. She claims that the receipt and registration of the individual complaint by the European Court with its subsequent discontinuance decision does not mean it was "considered" by the Court.

5.3 With regard to the argument of non-exhaustion of domestic remedies, the author submits that in order for her nephew to submit requests for his release, to lodge complaints against the decisions about his detention and its prolongation, to request for a change of lawyer, he should have been aware of the procedures and know how to write such submissions. The author reiterates that her nephew does not speak Polish and was not familiar with the criminal procedure law of Poland, as he is not a lawyer. To avail himself of the remedies mentioned by the State party he required help from a lawyer. She claims that the State party does not contest that her nephew was not provided with legal assistance by the lawyers assigned to him. The State party does not refute her claim that during pretrial investigation he was questioned in the absence of a lawyer.

5.4 As to the rejection of the cassation appeal on 1 October 2002, the author claims that the lawyer who submitted the cassation appeal did not meet her nephew prior to submission of the appeal and did not discuss the issues that her nephew would have wanted raised on cassation.

5.5 The author argues that lack of legal professionalism of lawyers is common in the State party and violations of the right to defence are widespread. In the absence of legal assistance from Polish lawyers, there were no effective domestic remedies available.

Committee's decision on admissibility

6.1 On 8 July 2009, just prior to its ninety-sixth session, the Committee examined the admissibility of the communication. As to the State party's argument that the author had no authorization to represent her nephew, the Committee noted that it had received written evidence of the representative's authority to act on the behalf of Mr. Rastorguev and referred to rule 96 (b) of its rules of procedure, which provides for such a possibility. It concluded that the author had proper standing to act on behalf of her nephew and that the communication was therefore not inadmissible for this reason.

6.2 In accordance with article 5, paragraph 2 (a), of the Optional Protocol, the Committee had ascertained that a similar complaint filed by the author in 2003 was discontinued by the European Court of Human Rights. The Committee noted also that on acceding to the Optional Protocol, the State party had entered a reservation to article 5, paragraph 2 (a), of that Protocol "that would exclude the procedure set out in article 5 (2) (a), in cases where the matter has already been examined under another procedure of international investigation or settlement". The Committee noted that in the present case, however, the European Court had not "examined" the case within the meaning of article 5, paragraph 2 (a), of the Optional Protocol. It concluded that there was therefore no impediment arising out of this provision of the Optional Protocol, bearing in mind the State party's reservation.

6.3 With respect to the alleged violation of article 7 of the Covenant, the Committee considered that the author had failed to sufficiently substantiate, for purposes of admissibility, how her nephew's unawareness of the reasons for his arrest would amount to inhuman or degrading treatment. Accordingly, this part of the communication was declared inadmissible under article 2 of the Optional Protocol.

6.4 As regards the author's claims relating to article 14, paragraph 1, of the Covenant, the Committee observed that the author had not provided any explanation on how her nephew's right under this provision were violated. It concluded that the author had failed to sufficiently substantiate this claim, for purposes of admissibility, and declared it inadmissible under article 2 of the Optional Protocol.

6.5 The Committee further noted the author's claim that her nephew's right under article 26 were violated as he had been allegedly discriminated by the Polish authorities on the basis of his nationality. It considered that the author had failed to sufficiently substantiate this claim, for purposes of admissibility, and declared it inadmissible under article 2 of the Optional Protocol.

6.6 Finally, with regard to the requirement of exhaustion of domestic remedies, the Committee noted the State party's observation that the author had not resorted to the possibility of filing motions or interlocutory appeals, and had not requested the appointment of different defence counsel or the exclusion of trial judges. The Committee further noted the author's argument about the lack of awareness of Mr. Rastorguev of Polish criminal procedure law, language barriers with counsel, and the alleged lack of professionalism of the lawyers assigned to him. The author claimed that the lawyer who submitted an appeal had not met her nephew prior to filing the appeal and had not discussed the issues that her nephew would have wanted to have raised. The Committee recalled its jurisprudence that while the Covenant does not entitle an accused to choose counsel provided to him free of

charge, measures must be taken to ensure that counsel, once assigned, provides effective representation in the interest of justice.⁶ In this connection, the Committee considered that the question of the exhaustion of domestic remedies was closely linked to the issue of effective legal aid and should be examined on the merits. It thus declared the communication admissible regarding the author's claims under articles 9, paragraphs 1, 2 and 3; and 14, paragraph 3 (b), of the Covenant.

State party's observations on the merits

7.1 The State party submitted its observations on the Committee's admissibility decision by a note verbale dated 2 February 2010. It contends that Mr. Rastorguev was apprehended in accordance with the law and he was brought promptly before a judge. He was arrested for the reasons contained in an arrest warrant issued on 9 February 2000.

7.2 Mr. Rastorguev was provided with free legal aid before the courts of both instances. Subsequently, a cassation appeal was lodged with the Supreme Court on his behalf, by a lawyer of his own choice, and, therefore, on this occasion the author could have also complained about possible shortcomings in the criminal proceedings. In any event, according to the State party, it is noteworthy that allegations such as lack of information on the reasons for arrest at the time of apprehension and subsequent application for detention on remand; absence of interpreter in the course of the above activities; or lack of possibility to communicate with counsel, constitute valid grounds of appeal, which are always taken into account by a higher court. However in the present case, the State party points out that the Supreme Court had found that the cassation appeal was manifestly ill-founded.

7.3 In the light of all the above-mentioned considerations, the State party concludes that no violation of Mr. Rastorguev's rights under the Covenant has taken place.

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

8.1 Commenting on the State party's observations, the author, in her submission of 12 July 2010, reaffirms her initial allegations and maintains that Mr. Rastorguev's rights under article 9, paragraphs 1, 2, 3; and article 14, paragraph 3 (b), have been violated.

8.2 With respect to the alleged violation of article 14, paragraph 3 (b), the author submits that the State party has contested neither the fact that Mr. Rastorguev had no knowledge of the Polish language and of criminal procedure legislation of Poland nor that he was questioned in the absence of a lawyer. It also did not refute Mr. Rastorguev's claim that he had no possibility to consult his lawyer during the pretrial investigation.

8.3 The author claims that the State party has not submitted any concrete evidence that Mr. Rastorguev was provided with free legal assistance before the court of two instances and maintains that no adequate legal aid was provided to her nephew. She maintains that there was a language barrier between Mr. Rastorguev and his lawyers, and the State party failed to submit any concrete evidence either on the fact that the lawyers assigned ex officio to Mr. Rastorguev have command of the Russian language or on the assistance of an interpreter made available to her nephew.

8.4 The author claims that the lawyer who lodged a cassation appeal on behalf of Mr. Rastorguev did not meet him and did not discuss the issues which Mr. Rastorguev would have wished to raise, including issues concerning the violation of his civil rights. She further submits that Mr. Rastorguev had no possibility to appeal against the violation of his

⁶ See, inter alia, communications No. 253/1987, *Kelly v. Jamaica*, Views adopted on 8 April 1991, para. 5.10; No. 250/1987, *Reid v. Jamaica*, Views adopted on 20 July 1990, para. 11.4.

rights under the International Covenant on Civil and Political Rights because he was not provided with adequate legal aid, and the lawyers representing his interests at different stages of criminal proceedings failed to raise the violation of his Covenant's rights in their appeals. Thereby, the author claims that Mr. Rastorguev had no effective legal remedy of which he could have availed himself.

8.5 With respect to the alleged violation of article 9, paragraphs 1, 2 and 3, of the Covenant, the author refers to the State party's submission that Mr. Rastorguev was arrested in accordance with the law and was brought promptly before a judge. She submits that, in the view of the State party, in order to comply with the obligation laid down in art. 9, paragraph 3, it was sufficient to arrest Mr. Rastorguev for seven days on the basis of an arrest warrant issued by the court. The author considers that, in the sense of article 9, paragraph 3, of the Covenant, the competent Polish authorities were not only obliged to arrest on the basis of a court decision, but also to bring the person promptly before a judge, in order for the arrested person to have the possibility to personally present arguments against his arrest directly to a judge or other officer authorized by law to exercise judicial power.

8.6 The author submits that the State party has not contested the fact that Mr. Rastorguev was arrested on 18 March 2000 and was brought before a judge for the first time on 24 March 2000, i.e. six days after the time of his arrest. She challenges the State party's contention that Mr. Rastorguev was brought promptly before the court. She recalls general comment No. 8 (1982) on the right to liberty and security of persons, in which the Human Rights Committee explains that the wording "promptly" in art. 9, paragraph 3, means that the delay must not exceed a few days (para. 2), and also recalls the Committee's Views in *Borisenko v. Hungary*, where it concluded that the author's detention for three days before being brought before a judicial officer did not meet the requirement of promptness in the sense of art. 9, paragraph 3, of the Covenant insofar as no explanation on the necessity for such a delay was provided.⁷ The author claims that the State party has not provided sufficient explanations to justify the delay of six days before bringing her nephew before a judge and considers that this delay is too long and does not meet the requirement of promptness in the sense of art. 9, paragraph 3, of the Covenant. Therefore, the author claims that the State party violated Mr. Rastorguev's rights under article 9, paragraphs 1, 2 and 3, of the Covenant.

Issues and proceedings before the Committee

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 claim that no adequate legal aid was provided to her nephew, and that he could neither communicate with his lawyer because of the language barrier nor prepare his defence, as he did not have the assistance of an interpreter. It also notes the State party's argument that throughout the criminal proceedings, including in court, Mr. Rastorguev was represented by a lawyer (assigned either ex-officio or, as was the case before the Supreme Court, by a privately retained lawyer), and he was provided with an interpreter and the translation of important documents at all stages of the proceedings. According to the State party, he could also have contacted his lawyer, including by mail, and requested him to file complaints on his behalf or inquire about his

⁷ Communication no. 852/1999, Views adopted on 14 October 2002, para. 7.4.

procedural rights or the conduct of proceedings. He could also have requested a change of lawyer. However, he did not avail himself of these possibilities.

9.3 The Committee also notes the author's claim that the legal aid lawyer who represented Mr. Rastorguev did not contact him before filing the appeal against the decision of the first instance court. In this connection, the Committee recalls that, although it is incumbent on the State party to provide effective legal aid representation, it is not for the Committee to determine how this should have been ensured, unless it is apparent that there has been a miscarriage of justice.⁸ Notwithstanding the author's claim, the information available to the Committee does not contain indications that the lawyer's conduct in the appeal process was contrary to the interests of justice.⁹

9.4 With respect to the cassation appeal, the author claims that the legal aid lawyer refused to lodge a cassation appeal because, in his view, the prerequisites for such an appeal were not met. However, the Committee notes the State party's argument that Mr. Rastorguev was duly informed about the refusal and advised to find another lawyer to submit the cassation appeal. It further observes that a cassation appeal with the Supreme Court was submitted on his behalf by a lawyer of his own choice, and was dismissed as manifestly ill-founded. The Committee notes the author's claim that the lawyer did not meet her nephew prior to the submission of the appeal and therefore could not discuss with the lawyer the issues that Mr. Rastorguev would have wished to raise on appeal. In this respect, the Committee recalls its jurisprudence that the State cannot be held responsible for the conduct of a privately retained lawyer.¹⁰

9.5 On the basis of the material available to it, the Committee cannot conclude that Mr. Rastorguev's lawyers were unable to represent him adequately, or that they displayed lack of professional judgment in the conduct of his defence. There is nothing in the file which suggests that it should have been manifest to the courts that the lawyers' conduct was incompatible with the interests of justice.

9.6 The Committee must also address the author's allegation that Mr. Rastorguev could not communicate with his lawyer and properly prepare his defence because of the language barrier. The Committee notes the State party's observations that Mr. Rastorguev was assisted by an interpreter during the interrogations and the court hearings. However, the author has not indicated the reasons why Mr. Rastorguev could not have made use of the opportunity that the interpreter was present during the hearings in order to address the court with his claims regarding the alleged violation of his rights, such as the alleged absence of an interpreter during his meetings with the lawyer, the inadequate preparation of his defence, and the alleged lack of professionalism of his defence counsel. The material before the Committee reveals that Mr. Rastorguev at no point during the court proceedings addressed the judge with such requests.

9.7 The Committee takes note of the author's argument that Mr. Rastorguev had no possibility to complain against the alleged violation of his rights, in the absence of an interpreter and adequate legal aid. However, these allegations seem to be in contradiction with the fact that Mr. Rastorguev addressed himself to the authorities on certain issues. Thus, as it transpires from the materials on file, he made requests on two occasions (in letters dated 29 March 2000 and 9 June 2000) to the prosecutor in charge of the preliminary

⁸ Communication No. 667/1995, *Ricketts v. Jamaica*, Views adopted on 4 April 2002, para. 7.3.

⁹ Communications No. 536/1993, *Perera v. Australia*, decision on inadmissibility adopted on 28 March 1995, para. 6.3; and No. 618/1995, *Campbell v. Jamaica*, Views adopted on 20 October 1998, para. 7.3.

¹⁰ Communication Nos. 226/1987 and 256/1987; *Sawyers; McLean v. Jamaica*, Views adopted on 11 April 1991; communication No. 493/1992, *Griffin v. Spain*, Views adopted on 4 April 1995, para. 9.8.

investigation, asking for an audition and inviting him to “come to his prison”. The investigative authorities commissioned the translation of the above-mentioned letters from Russian into Polish in order to be able to respond to his requests. On 22 December 2001, he also requested the Supreme Court to appoint a lawyer for the purpose of initiating cassation proceedings. Therefore, the Committee finds the author’s argument that Mr. Rastorguev had no possibility to lodge complaints and/or appeals or any other motions related to the proceedings and the alleged violation of his rights because of the language barrier as unconvincing.

9.8 In view of the fact that the decision of the Committee to declare the present communication admissible was linked to the issue of effective legal aid and that, as it transpires from the information contained in the file, Mr. Rastorguev had access to such legal aid, the Committee concludes that the facts before it do not reveal violations of Mr. Rastorguev’s rights under article 9 and article 14, paragraph 3 (b), 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 do not reveal a breach of any provision of 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.]

**Q. Communication No. 1530/2006, *Bozbey v. Turkmenistan*
(Views adopted on 27 October 2010, 100th session)***

<i>Submitted by:</i>	Omar Faruk Bozbey (represented by counsel, Timur Misrikhanov)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Turkmenistan
<i>Date of communication:</i>	27 September 2006 (initial submission)
<i>Subject matter:</i>	Inhuman treatment, right to have the free assistance of an interpreter if one cannot understand or speak the language used in court
<i>Procedural issue:</i>	None
<i>Substantive issue:</i>	Degree of substantiation of claims
<i>Articles of the Covenant:</i>	2, paragraph 1; 9, paragraphs 1 and 4; 10, paragraph 1; 14, paragraphs 1 and 4; 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 27 October 2010,

Having concluded its consideration of communication No. 1530/2006, submitted to the Human Rights Committee on behalf of Mr. Omar Faruk Bozbey 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. The author of the communication is Mr. Omar Faruk Bozbey, a Turkish national, born in 1944, who worked in Turkmenistan between 1998 and 2005 and who currently resides in Mersin, Turkey. He claims a violation by Turkmenistan of his rights under article 2, paragraph 1, article 9, paragraphs 1 and 4, article 10, paragraph 1, article 14, paragraphs 1 and 4, and article 26 of the International Covenant on Civil and Political Rights. He is represented by a counsel, Mr. Timur Misrikhanov.¹

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

¹ The Optional Protocol entered into force in relation to Turkmenistan on 1 May 1997.

The facts as presented by the author

2.1 The author, owner and president of the Bozbey Company (a construction company) arrived in Turkmenistan in 1998, to construct an agro-industrial complex. Pursuant to Presidential Decree 3644 of 16 March 1998, the company concluded a contract with the Saparmyrat Turkmenbashi Foundation, the foundation of the President of Turkmenistan. According to the author, the same Decree exempted his company from taxes and customs duties. To implement the contract, in October 1998 he created a subsidiary enterprise in the country.

2.2 The author claims that in 2003, on an unspecified date, he received a call from the chief of the State Tax Service who demanded a bribe of 200,000 United States dollars and the construction of a heliport for the President of Turkmenistan at the expense of the company. The author refused to comply. The next day, tax inspectors searched his office and seized all the company's documents. The Tax Service claimed that his companies owed the State 6,769,443,500 Turkmen manats (US\$ 1.3 million) in taxes and fines.

2.3 Since the author refused to pay this amount, criminal proceedings were instituted against him. On 21 April 2004, the Ashgabat District Court found him guilty of several economic offences, including tax evasion and ordered the confiscation of all his property, including his company, and sentenced him to 14 years of imprisonment. The same day, he was detained. According to the author, criminal proceedings were initiated on the order of the President himself.

2.4 The author claims that all the court proceedings were conducted and the verdict was delivered in the Turkmen language, which he did not understand. He had to ask for help from other prison inmates to translate the verdict and to prepare his appeal. Both during the trial and after he started serving his sentence, the author unsuccessfully complained to the courts regarding the violation of his right to have an interpreter during the proceedings.

2.5 The author claims that he was subject to degrading and humiliating conditions of detention because of the size and the conditions of the cell in which he was kept, the insufficient quantity of food and water provided, and of the way prisoners were treated by prison guards.

2.6 On 26 April 2004, the author filed a cassation appeal before the criminal panel of the Ashgabat City Court. On 2 June 2004, the City Court confirmed the first instance verdict and dismissed the appeal. The author then filed a complaint before the Supreme Court, which was rejected on 16 November 2004.

2.7 The author complained about the conditions of his detentions to different authorities, including the Director of the prison, prosecutors responsible for supervising the lawfulness of detention conditions, the Prosecutor General of Turkmenistan and the Turkish embassy in Ashgabat. Therefore, the author contends that he exhausted all available domestic remedies.

2.8 While he was in detention, representatives of the Secret Services and law enforcement officers twice asked him to sign a confession and promised to free him if he did so. The author refused to sign. He affirms that he was released on 29 October 2005.

The complaint

3.1 The author contends that he has exhausted all available and effective domestic remedies.

3.2 The author claims that the State party violated his rights under article 2, paragraph 1, article 9 paragraphs 1 and 2, article 10, paragraph 1, article 14, paragraphs 1 and 4 and article 26 of the Covenant.

State party's observations on admissibility and merits

4.1 The State party confirms that, on 21 April 2004, the author was convicted to 14 years of imprisonment for various economic crimes. The State party restates the main points of the verdict and maintains that the author's guilt was proven beyond doubt by numerous witnesses and documentary evidence. It also states that in accordance with international law the Turkish Embassy in Turkmenistan had unimpeded access to the author and that the State party on several occasions expressed willingness to allow representatives of international organizations to have access to the investigation.

4.2 The State party states that no violence was inflicted on the author while he was serving his sentence. It submits that in October 2005 the author received a presidential pardon and returned to his home country.

Authors' comments

5.1 The author submits that the hearings of the Ashgabat District Court were not transparent, unbiased and just, and that neither that court, nor the higher instance took into consideration any of the documents proving his innocence. He also submits that the seizure of the assets of his company was illegal. He further submits that he was subjected to psychological pressure by the secret police to "accept the tax claims" and that interrogation officers of the Finance Department of the Ministry of Internal Affairs used "physical force" against him and tortured him in order to compel him "to withdraw his objections to taxation".

5.2 The author explains at length that his company was supposed to be exempted from taxation based on a Presidential Decree 3644 and that according to him the subsidiary company, created by him in Turkmenistan should also have been exempted from taxation. He refutes in detail the criminal charges on which he was convicted by the domestic courts.

5.3 The author submits that following the announcement of the court verdict on 21 April 2004, he had immediately been taken to a dirty dungeon, which had no windows and where there was no "possibility to receive air and light". The dungeon had no toilet and there were 35 people in it in 25 square metres. The author claims that he had been stripped naked and left without food and water for three days. He also claims that he was denied medicines for his heart condition, even though the medication was delivered to the prison, and that his medication was sold on the market by the prison staff. During his stay in the dungeon he was visited by a prosecutor, whose name he did not know and who offered to transfer him elsewhere if he "accepted the taxation", signed a confession and did not attempt to appeal to international courts. When the author refused, he was threatened that he would be kept in prison for 15 years and would die there.

5.4 After being kept in the dungeon for an unspecified period of time, the author was transferred to the Tecen prison, 220 kilometres away from the city where his wife resided. He was again tortured. When he refused to sign a confession, he was placed in a cell of two by three metres, which he had to share with two other prisoners. His brothers and his Turkish solicitor, who wanted to visit him, were denied entry visas to Turkmenistan.

5.5 On 9 November 2004, the author was transferred to the Bayramali prison in Mary province, a further 250 kilometres away from his residence and his wife. He was kept in a section called the "isolator". In the isolator there were rats, insects and dirt. The authorities continued to exercise pressure on him to sign the "confession" that he would agree to pay the taxes due by selling his commodities and to state that he would not claim any rights or complain. He was threatened with a permanent transfer to the Ovadantepe prison, where prisoners are kept in underground cells. The author was tortured again and denied medical treatment by the prison staff.

5.6 The author claims that when an amnesty, in which he was included, was declared by the President on 20 October 2005, the authorities again attempted to force him to sign a “confession”. He was transferred to the prison in Ashgabat. Around midnight on 28 October 2005, he was visited by three officers from the National Security Service. They wanted him to sign legal documents revoking a contract, concluded in the name of his company, to “accept the taxes which have been collected” and to undertake that he would not make any complaints or apply to any international arbitration institution regarding his investments in the country. He refused.

5.7 In the interim the author’s wife had learned that he was in the Ashgabat prison and had alerted the Turkish Embassy. An official of the Embassy requested to see him and eventually was allowed to accompany him to the airport. The author was repatriated to Turkey in the early morning hours of 29 October 2005 with the assistance of the Turkish Embassy’s official.

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 article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

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

6.3 The author claims that he is a victim of violations of article 2, paragraph 1, article 9, paragraphs 1 and 2, and article 26 of the Covenant. The author, however, has provided no detail and no supporting documents in substantiation of these claims. In the circumstances, the Committee considers that this part of the communication is unsubstantiated, for purposes of admissibility, and is therefore inadmissible under article 2 of the Optional Protocol.

6.4 The Committee notes the author’s claim that his rights under article 14, paragraph 4, of the Covenant were violated in relation to his conviction for economic crimes by the Ashgabat city District Court. Since article 14, paragraph 4, applies only to juvenile persons, and the author is not a juvenile, the Committee considers that the above article is not applicable to the instant case.

6.5 The Committee takes note of the State party’s arguments that the author had been convicted in accordance with the domestic legislation. The Committee, however, observes the author’s allegation that his right to the assistance of an interpreter was violated. This allegation has not been refuted by the State party. The Committee considers that this claim gives rise to fair trial issues under article 14, paragraphs 1 and 3 (f) of the Covenant. Accordingly, the Committee declares this part of the communication admissible and proceeds to the consideration of its merits.

6.6 Regarding the author’s claims under article 10, paragraph 1, of the Covenant, the Committee observes that the author has provided a detailed account of the conditions in which he was held following his conviction and notes that the State party has limited its submission to a blanket statement that no violence was inflicted on the author while he was serving his sentence. The Committee considers this part of the communication sufficiently substantiated and, not finding other obstacles to admissibility, declares it admissible.

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 takes note of the author's claim, not contested by the State party, that all court proceedings were conducted and the verdict was delivered in the Turkmen language, which he did not understand. The Committee considers that not providing the author with an interpreter when he could not understand and speak the language used in court, constitutes a violation of article 14, paragraph 1, read in conjunction with article 14, paragraph 3 (f), of the Covenant.

7.3 With respect to the author's claims regarding his conditions of detention in Ashgabat and in the Tecen and Bayramali prisons, the Committee notes the detailed description made by the author (see paras. 5.3 to 5.5 above), which has not been contested by the State party. The Committee finds that confining the author in such conditions constitutes a violation of his right to be treated with humanity and with respect for the inherent dignity of the human person under article 10, paragraph 1, of the Covenant.²

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 disclose violations by the State party of article 14, paragraph 1, read in conjunction with article 14, paragraph 3 (f) and article 10, paragraph 1, 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 and, to that effect, take appropriate steps to: institute criminal proceedings for the prosecution and punishment of the persons responsible for the treatment to which the author was subjected; and provide the author with appropriate reparation, including compensation. The State party is also under an obligation to take steps to prevent similar violations occurring 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 remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. In addition, it requests the State party to publish the Committee's Views.

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

² See for instance communications No. 590/1994, *Bennett v. Jamaica*, Views adopted on 25 March 1999, paras. 10.7 and 10.8; No. 695/1993, *Simpson v. Jamaica*, Views adopted on 31 October 2001, para. 7.2; No. 704/1996, *Shaw v. Jamaica*, Views adopted on 2 April 1998, para. 7.1; and No. 734/1997, *McLeod v. Jamaica*, Views adopted on 31 March 1998, para. 6.4.

**R. Communication No. 1531/2006, *Cunillera Arias v. Spain*
(Views adopted on 26 July 2011, 102nd session)***

<i>Submitted by:</i>	Jesús Cunillera Arias (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	27 July 2006 (initial submission)
<i>Decision on admissibility:</i>	10 March 2009
<i>Subject matter:</i>	Waiver of representation by a lawyer and <i>procurador</i> (court attorney) in criminal proceedings
<i>Procedural issue:</i>	Failure to substantiate claims; incompatibility <i>ratione materiae</i>
<i>Substantive issue:</i>	Equality before the courts
<i>Article of the Covenant:</i>	14, paragraph 1
<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 26 July 2011,

Having concluded its consideration of communication No. 1531/2006, submitted to the Human Rights Committee 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 27 July 2006, is Jesús Cunillera Arias, a Spanish national who claims to be the victim of a violation by Spain of articles 2, paragraphs 1 and 2; 14, paragraphs 1 and 3 (b) and (d); 16; and 26 of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The author is not represented by counsel.

* 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, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

1.2 On 31 March 2007, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, granted the State party's request to consider the admissibility of the communication separately from the merits.

The facts as submitted by the author

2.1 On 21 November 2002, the author filed a complaint with Madrid Investigating Court No. 13 alleging negligence — defined as a criminal offence under article 467.2 of the Criminal Code¹ — on the part of the court-appointed lawyer and *procurador* (court attorney) in a civil suit in which he was the plaintiff. Their appointment was a legal requirement and the author did not have confidence in them. They never informed him of the status of the proceedings; they never consulted with him; they failed to contest an appeal; and, in the pretrial hearing, they prevented the author from intervening and presenting evidence.

2.2 After summoning the parties to give their statements, Investigating Court No. 13 issued a stay of proceedings, without notifying the author, whose new lawyer did not challenge the decision or give him any information. The author requested a copy of the proceedings, but his request was denied.

2.3 On 1 May 2003, the author filed an application for review (*reposición*) of the decision to stay proceedings, in which he invoked, inter alia, article 6.3 (c) of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (the right of all persons charged with a criminal offence to defend themselves in person). He argued, inter alia, that there was a requirement to act through a lawyer and a *procurador* only in civil and criminal proceedings but not in labour or administrative proceedings, despite the fact that the latter were often more complex. The author asked that his application be accepted — even though it was not lodged by a *procurador* — and requested the right to choose a lawyer from the roster to assist him but not to act for him, as he would act on his own behalf in all trial proceedings without the need for the lawyer's signature; he also asked for an up-to-date copy of the judicial proceedings. His application was rejected on 17 June 2003 on the grounds, inter alia, of an irregularity relating to court appearances (*defecto de personificación*) owing to his failure to comply with the provisions of article 118 of the Criminal Procedure Act.

2.4 On 23 June 2003, the author submitted another application to Investigating Court No. 13, this time a request for review (*reforma*) and, in the alternative, an appeal (*apelación*), but the application was rejected on 26 June 2003. The author filed complaint proceedings (*queja*) with the Madrid Provincial High Court, but these were dismissed on 10 November 2003. The Court pointed out that, for an individual to bring a criminal or civil action, article 761 of the Criminal Procedure Act requires the intervention of a *procurador* and lawyer and that this is a binding procedural requirement that entails no infringement of international treaties or laws. The Court dismissed the complaint proceedings because the author failed to comply with this requirement. An application for reconsideration (*súplica*) of this decision was declared inadmissible on 15 January 2004.

2.5 The author instituted *amparo* proceedings before the Constitutional Court, invoking article 6, paragraph 3 (c), of the Convention for the Protection of Human Rights and Fundamental Freedoms, under which persons charged with a criminal offence have the

¹ Article 467.2: "Any lawyer or *procurador* who by act or omission manifestly prejudices the interests entrusted to him/her shall be liable to a 12 to 24-month fine and one to four years' specific disqualification from employment, public office or professional practice or function. If such act or omission was the result of serious negligence, the penalties shall be a 6 to 12-month fine and specific disqualification from professional practice for six months to two years."

right to defend themselves in person. He requested annulment of the previous judicial decisions preventing him from exercising his right to legal counsel of his own choosing and to appear on his own behalf to plead his own defence, assisted, but not replaced, by that counsel. On 20 June 2005, the Court declared his appeal inadmissible on the ground that the author had failed to meet the requirement under article 81, paragraph 1, of the Constitutional Court Organization Act for actions before the Court to be conducted through the intermediary of a *procurador* and for the defence to be provided or overseen by a lawyer.

The complaint

3.1 The author alleges that the facts described constitute a violation of articles 2, paragraphs 1 and 2; 14, paragraphs 1 and 3 (b) and (d); 16; and 26 of the Covenant. He maintains that Spanish law denies citizens the right to appear on their own behalf before civil and criminal courts and requires them to appoint a legal representative who is “imposed on them” without their consent. Furthermore, it offers no legal redress against a representative who does not act in good faith, since that requires direct knowledge of the judicial proceedings, which the client is denied.

3.2 The author points out that the right to appear on one’s own behalf should apply equally to all parties in the proceedings, not only the accused. The author does not reject the assistance of a lawyer, provided that he can choose one himself, that the lawyer does not claim to act for him, and that the author can conduct his case in court himself, be notified of all procedures and take issue with his lawyer, that is, be free to act as he chooses in the defence of his rights.

State party’s observations on admissibility

4.1 In its note verbale dated 31 January 2007, the State party contests the admissibility of the communication for lack of substantiation. It points out that, since the author has not been charged with a criminal offence, article 14, paragraph 3, of the Covenant is not applicable. Moreover, the Covenant does not recognize a right to institute proceedings, whether civil or criminal, without legal counsel. This matter falls outside the scope of the Covenant, which refers exclusively to assistance to persons charged with a criminal offence, a situation the author has never been in.

4.2 The State party draws attention to various communications addressed to the Committee alleging a violation of article 14, paragraph 1, and article 26 of the Covenant on the ground of having been denied the right to appear before the Constitutional Court without being represented by a *procurador* – a requirement not imposed on applicants who are qualified lawyers. The State party recalls that the Committee declared these communications² inadmissible because, accepting the Constitutional Court’s argument, it found that the requirement for a *procurador* reflects the need for a person with knowledge of the law to be responsible for handling an application to that Court.

Author’s comments on the State party’s observations on admissibility

5.1 On 3 July 2007, the author transmitted his comments on the State party’s observations. He repeats that the right to defend oneself in person, as with any other right, must apply to all parties in the proceedings, not only the accused. In this connection, he

² Communications No. 865/1999, *Marín Gómez v. Spain*, Views adopted on 22 October 2001, para. 8.4; No. 866/1999, *Torregrosa Lafuente et al. v. Spain*, Views adopted on 16 July 2001, para. 6.3; and No. 1006/2001, *Martínez Muñoz v. Spain*, Views adopted on 30 October 2003, para. 6.4.

invokes the principle of equality before the courts under article 14, paragraph 1, and the prohibition of discrimination contained in article 26 of the Covenant.

5.2 The author points out that the decisions of the Committee cited by the State party are not applicable in the present case, as this case concerns the right to defend oneself in person before a criminal court. Spanish civil and criminal procedural law expressly and without exception denies all citizens, including practising lawyers, the right to defend themselves in person. The decisions cited by the State party refer only to *amparo* proceedings in the Constitutional Court, which has its own rules.

The Committee's decision on admissibility

6.1 The Human Rights Committee considered the admissibility of the communication on 10 March 2009 at its ninety-fifth session.

6.2 The author maintains that, under Spanish procedural law, he was not permitted to act on his own behalf before the civil or criminal courts without the assistance of a lawyer and a *procurador* or to participate actively in the trial in which he was a party when the court-appointed lawyer and *procurador* failed to defend his interests. The author maintains that these facts constitute a violation of articles 2, paragraphs 1 and 2; 14, paragraphs 1 and 3 (b) and (d); 16; and 26 of the Covenant. The Committee was of the view that, for the purposes of admissibility, the author had not sufficiently substantiated his claim of a violation of articles 2, paragraphs 1 and 2; 16; and 26. It consequently found this part of the communication inadmissible under article 2 of the Optional Protocol.

6.3 As to the author's complaint under article 14, paragraph 3 (b) and (d), the Committee recalled that these provisions recognize rights that are applicable only to persons accused of a criminal offence. Given that the author does not fall into this category, he cannot invoke them. The Committee consequently found this part of the communication to be incompatible *ratione materiae* with the provisions of the Covenant and thus inadmissible under article 3 of the Optional Protocol.

6.4 The author also invokes article 14, paragraph 1, and maintains, inter alia, that the right to appear on one's own behalf must be applied equally to all parties in the proceedings, not only the accused. The Committee considered that the author had substantiated that complaint sufficiently for the purposes of admissibility and that the complaint raises issues related to the right of all persons to a fair hearing by a court of law. Moreover, the facts in the present communication differ from those presented in other communications, where what was at issue was the requirement to be represented by a *procurador* before the Constitutional Court. Since there were no other obstacles to admissibility, the Committee considered this part of the communication to be admissible.

State party's observations on the merits

7.1 On 2 October 2009, the State party submitted its observations on the merits of the communication. It asks the Committee to reject the communication as domestic remedies have not been exhausted and there has been no violation of the Covenant.

7.2 According to the State party, if it is accepted that an application is obligatory when filing for *amparo* — as implied in the decision on admissibility and accepted by the Committee in previous communications — since the author did not heed the request by the Constitutional Court that he be represented by a *procurador* and assisted by a lawyer and the application was declared inadmissible, it is clear that domestic remedies have not been exhausted in this case. They can only be said to have been exhausted when the complaint that is the subject of the application has been rejected by the Constitutional Court. If the Constitutional Court has legitimately and correctly demanded an application, with no

violation whatsoever of the Covenant, the author has not exhausted domestic remedies for any complaint under article 14, paragraph 1.

7.3 Notwithstanding the above, it should be recalled that the author filed a complaint for alleged professional errors by the lawyer and *procurador* assigned to him by the court for a civil suit in which he was the plaintiff. It is debatable whether what the author claims to have been professional errors — without producing even minimal evidence — were in fact errors. The errors referred to in his complaint concern an irregularity in the application because of lack of proxy — the intention being to prevent the other party from being heard — the remedy for which is well known to legal professionals, and a procedural formality in the hearing where, as the author expressly admitted in his complaint, he was able to appear on his own behalf. He claims to have been prevented from doing so, but does not specify how. Nor does he provide any information on the outcome of the civil suit or the remedies available to him in that connection. The scant information he does provide on this is contained in the criminal complaint filed by him and is offered for the sole purpose of attacking what he calls the representative “imposed on him”. The author only tried to exercise his right to defend himself in criminal proceedings instituted on the basis of his complaint, which did not involve a lawyer at all and that bore only his own name and signature.

7.4 According to the State party, filing a complaint is not an appropriate action to establish the complainant as a party to criminal proceedings, which must be pursued by law in the case of alleged offences like the ones claimed by the author. It is simply an act that brings to the attention of the judicial authority a claim that an offence has been committed, but it does not confer on the complainant the status of prosecutor (*parte acusadora*). Citizens can become a party to criminal proceedings by means of a criminal accusation (*querrela*), but there is no record of the author having filed one. What the file before the Committee does contain is a complaint document signed exclusively by the author. In view of this, it can be stated that the author was not even a party to the proceedings in which he claimed to have been conducting his own defence and which were not intended to determine rights and obligations of a civil nature but to investigate ex officio and possibly sanction an alleged offence. The author’s status was simply that of a complainant, not a party to the proceedings, which were criminal proceedings in which he did not appear in person either with or without the assistance of a lawyer and in which no one had to assist him as he was not a party to the proceedings.

7.5 The State party points out that no one has a right to have a person convicted of a criminal offence and that the Covenant does not require that individuals be able to act as prosecutors in criminal proceedings. Apart from the fact that the alleged errors attributed to his lawyer in the civil suit are debatable, the author’s complaint gave rise to criminal proceedings that were followed up on ex officio and in which the judge found no offence had been committed. There are no objective facts to support the claim that there has been a violation of article 14, paragraph 1, of the Covenant, either in the civil suit (on which no information is provided that would allow that conclusion to be drawn) or in the criminal proceedings.

Author’s comments on the State party’s observations on the merits

8.1 On 14 February 2010, the author submitted comments on the State party’s observations. He states that the Constitutional Court never grants *amparo* to individuals claiming their right to defend themselves in person in criminal or other courts, despite the Committee’s decision concerning communication No. 526/1993, in which the Committee concluded that the author’s right to defend himself in person had not been respected, in

violation of article 14, paragraph 3 (d), of the Covenant.³ Citizens can only appear on their own behalf or on behalf of someone else in labour courts, irrespective of the importance or nature of the matter in question. This applies even in conflicts concerning groups that affect many individuals, which are far more important to society than most of the trivial disputes between individuals in civil cases or the frequently irrelevant minor offences dealt with by the criminal courts.

8.2 In a State governed by the rule of law, a representative cannot be imposed on citizens against their will, since every power of attorney is voluntary, and without consent no legal act or right exists. A representative imposed on a person takes over the case without consulting or passing on information on the judicial proceedings or responding to any of the requests of the client, who loses all oversight or control of the proceedings to which he or she is a party. It is not possible to take legal action against a representative who does not act in good faith, since that requires direct knowledge of the judicial proceedings.

8.3 The author reiterates that he filed a complaint about a lawyer and *procurador* assigned to him in a civil suit; their appointment was a legal requirement and he had no confidence in them. Neither of the two ever informed him of the status of the proceedings or consulted with him about anything; they did not contest a groundless appeal by the defendant and prevented the author from speaking at the pretrial hearing. On the basis of his complaint about these matters, Madrid Investigating Court No. 13 instituted preliminary proceedings. The court dismissed the case after doing no more than summoning the defendants and the author to make a statement, without notifying the author, whose new court-appointed lawyer and *procurador* did not challenge the decision or give him any information. The author requested a copy of the proceedings to find out what their status was, but this information was denied him. In view of this, he asked to be allowed to appear on his own behalf with the assistance of a lawyer of his choice, but his request was rejected. The Madrid Provincial High Court allowed his complaint proceedings, without denying his rights to appear and defend himself. However, its decision complied with domestic law, denying the applicability of the Covenant. The Constitutional Court subsequently rejected the application for *amparo*, stating that the right to defend oneself is central to the right to a defence and must be considered crucial from a constitutional viewpoint and that it is an essential component of fundamental rights. The author also states that the European Court of Human Rights has unequivocally reaffirmed that the right to defend oneself includes the power to actually conduct one's own defence, give instructions to lawyers, question witnesses and exercise the other prerogatives inherent in that right.

8.4 The author states that the right to defend oneself in person, like any other right, must apply equally to all citizens who are a party to proceedings, not just to one party, in accordance with article 14, paragraph 1, of the Covenant.

Issues and proceedings before the Committee

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, in accordance with article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee must decide if the requirement that the author be represented by a lawyer and a *procurador* in criminal proceedings in which he is the complainant contravenes article 14, paragraph 1, of the Covenant. The Committee takes note of the

³ Communication No. 526/1993, *Hill v. Spain*, Views adopted on 2 April 1997, para. 14.2.

observations made by the State party concerning the existence of jurisprudence on this question. It notes, however, that the decisions of the Committee mentioned by the State party refer to complaints focusing solely on the fact that representation by a *procurador* is required in *amparo* proceedings before the Constitutional Court. The claim made in these cases therefore differs from the claim made in the present case.

9.3 The Committee considers that there may be objective and reasonable grounds for the requirement of representation set forth in the law of a given State owing, for example, to the complexity of criminal proceedings. Consequently, on the basis of the information contained in the case file, the Committee considers that there is no objective or reasonable ground for concluding that there has been a violation of article 14, paragraph 1, 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 information before it does not disclose a violation of article 14, paragraph 1, 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 present report.]

**S. Communication No. 1532/2006, *Sedljar and Lavrov v. Estonia*
(Views adopted on 29 March 2011, 101st session)***

<i>Submitted by:</i>	Roman Sedljar and Dmitry Lavrov (not represented by counsel)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Estonia
<i>Date of communication:</i>	26 October 2005 (initial submission)
<i>Subject matter:</i>	Conviction of the authors in violation of fair trial guarantees
<i>Procedural issue:</i>	Same matter being examined under another procedure of international investigation or settlement
<i>Substantive issues:</i>	Fair hearing, right to be presumed innocent, right to defend oneself through legal assistance of his own choosing, right to examine witnesses
<i>Articles of the Covenant:</i>	14, paragraphs 1, 2, 3 (b), (d), (e)
<i>Articles of the Optional Protocol:</i>	2, 5, paragraph (2) (a)

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

Meeting on 29 March 2011,

Having concluded its consideration of communication No. 1532/2006, submitted to the Human Rights Committee by Mr. Roman Sedljar and Mr. Dmitry Lavrov, 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. The authors of the communication are Mr. Roman Sedljar, born in 1963, and Mr. Dmitry Lavrov, born in 1970, both Estonian citizens. They claim to be victims of violations by Estonia of articles 14, paragraphs 1, 2, 3 (b), 3 (d) and 3 (e) of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Estonia on 21 January 1992. Mr. Sedljar is submitting the communication on his own behalf and on behalf of Mr. Lavrov, who has authorized Mr. Sedljar to represent him.

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

The facts as submitted by the authors

2.1 The authors worked as hospital attendants in the psychiatric ward of the Charity Hospital of Narva-Joesuu. The most aggressive mentally sick patients resided in room No. 52: Messrs. V.G., P.K. and R.V. All of them were diagnosed with paranoid schizophrenia.

2.2 On 4 and 5 September 1999, the authors were on duty. Mr. Lavrov submits that he went home at approximately 7 p.m. on 5 September 1999. Between 8 and 9 p.m., the nurse on duty, Ms. M., asked Mr. Sedljar to check room No. 52, because of the noise coming from inside. He discovered that there was a fight between Messrs. V.G. and P.K. He threatened them that if they did not stop fighting he would call the police and they would be placed in isolation, whereupon they stopped fighting. Mr. Sedljar noticed that both men sustained light wounds as a result of the fight. He claims that this was the last time he entered room No. 52. He attended to several other patients and around 11 p.m. went to sleep in the attendants' room. Early in the morning of 6 September 1999, the duty nurse discovered the dead body of Mr. V.G. lying on his bed. The same day, the body was taken to the Narva Hospital morgue and a post-mortem examination was carried out.

2.3 On 9 September 1999, Mr. Sedljar was dismissed from the Charity hospital on the basis of the Director's order for neglect of official duties causing the death of Mr. V.G. The next day, Mr. Lavrov resigned from the hospital on his own initiative.

2.4 On 18 October 1999, a senior inquiry officer from the Sillamae Police charged the authors with causing the death of Mr. V.G. and summoned them to the police station on 20 October 1999. The authors went to the hospital early in the morning of 20 October 1999, to discuss the accusation with the hospital staff. Nurse M. told them that a policeman, one Mr. M., had interrogated her on 19 October 1999 and threatened her with considering her as an accomplice of the authors, should she refuse to sign the interrogation protocol drawn up by the investigating officer. She admitted to not having read the protocol she signed, since she did not have her glasses at hand.

2.5 On 20 October 1999, the authors went to the police station and were questioned. They were arrested as suspects the same day. On 29 October 1999, charges were formally brought against them. The investigation, led by the investigator Ms. V., continued until 5 June 2000. During that period, the authors filed numerous motions in which they requested: (a) to be able to cross-examine the hospital patient Mr. R.V., whose testimony of 19 November 1999 was the main evidence against the authors; (b) to have an assessment of the mental health of R.V. and his ability to act as a witness in the criminal case; and (c) to add to the case file the medical history of Mr. P.K., who had a record of violent crimes but had never been convicted since he was mentally incapable of standing trial. These motions were all rejected on 24 May and 5 June 2000.

2.6 The authors submit that on 19 November 1999, the same day when the police was trying to obtain a testimony by "illegal means" from Mr. R.V., the latter was undergoing intensive treatment at Narva hospital, due to the exacerbation of his mental illness. According to relatives of Mr. R.V., he did not sign any testimony that day. Therefore, the authors submit that the protocol of the interrogation was falsified by the police, and hence "illegal". The authors filed motions related to this matter with the Ida-Virumaa Prosecutor's Office and the General Prosecutor's Office, which were all rejected. None of these motions were included in the authors' court case file. The authors filed a motion with the Yykhvi Administrative Court against the Narva hospital for its refusal to provide information on the above matter, but it was rejected. The subsequent appeals to the Tartus District Court and to the State Court on this issue were also rejected (final decision dated 28 March 2003).

2.7 The authors submit that investigator Ms. V., who was in charge of the investigation, had a direct interest in the outcome of their prosecution. In 1997, her husband worked as a

lawyer in the City Housing Service Narva Elamuvaldus, which organized a “suspect” deal to appropriate an apartment owned by Mr. Lavrov. When the authors learned about this deal and tried to take action, they themselves were charged with the offence of “forcible assertion of private rights” and sentenced to fines. They appealed the fines to the second and third instance courts, but the sentences were upheld. After the 8 November 2000 murder verdict, Mr. Lavrov’s property was confiscated.

2.8 On 15 June 2000, the authors’ criminal case on the death of Mr. V.G. was sent to the Ida-Viru County court for consideration. On 22 June 2000, the authors filed motions in which they listed violations of the Criminal Procedure Code in their case, including the refusal to allow them to examine the medical expertise regarding Mr. R.V.’s sanity and his ability to be a witness in the criminal case and the refusal to allow them to question the psychiatrists who conducted his psychiatric evaluation. They also asked that a new investigation be conducted, given that investigator Ms V. had a direct interest in the outcome of the case. These motions were all unsuccessful.

2.9 On 1 October 2000, the authors learned that Mr. R.V. had been found dead on 9 September 2000 in an area some eight kilometres away from the psychiatric hospital in which he was interned at the time. The authors questioned the cause of his death, provided in the death certificate, which states that Mr. R.V. died of hypothermia, while according to the information of the meteorological service the air temperature on that date was +17°C. The authors filed a request to the State Prosecutor’s Office to investigate the circumstances of the death of Mr. R.V. but this request was refused. The refusal was unsuccessfully appealed through three court instances.

2.10 On 2 November 2000, the authors learned that the court hearing would be held the following day, and as a result, neither they, nor their State-appointed counsel, could prepare for the hearing. The authors’ request to appoint the same counsel who had defended them during the pretrial investigation was rejected by the court. During the trial the authors maintained that they were innocent and that Mr. V.G. died as a result of injuries inflicted on him by his roommate Mr. P.K. during a fight. On 8 November 2000, the authors were convicted of the premeditated murder of a mentally deranged person and sentenced to 15 years of imprisonment by the Ida-Viru County Court, in accordance with article 101, paragraphs 2 and 7, of the Criminal Code.

2.11 The authors filed the same motions with the court of first instance as during the pretrial investigation, as well as a motion for calling a relative of Mr. R.V. as a witness, who could have confirmed that Mr. R.V. had not signed any testimony. All these motions were rejected by the court. From the beginning of the hearing, the court followed only the prosecutors’ arguments.

2.12 The authors appealed their verdict to the Viru Court of Appeal. The authors submitted motions similar to the ones presented during the first instance trial. One relative of Mr. R.V., who could confirm that Mr. R.V. did not sign any testimony on 19 November 1999, volunteered to testify in front of the Viru Court of Appeal but was not given the opportunity to do so. The defence lawyer, hired by Mr. Lavrov’s family, presented medical certificates confirming that Mr. R.V. underwent an intensive treatment at Narva hospital from 21 October until 30 November 1999 and could not have been physically interrogated at the police station on 19 November 1999, as indicated in the protocol of the interrogation. On 23 March 2001, the Viru Court of Appeal reduced the authors’ sentence from 15 to 13 years of imprisonment, changing the qualification of the crime from “premeditated murder” to “murder”. On two occasions, (on 30 May and 20 June 2001), the Supreme Court denied the authors leave to appeal further.

2.13 Throughout the summer of 2001, the authors sent numerous complaints to the State Prosecutor’s office, requesting the re-opening of their criminal case because of the forgery

of the interrogation protocol of 19 November 1999 and of a medical certificate on Mr. R.V.'s state of mental health of 31 December 1999. The State Prosecutor's office denied these requests. Its decision was unsuccessfully appealed through three court instances.

2.14 On 28 May 2004, the authors submitted another cassation appeal to the State Court requesting reconsideration of their criminal case due to newly discovered facts. This appeal was rejected on 9 June 2004.

2.15 In 2001, the authors filed submissions, based on the same facts as the present complaint, to the European Court of Human Rights (ECHR). On 11 March 2003, ECHR found that neither complaint disclosed any violation of any rights under the Convention.

2.16 The authors contend that they have exhausted all available and effective domestic remedies.

The complaint

3.1 The authors claim to be victims of a violation by Estonia of article 14, paragraphs 1, 2, 3 (b), 3 (d) and 3 (e) of the Covenant.

3.2 The trial against the authors was not fair, and the courts were not impartial, in violation of article 14, paragraph 1 of the Covenant. The authors claim that the first instance court rejected their motion to be allowed to question the experts who conducted the psychiatric expertise of the main prosecution witness; that the first instance court rejected their motion to be allowed to question the expert who conducted the autopsy of the victim, an autopsy report which allegedly contained inconsistencies; and that they were refused the opportunity to question the main prosecution witness. They also submit that their motion to recuse the investigator Ms. V., (who had a personal interest in their conviction), and to appoint another investigator was rejected. Further, they maintain that their motions to correct the court records, which presented incorrect testimonies of some witnesses, were rejected.

3.3 The authors were informed of the date of the court hearing only one day in advance, which did not allow them or their attorneys, appointed *ex officio*, to properly prepare for the trial. That was aggravated by the fact that the authors did not have funds to hire their own attorneys, and the attorneys appointed by the court were changing all the time and did not provide them with adequate legal assistance. The authors' request to be represented in court by the attorneys that were assisting them during the pretrial investigation, and who were somewhat familiar with the case, was also rejected. This led to a violation of their rights under article 14, paragraph 3 (b) and (d), of the Covenant.

3.4 The second instance court also ignored their motions, identical to the ones made during the first instance trial, and had the same "accusative tendency" as the first instance, literally adopting the position of the investigation and prosecution.

3.5 The authors submit that two months before the first instance trial, press articles appeared quoting the investigator and referring to them as guilty. Those articles could have influenced the court's decision. During the second instance trial numerous publications accusing them of murder also appeared in the press. These facts constitute a violation of their rights under article 14, paragraph 2, of the Covenant.

3.6 The authors submit that they were not afforded the opportunity to call a witness who could have confirmed that the protocol of the interrogation of Mr. R.V. was false. This refusal violated their rights under article 14, paragraph 3 (e). They attached a copy of the trial transcript of the first instance court, in which it is indicated that the Court refused to hear the witnesses proposed by the authors because their testimonies would not have been significant to establish the truth.

State party's observations on admissibility and merits

4.1 On 26 January 2007, the State party requested the Committee to declare the communication inadmissible under article 5, paragraph 2 (a), of the Optional Protocol, since an identical complaint had been reviewed and rejected by the ECHR. On 28 May 2007, the State party reiterated its request that the Committee should declare the communication inadmissible. Alternatively, the Committee should conclude that there is no violation of any of the articles of the Covenant.

4.2 As to the facts, the State party submits that the authors were convicted of having killed, while working as orderlies in the psychiatric ward at the Charity Hospital of Narva-Joesuu, on 5 September 1999, a mentally disabled patient, Mr. V.G., driven by "hooliganism" and in a particularly cruel manner, thus committing a criminal offence under article 101, paragraphs 2 and 7, of the Criminal Code. They were sentenced to 15 years of imprisonment by the Ida-Viru County Court. Mr. V.G. had insulted the authors earlier that day. In the evening, intoxicated, the authors entered the room and beat Mr. V.G. intentionally, hit him against the floor and the radiator and trampled over him. In the morning of 6 September 1999, he was discovered dead in his room. The autopsy revealed that he had injuries to vital parts of the body, such as internal traumas of the skull, chest and stomach, which caused massive internal bleeding.

4.3 During the pretrial investigation the authors had State-appointed lawyers, who participated in the proceedings from the moment when the authors were declared as suspects, participated in all procedural actions and at the end of the investigation were familiar with all the materials of the criminal case. During the first instance trial the authors were represented by court appointed lawyers. At the first hearing they requested to be defended by the same lawyers who represented them during the investigation, but the court dismissed their request. The authors denied their guilt throughout the proceedings.

4.4 The Court interviewed the defendants and 11 witnesses and examined written evidence, including the statement given by R.V. on 19 October 1999 and the report on his psychiatric examination. According to this report, he did not suffer from acute mental disturbances during the examination and at the time of the killing, his memory was not distorted and he was able to explain correctly what he saw and heard. The court also examined the report on the psychiatric examination of P.K., according to which his mental condition excluded the possibility of verbal contact and he was not able to tell what he saw or heard. All the witnesses who knew V.G. and P.K. explained that V.G. was the most aggressive one and it was unlikely that P.K. had been able to beat V.G. so seriously without receiving any serious injuries himself.

4.5 The authors appealed the verdict before the Viru Court of Appeal, claiming that they were innocent, that the testimony of R.V. should not be taken into account and that the case against them was fabricated by a biased investigator. The defendants and their defence counsels were present at the second instance hearings, which took place on 10 January, 29 January, 14 March and 21-22 March 2001. Mr. Lavrov was defended by a lawyer of his own choice, Mr. Sedljar by a State-appointed counsel. On 23 March 2001, the Court of Appeal annulled the part of the verdict that concerned the conviction of the authors for "manslaughter driven by hooliganism" and reduced their sentences to 13 years of imprisonment. The Court of Appeal reviewed the authors' request (dated 21 March 2001) to amend the minutes of the hearings, introduced some of the corrections requested by them and rejected others.

4.6 The Court of Appeal concluded that the decision of the County Court had been legal and justified, and was based on statements of six witnesses, including R.V. The Court of Appeal reviewed the witnesses statements once again and reached the conclusion that such statements disproved the authors' version of the events, i.e. that V.G. had been beaten by

P.K.. The Court of Appeal agreed with the County Court conclusions that the psychiatric expert assessment made in respect of R.V. provided a basis to use his statements as evidence. It also found that the nature and location of the injuries of V.G. described in the forensic report coincided with the statements made by R.V. about the beatings by the authors.

4.7 According to the Court of Appeal, the authors' claim that the investigator had been biased were not proved. This claim was only made in the appeal. Prior to that, there had been no request for removal of the investigator. Furthermore, the authors claimed that the Criminal Procedure Code was violated, but did not specify which particular rule the investigator and the County Court allegedly violated.

4.8 On 23 March 2001, the authors appealed the second instance decision to the Supreme Court, which on 30 May 2001 denied them leave to appeal. In 2004 Mr. Sedljar filed an additional request to the Supreme Court to reopen proceedings, because in his opinion new facts had been found. On 9 June 2004, the Supreme Court decided that the request for review was manifestly unfounded and dismissed it.

4.9 Mr. Sedljar filed an application for the initiation of criminal proceedings against the investigator in connection with his conviction on the basis of fabricated evidence. The application was reviewed by the Public Prosecutor's office, the administrative court and the Court of Appeal, all of which considered it unfounded and rejected it. The Supreme Court decided that the author's appeal against that decision should not be granted leave to appeal.

4.10 On the admissibility of the communication, the State party submits that ECHR had reviewed the same matter and, on 11 March 2003, declared the authors' applications inadmissible, since they did not indicate any breach of applicants' rights and freedoms protected under the European Convention for the Protection of Human Rights and Fundamental Freedoms. The State party notes that the applications were reviewed and rejected by ECHR not only on procedural grounds, but on the merits. The State party maintains that the communication should be declared inadmissible, in accordance with article 5, paragraph 2 (a), of the Optional Protocol, on the grounds that another international body has examined the complaint on its merits. The State party submits that it would be "particularly unfortunate" if the Committee started to review a communication in which ECHR did not find any violations of article 6 of the European Convention, which is substantively analogous to article 14 of the Covenant. The State party also submits that even if the Committee does not declare the application inadmissible on the above ground, it should take into account the conclusions of ECHR and should reject the communication on its merits in order to avoid the emergence of double standards and the weakening of human rights protection.

4.11 The communication should be declared inadmissible, as it constitutes an abuse of the right to submit communications under article 3 of the Optional Protocol, in view of the time elapsed since the exhaustion of domestic remedies. The criminal proceedings ended with the refusal of the Supreme Court to grant leave to their appeals in cassation on 30 May 2001, and their first communication to the Committee was submitted on 26 October 2005. The State party maintains that a communication should be submitted within a reasonable time as of the exhaustion of domestic remedies and that four and a half years cannot be considered a reasonable time. The authors have not justified in any way why the submission of the communication took so long and they have not claimed that there had been any exceptional difficulties or obstacles that prevented them from submitting the communication within a reasonable time frame.

4.12 The authors have not raised before any domestic court or other body the issue that the press coverage in their case adversely affected the procedures before the courts.

Accordingly, this claim should be declared inadmissible on the ground of non-exhaustion of the domestic remedies.

4.13 The State party notes that the authors are in effect attempting to challenge decisions handed down by the domestic courts in front of the Human Rights Committee and that the latter cannot grant their requests, because it lacks the competence to annul or amend decisions made by the domestic courts. The State party refers to the Committee's jurisdiction stating that it is not a "fourth instance" competent to re-evaluate findings of fact or review the application of domestic legislation. The State party maintains that in the instant case domestic courts dealt with the charges of manslaughter under aggravated circumstances that were brought against the authors and came to the conclusion that the guilt of the authors in respect of the acts they were accused of were proven beyond a reasonable doubt. The State party also refers to the case law of the Committee, according to which a mere disagreement of the author with the outcome of the court's decision is not sufficient to bring the issue within the scope of article 14 of the Covenant.

4.14 The State party makes reference to the Committee's jurisprudence according to which it is generally not for the Committee but for the courts of the State parties to evaluate the facts and evidence in a specific case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice. Further, it states that it is not for the Committee to review the interpretation of domestic law by the national courts. In the present case the County court ascertained all the facts after having examined all the evidence, and concluded that the authors were guilty of the offence they were charged with. The second instance court reviewed the appeals of the authors and their arguments, as well as the application of the law and concluded that the County court had correctly evaluated the evidence, but found and corrected certain shortcomings in the application of the law. The State party notes that the Court of Appeal is competent to verify within the scope of the appeal all the facts of the case, and to examine the matter on its substance. The judges are not bound by the facts as ascertained by the first instance court, but they verify issues of evidence themselves.

4.15 The State party submits that the verdict was not reached based on any one single piece of evidence (i.e. the statement of the mentally ill witness, who died prior to the trial), but on the entire body of evidence presented to the court.¹

4.16 Both during the pretrial investigation and the court proceedings, both authors had been ensured the participation of a defence lawyer. During the pretrial investigation and the first instance proceedings the lawyers were appointed by the State. There are no facts to demonstrate that the lawyers were incompetent or not familiar with the proceedings. They actively defended their clients, filed requests, supported the views and positions of their clients, expressed opinions about the questions that arose during the hearings, made detailed and legally well justified statements. The only complaint that the authors made, (a request to be represented by the same lawyers they had during the investigation), was at the start of the first instance hearing, before the defence counsels could even begin their work. During the court hearing they made no other complaints concerning the unsuitability of the defence counsels. Moreover, they had the opportunity to choose their own lawyers, if they did not wish to have State-appointed lawyers. Further, the authors have not filed any complaints to the Bar or its Court of Honour in connection with the alleged incompetence

¹ The State party submits that it is important that a person's conviction is not based on an occasional piece of evidence and makes reference to cases where the Committee found communications inadmissible for non-substantiation as the authors challenged expert reports but not the rest of the evidence (communications Nos. 1329/2004 and 1330/2004, *Pérez Munuera and Hernández Mateo v. Spain*, decision on inadmissibility adopted on 25 July 2005, para 6.4.)

of the lawyers. Lastly, during the second instance proceedings Mr. Lavrov was represented by a lawyer of his own choice, while Mr. Sedljar was represented by a State-appointed lawyer.

4.17 The State party reiterates that the authors received a fair trial at all instances and that they have been provided with the guarantees under article 14, paragraph 5, namely that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. The State party maintains that the Covenant does not require that it should provide any other possibilities for challenging one's conviction and punishment. Nevertheless, the authors had the opportunity to file a cassation appeal to the Supreme Court and also made use of extraordinary legal remedies by filing requests for review of the case based on new evidence and for the amendment of court errors. The Supreme Court could not find errors in the work of the lower courts, nor did it find new evidence. The State party submits that there is no ground for the Committee to reach a different conclusion than that reached by the domestic courts.

Authors' comments and further submissions

5.1 On 22 March 2007, the authors submit that the State party has ignored the violations of the law committed against them, as described in their original communication. They reiterate that the investigative and judicial processes were "accusatory" in nature; that the investigation never explored any other line of investigation than the accusation against them; that the courts refused to question witnesses that could have proven their innocence; and that the court accepted the testimony of a mentally ill individual who was undergoing treatment for an acute phase of his illness. The authors also reiterate that they were deprived of effective legal defence and of fair trial.

5.2 The authors submit that they lost their cases before ECHR because they were unrepresented, did not have money to hire an attorney and lacked legal knowledge to present their cases sufficiently well themselves. They maintain that they are not trying to appeal the ECHR decision before the Human Rights Committee, but are submitting an independent communication to a different international mechanism. They also state that when presenting their cases to ECHR they lacked some documents related to the case, which they are now presenting to the Committee.

5.3 On 3 November 2007, the authors reiterate that the trial against them was unfair and illegal, since it was based on "artificially created" materials. They maintain that the protocol of the interrogation of the main witness Mr. R.V., dated 19 November 1999, was written by the investigator Ms. V. in the police station, while Mr. R.V. was undergoing medical treatment in a mental hospital in Narva. They point out that doctors and other personnel in the hospital were not aware of Mr. R.V. being questioned at any time during his stay in Narva, which lasted from 20 October to 30 November 1999. They also maintain that the medical expertise of the mental condition of Mr. R.V. is also "artificially created" evidence of their guilt, since: it lacks a date of the expertise, (which is required by law); it states that the last stay of Mr. R.V. in the Narva psychiatric hospital was between 24 May 1999 and 9 June 1999, while in reality he was again hospitalized between 20 October and 30 November 1999; and the exact diagnosis of Mr. R.V. is not mentioned. The first instance court intentionally amended the testimony of some of the witnesses and refused to correct the court record, following the authors' request. They reiterate that they were refused the opportunity to cross-examine Mr. R.V., and that the second instance court refused to summon Ms. M., the nurse whose testimony had been misrepresented by the first instance court. The second instance court refused to call witnesses and to allow them to question the doctors who conducted the psychiatric expertise on Mr. R.V.

5.4 The authors explain the four and a half years delay in submitting their communication to the Committee by the fact that they first attempted to address a petition

to ECHR and were waiting for the outcome of that procedure. Furthermore, the first author had tried, in 2004, to reopen the case within the State party by petitioning the State court to review the case based on new evidence and the Prosecutor's office to start an investigation into the false evidence used against them by the investigator. Once these avenues proved unsuccessful, the authors addressed their complaint to the Human Rights Committee.

5.5 On 29 July 2008, the authors submit that they were released on probation, (respectively on 27 June 2008 and on 25 July 2008), with a probation term until 20 October 2012. On 7 November 2008, the authors submitted that they wished to maintain their communication to the Human Rights Committee. On 13 February 2010, the authors submitted that two of the judges who participated in the adjudication of their case had been arrested on corruption charges. One of the judges, Mr. M.K. (who had participated in the second instance court panel in the author's case), had been convicted on 18 January 2010. The other, Mr. Y.S. (who had participated in the first instance trial in the authors' case), plea-bargained with the prosecutors' office and took an early retirement. Prior to both court instances State-appointed lawyers told them that the above judges were requesting money in exchange for non-guilty verdicts. Since the authors did not have money and considered themselves innocent, they refused these offers. They did not complain regarding these requests, since they were in jail and did not have any evidence of such proposals.

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 article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes the State party's challenge to the admissibility of the communication on the ground that ECHR has reviewed the same matter and, on 11 March 2003, declared the authors' applications inadmissible, since they "did not indicate any breach of applicants' rights and freedoms protected under the European Convention". The Committee, however, observes that the State party has not entered a reservation concerning article 5, paragraph 2 (a), of the Optional Protocol to the effect that the competence of the Committee shall not apply to communications which have already been examined by ECHR. The communication is presently not being considered by ECHR or examined under another procedure of international investigation or settlement, and the Committee, therefore, considers that it is not precluded under article 5, paragraph 2 (a), of the Optional Protocol from considering the communication.

6.3 The Committee also notes the State party's contention regarding the abuse of the right to submit a communication in view of the time elapsed from the final exhaustion of domestic remedies, i.e. four and a half years. Two years and 7 months elapsed since ECHR declared the case inadmissible. The Committee observes that the Optional Protocol does not establish any deadline for the submission of communications, and that in the circumstances of the instant case the Committee does not consider the delay to amount to an abuse of the right of submission.

6.4 The Committee notes the authors' claim under article 14, paragraph 2, of the Covenant that, before and during the first and second instance trials, articles were published portraying them as guilty and quoting the investigator, which could have influenced the courts' decisions. However, the Committee observes that this claim does not appear to have been raised at any point in the domestic proceedings. This part of the communication is accordingly inadmissible for failure to exhaust all domestic remedies in accordance with article 5, paragraph 2 (b), of the Optional Protocol.

6.5 The Committee notes the authors' claim that they were informed of the date of the court hearing only one day in advance, which did not allow them or their attorneys, appointed ex officio, to properly prepare for the trial. The Committee also notes their claims that the attorneys appointed to represent them in court did not provide them with adequate legal assistance and that their request to be represented in court by the attorneys who had assisted them during the pretrial investigation was rejected, which led to a violation of their rights under article 14, paragraph 3 (b) and (d), of the Covenant. However, the Committee observes that, according to the documents contained in the file, the authors did not raise such complaints before the second instance court. This part of the communication is accordingly inadmissible for failure to exhaust domestic remedies, in accordance with article 5, paragraph 2 (b), of the Optional Protocol.

6.6 The Committee notes the information submitted by the authors that two of the judges who participated in the adjudication of their cases were later arrested on corruption related charges and that one of them was convicted. The Committee observes that the authors have not presented any information that the arrests were in any way related to their particular case. The Committee also notes the authors' submission that "State-appointed lawyers" requested money from them allegedly on behalf of the judges in order to secure a non-guilty verdict. The Committee, however, observes that, according to their own submission, the authors never attempted to complain to any national authority in relation to this claim, neither before their conviction nor after their conditional release from prison. This part of the communication is accordingly inadmissible for failure to exhaust all domestic remedies in accordance with article 5, paragraph 2 (b), of the Optional Protocol.

6.7 The Committee considers that the authors' claims under article 14, paragraphs 1 and 3 (e), have been sufficiently substantiated, for purposes of admissibility, declares them admissible and proceeds to their examination on their 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 provided for under article 5, paragraph 1, of the Optional Protocol.

7.2 The authors claim that their rights under article 14, paragraphs 1 and 3 (e), have been violated on the grounds mainly that the courts rejected their request to question the expert who conducted the psychiatric evaluation of Mr. R.V., the expert who carried out the autopsy of the victim and the relative of Mr. R.V. who could testify on the statement made by Mr. R.V. before his death. Furthermore, their motion to recuse the investigator was also rejected. The Committee notes the State party's observations in this regard, in particular the fact that the Courts took their decision to convict the authors after hearing 11 witnesses and examining written evidence.

7.3 The Committee observes that the authors' claim relates 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 evaluate facts and evidence, unless their evaluation is manifestly arbitrary or amounts to a denial of justice.² It also recalls its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, according to which paragraph 3 (e) does not provide an unlimited right to obtain the attendance of any witness requested by the accused or their counsel, but only a right to have witnesses admitted that are relevant for the

² See, for example, communications No. 1212/2003, *Lanzarote v. Spain*, decision on inadmissibility, adopted on 25 July 2006, para. 6.3; No. 1616/2007, *Manzano v. Colombia*, decision on inadmissibility of 19 March 2010, para. 6.4.

defence.³ On the basis of the materials before it, the Committee considers that the authors have not shown sufficient grounds to support their claims that the domestic courts acted arbitrarily in that respect or that their decisions resulted in denial of justice. Accordingly, the Committee concludes that the facts before it do not disclose a violation of articles 14, paragraphs 1 and 3 (e), 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 English text being the original version.
Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

³ *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI, para. 39.

**T. Communication No. 1535/2006, *Shchetka v. Ukraine*
(Views adopted on 19 July 2011, 102nd session)***

<i>Submitted by:</i>	Nataliya Litvin (not represented by counsel)
<i>Alleged victim:</i>	The author's son, Viktor Shchetka
<i>State party:</i>	Ukraine
<i>Date of communication:</i>	15 June 2006 (initial submission)
<i>Subject matter:</i>	Imposition of a sentence of life imprisonment after an unfair trial
<i>Procedural issue:</i>	Incompatibility <i>ratione materiae</i>
<i>Substantive issues:</i>	Prohibition of torture and inhuman or degrading treatment; right to a fair trial; right to be presumed innocent; right to examine witnesses and to obtain the attendance of witnesses on his behalf; right to have his sentence and conviction reviewed by a higher tribunal;
<i>Articles of the Covenant:</i>	7; 14, paragraph 1; 14, paragraph 2; 14 paragraph 3 (e) and (g); 14 paragraph 5;
<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 19 July 2011,

Having concluded its consideration of communication No. 1535/2006, submitted to the Human Rights Committee on behalf of Mr. Viktor Shchetka, 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 15 June 2006 is Ms. Nataliya Litvin, a Ukrainian national born in 1949, on behalf of her son, Mr. Viktor Shchetka, also a national of Ukraine born in 1973 who, at the time of initial submission, was serving a prison

* 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. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

The text of an individual opinion signed by Committee member, Mr. Fabián Omar Salvioli is appended to the present Views.

sentence in Zhitomir, Ukraine. The author claims that her son is a victim of a violation of his rights under articles 7; 14, paragraphs 1, 2, 3 (e), and 5, of the International Covenant on Civil and Political Rights. The author is unrepresented. The Optional Protocol entered into force for the State party on 25 October 1991.

The facts as presented by the author

2.1 On 11 July 2000, a sister of the wife of the author's son was murdered in the apartment of her son's parents-in-law, where he was temporarily living. The victim was undressed and her personal belongings were scattered all over the apartment. The investigation's initial version was that the victim had been raped and murdered. When her son returned home in the evening of 11 July 2000, he was requested to come to the district police department to testify.

2.2 At the police department, her son was told that he was the only person who could have raped and murdered his wife's sister. The author alleges that the head of investigation officially named her son as the perpetrator of rape and murder, even in official documents such as the decision on the conduct of a forensic medical examination dated 11 July 2000. For 24 hours, the police officers tried to make him confess guilt. Her son was humiliated in many ways, deprived of water and sleep and not allowed to use the toilet. He was also refused access to a lawyer. The author claims that in the evening of 12 July 2000, the police officers started torturing her son. Thus, he was handcuffed, hung on a metal crowbar and hit on the head. He also had a gas mask put on and the police officers restricted the passage of air. As a result, he suffered a heart attack and wrote down a confession of guilt at the dictation of police officers (i.e. raped, murdered, scattered the belongings) who were constantly correcting him throughout the writing. Shortly after, around 11.30 p.m. on 12 July 2000, a report of the detention of her son as a suspect was drawn up, followed by a report of the interrogation, which he was forced to sign under threat of further torture. These investigative actions were conducted in the absence of a lawyer.

2.3 In the morning of 13 July 2000, the author's son was transferred from the district police department to the temporary detention ward (KPZ-23-GOM), where he was interrogated by the senior investigative officer of the Prosecutor's Office, Mr. K. in the absence of a lawyer. During the interrogation, he retracted his previous confession and claimed that it was extracted under torture. He also asked the investigator not to be exposed to those police officers who had recently tortured him. This interrogation was documented and filmed. However, no further investigation into his torture allegations followed.

2.4 During the night of 13-14 July, two police officers came to the temporary detention ward (KPZ-23-GOM) and tortured her son for having retracted his confession. In the morning of 14 July, the investigator K. visited him and asked him whether he had changed his mind as to the retraction of the confession. Her son refused to take responsibility for the crimes and refused to talk to the investigator for as long as he was not allowed to see a lawyer.

2.5 The author claims that her son's lawyers were prevented from meeting him and that the investigation intentionally refused to disclose his whereabouts to the lawyer, despite several petitions lodged with the Prosecution's Office. Only on 18 July 2000, that is seven days after the arrest and when the marks of torture became less visible, was her son allowed to see a lawyer. The next day, on 19 July 2000, the lawyer submitted a motion to the prosecutor of Minsk District stating that his client bore traces of torture and requested an immediate medical examination. On 20 July 2000, the lawyer filed a complaint with the prosecutor of Minsk District for the illegal actions of the senior investigative officer K. who, abusing his powers, deprived his client of legal assistance for six days, and requested the prosecutor to initiate an investigation for illegal conduct. A similar complaint was lodged with the General Prosecutor of Ukraine. On 29 July 2000, the lawyer was informed

that the internal investigation collected insufficient evidence against Mr. K. Although the Prosecutor's Office was obliged to conduct a medical examination and initiate an investigation into her son's torture allegations, it did so in an ineffective manner. Thus, the Prosecutor Office's staff initially refused to officially register the motion. On 28 September 2000, the senior investigator K. refused to initiate criminal proceedings against the police officers responsible for the torture of the author's son, indicating that the latter's allegations were not confirmed. Mr. K. stated, *inter alia*, that on 12 July 2000 the author's son had voluntarily written a confession of guilt to the prosecutor of Minsk District and had not complained of torture; that he was examined by a doctor on 12 July 2000 and that the latter did not find any marks of torture. The author submits that K. was well aware that the medical examination of her son was conducted in the morning of 12 July, while he was subjected to torture in the evening of 12 July and during the night of 13-14 July. Moreover, K. concealed the fact that he interrogated her son on 13 July 2000 with the use of video recording. Instead, K. claimed that the author's son complained for the first time about torture and retracted his confession only on 25 July 2000. All video materials were removed from the case file because they contained the retraction of her son's confession and showed that he bore visible marks of torture. According to the author, later on during a court hearing K. admitted that he interrogated her son on 13 July 2000 and that the latter retracted his confession extracted under torture. Mr. K. also admitted having removed the interrogation report and any further documents mentioning this interrogation from the case file.

2.6 On 16 August 2000, the author's son complained to the Prosecutor's Office of Kiev city, claiming that he was subjected to torture. It was the first complaint that he could write himself since, as a result of torture, he could not bend his fingers to hold a pen. This complaint was not added to his case file and later on the court dismissed the lawyer's motion to add it as evidence.

2.7 On 12 December 2000, the Judicial Chamber on Criminal Cases of the Kiev City Court (first instance court) found the author's son guilty on a number of charges that included theft, illegal bearing of "cold" weapons¹ and a murder aggravated by rape, and sentenced him to life imprisonment. During the court hearing, he complained about the physical and psychological pressure exerted by police. He stated that his confession of guilt had been extracted under torture, that the interrogation report of 12-13 July 2000 had been signed under the threat of further torture, and that he did not have access to a lawyer. The court simply ignored his allegations of torture, without examining them.

2.8 The author confirms that her son had indeed a knife and nunchaku (*engl.* "nunchuks")² that were moved from his old apartment to a recently purchased one. However, she claims that neither the investigation nor the court clarified the location of these objects during the move and whether they could have been used to commit a crime. The court did not ask any clarifying questions and did not examine this criminal charge during the proceedings, despite which it found her son guilty of illegal bearing of "cold" weapons. Based on the confession of 12 July 2000 extracted under torture and the inconclusive finding of the forensic medical examination,³ the court also found her son

¹ Meaning not firearms.

² A forensic examination concluded that Mr. Shchetka's knife and nunchaku fell under the category of "cold" weapons.

³ The forensic medical examination (autopsy report) of 18 September 2000 confirmed that the victim was a virgin and that no injuries had been identified on the victim's external sex organs, hips or shins. No traces of semen were found in any of the swabs taken from the victim's mouth, vagina and anus. The expert examination concluded that the sexual intercourse could have been possible without damaging the hymen given the victim's anatomic particularities (the structure and shape of the

guilty of murder aggravated by rape, without examining this charge. The author claims that the evidence collected objectively indicated that the victim had not been raped. Nonetheless, the court ignored this fact and sentenced her son to life imprisonment under article 93 of the Criminal Code (murder aggravated by, inter alia, rape). It was possible for the court to apply article 93 only because it “officially” established that the victim had been raped before being murdered. Except for rape, there were no other aggravating circumstances in the sense of article 93 of the Criminal Code.

2.9 The author’s son lodged a cassation appeal with the Judicial Chamber on Criminal Cases of the Supreme Court, which rejected the appeal on 22 February 2001. The Supreme Court stated that during the pretrial investigation her son confessed guilt and his guilt was corroborated by other evidence, inter alia by the testimony of the main witness of prosecution, to whom he had told details of the crime, as well as by forensic medical examinations which did not rule out the fact of rape. The Court further stated that her son’s claims that the evidence was obtained in violation of criminal procedure norms and the investigative organs used illegal methods of interrogation had not been confirmed by the materials on file. The court concluded that her son’s guilt was established by evidence and found no grounds for reversal of his conviction.

2.10 The author points to a number of irregularities committed by the courts during the consideration of the criminal case of her son, as outlined below.

False testimony of the main witness of the prosecution

2.11 The court based its judgment on the testimony of the main witness, one Ko., who claimed that in July 2000 he shared a cell with her son in the district police department, where the latter told him and three other detainees details about the crimes he had committed. The witness further claimed that her son himself called for a policeman on duty and wrote down a confession of guilt. Mr. Ko. maintained that he immediately informed the police officers in writing about the details of the crimes as told by her son. Mr. Ko. was interrogated as a witness only on 3 August 2000, i.e. almost one month after his written statement to police. Despite the lawyer’s questions in that regard, the court failed to clarify why such an important witness was not questioned shortly after his denouncing statement and why no confrontation between the witness and the accused was organized. The witness also testified in court that he had provided the information about the crimes in both his written statement of July 2000, as well as during his interrogation of 3 August 2000. However, the investigator K. denied the fact that the witness had provided such information. The author’s son stated in court that Mr. Ko. was a false witness, as they had never shared a cell, and claimed that this information could have been easily verified in the police department’s official records of arrests and through a confrontation with Mr. Ko., the policeman on duty and the three inmates whom he allegedly told about the crimes.

Refusal of court to summon and hear important witnesses, distortion and misrepresentation of witness testimonies

2.12 The author submits that the investigation was able to determine the exact time of the victim’s murder, because at the moment of assault the victim was using the Internet and the use of the computer was disrupted at 4.39 p.m. Her son requested the court on many occasions to summon and consider the testimonies of two witnesses, one Kl. and one O. who testified during the preliminary investigation that they had seen him at 4.30 p.m., i.e. 9 minutes before the commission of the crimes, several kilometres away from the crime site.

hymen). Another forensic cytological examination concluded that no vaginal epithelial cells had been identified in the cytological smear obtained from Mr. Shchetka’s penile surface.

Although this information confirmed his alibi, it was ignored by the court and her son's alibi was not verified.

2.13 Furthermore, the interrogation report of another witness, one Ch., who was interrogated on 12 July 2000 and testified that her son had no scratches on his face at 7 p.m., i.e. more than two hours after the crimes, was removed from the criminal file by the investigator, who maintained that such a witness had never been interrogated and that her son had never mentioned him as a witness who saw him on the day of the crime. Although her son himself indicated the name of this witness at the time of his interrogation and this information was included in all interrogation reports, and Mr. Ch. himself confirmed his interrogation in the morning of 12 July 2000, the court ignored these facts and rejected the defence's motion to request the respective interrogation report from the investigator and to add it as evidence to the case file. The court also refused to request and to add to the criminal file other documents that were favorable to the defence.

2.14 The court also substantially distorted the testimony of Mr. B., who testified that her son did not drink any vodka on 11 July 2000 (the day of the crime), whereas in its decision the court on the contrary indicated that he had consumed alcohol and was drunk. The author claims that there was no evidence on file that her son was drunk on 11 July 2000 (neither a witness testimony nor any expert medical examination).

Concealment by the court of exculpatory facts and evidence

2.15 The court made reference to a series of circumstances that, in its view, confirmed her son's guilt. Thus, it indicated that the victim physically resisted her son and scratched his face with her fingernails. A forensic medical examination identified four scratches on the left side of her son's chin and the medical expert concluded that they could have been inflicted by the victim during her resistance. The court also stated that there were no scratches on her son's face in the morning of 11 July 2000. The author however claims that according to the expert examination, minute particles of male skin, hair follicles and cells of mucous membranes of the attacker were found under the victim's fingernails of both hands. Therefore, the attacker should have had more than four scratches and his mucous membranes should have been damaged, while the medical examination found no other lesions than four scratches on her son's face and concluded that his mucous membranes were intact. Furthermore, the court cited the medical expert that "the location of the scratches does not exclude their formation following the victim's resistance", whereas it ignored another conclusion of the expert that the scratches could have been self-inflicted,⁴ as her son himself declared during the pretrial investigation. The author maintains that the scratches on her son's face appeared during the interrogation, i.e. three hours after the crime was committed. As the court stated in its judgment, the victim's relatives confirmed that there were no scratches on his face in the morning of 11 July 2000 (the day of the crime). However, the court failed to refer to the testimonies of the victim's relatives and two other witnesses, according to which her son had no scratches on his face at 7 p.m., i.e. more than two hours after the commission of the crimes.

⁴ The investigation posed the following questions before the forensic expert: (a) whether there were any injuries on Mr. Shchetka's body; (b) whether the scratches on his face could have been self-inflicted by imprudence because of sharp-edged nails, i.e. in the circumstances described by Mr. Shchetka; (c) whether the injuries on his face could have been the result of the victim's resistance. The expert, however, stated only that the four scratches on Mr. Shchetka's face had been produced by blunt objects.

The fabrication of evidence by investigative organs and the court

2.16 The author claims that the stains of the victim's blood on her son's shirt were fabricated by the investigation, as no such stains existed at the time of seizure of his shirt. The existence of blood stains was not recorded in any of the procedural documents drawn up on 11 July 2000. The court in its judgment states that "being interrogated as a suspect on 12 July 2000, Mr. Shchetka indicated that blood spurted out on his clothes", while in reality in the interrogation report the sentence stated "after that the blood spurted out", without any indication of clothes.⁵ Therefore the author maintains that her son never testified about any blood stains on his clothes, this is a distortion of facts by the court.

2.17 The court referred to washed off splashes of blood on her son's shirt. Her son challenged this finding and requested the court to carry out additional examinations in order to clarify the mechanism of formation of stains on his shirt, but his request was rejected by the court on grounds that the biological examination offered an exhaustive response to his questions and the cloth became unfit for an additional chemical examination. The author claims that on the contrary the expert biologist explained that the formation of blood stains was outside his competence and that an additional physical and chemical examination could be carried out.

2.18 On 18 July 2001, after the first instance court judgment, the author submitted a written application to the prosecutor of Minsk District requesting her son's clothes that had been seized as evidence. On 27 July 2001, the prosecutor informed that the clothes retained as evidence might be returned only after the sentence entered into force and the court issued a ruling regarding the evidence. The same day, on 27 July, the author filed a motion to the Kiev City Court, requesting the court to release her son's clothes or, if that was not possible, to store them in view of the fact that the sentence was appealed and the clothes would be needed for a new forensic examination. On 30 July 2001, the author filed a new written request to the president of the Kiev City Court, asking the court to order the release of her son's clothes for additional forensic examinations. Following the request of the Kiev Appeal Court, the prosecutor transmitted all the evidence to the court on 7 August 2001. The Appeal Court ordered the destruction of the clothes, which was carried out on 21 September 2001. The court later indicated that the evidence was destroyed following the declaration of her son during a court hearing that he did not want his clothes back. The author maintains that her son never made such declarations, on the contrary he and his lawyers requested the court on many occasions to order additional forensic examination and to safely store the shirt with the alleged traces of the victim's blood. The author therefore claims that the court intentionally destroyed the evidence in order to prevent the defence from conducting additional forensic examinations.

Newly discovered facts and refusal of the Prosecutor's Office to reconsider the case

2.19 The author claims that during the pretrial investigation and the court proceedings her son was deprived of his right to effectively defend himself and to refute the arguments put forward by the prosecution. In particular, his right to ask additional questions to the experts and to have additional forensic examination conducted, was denied. Therefore, after the judgment, his lawyer requested several forensic experts to assess the conclusions of the previously conducted forensic examinations. Thus, on 23 July 2001, he requested the opinion of two experts (specialists in forensic medicine and in molecular biology and genetics) on the conclusion of the forensic examination conducted on 19 July 2000. The experts stated that, based on the methods of investigation used and the data available to the

⁵ According to the interrogation report of 12 July 2000, Mr. Shchetka indeed stated that "after [he stabbed the victim in the neck] the blood spurted out", without any mention of clothes.

expert, it was impossible to reach the conclusion that the second blood stain on her son's shirt contained undoubtedly the victim's blood. Following the lawyer's request, a specialist in forensic medicine studied the forensic medical documents and the conclusion of the autopsy report dated 18 September 2000. He concluded that no forensic data confirming sexual intercourse with the victim before her death, and especially in a coerced and violent manner, existed.

2.20 In order to confirm her son's allegations of torture, two additional forensic examinations were carried out. After the examination of his handwriting text in the reports on provision of legal assistance dated 14 and 25 July 2000, the graphologist concluded that at the time of writing her son experienced significant difficulties in carrying out his handwriting ability due to an injury of his writing hand, as well as due to possible unusual emotional state (fear, stress, etc.). The second examination was conducted by a specialist in forensic linguistics on the text of his confession of guilt of 12 July 2000. The expert concluded that the confession of guilt was written under mental tension and reflected the reproduction in writing of the spontaneous speech of a person with skills in taking statements.

2.21 The defence also collected evidence in support of the claim that the main witness, Mr. Ko., made false testimonies during the court proceedings. The author claims that the written statement against her son which Mr. Ko. allegedly submitted to police officers on 12-13 July 2000 was missing from the case file. At the lawyer's request, the district police department confirmed that in 2000, the police department received no written motion from Mr. Ko.⁶ The author further claims that Ko. was a homeless man who had been detained by police on many occasions for petty crimes and might have been cooperating with the authorities in fabrication of evidence against her son in order to secure his release. Ko. testified against her son not immediately after he was allegedly told about the crimes, but only after having been arrested and fined twice for hooliganism (on 2 and 3 August 2000),⁷ and the date of his interrogation coincided with his last apprehension – 3 August 2000.

2.22 On 13 August 2002, her son's lawyers lodged a motion with the General Prosecutor's Office for reconsideration of his case based on the above-mentioned newly discovered facts.⁸ On 27 September 2002, the General Prosecutor rejected the lawyers' motion on grounds that the expert examinations were conducted outside the criminal proceedings and therefore had no procedural value. The author claims that the General Prosecutor had a legal obligation to conduct the required investigation of the new facts,⁹

⁶ In its reply of 5 September 2001, the police department stated that it was not possible to verify whether Mr. Shchetka was detained together with Mr. Ko. in the same cell, as at that time no records to this effect had been drawn up. However, the police department confirmed that Mr. Ko. did not submit any written motion in 2000.

⁷ The arrest of Mr. Ko. on 2 and 3 August 2000 is confirmed by the head of the district police department in his information of 26 October 2001. See also para. 2.11.

⁸ According to article 400-5 of the Criminal Procedure Code, the following shall be considered to be newly discovered facts: (1) falsified evidence, wrong translation, misleading testimonies of a witness, victim, accused or defendant, wrong opinion and explanations of a court expert; (2) abuses of the prosecutor, investigator, or judges committed during court proceedings; (3) any other facts of which the court had no knowledge when rendering its decision and which themselves or together with previously established facts show that the conviction or acquittal of the defendant was a mistake.

⁹ In accordance with article 400-8 of the Criminal Procedure Code, interested individuals, enterprises, institutions, organizations, and officials submit to the prosecutor applications for reopening of a criminal case. The prosecutor may request the court to submit the trial transcript for verification. In any case, the prosecutor, when new facts come to his/her knowledge, is required to personally, or through the investigators, conduct required investigation of such facts [...] Having investigated newly discovered facts, should any grounds for reopening the case be present, the prosecutor forwards the

that his refusal constitutes a de facto interdiction of any prosecutor to investigate those facts and that his actions amount to a denial of justice.

2.23 On 23 September 2003, her son submitted to the Supreme Court an application for the review of his conviction.¹⁰ The Supreme Court rejected the application on 4 November 2003, finding no grounds for reconsideration of the case.

2.24 The author claims that her son has exhausted all available domestic remedies.

The complaint

3.1 The author claims that her son is a victim of a violation of his rights under article 7 of the Covenant, as he was subjected to torture and forced to assume responsibility for the crimes he did not commit.

3.2 She submits that her son's rights under article 14, paragraph 1, have been violated, since the court failed to recognize the fact of torture and, by doing so, used her son's confession of guilt extracted under torture as a basis for his conviction. The courts failed to properly evaluate the facts and evidence of the case, distorted witnesses' testimonies and concealed facts that had an exculpatory value or contradicted the arguments of the prosecution. Furthermore, the courts did not consider her son's claims regarding the false testimony of the main witness of the prosecution and tampering with evidence by the investigator, but merely ignored them. The courts violated the principle of impartiality by granting a privileged status to the prosecutor's side, while dismissing the requests of the defence to conduct additional forensic examinations and to add certain procedural documents as evidence to the case file. The author claims that the right guaranteed by article 14 would be rendered totally ineffective in the absence of any safeguards against the fabrication and manipulation of evidence, use of false testimonies and other abuses committed by the prosecution.

3.3 The author further claims that her son's right under article 14, paragraph 2, has been violated, since he was declared as the perpetrator of the crimes in official documentation without his guilt being proven according to law. The court found him guilty of illegal bearing of "cold" weapons and rape without examining these charges during the proceedings.

3.4 She submits that the courts have repeatedly declined her son's request to secure the attendance and the examination of several witnesses that could have confirmed his alibi, in violation of article 14, paragraph 3 (e), of the Covenant.

case to the higher prosecutor who has the competence to file an appropriate application with the cassation court based on newly discovered facts [...] Whenever the prosecutor finds no grounds for reopening a case upon newly discovered facts, he/she issue a decision to that effect and informs thereon the applicants. The decision may be appealed before the higher prosecutor.

¹⁰ Mr. Shchetka claimed that: (a) he was sentenced for rape without this criminal charge being examined by the court; (b) he was deprived of his right to present arguments against the charge of rape; (c) the court found him guilty of rape in the absence of any forensic data that the rape had actually been committed, the court based its conclusion on the assumption that the sexual intercourse (not the rape) could have been possible and on his confession of guilt extracted under torture; (d) the fact that he was found guilty of rape in the absence of any evidence allowed the court to apply article 93 of the Criminal Code and to sentence him to life imprisonment for murder aggravated by rape; (e) the court invented the only aggravating circumstance (alcohol consumption) in order to declare him "extremely dangerous" by distorting the testimony of Mr. B. who stated that he did not drink any alcohol on the day of the crime; (f) the court was biased, partial and acted in an arbitrary manner.

3.5 Finally, the author claims that her son is a victim of a violation of article 14, paragraph 5, since the General Prosecutor refused to examine his application for reconsideration of his case based on newly discovered facts, and the Supreme Court rejected his motion for the review of his conviction.

State party's observations on admissibility and merits

4.1 In a note verbale of 6 June 2007, the State submits that Mr. Shchetka's guilt was duly established by evidence, in particular by his confession to the commission of the crimes that was consistent with the testimonies of the victim's relatives and of other witnesses, as well as with the information contained in the crime scene report. Mr. Shchetka described the character and location of the inflicted bodily injuries, which later on had been confirmed by forensic expert examinations. Under the victim's fingernails, minute particles of male skin and hair follicles had been identified, and their provenience from Mr. Shchetka was not excluded. The four scratches on his face and neck could have been produced by the victim's fingernails upon her resistance, and the blood traces on his shirt contained the DNA profile found in the victim's blood sample.

4.2 The State party considers groundless the author's claim that the expert examinations conducted after the judgment confirmed her son's innocence and constitute newly discovered facts, and submits that these facts had been examined during the pretrial investigation and court proceedings. In particular, the courts thoroughly considered Mr. Shchetka's confession to the commission of the crimes, the reasons for its retraction, the claim of prohibited interrogation methods, as well as the testimonies of the victim's relatives and other witnesses, the conclusion of expert forensic examinations and of other evidence available to the court. The Supreme Court found no violation of the criminal procedure norms that would have justified the reversal of the conviction or the modification of the imposed sentence, and rejected his cassation appeal on 22 February 2001.

4.3 Mr. Shchetka's allegations of physical and psychological pressure by police officers were considered by the court, and the internal investigation confirmed that the police officers had not been involved in inflicting bodily injuries to him. The internal investigation also established that the documents regarding the activity of the police department of Minsk District (the reports on the arrest and custody of persons suspected of crimes, records of detained persons etc.) had been destroyed on 16 February 2005: in accordance with the decree of the Ministry of Interior of 4 June 2002, such documents are retained for a period of five years and thereafter are destroyed.

4.4 The State party also provides a copy of Mr. Shchetka's written explanation dated 5 June 2006 in which he states that he has no claims against the administration of the Kiev remand centre (No. 13) and the Zhitomir penitentiary institution (No. 8). It also appended to its observations a nine-page summary of the criminal procedure provisions regulating the issues raised by the author in the present communication.

Author's comments on the State party's observations

5.1 In her comments of 11 January 2008, the author states that the State party has not refuted any of her claims under the Covenant, but merely reproduced the content of the court judgment and quoted the relevant national legislation. She maintains that the State party provided false information on the violation of her son's rights under article 14, paragraph 5, by claiming that the newly discovered facts had been examined during the pre-trial investigation and court proceedings. In reality, the General Prosecutor did not refute any of the new facts presented by the lawyer, but simply refused to investigate the newly exculpatory facts on grounds that such facts should have been collected in the context of the criminal proceedings. She insists that the prosecutor is required, under the national

legislation, to conduct an investigation of the new facts and that the lawyer may collect such new evidence anywhere.

5.2 The author reiterates the claims under the articles 7 and 14 of the Covenant. The allegations of torture are confirmed by indirect evidence (the sequence of events, the absence of the video materials of his interrogation, the absence of legal assistance from the time of arrest, the refusal of authorities to document torture by a medical examination etc.) and direct evidence (the lawyer's complaints on torture, the conclusions of the linguistics and handwriting examinations etc.). The author recalls that the courts violated her son's right to defence, committed forgery of documents and destroyed exculpatory evidence, in breach of article 14 of the Covenant, while the General Prosecutor misinterpreted the law in order not to investigate the new exculpatory facts in his case, in violation of article 14, paragraph 5. Furthermore, the court sentenced her son to life imprisonment without examining the key criminal charge against him during the court hearings, in breach of article 14, paragraph 2, of the Covenant. The author therefore maintains that her claims are sufficiently substantiated and corroborated by the documentary evidence provided to the Committee.

Additional observations by the State party

6.1 On 16 April 2008, the State party provided to the Committee information from the General Prosecutor's Office and the Ministry of Interior. It states that the author's claim that her son is innocent is refuted by his written confession of guilt addressed to the prosecutor. Moreover, answering the prosecutor's questions, he communicated the details of the crimes he had committed and he made similar statements during his interrogation as a suspect. His allegations of torture were considered by the Supreme Court in cassation proceedings and were not confirmed. His guilt was fully established by the collected evidence which was thoroughly considered by courts.

6.2 The State party also states that on 31 August 2001 the author, Ms. Nataliya Litvin, filed a written motion to the Interior Department of Kiev city, requesting information on the arrest of Mr. Ko. The requested information was provided on 21 October 2001. On 12 December 2005, she requested written explanations as to whether it was possible to detain together in the preliminary detention cell a person with multiple convictions and a person arrested for the first time. Ms. Litvin was invited to the Interior Department, and during the conversation she retracted her request for a written reply.

Additional comments by the author

7.1 In a letter of 25 July 2008, the author reiterates her previous comments that the State party has failed to refute her claims under the Covenant and states that it provided information which is not relevant to the consideration of the communication.

7.2 On 9 July 2009, the author provided the Committee with a copy of her son's application for review of his sentence that he had been regularly addressing to the Supreme Court of Ukraine since 2003, as well as with a copy of the court's reply of 18 March 2009 according to which his complaint was examined and no grounds for the review of the sentence were found.

Further observations by the State party

8. On 3 March 2010, the State party reiterated its previous observations. With regard to the charge of rape, it states that Mr. Shchetka confessed guilt of rape in the presence of a lawyer during the preliminary investigation, and only during the court hearings changed his testimony, accusing the police officers of falsification and use of physical force towards him. These claims have been the object of an investigation conducted by the Prosecutor's

Office of Minsk District who found no violations of his rights and therefore refused to initiate criminal proceedings against the police officers on 28 September 2000. Mr. Shchetka had the possibility to appeal against the prosecutor's refusal to the higher prosecutor in accordance with article 99, paragraph 1, of the Ukrainian Code of Criminal Procedure, as well as in court, as prescribed by article 336, paragraph 1, of the said Code.

Issues and proceedings before the Committee

Consideration of admissibility

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

9.2 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.

9.3 With regard to the requirement of exhaustion of domestic remedies, the Committee notes that according to the information submitted by the author, all available domestic remedies have been exhausted. 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.

9.4 As to the author's claim that the refusal of the General Prosecutor to reconsider the criminal case of her son based on newly discovered facts after the Supreme Court decided the cassation appeal amounts to a violation of article 14, paragraph 5, of the Covenant, the Committee considers that the scope of article 14, paragraph 5, does not extend to a review of a conviction and sentence based on newly discovered facts once this sentence has become final. Therefore, the Committee considers that the author's claim under article 14, paragraph 5, is incompatible *ratione materiae* with the provisions of the Covenant and declares it inadmissible in accordance with article 3 of the Optional Protocol.

9.5 The Committee also notes that, in addition to the violations claimed by the author, the facts of the present complaint raise issues under article 14, paragraph 3 (g), of the Covenant. Accordingly, the Committee declares the communication admissible with regard to article 7, article 14, paragraph 1, article 14, paragraph 2 and article 14, paragraph 3 (e) and (g), of the Covenant, and proceeds to its consideration on the merits.

Consideration of 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, as required under article 5, paragraph 1, of the Optional Protocol.

10.2 The Committee notes the author's claim that her son was tortured by police officers and thus forced to confess guilt to the rape and murder of his wife's sister. He retracted his confession during an interrogation conducted by the investigative officer of the Prosecutor's Office with the use of video recording, claiming that he was tortured and coerced to take responsibility for the crimes. However, his allegations were ignored and the respective video materials were subsequently removed from his criminal file. The author provides details on the methods of ill-treatment used and contends that these allegations were raised by her son before the Prosecutor's Office, as well as in court. The Committee observes that Mr. Shchetka's lawyer submitted complaints to the Prosecutor's Office

requesting, inter alia, for a medical examination and an investigation into his allegations of torture. In this regard, the Committee recalls that once a complaint about treatment contrary to article 7 has been filed, a State party must investigate it promptly and impartially.¹¹ The Committee takes note of the State party's affirmation that Mr. Shchetka's allegations of torture were the object of an investigation conducted by the Prosecutor's Office of Minsk District and were also considered by the Supreme Court in cassation proceedings, but were dismissed as groundless. It further notes that the State party provided a written explanation from Mr. Shchetka (see para. 4.4 above) stating that he did not have any claims against the administration of the Kiev remand centre (No. 13) and the Zhitomir penitentiary institution (No. 8). The Committee observes that it is not clear from that explanation whether Mr. Shchetka referred to his detention following the arrest (when he was allegedly tortured) or to his detention following his conviction by the court. Given the fact that the explanation is dated 5 June 2006 and mentions none of the institutions where Mr. Shchetka alleged to have been tortured (the district police department and the temporary detention ward (KPZ-23-GOM), see paras. 2.2 and 2.4 above), the Committee does not consider it relevant in connection with the author's claims under article 7.

10.3 The Committee also notes that Mr. Shchetka was allowed to see his lawyer only after seven days from the date of actual apprehension, when the marks of torture became less visible. It further notes the State party's argument that Mr. Shchetka confessed guilt of rape in the presence of a lawyer. However, the Committee observes that, while the State party has not provided any documentary evidence in support of its argument, Mr. Shchetka's claims are supported by the materials on file, inter alia by two complaints submitted to the prosecutor against the abuses committed by the investigative officer. In the absence of a thorough explanation from the State party regarding the investigation into the torture allegations, the reasons for refusing a medical examination of the author's son and the information provided by the author, such as the linguistic and graphologist examinations, the Committee considers that the State party's competent authorities did not give due and adequate consideration to Mr. Shchetka's complaints of torture made both during the pretrial investigation and in court. In these circumstances, the Committee concludes that the facts before it disclose a violation of Mr. Shchetka's rights under articles 7 and 14, paragraph 3 (g), of the Covenant.¹²

10.4 The Committee further notes the author's claim that the court ignored her son's request to call and examine several important witnesses that testified during the preliminary investigation and confirmed, inter alia, his alibi and the absence of injuries on his face after the commission of the crimes. The court also declined her son's motions for the conduct of additional forensic examinations. The Committee recalls that, as an application of the principle of equality of arms, the guarantee of article 14, paragraph 3(e), is important for ensuring an effective defence by the accused and their counsel and guaranteeing the accused the same legal power of compelling the attendance of witnesses relevant for the defence and of examining or cross-examining any witnesses as are available to the prosecution.¹³ In the present case, the Committee observes that the State party failed to respond to these allegations and to provide any information as to the reasons for refusing to

¹¹ See, e.g., Human Rights Committee, general comment No. 20 (1992) on the prohibition of torture and cruel treatment or punishment), *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40), annex VI, sect. A*, para. 14.

¹² See Human Rights Committee general comment No. 32 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. 60; and communication No. 1401/2005, *Kirpo v. Tajikistan*, Views adopted on 27 October 2009, para. 6.3.

¹³ See Human Rights Committee general comment No. 32, para. 39.

examine the respective witnesses. In the absence of information from the State party in that respect, the Committee concludes that the facts, as reported, amount to a violation of Mr. Shchetka's rights under article 14, paragraph 3 (e), of the Covenant.

10.5 The author claims that her son's rights under article 14, paragraph 1, have been violated, as the court has failed to take into account exculpatory facts and evidence, to address the issue of fabrication and tampering with evidence by the investigation, as well as to verify the credibility of the main witness's testimony and, by doing so, it has given an unfair advantage to the prosecution's side. Her son was also referred to as the perpetrator in documents concerning the investigation. The Committee observes that the author's allegations refer 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. In the present case, the Committee notes that the State party has not addressed the substance of the author's respective claims, but merely affirmed, in general terms, that her son's guilt was duly established on the basis of corroborating testimonies and other evidence. Based on the materials on file, and given the Committee's findings of a violation of article 7, and article 14, paragraphs 3 (e) and (g), of the Covenant, the Committee is of the view that the consideration of Mr. Shchetka's case by courts did not observe the minimum guarantees of a fair hearing, in violation of article 14, paragraph 1, of the Covenant.¹⁴

10.6 Having reached the above conclusions, the Committee will not examine separately the author's claim under article 14, paragraph 2, of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has violated article 7 and 14, paragraph 3 (g); article 14, paragraphs 1 and 3 (e), of the International Covenant on Civil and Political Rights.

12. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the State party is under an obligation to provide Mr. Shchetka 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; considering 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.

13. 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.

[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.]

¹⁴ See, e.g., communication No. 1519/2006, *Khostikoev v. Tajikistan*, Views adopted on 22 October 2009, para. 7.3.

Appendix

Individual opinion of Committee member Mr. Fabián Salvioli

1. I concur with the decision on communication No. 1535/2006, *Shchetka v. Ukraine*, as I fully share the Committee's reasoning and conclusions. However, I would like to add some comments on an issue which, I believe, deserves fuller treatment in the future jurisprudence of the Human Rights Committee. That issue has to do with the idea of "cross-fertilization" in the resolution of personal cases like the present one and the impact that this can have in terms of the reparations recommended by the Committee.

2. The present case of *Shchetka v. Ukraine* reveals extremely serious failings and omissions by the State in investigating the victim's allegations of torture and punishing those responsible. These faults were deemed by the Committee to constitute a violation, inter alia, of article 7 of the International Covenant on Civil and Political Rights.

3. When expressing its Views on individual communications, the Committee usually indicates, as it has done here, that the State should ensure that similar violations do not occur in the future. Paragraph 12 of its Views on this case is not, however, sufficient to achieve this; in order to ensure that violations do not recur, it is necessary to state what specific steps need to be taken.

4. For this purpose, the Committee can, and should, draw on the findings of other international or regional human rights bodies, as appropriate. In this regard, the observations made to Ukraine in 2007^a by the Committee against Torture referred unequivocally to specific measures for the prevention of torture. These measures included, firstly, the establishment by the State of an effective and independent oversight mechanism to guarantee prompt, impartial and effective investigations into all complaints of torture and ill-treatment during criminal investigations and, secondly, the adoption of all appropriate measures to eliminate any adverse effects that the current investigation system for promoting confessions might have on the treatment of suspects. The Committee against Torture also called upon Ukraine to take the necessary measures to establish that statements which had been made under torture would not be invoked as evidence in any proceedings.^b

5. The prohibition of torture is absolute. This is a norm of international public law (*jus cogens*) and as such has garnered unanimous support in international human rights jurisprudence. The Human Rights Committee's mandate and duty are to apply the International Covenant on Civil and Political Rights. To fulfil its mandate effectively, the Committee should apply the principle of useful effect. In this case, the Committee, taking a *pro persona* approach to protecting the victim's rights and reinforcing its decision by correctly applying the logic of "communicating vessels" (cross-fertilization), should have enjoined Ukraine to make specific reparations to guarantee the non-recurrence of such violations, by, for example, establishing an independent and effective mechanism for investigating complaints of torture or ill-treatment and making the filming of interrogations mandatory.

(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.]

^a CAT/C/UKR/CO/5, 3 August 2007.

^b *Ibid.*, paras. 10 and 11.

**U. Communication No. 1545/2007, *Gunan v. Kyrgyzstan*
(Views adopted on 25 July 2011, 102nd session)***

<i>Submitted by:</i>	Ahmet Gunan (represented by counsel, Nina Zotova)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Kyrgyzstan
<i>Date of communication:</i>	29 January 2007 (initial submission)
<i>Subject matter:</i>	Imposition of a death penalty after an unfair trial
<i>Procedural issue:</i>	None
<i>Substantive issues:</i>	Right to an effective remedy; right to life; prohibition of torture or cruel, inhuman or degrading treatment; right to liberty and security; right to a fair trial; right to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; right to legal assistance; self-incrimination;
<i>Articles of the Covenant:</i>	2, paragraph 3; 6; 7; 9; 10, paragraph 1; 14, paragraph 1; 14, paragraph 3 (b), (d) and (g)
<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 25 July 2011,

Having concluded its consideration of communication No. 1545/2007, submitted to the Human Rights Committee on behalf of Mr. Ahmet Gunan, 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:

* 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, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zonele Majodina, Mr. Gerald L. Neuman, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

The texts of three individual opinions signed by Committee members Mr. Rafael Rivas Posada, Mr. Yuji Iwasawa, Mr. Cornelis Flinterman, Mr. Rajsoomer Lallah and Mr. Fabián Omar Salvioli are appended to the text of the present Views.

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

1. The author of the communication, dated 29 January 2007, is Mr. Ahmet Gunan, a Turkish national born in 1968. At the time of submission of the communication he was detained on death row in the Investigation Isolator (SIZO) No. 1 in Bishkek.¹ The author claims to be a victim of a violation by Kyrgyzstan of his rights under articles 2, paragraph 3; 6; 7; 9; 10, paragraph 1; 14, paragraphs 1 and 3 (b), 3 (d) and 3 (g), 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.

Factual background

2.1 On 21 May 1998, an unidentified person left a bag with an improvised explosive device (hereinafter IED) in a minibus in the city of Osh, Kyrgyzstan. The person asked the driver to wait for him, but did not come back at the time of departure, and the driver handed the bag to a trusted person in order to return it to the owner. As no one claimed the bag, it was given to Mr. S., the watchman of the mosque, to store it until claimed by the owner. As no one claimed it, the watchman took the bag home. On 1 June 1998, the IED in the bag accidentally exploded in the watchman's kitchen, killing two persons and severely wounding a third one.

2.2 On 30 May 1998, around 10 p.m., an unidentified person left another bag with an IED in a minibus which exploded 30 minutes later, killing 2 persons and wounding 11. A criminal case was initiated in relation to the explosions on 2 June and 31 May 1998 respectively, without any suspect being identified.

2.3 On 12 July 1998, a car was stopped by the police in Almaty, Kazakhstan, for a regular check. The author, Mr. Gunan, was one of the passengers, together with three other persons. During the search the police found in the car a carrier bag with a grenade, eight IEDs, seven self-made detonators, electrical detonating fuses, a battery for detonating fuse and a "Makarov" pistol. A criminal case was opened in Kazakhstan against the author and the other three passengers for illegal acquisition, storage and transportation of prohibited objects. On 11 February 1999, after examining the author's case, the Auezovsk District Court of Almaty referred the case back to the Prosecutor's Office for lack of sufficient investigation and elimination of procedural shortcomings committed during the pretrial investigation.

2.4 Meanwhile, during the criminal investigation carried out by Kyrgyz authorities into the explosion incidents, a connection was established between one of the suspects for the blasts, one A., and the author (who was arrested on 12 July 1998 in Kazakhstan). On 25 November 1998, the Investigative Department of the Osh Region decided that the author should be arrested on suspicion of terrorism and the Prosecutor of the Osh Region sanctioned his arrest. On 2 February 1999, in accordance with the Minsk Convention on legal assistance and legal relations in civil, family and criminal matters (adopted on 22 January 1993), the Kyrgyz authorities submitted to the General Prosecutor of Kazakhstan a request for the extradition of the author and the other three persons arrested with him in Almaty. On 14 May 1999, the author was extradited from Kazakhstan to Kyrgyzstan and placed in the Investigation Isolator (SIZO) No. 1 in Bishkek.

¹ The author's penalty had not been carried out because of the introduced moratorium on death penalty. On 9 November 2006, the death penalty in Kyrgyzstan was abolished. Notwithstanding, the author claims that his death sentence had not been reviewed and at the time of the submission to the Human Rights Committee was still in force.

2.5 The following day, the author was taken to the Pervomaisk Department of the Interior (police). He claims that a black plastic bag was put over his head and he was subjected to different forms of ill-treatment by officers of the National Security Service. He was beaten with sticks all over his body. He was also beaten by one police officer on the soles of his feet with a truncheon, while two other officers were holding his feet. After three days of this kind of treatment, because of swollen feet and bone pain, the author could not walk and had to be carried from the cell to the investigator's office by two men. Furthermore, he could not chew, as his jaw bones were dislocated. Not able to withstand the torture, the author signed several incriminating statements in the absence of a lawyer,² where *inter alia* he confessed that he had participated in a military training camp in Chechnya together with the other co-accused. Although during the court proceedings all of them retracted these statements, claiming that the confession was extracted by torture and showing marks of ill-treatment on their bodies, their self-incriminating statement was used by the courts as a basis for their conviction: the first instance court concluded that the author, together with the co-accused, participated in a military training camp in Chechnya, and set up and run a criminal organization specialized in carrying out terrorist acts. After the interrogations, they were all taken back to SIZO No. 1, and there the officers of SIZO refused to accept him in the facility because of his poor condition. After long negotiations the author was finally handed over to them by the officers of the Pervomaisk Department of the Interior.

2.6 On an unspecified date, the author was transferred to Osh, where he was again subjected to systematic torture by officers of the National Security Service. The investigator, one T., beat up the author in the presence of a defence lawyer, who the investigator had himself assigned to the author. On one occasion, Mr. T. put a pistol to the author's head and threatened to shoot him.³ Out of fear, the author did not specifically complain about the torture he endured and did not petition for a medical examination during the pretrial investigation. His *ex officio* counsel appointed by the National Security Service did not submit any complaint either. Notwithstanding, the author submits that he and his co-accused openly showed marks of ill-treatment on their bodies during the appeal proceedings before the Appeal College on Criminal Cases of the Osh Regional Court of 3 August 2000, and claimed that they were forced to sign the report of the interrogation conducted in the absence of a lawyer (for more details, see para. 2.7).

2.7 On 3 May 2000, the Osh City Court found the author guilty of murder of four persons,⁴ terrorism, membership in a criminal organization and illegal acquisition and storage of arms and explosives, and sentenced him to 22 years' imprisonment. The author and his co-accused pleaded not guilty. The author has never assumed responsibility for the explosions in Osh, maintaining that he is innocent and he had never been in Osh or Kyrgyzstan before (as demonstrated by his travel documents). The first instance court, as well as the higher courts failed to provide any evidence to the contrary and simply concluded that the author crossed the border illegally. According to the transcript of the court proceedings, the author retracted his statement that he participated in a military training camp in Chechnya, claiming that he made the statement under physical and psychological pressure and that no lawyer was present during the interrogations. This fact

² The author claims that counsel was not present during these interrogations. Counsel was appointed by the investigator only on 30 July 1999.

³ The author also accuses the investigator T. of an attempt on his life. On 12 or 13 April 2000, the car transporting him and the other co-accused to prison after a court hearing collided with a police car and flipped over twice. Mr. Gunan was severely wounded.

⁴ Under article 97, paragraph 2, of the Criminal Code, this crime was punishable by 12 to 20 years of imprisonment or death penalty.

was confirmed by his lawyer, who indicated that the author did not give any testimonies about Chechnya in her presence. Asked about the signature on the interrogation report, the lawyer declared that it was similar to hers, but maintained that Mr. Gunan had never testified about Chechnya in her presence. Nevertheless, the court considered his allegations of ill-treatment and forced confession as groundless, not supported by materials on file and concluded that these claims were made in order to avoid criminal responsibility.

2.8 The author appealed his sentence to the Osh Regional Court. On 3 August 2000, the Appeal College on Criminal Cases of the Osh Regional Court reversed the decision of the first instance court and referred the case back to the Osh City Court for re-examination. The decision was reversed on the following grounds: (a) incomplete evaluation by the first instance court of the factual circumstances of the case and of the collected evidence; (b) complete lack of evidence regarding the author's and other co-accused's membership in the "Ozadlyk Sharki Turkestan" (Free Eastern Turkestan) criminal organization or its mere existence; (c) author's interrogation in the absence of a lawyer; lack of investigation into the author's allegations of ill-treatment and self-incriminating statement extracted by physical and psychological pressure; the failure of the prosecutor to adduce any concrete evidence refuting the author's (and his co-accused's) arguments. On 9 January 2001, following the objection submitted by the Prosecution's Office,⁵ the Supreme Court reversed the decisions of the Osh City and Regional Courts⁶ and the case was once again referred back to the Osh City Court for re-examination.

2.9 On 12 March 2001, the Osh City Court, in closed session, sentenced the author to death. The court found a link between the May 1998 explosions in Osh, Kyrgyzstan, and the seizure of explosives in Kazakhstan on 12 July 1998, and based its decision on the following grounds: (a) the participation of the author and his co-accused in a military training camp in Chechnya⁷ and their alleged membership in the criminal organization "Ozadlyk Sharki Turkestan" (Free Eastern Turkestan);⁸ (b) the alleged similarity between the IEDs found during the search of the car in Kazakhstan and those used during the explosions in Osh, although two forensic examinations found similarities, but also differences between those devices; (c) the seizure from the apartment rented by one of the co-accused in Almaty of certain materials containing information on methods of manufacturing explosive devices, although it was established that those materials did not belong to the author; (d) the existence of a map of Kyrgyzstan with Osh city marked as a target, which the author claims was fabricated.⁹ The court stated that the author's guilt and that of the other co-accused was established by victims' testimonies and witness statements. However, according to the author, none of the victims or witnesses declared that they knew or had ever seen him either at the crime scene or in Osh city. The description given by the

⁵ The prosecutor referred to the author's and other co-accused's claims of ill-treatment and self-incrimination statements made under physical and psychological pressure, stating that these claims were groundless and were made with the purpose to avoid criminal responsibility. He requested the Supreme Court to reverse the decision of both the Osh City Court and the Osh Regional Court.

⁶ The court accepted the prosecutor's arguments that the penalty imposed by the first instance court was too light and that the reversal decision of the Osh Regional Court was groundless. It concluded that the guilt of the author and his co-accused was corroborated by evidence.

⁷ See para. 2.7 above.

⁸ The court concluded that all the accused were members of this criminal organization without providing any evidence as to its existence or the membership of the author and his co-accused (this shortcoming was identified earlier on by the Osh Regional Court which reversed the decision of the first instance court, see para. 2.8).

⁹ According to the author, the map of Kyrgyzstan with Osh city marked as a target was fabricated, because its origin is unknown. He maintains that the map was fabricated at the time of his extradition to Kyrgyzstan and was subsequently attached to his case file.

witnesses of the person seen in the minibus (who left the bag with explosives on 30 May 1998, see para. 2.2) did not match that of the author and of the other co-accused¹⁰. The court did not address these inconsistencies and concluded that the criminal organization “Ozadlyk Sharki Turkestan” (Free Eastern Turkestan), with the help of an unidentified person, placed an IED in a minibus in Osh city on 21 May 1998; having information that the bomb did not explode, the same criminal organization placed a second bomb in a minibus on 30 May 1998 with the assistance of Mr. B.A.¹¹ The author claims that the court sentence was based solely on unfounded assumptions and was influenced by public opinion and the political situation in the country.

2.10 The sentence was upheld by the Appeal College on Criminal Cases of the Osh Regional Court on 18 May 2001. The author submitted an application for supervisory review to the Supreme Court on 15 June 2001.¹² On 18 September 2001, the Supreme Court upheld the decisions of the previous courts and rejected the author’s application.

¹⁰ According to the documents available on file, the main witness declared that he did not know the author. However, he identified Mr. B.A (one of the co-accused) as being the person who presumably left the bag with explosives in the minibus on 30 May 1998, but he was not completely sure, stating that there were certain similarities between Mr. B.A. and that person (the nose and the eyes). The testimony of the main witness was in contradiction with the testimony of another witness who stated that the person who left the bag was red-haired and had bright eyes (she did not identify any of the accused during the photo identification; in addition, she also stated in court that after the blasts she had seen on an Uzbek TV channel a person resembling very much the man who left the bag in the minibus). According to the author, none of the accused was red-haired or had bright eyes, both Mr. B.A. and himself have dark hair and dark eyes. Mr. B.A. pleaded not guilty throughout the proceedings (as well as the other co-accused) and denied that he knew Mr. Gunan. The court did not address these contradictions, and concluded that the criminal organization “Ozadlyk Sharki Turkestan” (Free Eastern Turkestan), with the help of an unidentified person, placed a bag with an IED in a minibus in Osh city on 21 May 1998 (which exploded on 1 June 1998 in the watchman’s kitchen, see para. 2.1 above). The court finally concluded that the same criminal organization, with the help of Mr. B.A., placed a second bomb in the minibus in Osh on 30 May 1998 (although none of the witnesses testified against the author or other co-accused in relation to the first or the second episode, excepting the uncertain and contradictory testimonies related to the alleged involvement of Mr. B.A.).

¹¹ See footnote 10 above.

¹² The author indicated, inter alia, that: (a) he is innocent and not responsible for the explosions produced in Osh; (b) he had never been in Kyrgyzstan before, his Turkish passport contained no border-crossing stamp; (c) he did not set up or operate any criminal organization and maintained that no evidence was adduced to corroborate the existence of such an organization or prove his and the other convicts’ membership; (d) he was not provided with legal assistance and interpreter at all stages of the criminal investigation; (e) he was refused copies of the applications lodged by the Osh Regional Prosecutor and the General Prosecutor of the Kyrgyz Republic and thus he was denied the opportunity to present written objections to the Supreme Court; (f) he had never been in Chechnya and he made this statement after being subjected to physical and psychological pressure by the investigator and police officers; (g) the map of Kyrgyzstan with Osh city marked as a target was fabricated at the time of his extradition, because it did not appear in any report concerning the seizure of evidence by Kazakh authorities either from the car or during the search of the apartment in Almaty; (h) the courts based their decisions solely on the alleged similarity between the IED found in the car in Kazakhstan and those used during the explosions in Kyrgyzstan, although a forensic expert examination concluded that the explosive agent used in Osh was different from the explosive agent present in the IED confiscated during the car search in Kazakhstan, and that none of the bomb recipes described in the manuscript corresponded to the composition of the exploded IEDs in Osh; (i) although the handwriting expert examination concluded that the manuscript with bomb recipes seized from the apartment in Almaty did not match his handwriting, the court judgment stated the contrary.

2.11 The author claims that he has exhausted all available domestic remedies and that the same matter has not been examined under another procedure of international investigation or settlement.

The complaint

3.1 The author submits that his rights under article 6 have been violated, as he was sentenced to the death penalty after an unfair trial.

3.2 He claims that he is innocent and thus his arrest and detention amounts to a violation of his right to liberty and security under article 9 of the Covenant.

3.3 The author also claims a violation of his rights under articles 7, 14, paragraph 3 (g), and 10, paragraph 1, as he was subjected to torture and was compelled to sign self-incriminating statements. The courts and the prosecutor failed to carry out an investigation into his allegations of ill-treatment, and rejected his claims as groundless.

3.4 He submits that his rights under article 14, paragraph 1, have been violated, since he was denied a fair trial in the determination of the criminal charges against him. The author claims that the consideration of his case by Kyrgyz courts was partial, and that the courts were biased and subjected to political influence. The courts failed to establish a link between the seizure of explosives in Kazakhstan and the explosions in Kyrgyzstan and based their decisions exclusively on unfounded assumptions. They did not establish his motivation for the organization of terrorist acts in Kyrgyzstan, nor prove his membership in a criminal organization or its mere existence. The evaluation of facts and evidence of the case was flawed and arbitrary, and inconsistencies in the witness testimonies remained unaddressed. His guilt was not supported by any reliable evidence and thus he was wrongfully convicted. The author claims that under article 16 of the Kyrgyz Criminal Procedure Code, any doubts which cannot be resolved during court proceedings shall be interpreted in favour of the accused.

3.5 The author claims that he was not informed about his rights at the time of the arrest and was not provided with legal assistance from the moment of his arrest. He was extradited to Kyrgyzstan on 14 May 1999 and was intensely interrogated in the absence of a lawyer and subjected to torture by police and investigative officers. A lawyer was assigned to him only on 30 July 1999, after he had already made self-incriminating statements under pressure. The author also claims that at different stages of the judicial proceedings he had difficulties in consulting the materials contained in the file, most of which were not translated into Turkish (e.g. trial transcripts). He did not speak Russian and Kyrgyz and therefore was not able to check whether the trial transcripts and other court documents reflected correctly his statements and witnesses' testimonies. His lawyer was refused copies of the applications lodged by the Osh Regional Prosecutor and the General Prosecutor of the Kyrgyz Republic and thus he was denied the opportunity to present written objections to the Supreme Court. The author maintains that the above facts amount to a violation of his rights under article 14, paragraph 3 (b) and (d) of the Covenant.

3.6 Finally, the author claims a violation of article 2, paragraph 3, of the Covenant, as he did not have access to an effective remedy.

State party's failure to cooperate

4. The State party was invited to present its observations on the admissibility and/or the merits of the communication in February 2007, and reminders were sent in this respect on 28 April 2008, 1 October 2009, 1 September 2010, and 4 February 2011. The Committee notes that this information has still not been received. The Committee regrets the State party's failure to provide any information with regard to the admissibility or the substance of the authors' claims. It recalls that it is implicit in article 4, paragraph 2, of the

Optional Protocol, that States parties examine in good faith all the allegations brought against them and submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that it may have given.¹³ 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.

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 article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 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.

5.3 Concerning the requirement of exhaustion of domestic remedies, the Committee has noted that according to the information submitted by the author, he brought his claims to the attention of the authorities who dealt with the criminal case. 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 also been met.

5.4 In the Committee's view, the author has sufficiently substantiated, for purposes of admissibility, the claims under articles 2, paragraph 3; 6; 7; 9; 10, paragraph 1; 14, paragraph 1; 14, paragraph 3 (b), (d) and (g), of the Covenant. Consequently, the Committee considers the communication admissible and proceeds to its examination on the merits.

Consideration of 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 required under article 5, paragraph 1, of the Optional Protocol.

6.2 The Committee notes the author's claim that he was tortured by the police and investigative officers during his interrogation, and was compelled to sign self-incriminating statements, inter alia that he had participated in a military training camp in Chechnya, in the absence of a lawyer. The author provides detailed information regarding his torture. He claims that he was initially refused access to SIZO No. 1 in view of his bad physical condition and that he retracted his statement made under physical and psychological pressure at the time of the first instance court hearings. Eventually, his complaint was ignored by the prosecution and the courts. In this regard, the Committee recalls that once a complaint about ill-treatment contrary to article 7 has been filed, a State party must investigate it promptly and impartially.¹⁴ Although the author's allegations of torture and forced confession are mentioned in the decisions of all courts that considered his criminal case, these claims were ultimately rejected as being groundless, not supported by materials

¹³ See communications No. 1522/2006, *N.T. v. Kyrgyzstan*, decision on inadmissibility adopted on 19 March 2010, para. 4; Nos. 1461, 1462, 1476 and 1477/2006, *Maksudov and Rakhimov, Tashbaev and Pirmatov v. Kyrgyzstan*, Views adopted on 16 July 2008, para. 9.

¹⁴ See, e.g., Human Rights Committee general comment No. 20 (1992) on the prohibition of torture and cruel treatment or punishment), *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A, para. 14.

on file and made in order to avoid criminal responsibility. There is no indication in the decisions that the claims were investigated. The Committee therefore considers that the State party's competent authorities have failed to give due and adequate consideration to the author's complaints of torture made during the domestic criminal proceedings. In these circumstances, and in the absence of any observations on the author's specific claims by the State party, the Committee concludes that the facts before it disclose a violation of Mr. Gunan's rights under articles 7 and 14, paragraph 3 (g), of the Covenant.¹⁵ In the light of this conclusion, the Committee will not examine separately the author's claim under article 10, paragraph 1, of the Covenant.

6.3 The author claims that he was extradited to Kyrgyzstan on 14 May 1999 and was not granted legal assistance until 30 July 1999. Upon arrest, he was interrogated on several occasions in the absence of a lawyer. Moreover, the defence was refused copies of the Prosecutor's Office applications to the Supreme Court and thus the author was deprived of the right to raise any objections in relation to those submissions. The Committee notes that these allegations are confirmed by the materials submitted to it by the author. In this respect, it recalls that the Osh Regional Court on 3 August 2000 reversed the decision of the first instance court *inter alia* on grounds that the author's interrogation was conducted in the absence of a lawyer (see para. 2.8 above). In the absence of any information by the State party to refute the author's specific allegations, and in the absence of any other pertinent information on file, the Committee considers that due weight must be given to the author's allegations. Accordingly, it concludes that the facts before it reveal a violation of Mr. Gunan's rights under article 14, paragraph 3 (b) and (d), of the Covenant.

6.4 The Committee takes note of the author's claim that his rights under article 14, paragraph 1, have been violated as the courts, *inter alia*, failed to properly assess the inconsistencies in the witness testimonies and to establish a link between the seizure of explosives in Kazakhstan and the explosions in Kyrgyzstan. In this regard, the Committee recalls its jurisprudence that 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. In the present case, from the uncontested information before the Committee, it transpires that the evaluation of evidence against the author by national courts reflected their failure to comply with the guarantees of a fair trial under article 14, paragraphs 3 (b), 3 (d) and 3 (g), of the Covenant. Accordingly, the Committee is of the view that the author's trial suffered from irregularities which, taken as a whole, amount to a violation of article 14, paragraph 1, of the Covenant.¹⁶

6.5 The author finally claims a violation of his right to life under article 6 of the Covenant, as he was sentenced to death after an unfair trial. In this regard, the Committee reiterates its jurisprudence that the imposition of a sentence of death upon conclusion of a trial, in which the provisions of article 14 of the Covenant have not been respected, constitutes a violation of article 6 of the Covenant.¹⁷ In the light of the Committee's

¹⁵ 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, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI, para. 60; communication No. 1401/2005, *Kirpo v. Tajikistan*, Views adopted on 27 October 2009, para. 6.3.

¹⁶ See, e.g., communication No. 1519/2006, *Khostikoev v. Tajikistan*, Views adopted on 22 October 2009, para. 7.3.

¹⁷ See Human Rights Committee general comment No. 32, para. 59; communications No. 719/1996, *Levy v. Jamaica*, Views adopted on 3 November 1998, para. 7.3; No. 730/1996, *Marshall v. Jamaica*, Views adopted on 3 November 1998, para. 6.6; No. 1096/2002, *Kurbanov v. Tajikistan*, Views adopted on 6 November 2003, para. 7.7; No. 1044/2002, *Shakurova v. Tajikistan*, Views adopted on

findings of a violation of article 14, it concludes that the author is also a victim of a violation of his rights under article 6, paragraph 2, read in conjunction with article 14, of the Covenant.

6.6 Having reached the above conclusions, the Committee will not examine separately the author's claims under article 2, paragraph 3, and article 9, 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 article 6, read together with article 14; articles 7 and 14, paragraph 3 (g); article 14, paragraphs 1 and 3 (b) and (d), of the International Covenant on Civil and Political Rights.

8. 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: carrying out an impartial, effective and thorough investigation into the allegations of torture and ill-treatment and initiating criminal proceedings against those responsible for the treatment to which the author was subjected; considering his retrial in conformity with all guarantees enshrined in the Covenant or his release; and providing the author 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.

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 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.]

17 March 2006, para. 8.6; No. 1304/2004, *Khoroshenko v. Russian Federation*, Views adopted on 29 March 2011, para. 9.11.

Appendix

Individual opinion by Committee member Mr. Rafael Rivas Posada (partially dissenting)

The Human Rights Committee considered communication No. 1545/2007 on 25 July 2011 and, in paragraph 7 of its Views, concluded that the State party had violated article 6, read together with article 14; articles 7 and 14, paragraph 3 (g); and article 14, paragraphs 1 and 3 (b) and (d), of the International Covenant on Civil and Political Rights.

I am in agreement with regard to the violation of article 14, paragraphs 1 and 3 (b), (d) and (g) of the Covenant, as the information provided by the author leaves no room for doubt in that respect. I disagree, however, with the conclusion that there was a direct violation of article 6, since the author was not deprived of his life. According to my interpretation of paragraph 1 of the aforementioned article, which upholds the right to life, it is not appropriate to conclude that there was a direct violation of the article if the author is still alive. It is true that in several of its Views and in its general comment No. 32, paragraph 59, the Committee considers that if the guarantees of due process enshrined in article 14 of the Covenant have been violated and a death sentence has been imposed, this constitutes a violation of article 6. I do not share this conclusion, however, as in my view it does not respect the precise formulation of paragraph 1, which establishes that “no one shall be arbitrarily deprived of his life” and which therefore is not applicable in cases where no deprivation of life has taken place.

The Committee should have concluded its consideration of the communication by finding a violation of article 6, paragraph 2, which refers specifically to the need to respect the laws in force at the time of the commission of the crime; that is to say, the rights enshrined in article 14 must not be violated. In my opinion, the correct formulation would have been “is of the view that the State party has violated article 6, paragraph 2, read together with article 14; articles 7 and 14, paragraph 3 (g); and article 14, paragraphs 1 and 3 (b) and (d), of the International Covenant on Civil and Political Rights”. An alternative formulation, which would also be correct and which the Committee has used on other occasions, would be to say that there has been a violation of article 14, read together with article 6.

The Committee was inconsistent with the statement that it made in paragraph 6.5 of the Views, which reads as follows: “In the light of the Committee’s findings of a violation of article 14, it concludes that the author is also a victim of a violation of his rights under *article 6, paragraph 2*, (emphasis added) read in conjunction with article 14, of the Covenant.”

(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.]

Individual opinion by Committee members Mr. Yuji Iwasawa and Mr. Cornelis Flinterman

In the absence of a reply from the State party, the Committee gives due weight to the author's allegations and finds a violation of his rights under article 14, paragraph 3 (b) and (d) of the Covenant (para. 6.3). This opinion expands upon the reasoning of the finding. Article 14, paragraph 3, provides that everyone shall be entitled "(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing" and "(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing..." There was a violation of these provisions, because the author was extradited on 14 May 1999 and was not granted legal assistance until 30 July 1999, and the defence was refused copies of the Prosecutor's Office applications to the Supreme Court and he was deprived of the right to raise any objections in relation to those submissions. Article 14 guarantees the right of everyone to "communicate with counsel" and requires that "the accused is granted prompt access to counsel" (general comment No. 32, para. 34).

(Signed) Yuji **Iwasawa**

(Signed) Cornelis **Flinterman**

[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.]

Individual opinion by Committee members Mr. Rajsoomer Lallah and Mr. Fabián Omar Salvioli

We disagree with the view that the Human Rights Committee must wait for a person to be deprived of his life before the Committee can legitimately find that the person's inherent right to life, as prescribed under Article 6 of the Covenant, has not been protected.

It stands to reason and common sense that, once life is taken away by an act of a State party, whether legislative or judicial or executive, the person whose life has been extinguished cannot physically or otherwise complain of anything, still less, remain capable of having recourse to article 2 of the Optional Protocol to bring a communication before the Committee. The consequences of death are fundamental and irreversible. Surely, the reasoning of the Committee has always been that the duty undertaken by a State party is:

- To ensure and protect, under article 2 of the Covenant, a person's inherent right to life as prescribed under article 6 of the Covenant; and
- To ensure, in this regard, that this inherent right is protected by law. We would, with confidence, interpret the express provisions of the first, second and third sentences of article 6, paragraph 1, as requiring a State party to ensure that this inherent right is effectively protected and to secure that protection not only by the existence of a law *in fact* but also *in the application of that law*.

It is no doubt for the above reasons that the Committee has, for example in appropriate cases of a threatened extradition by an abolitionist State to another State where the sanction for the extraditable offence is the death penalty (without seeking assurances that the death penalty would not be applied), considered the inherent right to life, given the irreversible character of a violation of that right, to comprise protection from demonstrable risks to that inherent right. *A fortiori*, it seems to us that the non-observance by any judicial authority of the basic guarantees of a fair trial which results in the imposition of the death penalty is a violation of the inherent right to life of an accused.

For the reasons explained above, the appropriate decision of the Committee, in accordance with its established jurisprudence, should have been that there has been a separate violation of article 6 proper.

(Signed) Rajsoomer **Lallah**

(Signed) Fabián Omar **Salvioli**

[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.]

**V. Communication No. 1556/2007, *Novaković v. Serbia*
(Views adopted on 21 October 2010, 100th session)***

<i>Submitted by:</i>	Marija and Dragana Novaković (represented by counsels, Dušan Ignatović and Žarko Petrović)
<i>Alleged victim:</i>	Zoran Novaković (son and brother of the authors)
<i>State party:</i>	Serbia
<i>Date of communication:</i>	10 November 2006 (initial submission)
<i>Subject matter:</i>	Right to life, lack of adequate legal remedy
<i>Procedural issue:</i>	None
<i>Substantive issues:</i>	None
<i>Articles of the Covenant:</i>	6 and 2 in conjunction with 6
<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 October 2010,

Having concluded its consideration of communication No. 1556/2007, submitted to the Human Rights Committee on behalf of Mr. Zoran Novaković 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. The authors of the communication are Ms. Marija and Ms. Dragana Novaković, Serbian nationals. They submit the communication on behalf of their son and brother, respectively, Mr. Zoran Novaković, also a Serbian national, who passed away in a State-owned hospital in Belgrade, on 30 March 2003, at the age of 25. The authors claim Mr. Novaković to be a victim of violations of article 6 and article 2, paragraph 3, in conjunction with article 6 of the International Covenant on Civil and Political Rights.¹ The authors are represented by counsel, Mr. Dušan Ignatović and Mr. Žarko Petrović.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

¹ The Optional Protocol entered into force in relation to Serbia on 6 December 2001.

Facts as presented by the authors

2.1 The victim was admitted to the Clinic for Maxillofacial Surgery, in Belgrade, on 24 March 2003 with a swelling jaw, resulting from a tooth infection. On 29 March 2003, he was transferred to the Clinic for Infectious Diseases. Both hospitals are State owned and State run. On 30 March 2003, Mr. Novaković died as a result of suppurating inflammation of his mouth, neck, chest and subsequent complications. The tooth at the origin of the initial infection was never extracted, basic medical tests, such as microbiological analysis, were never conducted and the surgical treatment applied was totally inappropriate. On the basis of several documents, such as the post-mortem examination carried out on the victim and findings and opinions of forensic experts, they consider that the doctors who treated Mr. Novaković in the two hospitals were responsible for serious omissions and mistakes in the medical treatment, which caused serious health deterioration and resulted in his death.

2.2 A post-mortem examination ordered by the Belgrade District Court was conducted on 1 April 2003. On 21 April 2003, the authors submitted a request to the Ministry of Health to re-examine the circumstances of the death of their son/brother. A Commission of the Ministry of Health, established on 25 June 2003, issued a final report on 14 April 2004.

2.3 On 2 October 2003, the authors submitted to the Belgrade Municipal Prosecutor's Office a complaint regarding the death of Mr. Novaković, together with his death certificate, a specialist report of the Clinic for Maxillofacial Surgery, which originally admitted him, and the discharge list of the Clinic for Infectious Diseases. The Prosecutor's Office initiated an investigation directed against unknown perpetrators, despite the fact that the names of the doctors who treated the victim were known to the Prosecutor's Office at that time. On 5 May 2004, the authors submitted an amendment to their complaint, including the names of eight doctors the authors deemed responsible for the death of their son/brother, accusing them of grave offences against health (article 259 of the Criminal Code) and medical malpractice (article 251 of the Criminal Code). The domestic legislation envisages that the prosecutions for above crimes can only be conducted ex officio by the Public Prosecutor. Damaged persons may take over the prosecution only if the Prosecutor abandons the case, which has not happened in the present case (art. 61 of the Criminal Procedure Code).

2.4 On 23 August 2005, following requests from the Prosecutor's office, the Institute of Forensic Medicine of the Belgrade Medicine Faculty issued Findings and Opinions of its Expertise on Mr. Novaković's case. An additional forensic expertise was conducted on 13 December 2005.

2.5 On 3 April 2006, the Prosecutor's Office submitted a motion for criminal investigation against nine doctors suspected of having committed grave offences against the health of Mr. Novaković. On 5 July 2006, one of the suspects, Dr. Ebrahimi was interrogated and on the same day the investigative judge decided to open criminal proceedings against him. At the time of the submission of the communication, (on 10 November 2006), the above proceedings were still pending.

The complaint

3.1 The authors affirm that they have exhausted all available domestic remedies, namely the filing of a complaint under the domestic criminal procedure and the submission of a complaint to the Ministry of Health.

3.2 The authors claim that the State party violated Mr. Novaković's right under article 6 of the Covenant because it failed to protect his right to life. They state that in the case

Lantsov v. the Russian Federation, the Committee concluded that in the case of persons in vulnerable situations, such as detainees, the authorities had a special duty to protect the right to life if they knew about or ought to have known about the danger.² The authors claim that the same standard should apply to persons who entrusted themselves to the care of medical professionals of a State-run hospital. They submit that the doctors, employed by the State, should have known of the danger to Mr. Novaković, since it is clear from the submitted reports that the doctors committed gross negligence. The authors consider that gross negligence committed by Government employees, including hospital personnel, triggers the State's responsibility for failure to protect life in a particular case.

3.3 The authors complain about the lack of prompt and efficient investigation into the death of the victim as required by article 6 of the Covenant. They submit that it took three years and three months before criminal proceedings against one of the responsible doctors were opened and that accordingly the investigation cannot be considered efficient. The authors consider that delay excessive and refer to the jurisprudence of the European Court of Human Rights, which considered smaller delays to be unreasonable.³ They submit that the scrutiny by the Public Prosecutor was insufficient and make reference to the jurisprudence of the European Court of Human Rights.⁴

3.4 The authors specifically invoke a violation by the State party of their right to effective remedy under article 2, paragraph 3, read in conjunction with article 6 of the Covenant, with respect to the impossibility of challenging the promptness and effectiveness of the investigation. They claim that under the Serbian Criminal Procedure Code there is no possible action to complain about the lack of expediency of the proceedings. With regard to the complaint submitted to the Ministry of Health, the authors submit that it cannot be considered an effective remedy for the violation of the right to life, since it is purely administrative and refer to the Committee's jurisprudence in that sense.⁵

State party's observations on admissibility and merits

4.1 On 30 March 2009, the State party reiterates the facts surrounding the demise of Mr. Novaković and the subsequent investigation. It adds that after the investigative actions in the case of Mr. Novaković's death were completed, on an unspecified date, a request was made to the investigative judge to undertake investigation against seven individuals on the ground of reasonable doubt of having committed a grave criminal offence against health, relating to the criminal offence of medical malpractice. On 19 December 2006 and 15 October 2007, motions to supplement the investigation were submitted (it is unclear by whom).

4.2 On 21 January 2008, the Public Prosecutor's office raised an indictment against six defendants on the grounds of committing a grave offence against health to the detriment of Mr. Novaković. On an unspecified date, the Public Prosecutor issued a statement on discontinuation of the criminal proceedings against three of the defendants due to lack of evidence and, accordingly, on 1 April 2008, the investigative judge of the Second Municipal Court adopted a ruling on discontinuation of the criminal proceedings for those

² Communication No. 763/1997, Views of 26 March 2002, para. 9.2.

³ The authors refer to *McShane v. the United Kingdom*, Application No. 43290/98, Judgement of 28 May 2002, para. 113, where The European Court of Human Rights considered a five-and-a-half-month lapse between the first and the second interrogation of a driver of an army vehicle that killed a victim to constitute unreasonable delay.

⁴ The authors refer to *Ikincisoy v. Turkey*, Application No. 26144/95, Judgement of 27 July 2004, para. 78.

⁵ Reference to communication No. 563/1993, *Bautista de Arellana v. Colombia*, Views adopted on 27 October 1995, para. 8.2.

defendants. Regarding the remaining defendants the State party submits that the main trial was scheduled for April 2009.

4.3 The State party submits that the communication should be declared inadmissible for non-exhaustion of domestic remedies, since the Constitution of the Republic of Serbia includes a provision for a constitutional complaint, which the authors' did not avail themselves of in the present case. According to article 170 of the State party's Constitution, a constitutional complaint may be lodged against acts performed by State bodies which violate or deny human rights guaranteed by the Constitution, if other legal remedies have been exhausted or are not specified. Pursuant to article 82, paragraph 2, of the Law on the Constitutional Court, complaints may also be lodged where all legal remedies have not been exhausted, in cases where the complainant's right to a trial in a reasonable time was breached.

4.4 The State party further submits that the authors' claim that the domestic legal remedies have proved inefficient is not acceptable, since the authorized prosecutor acted upon the criminal charges, initiated criminal proceedings *ex officio* and criminal prosecutions are underway. With regard to the three suspects, against whom the prosecution *ex officio* was abandoned, the State party submits that the authors may, in accordance with article 19, paragraph 3, of the Criminal Procedure Code, undertake criminal proceedings as subsidiary prosecutors, and notes that the authors have not provided information as to whether they have exercised this right.

4.5 The State party concludes that the communication should be declared inadmissible for non-exhaustion of the domestic remedies, as required by rule 96 (f) of the rules of procedure of the Human Rights Committee. As a subsidiary conclusion the State party submits that the claims of violations of article 6 and article 2 relating to article 6 of the Covenant are unfounded, since the domestic court still had to decide on the possible criminal responsibility of the defendants.

Authors' comments on admissibility and merits

5.1 The authors maintain that the State party's arguments as to the admissibility and the merits are unfounded and should be dismissed by the Committee and reiterate their complaint.

5.2 The authors submit that, even though the Serbian Constitution includes the possibility to file a constitutional complaint, this remedy is ineffective. The Constitution was promulgated on 8 November 2006, i.e. a week before the communication was lodged with the Human Rights Committee, and at the time of the authors' submission there was no domestic procedure for filing such constitutional disputes. The authors also submit that, as of June 2009, a very limited number of constitutional complaints had been discussed and decided by the Constitutional Court and a vast number of complaints had been pending for more than a year and a half, with uncertain perspective as to when they will be heard. Additionally, filing a constitutional complaint in 2006 was a non-realistic remedy for the authors, since the work of the Constitutional Courts was blocked between October 2006 and December 2007 because of the retirement of the Chief Justice and the insufficient number of judges.

5.3 With regard to the State party's argument that pursuant to article 82, paragraph 2, of the Law on the Constitutional Court, complaints may also be lodged in cases where the complainant's right to a trial in a reasonable time was breached, the authors reiterate that they are not claiming violation of fair trial rights, but a violation of the right to life under article 6 of the Covenant, based both on the failure to protect his life and on the lack of prompt and efficient investigation into the loss of life in the case of Mr. Novaković.

5.4 The authors reiterate that the first suspect was interrogated and the criminal procedure initiated 40 months after the death of the victim and that in itself demonstrates the lack of prompt and efficient investigation. The authors further submit that the trial, which the State party stated was scheduled for April 2009, was in fact subsequently postponed twice - first for May 2009, then for June 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 article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

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

6.3 The Committee notes the State party's challenge to the admissibility of the communication on the ground of failure to exhaust domestic remedies, as well as the authors' claim that remedies have been ineffective and unreasonably prolonged. The Committee recalls its jurisprudence that, for the purposes of article 5, paragraph 2 (b), of the Optional Protocol, domestic remedies must both be effective and available, and must not be unduly prolonged.⁶ The Committee notes the authors' allegation that the complaint filed with the Ministry of Health is a purely administrative remedy which cannot be deemed effective in the present case. This allegation has not been disputed by the State party.

6.4 The Committee further notes the State party's submission that the authors did not attempt to file a recourse with the Constitutional Court for violation of the rights guaranteed by the Constitution. The authors, however, have explained that at the time of the submission of the communication, they could not avail themselves of this remedy, since it had just been created and there was no procedure for its application in the domestic legislation. This allegation has remained uncontested by the State party. Accordingly, the Committee considers that the said legal remedy cannot be considered effective and available.

6.5 The Committee also observes that in the instant case criminal proceedings were not initiated for three and half years after the death of the victim and that, to the Committee's knowledge, these proceedings are yet to be finalized. Therefore, the Committee considers that, in the circumstances of the present case, domestic remedies have been unreasonably prolonged⁷ and that article 5, paragraph 2 (b), does not preclude it from considering the communication.

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.

⁶ See *ibid.*, paras. 8.2 and 10; and communication No. 612/1995, *Villafañe Chaparro et al. v. Colombia*, Views adopted on 29 July 1997, paras. 5.2, 8.8 and 10.

⁷ See the Committee's jurisprudence in communications No. 1560/2007, *Marcellana and Gumanoy v. the Philippines*, Views adopted on 30 October 2008, para 6.2; No. 1250/2004, *Rajapakse v. Sri Lanka*, Views adopted on 14 July 2006, paras. 6.1 and 6.2; No. 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006, para. 8.3.

7.2 The Committee must determine whether the State party failed in its obligations regarding article 6 and article 2 of the Covenant in connection with the death of Mr. Novaković as a result of inadequate medical treatment. In this regard the Committee recalls its general comment No. 6 (1982),⁸ in which it declared that the protection of the right to life requires that States adopt positive measures to this end. In some cases the Committee has found violations of this treaty obligation.⁹ However, in the instant case, the Committee finds that there is insufficient evidence before it to attribute direct responsibility to the State for failure to meet its obligation under article 6 of the Covenant.

7.3 The Committee notes the State party's submission that the domestic criminal legislation establishes criminal responsibility for medical malpractice and for grave offences against health. The Committee, however, observes that the State party has failed to provide an explanation as to the functioning of the Ministry of Health's Inspectorate, or as to the efficiency of criminal prosecution in cases of medical malpractice and other offences against health. In the instant case, it notes that the first suspect was not interrogated and the criminal procedure was not initiated until 40 months after the death of the victim; an indictment against the possible perpetrators was not raised until 21 January 2008, nearly five years after the death of the victim; and the first instance trial had not started as of June 2009. The Committee also notes that a medical report regarding the cause of the death of Mr. Novaković was available on 1 April 2003; however a full forensic expertise was only conducted in August 2005. Both the initial examination and the subsequent additional expertise, issued by the Belgrade Institute of Forensic Medicine, contain strong indications that standard medical procedures had not been performed and raise questions as to the possible medical malpractice and/or offences against health. The State party has not provided any explanation in connection with these allegations, including the reasons for the delay in initiating and completing the criminal investigation and proceedings on Mr. Novaković's death. The Committee considers that these facts constitute a breach of the State party's obligation under the Covenant to properly investigate the death of the victim and take appropriate action against those responsible and, therefore, reveal a violation of article 2, paragraph 3, in conjunction with article 6 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 2, paragraph 3, in conjunction with article 6 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. The State party is under an obligation to take appropriate steps (a) to ensure that the criminal proceedings against the persons responsible for the death of Mr. Novaković are speedily concluded and that, if convicted, they are punished, and (b) to provide the authors with 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 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

⁸ *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40), annex V.*

⁹ See note 2 above.

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.

[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.]

**W. Communication No. 1557/2007, *Nystrom et al. v. Australia*
(Views adopted on 18 July 2011, 102nd session)***

<i>Submitted by:</i>	Stefan Lars Nystrom (represented by the Human Rights Law Resource Centre)
<i>Alleged victims:</i>	The author, his mother, Britt Marita Nystrom and his sister, Annette Christine Turner.
<i>State party:</i>	Australia
<i>Date of communication:</i>	22 December 2006 (initial submission)
<i>Subject matter:</i>	Expulsion of the author from his country of residence.
<i>Procedural issue:</i>	Non-substantiation
<i>Substantive issues:</i>	Arbitrary interference with right to privacy, family and home; right to protection of the family; right to enter one's own country; freedom from arbitrary detention; <i>ne bis in idem</i> ; and prohibition of discrimination.
<i>Articles of the Covenant:</i>	2, paragraph 1; 9, paragraph 1; 12, paragraph 4; 14, paragraph 7; 17; 23, paragraph 1; and 26.
<i>Article 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 18 July 2011,

Having concluded its consideration of communication No. 1557/2007, submitted to the Human Rights Committee by Stefan Lars Nystrom 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:

* 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. Helen Keller, 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 and Ms. Margo Waterval.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Krister Thelin did not participate in the adoption of the present Views.

The texts of two individual opinions signed by Committee members Mr. Gerald L. Neuman, Mr. Yuji Iwasawa, Sir Nigel Rodley, Ms. Helen Keller and Mr. Michael O'Flaherty are appended to the text of the present Views.

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

1.1 The author of the communication, dated 22 December 2006, is Stefan Lars Nystrom, a Swedish citizen born in Sweden on 31 December 1973. He submits his communication on his behalf and on behalf of his mother, Britt Marita Nystrom, a Swedish citizen born on 27 March 1942 in Finland; and on behalf of his sister, Annette Christine Turner, an Australian citizen born on 12 October 1969 in Australia. He claims to be a victim of a violation by Australia of his rights under articles 9, paragraph 1; 12, paragraph 4; 14, paragraph 7; 17; 23, paragraph 1; and 26, of the International Covenant on Civil and Political Rights, as well as a violation of article 2, paragraph 1, read in conjunction with the foregoing articles. He also claims that his mother and sister are victims of a violation of articles 17 and 23, paragraph 1 of the International Covenant on Civil and Political Rights. He is represented by the Human Rights Law Resource Centre.¹

1.2 On 23 December 2006, the Committee, pursuant to rule 97 of its rules of procedure, acting through its Special Rapporteur on new communications and interim measures, denied the author's request for interim measures to prevent his expulsion to Sweden. The author was deported to Sweden on 29 December 2006.

The facts as submitted by the author

2.1 The author's mother was born in Finland and migrated to Sweden in 1950 where she got married. In 1966, the couple migrated to Australia. Their first child, Annette Christine Turner, was born in Australia. In 1973, while pregnant a second time, the author's mother travelled back to Sweden with her daughter to visit family members. She stayed in Sweden for the author's birth. When the author was 25 days old he travelled to Australia on a Swedish passport with his mother and his sister. They arrived in Australia on 27 January 1974.

2.2 The author's parents separated when he was 5 years old and are now divorced. His mother, father and sister continue to live in Australia. There has been little contact between the author and his father since his parents' divorce. His mother is a permanent resident and his sister was born in Australia and therefore holds an Australian passport. The author remained in Australia all his life since he was 27 days old, holding a Transitional (Permanent) Visa. He has few ties with Sweden, having never learned the Swedish language and not having been in direct contact with his aunts and uncles and cousins there. On the other hand, the author has close ties with his mother and sister as well as his nephews living in Australia. The author has held an Australian Medicare (governmental health care) card and an Australian driver's licence. He has received Centre link unemployment benefits from the Government of Australia at several points in his life. He has paid taxes to the State as a car detailer and fruit picker.

2.3 The author has a substantial criminal record within the meaning of Section 501(7) of the Migration Act.² Since the age of 10, he has been convicted of a large number of

¹ The Optional Protocol entered into force for the State party on 25 September 1991.

² Section 501 (2) of the Migration Act 1958 provides that the Minister may cancel a visa granted to a person if the Minister reasonably suspects that the person does not pass the character test (s. 501 (2) (a)), and the person does not satisfy the Minister that he or she in fact passes the character test (s. 501 (2) (b)).

Section 501 (6) (a) provides that a person does not pass the character test if he or she has a substantial criminal record within the meaning of s. 501 (7).

Section 501 (7) (c) provides that a person is deemed to have a substantial criminal record if he or she has been sentenced to a term of imprisonment of 12 months or more.

offences, including aggravated rape when he was 16 years old on a child 10 years old, arson and various offences relating to property damage, armed robbery, burglary and theft, various driving offences; and offences relating to possession and use of drugs. In relation to all of these offences, the author has been punished under the domestic criminal justice system. At the age of 13, he was committed to the care of the State. At the time of deportation, the author was not subject to any outstanding or incomplete sentences or punishments. The author suffered from a drinking problem at the origin of most of the offences he was accused of. He was partially treated for this drinking problem and learned to control it.

2.4 On 12 August 2004, the Minister cancelled the author's Transitional (Permanent) Visa on the basis of his failure to meet the character test specified in Section 501(6) of the Act by reference to his substantial criminal record. As a result, the author was arrested and detained at Port Phillip Prison where he stayed for eight months. The author's application for judicial review of the decision to cancel his visa was dismissed by a federal magistrate but subsequently allowed by the Full composition of the Federal Court. The judgement dated 30 June 2005, ruled that "it is one thing to say that the responsibility to determine who should be allowed to enter or to remain in Australia in the interests of the Australian community ultimately lies with the discretion of the responsible minister. That has little to do with the permanent banishment of an absorbed member of the Australian community with no relevant ties elsewhere". As a result of his successful appeal to the Full Federal Court, the author was released, started working and found some stability in his life.

2.5 The Minister successfully appealed to the High Court, which ruled on 8 November 2006 that the author's visa should be cancelled and the author deported from Australia. The author was therefore re-arrested on 10 November 2006 and imprisoned at the Maribyrnong Immigration Detention Centre pending deportation, which occurred on 29 December 2006. During his detention period, the author was classified as a "high risk" detainee and he was accordingly subjected to solitary confinement through the entire course of his detention. Prior to the author's deportation to Sweden, the Swedish authorities requested the State party not to deport him based on humanitarian grounds.

2.6 The author thought he was an Australian citizen, having lived all his life in Australia. He realized he was a foreigner in his own country when the State party authorities raised the possibility of cancelling his visa in August 2003. He was not aware he had a visa as the visas held were conferred on him automatically by Australian legislation. They did not consist of visas made or stamped on a passport. The author's mother herself thought the author was an Australian citizen. In the earlier time of their stay in Australia (including for two to three years after the author's birth), the author's mother and her husband received letters from the Australian authorities inviting the two of them to become citizens. However, these letters never referred to their children, which reinforced the impression that the children were, in fact, Australian citizens.

2.7 The author signed a statutory declaration agreeing to his deportation to Sweden as he was told by the State party authorities that he would face indefinite detention pending consideration of the matter by the Committee if he decided not to sign this declaration. The author was offered no legal advice before signing this declaration. Upon arrival in Sweden, the author was not met at the airport by the Swedish authorities. The Swedish Justice Department claimed in the press that they received no request of any kind by the Australian authorities for transitional assistance to be provided to the author. As he was not deported to Sweden to serve any type of prison sentence, the author has received no government support, other than unemployment benefits, since his arrival. The author temporarily lived with his mother's brother-in-law and then rented a small apartment, using half of his unemployment benefit.

2.8 The author arrived in Sweden entirely unprepared for the culture, language and climate. He has suffered considerable confusion, exhaustion, anger and unhappiness as a result of the process to which he has been subjected. Apart from the provision of unemployment benefits, the author has received no governmental or community support in relation to language training and social aspects. This distress has led to a return to alcohol abuse. His mother and sister are unable to visit him due to a lack of financial means. Such separation has caused great emotional distress to the family, which is irreparably and indefinitely disrupted.

The complaint

3.1 The author considers that the State party's decision to expel him to Sweden violates articles 9, paragraph 1; 12, paragraph 4; 14, paragraph 7; 17; 23, paragraph 1; and 26, of the Covenant as well as article 2, paragraph 1, read in conjunction with articles 14, paragraph 7; 17; and 23, paragraph 1. The author further claims that the State party has violated his mother and sister's rights under articles 17 and 23, paragraph 1 of the Covenant.

Article 12, paragraph 4

3.2 The author alleges that by cancelling his Transitional (Permanent) Visa, leading to his deportation, the State party has breached his right to enter his own country, set forth in article 12, paragraph 4, of the Covenant. He refers to the Committee's jurisprudence,³ including general comment No. 27 (1999) on the freedom of movement,⁴ where the Committee has stated that the wording of article 12, paragraph 4, does not distinguish between nationals and aliens; that persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase "his own country"; that the concept of "his own country" is broader than the concept "country of his nationality"; and that it is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral but that it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. The author attaches particular importance to the separate opinion of Committee members Evatt, Medina Quiroga and Aguilar Urbina (joined by Ms. Chanet, Mr. Prado Vallejo and Mr. Bhagwati) who, in *Stewart v. Canada* considered that "for the rights set forth in article 12, the existence of a formal link to the State is irrelevant; the Covenant is here concerned with the strong personal and emotional links an individual may have with the territory where he lives and with the social circumstances obtaining in it. This is what article 12, paragraph 4 protects".

3.3 The author notes that by contrast with *Stewart v. Canada* and *Canepa v. Canada*,⁵ the author has lived all his life in Australia which he therefore considers his own country. The author emphasizes that the *travaux préparatoires* of the Covenant also strongly indicate a willingness to broadly interpret the concept of "his own country" as such wording was preferred to the initial concept of "country of which he is a national". The author also refers to the judgement of the Australian Full Federal Court, which ruled that the author was an absorbed member of the Australian community with no ties to Sweden. Indeed, the Government of Australia had accepted that from 2 April 1984 (a date relevant in relation to certain legislative changes), the author had ceased to be an immigrant by

³ The author refers to communication No. 538/1993, *Stewart v. Canada*, Views adopted on 1 November 1996, para. 12.4.

⁴ *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40*, vol. I (A/55/40 (Vol. I)), annex VI, sect. A.

⁵ The author refers to communication No. 558/1993, *Canepa v. Canada*, Views adopted on 3 April 1997.

reason of his absorption into the Australian community. That year, he was indeed granted an Absorbed Person Visa. In an Australian legal context, ceasing to be an immigrant by reason of absorption occurs when a person becomes a member of the Australian community or is absorbed into the community of the country.⁶ In this regard, the ties existing between absorbed members and the State are as important as the ties between the State and Australian citizens. Thus the author was obliged to comply with the laws regarding taxation, he could vote and be elected for office in local government in Victoria, and could be eligible to serve in the Australian Defence Force, which is not confined to citizens. The author further argues that he could have served in the police or similar public services if he had wished so. Therefore, the ties binding him to Australia are as strong as the ties the State would have with any of its citizens.

3.4 Due to his criminal record, once deported to Sweden, the author is unlikely to be allowed to return to Australia. In this regard, the author submits that the commission of criminal offences alone does not justify the expulsion of a person from his own country, unless the State could show that there are compelling and immediate reasons of necessity, such as national security or public order, which require such a course. Both the delay in taking action after the author's most serious offences (offences committed mainly during the author's teenage years) and the fact that only moderate weight was given to the risk of recidivism suggest that protection of the Australian community from future conduct on the part of the author was not a major factor for the Minister in reaching her decision. The author therefore considers that the State party's decision to deport him and subsequently prohibit him from ever returning to Australia is arbitrary and contravenes article 12, paragraph 4 of the Covenant.

Article 14, paragraph 7

3.5 The author further contends that the State party has violated his rights under article 14, paragraph 7, which states that no one shall be tried or punished again for an offence for which he has already been convicted. The author submits that his visa cancellation and consequential deportation constitutes another punishment for offences in respect of which he has already served his time in accordance with Australian law. The author notes the use of "tried or punished" in article 14, paragraph 7. In this sense, he acknowledges that he has not been retried for his crimes. However, he claims he has been punished again, through the cancellation of his transitional (permanent) visa, his consequential detention and his deportation to Sweden years after the events in question took place. The author insists that his detention for a period of eight months at Port Philip Prison which is not an approved immigration facility but rather a maximum-security regular prison, where convicted and remand prisoners are held in relation to indictable offences, are strong evidence that the State party's actions against the author amount to punishment within the meaning of article 14, paragraph 7, of the Covenant.

Articles 2, paragraph 1, and 26

3.6 The author submits that the denial of his right to be free from double punishment amounts to a breach of articles 2, paragraph 1, and 26 of the Covenant in that he was unreasonably discriminated against based on his nationality. As stated previously, the author considers that he has been punished twice for the same offence. Such double punishment could not be imposed on an Australian national. A person's long-term residency, as opposed to citizenship, is not a reasonable and objective criterion to form the

⁶ The author refers to Australian jurisprudence in *Ex parte Walsh and Johnson*; *In re Yates* (1925) 37 CLR 36, 62-5 (Knox CJ), and *O'Keefe v. Calwell* (1948) 77 CLR 261, 277 (Latham CJ).

basis of a decision to infringe the rights enshrined in article 14, paragraph 7. The author therefore considers that the State party has violated his rights under article 2, paragraph 1 and article 26, read in conjunction with article 14, paragraph 7 of the Covenant.

Articles 17 and 23, paragraph 1

3.7 The author contends that the State party has violated his right to protection from arbitrary interference with his family life on the one hand, thus violating article 17, read in conjunction with article 23, paragraph 1; and his right to protection from arbitrary interference with his home on the other hand, in violation of article 17 of the Covenant. The bonds between his mother, his sister and him constitute family for the purposes of both articles 17 and 23. Being a nuclear family, this relationship satisfies even the most restrictive interpretation of both provisions. Requiring one member of a family to leave, while the other members of the family remain in Australia, amounts to an interference with the family life of the author, his mother and his sister. When not imprisoned or placed in foster care, the author used to live with his mother.

3.8 While acknowledging that his mother and his sister are not per se prohibited from visiting him in Sweden, the author refers to the Committee's jurisprudence where it has considered that a State party's refusal to allow one member of a family to remain in its territory, while the other members of the family unit are allowed to remain in its territory, can still amount to an interference with that person's family life.⁷ Therefore a decision by the State party to deport him and to compel his immediate family to choose whether they should accompany him or stay in the State party would result in substantial changes to long-settled family life⁸ in either case, in a manner which would violate article 17, read in conjunction with article 23, paragraph 1.

3.9 As for the notion of home, the author refers to the Committee's general comment No. 16 (1988) on the right to privacy,⁹ where it has stated that the term "home" in English as used in article 17 of the Covenant is to be understood to indicate the place where a person resides or carries out his usual occupation. The author submits that the term home should here be interpreted broadly to include the community in which a person resides and of which he is a member. The fact that the author is not an Australian citizen is not relevant for the Committee's understanding of the notion of home under article 17 of the Covenant. By uprooting the author from the only country he has ever known, severing his contact with family, friends and regular employment, and deporting him to an alien environment such as Sweden, without any support networks, settlement initiatives, or prospects of meaningful integration, the State party has interfered with the home life of the author. With regard to the arbitrariness of such measure, the author refers to the Committee's jurisprudence where it has considered that in cases where one member of a family must leave the territory of a State party, while the other members of a family are entitled to remain, the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered on the one hand, in light of the significance of the State party's reasons for the removal of the person concerned and, on the other hand, the degree of hardship the family and its members would encounter as a consequence of such removal.¹⁰

⁷ The author refers to communications No. 1011/2001 *Madafferi v. Australia*, Views adopted on 26 July 2004, para. 9.7; No. 930/2000, *Winata v. Australia*, Views adopted on 26 July 2001, para. 7.1; and *Canepa v. Canada* (note 5 above), para. 11.

⁸ The author refers to *Madafferi v. Australia* (note 7 above), para. 9.8; and communication No. 930/2000, *Winata v. Australia* (note 7 above), para. 7.2.

⁹ *Official Records of the General Assembly, Forty-third Session, Supplement No. 40 (A/43/40)*, annex VI.

¹⁰ The author refers to *Madafferi v. Australia* (note 7 above), para. 9.8.

3.10 The State party has justified his deportation on the basis that he had a substantial criminal record and was therefore deemed to be of a “bad character” for the purposes of the criteria set out under the Act. In commenting on the seriousness and nature of the author’s conduct, the Minister placed the greatest emphasis on the convictions for rape and intentionally causing serious injury which occurred in December 1990 and then on two armed robbery convictions in February 1997. Thus, the Minister’s decision to deport the author was made almost 14 years after the conviction for rape and intentionally causing injury and over nine years after his release from prison on those charges, seven years after the armed robbery convictions and a number of years after his release from prison on the latter charges. The author therefore concludes that the timing of the Minister’s decision does not demonstrate any sense of an urgent need to protect the Australian community, but rather a willingness to further punish the author for the crime he has committed. For all the reasons mentioned, the author considers that the State party has violated articles 17 and 23, paragraph 1, in that it has arbitrarily interfered with his rights to privacy, family and home and his right to protection of his family. It has uprooted him from his “home” which he defines as the Australian community in which he has lived all his life. Due to his criminal record, it is unlikely that he will ever be in a position to return to Australia and thus be close to his family in the near future.

3.11 The author also considers that as a person with a different nationality, he has suffered discrimination in his entitlement to his right to protection from arbitrary interference with his home and his right to protection of his family. He therefore considers that the State party has also violated articles 2, paragraph 1, and 26, read in conjunction with articles 17 and 23, paragraph 1 of the Covenant.

Article 9

3.12 The author finally claims that his detention period of over nine months, mainly at Port Phillip Prison (eight months) constitutes a violation of article 9, paragraph 1, of the Convention. He points out that article 9, paragraph 1 permits deprivation of liberty as long as such detention is provided by law and is not arbitrary. Australian authorities have not provided any justification for his detention during the course of his legal appeals or in preparation for his deportation that takes into account the nature of his individual circumstances. The author has not entered Australia illegally or purported fraudulently or dishonestly to have any visa or citizenship status he does not possess, and the State party has never alleged he has done so. The author’s substantial criminal record could not be the basis for his detention as he has already served his sentences for those crimes. His detention on such grounds would therefore be unnecessary and unreasonable. The author adds that he did not represent a flight risk so as to render incarceration in immigration detention a proportionate response. At that time, the author had a steady employment and prospects of success in regaining his visa. He had no advantage in fleeing. The State party could have used alternatives to imprisonment, such as the imposition of reporting obligations, sureties or other conditions, to achieve the same goal. The author therefore claims that his detention was arbitrary, thus violating article 9, paragraph 1 of the Covenant.

The State party’s observations on admissibility and merits

4.1 On 7 February 2008, the State party submitted its observations on the admissibility and merits. It rejects the authors’ claims as insufficiently substantiated and for failing to exhaust domestic remedies as far as article 14, paragraph 7 is concerned. The State party further claims that the author’s allegations are without merit.

Article 9, paragraph 1

4.2 Regarding the author's claims under article 9, paragraph 1, the State party considers that the author's detention per se cannot constitute sufficient substantiation for his claim of arbitrariness and that there was ample justification for detaining the author. The author's detention was specifically adapted to the purpose of processing him for removal, which is considered to be a lawful purpose under the Covenant.

4.3 On the merits, the State party argues that the author was detained following the lawful revocation of his visa on character grounds under the Migration Act. Immigration officers are obliged to detain people in Australia without valid visas under Section 189 of the Act. Section 196 provides for the duration of detention. It states that non-citizens detained under section 189 must be kept in immigration detention until they are (a) removed from Australia under Section 198 or 199; (b) deported under section 200; or (c) granted a visa. The State party considers this legislative regime to be appropriate and proportional to the ends of preserving the integrity of Australia's immigration system and protecting the Australian community. As such, it cannot be considered arbitrary.

4.4 The State party refutes the author's claim that his detention for eight months in Port Phillip prison was so long as to render it arbitrary. The Minister for Immigration was exercising her lawful powers under Section 501 of the Migration Act when she decided to cancel the author's visa. His detention was a predictable consequence of this decision, as it was a corollary of his removal, which flowed automatically from the Minister's decision. Furthermore, the author's appeal to the Full Federal Court took some time to be resolved but it was the author's decision to make such an appeal. Once the Full Federal Court handed down its decision in favour of the author, he was promptly released from detention, until the State party successfully contested it in the High Court, at which time he was rearrested. The State party adds that contrary to the author's argument, his long history of contempt for Australian law and alcoholism suggested he could not be relied on to present himself for removal. This view was vindicated when he did not comply with such an order after the High Court's decision on 8 November 2006, necessitating an escort on 10 November 2006.

4.5 Several factors demonstrate that the author was treated in a reasonable, necessary, appropriate and predictable manner, which was proportional to the ends sought given the circumstances of the case. First, he was always treated in accordance with domestic law. Secondly, he failed to meet the character test established by section 501 of the Migration Act due to his substantial criminal record. The author was accorded a hearing, but failed to convince the Minister of his suitability to remain in Australia. Finally the author made threats at various stages of the process which led immigration authorities to consider him to be unsuitable for mainstream immigration detention.

4.6 The State party further claims that the Minister was guided by Ministerial Direction No. 21 on the exercise of powers under section 501 of the Migration Act when she made her decision to cancel the author's visa. The author's relationship with his mother, sister and nephews were relevant considerations. However, the potential for disruption to these relationships had to be weighed against the risk to the Australian community of allowing him to stay and the expectations of the Australian community in this regard. The State party insists that it takes all reasonable measures to protect the Australian community, especially vulnerable members of the community such as children and young people. The author was convicted of rape and assaulting a 10-year-old boy when he was 16 years old. In assessing the author's character and the need to protect the community, the Minister took into account the seriousness of the offences, the risk he would re-offend and whether cancelling his visa would serve as a deterrent. The State party notes that since the rape and assault of the 10-year-old boy, the author has been convicted of around 80 other offences, including two counts of armed robbery resulting in substantial prison sentences. The author's last

conviction occurred in 2002 and he was making apparent efforts to reform his behaviour. However he established a pattern of recidivism in his lifetime which meant it was reasonable for the Minister to form the view that he still constituted a risk to the community. The Minister also recognized that the author had no ties to Sweden and did not speak Swedish but eventually decided that the seriousness and frequency of his crimes would outweigh these considerations.

Article 12, paragraph 4

4.7 With regard to article 12, paragraph 4, the State party considers the author's claims to be inadmissible for failure to substantiate. The author's claims that Australia is his own country are based on circumstantial evidence which does not assist his case. The author is not a national of Australia for the purposes of the Covenant, and is therefore subjected to the domestic rules which apply to non-citizens. Without a valid visa, the author does not lawfully reside in Australia. The State party refers to the Committee's general comment No. 15 (1986) on the position of aliens under the Covenant, where it has stated that "it is in principle a matter for the State to decide who it will admit to its territory".¹¹

4.8 On the merits, the State party notes that the author relies heavily on the Committee's jurisprudence in *Stewart v. Canada*.¹² Despite the high number of individual opinions in this case, the Committee's Views themselves do not support the author's conclusion that Australia is his own country for the purpose of article 12, paragraph 4, of the Covenant. In *Stewart v. Canada*, the Committee lists some circumstances in which an author's "own country" would not be dependent on his nationality. However, none of the exceptions covers the author's particular situation. He has not been stripped of his nationality, nor has the country of nationality ceased to exist as a State, nor is he stateless. All of these exceptions involve aliens whose nationality is in doubt, illusory or has ceased to exist. The author's Swedish nationality on the other hand, has never lapsed. The State party quotes the critical passage of *Stewart v. Canada*, where the Committee considered that the question was "whether a person who enters a given State under that State's immigration laws, and subject to the conditions of those laws, can regard that State as his own country when he has not acquired its nationality and continues to retain the nationality of his country of origin. The answer could possibly be positive were the country of immigration to place unreasonable impediments on the acquiring of nationality by new immigrants. But when [...] the country of immigration facilitates acquiring its nationality, and the immigrant refrains from doing so, either by choice or by committing acts that will disqualify him from acquiring that nationality, the country of immigration does not become "his own country" within the meaning of article 12, paragraph 4, of the Covenant.¹³ In this regard it is to be noted that while in the drafting of article 12, paragraph 4, of the Covenant the term 'country of nationality' was rejected, so was the suggestion to refer to the country of one's permanent home".

4.9 The State party emphasizes that far from placing unreasonable impediments on the acquisition of citizenship, it offered the author's mother and her husband the opportunity to apply for citizenship more than once. Not only did the Nystrom family not take up this offer, the author also committed several crimes, any one of which would disqualify him from eligibility for a visa to remain in Australia, let alone citizenship. As for the strong connection tying the author with Australia, the State party refers to the Committee's

¹¹ The State party refers to para. 5 of the general comment. *Official Records of the General Assembly, Forty-first Session, Supplement No. 40 (A/41/40)*, annex VI.

¹² See note 3 above.

¹³ *Ibid.*, para. 12.5.

jurisprudence in *Madafferi v. Australia*,¹⁴ where the Committee rejected the author's claim that Australia was his own country within the meaning of article 12, paragraph 4, despite his being married to an Australian citizen, having Australian children and running a business in Australia. The State party concludes that if the Committee did not consider Australia as Mr. Madafferi's own country, *a fortiori*, it could not consider Australia as the author's own country, within the meaning of article 12, paragraph 4, of the Covenant. The State party adds that Absorbed Person Visa holders fall squarely within the category of non-citizens and are subject to the same visa rules under the Migration Act as other non-citizens. The Absorbed Person Visa does not grant the same rights as an Australian citizen, and specifically does not grant the visa holder implied protection from removal. The State party concludes that the author's own country is nothing other than Sweden.

Article 14, paragraph 7

4.10 With regard to article 14, paragraph 7, the State party argues that the author has failed to exhaust domestic remedies as he has never raised the prospect of double punishment before any domestic tribunal. The State party further contests admissibility of the communication for lack of substantiation since nothing in the author's communication constitutes evidence of an intention on the part of the State party, in cancelling the visa, to further punish him for crimes he had already committed.

4.11 On the merits, the State party refers to Section 5 of the Migration Act which defines Immigration Detention to include detention in a prison or remand centre of the Commonwealth, a State or a Territory. When the responsible immigration officer adjudges a detainee to be unsuited to a detention centre established under the Migration Act (for example because the detainee has a history of violence), the decision may be made to detain him or her in a prison or remand centre. The author has a significant and sustained history of violent crime. When his last custodial sentence ceased, he made threats to attack staff and detention centre inmates, if he were to be transferred to an immigration detention centre. Immigration detention centres are low security and there is very limited capacity to manage violent incidents. The State party therefore contends that to protect the welfare of staff and other inmates, between November 2004 and July 2005, the author was detained under section 189 of the Migration Act at Port Phillip Prison in Victoria.

4.12 Regarding the author's claim that his conditions of detention at Maribyrnong Immigration Detention Centre constituted punishment, the State party replies that the conditions were adequate and meant to monitor his acute alcohol withdrawal and anxiety. He was placed in an individual room for that purpose with all the medical attention needed. When he returned to the Detention Centre in December 2007, the author refused to be held in another area than the one where he was during the first period. He stated that he did not want to mingle with other inmates especially those from different ethnic groups than his. The State party concludes that the author's conditions of detention could not be considered to be a punishment within the meaning of article 14, paragraph 7 of the Covenant.

Articles 17 and 23, paragraph 1

4.13 With regard to author's claims under articles 17 and 23, paragraph 1 of the Covenant, the State party contends that the author has not sufficiently substantiated his claims as his communication does not demonstrate that the State party failed to take into account all relevant considerations in making the decision to cancel his visa. The State party's obligations under articles 17 and 23, paragraph 1 were specifically considered by the Minister in making her decision to cancel the author's visa. Direction No. 21 guiding

¹⁴ The State party refers to *Madafferi v. Australia* (note 7 above), para. 9.6.

the exercise of powers provides for consideration of a broader range of impact on the individual's life than articles 17 and 23, paragraph 1. The State party specifies as well that the claims related to the author's mother and sister will not be distinguished from that of the author as they relate to the same issue.

4.14 On the merits, the State party insists that articles 17 and 23, paragraph 1 should be read in the light of the State party's right, under international law, to control the entry, residence and expulsion of aliens. In accordance with this right, the Covenant allows the State party to take reasonable measures to maintain the integrity of its migration regime, even where such measures may involve removal of one member of a family.

4.15 Regarding article 17, the State party refers to the Committee's general comment No. 16 on the right to privacy, which when defining home as "a place where a person resides or carries out his usual occupation" refers to dwelling houses and possibly places of business, not the whole country.¹⁵ The State party refers for this purpose to Manfred Nowak's *CCPR Commentary* where he defines home as "all types of houses" and "that area over which ownership (or any other legal title) extends".¹⁶ The State party therefore rejects the author's assumption that "home" in article 17 could extend to the whole of Australia.

4.16 With regard to the author's claims under article 23, paragraph 1, the State party agrees that it has interfered in his family life. It however contends that it has not done so unlawfully or arbitrarily. The State party recalls the Committee's general comment No 16 on the right to privacy, which states that no interference can take place except in cases envisaged by the law, which must comply with the provisions, aims and objectives of the Covenant.¹⁷ The State party argues that the Migration Act envisages the removal from Australia of persons with substantial criminal records who are not Australians. This is in accordance with the provisions, aims and objectives of the Covenant because its object is to protect the Australian community from threats to the fundamental right to life, liberty and security of individuals. The character test in section 501 specifies precisely the circumstances under which the decision may be taken to cancel or refuse a visa, and each decision is made on the individual merits after consideration of the principles in Direction 21.

4.17 The State party insists that the Committee in its jurisprudence allowed and applied a balancing test between considerations under article 23, paragraph 1, and the State party's reasons for removing an individual.¹⁸ Accordingly, the disruption of the author's family was weighed against factors such as the protection of the Australian community and the expectations of the Australian community. In these circumstances it was decided that the seriousness of the author's crimes and risk to the Australian community outweighed the interference with the author's family. This decision was taken in full respect of Australian law. The State party refers to Committee's jurisprudence in *Byahuranga v. Denmark* where it considered that Mr. Byahuranga's criminal conduct was of a serious enough nature to justify his expulsion from Denmark.¹⁹ In the present case, the author committed crimes resulting in far longer sentences. Therefore, it was reasonable for the Australian community to expect protection from the State party through legal mechanisms, including visa cancellation under the Migration Act.

¹⁵ The State party refers para. 5 of the general comment.

¹⁶ Manfred Nowak, *UN Covenant on Civil and Political Rights. CCPR Commentary* (2nd rev. ed.) (Kehl am Rhein, Engel, 2005), p. 302.

¹⁷ Para. 3.

¹⁸ The State party refers to *Madafferi v. Australia* (note 7 above), para. 9.8.

¹⁹ The State party refers to communication No. 1222/2003, *Byahuranga v. Denmark*, Views adopted on 1 November 2004.

Articles 2, paragraph 1, and 26

4.18 As for articles 2, paragraph 1, and 26 of the Covenant, the State party argues that the author's claims have been insufficiently substantiated for purposes of admissibility. Since the State party admits no breach of the Covenant in relation to articles 14, paragraph 7, 17 and 23, paragraph 1, it categorically refutes allegations of discrimination in this case and therefore requests the Committee to dismiss those claims as lacking substance.

4.19 On the merits, while agreeing to the application of the rights of the Covenant to all individuals including non-citizens, the State party considers that States parties have the right to control the entry, residence and expulsion of aliens. Referring to the Committee's general comment No. 15 on the position of aliens under the Covenant, as well as its general comment No. 18 (1989) on non-discrimination,²⁰ the State party insists that the Minister acted reasonably and in good faith in applying the provisions of the Migration Act. She took into account the impact on the author's family and carefully weighed this aspect against the other considerations outlined in Direction 21, with the ultimate aim being to safeguard the rights of the broader Australian community, which is, in the State party's view, entirely legitimate under the Covenant. The State party remarks that the author had the opportunity to present his case at first instance, but also to challenge the Minister's decision in court. The State party therefore considers that it has guaranteed the right to equality before the law in the present case.

Authors' comments on the State party's observations on admissibility and merits

5.1 On 18 April 2008, the author provided comments on the State party's observations. After rejecting the State party's contention that the author's mother and sister are not victims under articles 17 and 23, paragraph 1, and giving his own interpretation of article 2 of the Optional Protocol, the author argues that he did not consent to his deportation. He signed a declaration accepting to be deported solely because immigration officials told him that he would otherwise remain in indefinite detention until the Committee's examination of his communication.

Article 9, paragraph 1

5.2 Regarding article 9, paragraph 1, the author adds that contrary to the arguments of the State party, he has not claimed that his detention was unlawful. Rather, he has submitted that his detention was not reasonable, necessary, proportionate, appropriate and justifiable in all the circumstances and was thus arbitrary within the meaning of article 9, paragraph 1. The State party has not provided evidence to the contrary. In this regard, the State party has ignored the Committee's jurisprudence in respect of Australia's mandatory detention policy regarding unlawful non-citizens under the Migration Act.²¹

5.3 The State party alleges that the author made threats at various stages of the process, without however making specific reference to those threats. On the State party's contention that the author has a long history of contempt for Australian law and of alcoholism, the author replies that he has completed all the sentences imposed on him and, prior to his detention and deportation, was very positively dealing with his alcohol abuse problems. The author rejects the arguments of the State party related to the High Court of Australia's decision on 8 November 2006 and the required escort of the author due to his non-

²⁰ *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40*, vol. I (A/45/40 (Vol. I)), annex VI, sect. A.

²¹ The author refers to communications No. 560/1993, *A. v. Australia*, Views adopted on 3 April 1997; No. 900/1999, *C. v. Australia*, Views adopted on 13 November 2002; and No. 1069/2002, *Bakhtiyari v. Australia*, Views adopted on 29 October 2003.

compliance on 10 November 2006. He concludes that the State party has not been able to refute his arguments under article 9, paragraph 1 of the Covenant.

Article 12, paragraph 4

5.4 Regarding article 12, paragraph 4, the author claims that contrary to *Stewart v. Canada* he is not in a situation where the State party has facilitated the acquisition of citizenship and he is the one who has made a conscious decision not to acquire it. The author has never made a decision related to his citizenship because he never thought it was necessary to do so. He arrived in Australia when he was only 27 days old. He could not form an opinion on this matter at that time. He has subsequently gone through his childhood and adulthood unaware that he was not an Australian citizen. The author only realized he was not an Australian citizen when the State party raised the possibility of cancelling his visa in August 2003. The State party has failed to act to remedy his erroneous belief regarding his citizenship. In the first instance, the State party invited the author's parents to become Australian citizens without referring to their children. Secondly, the status of the author's citizenship was ignored by the State party when, in 1986, he was placed in the State party's care. The author being removed from his parents' care, the State became his legal guardian and as such should have acted in his best interest. The author was only 13 years old at that time, and although he had a minor criminal record, he would have been able to obtain Australian citizenship had the process been undertaken on his behalf by the State party. The author insists that the State party's assertion that his circumstances do not fall into one of the exceptions articulated in *Stewart v. Canada* is misplaced as these exceptions do not represent an exhaustive list.

5.5 Reiterating his previous arguments on the notion of "own country" the author notes that his social, cultural and family ties to Australia, his age when he arrived in the country and the fact that he was for a period legally a ward of the State mean that the author has forged links with Australia that possess the characteristics necessary to call Australia his own country within the meaning of article 12, paragraph 4.

Article 14, paragraph 7

5.6 Regarding the State party's contention on non-exhaustion of domestic remedies related to his claim under article 14, paragraph 7, the author is unaware of any Australian jurisprudence that supports the suggestion that the author could be afforded an effective remedy occasioned by the rule of common law which protects individuals against double punishment. The State party does not indicate what the domestic remedies would be. In Australia, common law is subject to statute law. If validly enacted legislation provided for measures leading to double punishment, the common law would not prevent effect being given to the legislation. The Minister relied on statutory power given to her by the Migration Act to cancel the author's visa. Unless the State party is arguing that the relevant provision of the Act is invalid or should be read down to give it a more restrictive meaning, there is no basis for arguing that any common law doctrine concerning double punishment would overcome, or give rise to a domestic remedy in respect of the Minister's power under section 501 of the Act. The author therefore contends that no domestic remedies are available in this regard.

5.7 On the merits, while acknowledging the State party's argument that the reasonable regulation of aliens under immigration law cannot be said to constitute punishment, the circumstances under which the author himself had his visa cancelled is punishment. The author refers to his being uprooted from his home, family and employment and denied the possibility to return to Australia once deported. The author therefore reaffirms that his visa cancellation and subsequent deportation is a punishment in that it directly derives from his criminal record and convictions. The author rejects the State party's contention that the

Minister never intended to inflict double punishment upon the author since the focus should be on the substantive impact of such measure. The author also considers that his detention at both Port Phillip Prison and Maribyrnong Immigration Detention Centre constituted punishment for the purpose of article 14, paragraph 7. The State party has not established that he was unsuitable for conventional detention. Moreover, the mere fact that his imprisonment in Port Phillip Prison for eight months was lawful does not obviate the fact that it amounted to punishment. The State party's arguments related to his adequate conditions of detention are irrelevant. He rejects the characterization of his criminal record as a significant and sustained history of violent crime, which misrepresents his record, and in particular the position over the past 10 years.

Articles 17 and 23, paragraph 1

5.8 Regarding article 17 and the interpretation of the expression "home", the author maintains that this term should be interpreted broadly to include the community and social network where a person resides or carries out his usual occupation. The author's home is his immediate community and not the whole of Australia.

5.9 Regarding the State party's alleged interference with the author's family, in violation of articles 17 and 23, paragraph 1, the author submits that such interference was arbitrary and that he never argued about its unlawfulness. The State party failed to adequately balance reasons for deporting him with the degree of hardship his family would encounter as a consequence of such removal. The author rejects the assertion that his deportation is the direct consequence of his misconduct. Rather, the direct consequence of his misconduct was criminal conviction. Regarding the Australian community's expectations, the author submits the absence of evidence to indicate the nature of these expectations. It may be that community expectations are that a person who has spent all his life in Australia should be entitled to remain in that country and not deported to a country with which he has no relevant ties. When he committed the offences that were most relevant for the Minister in her decision, the author was under State guardianship. In determining the weight these offences should be given, the State party ignored its own responsibility as the author's guardian at the time. The author finally observes the lack of substantiation given to the State party's assumption that the author continues to pose a risk to the Australian community. The author therefore considers that articles 17 and 23, paragraph 1, have been violated since the interference with his family was arbitrary.

Articles 2, paragraph 1, and 26

5.10 As for the author's claims under articles 2, paragraph 1 and 26, contrary to the State party's argument, the author does not claim that the State party should not be able to distinguish between citizens and non-citizens. Rather, the State party can distinguish between citizens and non-citizens as long as the treatment does not amount to a violation of articles 14, paragraph 7, 17 or 23, paragraph 1 of the Covenant. The author refers to Committee's general comment No. 15 on the position of aliens under the Covenant, where the Committee states that "in certain circumstances, an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhumane treatment and respect for family life arise".²²

²² The author refers to para. 5 of the general comment.

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 notes the State party's contention that the author did not exhaust domestic remedies pursuant to article 5, paragraph 2 (b) of the Optional Protocol in relation to his claim under article 14, paragraph 7 of the Covenant, that by having his visa cancelled, being detained and deported, he was punished again for offences in respect of which he had already served a prison term. The Committee notes that the State party's argument relates to the author's failure to raise such claims before domestic tribunals.

6.4 Notwithstanding this argument, the Committee refers to its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, where it has stated that paragraph 7 of article 14 prohibits punishing a person twice for the same offence, but does not prohibit subsequent measures "that do not amount to a sanction for a criminal offence within the meaning of article 14 of the Covenant".²³ Proceedings for the expulsion of a person not holding the nationality of the State party are ordinarily outside the scope of article 14,²⁴ and the author has not shown that the proceedings at issue were intended to impose additional punishment upon him rather than to protect the public. Accordingly, the Committee declares this part of the communication inadmissible for failure to substantiate pursuant to article 2 of the Optional Protocol. The author's claim of discrimination with regard to articles 2, paragraph 1, and 26, in conjunction with article 14, paragraph 7, is inadmissible for the same reason.

6.5 The Committee notes that the State party has contested the admissibility of the author's claims under articles 9, paragraph 1; 12, paragraph 4; 17; and 23, paragraph 1 of the Covenant, and articles 2, paragraph 1; and 26 in conjunction with articles 17 and 23, paragraph 1, for lack of substantiation. Despite the State party's contention, the Committee finds that the author has sufficiently substantiated these claims, as they relate to the author himself, and the claims under articles 17 and 23, paragraph 1, relating to the author's mother and sister. It therefore declares the communication admissible insofar as it appears to raise issues under articles 2, paragraph 1; 9, paragraph 1; 12, paragraph 4; 17; 23, paragraph 1; and 26 of the Covenant, and proceeds to the consideration on the merits.

Consideration of 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.

²³ See *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI, para. 57.

²⁴ See communications No. 1494/2006, *Chadzjian et al. v. The Netherlands*, decision on inadmissibility adopted on 22 July 2008, para. 8.4; No. 1341/2005, *Zundel v. Canada*, decision on inadmissibility adopted on 20 March 2007, para. 6.8.; No. 1234/2003, *P.K. v. Canada*, decision on inadmissibility adopted on 20 March 2007, paras. 7.4-7.5.

Article 9

7.2 The Committee notes the State party's contention that the author's detention for nine months pending deportation was lawful and reasonable and derived directly from the author's visa cancellation, which was decided upon by the Minister in compliance with national legislation. The Committee also takes note of the State party's argument regarding the necessity to detain the author in a prison rather than in an immigration detention centre due to the threats he allegedly made against the detention centre staff and inmates and the risk of flight. The Committee takes note of the author's argument related to alternatives to imprisonment which could have been chosen such as the imposition of reporting obligations, sureties or other conditions, to achieve the same goal.

7.3 The Committee recalls its jurisprudence that, although the detention of aliens residing unlawfully on the State party's territory is not per se arbitrary, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case: the element of proportionality becomes relevant.²⁵ In the present case, the Committee observes that the author was lawfully arrested and detained in connection with his visa cancellation, which made him an unlawful resident under the Migration Act. Furthermore, the author was detained pending his deportation, which could not occur until such time as all domestic remedies were exhausted. The Committee notes the State party's argument that the author's imprisonment was necessary in view of his substantial criminal record, risk of recidivism and the State party's need to protect the Australian community. Given the State party's decision to cancel the author's visa, the concern that he might harm the detention centre personnel and inmates and his risk of flight, the Committee considers the author's detention pending deportation to be proportionate in the particular circumstances of the case. It therefore finds no violation of article 9, paragraph 1 of the Covenant.

Article 12, paragraph 4

7.4 With regard to the author's claim under article 12, paragraph 4, of the Covenant, the Committee must first consider whether Australia is indeed the author's "own country" for purposes of this provision and then decide whether his deprivation of the right to enter that country would be arbitrary. On the first issue, the Committee recalls its general comment No. 27 on freedom of movement where it has considered that the scope of "his own country" is broader than the concept "country of his nationality". It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien.²⁶ In this regard, it finds that there are factors other than nationality which may establish close and enduring connections between a person and a country, connections which may be stronger than those of nationality.²⁷ The words "his own country" invite consideration of such matters as long-standing residence, close personal and family ties and intentions to remain, as well as to the absence of such ties elsewhere.

7.5 In the present case, the author arrived in Australia when he was 27 days old, his nuclear family lives in Australia, he has no ties to Sweden and does not speak Swedish. On the other hand, his ties to the Australian community are so strong that he was considered to be an "absorbed member of the Australian community" by the Australian Full Court in its judgement dated 30 June 2005; he bore many of the duties of a citizen and was treated like one, in several aspects related to his civil and political rights such as the right to vote in

²⁵ Communication No. 1011/2001, *Madafferi v. Australia* (note 7 above), para. 9.2.

²⁶ General comment No. 27, para. 20.

²⁷ *Stewart v. Canada* (note 3 above), para. 6.

local elections or to serve in the army. Furthermore, the author alleges that he never acquired the Australian nationality because he thought he was an Australian citizen. The author argues that he was placed under the guardianship of the State since he was 13 years old and that the State party never initiated any citizenship process for all the period it acted on the author's behalf. The Committee observes that the State party has not refuted the latter argument. Given the particular circumstances of the case, the Committee considers that the author has established that Australia was his own country within the meaning of article 12, paragraph 4 of the Covenant, in the light of the strong ties connecting him to Australia, the presence of his family in Australia, the language he speaks, the duration of his stay in the country and the lack of any other ties than nationality with Sweden.

7.6 As to the alleged arbitrariness of the author's deportation, the Committee recalls its general comment No. 27 on freedom of movement where it has stated that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country. In the present case, the Minister's decision to deport him occurred almost 14 years after the conviction for rape and intentionally causing injury and over nine years after his release from prison on those charges, seven years after the armed robbery convictions and a number of years after his release from prison on the latter charges; and more importantly at a time where the author was in a process of rehabilitation. The Committee notes that the State party has provided no argument justifying the late character of the Minister's decision. In light of these considerations, the Committee considers that the author's deportation was arbitrary, thus violating article 12, paragraph 4 of the Covenant.

Articles 17 and 23, paragraph 1

7.7 As to the alleged violations under articles 17 and 23, paragraph 1, in respect of the author, his mother and his sister, the Committee recalls its general comments No. 16 on the right to privacy, and No. 19 (1990) on the protection of the family, the right to marriage and equality of the spouses²⁸, whereby the concept of the family is to be interpreted broadly. The Committee also recalls its jurisprudence that there may be cases in which a State party's refusal to allow one member of a family to remain on its territory would involve interference in that person's family life. However, the mere fact that certain members of the family are entitled to remain on the territory of a State party does not necessarily mean that requiring other members of the family to leave involves such interference.²⁹ It recalls that the separation of a person from his family by means of expulsion could be regarded as an arbitrary interference with the family and a violation of article 17 if, in the circumstances of the case, the separation of the author from his family and its effects on him were disproportionate to the objectives of the removal.³⁰

7.8 The Committee considers that the decision by a State party to deport a person who has lived all his life in the country leaving behind his mother, sister and nephews, to a country where he has no ties apart from his nationality, is to be considered "interference"

²⁸ *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40*, vol. I (A/45/40 (Vol. I)), annex VI, sect. B.

²⁹ See, for example, *Winata v. Australia* (note 7 above), para. 7.1; *Madafferi v. Australia* (note 7 above), para. 9.7; *Byahuranga v. Denmark* (note 19 above), para. 11.5; and communication No. 1792/2008, *Dauphin v. Canada*, Views adopted on 28 July 2009, para. 8.1.

³⁰ See *Canepa v. Canada* (note 5 above), para. 11.4.

with the family. The Committee notes that the State party has not refuted the existence of interference in the present case. The Committee must then examine if the said interference could be considered either arbitrary or unlawful. The Committee first notes that such interference is lawful as it is provided by the State party's Migration Act, according to which the Minister may cancel a visa, if a person has been sentenced to a term of imprisonment of 12 months or more. In the present case, the author has been convicted for serious criminal offences and for a minimum of nine years in prison.³¹

7.9 As to the balance between on the one hand, the significance of the State party's reasons for the author's removal and, on the other, the degree of hardship the family and its members could encounter as a consequence of such removal,³² the Committee notes the State party's observation that it has weighed all these aspects and concluded in favour of the author's deportation to protect the Australian community and address the Australian community's expectations.

7.10 The Committee acknowledges the significance of the author's criminal record. On the other hand, it notes the author's claim that he has maintained a close relationship to his mother and sister despite the time he spent either in detention centres or under the care of the State; that he was engaged in reducing his alcohol addiction and was steadily employed when the State party decided to cancel his visa; that he does not have any close family in Sweden and that his deportation led to a complete disruption of his family ties due to the impossibility for his family to travel to Sweden for financial reasons. The Committee further notes the author's argument that his criminal offences arose from alcoholism, which he had partly overcome and that the Minister's decision to deport him occurred almost 14 years after the conviction for rape and intentionally causing injury and over nine years after his release from prison on those charges, seven years after the armed robbery convictions and a number of years after his release from prison on the latter charges.

7.11 In the light of the information made available before it, the Committee considers that the Minister's decision to deport the author has had irreparable consequences on the author, which was disproportionate to the legitimate aim of preventing the commission of further crimes, especially given the important lapse of time between the commission of offences considered by the Minister and the deportation. Given that the author's deportation is of a definite nature and that limited financial means exist for the author's family to visit him in Sweden or even be reunited with him in Sweden, the Committee concludes that the author's deportation constituted an arbitrary interference with his family in relation to the author, contrary to articles 17 and 23, paragraph 1, of the Covenant.

7.12 As to the author's claim made in relation to his mother and sister that their rights have been directly violated under articles 17 and 23, paragraph 1 of the Covenant, the Committee notes that most, if not all of the arguments invoked by the author are related to the consequences of the disruption of family life for the author who has been deported to another country. The Committee further notes that the mother and sister were not uprooted from their family life environment, which was established in Australia. In the light of the information before it, the Committee cannot therefore conclude that there has been a separate and distinct violation of articles 17 and 23, paragraph 1 in relation to the author's mother and sister.

7.13 In the light of the Committee's conclusion, it deems it unnecessary to address the author's claims under articles 2, paragraph 1 and 26 of the Covenant.

³¹ The total amount of time spent in detention is not mentioned by either party to the case.

³² *Madafferi v. Australia* (note 7 above), para. 9.8.

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 author's deportation to Sweden has violated his rights under articles 12, paragraph 4, 17 and 23, 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, including allowing the author to return and materially facilitating his return to Australia. The State party is also under an obligation to avoid exposing others to similar risks of a violation 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 remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. In addition, it requests the State party to publish the Committee's Views.

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

Appendix

Individual opinion of Committee members Mr. Gerald L. Neuman and Mr. Yuji Iwasawa (dissenting)

1. We cannot join the majority in its analysis and conclusions on this communication. We disagree with the majority's evaluation of the proportionality of deporting the author to Sweden, in the light of articles 17 and 23 of the Covenant. But more fundamentally, we dissent from the majority's overturning of the Committee's established jurisprudence concerning the right to enter "one's own country," recognized in article 12, paragraph 4, of the Covenant.

2.1 In the past, the Committee has interpreted article 17 of the Covenant, protecting family life against arbitrary interference, and article 23 of the Covenant, entitling the family to protection by the state, as limiting the traditional authority of states to expel individuals who are not their nationals, when the expulsion would unreasonably interfere with their family life. The Committee's proportionality standard for evaluating the reasonableness of such interference represents an important safeguard for the human rights of immigrants, and we fully agree with it. On the facts of the present communication, however, we do not believe that the application of this standard should lead to the finding of a violation of the author's rights.

2.2 The State party is responsible for ensuring both the author's rights and the rights of its other residents. The author's extensive criminal record gave the State party reason to exercise its authority, recognized in its domestic legislation and in international law, to protect its residents by sending the author back to his country of nationality. The competent officials considered the arguments for and against exercising this authority, and concluded in favour of deportation. If we had been the competent officials in Australia, we would not have chosen to deport the author; instead, we would have accepted Australia's responsibility for his upbringing, and permitted him to remain. But we do not believe that the Covenant requires the State party to adopt this perspective, and under the circumstances its contrary decision was not disproportionate.

2.3 At the time of the relevant decision, the author was over 30 years old, without spouse, partner or children in Australia. His family in Australia consisted of his mother, his sister and her own family, and a father with whom he had no contact. The author denies that he had ties to his relatives in Sweden, but his Australian family remained in touch with them, and one of his uncles took him in after his arrival in Sweden. Both Sweden and Australia are countries with advanced communications technology.

2.4 Neither this Committee's prior Views nor the jurisprudence of the regional human rights courts would support the conclusion that deportation of an adult in this family situation and with this criminal record represents a disproportionate interference with family life. Until now, the Committee has given greater weight to the interest of States in preventing crimes than it does on this occasion.

2.5 The majority also faults the State party for waiting too long after the author's most serious crimes before deciding to deport him. We believe this objection is counterproductive to the protection of human rights. This is not a case in which an individual has led a blameless life after a youthful transgression and then is needlessly confronted with additional consequences. Here, the author's release from prison after his armed robbery convictions was soon followed by a series of further offences, including thefts of automobiles and reckless endangerment of life, that prompted the State party's action. The Committee should not discourage States from giving deportable residents a

chance to demonstrate their rehabilitation, by maintaining that the delay forfeits the option of deportation even if further crimes occur.

2.6 For these reasons, we cannot say that the State party violated the author's rights under articles 17 and 23 by deporting him to Sweden. But our disagreement with the majority's Views does not end here.

3.1 The majority also departs from its established interpretation of article 12, paragraph 4, of the Covenant, which provides that "no one shall be arbitrarily deprived of the right to enter his own country". The primary function of this provision has been to protect strongly the right of a State's own citizens not to be exiled or blocked from return.^a The structure of the Covenant suggests, and its *travaux préparatoires* confirm, that article 12 was carefully drafted so that this right would not be subject to the limitations on freedom of movement permitted by article 12, paragraph 3.^b Nor would citizens be exposed to a two-stage process of first denationalizing them and then applying the procedures for expulsion of aliens contemplated by article 13. In its Views in *Stewart v. Canada*,^c after mentioning this problem of denationalization, the Committee identified other types of manipulation of nationality law that should not be permitted to circumvent the protection of article 12, paragraph 4, such as cases "of individuals whose country of nationality has been incorporated into or transferred to another national entity whose nationality is being denied them," and possibly "stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence". When, however, "the country of immigration facilitates acquiring its nationality and the immigrant refrains from doing so, either by choice or by committing acts that will disqualify him from acquiring that nationality, the country of immigration does not become 'his own country' within the meaning of article 12, paragraph 4, of the Covenant".^d The Committee's interpretation avoided making the right depend entirely on the State's formal ascription of nationality, but it preserved a relationship between the right and the concept of nationality, a fundamental institution of international law whose importance is also recognized in article 24, paragraph 3, of the Covenant.

3.2 In its present Views, the majority abandons any link to nationality, and pursues a broader approach that had been advocated in dissents, and mentioned but not endorsed in the Committee's general comment No. 27 on article 12. The majority's paragraph 7.4 borrows language from a dissenting opinion in *Stewart v. Canada*,^e and omits any mention of unreasonable impediments to naturalization. It suggests that long-standing residence and

^a See, for example, communications No. 1011/2001, *Madafferi v. Australia*, Views adopted on 26 July 2004, para. 9.6 (stating that article 12, paragraph 4, applies to unnaturalized immigrants only in limited circumstances); No. 859/1999, *Jiménez Vaca v. Colombia*, Views adopted on 25 March 2002, para. 7.4 (finding that the State party had not ensured a national's right to enter his own country where it failed to protect him against death threats that drove him into involuntary exile); concluding observations on the second periodic report of the Syrian Arab Republic (CCPR/CO/71/SYR), para. 21 (expressing concern about denial of passports to Syrian citizens in exile abroad, depriving them of the right to return to their own country).

^b See especially the summary records of the debate in the Third Committee, fourteenth session (1959), A/C.3/SR.954 through A/C.3/SR.959. Article 12, paragraph 3, subjects other aspects of freedom of movement to restrictions that "are provided by law, 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".

^c Communication No. 538/1993, *Stewart v. Canada*, Views adopted on 1 November 1996, para. 12.4.

^d *Ibid.*, para. 12.5.

^e Compare the final sentence of the majority's paragraph 7.4 with paragraph 6 of the dissenting opinion of members Evatt, Medina Quiroga, and Aguilar Urbina in *Stewart v. Canada*.

subjective (and often unprovable) ties supply the criteria that determine whether non-nationals can claim a state as their “own country” under article 12, paragraph 4.

3.3 This expansion of the scope of article 12, paragraph 4, presents at least two dangers. On one alternative, it vastly increases the number of non-nationals whom a State cannot send back to their country of nationality, despite strong reasons of public interest and protection of the rights of others for terminating their residence. Presumably the prohibition under article 12, paragraph 4, applies even where deportation would represent a proportionate interference with family life under articles 17 and 23, because otherwise the majority’s new interpretation would be superfluous. Moreover, the majority repeats in paragraph 7.6 the observation in general comment No. 27 that “few, if any circumstances” would justify deprivation of the right to enter one’s own country, an observation that had previously been used to limit the banishment of nationals.

3.4 Or, alternatively, the result of the majority’s approach will be to dilute the protection that article 12, paragraph 4, has traditionally afforded to nationals and a narrow category of quasi-nationals. That dilution might even result from a shift in emphasis from the structure and purpose of article 12, paragraph 4, to the literal wording of the sentence, which refers to one’s “own country” but prohibits only “arbitrarily” imposed deprivations of the right to enter it.

3.5 In our view, the Committee should neither undermine the safeguard of article 12, paragraph 4, by lowering its rigorous standard, nor extend a kind of *de facto* second nationality to vast numbers of resident non-nationals.

3.6 On the peculiar facts of the present case, we can imagine a very limited conclusion that the author should be treated like a national of Australia because the authorities of the State party failed to secure naturalization for him when he was an adolescent under State guardianship. But that is not the interpretation of article 12 that the majority expounds in paragraph 7.4, and it is not the interpretation that the majority applies in another set of Views adopted this session, *Warsame v. Canada*,^f where the issue of thwarted naturalization does not arise. The present decision rests on an expansive reinterpretation of article 12, paragraph 4, from which we respectfully dissent.)

(Signed) Gerald L. Neuman

(Signed) Yuji Iwasawa

[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.]

^f Communication No. 1959/2010, *Warsame v. Canada*, Views adopted 21 July 2011, paras. 8.4-8.6. So far as article 12, paragraph 4, is concerned, our dissenting opinion in the present communication also applies to the Committee’s Views in *Warsame v. Canada*.

**Individual Opinion of Committee members, Sir Nigel Rodley,
Ms. Helen Keller and Mr. Michael O’Flaherty (dissenting)**

We find it difficult to join the Committee’s finding of a violation of article 12, paragraph 4, generally for the reasons given by Mr. Neuman and Mr. Iwasawa in their dissent. The Committee gives the impression that it relies on general comment 27 for its view that Australia is the author’s own country. Certainly, the general comment states that “the scope of ‘his own country’ is broader than the concept of ‘country of his nationality’”. What the Committee overlooks is that all the examples given in the general comment of the application of that broader concept are ones where the individual is deprived of any effective nationality. The instances offered by the general comment are those relating to “nationals of a country who have been stripped of their nationality in violation of international law”; “individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them”; and “stateless persons arbitrarily denied the right to acquire the nationality of the country of ... residence” (general comment 27, para. 20).

None of the examples applies to the present case. Nor is there any doubt that the author has an effective nationality, namely, that of Sweden. On the other hand, the State party has not addressed the author’s assertion that he did not know that he was not an Australian citizen, an assertion whose plausibility is bolstered by the fact that the State party assumed responsibility for his guardianship for a substantial and formative period of his life. In such an exceptional, borderline case, we are unwilling to conclude definitively that article 12, paragraph 4, could not be violated. However, we consider that, in the light of its finding of a violation of articles 17 and 23, paragraph 1, the Committee could and should have refrained from going down the path that it was to tread far less explicable in *Warsame v. Canada*.

(Signed) Sir Nigel **Rodley**

(Signed) Helen **Keller**

(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.]

**X. Communication No. 1564/2007, X.H.L v. Netherlands
(Views adopted on 22 July 2011, 102nd session)***

<i>Submitted by:</i>	X.H.L. (represented by counsel, M.A. Collet)
<i>Alleged victim:</i>	The author
<i>State party:</i>	The Netherlands
<i>Date of communication:</i>	8 January 2007 (initial submission)
<i>Decision on admissibility</i>	7 October 2009
<i>Subject matter:</i>	Unaccompanied minor claiming asylum
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Inhuman treatment; arbitrary interference with the family; protection as a child
<i>Articles of the Covenant:</i>	1; 2; and 5, paragraph 2 (b)
<i>Article of the Optional Protocol:</i>	7; 17; and 24

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

Meeting on 22 July 2011,

Having concluded its consideration of communication No. 1564/2007, submitted to the Human Rights Committee on behalf of Mr. X.H.L. 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 8 January 2007, is Mr. X.H.L., a Chinese national, born in 1991. He claims to be a victim of violations by the Netherlands of articles 7, 17 and 24 of the Covenant. He is represented by counsel, Mr. M.A. Collet.

* 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. Yuji Iwasawa, Ms. Helen Keller, 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. and Mr. Krister Thelin

Pursuant to rule 90 of the Committee's rules of procedure, Committee members Mr. Cornelis Flinterman and Ms. Margo Waterval did not participate in the adoption of the present decision.

The texts of three individual opinions, signed by Committee members Sir Nigel Rodley, Mr. Krister Thelin, Mr. Gerald L. Neuman, Mr. Yuji Iwasawa and Mr. Fabián Omar Salvioli are appended to the present Views.

1.2 On 16 October 2007, the Committee, acting through its Special Rapporteur on new communications and interim measures, granted a request from the State party to split the consideration of the admissibility of the communication from its merits.

Facts as submitted by the author

2.1 The author entered the Netherlands as an unaccompanied minor when he was 12 years old. He states that he left China with his mother on 24 February 2004 by plane from Beijing to Kiev. They stayed in Kiev for three days. In the evening of 27 February they left Kiev by car and drove until the next evening. His mother then left with two unknown persons, and the author was taken by a man in a car to the Netherlands, where he arrived on 3 March 2004.

2.2 Upon arrival in the Netherlands, the author applied for asylum. His request was rejected on 24 March 2004 in the so-called “48-hour accelerated procedure”.¹ On appeal, the District Court, by decision of 30 July 2004, quashed the Minister’s decision and ordered a reconsideration of the author’s application under the regular procedure.

2.3 On 21 April 2005, the Minister of Immigration rejected the author’s application arguing that he had not provided any reasonable grounds for fear of persecution. In relation to the author’s young age, the Minister considered that Chinese unaccompanied minors were not eligible for a special residence permit, as adequate care was provided in their country of origin. The District Court, by decision of 13 February 2006, rejected the author’s appeal. A further appeal was rejected by the Council of State on 17 July 2006. The author continues to reside in the Netherlands.

The complaint

3.1 The author claims that the decision to return him to China violates article 7 of the Covenant because he would be subjected to inhumane treatment. He explains that, since he was only 12 when he left China, he does not have his own identity card or *hukou* registration. Without these, he cannot prove his identity or access orphanages, health care, education, or any other kind of social assistance in China. He notes that, given that he has no contact or family connections in China, he would be forced to beg in the streets.

3.2 He further claims that the State party’s decision to return him to China constitutes a breach of his right to private and family life recognized by article 17 of the Covenant. He notes that he considers his Dutch guardian as his only family, as he has no family left in China and is unaware of his mother’s whereabouts.

3.3 Finally, he claims a violation of article 24 of the Covenant and article 3 of the Convention on the Rights of the Child, since the Netherlands did not take his best interests as a child into account by subjecting him to the accelerated asylum procedure. He claims that he was left with the burden to prove that he would not have access to an orphanage in China, which is too heavy a burden for a child. A further violation of article 24 is claimed because rejecting his request for asylum or for a permit on humanitarian grounds is against his best interests as a minor. He argues that he has integrated into Dutch society since his arrival in 2004 and has learned the language.

State party’s observations concerning the admissibility of the communication

4.1 By submission of 16 July 2007, the State party requested that the Committee declare the communication inadmissible.

¹ The author notes that this accelerated procedure is used to decide on apparently weak asylum cases.

4.2 With regard to the author's claim under article 7, the State party argued that it had not been sufficiently substantiated for purposes of admissibility, because all documents submitted by the author were of a general nature and did not relate to his specific case.

4.3 The State party further submitted that the author had not brought his claim under article 17 before the domestic courts, and that this claim was thus inadmissible for non-exhaustion of domestic remedies.

4.4 With regard to the author's claim under article 24, the State party noted that the author's asylum application was at first rejected through an accelerated procedure, but that the District Court ordered the reassessment of the author's application under the regular asylum procedure, which was subsequently done. Accordingly, the author had ample opportunity to substantiate his claims. Therefore, the State party contended that this part of the communication was not sufficiently substantiated for the purposes of admissibility.

4.5 Finally, the State party claimed that the parts of the communication relating to alleged breaches of the Convention on the Rights of the Child were inadmissible under article 1 of the Optional Protocol.

Author's comments

5.1 By submissions of 31 July 2008 and 2 December 2008, the author noted, with regard to his claim under article 17 of the Covenant, that it was not possible to address a breach of family life under Dutch asylum law. Nevertheless, he stated that he had raised a possible violation of article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms before the Court of Appeal in the Netherlands, which was an equivalent provision.

5.2 With regard to his claim under article 7, the author claimed that he could not provide information relating to his personal situation in China, as he had been in the Netherlands since 2004. He referred to general information that showed that it was impossible to return and live in China without any documentation.

5.3 The author explained that he had invoked article 3 of the Convention on the Rights of the Child only in conjunction with article 24 of the Covenant. He further maintained that the State party's intention to have his claim dealt with under the accelerated procedure was a violation of article 24 of the Covenant, even though this decision was later overturned by the District Court.

Committee's decision on admissibility

6. On 7 October 2009, the Committee declared the communication admissible under articles 7, 17 and 24. With regard to the State party's allegation that the author had not expressly invoked article 17 before national courts, the Committee noted the author's argument that it was not possible for the Courts to address such claims in the context of an asylum procedure, and that he had nevertheless raised in his appeal the possible violation of article 8 of the European Convention on Human Rights, which relates to a similar substantive right. With regard to the author's claim under article 24 because he had been subjected to the accelerated asylum procedure, the Committee considered that part of the claim inadmissible under article 2 of the Optional Protocol because the Court ordered the reassessment of the author's claim through the regular procedure, which was subsequently done. However, the Committee considered that there were no obstacles to the admissibility of the part of the author's claim that the decision to reject his application for asylum and for a permit on humanitarian grounds violated his rights under article 24 because he was well integrated into Dutch society.

State party's observations concerning the merits of the communication and author's comments

7.1 On 4 May 2010, the State party noted that it was the author's responsibility to prove that there were serious grounds for believing that, if returned to China, he would be subjected to a treatment in violation of article 7. The State party added that, according to the country report on China issued by the Minister of Foreign Affairs of the Netherlands, every family in China had a *hukou* or family book, and all *hukou* registers were kept indefinitely by regional authorities, even in the event that citizens left the country, in which case these were required to report the change of address to the *hukou* administrative body. The State party noted that the author had not supplied any information to conclude that he was not registered in China. In the State party's view, the fact that the author attended school and had access to health care in China supports the assumption that he was registered. The State party further noted that the author had now reached the age of majority and could be expected to care and provide for himself. The State party observed that the mere fact that the author's circumstances would be significantly less favourable if he were to be removed from the Netherlands could not in itself be considered a violation of article 7 of the Covenant. The State party added that there were no grounds for assuming that the author would not have access to adequate care in China. According to recent reports, China had made caring for orphans a priority and medical care provided was basic but acceptable by local standards.

7.2 With regard to the author's claim under article 17, the State party noted that the only issue raised by the author during the national procedures was his request to be reunited with his mother. The State party notes that the author did not make use of the opportunity to have his right to a private and/or family life assessed by applying for a regular residence permit under the Aliens Decree 2000. The State party also noted that the author's ties with his guardian could not be characterized as family ties, especially since he was now 18 years old and no longer in need for guardianship. Additionally, the State party noted that the author had not specified why his ties with the Netherlands were so important to him that he could not return to China, nor had he provided any evidence that he could not resettle in China. The State party concluded that, if the Committee were to conclude that there had been interference with the author's right under article 17, it should be nonetheless considered that such interference would be neither arbitrary nor unlawful.

7.3 With regard to the author's claim under article 24, the State party stressed that the author had now reached the age of majority and could be expected to care and provide for himself. The State party noted that the policy of returning unaccompanied minor asylum seekers was based on their own interest, since few uprooted or displaced children would benefit from being separated from their families. On the contrary, the best interest of the child required restoring their relationship with their parents, family and social surroundings.

8. On 31 December 2010, the author noted that the State party had not put forward any new arguments. Therefore, the author did not add any new comments on the merits of the case.

Issues and proceedings before the Committee

Reconsideration of the Committee's decision on admissibility with regard to the author's claim under article 17

9. With regard to the author's claim that his return to China would violate his right to private and family life, the Committee notes the State party's argument in the sense that the author failed to use his opportunity to invoke this right by not applying for a regular residence permit on grounds of exceptional personal circumstances, according to the relevant domestic legislation. In light of this new information, which has not been

challenged by the author, the Committee considers that the author's claim under article 17 is inadmissible for non-exhaustion of domestic remedies.

Considerations on the merits

10.1 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.

10.2 The Committee 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 way of their extradition, expulsion or refoulement.² The Committee must therefore assess whether there are substantial grounds for believing that there is a real risk that the author would be subjected to the treatment prohibited by article 7 if he were to be removed to China.³ In the present case, the Committee takes note of the author's argument that, since he does not have an identity card or *hukou* registration, he is unable to prove his identity or access any social assistance services in China, and since he does not have any family or connection in the country, he would be forced to beg to survive. The Committee notes the State party's argument to the effect that the author must have been registered in China but considers that it cannot be expected from an unaccompanied 12-year-old that he know his administrative obligations regarding notification to the relevant *hukou* administrative body. Moreover, it would have been unreasonable to demand from the author that he notify his residence in the Netherlands to the Chinese authorities given the fact that he was seeking asylum. The Committee notes that the author's claim under article 7 is closely linked to his claim under article 24, namely, the treatment he may have been subjected to as a child had the deportation order been implemented at the time where it was adopted. Therefore, the Committee will examine both claims jointly.

10.3 With regard to the author's claim that the State party did not take his best interest as a child into consideration when deciding on his return to China, the Committee notes that, from the deportation decision and from the State party's submissions, it transpires that the State party failed to duly consider the extent of the hardship that the author would encounter if returned, especially given his young age at the time of the asylum process. The Committee further notes that the State party failed to identify any family members or friends with whom the author could have been reunited in China. In light of this, the Committee rejects the State party's statement that it would have been in the best interest of the author as a child to be returned to that country. The Committee concludes that, by deciding to return the author to China without a thorough examination of the potential treatment that the author may have been subjected to as a child with no identified relatives and no confirmed registration, the State party failed to provide him with the necessary measures of protection as a minor at that time.⁴

² See 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-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A.

³ See general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40, vol. I (A/59/40 (Vol. I))*, annex III, para. 12. See also communications No. 1315/2004, *Singh v. Canada*, Views adopted on 30 March 2006, para. 6.3; No. 706/1996, *G.T. v. Australia*, Views adopted on 4 November 1997, para. 8.4; and No. 692/1996, *A.R.J. v. Australia*, Views adopted on 28 July 1997, para. 6.12.

⁴ See also the Committee's Views in communication No. 1554/2007, *El-Hichou v. Denmark*, 22 July 2010, paras. 7.4 and 7.5.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party's decision to return the author to China violates his rights under article 24, in conjunction with article 7 of the Covenant.

12. 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 by reconsidering his claim in light of the evolution of the circumstances of the case, including the possibility of granting him a residence permit. The State party is also under an obligation to take steps to prevent similar violations occurring in the future.

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

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

Appendix

Individual opinion of Committee members, Sir Nigel Rodley and Mr. Krister Thelin (dissenting)

In a few short words and without explanation, the Committee has embarked on novel jurisprudence. In previous cases involving fears of adverse consequences if a decision to deport were implemented, the Committee has expressed the opinion that, if the decision were implemented, the rights at issue *would be* violated. This indeed was the case in *El-Hichou v. Denmark*, the very one cited by the Committee as authority for its decision (see footnote 4). Also, the operative date for the Committee's analysis has typically been, not the date the authorities took their decision, but the date of its own decision, so as to ensure that serious harm is avoided.

Now, out of the blue, the Committee has decided that a mere unimplemented decision of the State party's authorities entails a violation of article 24 (protection of children – at the time of the authorities' decision the author was a child; now he is 19 or 20) and this read together with nothing less than article 7 (prohibition of torture and similar ill-treatment). The Committee invokes the notion of the best interests of the child, as if this were the only applicable criterion for the interpretation of article 24, a status it does not enjoy even under the Convention on the Rights of the Child, from which the Committee has imported it. According to article 3, paragraph 1, of the latter Convention, the best interests of the child are “a primary consideration”, not “the primary consideration”, and certainly not the only consideration.

Another factor for the Committee seems to have been the State party's failure to conduct a “thorough examination” of the consequences of such a deportation. The fact that those consequences could have been addressed at the stage of the practical implementation of the decision is ignored by the Committee. In any event, the implementation never happened.

We therefore dissent from a decision that is unprecedented, unjustified and arbitrary. This dissent should not be interpreted as approval of the State party's actions. Humane behaviour by the State party would be demonstrated by a reversal of the decision to deport after the author has spent so much time and developed such roots in The Netherlands. It is just that the Committee has no basis in law for finding an unimplemented decision of this sort to violate the Covenant.

(Signed) Sir Nigel **Rodley**

(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.]

Individual opinion of Committee members Mr. Gerald L. Neuman and Mr. Yuji Iwasawa (dissenting)

The State party's observations concerning this communication detail its efforts to ascertain that the author would benefit from appropriate supervision and care if he were returned to his own country. We cannot share in the majority's negative evaluation of its efforts to take into account the best interests of the child as a primary factor in its decision.

It might have been helpful for the State party also to specify the additional steps that it would have taken to clarify the author's status if it had attempted to implement the return order; but the order was never implemented and he is now an adult and no longer in need of supervision. We hope that the Committee's future approach in similar cases will not establish a pattern that provides encouragement to the needless placement of unaccompanied children, without documents, in the hands of smugglers, which exposes them to serious risks of human trafficking, injury, and death.

(Signed) Gerald L. Neuman

(Signed) Yuji Iwasawa

[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.]

Individual opinion of Committee member Mr. Fabián Salvioli

1. I concur with the Committee's Views as expressed in communication No. 1564/2007 concerning *X.H.L. v. Netherlands*, as I fully share the Committee's reasoning and conclusion that the State party has violated article 24, read together with article 7, of the Covenant. However, I consider that the Committee should have also found an independent violation of article 24 of the Covenant.

2. Paragraph 1 of article 24 of the International Covenant on Civil and Political Rights is a directive of great scope and power, as it states that all children shall have the right to such measures of protection as are required by their status as minors, on the part of the family, society and the State.

3. In its general comment No. 17, the Committee stated that the measures that should be adopted by virtue of article 24, paragraph 1, are not specified in the Covenant, and it is for each State to determine them in the light of the protection needs of children in its territory and within its jurisdiction.^a

4. Of course, those measures cannot be arbitrary and must be adopted within the framework of other international obligations which the State party has undertaken; in this case, that framework is provided by the Convention on the Rights of the Child,^b which was ratified by the Netherlands in 1995.

5. The obligations established in the Convention, to the extent that they are relevant, go hand in hand with the obligations set forth in article 24 of the International Covenant on Civil and Political Rights. These obligations constitute the parameter for the analysis that the Human Rights Committee should undertake in all cases that involve a boy or a girl and a State party to both instruments. This should always be the case, and especially when a boy or a girl has been a victim of human trafficking. In those cases, States parties have an even greater duty to ensure that the children do not become victims again. Failing to carry out a comprehensive analysis of the obligations freely adopted by States parties creates an artificial division that is associated, no doubt, with approaches that have been superseded by a more coherent doctrine on the issue. The focus of that doctrine is invariably on ensuring that the provisions contained in human rights instruments have the proper effects.

6. In the current case, in addition to the violation of article 24, read together with article 7, the Committee should also have found an independent violation of article 24. Under the particular circumstances of the case, the decision by the Netherlands to return X.H.L. to China constituted in itself a violation of article 24 of the Covenant, independently of whether or not the decision could do harm to the minor's psychological well-being.

7. There is one final aspect that I consider important to highlight in this individual opinion. In paragraph 11 of its Views, the Committee correctly rules that the State party's decision to return the author to China violates his rights under article 24, in conjunction with article 7, of the Covenant, which indicates the presence of an actual, rather than a potential, violation.

8. If the Committee had decided that there was a "potential violation" owing to the fact that X.H.L. is still living in the Netherlands and has not actually been sent to China, it would then have failed to consider the violation itself. The current case does not have

^a Human Rights Committee, general comment No. 17 (1989), para. 3.

^b The Convention on the Rights of the Child, adopted in 1989, should, in my opinion, be entitled "the Convention on the Rights of Boys and Girls", in view of the need to use appropriate language.

anything to do with possible cases of deportation to a place where a person might be tortured; in that type of case, it is logical to consider *ratione temporis* the possible violation at the moment that the ordered deportation occurs, since the violation depends on the circumstances that exist in the country to which the person is sent.

9. In this case, which has completely different characteristics, the violations of article 24 and article 7 of the Covenant were actually committed when the decision was taken by the State party (i.e., the decision gave rise to international responsibility), and this was fully understood by the Human Rights Committee.

(Signed) Fabián **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.]

**Y. Communication No. 1581/2007, *Drda v. Czech Republic*
(Views adopted on 27 October 2010, 100th session)***

<i>Submitted by:</i>	Victor Drda (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	The Czech Republic
<i>Date of communication:</i>	29 December 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 of submission, preclusion <i>ratione temporis</i>
<i>Substantive issues:</i>	Equality before the law; equal protection of the law without any discrimination
<i>Article of the Covenant:</i>	26
<i>Article of the Optional Protocol:</i>	3

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

Meeting on 27 October 2010,

Having concluded its consideration of communication No. 1581/2006, submitted to the Human Rights Committee by Mr. Victor Drda 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. The author of the communication, dated 29 December 2006, is Mr. Victor Drda, an American national (former citizen of Czechoslovakia), born in 1922, and currently residing in the Czech Republic. He claims to be a victim of a violation by the Czech Republic of his rights under article 26 of the International Covenant on Civil and Political Rights,¹ having been forced to cede his property to the State of Czechoslovakia. He is not represented.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

¹ The Optional Protocol to the International Covenant on Civil and Political Rights entered into force for the Czech Republic on 22 February 1993.

The facts as submitted by the author

2.1 In June 1964, the author left Czechoslovakia for the United States of America. He obtained American citizenship in 1970 and thereby lost his Czechoslovak citizenship. He never applied to recuperate his Czechoslovak citizenship.

2.2 The author owned an apartment building in Prague-Vinohrady with a parcel of land (No. 2913), as well as several other parcels of land (No. 1011/1-2, and 1012) in Kunratice (a suburb of Prague). On 28 November 1961, the author was forced to cede his apartment building to the State. Law No. 119/1990 on judicial rehabilitation pronounced all forced donations null and void, as of the date of donation.

2.3 On 24 March 1998, the Prague Regional Court decided that the author failed to prove that he had been forced to donate the building to the State. He further did not fulfil the condition of citizenship and could therefore not lodge his complaint according to the restitution legislation. The Court also concluded that the author's decision to donate the building to the State was not influenced by any concrete distress.

2.4 In another decision, on 24 June 1998, the same court rejected the author's restitution claim, because he was not a Czech citizen and thus not an "entitled person", according to the special restitution law 87/1991.² On 10 November 2000, the Constitutional Court rejected the author's complaint, stating that the author, as an American citizen, was not entitled to submit a complaint under the restitution legislation.

2.5 With regard to the land parcels in Kunratice, the Town Council of Prague had informed the author was informed on 7 January 1991 that the parcels had been nationalized³ in 1966 pursuant to Decree 5/1945 and Regulation 85/1960.

The complaint

3. The author claims that the State party's refusal to proceed with the restitution of his property constitutes discrimination on grounds of nationality in violation of article 26 of Covenant.

The State party's submission on admissibility and merits

4.1 On 4 February 2008, the State party submitted its comments on admissibility and merits of the communication. It clarifies the facts as presented by the author and adds that on 16 March 1965, the author was sentenced by the Prague 4 District Court for the criminal offence of leaving the Republic. On 13 August 1990, the District Court, on the basis of Act No. 119/1990 on Judicial Rehabilitation, reversed the author's sentence of 16 March 1965.

4.2 On 2 November 1994, the author sought a declaration of nullity of the deed of gift of his apartment building in Prague. After a hearing held on 14 September 1995, the District Court declared the deed to be null, recognizing that it had been concluded under duress and conspicuously disadvantageous conditions. After a hearing held on 26 January 1996, the

² Act No. 87/1991 on Extra-judicial Rehabilitation was adopted by the Government of the Czech Republic, 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.

³ The author uses the term "national administration of the parcels was introduced".

Prague Municipal court remanded the case back to the District Court for further findings on the facts of the contractual conclusion under duress. On 11 March 1997, after several hearings of the author and witnesses proposed by him, the District Court concluded that the author had not been under any duress when he donated his apartment building. On 1 November 1997, the Municipal Court reversed the District Court's decision on formal grounds and remanded the case back to the District Court.

4.3 On 24 March 1998, the District Court referred to its earlier deliberations and rejected the author's action. On 8 March 1999, the Municipal Court reversed the lower court's decision again on formal grounds. After a hearing held on 17 August 1999, the District Court rejected the author's application for failure to meet the citizenship requirement in Law No. 87/1991 on Extra-judicial Rehabilitation. On 24 February 2000, the Municipal Court confirmed the judgment of the lower court. On 10 November 2000, the Constitutional Court dismissed the author's appeal as manifestly ill-founded.

4.4 With regard to the parcels of land in Kunratice, the State party refers to the opinion of the Financial Department of 6 December 1990 and 7 January 1991, in which it stated that the author continues to be the owner of these properties and that he should exercise his property rights in court.

4.5 On 19 March and 10 September 2002, the European Court of Human Rights (ECHR) rejected the author's applications as manifestly ill-founded. The State party highlights that, as the author did not mention this fact the content of these applications remains unknown.

4.6 The State party challenges the admissibility of the communication on the ground that it constitutes an abuse of the right of submission of communications within the meaning of article 3 of the Optional Protocol. It invokes the Committee's jurisprudence, in particular communications No. 1452/2006, *Chytil v. the Czech Republic*,⁴ No. 1434/2005, *Fillacier v. France*⁵ and No. 787/1997, *Gobin v. Mauritius*,⁶ in which the Committee declared inadmissible communications which had been submitted with considerable delays after the alleged violation of the Covenant. In the present case, the State party argues that the author petitioned the Committee on 29 December 2006, six years after the Constitutional Court judgment of 10 November 2000 and more than four years from the 10 September 2002 ECHR decision, provided that the ECHR decision concerned the issues under review, without offering any reasonable explanation for this time lapse.

4.7 The State party further challenges the admissibility of the communication on grounds of *ratione temporis*, given that the author donated his properties to the State in 1961, therefore before the Optional Protocol was ratified by the Czechoslovak Socialist Republic.

4.8 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.⁷ The State party argues the author failed to comply with the legal citizenship requirement and his action for

⁴ Decision on inadmissibility adopted on 24 July 2007, para. 6.2.

⁵ Decision on inadmissibility adopted on 27 March 2006, para. 4.3.

⁶ Decision on inadmissibility adopted on 16 July 2001, para. 6.3.

⁷ See communication No. 182/1984, *Zwaan-de Vries v. the Netherlands*, Views adopted on 9 April 1987, paras. 12.1 to 13.

surrender of the apartment building was therefore not supported by the legislation in force. The State party further reiterates its earlier submissions in similar cases.⁸

4.9 With regard to the land parcels in Kunratice, the State party observes that the author has not furnished any information about litigation or legal treatment of this property and that this part of the communication should therefore be declared manifestly ill-founded.

The author's comments on the State party's observations

5.1 On 29 July 2008, the author commented on the State party's submission and confirmed the State party's clarifications on the facts. He underlines that according to article III⁹ of the Treaty of Naturalization between the United States and Czechoslovakia, signed by Czechoslovakia on 16 July 1928, a national of either country who renews residence in his original country without the intent to return to that in which he was naturalized, is considered to have lost that nationality. The intent not to return is held to exist if the person has resided more than two years in the original country. The author returned to Czechoslovakia in November 1989 and has lived on the territory of the State party since then.

5.2 With regard to the delay in submission of his communication, the author explains that he was not aware of any of the Committee's jurisprudence, as the State party does not publish any of the Committee's views. He underlines that he filed his complaint immediately after he heard about the Committee. The author further maintains that his complaint does not concern the forced donation in 1961 but the partial view by the State party's courts in proceedings of property restitution, which he claims to be discriminatory.

5.3 The author withdraws his complaint with regard to the land parcels in Kunratice, for which he will renew proceedings in the State party's courts.

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 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 four years after the inadmissibility decision of ECHR (six years after the exhaustion of domestic remedies) before submitting his complaint to the Committee. The author argues that the delay was caused by lack of available information. The Committee observes that

⁸ See for example, State party observations on communication No. 586/1994, *Adam v. The Czech Republic*, Views adopted on 23 July 1996.

⁹ Article III of the Treaty of Naturalization between the United States and Czechoslovakia: "If a national of either country, who comes within the purview of Article I, shall renew his residence in his original country without the intent to return to that in which he was naturalized, he shall be held to have lost the nationality acquired by naturalization. The intent not to return may be held to exist when a person naturalized in the one country shall have resided more than two years in the other".

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.¹⁰ Recalling its previous jurisprudence, the Committee considers that, in the circumstances of the present case, a delay of six years since the exhaustion of domestic remedies and over four years since the decision of another procedure of international investigation or settlement does not constitute an abuse of the right of submission under article 3 of the Optional Protocol.

6.4 The Committee further notes the State party's argument that it considers the Committee precluded *ratione temporis* from examining the alleged violation. With regard to the land parcels in Kunratice, the Committee notes the author's withdrawal of his complaint in this regard and notes that although the donation of the apartment building took place in 1961 and before the entry into force of the Covenant and the Optional Protocol for the State party, the new legislation that excludes applicants for property restitution who are not Czech citizens, has continuing consequences subsequent to the entry into force of the Optional Protocol for the State party, which could entail discrimination in violation article 26 of the Covenant¹¹. The Committee therefore decides that the communication is admissible; in as 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 has been presented by the parties, is whether the application to the author of Law No. 87/1991 on extra-judicial 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 26¹².

7.3 The Committee recalls its Views in the numerous Czech property restitution cases¹³, 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 author's original entitlement to their properties had not been predicated on citizenship, it found that the citizenship requirement was unreasonable. In the

¹⁰ See for example communications No. 1223/2003, *Tsarjov v. Estonia*, Views adopted on 26 October 2007, para. 6.3; *Fillacier v. France* (note 5 above), para. 4.3; and *Gobin v. Mauritius* (note 6 above), para. 6.3.

¹¹ See *Adam v. the Czech Republic* (note 8 above), para. 6.3.

¹² See *Zwaan-de Vries v. The Netherlands* (note 7 above), para. 13.

¹³ Communication No. 516/1992, *Simunek v. the Czech Republic*, Views adopted on 19 July 1995, para. 11.6; *Adam v. the Czech Republic* (note 8 above), para. 12.6; communications No. 857/1999, *Blazek v. the Czech Republic*, Views adopted on 12 July 2001, para. 5.8; No. 945/2000, *Marik v. the Czech Republic*, Views adopted on 26 July 2005, para. 6.4; No. 1054/2002, *Kriz v. the Czech Republic*, Views adopted on 1 November 2005, para. 7.3; No. 1463/2006, *Gratzinger v. the Czech Republic*, Views adopted on 25 October 2007, para. 7.5; and No. 1533/2006, *Ondracka v. the Czech Republic*, Views adopted on 31 October 2007, para. 7.3.

Des Fours Walderode case,¹⁴ the Committee observed further 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. The Committee therefore concludes that the application to the author of the citizenship requirement under Law No. 87/1991 violate his 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 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.

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.

[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.]

¹⁴ Communication No. 747/1997, *Des Fours Walderode v. the Czech Republic*, Views adopted on 30 October 2001, paras. 8.3-8.4.

**Z. Communication No. 1586/2007, *Lange v. Czech Republic*
(Views adopted on 13 July 2011, 102nd session)***

<i>Submitted by:</i>	Adolf Lange (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	The Czech Republic
<i>Date of communication:</i>	29 January 2007 (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>
<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 13 July 2011,

Having concluded its consideration of communication No. 1586/2007, submitted to the Human Rights Committee on behalf of Mr. Adolf Lange, his wife and two children 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 January 2007, is Adolf Lange, a naturalized American citizen residing in the United States of America and born on 1 May 1939 in Pilsen, Czechoslovakia. He claims to be a victim of a violation by the Czech Republic of article 26, of the International Covenant on Civil and Political Rights.¹ He is not 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. Ahmed Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Helen Keller, 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. Krister Thelin and Ms. Margo Waterval.

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

The facts as submitted by the author

2.1 The author escaped from Czechoslovakia on 10 August 1968 and obtained United States citizenship on 6 August 1980, thereby losing his Czechoslovak citizenship. Upon his application, Czech citizenship was returned to him on 16 May 2003. The author was supposed to inherit half of villa No. 601 and half of apartment building No. 70 in Pilsen.

2.2 The author was denied his inheritance on the basis of Czech law No. 87/1991 on extrajudicial rehabilitation.² On 9 September 1998, the District Court in Pilsen rejected his request for restitution on the basis of law No. 87/1991, which requires claimants to be Czech citizens. On 30 May 2000, the Regional Court in Pilsen rejected his appeal. On 8 February 2001, the Constitutional Court also rejected his appeal on the basis of the same law.

2.3 The author went to the European Court of Human Rights, which, on 3 October 2002, in a committee of three judges rejected his complaint as inadmissible.

The complaint

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

The State party's observations on admissibility and merits

4.1 On 1 February 2008, the State party submits its observations on the admissibility and merits. It clarifies the facts as submitted by the author. On 7 June 1980, the author lost his Czechoslovak citizenship and on 20 February 2003, he re-acquired it.

4.2 On 27 October 1995, the author applied to the Pilsen District Court seeking the surrender of property. The original owner of the property was the author's grandfather, who was sentenced in 1950 to, inter alia, punishment of the forfeiture of property. He died in 1951 and was rehabilitated in 1990. Until 1992, the property was used and managed by two entities acting on behalf of the State. Under Law No. 87/1991, the property was surrendered to the children of the author's brother, who then transferred the ownership title to a third person. On 9 September 1998, the District Court rejected the author's action holding that the author had failed to prove his relationship to the original owner of the properties and, therefore also his status as entitled person under Law No. 87/1991. In his appeal, the author provided documentation proving that he was a relative of the original owner and he also claimed that he has never lost Czechoslovak citizenship. On 30 May 2000, the Regional Court upheld the judgment of the first instance court and noted that the author failed to prove his claim that he had continuous Czech citizenship. On 8 February 2001, the Constitutional Court noted that the author failed to meet the requirements of the restitution law. On 24 September 2002, the European Court of Human Rights rejected the author's application as manifestly ill-founded.

² Law No. 87/1991 on Extra-judicial Rehabilitation was adopted by the Government of the Czech Republic, 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.

4.3 The State party 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 his communication on 29 January 2007, which is more than six years after the last decision of the domestic court dated 8 February 2001 and nearly four-and-a-half years from the European Court of Human Rights' decision of 24 September 2002. The State party argues that the author has not presented any reasonable justification for this delay and therefore the communication should be declared inadmissible.³ 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.

4.4 The State party further adds that the author's grandfather's property was forfeited in 1950, thus a long time before Czechoslovakia ratified the Optional Protocol. The communication should therefore be declared inadmissible *ratione temporis*.

4.5 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.⁴ The State party argues that the author failed to comply with the legal citizenship requirement and his application for property restitution was therefore not supported by the legislation in force. The State party further reiterates its earlier submissions in similar cases.

The author's comments

5.1 On 6 March 2008, the author submits his comments on the State party's observations on the admissibility and merits. With regard to the author's loss of Czechoslovak citizenship on the basis of the Naturalization Treaty of 16 July 1928 between the Czechoslovak Republic and the United States of America, the author argues that the State party misused this treaty, which had been set up for temporary loss of citizenship only and for protection of young Europeans coming to the United States of America in the nineteenth and twentieth centuries.

5.2 With regard to the author's belated submission of his communication, he argues that both the Constitutional Court and the European Court of Human Rights decisions mentioned that they are final and cannot be appealed. As the State party does not publish any decisions by the Human Rights Committee, the author only found out later about this possibility. He claims that his late submission is not due to any negligence on his part but due to the State party's intentional withholding of information on jurisprudence of the Human Rights Committee.

³ See communications No. 787/1997, *Gobin v. Mauritius*, decision on inadmissibility adopted on 16 July 2001, para. 6.3; No. 1434/2005, *Fillacier v. France*, decision on inadmissibility adopted on 27 March 2006, para. 4.3; No. 1452/2006, *Chytil v. the Czech Republic*, decision on inadmissibility adopted on 24 July 2007, para. 6.2; and *a contrario* communication No. 1533/2006, *Ondracka v. the Czech Republic*, Views adopted on 31 October 2007, para. 6.4.

⁴ See for example communication No. 182/1984, *Zwaan-de Vries v. the Netherlands*, Views adopted on 9 April 1987, paras. 12.1 to 13.

5.3 With regard to the merits, the author submits that he claims a violation of his inheritance rights under the Covenant due to the citizenship requirement, which was made impossible to comply with. He submits that the legislation in force is not constitutional.

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 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 nearly four-and-a-half years after the inadmissibility decision of the European Court of Human Rights (more than six years after exhaustion of domestic remedies) before submitting his complaint to the Committee. The author argues that the delay was caused by lack of available information and intentional withholding of information by the State party. The Committee observes that according to rule 96 (c), of the Committee's rules of procedure, 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 one month since the exhaustion of domestic remedies and four years and five months since the decision of another procedure of international investigation or settlement to amount to an abuse of the right of submission under article 3, of the Optional Protocol.

6.4 The Committee further notes the State party's argument that it considers the Committee precluded *ratione temporis* from examining the alleged violation. The Committee notes that although the forfeiture of the author's grandfather's property took place in 1950 and before the entry into force of the Covenant and the Optional Protocol for the State party, the new legislation that excludes applicants for property restitution who are not Czech citizens, has continuing consequences subsequent to the entry into force of the Optional Protocol for the State party, which could entail discrimination in violation article 26, of the Covenant.⁵ The Committee therefore decides that the communication is admissible, in as far as it appears to raise issues under article 26, of the Covenant.

⁵ See communication No. 586/1994, *Adam v. the Czech Republic*, Views adopted on 23 July 1996, para. 6.3.

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 26.⁶

7.3 The Committee recalls its Views in the numerous Czech property restitution cases,⁷ 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 author's original entitlement to their properties had not been predicated on citizenship, it found that the citizenship requirement was unreasonable. In the case *Des Fours Walderode*,⁸ the Committee observed further 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. The Committee therefore concludes that the application to the author of the citizenship requirement under Law No. 87/1991 violate his 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 adequate compensation if the properties cannot be returned. The Committee reiterates the position taken in its earlier jurisprudence⁹ 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.

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

⁶ See *Zwaan-de Vries v. the Netherlands* (note 4 above), , para. 13.

⁷ Communication No. 516/1992, *Simunek v. the Czech Republic*, Views adopted on 19 July 1995, para. 11.6; *Adam v. the Czech Republic* (note 5 above), para. 12.6; communications No. 857/1999, *Blazek v. the Czech Republic*, Views adopted on 12 July 2001, para. 5.8; No. 945/2000, *Marik v. the Czech Republic*, Views adopted on 26 July 2005, para. 6.4; No. 1054/2002, *Kriz v. the Czech Republic*, Views adopted on 1 November 2005, para. 7.3; 1463/2006, *Gratzinger v. the Czech Republic*, Views adopted on 25 October 2007, para. 7.5; and *Ondracka v. the Czech Republic* (note 3 above).

⁸ Communication No. 747/1997, *Des Fours Walderode v. the Czech Republic*, Views adopted on 30 October 2001, paras. 8.3 - 8.4.

⁹ Communication No. 516/1992, *Simunek v. the Czech Republic*, Views adopted on 19 July 1995, paragraph 11.6; *Adam v. the Czech Republic* (note 5 above), para. 12.6; *Blazek v. the Czech Republic* (note 7 above), para. 5.8; *Marik v. the Czech Republic* (note 7 above), , para. 6.4; *Kriz v. the Czech Republic* (note 7 above), , para. 7.3; *Gratzinger v. the Czech Republic* (note 7 above), para. 7.5; and *Ondracka v. the Czech Republic* (note 3 above) para. 7.3.

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. 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.]

**AA. Communication No. 1604/2007, *Zalesskaya v. Belarus*
(Views adopted on 28 March 2011, 101st session)***

<i>Submitted by:</i>	Elena Zalesskaya (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	8 February 2007 (initial submission)
<i>Subject matter:</i>	Prosecution of the author for distributing newspapers and leaflets in the street
<i>Procedural issue:</i>	Degree of substantiation of claims
<i>Substantive issues:</i>	Freedom of expression, right to impart information, peaceful assembly, prohibition of discrimination
<i>Articles of the Covenant:</i>	19, paragraphs 2 and 3; 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 28 March 2011,

Having concluded its consideration of communication No. 1604/2007, submitted to the Human Rights Committee by Ms. Elena Zalesskaya 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. The author of the communication, dated 8 February 2007, is Ms. Elena Zalesskaya, a Ukrainian citizen born in 1932. She claims to be a victim of violation by Belarus¹ of her rights under article 19 and 21 of the International Covenant on Civil and Political Rights. The author is unrepresented.

The facts as presented by the author

2.1 On 27 July 2006, the author, together with other two persons, distributed copies of the officially registered newspapers *Tovarishch* (“Comrade”), *Narodnaya Volya* (“Peoples’

* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Motoc, Mr. Gerald L. Neuman, Mr. Michael O’Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

¹ The Optional Protocol entered into force for Belarus on 30 December 1992.

Will”), and informative leaflets to passers-by on a sidewalk in Vitebsk city. Soon after, they were arrested and taken by the police to the Department of Internal Affairs of Oktyabrsky district of Vitebsk, where a report that they had committed an administrative offence under article 167, part 1, of the Belarus Code of Administrative Offences,² was drawn up. The author was accused of violation of the procedure for organizing and conducting street marches. On 28 July 2006, she was fined 620,000 Belarusian roubles by the Vitebsk District Court.

2.2 On 14 August 2006, the author appealed the decision of the Vitebsk District Court to the Vitebsk Regional Court, which dismissed the appeal on 20 September 2006. On 25 September 2006, she filed an appeal with the Supreme Court, which upheld the decision of the Vitebsk Regional Court on 10 November 2006.

2.3 The author claims that she has exhausted all available domestic remedies.

The complaint

3.1 The author claims that the State party violated her right to impart information as well as the individuals’ right to receive information, as guaranteed by article 19 of the Covenant.

3.2 She further claims that the court failed to establish that on 27 July 2006 she organized and conducted a street march from Liberty Square to Lenin Square in the city of Vitebsk. Three persons walking on a sidewalk and distributing copies of the officially registered newspaper *Tovarishch* (“Comrade”), an activity for which they possessed written authorization,³ and of other printed materials (leaflets), the legality of which was not contested by the court, cannot be considered as an organized mass event.

3.3 The author maintains that she and the other two persons involved in the distribution activity did not display any flags, posters or other propaganda materials, as shown in the video records presented by the police as proof of her guilt. Her acts were wrongly qualified by the court as an organized mass event.

3.4 The author also submits that she had not requested authorization for the organization of a mass event from the competent authorities, as required by law, because she had no intention of organizing such an event. The distribution of printed materials lasted no more than 10 minutes before the arrest, and her actions neither impaired the rights and freedoms of others, nor resulted in damage to citizens’ or municipal property. She considers that the decision of the court was unreasonable, unfair and cruel, noting that the sum of the fine imposed is the equivalent of two months of her retirement pension.

3.5 According to the author, the authorities did not present any facts disclosing a breach of national security or of public order during the distribution of printed materials, and thereby endorsed its peaceful character. Neither did they provide any documentary evidence on attempts upon the life and health of individuals, upon their morals or on breaches of their rights and freedoms. Therefore, the author claims that the State Party has also violated her right of peaceful assembly under article 21 of the Covenant.

² Article 167, part 1, of the Belarus Code on Administrative Offences on “violation of the procedure for organizing and conducting religious, sporting, cultural or other events, as well as of gatherings, rallies, street marches, demonstrations and pickets”.

³ The author enclosed a copy of the written authorization given by the editor-in-chief of the *Tovarishch* newspaper.

State party's observations on admissibility and merits

4.1 On 2 May 2008, the State party provided its observations on the admissibility and merits of the communication. It submits that on 27 July 2006, a report on the commission of an administrative offence under the article 167, part 1, of the Belarus Code of Administrative Offences was drawn up in relation to the author. According to the report, the author, on 27 July 2006 at 6.10 p.m., organized an unauthorized mass event – a street march of a group of individuals moving from Liberty Square to Lenin Street in Vitebsk, with the intent of publicly expressing their socio-political opinion (an event accompanied by the distribution of informative leaflets). During the police questioning, the author explained that, as a member of the United Civic Party (Obedinennaya Grazhdanskaya Partiya) and the President of the Vitebsk municipal organization of the United Civic Party, she received a letter from the Russian National Unity Party (Russkaya Natsionalnaya Edinstvo) with a call to interethnic hatred, and decided to reply to that letter by distributing leaflets among the inhabitants of Vitebsk.

4.2 The State party also points out that similar reports were drawn up in relation to the other two persons involved in the event. On 27 July 2006 at 6.10 p.m., the author, together with two other persons, organized an unauthorized street march from Liberty Square to Lenin Square, distributing printed materials, the *Narodnaya Volya* ("Peoples' Will") newspaper, and leaflets entitled "Za nashu, za vashu svobodu" ("For our, for your freedom"). According to the report on the body search, the author was found in possession of 13 copies of the *Narodnaya Volya* newspaper, about one hundred copies of the *Tovarishch* newspaper and about two hundred informative leaflets.

4.3 On 28 July 2006, the reports on administrative offence were considered by the Vitebsk District Court. The author pleaded not guilty during the court hearings, and maintained that her movement on a sidewalk and distribution of newspapers and leaflets to passers-by cannot be considered a street march. The police agents explained that the author and the two other persons were walking together on Lenin Street, distributing leaflets and the *Tovarishch* newspaper to passers-by, thus attracting their attention. They also informed the court that no written request to hold on 27 July 2006 a street march from Liberty Square to Lenin Square was received by the Town Executive Committee. A video recording of the above-mentioned events was presented in court.

4.4 The author and the other two persons were held administratively responsible for a violation of the procedure for organizing and conducting a street march, as prescribed by article 167, part 1, of the Belarus Code of Administrative Offences, and were sanctioned with a fine of 20 basic units (620,000 Belarusian roubles). The court considered the author as the organizer of the unauthorized street march. The case was examined by the Vitebsk Regional Court and the Supreme Court of Belarus under the supervisory judicial review in October 2006 and November 2006 respectively. The decision of the first instance court was confirmed. Ms. Zalesskaya lodged no complaint with the Vitebsk Regional Prosecutor's Office. However, she filed a complaint with the Prosecutor's Office of Oktyabrsky District of Vitebsk, on 16 August 2006, which was returned to the author on 21 August 2006 for failure to pay the State fees.

4.5 The author's claim that the administrative penalty for violating the order on organizing and conducting mass events constitutes a violation of her right to freely impart information, as stipulated in article 34 of the Constitution,⁴ is unfounded. The State party

⁴ Article 34 of the Constitution of Belarus stipulates: (1) Citizens of the Republic of Belarus shall be guaranteed the right to receive, store and disseminate complete, reliable and timely information of the activities of state bodies and public associations, on political, economic, cultural and international life, and on the state of the environment; (2) State bodies, public associations and officials shall afford

argues that the right to freely impart information is fully observed in Belarus. The author tries to unreasonably present her lawful sanctioning for violating the order on organizing and conducting gatherings, meetings, street marches as a violation of one of her other constitutional rights. It was repeatedly explained to the author that the distribution of printed materials during the street march and thus the dissemination of information was not used as evidence in her administrative offence case. The author also attempted to challenge the court's evaluation of the factual circumstances of her case and to impose her own definition of the term "street march". In this regard, the State party recalls that legal norms, as well as the evaluation of facts of a case, are matters of the sovereign rights of each State, and thereby fall outside the scope of the Covenant. The author considered the court's decision to sanction her with a fine of 620,000 roubles as cruel, taking into account the amount of her retirement pension. However, this amount was the minimum established by law, and all the circumstances referred to by the author were taken into consideration at the time of proceedings.

Author's comments on the State party's observations

5.1 By letter of 17 July 2008, the author recalls that the purpose of her communication to the Human Rights Committee is an attempt to restore the right of Belarusian citizens to freely impart and receive information as guaranteed by the Belarusian Constitution and other laws, as well as by international treaties to which Belarus is a State party. The author acknowledges the State party's information regarding her arrest on 27 July 2006, the subsequent accusation of having violated the order on organizing and conducting street marches, the drawing up of the report on an administrative offence under article 167, part 1, of the Belarus Code of Administrative Offences, and the imposition of a fine of 620,000 Belarusian roubles.

5.2 The author further states that she has been the President of the municipal organization of the United Civic Party for more than 10 years and she knows the procedure for the organization and conduct of meetings, street marches and pickets. She further claims that she is aware of the sanctions applicable for violations of the Law on Mass Events in the Republic of Belarus (hereinafter Law on Mass Events), and that she has always considered herself as a law-abiding citizen. The action of 27 July 2006 was not intended to be a mass event. They merely distributed to passers-by the officially registered newspapers *Narodnaya Volya* and *Tovarishch* and the informative leaflets. For this reason, she did not request an authorization to conduct an organized mass event from the competent authorities, as required by law. During the proceedings it was ascertained that the newspapers and leaflets distributed did not contain information that might violate the rights or reputation of other citizens. She also submits that the materials distributed did not disclose State secrets and did not contain calls to disrupt public order or to infringe upon public health or morals. This fact was not challenged by the Belarusian authorities in their observations on admissibility and merits. Accordingly, she claims that none of the restrictions on the right to freely impart information, as provided by the Belarusian legislation, are applicable to her case.

5.3 The author further refers to article 34 of the Constitution of Belarus, which provides that citizens of the Republic of Belarus shall be guaranteed the right to receive, store and disseminate complete, reliable and timely information of the activities of State bodies and public associations, on political, economic, cultural and international life, and on the state

citizens of the Republic of Belarus an opportunity to familiarize themselves with material that affects their rights and legitimate interests; (3) The use of information may be restricted by legislation with the purpose to safeguard the honour, dignity, personal and family life of the citizens and the full implementation of their rights.

of the environment. She points out that the State is the guarantor of the realization of this right, but police agents, as representatives of the State, through their unlawful actions, prevented her from realizing her right to freedom to impart information and the citizens' right to receive information.

5.4 The author further refers to the State party's assertion that she organized and conducted an unauthorized street march, together with two other persons. She submits that the Law on mass events does not define the term "mass event", and thereby the authorities wrongly qualified the event of 27 July 2006 as a mass event. On this matter, the law is ambiguous and lacks clarity, which consequently leaves room for errors, as has happened in her case. In her opinion, three persons walking on a sidewalk cannot be considered a mass street march. Nonetheless, it was qualified as such by the police and judiciary. The author reiterates her allegation that she is a victim of a violation of article 19 of the Covenant.

5.5. The author refers to other events which took place in 2007 and 2008 and, as a result of which she was fined 62,000 and 700,000 Belarusian roubles respectively for participating in unauthorized mass events (pickets).⁵

State party's further observations

6.1 In its submission of 12 January 2009, the State party recalls that the right to freedom of expression is guaranteed to nationals of State parties to the International Covenant on Civil and Political Rights by article 19, paragraph 2. It submits that Belarus, as a State party to the Covenant, fully recognizes and carries out its obligations under the Covenant, and refers to article 33 of the Constitution of Belarus which guarantees to everyone freedom of opinion and belief and freedom of expression. It further refers to article 26 of the Covenant and states that nationals of Belarus have, in addition to other rights, the constitutional right to judicial protection, which ensures to everyone free access to courts and equality of all persons before the law. Therefore, the State party maintains that Belarusian legislation provides all necessary conditions for the enjoyment of the citizens' right to freedom of expression, to receive and impart information. It further submits that Ms. Zalesskaya has violated the legal provisions establishing the order on organizing and conducting mass events, and unlawfully attempted to exercise her rights under article 19 of the Covenant and article 33 of the Constitution of Belarus.

6.2 With regard to the author's reference to events which took place in 2007 and 2008, the State party notes that neither the Optional Protocol nor the rules of procedure of the Human Rights Committee contain provisions allowing for the consideration of a new submission based on facts and allegations not related to the initial communication

Additional comments by the author

7.1 On 12 March 2009, the author submitted further comments on the State party's observations and reiterates that articles 19 and 21 of the Covenant have been violated. She confirms the State party's assertion that the procedure for the organization of mass events is set forth in national legislation, and that the organizers of such events have to comply with certain requirements in order to obtain authorization for their conduct. However, she did not request authorization from the town authorities because, in her opinion, the action was not a "mass" event. The Law on mass events does not specify any quantitative threshold which would assist citizens, police or courts in their assessment on whether an event is of a "mass" character or not. Consequently, when they planned the distribution of printed materials, they didn't think that three persons were enough to hold a "mass" event. She

⁵ These events are not directly relevant to the present communication.

further states that the State party did not provide any evidence that the distribution of newspapers and leaflets was a mass street march.

7.2 The author further explains that the existence of a by-law regulating the organization of mass events in Vitebsk city was another reason for which they did not request authorization from the town authorities. She refers to the Town Executive Committee's Decision No. 820 of 24 October 2003 regarding the procedure for the organization and conduct of mass events in Vitebsk city (hereinafter Decision No. 820), and claims that it significantly restricts the right to freedom of opinion and belief and their free expression as well as the right of peaceful assembly of the citizens of Vitebsk. The restrictions are imposed by: (a) designation of specific locations where mass events may be organized (only three rarely visited parks as possible venues); (b) compulsory payment of special services of the city (police, garbage-collection services, ambulance; those activities need to be paid, according to the author, from the city budget which comes from tax payments); (c) impossibility to conduct mass events on holidays, commemorative and other significant days defined as such by the authorities. These conditions are contrary to article 19 of the Covenant.

Additional observations by the State party

8.1 On 4 September 2009, the State party submitted its further observations. It refers to the wording of article 19 of the Covenant and argues that paragraph 3 of the article in question 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 for the respect of the rights or reputation of others and for the protection of national security or public order, of public health or morals. This provision is reflected in article 23 of the Constitution of Belarus, which stipulates that restriction upon personal rights and freedoms shall be permitted 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 rights and freedoms of other persons. 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 conducting such events is enshrined in law. In this regard, article 6 of the Law on mass events clearly states that it is the head of the local executive body who has the authority to take decisions regarding the time and the location of a mass event. Since the prohibitions and rules governing the conducting of mass events are contained in the Constitution and laws, as required by the Covenant, and since Decision No. 820 of the Vitebsk Town Executive Committee was adopted in conformity with the corresponding provisions of the laws, the State party does not find the above-mentioned decision in violation of its international legal obligations or in violation of the rights of citizens. Accordingly, the author's allegation that Decision No. 820 regarding the procedure for the organization and conduct of mass events in Vitebsk city restricts the right to freedom of opinion and belief and their free expression as well as the right of peaceful assembly of the citizens of Vitebsk is groundless.

8.2 The State party further submits that article 2 of the Law on mass events defines a mass event as any gathering, meeting, street march, demonstration, picket or any other events of a mass character. The action organized by the author was qualified by the competent organs as a street march, i.e. an organized mass movement of a group of persons on sidewalk or carriageway, boulevard, avenue, square, with the purpose of drawing attention to any problems or publicly expressing one's socio-political opinion or protest. Since the law does not define the lower limit of the number of participants, the State party believes that qualifying an event or another as a "mass" event is the prerogative of the competent State organs, taking into account the existing situation at the site of the event. The author in general ignored the requirements of the Law and did not file a request for

authorization to conduct a mass event with the local executive body. The author has repeatedly participated in unauthorized mass events and therefore was justly held administratively responsible. In particular, on 25 March 2008 she was fined for repeated participation during the year in an unlawful mass event, namely a picket, which is defined in the Law on mass events as public expression by a citizen or a group of citizens of their socio-political, collective, personal or of other interests or of their protest (without a march), including by way of hunger strike, on any problems, with or without using posters, banners or other means. The State party submits that the author's claim that her actions as part of a group of three persons cannot be considered participation in a mass event is her personal opinion and constitutes an inappropriate interpretation of Covenant's provisions and the national legislation.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 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.

9.2 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.

9.3 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 lodge a complaint against the decision of the Court of Oktyabrsky district of Vitebsk (first instance court) to the Vitebsk Regional Prosecutor's Office, although it admitted that the author filed a complaint with the Prosecutor's Office of Oktyabrsky District of Vitebsk, which was rejected for failure to pay the State fees. The Committee also notes that the author appealed to the Supreme Court, which upheld the decision of the first instance court. In these 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.

9.4 The Committee considers that the author's claims under article 19 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

10.1 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.

10.2 The Committee notes the author's allegation that her right to freedom to impart information under article 19, paragraph 2, was violated, since she was arrested and subsequently fined 620,000 Belarusian roubles (20 basic units) for distributing newspapers and informative leaflets on 27 July 2006 in Vitebsk.

10.3 The Committee also takes note of the author's argument that the Law on mass events in Belarus is ambiguous and lacks clarity, as it does not define precisely the term "mass event" and does not specify the lower limit of the number of participants in order for an event to be qualified as "mass" event. The State party acknowledges this fact and submits that the question of qualification of one or another event as a "mass" event shall be decided each time by the competent State organs.

10.4 The Committee considers that the legal issue before it is not the question whether the author's actions ought or ought not to be qualified as an unauthorized mass event in the sense of the Belarus laws, i.e. its task is not to evaluate the facts and evidence made by the courts of the State party or interpret its domestic legislation. Rather, it is called upon to decide whether the imposition of the fine amounts to a violation of article 19 of the Covenant. From the material before the Committee, it transpires that the author's activities were qualified by the courts as participation in an unauthorized street march and not as "imparting of information". In the Committee's opinion, the above action of the authorities, irrespective of its legal qualification, amounts to a de facto limitation of the author's rights under article 19, paragraph 2, of the Covenant.

10.5 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, in the present case, the State party has merely argued that the right to freedom of expression as guaranteed by article 19, paragraph 2, of the Covenant, may be subject to limitations as provided for by law (article 19, paragraph 3, of the Covenant and article 32 of the Belarus Constitution). It further observes that the State party has not contested the author's assertion that the distributed newspapers and leaflets did not contain information that might harm the rights or reputation of others, did not disclose State secrets, and did not contain calls to disrupt public order or to infringe upon public health or morals. Furthermore, the State party has failed to invoke any specific grounds on which the restrictions imposed on the author's activity would be necessary within the meaning of article 19, paragraph 3, of the Covenant. The Committee considers that, in the circumstances of the case, the fine imposed on the author was not justified under any of the criteria set out in article 19, paragraph 3. It therefore concludes that the author's rights under article 19, paragraph 2, of the Covenant, have been violated.⁶

10.6 Regarding the author's claim under article 21 of the Covenant, the Committee considers that the State party has failed to demonstrate that the restrictions imposed on the author were necessary 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. Accordingly, the Committee concludes that the facts before it resulted also in a violation of the author's rights under article 21 of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of the author's rights under article 19, paragraph 2, and article 21, 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 author with an effective remedy, including reimbursement of the present value of the fine and any legal costs incurred by the author,⁷ as well as compensation. The State party is also under an obligation to take steps to prevent similar violations in the future.

13. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to

⁶ Communications No. 927/2000, *Svetik v. Belarus*, Views adopted on 8 July 2004, paragraph 7.3; and No. 1009/2001, *Shchetko v. Belarus*, Views adopted on 11 July 2006, para. 7.5.

⁷ See communication No. 780/1997, *Laptsevich v. Belarus*, Views adopted on 20 March 2000.

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.

[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.]

**BB. Communication No. 1605/2007, Zyuskin v. Russian Federation
(Views adopted on 19 July 2011, 102nd session)***

<i>Submitted by:</i>	Nikolai Zyuskin (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Russian Federation
<i>Date of communication:</i>	15 March 2007 (initial submission)
<i>Subject matter:</i>	Long-term imprisonment after torture and unfair trial
<i>Procedural issue:</i>	Lack of substantiation of claims
<i>Substantive issues:</i>	Effective remedy; no derogation from article 7; torture, cruel, inhuman or degrading treatment or punishment; right to a fair hearing by an independent and impartial tribunal; right to be presumed innocent; right to obtain the attendance and examination of witnesses; right to have one's sentence and conviction reviewed by a higher tribunal.
<i>Articles of the Covenant:</i>	7; 14, paragraphs 1, 2, 3 (e) and 5
<i>Article of the Optional Protocol:</i>	2

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

Meeting on 19 July 2011,

Having concluded its consideration of communication No. 1605/2007, submitted to the Human Rights Committee by Mr. Nikolai Zyuskin 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. Nikolai Zyuskin, a Russian national born in 1978, who is currently serving a prison sentence in the Russian Federation. He claims to be a victim of violations by the Russian Federation of his rights under article 7 and article 14, paragraphs 1, 2, 3(e) and 5, of the International Covenant on Civil and Political Rights. The

* 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, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

Optional Protocol entered into force for the State party on 1 January 1992. The author is not represented.

Factual background

2.1 At 11.35 p.m. on 19 March 2001, the author was arrested by officers of the District Department for Combating Organised Crime of Gatchina city (District Department) on suspicion of having committed a crime and brought to the District Department where he was allegedly subjected to physical and psychological pressure. On 22 November 2001, the Leningrad Regional Court convicted the author on counts of premeditated murder under aggravated circumstances (art. 105, part 2, of the Criminal Code), premeditated infliction of light bodily injuries (art. 115) and assault (art. 116). He was sentenced to 16 years and 6 months' imprisonment. The court established that, on 24 November 2000, in the course of a quarrel the author assaulted a certain Ms. N.B. with whom he was consuming alcoholic beverages. When Ms. N.B. threatened to report the assault to the police, the author and Mr. I.L. killed her by hitting her with a stick on her head a number of times. Shortly thereafter they threw the body of Ms. N.B. into the ditch and buried it two days later.

2.2 On 14 February 2002, the Supreme Court examined the author's cassation appeal and decided to terminate criminal proceedings against him in relation to premeditated infliction of light bodily injuries (art. 115 of the Criminal Code) and assault (art. 116) for procedural reasons. The Supreme Court, therefore, established that the author was guilty of premeditated murder under aggravated circumstances (art. 105, part 2, of the Criminal Code) and sentenced him to 16 years' imprisonment.

2.3 On 17 October 2002, the author submitted an application to the European Court of Human Rights that was declared inadmissible on 7 January 2005, as it was lodged after the expiry of the six-month time limit.

Allegations of torture and ill-treatment during pre-trial investigation

2.4 The author claims that shortly after his arrest on 19 March 2001, on the premises of the District Department he was forced by officers to wear a gas mask with obstructed air access and was thus prevented from breathing until he fainted. He was unable to remove the gas mask from his head, as his hands were handcuffed behind the chair on which he was sitting. Also, a scarf was placed on his head to prevent him from seeing those who beat him with a stick on his head, thighs and shins. These actions of officers of the District Department were accompanied by threats and insults, as well as kicks and punches on his abdomen, groin, back and the head in order to force him to confess guilt. The author could also hear the cries and beatings of his co-accused, Mr. I.L., who was arrested together with him.

2.5 The author submits that the unlawful actions of officers of the District Department were witnessed by a senior investigator of the Gatchina City Prosecutor's Office, Mr. V.V., who was subsequently put in charge of the investigation in relation to the author's criminal case. Mr. V.V. did not intervene and shortly thereafter drew up a report of the author's interrogation as a suspect. In the morning of 20 March 2001, he and Mr. I.L. were transferred to the temporary confinement ward (IVS) of Gatchina city, where Mr. V.V. drew up their respective arrest and personal search reports.

2.6 On 22 March 2001, the author was interrogated by Mr. V.V. in the presence of the Gatchina City Prosecutor and an ex officio lawyer. He submits that, still afraid because of the beatings and torture to which he had been subjected and fearing negative repercussions he would have faced had he complained, he did not make any depositions to the prosecutor about the unlawful methods used by officers of the District Department against him and about the investigator's failure to intervene. The author states that he did not ask the

prosecutor to order a medical examination in order to document the injuries on his body, since the bruises and scratches on his face were still clearly visible but the prosecutor failed to react, despite his obligation to ensure compliance with law at the preliminary investigation stage.¹ He adds that the ex officio lawyer did not duly react to the bruises and scratches either.

2.7 On 18 June 2001, the author submitted a written complaint to the Gatchina City Prosecutor, stating, inter alia, that he was subjected to acts of violence by officers of the District Department. On 10 July 2001, the Gatchina City Prosecutor replied by reminding the author that on 22 March 2001 he was interrogated in the presence of the very same Gatchina City Prosecutor and could have informed him about the use of violence if it had indeed taken place. On 6 August 2001, the author submitted another written complaint to the Gatchina City Prosecutor. On 7 August 2001, the Gatchina City Prosecutor replied by informing the author that, under article 51 of the Constitution, he had a right not to testify against himself and close relatives.

2.8 On 19 September 2001, the author submitted a further written complaint to the Gatchina City Prosecutor's Office with the request to initiate criminal proceedings with regard to the beatings to which he had been subjected on 20 March 2001 by officers of the District Department. On 23 October 2001, the senior assistant of the Gatchina City Prosecutor decided not to initiate criminal proceedings. As transpires from the decision, four officers of the District Department who were questioned in relation to the author's complaint stated that they had to use sambo techniques (martial art) and handcuffs while arresting the author and Mr. I.L., as they tried to escape. The officers further stated that they duly reported the use of sambo techniques and handcuffs and that the report in question was added to the case file materials. They also stated that no force was used against the author and Mr. I.L. on the premises of the District Department. The latter was confirmed by the statement of a certain Mr. A.A., a former officer of the District Department, who was present at the time of arrest. According to the statement of the investigator, Mr. V.V., the author and Mr. I.L. were not subjected to torture and violence on the premises of the District Department and, while being transferred to the IVS, they affirmed that they did not complain about having been beaten. The investigator also stated that the author started complaining "everywhere" about being subjected to unlawful methods only after he was remanded in custody as an attempt to avoid responsibility for the murder he had committed. The investigator added that all investigation actions, except for the interrogation as a suspect, took place in the presence of a lawyer.

2.9 The author submits that he complained to the Leningrad Regional Court about the use of unlawful methods by three officers of the District Department and refers to page 18 of the trial transcript in support of his claim. He adds that the first instance court disregarded his allegations of torture and ill-treatment as demonstrated by lack of any reference to these allegations in the judgment of the Leningrad Regional Court. The author claims that he also complained about the beatings and torture in his cassation appeal to the Supreme Court. In the ruling of 14 February 2002, the Supreme Court stated that the author's arguments about the use of unlawful methods during pretrial investigation were examined by the Leningrad Regional Court and were found to be groundless in its reasoned judgment. The author adds that Mr. I.L. also complained about beatings and torture in his cassation appeal.

¹ Reference is made to article 211 of the Criminal Procedure Code and article 1 of the Federal Law "On the Prosecutor's Office".

2.10 The author submits that he unsuccessfully complained about the use of unlawful methods to the Leningrad Regional Prosecutor's Office² and the General Prosecutor's Office³ through the supervisory review procedure.

2.11 On 8 January 2002, the author submitted a written complaint to the Human Rights Ombudsman. On an unspecified date, this complaint was transmitted to the Leningrad Regional Prosecutor's Office. On 11 March 2002, the Leningrad Regional Prosecutor's Office revoked the decision of 23 October 2001 not to initiate criminal proceedings and the case file materials were sent back to the Gatchina City Prosecutor's Office for an additional investigation.

2.12 On 18 May 2002, the Gatchina City Prosecutor decided not to initiate criminal proceedings with regard to the unlawful methods used by officers of the District Department and the failure of the investigator to duly react to these unlawful actions. In the course of the additional investigation, the author explained that he had not been beaten at the time of his arrest but that the beatings and other forms of physical violence were used by officers on the premises of the District Department in the presence of the investigator who did not intervene. According to the register of medical examination of individuals detained in the IVS, no injuries were identified on the author's body upon his arrival to the IVS and no medical assistance was provided to him from 21 to 23 March 2001. The report of additional investigation referred to what was explained by the author in writing to the administration of the IVS, i.e. that his injuries resulted from a beating before his arrest. The report noted that it was impossible to either confirm or refute this claim. According to the report of the Gatchina District Medical Association, the author was examined on 23 March 2001. The examination established that he had a number of head injuries and a bruise around his right eye. According to the certificate from the IVS, the author was detained there from 23 March to 2 April 2001. He was examined by a duty medical assistant at 6.40 p.m. on 23 March 2001 upon his arrival to the IVS. The examination established that he had a head injury, a haematoma of the right eye and a few scratches on the left side of the forehead; the author did not complain about his health condition and did not require medical assistance. The report of additional investigation also referred to a testimony of a bartender who stated that the author and Mr. I.L. did not offer any resistance at the time of their arrest but could have received injuries when they fell over an overturned table. Four officers of the District Department who were questioned in relation to the author's initial complaint of 19 September 2001 repeated their earlier statements about the use of sambo techniques and handcuffs against the author and Mr. I.L. at the time of their arrest. One of the officers added that there were no gas masks on the premises of the District Department.

2.13 On numerous occasions,⁴ the author unsuccessfully complained about the failure of the Gatchina City Prosecutor's Office to duly provide him with a copy of the decision of 18 May 2002,⁵ as well as with the materials of the additional investigation. On 26 August 2004, the author sent a written complaint to the Leningrad Regional Prosecutor's Office with the request to initiate criminal proceedings against the Gatchina City Prosecutor for her failure to duly provide him with a copy of the decision of 18 May 2002 and with the materials of the additional investigation; this complaint was rejected on 29 October 2004. The First Deputy Prosecutor of the Leningrad Region explained that should the author

² The author refers to a letter of the Deputy Prosecutor of the Leningrad Region dated 29 July 2002.

³ The author refers to a letter of the Deputy General Prosecutor dated 14 May 2002 and two letters of the General Prosecutor's Office dated 18 May 2002 and 18 June 2002.

⁴ The author refers to his requests of 4 September 2003, 13 November 2003 and 8 January 2004 to the Gatchina City Prosecutor's Office; of 13 November 2003 and 15 April 2004 to the Leningrad Regional Prosecutor's Office; of 6 November 2003 to the Human Rights Ombudsman.

⁵ The author submits that he was familiarized with the decision of 18 May 2002 on 10 June 2004.

himself be unable to personally familiarize himself with the materials of the additional investigation, he should authorize a lawyer to represent him. On 18 November 2004, the author complained to the General Prosecutor's Office about the decision of 29 October 2004; this complaint was rejected by the Assistant General Prosecutor on 21 January 2005.

2.14 On 17 June 2004, the author complained to the Gatchina City Court about the decision of 18 May 2002 not to initiate criminal proceedings with regard to the unlawful methods used against him by officers of the District Department. The author argued, *inter alia*, that the following investigation actions have not been undertaken in the course of the additional investigation: questioning of the individuals who were detained in the same cell in the IVS from 20 to 23 March 2001; questioning of Mr. I.L. who saw injuries on the author's face when they were transferred to the IVS; clarifying contradictions between the testimony of the investigator about the use of sambo techniques and handcuffs at the moment of arrest as the author and Mr. I.L. tried to escape and the testimony of a bartender, stating that they did not offer any resistance; duly assessing the author's claims that there was no medical examination at the time of his arrival to the IVS and that, on 23 March 2001, he explained in writing that he had been beaten prior to his arrest on 19 March 2001. The author added that he later retracted these explanations.

2.15 On 18 August 2004, the Gatchina City Court examined the author's complaint in his absence and rejected it. The court concluded that the investigation of the author's allegations about being subjected to beatings and other unlawful methods was comprehensive and impartial. The investigation established that force (sambo techniques) and handcuffs were used against the author at the time of his arrest and that the latter did not exclude the infliction of injuries that have been identified on his body on 23 March 2001 (head injuries, haematoma of the right eye and scratches on the left side of the forehead). The use of force at the time of his arrest was in compliance with the Law on police, since the author was suspected of having committed a premeditated murder and there was information that he and Mr. I.L. could offer armed resistance. The court established that it was impossible to question the individuals who were detained together with him from 20 to 23 March 2001, since he did not provide any information that would allow identifying them and their identification at that time was no longer possible. As to the author's request to question Mr. I.L., the court decided that it was unnecessary, since there was enough information in the materials of the additional examination to make a decision.

2.16 On 23 September 2004, the author submitted a cassation appeal to Leningrad Regional Court against the decision of the Gatchina City Court on 18 August 2004 and reiterated his earlier arguments summarized in paragraph 2.14 above. On 26 October 2005, the Leningrad Regional Court rejected the author's appeal and upheld the decision of 18 August 2004.

Proceedings in trial court

2.17 The author refers to the part of the judgment of the Leningrad Regional Court of 22 November 2001, in which the court examined the witness testimony of his mistress, Ms. A.O., given by her at the pretrial investigation, in which she stated that the author told her that at the end of 2000, he and Mr. I.L. had committed a murder of a friend of Ms. E.S. without naming the victim and that later Ms. E.S. also told her that in November 2000, the author and Mr. I.L. had murdered her friend "Natasha". The author argues that the testimony of Ms. A.O. was included in the judgment as inculpatory evidence in violation of his right to a fair trial. He submits that in the first instance court Ms. A.O. retracted her testimony given at the pretrial investigation and stated that it was obtained by the investigator under pressure, because she had to give a written undertaking not to leave the place of her habitual residence. She stated instead that Ms. E.S. had not told her that her friend had been murdered by the author and Mr. I.L. Ms. E.S. also stated in the first

instance court that she did not tell Ms. A.O. who had murdered Ms. N.B. The author argues, therefore, that the testimony of Ms. A. O. given at the pretrial investigation could not have been used in the judgment. He adds that the court disregarded the subsequent testimony of Ms. A.O. by stating that she changed the testimony to help the author to avoid responsibility for the crime he had committed.

2.18 The author further submits that the Leningrad Regional Court disregarded the testimony of Mr. I.L., affirming that he had murdered Ms. N.B. because he feared that she would report to the police another crime committed by him together with Ms. E.S., as well as a testimony of another witness, corroborating a claim of Mr. I.L. that he had a reason to murder Ms. N.B. The author argues, therefore, that the conclusions of the Leningrad Regional Court set forth in its judgment of 22 November 2001, amounted to a violation of his right to a fair trial.

2.19 The author also submits that, according to conclusions of the pretrial investigation and the Leningrad Regional Court, he murdered Ms. N.B. after she threatened to report to the police that he had assaulted her earlier on that day. The author argues in great detail that witnesses gave contradictory statements as to the assault and the murder of Ms. N.B. He claims that in violation of article 14, paragraph 1, of the Covenant, these contradictory statements were disregarded by the Leningrad Regional Court.

2.20 The author states that he unsuccessfully complained in his cassation appeal to the Supreme Court about the use of the initial testimony of Ms. A.O. in the judgment of the Leningrad Regional Court, the fact that the Leningrad Regional Court disregarded the testimony of Mr. I.L., affirming that he had murdered Ms. N.B. and the contradictory statements of the key witnesses. He adds that his subsequent complaints to the Supreme Court, the Leningrad Regional Prosecutor's Office and the General Prosecutor's Office through the supervisory review procedure have not remedied the alleged violations either.

Objections to the trial transcript

2.21 On 7 December 2001, the author submitted to the Leningrad Regional Court, pursuant to article 260 of the Criminal Procedure Code, his objections to the trial transcript of the first instance court in order to have his own statements and those of the witnesses amended to correspond to what had actually been stated. On 18 December 2001, the author's objections and those of Mr. I.L. were examined by a judge of the Leningrad Regional Court and were dismissed. The judge concluded that the author and Mr. I.L. submitted their objections to the trial transcript to distort the testimonies that were duly recorded and to avoid responsibility for what they had committed.

2.22 On 13 January 2002, the author expressed his disagreement with the ruling of 18 December 2001 in his cassation appeal to the Supreme Court. On 23 January 2002, the Court decided not to examine this part of the cassation appeal, since that matter had already been examined by the Leningrad Regional Court on 18 December 2001.

2.23 The author submits that a testimony of a witness, Ms. E.Sm., that was distorted in the trial transcript, affected the court's ability to hand down a just judgment, since the statement in question demonstrated that Mr. I.L., unlike the author, had a reason to murder Ms. N.B. The author argues, therefore, that the trial transcript was drawn up in violation of article 264 of the Criminal Procedure Code (trial transcript) and amounts to a substantial procedural violation pursuant to article 345 of the same Code (substantial violations of the law of criminal procedure). On numerous occasions, the author unsuccessfully complained to the Supreme Court, the Leningrad Regional Prosecutor's Office and the General Prosecutor's Office about the inaccuracy and untruthfulness of the trial transcript of the first instance court through the supervisory review procedure.

The complaint

3.1 The author claims that in violation of article 7 of the Covenant, he was subjected to beatings and torture shortly after his arrest on 19 March 2001. He submits that the failure of the State party's authorities to provide him with the materials of the additional investigation confirms his allegation.

3.2 The author claims that his right to a fair trial, guaranteed under article 14, paragraph 1, of the Covenant, was violated, since the first instance court disregarded his allegations about the use of unlawful methods at the pretrial investigation and the respective trial transcript was inaccurate and untruthful. Furthermore, the Leningrad Regional Court included the testimony of Ms. A.O. given at the pretrial investigation in its judgment of 22 November 2001 as inculpatory evidence and disregarded her subsequent testimony. Moreover, the Leningrad Regional Court disregarded the testimony of Mr. I.L., affirming that he had murdered Ms. N.B., because he feared that she would report to the police another crime and ignored the contradictory statements of the key witnesses.

3.3 The author claims a violation of the right, guaranteed under article 14, paragraph 5, of the Covenant, to have his conviction and sentence reviewed by a higher tribunal according to law, because the second instance court dismissed the arguments of his appeal in relation to the use of unlawful methods at the pretrial investigation by merely referring to the judgment of the first instance court and without taking any further measures for the protection of his rights. Furthermore, the Supreme Court has ignored his allegations about the inaccuracy and untruthfulness of the trial transcript of the first instance court. Moreover, the Supreme Court has disregarded his claim that the testimony of Ms. A.O. given at the pretrial investigation should not have been included in the judgment of the Leningrad Regional Court as inculpatory evidence, as well as his claim in relation to the testimony of Mr. I.L., affirming that he had murdered Ms. N.B., because he feared that she would report to the police another crime. The Supreme Court has also ignored his claim that the statements of the key witnesses were contradictory.

3.4 The author invokes a violation of his rights under article 14, paragraphs 2 and 3 (e), of the Covenant, without providing any information in substantiation of these claims.

State party's observations on the merits

4.1 On 25 March 2008 and 28 April 2008, the State party submits its observations on the merits of the communication and reiterates the facts of the case summarized in paragraphs 2.1 and 2.2. above. It adds that at the pretrial investigation Mr. I.L. gave detailed information about the circumstances of the crime in question and the author's role in it. His testimony corresponds to that of a witness, Ms. A.O., who learned about the crime from the author himself. The author's guilt was established by the testimony of an eyewitness, Ms. E.S., and other witnesses to whom the author offered money in exchange for their silence, the forensic medical examination of the body of Ms. N.B., the forensic chemical examination of soil from the burial place and the shovel surrendered by the author and Mr. I.L., as well as by other evidence that was duly examined by the court. The author's claims to the effect that the evidence against him was contradictory have been examined on numerous occasions by the General Prosecutor's Office and by the Supreme Court within the framework of cassation proceedings.

4.2 The State party submits that a report of the author's arrest pursuant to article 122 of the Criminal Procedure Code was drawn up at 2.40 a.m. on 20 March 2001. On the same day, he was interrogated as a suspect and did not make any complaints about being subjected to unlawful methods at that time, nor on 22 March 2001, during his interrogation in the presence of the prosecutor and the lawyer. The author was interrogated many times at the pretrial investigation but he never admitted his guilt in the murder of Ms. N.B. The

State party adds that neither the author nor his lawyer complained about the use of unlawful methods while they were familiarizing themselves with the case file materials.

4.3 The State party notes that, on 8 November 2001, the author stated at the hearing before the Leningrad Regional Court that he had been subjected to unlawful methods and that he had previously complained about it to the prosecutor's office. In this regard, the State party recalls the facts of the case summarized in paragraphs 2.8 – 2.9, 2.12 and 2.14 – 2.16 above. It states that there were no medical documents issued in the author's name in the case file materials that were examined by the State party's courts. According to the information provided by the Federal Directorate of Corrections, the author was transferred from the IVS to the detention centre (SIZO) on 2 April 2001 and, according to the medical examination conducted on 2 and 3 April 2001, there were no injuries on his body. The State party concludes that there are no objective facts corroborating the author's claims about the violation of his rights by law enforcement personnel.

4.4 As for the author's claim that testimony of the witness, Ms. A.O., was obtained at the pretrial investigation in violation of unspecified provisions of the law of criminal procedure, the State party submits that Ms. A.O. clarified in the first instance court that she was warned by the investigator about criminal responsibility for giving false testimony and was explained the guarantees of article 51 of the Constitution. Ms. A.O. stated that she had not testified about the murder of Ms. N. B. by the author and Mr. L.I., and that in fact she had learned from the author about the murder of Ms. N.B. by Mr. L.I. and Ms. E.S. She stated that she signed an interrogation report with a different text in it and did not know how a new text appeared in the interrogation report that was read out in court. The State party submits that according to the Leningrad Regional Court, Ms. A.O., who was the author's mistress, changed her testimony to help him to avoid responsibility.

4.5 The State party submits that the author's remaining claims are related to the lawfulness and reasonableness of his conviction. It recalls that it is not for the Committee, but for the domestic courts to review or to evaluate facts and evidence, as well as the lawfulness and reasonableness of one's conviction. The State party concludes that the author claims about the violations of the State party's obligations under the Covenant, including those under articles 7 and 14, are unfounded.

Author's comments on the State party's observations

5.1 On 19 June 2008, the author submitted his comments on the State party's observations. He argues that it did not refute any of his initial claims (see, particularly, paras. 2.4, 2.6, 2.9 and 2.13 above) and did not contest the admissibility of his communication. The author rejects the State party's argument that there were no medical documents issued in the author's name in the case file materials and submits that the existence of injuries on his body was not contested by the prosecutor's office and was corroborated by the report of the Gatchina District Medical Association and a medical certificate from the IVS.

5.2 The author argues that, by not addressing his claim in relation to the inaccuracy and untruthfulness of the trial transcript of the Leningrad Regional Court, the State party has accepted this and all related claims. He states that the State party did not provide any evidence to refute his claim that the testimony of Ms. A.O. was obtained by the investigator at the pre-trial investigation under pressure. The author rejects the State party's argument that his remaining claims were related to the lawfulness and reasonableness of his conviction. He reiterates his claims summarized in paragraphs 2.18 – 2.19 above and argues that there was a violation of his rights under article 14, paragraphs 1 and 5, of the Covenant, since the conclusions of the State party's courts do not correspond to the facts and their evaluation of the evidence was arbitrary.

Further submissions from the State party and the author

6.1 On 17 November 2008, the State party reiterated the arguments from its previous submission and added that neither the Leningrad Regional Court, which examined the author's criminal case at first instance, nor the Supreme Court, which examined his cassation appeal, found any violations of the law of criminal procedure.

6.2 The State party submits that the investigation of the prosecutor's office into the author's allegations of being subjected to unlawful methods at the pretrial investigation was complete and objective. According to the medical examination of 23 March 2001, there were minor injuries on his body. It notes, however, that the author offered resistance at the time of his arrest and force and handcuffs were used against him. The State party adds that the use of force at the time of the arrest, which was in compliance with the Law "On Police", did not exclude that the injuries on the author's body were inflicted in these circumstances. It argues that the author's allegations about being subjected to torture by police officers and officers of the prosecutor's office have not been confirmed and refers to the facts of the case summarized in paragraphs 2.15 – 2.16 above.

7. On 15 January 2009, the author reiterates the arguments from his previous submission and argues that the State party's explanations as to how the injuries on his body were inflicted contradict the testimony of a bartender who witnessed the arrest of the author and Mr. I.L. and stated that they did not offer any resistance. He adds that he could not have received injuries when he fell over an overturned table, as all tables in the bar where he was arrested had been affixed to the floor and could not have been overturned. The author submits that the State party's authorities failed to question Mr. I.L. and Ms. A.O. who were in the same bar in the evening of 19 March 2001 and witnessed his arrest.

8. On 9 June 2009, the State party reiterated the arguments from its previous submissions and argued that the author's allegations in relation to the inaccuracy and untruthfulness of the trial transcript of the first instance court have already been examined by the Leningrad Regional Court on 18 December 2001 in compliance with the procedure set forth in article 260 of the Criminal Procedure Code. Pursuant to article 266 of the same Code, the ruling of 18 December 2001 gave reasons for dismissing the objections to the trial transcript that had been submitted by the author and his co-accused.

9. On 13 August 2009, the author reiterated the arguments from his previous submission and stated that the State was not able to refute any of his claims that were corroborated by relevant documents and witness statements.

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.

10.3 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.

10.4 The Committee notes that the author has invoked a violation of his rights under article 14, paragraphs 2 and 3(e), of the Covenant but has failed to provide any information in substantiation of these claims. Accordingly, he has failed to substantiate his claims, for

purposes of admissibility, and this part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

10.5 The Committee has noted the author's claims under article 14, paragraphs 1 and 5, of the Covenant, that the trial transcript of the first instance court was inaccurate and untruthful; that the Leningrad Regional Court included the testimony of Ms. A.O. given at the pretrial investigation in its judgment of 22 November 2001 as inculpatory evidence and disregarded her subsequent testimony; that the Leningrad Regional Court disregarded the testimony of Mr. I.L., affirming that he had murdered Ms. N.B., because he feared that she would report to the police another crime and ignored the contradictory statements of key witnesses, and that the Supreme Court considered his cassation appeal superficially and upheld the judgment of the Leningrad Regional Court despite his innocence. The Committee recalls its jurisprudence to the effect, that it is for the courts of the States parties to review or to evaluate facts and evidence in a particular case, and that the Committee will defer to this assessment, 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.⁶ The Committee further notes the author's argument that the conclusions of the State party's courts did not correspond to the facts of the case and their evaluation of the evidence was arbitrary. It also notes, however, that according to the material before it, the author's co-accused and the main witnesses changed their testimony and statements on numerous occasions both at the pretrial investigation and in the first instance court, often without providing a viable explanation. In the circumstances, the Committee considers that the author has failed to substantiate, for purposes of admissibility, that the conduct of the courts in the present case was arbitrary or amounted to denial of justice, and therefore declares his claims in relation to article 14, paragraphs 1 and 5, of the Covenant inadmissible under article 2 of the Optional Protocol.

10.6 The Committee considers the author's remaining claims under article 7 are sufficiently substantiated, for purposes of admissibility, 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 under article 5, paragraph 1, of the Optional Protocol.

11.2 The author claims that he was beaten, ill-treated, threatened and insulted by officers of the District Department on the night of 20 March 2001 to make him confess guilt, contrary to article 7 of the Covenant. The Committee notes that, on 19 September 2001, the author submitted a written complaint to the Gatchina City Prosecutor's Office with the request to initiate criminal proceedings with regard to the officers of the District Department and that the Prosecutor's Office decided not to initiate criminal proceedings, after hearing only the officers concerned and the investigator. It further notes that the investigation into the author's complaint was reopened by the Leningrad Regional Prosecutor's Office on 11 March 2002 and that the Gatchina City Prosecutor's Office was requested to conduct an additional investigation. On 18 May 2002, the Prosecutor's Office again decided not to initiate criminal proceedings, after hearing the author, the officers of the District Department concerned and the bartender who had witnessed the author's arrest and after reviewing the medical certificates issued by the Gatchina District Medical Association and the IVS. The Committee also notes that although the additional

⁶ See, inter alia, communication No. 541/1993, *Simms v. Jamaica*, decision on inadmissibility adopted on 3 April 1995, para. 6.2.

investigation has confirmed that the author suffered injuries, the author and the State party disagree as to the circumstances in which these injuries have been received. It further notes the author's argument that the officers' testimony contradicted the testimony of an eyewitness and that two other eyewitnesses indicated by him have not been heard at all in the course of the additional investigation.

11.3 The Committee also notes that, as transpires from the judgment of the Leningrad Regional Court of 22 November 2001, the court did not specifically address the author's claims about the use of unlawful methods at the pretrial investigation and did not carry out any investigation of these claims. It further notes that the Supreme Court did not find it necessary to investigate the author's allegations about the beatings and torture on the ground that they had already been examined by the Leningrad Regional Court and had been found to be groundless.

11.4 The Committee recalls that a State party is responsible for the security of any person in detention and, when an individual claims to have received injuries while in detention, it is incumbent on the State party to produce evidence refuting these allegations.⁷ In this regard, the Committee reaffirms its jurisprudence⁸ 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 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.

11.5 The Committee also recalls that complaints of ill-treatment must be investigated promptly and impartially by competent authorities.⁹ The Committee notes that the author provided a detailed description of the treatment to which he was subjected and of the circumstances in which his injuries were received. It further notes the author's assertion that the investigations conducted by the State party's authorities did not produce evidence refuting these allegations and did not properly address the author's claims about inconsistencies between the witness testimonies collected in the course of the additional investigation and the explanations advanced by the State party's authorities. In the circumstances of the present case, the Committee is of the view that the State party has failed in its obligation to promptly and impartially investigate the author's claims of having been subjected to ill-treatment, in violation of article 7, read in conjunction with article 2, paragraph 3, 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

⁷ Communications No. 907/2000, *Siragev v. Uzbekistan*, Views adopted on 1 November 2005, para. 6.2; and No. 889/1999, *Zheikov v. Russian Federation*, Views adopted on 17 March 2006, para. 7.2.

⁸ See, for example, communications No. 30/1978, *Bleier v. Uruguay*, Views adopted on 29 March 1980, para. 13.3; No. 139/1983, *Conteris v. Uruguay*, Views adopted on 17 July 1985, para. 7.2; and No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.3.

⁹ Human Rights Committee, general comment No. 20 (1992) on the prohibition of torture and cruel treatment or punishment, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A, para. 14.

facts before it disclose a violation by the State party of article 7, read in conjunction with article 2, paragraph 3, of the Covenant.

13. 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. The remedy should include an impartial, effective and thorough investigation of the author's claims falling under article 7, prosecution of any person(s) found to be responsible, and full reparation, including appropriate compensation. The State party is also under an obligation 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 when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. In addition, it requests the State party to publish the Committee's Views.

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

**CC. Communication No. 1608/2007, *L.M.R. v. Argentina*
(Views adopted on 29 March 2011, 101st session)***

<i>Submitted by:</i>	V.D.A. (represented by the organizations INSGENAR, CLADEM and ACDD)
<i>Alleged victim:</i>	L.M.R.
<i>State party:</i>	Argentina
<i>Date of communication:</i>	25 May 2007 (initial submission)
<i>Subject matter:</i>	Medical and judicial authorities' refusal to authorize a termination of pregnancy
<i>Procedural issue:</i>	Insufficient substantiation
<i>Substantive issues:</i>	Right to life; right to non-discrimination; right not to be subjected to cruel, inhuman or degrading treatment or punishment; respect for private life; right to freedom of thought, conscience and religion
<i>Articles of the Covenant:</i>	2, 3, 7, 17 and 18
<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 29 March 2011,

Having concluded its consideration of communication No. 1608/2007, submitted to the Human Rights Committee by V.D.A. 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. The author of the communication, dated 25 May 2007, is V.D.A., an Argentine national, who submits this communication on behalf of her daughter, L.M.R., born on 4 May 1987. She claims that her daughter was the victim of violations by Argentina of articles 2, 3, 6, 7, 17 and 18 of the Covenant. The Optional Protocol entered into force for the State party on 8 November 1986. The author is represented by counsel.

* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Motoc, Mr. Gerald L. Neuman, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Krister Thelin and Ms. Margo Waterval.

In accordance with article 90 of the Committee's rules of procedure, Mr. Fabián Omar Salvioli did not participate in the examination of the present communication.

The facts as submitted by the author

2.1 L.M.R. is a young woman living in Guernica, Buenos Aires province, who has a permanent mental impairment. She lives with her mother, V.D.A, attends a special school and receives neurological care. She has been diagnosed as having a mental age of between 8 and 10 years.

2.2 In June 2006 the author took her daughter to Guernica Hospital because she said that she was feeling unwell. At the hospital she was found to be pregnant and the author requested a termination. The hospital staff refused to perform the procedure and referred the patient to San Martín Hospital in La Plata, which is a public hospital. They also informed her that she needed to file a complaint with the police. On 24 June 2006 a complaint was filed against an uncle of L.M.R. who was suspected of having raped her. The author claims that Guernica Hospital had the resources necessary to perform the procedure, without needing to refer the case elsewhere, and that its refusal forced the family to travel 100 kilometres to the provincial capital and to incur the related costs and inconvenience.

2.3 L.M.R. was approximately 14 and a half weeks pregnant on her arrival at San Martín Hospital. She was admitted on 4 July 2006 and the hospital authorities requested an urgent meeting with the Bioethics Committee to solicit its opinion. Since this was a case of non-punishable abortion pursuant to article 86, paragraph 2 of the Criminal Code,¹ hospital staff began the pre-surgical examinations necessary for the procedure. The aforementioned provision gives female rape victims with a mental disability the right to terminate a pregnancy but does not set deadlines and does not specify the type of medical procedure to be used. In addition, it establishes no requirement for judicial authorization of any form. The only requirements are that the disability should be diagnosed, that the victim's legal representative should give consent and that the termination should be performed by a licensed physician.

2.4 The hospital was issued with an injunction on all procedures and judicial proceedings were initiated to prevent the abortion. The juvenile court judge ruled that a termination should be prohibited because she did not find it acceptable to repair a wrongful assault (sexual abuse) "with another wrongful assault against a new innocent victim, i.e. the unborn child".

2.5 The decision was confirmed on appeal by the Civil Court, which instructed the juvenile court judge to perform regular checks on L.M.R., accompanied by her mother, regarding the progress of her pregnancy and to monitor the health of the girl and her unborn child directly, on an ongoing basis, through the intermediary of the Under-secretariat for Children.

2.6 The decision was contested before the Supreme Court of Justice of Buenos Aires province, which overturned the contested decision on 31 July 2006 and ruled that the termination could proceed.² Consequently, the Court informed San Martín Hospital that the surgical procedure its staff were to perform was legal and did not require judicial

¹ This provision establishes the following: "Abortion performed by a licensed physician with the consent of the pregnant woman is not punishable: (1) if performed to avoid endangering the mother's life or health and if this danger cannot be prevented by other means; and (2) if the pregnancy results from the rape or indecent assault of a woman with a mental disability. In such cases, the consent of her legal representative must be obtained for the termination."

² The Court ruled that: "(a) judicial authorization is not required for application of article 86.2 of the Criminal Code; (b) since the present case is not punishable under national legislation (...) no order prohibiting the surgical termination of the young girl's pregnancy can be issued (...), provided that the decision to perform the procedure has been taken by medical professionals in accordance with best medical practice".

authorization. This ruling was issued almost a month and a half after the rape was reported and the termination of pregnancy was requested.

2.7 Despite the ruling, San Martín Hospital and the family came under enormous pressure from various sources opposed to the termination and the hospital refused to perform the procedure on the grounds that the pregnancy was too advanced (between 20 and 22 weeks). With help from women's organizations a new scan was performed in a private clinic on 10 August, revealing that the victim was 20.4 weeks pregnant.

2.8 With support from women's organizations, the family contacted various health centres and hospitals both in and outside the province, but none of them would agree to carry out a termination. However, the family managed to arrange an illegal termination on 26 August 2006.

2.9 Press reports indicate that both the Rector of the Catholic University and the spokesperson of the Corporation of Catholic Lawyers contributed to the pressure exerted on the family and the doctors. Threatening letters sent to the hospital were even made public without any authority taking action.

The complaint

3.1 The author maintains that, despite availing herself of a legal remedy that should have safeguarded her reproductive rights, L.M.R. was unable to obtain a legal abortion. She suffered discrimination in accessing reproductive health services and her reproductive autonomy, right to privacy and confidentiality and right to access a safe termination through the public health system were violated. Both the victim and her family suffered mental and psychological injury and their daily lives were disrupted. The psychological injury suffered by L.M.R. took the form of post-traumatic stress disorder, with predominantly phobic symptoms. Although it is difficult to distinguish between the effects of the rape and those attributable to the State's failure to guarantee access to a safe abortion, there are sufficient grounds to maintain that if the termination had been performed in due time and form its damaging consequences could have been minimized.

3.2 The author claims that both she and her elder daughter lost their jobs because, for three months, they had to make themselves available for the administrative formalities imposed on them by the judicial and medical systems and to provide round-the-clock care for L.M.R., who was very upset by the situation. They also had to cover the material costs of these formalities.

3.3 The author claims that it is not only mentally impaired rape victims who have difficulty accessing legal abortions. There are many cases in which continuing a pregnancy puts the mother's life and/or health at risk. Although such circumstances also constitute grounds for a legal abortion in Argentina, it is almost impossible to find health-care practitioners willing to carry out the procedure. There are numerous case law precedents in this area. Both in cases of non-punishable abortion and other medical interventions referred to the courts, and in applications for surgical methods of contraception, it has been ruled that judicial authorization is not necessary and that doctors should not request it.

3.4 Because it lacked the mechanisms that would have enabled L.M.R. to obtain a termination of pregnancy, the State party is responsible by omission for the violation of article 2 of the Covenant.

3.5 The author also maintains that the impossibility of obtaining a termination of pregnancy constituted a violation of the right to equality and non-discrimination established under article 3 of the Covenant. The State's failure to exercise due diligence in safeguarding a legal right to a procedure required solely by women, coupled with the arbitrary action of the medical staff, resulted in discriminatory conduct that violated

L.M.R.'s rights. The victim's status as a poor, disabled woman adds to the seriousness of the violation since it heightened the State's obligation to protect her rights and eradicate the cultural and religious prejudices that were undermining her well-being.

3.6 The author recalls the Committee's concluding observations to the State party's third periodic report, which state that "traditional attitudes towards women continue to exercise a negative influence on their enjoyment of Covenant rights" (CCPR/CO/70/ARG, para. 15). Since abortion is an issue that affects women only and is shrouded in all kinds of prejudices in the collective imagination, the attitude of the judicial officers and the medical staff at San Martín Hospital, and the authorities' failure to enforce the law, were discriminatory, depriving L.M.R. of her right to a safe, lawful abortion. Social attitudes and prejudices, and pressure from fundamentalist groups, also prevented L.M.R. from enjoying her right to life, health and privacy, and her right not to be subjected to cruel, inhuman and degrading treatment, among others, on equal terms without discrimination, it being understood that for women these rights are sometimes of a different tenor than for men. Furthermore, the lack of hospital protocols to facilitate abortion in the two situations where it is permitted under Argentine law makes it more difficult for women finding themselves in these situations to exercise their right to a termination and gives the authorities leeway to apply the law in an arbitrary manner.

3.7 The author also maintains that the facts described constitute a violation of L.M.R.'s right to life. The State failed to adopt the measures and act with the due diligence necessary to ensure that L.M.R. could obtain a safe abortion and prevent the need for an unlawful, unsafe abortion. As the Committee itself has stated, in the case of women, respect for the right to life implies a State duty to adopt measures that preclude the need for illegal abortions that put women's life and health at risk. She observes that illegal abortion is a public-health issue that continues to cost thousands of women's lives in Argentina and is the primary cause of maternal mortality. She recalls that when the Committee considered Argentina's third periodic report it expressed concern that "the criminalization of abortion deters medical professionals from providing this procedure without judicial order, even when they are permitted to do so by law, inter alia when there are clear health risks for the mother or when pregnancy results from the rape of mentally disabled women. The Committee also expresses concern over discriminatory aspects of the laws and policies in force, which result in disproportionate resort to illegal, unsafe abortions by poor and rural women" (ibid., para. 14).

3.8 The author maintains that forcing her daughter to continue with her pregnancy constituted cruel and degrading treatment and, consequently, a violation of her personal well-being under article 7 of the Covenant. The refusal to terminate the pregnancy inflicted many days of mental and physical anguish and suffering on L.M.R. and her family, forcing them to resort to an illegal abortion that endangered her life and health while enduring opprobrium from numerous sources. The pressure to continue the pregnancy and give the baby up for adoption exposed the family to some very painful dilemmas. For the author this amounted to cruel and degrading treatment. She felt that people dared to make such offers only because she was poor, and found this deeply humiliating.

3.9 The author also alleges that the facts described constitute a violation of article 17 of the Covenant. The State party not only interfered in a decision concerning L.M.R.'s legally protected reproductive rights but also interfered arbitrarily in her private life, taking a decision concerning her life and reproductive health on her behalf.

3.10 There was also a violation of article 18 of the Covenant. Catholic groups made direct, public and continual threats of various kinds and subjected the family to pressure and coercion without the authorities stepping in to protect L.M.R.'s rights. In objecting to the procedure on the grounds of collective or institutional conscience, the Gynaecology Department of San Martín Hospital also failed to respect the right to freedom of religion

and belief. Conscientious objection is inadmissible under the regulatory framework governing the duties of public servants and in application of the obligation to safeguard patients' right to life and health that is incumbent on all medical professionals. Under the prevailing law, the hospital should have referred the case to another department.

3.11 The author requests the Committee: (a) to establish the State's international responsibility; (b) to order the State to give full reparation to L.M.R. and her family, including compensation for material and mental injury and measures to prevent repetition; (c) to order the State to implement hospital protocols that would facilitate access to legal, safe abortion and the mechanisms necessary to give effect to this right; (d) to review the domestic legal framework for abortion, which establishes criminal penalties for women who terminate an unwanted or involuntary pregnancy, and forces them to undergo illegal abortions which seriously endanger their life and overall health.

State party's observations on admissibility and merits

4.1 In a note verbale dated 9 January 2008, the State party indicated that the communication was inadmissible on the grounds of failure to exhaust domestic remedies. The communication seeks to submit a simple application for compensation to international jurisdiction, even though the judicial remedies sought at the domestic level to ensure access to abortion were resolved in L.M.R.'s favour. The judicial proceedings which culminated in the Supreme Court ruling authorizing a termination of pregnancy lasted 37 days, which is not an excessive period based on the criteria of reasonableness consensually accepted in international human rights law. Consequently, since the case had been resolved favourably for the applicant under domestic jurisdiction, the application for full reparation submitted by the author is not substantiated.

4.2 Notwithstanding the foregoing, the State party observes that the author's claims for injury and damages should first be submitted to domestic jurisdiction. The Code of Civil and Commercial Procedure in effect in Buenos Aires province provides a specific, pertinent and effective procedure for claiming compensation for alleged physical and mental suffering.

4.3 On 9 May 2008 the State party reiterated that the judiciary acted with due promptitude in the case in point, since it was resolved in less than four weeks, despite having been referred from the court of first instance to the Civil Court and then to the Supreme Court of Justice of Buenos Aires province during a holiday period when the courts were in recess. However, the various circumstances of the case, the way in which the public took up the cause and the assessments of the medical staff involved made it impossible to carry out a surgical procedure permitted under criminal law. The author's subsequent decision to resort to an unsafe abortion was a decision she made of her own accord, and cannot be considered a direct consequence of the State's action. The State party also notes that the advocate for persons without legal capacity was never informed.

4.4 Should it be found that the author is entitled to reparation for damage and injury, mechanisms for lodging such claims are available under domestic legislation. With regard to her request that the State party take steps to prevent repetition and implement hospital protocols to facilitate access to safe, legal abortion and mechanisms for exercising this right, on 29 January 2007, through Decree No. 304/2007, the Ministry of Health of Buenos Aires province approved a Provincial Health Programme for the Prevention of Domestic and Sexual Violence and for Victim Support, which contains a protocol for non-punishable abortion. Provincial criminal legislation and policy is restricted by the definitions of criminal offences established in Argentina's Criminal Code. It was for this reason that, within the limits of its jurisdiction, to prevent similar cases from arising in future the authorities of Buenos Aires province approved the aforementioned programme.

Author's comments on the State party's observations

5.1 The author responded to the State party's observations on 14 June 2008. In relation to admissibility, she reiterated her request that the Committee should establish the State's international responsibility for the violation of L.M.R.'s rights, on the grounds that the State did not fulfil its obligation to safeguard and respect her right to a legal remedy, her right to life, her right to equal treatment, her right not to be subjected to cruel, inhuman and degrading treatment, her right to privacy and her right to freedom of thought and conscience. Establishing this responsibility is the main aim of the communication, and is fundamental to the satisfaction of the author's other requests. The application for full reparation and all other requests are a necessary consequence of the violation of L.M.R.'s human rights committed by the State.

5.2 L.M.R. sought a legal and safe abortion. She petitioned all possible courts to obtain one but the medical procedure sought was not performed. Accordingly, all domestic remedies were exhausted with regard to the main contention of the communication, which is that the refusal of a legal abortion was a violation of her rights. The applications for reparation and compensation that were prompted by the violation of these rights, and which the State contends should first have been filed in Buenos Aires province, would have done nothing to help guarantee her right to a legal abortion. In fact, they would have been ineffectual in helping L.M.R. access the medical procedure sought.

5.3 L.M.R. won a ruling in her favour before the highest provincial court, which was the court of last resort. However, the ruling was not enforced because the staff in the State hospital who should have executed it refused to do so. L.M.R. did not have the option of appealing against a favourable ruling that the State refused to enforce, in continuing violation of her rights. The author therefore maintains that the communication is admissible.

5.4 With regard to the State party's observations on the merits, the author notes that the State party prides itself on the speed of the judicial process. It fails to mention, however, that the process was unnecessary and the fact that it took place at all constitutes a violation of L.M.R.'s rights. Recourse to judicial proceedings was not required under the Criminal Code and was discouraged by numerous prior court decisions. The State party does not explain whether the juvenile court judge who made the first-instance ruling was disciplined for failing to properly perform her duties as a public servant, a failing of which the hospital's employees and directors were also guilty.

5.5 The State party fails to recognize that it made no attempt to protect L.M.R. from press hounding, institutional harassment and the hospital inaction which ultimately prevented the termination of pregnancy from being carried out. The State party cites the "assessments of the medical staff" as justification. However, besides being arbitrary and subjective, these assessments were inaccurate in numerous respects. In one ultrasound report the length of the pregnancy was falsely recorded. In addition, a time limit for termination that has no legal basis was imposed. In acting this way, the health-care professionals showed contempt for the law and failed to exercise their duties as public servants. Despite constituting criminal offences, these failings were never subject to administrative or judicial investigation.

5.6 The fact that the author turned to the black market for an abortion that the State refused to perform was a direct consequence of the State's inaction and negligence. The author takes issue with the State party's observation that the advocate for persons without legal capacity was not informed. The State is effectively affirming that, in the midst of press persecution and relentless pressure from fundamentalist groups, she should have informed a judicial official of an illegal procedure performed under pressure of time in the face of inadequate resources and lack of access to effective justice.

5.7 The promulgation of the Ministerial Decree containing a protocol for non-punishable abortion in Buenos Aires province was subsequent to the case. Furthermore, although the protocol is a positive development, it remains a partial solution only. The State party must ensure that protocols are in place in every province and every jurisdiction under its control in order to prevent violations of this kind from recurring. It must also ensure that such protocols are underpinned by laws of the highest level within the provincial jurisdiction and not, as in the case in point, by a Ministerial Decree.

Additional observations by the State party

6.1 On 21 August 2008 the State party observed that it could be concluded from the Supreme Court ruling that the lower instance courts of Buenos Aires province had interfered unlawfully since judicial authorization is not required for a termination of pregnancy under article 86.2 of the Criminal Code. The consequences of this interference made an abortion impossible due to the advanced stage of the pregnancy. This would appear to indicate that the claimant is right in invoking a possible violation of article 2 of the Covenant.

6.2 However, the hospital decided not to perform the termination because the advanced stage of the pregnancy meant that the procedure was no longer considered a termination from the medical point of view but was effectively an induced birth. This decision does not merit admonition, as there was no breach of any rule. It does, however, highlight the lack of rules to specify and clarify the point in a pregnancy beyond which a termination ceases to be considered an abortion and becomes an induced birth.

6.3 The State party also observes that the State's unlawful interference, through the judiciary, in an issue that should have been resolved between the patient and her physician may be considered a violation of her right to privacy. Furthermore, forcing her to endure a pregnancy resulting from rape and undergo an illegal abortion may have been a contributing factor to the mental injury that the victim suffered, although it did not constitute torture within the meaning of article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

6.4 The victim's freedom of thought, conscience and religion was not violated by the State, because the activities of specific groups are unconnected to the actions of its officials. The authorities of the hospital to which L.M.R. was admitted did not refuse to perform the termination for reasons of conscience but because they believed that the advanced stage of the pregnancy meant they were being asked to perform a different procedure, i.e. an induced birth.

6.5 On the basis of the above, the State party indicates that it would be ready to consider the possibility of initiating an amicable settlement procedure in which the applications made by the author would be examined.

Additional comments by the author

7.1 On 6 February 2010 the author rejected the contention that the hospital had decided not to perform the termination of pregnancy because the advanced stage of the pregnancy meant that the procedure was no longer considered a termination from the medical point of view but was effectively an induced birth. She recalls that the reason for the advanced state of the pregnancy was the unnecessary recourse to judicial proceedings. It was the State party that caused the delay. In addition, the hospital falsely recorded the length of the pregnancy in an ultrasound report and imposed a time limit for termination for which there is no legal basis either at national or international level.

7.2 Besides disregarding case law precedents which militate against recourse to judicial proceedings in such cases (i.e. against judicial responsibility), health-care professionals

showed contempt for the law and failed to fulfil their duties as public servants. Despite constituting criminal offences, neither failing was subject to administrative or judicial investigation. The refusal to terminate the pregnancy was a tacit objection of institutional conscience on the part of the State hospital. The refusal was entirely arbitrary, because the Criminal Code sets no time limit beyond which the procedure cannot be performed. Furthermore, a precedent can be found in the case law of Buenos Aires Provincial Court, which last year gave authorization for a therapeutic termination to be performed in a State hospital in a pregnancy as advanced as L.M.R.'s.

7.3 The author does not accept the State party's contention that this is not a case of torture within the meaning of article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The State party gives no explanation to back up its position, which is contrary to the Committee's case law in the case of *K.N.L.H. v. Peru*.³

7.4 The author reiterates that the State party did not at any time take steps either to protect L.M.R. and her family or to prevent conservative groups within the Catholic Church from imposing their religious convictions on the victim, her family and the hospital staff, denying them the freedom to make their own decisions. For this reason, she disputes the assertion that freedom of thought, conscience and religion was not violated by the State since the acts in question were the acts of private individuals.

7.5 With regard to the possibility of an amicable settlement, the author informs the Committee that the parties met on three occasions between August and November 2008 to discuss reparation for the victim and her family and measures to prevent repetition. At the outset of the discussions, the State's representatives stated that restrictions imposed by the Public Prosecution Service of Buenos Aires province placed legal impediments on the payment of financial compensation. As a result, the parties failed to make progress on any aspect of the application for compensation. The only agreement reached was for a study grant of 5,000 pesos to be paid by the Ministry of Education of Buenos Aires at the end of 2008. Despite an undertaking that this grant would be payable annually, to date no further payment has been made.

7.6 There was a similar lack of progress on other aspects of the application, including the State's public acceptance of responsibility and the package of measures needed to prevent repetition. Aside from the adoption, in March 2009, of a comprehensive law to prevent, punish and eliminate violence against women, to date the only advance achieved in relation to the issues raised is an undertaking to address them.

7.7 The author reiterates her request to the Committee, dismisses the possibility of an amicable settlement and urges the Committee to issue its Views.

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.

³ Communication No. 1153/2003, *K.N.L.H. v. Peru*, Views adopted on 24 October 2005.

8.3 The Committee observes that, although the State party initially contended that the communication was inadmissible on the grounds of failure to exhaust domestic remedies, in subsequent correspondence it agreed with the author that the injunction issued by the lower courts of Buenos Aires province in the case of L.M.R. constituted unlawful interference under article 86.2 of the Criminal Code. It also agreed with the author that several articles of the Covenant had been violated. Consequently, the Committee considers that there are no obstacles to consideration of the merits of the communication under article 5, paragraph 2 (b), of the Optional Protocol.

8.4 The Committee takes note of the author's claims that, because it lacked the mechanisms that would have enabled L.M.R. to undergo a termination of pregnancy, the State party is responsible by omission for a violation of article 2 of the Covenant. The Committee recalls that, according to its established case law, article 2 of the Covenant constitutes a general undertaking on the part of the State and cannot be invoked in isolation by individuals under the Optional Protocol. Consequently, the complaint under article 2 will be considered together with the claims made by the author under other articles of the Covenant.⁴

8.5 The Committee also notes the author's claim that the impossibility of obtaining an abortion constituted a violation of the right to equality and non-discrimination established under article 3 of the Covenant. In her opinion, the State's failure to exercise due diligence in safeguarding a legal right to a procedure required solely by women resulted in discriminatory treatment of L.M.R. The Committee considers this allegation to be closely related to those made under other articles of the Covenant, and that they should therefore be considered together.

8.6 The Committee notes the author's claim that the facts described constitute a violation of L.M.R.'s right to life in that the State failed to adopt the measures and act with the due diligence necessary to ensure that L.M.R. could obtain a safe abortion and prevent the need for an unlawful, unsafe abortion. The Committee observes, however, that there is nothing in the case file to indicate that L.M.R.'s life was exposed to particular danger because of the nature of her pregnancy or the circumstances in which the termination was performed. Consequently, the Committee considers that this complaint is not substantiated and is therefore inadmissible under article 2 of the Optional Protocol.

8.7 The author maintains that her daughter was subject to a violation of article 18 as a result of State inaction in the face of pressure and threats from Catholic groups and the hospital doctors' conscientious objection. The State party denies that this article has been violated, on the grounds that the activities of specific groups are unconnected to the actions of its officials, and that the hospital's refusal to perform the procedure was guided by medical considerations. In the circumstances, the Committee considers that the author has not adequately substantiated her complaint for purposes of admissibility and that the complaint must therefore be declared inadmissible under article 2 of the Optional Protocol.

8.8 Concerning the allegations relating to articles 7 and 17 of the Covenant, the Committee considers that they were adequately substantiated for purposes of admissibility.

8.9 In the light of the above, the Committee declares the communication admissible insofar as it raises issues under articles 2, 3, 7 and 17 of the Covenant.

⁴ Ibid., para. 5.4.

Consideration of the merits

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

9.2 The Committee takes note of the author's allegation that forcing her daughter to continue her pregnancy, even though she should have enjoyed protection under article 86.2 of the Criminal Code, constituted cruel and inhuman treatment. The State party asserts that, while forcing her to endure a pregnancy resulting from rape and undergo an illegal abortion could have been a contributing factor to the mental injury that the victim suffered, it did not constitute torture. The Committee considers that the State party's omission, in failing to guarantee L.M.R.'s right to a termination of pregnancy, as provided under article 86.2 of the Criminal Code, when her family so requested, caused L.M.R. physical and mental suffering constituting a violation of article 7 of the Covenant that was made especially serious by the victim's status as a young girl with a disability. In this connection the Committee recalls its general comment No. 20 (1992) on the prohibition of torture and cruel treatment or punishment in which it states that the right protected in article 7 of the Covenant relates not only to acts that cause physical pain but also to acts that cause mental suffering.⁵

9.3 The Committee takes note of the author's allegation that the facts described constituted arbitrary interference in L.M.R.'s private life. It also notes the State party's acknowledgement that the State's unlawful interference, through the judiciary, in an issue that should have been resolved between the patient and her physician could be considered a violation of her right to privacy. In the circumstances, the Committee considers that the facts reveal a violation of article 17, paragraph 1 of the Covenant.⁶

9.4 The Committee takes note of the author's allegations to the effect that, because it lacked the mechanisms that would have enabled L.M.R. to undergo a termination of pregnancy, the State party is responsible by omission for the violation of article 2 of the Covenant. The Committee observes that the judicial remedies sought at the domestic level to guarantee access to a termination of pregnancy were resolved favourably for L.M.R. by the Supreme Court ruling. However, to achieve this result, the author had to appear before three separate courts, during which period the pregnancy was prolonged by several weeks, with attendant consequences for L.M.R.'s health that ultimately led the author to resort to illegal abortion. For these reasons, the Committee considers that the author did not have access to an effective remedy and the facts described constitute a violation of article 2, paragraph 3 in relation to articles 3, 7 and 17 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 information before it reveals a violation of article 7, article 17 and article 2, paragraph 3, in relation to articles 3, 7 and 17 of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide L.M.R. with avenues of redress that include adequate 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 or not there has

⁵ *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A, para. 5. See also *K.N.L.H. v. Peru* (note 3 above), para. 6.3.

⁶ *K.N.L.H. v. Peru* (note 3 above), para. 6.4.

been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to guarantee 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 adopted 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.]

**DD. Communication No. 1610/2007, *L.N.P. v. Argentina*
(Views adopted on 18 July 2011, 102nd session)***

<i>Submitted by:</i>	L.N.P. (represented by the Gender, Law and Development Institute (INSGENAR) and the Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM)) ¹
<i>Alleged victim:</i>	The author
<i>State party:</i>	Argentina
<i>Date of communication:</i>	25 May 2007 (initial submission)
<i>Subject matter:</i>	Discrimination against a girl of indigenous origin who was a victim of rape
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Gender equality/cruel, inhuman or degrading treatment/equality before the courts and right to review of conviction and sentence by a higher tribunal/interference in private and family life/protection of minors/equality before the law and prohibition of discrimination/right to effective remedy
<i>Articles of the Covenant:</i>	2, paragraph 3; 3; 7; 14, paragraphs 1 and 5; 17; 24; 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 18 July 2011,

Having concluded its consideration of communication No. 1610/2007, submitted to the Human Rights Committee by L.N.P. 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:

* 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. Cornelius Flinterman, Mr. Yuji Iwasawa, Ms. Helen Keller, 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. Krister Thelin and Ms. Margo Waterval. Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Fabián Omar Salvioli did not participate in the adoption of the present Views.

¹ The two organizations enclose a power of attorney signed by the author and her legal representatives for the purpose of submitting the communication to the Committee.

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

1. The author of the communication is L.N.P., an Argentine citizen born in 1988, who claims to be the victim of violations by Argentina of the rights recognized in article 2; article 3; article 7; article 14, paragraphs 1 and 5; article 17; article 24; and article 26 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 8 November 1986.

The facts as submitted by the author

2.1 The author belongs to the Qom ethnic group² and lives at the place known as El Espinillo, situated in the north of the Chaco Province of Argentina. On 3 October 2003, soon after the author had turned 15 years of age, she was sexually assaulted by three young Creoles³ aged between 17 and 20 years. The author asserts that, on the evening of that date, she was called over by the three young men, with whom she was acquainted, in the village square and taken behind the church that gave onto the square, where she was forced by the eldest of the three, assisted by the other two, to practice oral sex, after which she was subjected to anal penetration. According to the author, the aggressor covered her mouth when she tried to scream and pinned her against the wall holding her arms, while the other two hid the scene with their jackets.

2.2 Immediately after the assault, the author went alone, in her blood-stained clothes, to the village police station, where she was kept waiting for approximately three hours before being sent to the local medical centre. When she arrived there, the author recounts that she was kept waiting again for several hours, standing up, before she was attended to. At around 4 a.m., she was subjected to a medical examination by the head of the medical centre, who performed anal and vaginal palpations which caused her intense pain. The medical report states that anal injuries were found which tallied with the violent assault that had occurred between 30 and 40 minutes prior to the examination. The author draws attention to the discrepancy between the time at which she was attended in the medical centre — approximately 4 a.m. — and the time entered in the medical report, which was 00.30 a.m. The author argues that this was an attempt to show that she was treated immediately, whereas, in actual fact, she was kept waiting for hours both in the police station and at the medical centre.

2.3 Worried about the author's absence, her family and several members of the Qom community started looking for her. When they found out what had happened, they met in front of the village police station, where the author's mother filed a complaint, written in Spanish and without any translation, despite the mother's difficulties in communicating in that language. Nevertheless, a judicial investigation was ordered; the three aggressors were arrested and the author was subjected to a forensic examination on 7 October. The report of the forensic physician of 7 October corroborated the conclusion of the medical report issued on 4 October. On 5 November 2003, a social worker was dispatched to the author's village "in order to enquire into lifestyles, habits and any other facts of interest" for the

² According to the author, the original Toba people (who now refer to themselves as Qom) have been living on the economic, social and cultural margins of society since the end of the nineteenth century. After the so-called "desert campaign", the Qom members who survived the systematic killings that took place during that campaign were deprived of their lands, which were handed over to Creole farmers. The author maintains that this government policy strengthened racist attitudes towards the indigenous peoples among the colonists. According to the author, racial tensions were further aggravated after 2000, when the Qom communities were granted land titles to 140,000 hectares and the non-indigenous families occupying the lands were relocated elsewhere.

³ The term "Creole" refers to non-indigenous citizens.

investigation. The author maintains that the social worker investigated only the victim, her family and her community, enquiring about her morals, but leaving aside the three accused.

2.4 After several months of police investigations, court proceedings were opened on charges of sexual abuse with carnal intrusion against the three individuals responsible. According to the author, neither she nor her family were informed of their right to appear as plaintiffs at the trial in accordance with articles 89 and 94 of the Code of Criminal Procedure of Chaco Province. The entire trial was conducted in Spanish, without interpreters, which hampered the testimony both of the victim and of other witnesses whose main language is Qom. Furthermore, the testimony of three members of the Qom community was not accepted on the grounds that their statements were “nonsensical” and influenced by “the local animosity between Creoles and Tobas”. In a judgement on 31 August 2004, the Second Criminal Chamber of the town of Presidencia Roque Sáenz Peña acquitted the three accused. The Chamber concluded that, while the fact of anal intrusion was proved and had even been admitted by the main person accused, it was not proven that such intrusion had not occurred with the author’s consent. The judgement states that “it would be difficult to speak of [the author’s] sexual inexperience considering that [her] defloration had occurred long ago” according to the two medical reports. The Court also concluded that the fact that the principal accused was of adult age was not a basis for concluding that the author had been taken advantage of.

2.5 According to the author, since they were not plaintiffs in the trial, neither she nor her legal representatives were notified of the judgement and, for that reason, they were unable to appeal against it. The only person who could appeal the judgement within 10 days of notification was the Public Prosecutor. As he did not do so, the judgement took effect on 16 September 2004. The author maintains that she was also unable to lodge an appeal in cassation or on grounds of unconstitutionality for the same reason, i.e., that those remedies were reserved for the parties to the proceedings and were subject to the 10-day deadline following notification of the judgement, in conformity with articles 446 and 477 of the Code of Criminal Procedure of Chaco. Lastly the author points out that an *amparo* remedy would not have been feasible either, since, according to National *Amparo* Act No. 16.986, the remedy is not effective against judicial acts. In addition, that law establishes a time frame of 15 working days for lodging an appeal. The author maintains that, in the light of all the above factors, domestic remedies have been exhausted.

2.6 The author points out that, since her family was not notified of the judgement, and since they live in a remote village, without telephone or Internet coverage and without public transport, at a distance of 250 km from Presidencia Roque Sáenz Peña, where the judgement was handed down, and accessible only by a mud road which is impassable in the rainy season, she was unable to find out the result of the judgement until almost two years had gone by. Seeing that the aggressors were still free, a group of youths of the indigenous association Meguexogochi⁴ cycled 80 km to the locality of Castelli to reach a telephone in order to contact the National Human Rights Secretariat. On 4 July 2006, the Secretariat sent a request for information to the Second Criminal Chamber of Presidencia Roque Sáenz Peña. The Chamber replied to the request, informing the Secretariat of the acquittal. The author cites these reasons as justification for not bringing the case before the Committee until almost three years had passed.

2.7 According to the author, her case is by no means exceptional, since Qom girls and women are frequently exposed to sexual assault in the area, while the pattern of impunity that exists in regard to such cases is promoted by the prevalence of racist attitudes. The

⁴ The indigenous association Meguexogochi is made up of eight Toba Qom communities.

author adds that, in the opposite case, when a Creole woman says that she has been raped by a Qom, he is immediately arrested and sentenced.

The complaint

3.1 The author claims that she was a victim of violations of article 2, article 3, article 7, article 14, paragraphs 1 and 5, article 17, article 24 and article 26 of the Covenant.

3.2 The author maintains that, because she was a girl and because of her ethnicity, she was a victim of discrimination on police premises, during the medical examination to which she was subjected and throughout the trial. She asserts that she had to wait for several hours standing up and in tears before anyone attended to her at the police station. When she was in the medical centre, where she was also kept waiting for several hours, she was subjected to palpations in the injured parts of her body without consideration for the intense pain that this caused her and purely in order to check whether the experience was really painful. She was also subjected to a vaginal examination to check her virginity, despite the fact that the attack she had suffered required an anal examination only. The court that heard the case introduced the virginity of the victim as a decisive factor in the trial. According to the author, unlike her, the accused youths spoke freely, giving a crude account of the facts, without denying carnal intrusion but asserting that she was a prostitute — a fact which was never proved and which was discredited by the report that was submitted on her social environment — and the court immediately took their side. She maintains that all the witnesses were asked if the author had a boyfriend and if she worked as a prostitute. According to the author, the court took no account of the fact that she had to express herself in a language that was not her own while in a state of profound distress when it found inaccuracies and discrepancies in her statement and invalidated it, while at the same time overlooking the inaccuracies and contradictions in the statements of the accused. The author concludes that the trial was flawed by gender bias that favoured impunity.

3.3 The author maintains that, throughout the proceedings, she was treated in a way that showed no regard for the fact that she was a girl or for her honour and dignity.

3.4 According to the author, she was unable to play a proper part in the trial and was denied her right to a fair trial and to due process because she had not received the necessary legal advice and had not been informed of her right to appear as a plaintiff at the trial.

3.5 The author alleges that the acts of physical and mental violence perpetrated by State officials, both at court and at the police station and medical centre where she was attended, caused her physical and moral injury.

3.6 The author maintains that the social worker who was sent to investigate her case questioned the neighbours about her family life and her morality, thereby violating her privacy, her honour and her good name, especially since it is such a small community, and that she was re-victimized as a consequence.

Request by the State party for an amicable settlement

4.1 On 30 April 2008, the State party informed the Committee that the Government of the Province of Chaco had requested that the Ministry of Foreign Affairs establish contact in order to explore the possibility of an amicable settlement of the case by the parties at the national level. The State requested that the Committee transmit the proposal to the author. Without prejudice to that proposal, the State reserved the right to make observations on the admissibility and merits of the case.

4.2 On 9 May 2008, the State party re-sent its message of 30 April and included an annex containing a series of communications from various executive and judicial authorities of the Province of Chaco, admitting the full responsibility of the provincial

government in the case and requesting the national Government to iron out the matter and begin to remedy the harm suffered by the author.

Author's comments

5. On 10 June 2008, the author complained that the national Government had not admitted responsibility for the violations that she had endured, whereas the provincial authorities of the Chaco had done so. The author expressed her willingness to negotiate but only on condition that the national Government should admit its full responsibility and should be prepared to discuss measures for granting full compensation to the author, her family and her community, as well as measures and programmes at national level to avoid the recurrence of similar cases in the future.

Provisional consideration of the proposed amicable settlement by the Committee

6. The State party's proposal for an amicable settlement was examined at the Committee's ninety-third session, in July 2008. In the light of the observations submitted by the author on 10 June 2008, however, the Committee decided to continue to pursue the normal procedure for the consideration of the communication and to request the State party to submit its observations on the merits without delay.

Additional observations of the parties

7. On 8 September 2008, the State party informed the Committee that a meeting would be held among the author, members of her family, their representatives, and representatives of the national and provincial governments in order to initiate a dialogue with a view to arriving at an amicable settlement of the case.

8. On 12 November 2008, the author reported that, at the meeting held with the national and provincial authorities, the Government of the Province of Chaco accepted the author's claims in full and added the offer of housing for her and her family in the vicinity. The author also reported that, in a letter sent by the Governor of Chaco to the Ministry of Justice, the former had requested that the national Government share responsibility for meeting the costs of compensation. The author added that the draft proposal for an amicable settlement prepared by the national Government was partially unsatisfactory owing to the ambiguity of the compensation plan and the vagueness of the terms used. The author reiterated her claim to a clear and express recognition of responsibility on the part of the national Government.

9. On 24 November 2008, the State party informed the Committee that, in its communication of 9 May 2008, the Government of the Province of Chaco, which bore primary responsibility for the human rights violations in the present case, had clearly stated its position, acceding unconditionally and proposing the opening of a conciliatory dialogue with a view to arriving at an amicable settlement. The State party recognized its international responsibility in the present case, undertaking to make every effort, in coordination with the Province of Chaco, to make full reparation to the author.

10.1 On 1 February 2010, the author reported that, after several meetings with representatives of the national and provincial governments, the provincial government had accepted and implemented most of the compensatory measures requested by the author, namely, a public apology, the payment of compensation, the grant of land and housing titles, the award of a US\$ 150 study grant and the organization of a seminar on gender discrimination and violence against women, to be attended on a compulsory basis by all the judicial officials of the province. The author considered the attitude of the Government of the Province of Chaco to be a positive one. As far as the national Government was concerned, she stated that it had carried out one of the measures requested: the approval of

a comprehensive national law on violence against women. However, other aspects of the amicable settlement proposed by the Government were, in the author's view, imprecisely worded, including the portion relating to an express recognition of responsibility by the national Government and the failure to specify the amount of financial compensation. On that basis, the author concluded that the efforts to reach an amicable settlement had not been successful owing to the vagueness of the Government's commitments, and she therefore rejected the proposed amicable settlement and requested that the Committee should continue to consider the case.

10.2 On 25 March 2010, the author expanded upon her comments regarding the amicable settlement agreement proposed by the State party, saying that the main outstanding measures included the award of a study grant to continue her studies (the amount offered being insufficient), the grant of a life pension and the offer of free psychological treatment. The author recognized that the initiation of compensation by the Government had had a positive effect on her life, but she insisted on the need for the complete implementation of all the measures contained in the agreement signed with the Government in order to achieve full reparation. The author pointed out that it was very important for the Committee to issue its Views in her case, as it was the first of its kind to be adjudicated. The author also emphasized the importance of emblematic cases in Argentina, above and beyond the question of reparations for victims, in promoting major legislative, judicial and social changes and ensuring that such events did not recur. She asked that the Committee issue a statement requesting the Government to honour all the obligations that it has assumed in the agreement signed with the author.

11.1 On 13 May 2010, the State party informed the Committee of the compensatory measures adopted as part of the amicable settlement entered into with the author, including the preparation of a bill for the award of a life pension, as well as the measures referred to by the author in her communication of 1 February 2010.

11.2 On 5 August 2010, the State party transmitted a copy of Act No. 6.551, issued under Provincial Decree No. 1202 of 24 June 2010, concerning the award of a life pension to the author, as well as an attestation that the monthly payment of the pension had begun.

Issues and proceedings before the Committee

Consideration of admissibility

12.1 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.

12.2 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.

12.3 The Committee notes the author's argument regarding the impossibility of exhausting the existing domestic remedies, which were reserved for the parties to the proceedings and subject to short application deadlines, due to the fact that she was not informed of her right to act as a plaintiff and that she was not notified of the acquittal judgement. It also notes the author's allegations regarding the unavailability of *amparo* proceedings, which would appear to be inapplicable in respect of judicial acts under existing domestic legislation. In the absence of any counter-arguments from the State party in that respect, the Committee considers that the author did not have access to any effective remedy to lodge her complaint relating to article 14 at national level. The Committee also notes that the State party has not raised the issue of the exhaustion of domestic remedies in connection with any of the author's other complaints. The Committee therefore finds that

all available domestic remedies have been exhausted, as stipulated in article 5, paragraph 2 (b), of the Optional Protocol.

12.4 With regard to the author's allegations concerning the violation of the right to a second hearing, which is recognized in article 14, paragraph 5, of the Covenant, the Committee points out that the paragraph referred to provides a procedural guarantee which is available to any person charged with an offence to have the conviction and sentence reviewed by a higher tribunal. In the present case, as the judgement took the form of an acquittal, that provision does not apply. The Committee therefore considers that the author's complaint under article 14, paragraph 5, is incompatible with the Covenant and declares it inadmissible in accordance with article 3 of the Optional Protocol.

12.5 Regarding the author's complaints under articles 2; 3; 7; 14, paragraph 1; 17; 24; and 26, the Committee considers that they have been sufficiently substantiated for the purposes of admissibility and declares the communication admissible with respect to those complaints.

Consideration of the merits

13.1 The Human Rights Committee has examined the present communication, taking into account all the information provided by the parties, in accordance with the provisions of article 5, paragraph 1, of the Optional Protocol.

13.2 The Committee acknowledges the recognition of responsibility by the State party, including that of the provincial authorities, for violations of its international obligations. The following paragraphs express the Committee's understanding of the specific provisions of the Covenant that provide the basis for the responsibility of the State party in the present case.

13.3 The Committee takes note of the author's allegations to the effect that she was a victim of discrimination based on the fact that she was a girl and an indigenous person, both during the trial and at the police station and during the medical examination to which she was subjected. The author alleges that the personnel of the police station of El Espinillo kept her waiting for several hours, in tears and with traces of blood on her dress, and that they did not take down any complaint, being content in the end to hand her over to the local medical centre. The author further alleges that, once at the medical centre, she was subjected to distressing tests which were not necessary to determine the nature of the assault committed against her, but were instead aimed at determining whether or not she was a virgin. The court that heard the case also invoked discriminatory and offensive criteria, such as "the presence of long-standing defloration" of the author to conclude that a lack of consent to the sexual act had not been demonstrated. The author further maintains that all the witnesses were asked whether she was a prostitute. The Committee considers that all the above statements, which have not been contested by the State party, reflect discriminatory treatment by the police, health and judicial authorities aimed at casting doubt on the morality of the victim. The Committee observes, in particular, that the judgement of the Criminal Chamber of Presidencia Roque Sáenz Peña bases its analysis of the case on the sexual life of the author and whether or not she was a "prostitute". The Chamber also takes the author's loss of virginity as the main factor in determining whether she consented or not to the sexual act. In the light of the uncontested facts which the Committee has before it, the Committee concludes that these facts reveal the existence of discrimination based on the author's gender and ethnicity in violation of article 26 of the Covenant.

13.4 The Committee further considers that the way in which the author was treated by the judicial, police and medical personnel, as described above, demonstrates a failure on the

part of the State to fulfil its obligation to adopt the measures of protection required by the author's status as a minor, recognized in article 24 of the Covenant.

13.5 The Committee takes note of the author's affirmation to the effect that, since she was not informed of her right to act as plaintiff under the provincial legislation in force, she was unable to participate as a party to the court proceedings and that, as a consequence, she was not notified of the acquittal. The author further alleges that several irregularities occurred during the trial of the three accused. In particular, according to the author, the proceedings were held entirely in Spanish, without interpretation, despite the fact that both she and other witnesses had difficulty communicating in that language. In view of the failure by the State to respond to those allegations, the Committee finds that the author's right to enjoy access to the courts in conditions of equality, as recognized in article 14, paragraph 1, was violated.

13.6 Regarding the author's affirmations concerning the physical and mental suffering that she endured, the Committee considers that the treatment she received in the police station and in the medical centre just after being assaulted, as well as during the court proceedings, when many discriminatory statements were made against her, contributed to her re-victimization, which was aggravated by the fact that she was a minor. The Committee recalls that, as pointed out in its general comment No. 20 and its jurisprudence, the right protected by article 7 covers not only physical pain but also mental suffering.⁵ The Committee concludes that the author was the victim of treatment of a nature that is in breach of article 7 of the Covenant.

13.7 Regarding the author's complaint related to article 17 of the Covenant, the Committee considers that the constant enquiries by the social worker, by medical personnel and by the court into the author's sexual life and morality constitute arbitrary interference with her privacy and an unlawful attack on her honour and reputation, all the more so because those enquiries were not relevant to the rape case and related to a minor. The Committee recalls its general comment No. 28, in which it points out that interference, in the sense in which the term is used in article 17, arises when the sexual life of a woman is taken into consideration in deciding the extent of her legal rights and protections, including protection against rape.⁶ In view of the above, the Committee finds a violation of article 17 of the Covenant.

13.8 The Committee notes the author's allegations to the effect that no remedy was available that would allow her to lodge the complaints currently before the Committee because, under existing domestic legislation, *amparo* proceedings cannot be brought in respect of judicial acts. In the absence of any response on the part of the State to that affirmation, the Committee considers that the author, as a victim, was not guaranteed an effective remedy. The Committee therefore finds a violation of article 2, paragraph 3, of the Covenant, in conjunction with articles 3; 7; 14, paragraph 1; 17; 24; and 26.

13.9 The Human Rights Committee, acting in accordance with article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, considers that the State party has violated articles 3; 7; 14, paragraph 1; 17; 24; and 26; and article 2,

⁵ General comment No. 20 (1992) on the prohibition of torture and cruel, inhuman and degrading treatment or punishment, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A, para. 5. See also the Committee's decisions in the cases *K.N.L.H. v. Peru* (communication No. 1153/2003), para. 6.3, and *L.M.R. v. Argentina* (communication No. 1608/2007), para. 9.2.

⁶ General comment No. 28 on equality of rights between men and women, *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40, vol. I (A/55/40 (Vol. I))*, annex VI, sect. B, para. 20.

paragraph 3, in conjunction with all the aforementioned articles, of the International Covenant on Civil and Political Rights.

14. The Committee takes note of the compensatory measures agreed upon between the author and the State party through the amicable settlement procedure. While recognizing the progress made by the State party in implementing several of those measures, the Committee requests full implementation of the agreed commitments. The Committee further recalls that the State party has the obligation to ensure that similar violations are not perpetrated in the future, in particular by guaranteeing access for victims, including victims of sexual assault, to the courts in conditions of equality.

15. 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 Committee's 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.]

**EE. Communication No. 1611/2007, *Bonilla Lerma v. Colombia*
(Views adopted on 26 July 2011, 102nd session)***

<i>Submitted by:</i>	Florentino Bonilla Lerma (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Colombia
<i>Date of communication:</i>	17 October 2006 (initial submission)
<i>Subject matter:</i>	Refusal by the judicial authorities to enforce the payment of damages to the author
<i>Procedural issues:</i>	Substantiation of the complaint; abuse of the right to submit a communication
<i>Substantive issues:</i>	Right to a fair trial; right to an effective remedy
<i>Articles of the Covenant:</i>	2, paragraphs 1–3; 3; 5; 14, paragraph 1; 16; 26; and 27
<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 26 July 2011,

Having concluded its consideration of communication No. 1611/2007, submitted by Florentino Bonilla Lerma 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 Florentino Bonilla Lerma, a Colombian national born on 5 September 1956, who claims to be the victim of a violation by Colombia of

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

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

The text of an individual opinion signed by Committee members Mr. Krister Thelin and Mr. Gerald L. Neuman are appended to the present Views.

articles 2, paragraphs 1–3; 3; 5; 14, paragraph 1; 16; 26; and 27 of the Covenant. The author is not 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 The author and his family owned a fishing company called Incamar that was registered at the port of Buenaventura, Colombia. The company's assets included two industrial fishing motorboats, the *Puri* and the *Copescol Doce*. A suit was brought against the author for failing to meet a financial obligation. As a result, in December 1989 the *Puri* was seized, and in January 1990 it was placed in the custody of a court official pending the outcome of the proceedings. The court official began using the motorboat, making profits that he reported neither to the court hearing the suit nor to the author.

2.2 In judgements dated 10 May and 7 June 1995, the Second Civil Circuit Court of Cali, Valle, ruled in favour of the author and ordered the court official to return the boat and to pay for structural and mechanical damage inflicted upon the boat, as well as compensation for loss of profits. On 7 September 1995, the Eighth Civil Circuit Court of Cali informed the harbour master of the port of Buenaventura that the seizure order had been lifted and ordered the court official to account for his actions and to return the motorboat. When this ruling was ignored, the author applied for an injunction (*acción de tutela*) before the Civil and Labour Division of the High Court of the Popayán Judicial District, located in the department of Cauca.

2.3 In a judgement dated 5 September 1996, the Popayán High Court granted the injunction and ordered "The State – Judicial Branch" (of which the court official was a member) to return the motorboat. It also ordered the administrative court to carry out the corresponding settlement procedures to enforce the payment of damages to the author. The main case file was referred to the Constitutional Court on 12 September 1996 to conduct the necessary legal procedures for a possible judicial review. The Popayán High Court refrained from initiating procedures to order payment of the settlement until the case file had been returned by the Constitutional Court. The latter decided not to review the judgement and remanded the case to the Popayán High Court on 17 January 1997.

2.4 The author claims that, when the case was before the Constitutional Court, the secretary of the Popayán High Court, acting on his own initiative, sent a copy of the judgement dated 5 September 1996, without any annex, without the authorization of the judges and without notifying the parties, to the Cali branch of the Administrative Court of Valle del Cauca, with a note stating that it should act on "point 4".¹ The author heard rumours that a copy of the judgement had reached the Administrative Court of Valle del Cauca, which is located far from the judicial district of Popayán. The author claims that he complained about this to the reporting judge of the Popayán High Court, who responded that the court had never ordered the judgement to be transmitted to the Administrative Court of Valle del Cauca and that he should not be involved in those proceedings. The author, who is not a lawyer, sent a letter to the Administrative Court of Valle del Cauca on 19 September 1996, which read as follows: "I hereby withdraw from the proceedings to prepare and implement a motion for settlement of damages as ordered in a writ (*despacho comisario*) issued by the Popayán High Court. For this reason, I respectfully request that you return the aforementioned writ to the court from which it originated, in accordance with article 344 of the Code of Civil Procedure."

¹ Point 4 states as follows: "Notify the Administrative Court of the above decision for action."

2.5 On 17 January 1997, the Popayán High Court instructed the Administrative Court of Cauca to order payment of the damages to the author. On 28 January 1997, the Administrative Court refused to enforce the judgement, on the ground that the request for withdrawal submitted by the author to the Administrative Court of Valle del Cauca meant that he had renounced all his claims, and that those claims could therefore not be exercised under the same procedure. The Court also reasoned that the acceptance by the Administrative Court of Valle del Cauca of the request for withdrawal had the effect of *res judicata*.

2.6 The author appealed to the Administrative Division of the Council of State, which upheld the decision of the Administrative Court of Cauca, basing its decision on the author's withdrawal. The Council of State referred the author to the Administrative Court of Cauca to submit a petition for annulment. However, that court set aside the case, in a decision that was subsequently upheld by the Council of State. Later, the author submitted numerous appeals to various bodies, including the Constitutional Court, claiming a violation of his rights to due process and access to justice. On 21 February 2003, the Constitutional Court rejected the author's claims, concluding that the author "withdrew his claims for damages before the Administrative Court of Valle del Cauca, thereby cancelling the motion for settlement of damages, and allowed considerable time to pass before reopening procedures that had already been completed. The various decisions handed down in response to the author's multiple petitions after the request for withdrawal had been accepted constitute a valid and reasonable premise on which to conclude that the motion for settlement of damages had already been voluntarily cancelled by the concerned party himself."

2.7 At the end of 2005, the author and his family obtained refugee status in Costa Rica, where he filed a claim for enforcement of the judgement with the First Division of the Supreme Court against the Republic of Colombia. On 8 March 2006, the Supreme Court rejected his claim, arguing that the jurisdiction of Costa Rica did not cover disputes between an individual and a sovereign Government or nation. Furthermore, the Court reasoned that the right being asserted could not be upheld by any Costa Rican court, given that the decision had been handed down by the courts of Colombia, which had absolute and sovereign authority to enforce it. That decision was upheld on 23 August 2006 by the same Court.

2.8 In his communication, the author criticizes the conduct of the Colombian judicial system.

The complaint

3.1 The author maintains that the State party violated article 2, paragraphs 1, 2 and 3, of the Covenant, given that, despite the judgement handed down by the Popayán High Court on 5 September 1996, the subsequent judicial remedies were not effective in enforcing that judgement. He also claims a violation of article 3 of the Covenant, because his right to equality before the law was not respected.

3.2 The author claims a violation of article 5 of the Covenant, given that the State party demonstrated through its judicial proceedings that it was not willing to comply with the international treaties to which it is a party.

3.3 The author alleges that he is the victim of a violation of article 14, paragraph 1, of the Covenant because, in the judicial proceedings that he initiated in an effort to assert his civil rights as a proprietor and businessman in Colombia, he did not receive equal treatment in relation to other plaintiffs in similar cases. Moreover, he did not enjoy the minimum guarantees of an independent and impartial trial, since his appeals were not dealt with in an

effective or timely manner. According to the author, the primary aspect of the violation is a misunderstanding of the principle of *res judicata*.

3.4 The author claims a violation of article 16 of the Covenant on the grounds that the judicial authorities of Colombia did not recognize him as a person before the law.

3.5 The author also alleges that he is the victim of a violation of article 26 of the Covenant, as he considers that the reason that the judgement of the Popayán High Court was not enforced was because he is a person of African descent. He asserts that an adviser to the president of the Constitutional Court told him informally that he had heard the judges say: "How can we rule in favour of this black man, Bonilla? For one thing, Colombia would have to pay him a lot of money and, for another, we would be passing judgement on our fellow judges from the Council of State."

3.6 Lastly, the author claims a violation of article 27, basing his argument on reasons involving racial discrimination in the State party.

State party's observations on admissibility

4.1 In a note verbale dated 8 January 2008, the State party maintains that the communication is inadmissible.

4.2 The author's petition asks the Committee to review or reassess acts already examined and ruled upon by the Colombian courts with a view to obtaining compensation for which he voluntarily and expressly withdrew his claim. The State party draws attention to the jurisprudence of the Committee and the Inter-American Court of Human Rights, according to which communications should be rejected if they seek a reassessment of acts that have already been examined and ruled upon by the domestic courts of States parties.

4.3 The State party recounts the facts and asserts that, in its judgement dated 10 May 1995, the Second Civil Circuit Court of Cali ordered an officer of the court to pay the author a sum of money in cash for his loss of profits from the operation of the *Puri* motorboat from 1990 to 1995. The motorboat had been seized from the author in the course of proceedings that ended with a decision in the author's favour. Since the officer of the court neither paid the sum of money to the author nor returned the motorboat to him as ordered, the author sought an injunction against him at the Popayán High Court. The court ordered the defendant to hand over the motorboat and the profits he had earned from it. It also ordered the administrative court to execute the decisions of the Eighth and Second Civil Circuit Courts of Cali to enforce the payment of damages. The Court sent a copy of the relevant decision to the Administrative Court of Valle del Cauca. On 19 September 1996, the author wrote to the latter stating: "I hereby withdraw from the proceedings to prepare and implement a motion for settlement of damages as ordered ... by the Popayán High Court. For this reason I respectfully request that you return the aforementioned writ to the court from which it originated."

4.4 In a decision dated 27 September 1996, the Administrative Court of Valle del Cauca accepted the withdrawal and ordered that the case should be closed following cancellation of the motion, and that the Popayán High Court should be informed of the withdrawal. On 5 December 1996, the author petitioned the Civil and Labour Division of the Popayán High Court to transfer to the administrative courts the motion for settlement of the damages to which he was entitled. On 17 January 1997, the Civil and Labour Division referred the case to the Administrative Court of Cauca to settle the payment of the corresponding damages. On 28 January 1997, this court rejected the case on the ground that the author had withdrawn the motion for settlement of damages. This decision was upheld by the Council of State. Subsequently, the author filed a complaint claiming conflict of jurisdiction; on 22 March 2001, the Constitutional Court decided not to rule on the issue on the ground that no conflict had actually occurred. It considered that the Administrative Court of Cauca had

never claimed not to have jurisdiction to hear the motion for settlement of damages; rather, it had simply refrained from processing the motion owing to the author's withdrawal of his claim for damages. The author later filed for an injunction to protect his rights to due process, to a defence and to the ownership of private property. This action was rejected by the Council of State and the Constitutional Court. The latter considered that there was no violation of the author's fundamental rights, since he had withdrawn his claim for damages before the Administrative Court of Valle del Cauca, thereby voluntarily cancelling the motion for settlement of damages.

4.5 The author is seeking to have the Committee act as a court of fourth instance by reassessing acts that have already been examined and ruled upon by the domestic courts in order to revive a claim for damages that he has voluntarily and expressly withdrawn, this withdrawal having been accepted by the domestic courts.

4.6 International bodies are competent to declare a communication admissible and to issue their findings on the merits of a case if it involves a judgement by a national court that was arrived at without due process of law, which would appear to violate any other right guaranteed in international treaties. If, on the other hand, the international body simply asserts that the judgement itself was wrong or unjust, then the communication should be rejected. The role of international bodies is to ensure the observance of obligations undertaken by States parties to treaties; they cannot act as a court of appeal to examine alleged errors of law or of fact that may have been committed by national courts acting within the limits of their jurisdiction. The Inter-American Court of Human Rights has also clearly stated (in the case of *Cantos v. Argentina*) that a judgement must be arbitrary in order to constitute per se a violation of the Convention.

4.7 The author had access to all the mechanisms provided for in the Constitution and in the law, and at no point was he restricted in his right to apply to judicial bodies or to exercise the remedies he considered viable to assert his claims. On the contrary, the author initiated numerous legal proceedings and obtained substantive decisions based on the law. Consequently, the State party considers the communication inadmissible under article 2 of the Optional Protocol.

4.8 The author merely lists the rights that he believes to have been violated, without explaining his reasons for believing so and without providing evidence to substantiate his claim. Therefore, the communication should be declared inadmissible for lack of substantiation. Moreover, it constitutes an abuse of the right to submit communications, given that the author submitted incomplete, false and ill-considered information to the Committee. The author's withdrawal of his claim was not the result of a legal mishap, but rather a conscious choice that he made. Thus, he is not providing the Committee with accurate information.

4.9 The State party alleges that, if the author believed at the time that it was not within the jurisdiction of the Administrative Court of Valle del Cauca to process the settlement for damages, there was a domestic legal remedy available to him that would have made it possible to rectify the alleged jurisdictional error, as pointed out by the Constitutional Court in its ruling on the author's application for an injunction.

4.10 The State party points out that, for the purpose of supporting the admissibility of his claim, the author has not substantiated his allegation that he was threatened and harassed by public officials; nor has he provided even prima facie evidence that he suffered racial discrimination.

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

5.1 On 11 February 2008, the author submitted his comments on the State party's submission. He maintains that the Popayán High Court did not transmit a copy of the

judgement dated 5 September 1996 to the Administrative Court of Valle del Cauca. Rather, this was an arbitrary action carried out by a junior employee of the court. This was why the judges of the High Court, when they discovered that there was a copy of the judgement in another city, recommended on 16 September 1996 that the author should withdraw his participation in that “non-delegated motion” and should request that the copy of the judgement be returned to the court from which it originated, given that any action taken would be null and void owing to lack of jurisdiction. The author followed this advice. Meanwhile, the judgement of the Popayán High Court was reviewed by the Constitutional Court, which upheld the decision and returned it to the Popayán High Court on 16 January 1997.

5.2 On 17 January 1997, the Popayán High Court ordered that the motion for settlement of damages should be handled by the Administrative Court of Cauca (Popayán) and sent a copy of the case file to that court. However, the court took the decision already outlined above. The author cites various legal provisions to substantiate his claim that he never renounced his right to compensation and that his supposed “withdrawal” should be declared null and void. The author reiterates that the facts referred to in his communication constitute a violation of articles 14 and 26 of the Covenant.

Additional observations by the State party on admissibility

6.1 On 14 May 2008, the State party submitted additional observations, in which it restated the arguments already formulated and asserted that the case file was sent by the Civil and Labour Division of the Popayán High Court to the Administrative Court of Valle del Cauca in accordance with the judgement dated 5 September 1996, which ordered “the administrative court to settle the [sic] within six months in order to enforce the payment of damages to Mr. Florentino Bonilla Lerma, so as to prevent irreparable harm”. It follows from this that the transfer of the case file was not an arbitrary action by an employee, but rather the result of a court order. As stated by the Constitutional Court, if the author believed at the time that the Administrative Court of Valle del Cauca did not have jurisdiction, “the appropriate procedural remedy would have been to file a complaint for lack of jurisdiction at the time, or to express this idea clearly and specifically”.

6.2 The State party reiterates that the fact that court rulings went against the author cannot be interpreted as racial discrimination against him.

State party’s observations on the merits

7.1 On 11 July 2008, the State party submitted its observations on the merits. With regard to the author’s claim of a violation of article 2 of the Covenant, the State party draws attention to the Committee’s jurisprudence, which indicates that this provision constitutes a general obligation of States parties and can only be considered to have been violated if a right recognized in the Covenant has been violated, or if the necessary measures were not taken at the domestic level to protect the rights enshrined in the Covenant. Regarding the alleged violation of article 5, the State party points out that this provision does not give rise to any specific individual right, but is rather a cross-cutting provision on the scope of human rights and the obligations of States parties. Consequently, the author’s complaints made on the basis of these provisions should be rejected.

7.2 The author’s allegations of a violation of articles 3 and 26 of the Covenant are unfounded, since he has not provided evidence to show that the alleged acts occurred. The author’s claim of a violation of article 3 is not appropriate in this case, given that he is male. If the author considers that the institutions of Colombia prevented him from enjoying the same rights as women, in his communication he has not explained, even briefly, how he considers this right to have been violated. Regarding article 26, the author cannot argue that this article was violated simply because the courts did not decide in his favour, and he

cannot claim racial motivation when the judicial decisions were reasonable and well-founded (de facto equality). Nor has any alleged de jure inequality been demonstrated, given that the norms applied by the Colombian courts respect the principle of non-discrimination set out in article 26. Moreover, the author did not indicate in any of the actions he brought before the domestic courts that the latter had acted in any way that discriminated against him on the ground of his race. The court decisions were based on the author's free and voluntary withdrawal; therefore, they constitute neither racial discrimination nor a violation of the right to equality before the law.

7.3 With regard to the alleged violation of article 14, paragraph 1, of the Covenant, the State party maintains that the complaint does not contain any evidence from which to conclude that the author's right to due process was violated during the civil proceedings. In relation to the Committee's interpretation of the conditions that must be met in civil proceedings, such as equality of arms, respect for adversarial proceedings, flexible legal procedures and the prohibition of ex officio increases in sentences, all of those conditions were met in the proceedings involving the author. He had the opportunity to be heard before various bodies to dispute the withdrawal that he had submitted, and he received appropriate, reasonable, objective and timely responses. Regarding the author's claim that it took approximately 17 years to process his petitions, the State party points out that his withdrawal was accepted in the judgement dated 27 September 1996. The subsequent legal actions, including petitions for annulment, appeals, actions to have court officials disqualified and applications for injunctions, were submitted on the author's own initiative in order to revive his chances of receiving the compensation to which he had withdrawn his claim. The State party reiterates that international bodies cannot act as appeal courts and examine alleged errors of law or of fact that may have been committed by national courts acting within the limits of their jurisdiction.

7.4 With regard to the alleged violation of article 16 of the Covenant, the State party maintains that a violation of this right must entail denying an individual the opportunity to be a holder of rights and obligations, which did not occur at any point in the author's case. On the contrary, he had the opportunity to undertake legal proceedings to explain why he disagreed with the decision to deny compensation. Therefore, there was no violation of this provision.

7.5 With regard to the alleged violation of article 27, the author mentions only that he belongs to a certain minority (persons of African descent), but does not explain what specific right of this minority he was prevented from exercising. Therefore, the alleged violation is unfounded.

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

8.1 In his communication dated 5 September 2008, the author reiterates that he is the victim of a miscarriage of justice. He asserts that the Civil and Labour Division of the Popayán High Court was the competent court in the principal proceedings but that its decision was not respected by the judge of the Administrative Court, who acted arbitrarily and in flagrant violation of due process. The author maintains that Colombian legislation does not in any way stipulate that the "withdrawal from legal proceedings" after an enforceable judgement has been submitted to a judge who lacks territorial jurisdiction and has not been officially appointed to hear the case should have the effect of nullifying an obligation. The judge should have refrained from presiding over the legal proceedings brought before him and should have requested that the copy of the decision be returned to the court from which it originated. The author points out that the actions of the Administrative Court were unlawful, as it refused, on the basis of unfounded arguments, to execute the motion for settlement of damages as ordered by the Popayán High Court.

8.2 The author reiterates that his withdrawal did not imply that he had renounced his rights as recognized in the decision of 5 September 1996, but rather was a withdrawal from the legal proceedings initiated by the Administrative Court of Valle del Cauca, which the author had been told was not competent to decide on the settlement. The author also maintains that, in order for the withdrawal to be considered valid, it would have to have been submitted with the defendant's consent before the decision of the Popayán High Court was handed down on 5 September 1996, and the parties would have to have been notified.

8.3 The author requests that the Committee declare the State party responsible for the facts described above, and that the State party establish the necessary mechanisms to grant the author the damages to which he is entitled in accordance with the judgement of 5 September 1996.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 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 International Covenant on Civil and Political Rights.

9.2 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.

9.3 The Committee takes note of the State party's observation that the communication should be considered inadmissible for lack of substantiation and because the Committee cannot assess facts that have already been examined and ruled upon by domestic courts. The State party also asserts that the author submitted incomplete, false and ill-considered information to the Committee and that the communication should therefore be considered inadmissible because it constitutes an abuse of the right to submit communications. The Committee does not share the State party's view as regards abuse, in the light of the information and evidence submitted by the author.

9.4 With regard to the alleged violation of articles 2, 3, 5, 16, 26 and 27, the Committee notes that the author invokes these articles in a general manner, without adequately explaining why he considers that the alleged acts constitute specific violations of these articles. Therefore, the Committee considers this part of the communication to be inadmissible for lack of substantiation under article 2 of the Optional Protocol.

9.5 Regarding the author's claim of a violation of article 14, paragraph 1, of the Covenant, the Committee considers that this claim has been sufficiently substantiated and that the other admissibility requirements have been met. The Committee therefore considers the claim admissible and proceeds to its consideration of 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, as required under article 5, paragraph 1, of the Optional Protocol.

10.2 The Committee must decide whether the domestic courts' decisions to refuse to grant the author the compensation ordered by the Popayán High Court in its judgement of 5 September 1996 constitute a violation of article 14, paragraph 1, of the Covenant. The Committee notes the State party's argument recalling the Committee's jurisprudence, according to which it is the responsibility of domestic courts to review the facts and

evidence in each particular case. The Committee recalls, however, that this jurisprudence provides for an exception when it is demonstrated that the evaluation was clearly arbitrary or amounted to a manifest error or denial of justice.²

10.3 In the present case, the Committee notes that the decision of the Popayán High Court dated 5 September 1996 was referred for execution to the Administrative Court of Valle del Cauca. Neither the State party nor the domestic courts have stated that this court was competent to process the case; it can therefore be concluded that this referral was carried out in error – an error that is not attributable to the author. The latter, having discovered that the Administrative Court did not have jurisdiction, and clearly believing that he was doing what was right, submitted a written statement of withdrawal. Furthermore, the information provided to the Committee by the parties does not contain any evidence that the author intended to renounce his rights as recognized in the judgement of 5 September 1996. On the contrary, the author had given many indications that he wished to recover his motorboat; he had received a favourable decision in the previous legal proceedings, resulting in the cancellation of the seizure order, and he had applied for an injunction, resulting in the judgment of 5 September 1996. At the same time, it is hard to believe that the “withdrawal of all claims to compensation”, which the domestic courts hold against the author, could be accepted, with all the resulting legal implications, by a court (the Administrative Court of Valle del Cauca) that clearly was not competent to decide on matters of compensation. It is also hard to believe that it was up to the author and not the courts involved to notice the error and take measures to safeguard his rights in the light of that error. The information provided by the parties leads to the conclusion that when, on 17 January 1997, the Popayán High Court finally ordered the competent court — the Administrative Court of Cauca (Popayán) — to enforce the settlement and ensure the payment of damages, it did so in all legality and without reproaching the author for any improper action on his part. The Administrative Court of Cauca nevertheless declined, on 28 January 1997, to act on the High Court’s order because it regarded the judgement of the Administrative Court of Valle del Cauca of 27 September 1996, in which it accepted the author’s withdrawal, as *res judicata*.

10.4 On the basis of the above, the Committee concludes that the domestic courts’ refusal to enforce the payment of damages to the author constitutes a violation of article 14, paragraph 1, of the Covenant.³

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of the rights of the author under article 14, 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 author with an effective remedy, including adequate compensation. The State party is also under an obligation to take steps to prevent similar violations 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 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

² 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.

³ See communication No. 1089/2002, *Rouse v. Philippines*, Views adopted on 25 July 2005, para. 7.2.

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.]

Appendix

Individual opinion of Committee members

Mr. Krister Thelin and Mr. Gerald L. Neuman (dissenting)

The Committee has found the author's claim of a violation of article 14, paragraph 1, admissible. We respectfully disagree.

The Committee is not a court of fourth instance. It is, as laid down in the Committee's established jurisprudence, generally for the courts of States parties to the Covenant to review facts and evidence, or the application of domestic legislation, in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice.¹

It is the task of the Committee simply to determine whether, in assessing the author's "withdrawal of all claims of compensation", the domestic courts failed this test. In our view, while mindful of the regrettable consequences of the author's procedural action, the facts before the Committee do not permit it to conclude — other than by resorting to numerous conjectures (see para. 10.3 of the majority decision) — that the domestic courts' evaluation or the way in which they applied domestic law amounted to a denial of justice. The Committee should therefore have also found the communication inadmissible with respect to an alleged violation of article 14, paragraph 1.

(Signed) Krister **Thelin**

(Signed) Gerald L. **Neuman**

[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.]

¹ See general comment No. 32, para. 26.

**FF. Communication No. 1620/2007, *J.O. v. France*
(Views adopted on 23 March 2011, 101st session)***

<i>Submitted by:</i>	Mr. J.O. (represented by counsel, Adam Weiss, AIRE Centre)
<i>Alleged victims:</i>	The author
<i>State party:</i>	France
<i>Date of communication:</i>	4 June 2007 (initial submission)
<i>Decision on admissibility:</i>	7 October 2009
<i>Subject matter:</i>	Allegation of abuse of criminal procedure and conviction for a non-existent offence
<i>Procedural issue:</i>	Non-exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to an effective remedy, right to a fair trial
<i>Articles of the Covenant:</i>	2, paragraph 1; 14, paragraphs 2, 3 (a) and (b) and 5; 15, paragraph 1; and 26
<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 2011,

Having concluded its consideration of communication No. 1620/2007, submitted to the Human Rights Committee on behalf of Mr. J.O. 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 author of the communication is Mr. J.O., a British national born on 24 January 1954. He claims to be the victim of a violation by France of article 2, paragraph 1; article 14, paragraphs 2, 3 (a) and (b) and 5; article 15, paragraph 1; and article 26 of the

* 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, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, 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 members, Ms. Christine Chanet, Sir Nigel Rodley and Mr. Krister Thelin did not participate in the adoption of the present decision.

Covenant. The author is represented by counsel, Mr. Adam Weiss (Advice on Individual Rights in Europe (AIRE) Centre).¹

1.2 On 12 February 2008, at the State party's request, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, decided to consider the admissibility and merits of the communication separately.

The facts as submitted by the author

2.1 In October 1993, the author co-founded a company in France called Riviera Communications and accepted the honorary title of manager of the company. The author devoted an average of one hour a month to this job, carrying out simple administrative tasks. He was never paid and never spent more than an hour a month on the company. In the 1980s and 1990s, the author occupied various accounting posts in American and British companies in Europe. From April 1994 to December 1995, he was employed by the French branch of a British company, Willis Corroon, as an accounting and financial director. He was laid off on 31 December 1995.

2.2 The author registered as a jobseeker at the French National Employment Agency (ANPE), and filed a claim for unemployment benefit on 31 January 1996. His entitlement to benefit started on 28 February 1996. From 10 September 1995 to the end of 1995, the author sent out 108 job applications. In 1996 and most of 1997, the author frequently sought guidance from ANPE to help him with his job search, and responded to 811 job offers. Finally, after two years of intensive job hunting, he found a job that matched his skills, signed a contract in December 1997, and began working as a financial director for a company in the United Kingdom of Great Britain and Northern Ireland. Throughout this period of professional inactivity, from the end of 1995 to the end of 1997, the author had devoted all his time to looking for a new job.

2.3 On 10 November 1997, ASSEDIC² wrote to the author to inform him that, upon review of his case, on 22 October 1997, it had come to light that he had worked as manager of Riviera Communications ever since the company's establishment on 21 October 1993. ASSEDIC deemed that this unpaid work which he had failed to declare at the proper time was incompatible with the status of jobseeker. On 14 November 1997, ASSEDIC wrote again stating that the author was obliged to pay back all the benefits he had received over the past 20 months within 30 days. The letter also stated that the author could submit an application for reconsideration to the Joint Committee of ASSEDIC within one month.

2.4 On 26 November 1997, ASSEDIC sent a third letter contradicting the first letter of 10 November 1997. According to the Joint Committee of ASSEDIC, collection of partial unemployment benefit while receiving income from gainful occupation was possible only under certain conditions, and under the unemployment benefit rules the author's position as manager of Riviera Communications precluded the collection of partial benefit. This clearly reflects confusion on the part of ASSEDIC since the author did not receive remuneration as manager of Riviera Communications. His counsel therefore submitted an application for reconsideration on 19 January 1998. The Joint Committee of ASSEDIC rejected this application on 15 April 1998, invoking the same grounds as in the ruling of 10 November 1997.

2.5 On 17 March 1998, ASSEDIC summoned the author to appear before the Criminal Court of Grasse for fraud or making a false statement in order to obtain unemployment

¹ The Covenant and Optional Protocol thereto entered into force for France on 4 February 1981 and 17 May 1984, respectively.

² French Association for Industrial and Commercial Employment (ASSEDIC).

benefits. The summons was ruled invalid in the proceedings of 25 June 1999 on the grounds that it did not give either the date or period of the events. On 27 September 2000, ASSEDIC issued a new summons to appear before the Court, stating that the author's position as manager of Riviera Communications since its establishment in October 1993 was incompatible with the status of jobseeker, notwithstanding the author's claims that the position was not a real job and that he had never stopped looking for work. The author contends that the summons contained two blatant contradictions. Firstly, it stated that he had collected unemployment benefit while engaged in undeclared gainful employment from 28 February 1996 to 31 October 1997. Secondly, it stated that he had started working again during the period he was receiving unemployment benefits, without notifying ANPE, and that he had kept that job since the company's establishment in 1993.

2.6 During the hearing of 26 January 2001, the ASSEDIC counsel requested a correction to a factual error contained in the summons, replacing "collected unemployment benefits while engaged in gainful employment" with "collected unemployment benefits while engaged in an undeclared activity". The author was not present during the hearing and contends that this correction should not simply have appeared in counsel's submission but should have led the court to declare the summons invalid. A third summons should thus have been drawn up. However, the statute of limitations ruled out that possibility. During the hearing of 25 May 2001, at which the author was not present, ASSEDIC explained for the first time that the author had replied "No" to the question "Are you currently an agent (*mandataire*) of a company, group or association?" in the ASSEDIC form, and that doing so constituted a false statement.³ However, as neither the author nor his counsel had been informed in advance of the amendments to the charges in the summons, they were unable to prepare a new line of defence. On 22 June 2001, the criminal court dismissed the author's claim invoking the statute of limitations, and gave him a one-month suspended prison sentence and a fine of €65,843 for fraud or making a false statement in order to obtain unemployment benefits.

2.7 The criminal division of the Aix-en-Provence Court of Appeal dismissed the author's appeal on 15 May 2003, and on 17 February 2004 the Court of Cassation dismissed his appeal in cassation. On the assumption that the court had not been apprised, during the criminal trial, of his efforts to find work, the author applied to the Commission for the Review of Criminal Convictions on 7 December 2004 for a review of his case in the light of new information, namely a list of 919 job applications. The Commission dismissed his application in its decision of 3 April 2006 on the grounds that, although a British citizen, he had lived long enough in France to understand the meaning of the word *mandataire* ("agent") in the questionnaire he had filled out; his argument was thus "unlikely to raise any doubt as to his guilt".

2.8 The author claims that his wrongful conviction had forced him to reimburse sums he had not received, and he was forced to take out additional loans to pay off his debt.

The complaint

3.1 The author claims a violation of article 14, paragraphs 2, 3 (a) and (b) and 5; article 15, paragraph 1; article 2, paragraph 1; and article 26 of the Covenant. He claims that he was the victim of abuse of criminal procedure, and that he had been convicted of a non-existent offence.

³ The French terms "*mandataire*" (agent) and "*gérant*" (manager) being interchangeable, the French authorities maintained that the author completed the ASSEDIC form with intent to deceive.

3.2 The author claims that the summons did not clearly set out the exact charges against him. He invokes general comment No. 13,⁴ in which the Committee states that “the specific requirements of subparagraph 3 (a) may be met by stating the charge either orally — if later confirmed in writing — or in writing, provided that the information indicates both the law and the alleged general facts on which the charge is based”. While the Committee’s case law on this matter is sparse, the author deems that a bare charge of “fraud or making a false statement in order to obtain unemployment benefits” fails to meet the requirements set out by the Committee since the officials in question should have provided him with detailed information on the grounds for the charge. However, the author had gathered that the basis of the charge was maintaining gainful employment while collecting unemployment benefits, and it was on that basis that he and his counsel had prepared their defence.

3.3 The author also claims a violation of his right to have adequate time and facilities for the preparation of his defence. He contends that the lack of clarity in the summons misled him and his counsel, preventing them from being able to prepare a suitable defence in time.

3.4 The author contends that, by obliging him to prove that the position of manager was not an obstacle to actively seeking work, the Criminal Court of Grasse violated his right to the presumption of innocence, protected under article 14, paragraph 2, of the Covenant.

3.5 The author claims a violation by the State party of article 14, paragraph 5, insofar as neither the Appeal Court nor the Court of Cassation afforded him the opportunity to air his grievances.

3.6 The author claims a violation by the State party of article 15, paragraph 1, according to which no one shall be held guilty of an offence on account of any act that does not constitute an offence under national law. He had been found guilty of fraud or making a false statement, yet the mere ticking of a box, according to the French case law of the Court of Cassation, is not sufficient to establish such an offence.

3.7 Lastly, the author contends that the treatment he received from the Commission for the Review of Criminal Convictions constitutes a violation by the State party of, it must be assumed, article 26 of the Covenant,⁵ amounting as it does to discrimination, which in itself is a violation of article 2, paragraph 1, of the Covenant. In finding that the author’s British origins were no excuse for confusing the terms *mandataire* (“agent”) and *gérant* (“manager”), the Commission failed to show impartiality. According to the author, no other case of making a false statement tried in French courts had ever been as unfavourable to the accused. All the other cases happened to involve French nationals, which proves discrimination on the basis of nationality by the national court.

State party’s observations

4.1 In a note verbale dated 4 February 2008, the State party contested the admissibility of the communication on grounds of non-exhaustion of domestic remedies. Referring to the facts as submitted by the author, the State party points out that, following the ASSEDIC decision to suspend its degressive single unemployment benefit and request the reimbursement of the sums the claimant had received from 28 February 1996 to 29 October 1997, the author had brought the case before the Joint Committee of ASSEDIC, yet he fails to produce the ruling the Committee is said to have rendered.

⁴ General comment No. 13 of 12 April 1984 has been replaced by 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.

⁵ The author does not refer explicitly to article 26 of the Covenant.

4.2 The State party argues that domestic remedies have not been exhausted in this case. Citing the Committee's case law,⁶ the State party emphasizes that the author must first set out his claim before the national courts "in substance", before bringing it to the Committee. Indeed, before individuals can assert a State party's failure to apply the law, they must first invoke the law in question before national courts, to give the State the opportunity to remedy the contentious situation itself.

4.3 In the present case, the State party contends that there is nothing to show that the author has brought his claims before national courts. Yet, the rights supposedly disregarded were and are protected, and thus fully justiciable in the domestic courts.

4.4 The ruling of the Criminal Court of Grasse, which takes up the procedural plea and the author's arguments, makes no mention of any allegation of omissions on the part of the French authorities, as the author claims before the Committee. The State party further notes that the author did not bring these claims before the Aix-en-Provence Court of Appeal because the Court had declared the appeal inadmissible, a situation for which the author himself was to blame for failing to lodge his appeal within the deadline, a fact he does not mention in his communication. Nor did he bring these claims before the Court of Cassation or the Review Commission. The author should have been able to bring his claims before national courts, since he was assisted by counsel at every stage of the proceedings. The State party thus concludes that, as the author has not invoked the alleged claims of violations of the Covenant even in substance, before national courts, he has not given French officials the opportunity to redress them.

Author's comments on the State party's submission

5.1 On 23 May 2008, the author argued that he could not have claimed violations of article 14, paragraphs 2, 3 (a) and (b); article 15, paragraph 1; article 2, paragraph 1; and, it is assumed, article 26 of the Covenant, before they had taken place. The irregularities in question are alleged to have occurred in the Criminal Court of Grasse and the Review Commission. While it would have been appropriate, as the State party notes, for the author to invoke these irregularities in his appeal, he had been deprived of the opportunity to do so, since the Aix-en-Provence Court of Appeal had declared the appeal inadmissible.

5.2 The author deems that he is not to blame for this situation. In fact, he had not been represented by his counsel during the hearing before the Criminal Court on 25 May 2001, contrary to what is stated in the ruling of 22 June 2001. Since the author was not represented by his initial counsel, but by another who was not properly authorized to represent him, the 10-day deadline for lodging an appeal under domestic law could only begin to run from the time of notification of the judgement to the author.⁷ Yet, as the author never received such notification, he considers that the 10-day period never started running. Moreover, since the Criminal Court of Grasse did not indicate in its judgement that the

⁶ Communications No. 661/1995, *Triboulet v. France*, Views adopted on 19 August 1997; No. 1118/2002, *Deperraz v. France*, Views adopted on 10 May 2005.

⁷ The author cites article 498 of the Code of Criminal Procedure, which states that, "the time-limit for appeal runs only from the service of the judgement, however this was carried out [...], for any party not present or represented at the hearing when the judgement was handed down, but only where such party or representative was not notified of the day when the judgement would be handed down". The author adds that a recent amendment to article 498 of the Code of Criminal Procedure (made subsequent to the situation described in the present case) explicitly accorded protection which had been implicit at the time of the alleged offence. According to this amendment, "the time-limit for appeal runs only from the service of the judgement, however this was carried out [...], for any defendant tried in their absence but in the presence of an advocate to conduct their defence, and where the advocate has no representation order signed by the defendant".

author had not been represented by counsel, the Aix-en-Provence Court of Appeal had no choice but to declare the appeal inadmissible. The Court of Cassation subsequently confirmed the Court of Appeal's dismissal based on this same erroneous assumption.

5.3 To clarify his lawyer's role in this matter, the author contends that his counsel was not present at the hearing of 25 May 2001 before the Criminal Court of Grasse and neglected to submit to the judge the documents attesting to the author's job search, which the author believes constitute crucial evidence for his case. This professional negligence, for which the author instituted civil proceedings, was recognized by the Aix-en-Provence Court of Appeal in its ruling of 29 April 2008. The author's counsel, Ms. Cohen-Seat, appealed to the Court of Appeal against the ruling of the Regional Court of Grasse of 12 June 2007, which had found in favour of the author in civil proceedings against his counsel for professional negligence, instituted on 26 January 2006.

5.4 Notwithstanding the Committee's case law by which any breach or inaction on the part of counsel cannot be ascribed to the State party,⁸ the author notes that, in the present case, the difficulties he encountered in attempting to exhaust domestic remedies could in fact be ascribed to the State party as well as to counsel. The civil division of the Aix-en-Provence Court of Appeal clearly recognized that the author's conviction was the result of both negligence on the part of counsel and miscarriage of justice. The Court of Appeal indeed held that, with regard to the substantive nullity of the ASSEDIC summons, this was "not just a purely factual error, but a matter which went to the very heart of the definition of the offence, insofar as J.O. should have been given the opportunity to prepare his defence on an informed basis".

5.5 As to the legality of the criminal conviction, the Court of Appeal stated that "simply replying 'no' to the question whether he was currently an agent of a company" was not sufficient to constitute fraud. Consequently, it was up to ASSEDIC to prove that the author's position as manager prevented him from looking for full-time work. In the view of both the author and the Court of Civil Appeal, by reversing the burden of proof, the Criminal Court of Grasse violated the principle of the presumption of innocence.

5.6 The author refutes the State party's argument that he could have asserted his right to a fair trial before the Review Commission. The Commission procedure⁹ does not allow for that. The Commission's role is limited to determining whether new elements have come to light during the proceedings which would warrant reconsideration by the trial court. It is not the Commission's role to find procedural irregularities. Consequently, the author could not avoid first lodging his claims of violations of the Covenant before the Committee rather than first lodging them before national courts.

5.7 Since the author was materially unable to contest the procedural irregularities committed by the Criminal Court of Grasse or the violations committed by the Review Commission, he asks the Committee to include in his claims a violation of article 14, paragraph 5, of the Covenant.

Decision on admissibility

6.1 On 7 October 2009, at its ninety-seventh session, the Committee considered the admissibility of the communication.

6.2 The Committee noted the State party's argument that the communication was inadmissible for non-exhaustion of domestic remedies. It further noted that, according to

⁸ Communication No. 433/90, *A.P.A. v. Spain*, Views adopted on 25 March 1994.

⁹ Article 622 of the Code of Criminal Procedure.

the State party, the non-exhaustion of domestic remedies was due to the author's own inaction in failing to lodge an appeal within the time established in domestic law and that the appeal in cassation was not open to the author for the same reason. The Committee noted the State party's argument that the rights which had allegedly been disregarded had been and still were protected by the Covenant and that the ruling of the Criminal Court of Grasse made no mention of any allegation of omissions on the part of the French authorities.

6.3 The Committee noted the author's argument that he could not have claimed violations of the Covenant before they took place; and that the omissions on the part of the Criminal Court of Grasse and the Review Commission could not at any stage have been subject to appeal. The Committee further noted the author's claim that the difficulties he had encountered in attempting to exhaust domestic remedies could in fact be ascribed to the State party as well as to counsel; and that, in the author's civil claim against his counsel (see para. 5.3 above), the civil division of the Aix-en-Provence Court of Appeal had clearly recognized that the author's conviction had been the result of both negligence on the part of counsel and miscarriage of justice. The Court of Appeal had indeed held that, with regard to the substantive nullity of the ASSEDIC summons, it was "not just a purely factual error, but a matter which went to the very heart of the definition of the offence, insofar as J.O. should have been given the opportunity to prepare his defence on an informed basis".

6.4 The Committee noted in that regard that the State party had not commented on the ruling of the civil division of the Aix-en-Provence Court of Appeal even though that Court had established that the non-exhaustion of domestic remedies could be attributed not only to the author's counsel but also to the criminal courts. In those circumstances and in the absence of a counter-argument from the State party on that specific matter, the Committee found the communication admissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.5 As to the alleged discrimination against the author under article 26 of the Covenant, the Committee did not find the author's claim that the Review Commission had discriminated against him on grounds of nationality sufficiently substantiated for purposes of admissibility. The Committee thus considered that part of the communication inadmissible under article 2 of the Optional Protocol.

6.6 As to the allegations of violations under article 14, paragraphs 2, 3 (a) and (b) and 5; article 15, paragraph 1; and article 2, paragraph 1; the Committee found that the author had sufficiently substantiated his claims for purposes of admissibility.

State party's observations on the merits

7.1 On 21 May 2008, the State party submitted its preliminary observations on the merits, which it subsequently asked the Committee to disregard since the Committee had decided to consider the admissibility of the communication separately from the merits. On 25 May 2010, the State party informed the Committee that, since the communication had been declared admissible, it would be grateful if the Committee would transmit those observations to the author.

7.2 In its preliminary observations on the merits, the State party first of all disputes the claim that the author was not given sufficient time to prepare his defence. The file shows that the author was aware of the summons on 25 January 2001, when he sent a fax appointing counsel to represent him, saying that he could not attend the hearing owing to his professional obligations and the distance between the court and his current location. The summons had been served on 27 September 2000, and the hearing was scheduled for 26 January 2001, four months after the summons had been served, in accordance with article 552 of the Code of Criminal Procedure. The author claims that he had been residing outside

France for two years and therefore could not have known about the summons. The State party notes that when the author contested the legality of the summons, at no point did he invoke his change of address as a reason. The State party points out that under article 392-1 of the Code of Criminal Procedure, the court must first determine the sum that the civil party must deposit with the court office to guarantee the payment of any civil fine. The first hearing therefore concerns only the deposit, not the merits of the case. Between the time of the deposit hearing on 26 January 2001 and the hearing on the merits on 25 May 2001, the author had a four-month period to prepare his defence. Furthermore, the author's counsel never mentioned the alleged lack of time at the hearing on 25 May 2001, even though she did submit a written defence. The State party stresses that if this aspect had posed a problem for counsel, it would have been mentioned in the statement of defence, which was not the case.

7.3 As to the alleged violation of article 14, paragraph 3, of the Covenant, the State party points out that that provision guarantees that every individual accused of an offence is informed promptly and in detail in a language which they understand of the nature and cause of the charge against them.¹⁰ In the present case, the author had been summoned on 27 September 2000 to appear before the Criminal Court of Grasse at the hearing of 26 January 2001, at the request of the Alpes Maritimes branch of ASSEDIC. The accusation is clearly outlined in the summons, as is the legal basis for the criminal proceedings: “[the author] collected unemployment benefit while engaged in undeclared gainful employment from 28 February 1996 to 31 October 1997. Specifically, by fraudulent means [the author] improperly obtained unemployment benefits in the amount of X francs from the Alpes Maritimes branch of ASSEDIC. Accordingly, these acts constitute an offence of fraud or making a false statement to obtain unemployment benefits, which is a punishable offence under article L. 365-1 of the Labour Code”. The State party therefore considers the author's allegation on that matter to be unfounded.

7.4 With regard to the legal status of the offence, the State party cites article L. 365-1 of the French Labour Code in force from 21 December 1993 to 1 January 2002, which states that “anyone found guilty of fraud or making a false statement for the purpose of wrongfully obtaining, helping someone obtain, or attempting to help someone obtain unemployment benefits or the benefits referred to in article L. 322-4 shall be subject to 2 months' imprisonment and/or a fine of 25,000 francs, without prejudice to any penalties arising under other applicable laws. The court may also order the restitution of the sums improperly obtained”. The criminal division of the Court of Cassation stated in its decision of 27 February 1996 that “anyone who engages in an activity, even unpaid, that prevents them from taking positive steps to seek work has fraudulently obtained unemployment benefits”. The State party adds that while French law no longer calls for imprisonment as punishment for such acts, they are still defined as an offence under article L. 5429-1 of the Labour Code, which states that “unless the act is found to constitute the offence of fraud as defined and punished under articles 313-1 and 313-3 of the Criminal Code, the act of obtaining or attempting to obtain by fraudulent means the unemployment benefits defined in this Code, including the flat-rate benefit established by article L. 5425-3, is punishable by a fine of €4,000. The act of helping or attempting to help someone obtain the aforementioned benefits by fraudulent means is liable to the same penalty”. The State party thereby concludes that the charges against the author did in fact constitute an offence and that there is therefore no violation of article 15, paragraph 1, of the Covenant.

¹⁰ The State party cites communication No. 16/1977, *Mbenge v. Zaire*, Views adopted on 25 March 1983.

7.5 Regarding the author's claims under article 2, paragraph 1, of the Covenant, the State party expresses serious doubts about the author's inability to understand the French language to the extent that he could not distinguish between the terms *mandataire* ("agent") and *gérant* ("manager"). The author worked in France as an accounting and financial director for an insurance and reinsurance broker in a French branch of a British company. Furthermore, the other documents submitted by the author show that he has a perfect command of French. For example, his employment contract, written in French, had been signed on 4 March 1994 with the added handwritten note "*lu et approuvé*" (read and approved).

7.6 Regarding the obligation to notify an individual of a judgement handed down in absentia, the State party points out that the criminal division of the Court of Cassation rejected the appeal on the grounds that the contested judgement had correctly applied articles 411, paragraphs 1 and 2,¹¹ and article 498 of the Code of Criminal Procedure.¹² The Court of Cassation stated that "the authorization that the defendant addressed to the court granted his counsel the authority to represent him at each hearing to which the case was assigned, unless the defendant appeared in person before the court, until a judgement was pronounced". It also said that "when a defendant is represented by counsel, the deadline for lodging an appeal is counted from the moment the decision is pronounced". The State party considers this position to be in full conformity with the Court of Cassation's case law regarding the validity of an authorization for counsel to represent a defendant and regarding compliance with the *audi alteram partem* rule when a judgement is pronounced in the absence of a defendant and the defence has been heard. The criminal division of the Court of Cassation has repeatedly pointed out that "counsel is invested with a general right to assist and represent without having to prove that they have a specific authority to act, and that this appointment of judicial representation is valid for the duration of the legal proceedings".¹³ Secondly, the Court has repeatedly judged that, when the counsel of an

¹¹ Article 411 of the Code of Criminal Procedure in force at the time of the events in question stipulates that:

"the defendant accused of an offence punishable by a fine or by less than two years' imprisonment may, by means of a letter sent to the president and which will be attached to the case file, request to be tried *in absentia*.

The same applies in the case of private prosecution by the civil party, regardless of the duration of the penalty incurred.

In both cases the defendant's counsel shall be heard.

However, if the court considers it necessary that the defendant appear in person, the district prosecutor then issues a new summons to the defendant to appear at a hearing on a date set by the court.

Any defendant who does not answer this summons may be tried adversarially.

The defendant shall also be tried adversarially in the case set out in the first paragraph of this article".

¹² Article 498 of the Code of Criminal Procedure in force at the time of the events in question stipulates that "except in the case described in article 505, the appeal shall be lodged within 10 days after the judgement is pronounced. However, the time-limit for appeal runs only from the service of the judgement, however this was carried out: (1) for any party not present or represented at the hearing when the judgement was handed down, but only where such party or representative was not notified of the day when the judgement would be handed down; (2) for any party who requested to be tried *in absentia* under the conditions set forth in article 411, paragraph 1; (3) for any party who did not appear, under the conditions set forth in article 411, paragraph 4. The same applies in the cases set forth in articles 410 and 494-1".

¹³ The State party cites the decision of the criminal division of the Court of Cassation dated 27 October 1999.

absent defendant has been heard, “the appeal must be lodged within 10 days after the judgement is pronounced”.¹⁴ The State party thereby concludes that the author’s claim is unfounded.

7.7 In its additional submission dated 7 May 2010, the State party pointed out that the Committee had asked the State party in its 7 October 2009 decision on admissibility to comment on the ruling of the civil division of the Aix-en-Provence Court of Appeal, which had found a miscarriage of justice on the part of the criminal courts. The State party notes that the Aix-en-Provence Court of Appeal’s decision of 29 April 2008, which dealt exclusively with the professional responsibility of the author’s counsel, had in no way held the criminal courts responsible for the failure to exhaust domestic remedies. When the Court of Appeal indicated on page 6 of its decision that the failure to apply to have the summons set aside on 26 June 2000 or 25 May 2001, together with the lack of a possibility of appeal, had twice deprived the author of any reasonable prospect of having it set aside, both omissions were attributed to the author’s counsel, not the criminal courts. Indeed, the Court of Appeal found that it was counsel’s error that had deprived the author of any chance of acquittal and that it was appropriate to award damages.

7.8 The State party stresses that at no point is it stated that the criminal court failed to meet its obligations in respect of the manner in which the author was notified of its judgement. In other words, while it is true that the Court of Appeal’s decision criticizes the decision of the criminal court, it does so only to demonstrate counsel’s professional responsibility, as she alone was responsible for not having sought to have the summons set aside, as she could — and, according to the Court of Appeal, should — have done, and for not giving her client the possibility of appealing within the time allowed. The State party thus concludes that the criminal courts bear no responsibility for the failure to exhaust domestic remedies.

7.9 The State party further points out that the Court of Appeal found that the author’s counsel, in failing to meet her professional obligations, was to blame for depriving the author of any real prospect of avoiding conviction. The author had received compensation from the Court in this regard, as his counsel had been ordered to pay €60,000 in damages.

Author’s comments

8.1 In his comments dated 5 July 2010, the author rejects the State party’s argument that the Court of Appeal’s decision on 29 April 2008 dealt exclusively with the professional responsibility of the author’s counsel. He considers that in order to evaluate the consequences of counsel’s negligence, the Court of Appeal was obliged to consider the author’s guilt and thus imagine the outcome of the proceedings if the author had been able to appeal his conviction. It is in that context that the Court of Appeal concluded that the author had not committed the offence of which he was accused, that it confirmed his counsel’s negligence and that it underlined the criminal court’s failure to apply French criminal law. The author repeats that the Court’s finding of an omission on the part of the criminal court, which resulted in failure to apply domestic criminal law and thus a violation of the Covenant, was an integral part of the Court of Appeal’s decision of 29 April 2008. The author refers to his comments on that issue in paragraphs 5.4 and 5.5. He explains that he does not consider that responsibility is shared by the courts in all cases of counsel negligence, but in the present case the omissions of the criminal court were sufficiently serious to conclude that the failure to exhaust domestic remedies was also attributable to the State party authorities. Given the manifest errors highlighted by the civil division of the

¹⁴ Court of Cassation, criminal division, decision of 27 November 1978.

Court of Appeal, the author doubts that the State party is sincere when it asserts that the criminal courts bear no responsibility for the failure to exhaust domestic remedies.

8.2 The author further notes that the State party did not answer his point that the criminal court's judgement of 22 June 2001 did not mention the fact that Ms. Cohen-Seat, the author's counsel, was not present at the hearing on 25 May 2001. In such circumstances, the 10-day time limit for appealing the decision can only begin to run from the time of notification of the judgement to the author, yet, since the author never received a notification, the appeal lodged on 3 September 2001 was in time. Even though the criminal court was aware that the author was not represented by his initial counsel at the hearing, it failed to mention that fact in its decision, as it should have done, so the author did not have proof of the change of counsel at the hearing on 25 May 2001 until November 2006, when he was given access to his file at the Criminal Court of Grasse. The criminal court's decision should have included this information about the change of counsel. The author notes that the State party gave no comment or clarification regarding this claim.

8.3 Regarding the compensation the author received in the civil courts, where his counsel was ordered to pay €60,000 in damages for professional negligence, the author points out that this sum corresponds to the amount he received in unemployment benefits from 1996 to 1997 and was forced to pay back when he was convicted by the criminal court on 22 June 2001. This sum cannot be considered compensation for his wrongful conviction. The author considers that a civil court decision cannot be considered an effective remedy within the meaning of article 2, paragraph 3, of the Covenant. The author remains guilty in the eyes of the French justice system, following legal proceedings that did not apply the Covenant guarantees. This wrongful conviction continues to prevent the author from working as a qualified accountant, thereby jeopardizing his ability to provide for his family.

8.4 As to his claims under article 14, paragraph 3 (a), of the Covenant, the author complains that the State party simply quotes the summons, which states that "Mr. O. collected unemployment benefit while engaged in undeclared gainful employment from 28 February 1996 to 31 October 1997." As the author previously stated in his initial submission, that summons does not reflect reality because he had never received remuneration as manager of Riviera Communications (see para. 2.4). The State party did not comment on this discrepancy, confining itself to arguing that the author had been "clearly" informed of the charges against him. The issue is not the clarity, but the accuracy, of the charges. The author stresses that the charges in the summons, while clear, did not reflect the actual accusations against him. The author again refers to his claim under article 14, paragraph 3 (a) as set out as part of the complaint, in paragraph 3.2 of this communication, and to which the State party has given no response. To support his argument, the author refers to the case law of the European Court of Human Rights in the case of *Pélissier and Sassi v. France*, in which the Court considered that "particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on notice of the factual and legal basis of the charges against him". The Court goes on to say that "the Convention affords the defendant the right to be informed not only of the cause of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterization given to those acts, ... [which should] be detailed".¹⁵ The Court emphasizes that "in criminal matters the provision of full, detailed information concerning the charges against a

¹⁵ *Pélissier v. France*, application No. 25444/94, judgement of 25 March 1999 (Grand Chamber), para. 51.

defendant, and consequently the legal characterization that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair”.¹⁶

8.5 Regarding his claim under article 14, paragraph 3 (b), the author refers to his initial argument and repeats that the alleged violation derives from the fact that he was not informed of the real factual basis of the charges against him, which were explained in detail only at the hearing. The State party’s arguments on this point are therefore not relevant.

8.6 Regarding article 15, paragraph 1, the author points out that the State party misquotes the Court of Cassation’s decision in the case of X ... René of 27 February 1996. That decision states that “even though the defendant’s work during the period in question [...] was performed on a voluntary basis, the fact that it was full-time [...] still made it impossible for him to look for other work”. The Court concluded that “the trial courts determined that the defendant engaged in an activity that did not allow him to take positive steps to look for work”. This decision suggests that the authorities must also prove that the defendant’s voluntary work precludes him from actively looking for a job, yet in the present case, both the prosecution and the criminal court failed to ascertain, as they should have done, whether the author’s voluntary work prevented him from actively looking for work. In his complaint (para. 3.7), the author said that, in similar cases of false statements made for the purpose of obtaining unemployment benefits, the Commission for the Review of Criminal Convictions had considered that the false statements in question were not blatant enough to warrant the defendant being unable to receive the aforementioned unemployment benefits. Neither this comparison made by the author nor his related claims have been countered by the State party.

8.7 The author reiterates his arguments concerning article 2, paragraph 1, in particular regarding the differential treatment he suffered.

8.8 The author points out that the State party did not comment on his claims under article 14, paragraphs 2 and 5, even though the Committee declared them admissible. The author maintains his previous arguments regarding those provisions.

8.9 On 26 November 2010, the author submitted additional comments to the effect that on 1 April 2010 he had petitioned the Minister of Justice under article 620 of the Code of Criminal Procedure to order the Procurator-General of the Court of Cassation to ask the criminal division of the Court of Cassation to set aside the rulings of the Criminal Court of Grasse, dated 22 June 2001, and of the Aix-en-Provence Court of Appeal, dated 15 May 2003, as contrary to French law. That petition was based on the arguments the author had previously submitted to the Committee. The Minister of Justice rejected the request on 15 October 2010. The author stresses that such a petition does not conflict with the Committee’s decision on admissibility of 7 October 2009 insofar as the remedy provided by article 620 of the Code of Criminal Procedure cannot be considered as an effective remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol. In his comments, the author also explains that he submitted not one but two requests for revision, the second following the judgement pronounced in the civil proceedings of the Aix-en-Provence Court of Appeal on 29 April 2008. In this second request, the author argued that the Court of Appeal’s 2008 decision addressed not only the negligence of the author’s counsel but also the miscarriage of justice by the Criminal Court of Grasse, and that consequently the criminal proceedings should be reviewed in the light of the civil court’s findings. The second request for revision was rejected on 29 September 2009. A careful reading of the second rejection by the Commission for the Review of Criminal Convictions led the author

¹⁶ Ibid., para. 52.

to conclude that the evidence submitted in support of his request for revision was sufficient to merit new criminal proceedings.

Consideration of the merits

9.1 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.

9.2 The Committee notes the author's allegation under article 14, paragraph 3 (a), in which he claims that the summons dated 27 September 2000 contained an error that the criminal courts could not consider as a simple "factual error", in stating that the author was accused of having collected unemployment benefit while engaged in "undeclared gainful employment". The author considers that the error failed to reflect the actual accusations and charges against him. The Committee recalls its general comment No. 32 on article 14,¹⁷ which guarantees the right of all persons charged with a criminal offence to be informed promptly and in detail of the nature and cause of the charge against them. The specific requirements of subparagraph 3 (a) may be met by stating the charge either orally — if later confirmed in writing — or in writing, provided that the information indicates both the law and the alleged general facts on which the charge is based.¹⁸ It must therefore be determined whether, in the present case, the summons dated 27 September 2000 meets the requirements of article 14, paragraph 3 (a), of the Covenant. The Committee is of the view that the State party has not clarified this point, as it simply reproduced the wording of the summons of 27 September 2000 without providing the necessary explanation.

9.3 The Committee therefore decided to examine the content of the summons, a copy of which was provided by the author. It notes first of all that the summons dated 27 September 2000 (that is, before it was amended by the criminal court at the hearing of 26 January 2001) is contained in a six-page document that specifies the offence and the applicable legal provisions as well as the allegations of fact. Those allegations state that the author registered as a jobseeker on 31 January 1996; that he had received unemployment benefits from 28 February 1996 to 31 October 1997; that the author had stated that he had been fully unemployed since 31 December 1995; that the file had been reviewed following an application by the author for employment under a cooperation agreement between the unemployment insurance and a private company; and that it had then come to light that the author had held a managerial position with Riviera Communications since the company's foundation on 21 October 1993. The summons further states that, in light of this activity, which was unpaid but also had not been declared at the proper time, the author's file had been submitted to the Joint Committee of ASSEDIC, which had decided that this activity was incompatible with the status of jobseeker. The Committee notes that it is only after this long statement of the facts that the contested passage appears, and it refers to gainful employment rather than undeclared activity. It must be said that the summons from which the Committee has cited the relevant passages does not seem confusing, despite the factual error highlighted by the author. The Committee therefore concludes that article 14, paragraph 3 (a), has not been violated in the present case.

9.4 Regarding the complaints concerning article 14, paragraph 3 (b), the Committee notes that the factual error in the summons had been pointed out by ASSEDIC and then amended by the criminal court at the hearing on 26 January 2001, four months prior to the hearing on the merits of the case. The Committee concludes that, if the author was not given an appropriate defence, the responsibility rests with his counsel, who did not use the

¹⁷ Para. 31.

¹⁸ See also communication No. 16/1977, *Mbenge v. Zaire*, Views adopted on 25 March 1983, para. 14.1.

time available to prepare a defence. The Committee concludes that the facts before it do not show any violation of article 14, paragraph 3 (b), of the Covenant.

9.5 Concerning the claim under article 14, paragraph 2, the Committee notes the author's argument that it was up to ASSEDIC to prove that the managerial position he held prohibited him from looking for full-time work, and that by reversing the burden of proof the Criminal Court of Grasse violated the principle of the presumption of innocence. The Committee notes the State party's argument that the author was accused of fraud or making a false statement in order to obtain unemployment benefits and that the charges against the author therefore constituted an offence under article L. 365-1 of the French Labour Code. The Committee notes that in its judgement of 22 June 2001, the criminal court stated that in his ASSEDIC application of 31 January 1996, the author had replied "No" to the question "Are you currently an agent (*mandataire*) of a company, group or association?"; that under articles L. 351 et seq. of the Labour Code, in order to receive unemployment benefits, it is necessary to have been unemployed and to be engaged in a full-time, effective job search; that the author has not proved that during the period in question, his position as manager of Riviera Communication allowed him to engage in a full-time, effective job search; and that consequently he must have been aware that his sworn statement on 31 January 1996 had been false.

9.6 The Committee recalls its general comment No. 32 on article 14, which states that the presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle.¹⁹ In this case, it is undeniable that the author was not given a proper defence owing to his lawyer's lack of diligence. Nor has it been denied that during the hearing of 25 May 2001, the author was represented not by his counsel, but by another who was not authorized to do so; and that it was during this hearing that the content of the summons to appear before the court, and thus of the charges against the author, was explained in detail. At this hearing, the criminal court simply stated that the author had failed to prove that he had not violated articles L. 351 et seq. of the Labour Code, without offering any evidence in support of this accusation. In view of the limited opportunity for defence available to the author, the Committee considers that the State party's courts placed a disproportionate burden of proof on the author and did not prove beyond a reasonable doubt that he was guilty of the offences of which he was accused. The Committee therefore considers that the State party has violated article 14, paragraph 2.

9.7 As to the author's claims under article 14, paragraph 5, the Committee considers that failure to notify the author of the ruling in first instance, when he had not been represented by the counsel who was authorized to do so, denied him his right of appeal. The Committee concludes that the facts before it reveal a violation of article 14, paragraph 5, of the Covenant.

9.8 Regarding the author's claim that article 15, paragraph 1, of the Covenant was violated because the alleged false statements were not sufficiently blatant to establish an offence under French criminal law, the Committee notes that the act of which the author was convicted, namely fraud, in fact constituted a criminal offence under the French Criminal Code at the time the act was committed.²⁰ The Committee therefore considers that article 15, paragraph 1, of the Covenant was not violated in the present case.

¹⁹ Para. 30.

²⁰ See communication No. 1157/2003 *Patrick Coleman v. Australia*, Views adopted on 17 July 2006, para. 6.4.

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 14, paragraphs 2 and 5, of the Covenant, in conjunction with article 2 of the Covenant.

11. 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 a review of his criminal conviction and appropriate compensation. The State party is also under an obligation to ensure that similar violations do not occur in the future.

12. Bearing in mind that, by becoming 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 guarantee 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 its Views. The State party is also requested to publish the Committee's Views.

[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.]

**GG. Communication No. 1621/2007, *Raihman v. Latvia*
(Views adopted on 28 October 2010, 100th session)***

<i>Submitted by:</i>	Leonid Raihman (also known as Leonīds Raihmans) (represented by counsel, Aleksejs Dimitrovs)
<i>Alleged victims:</i>	The author
<i>State party:</i>	Latvia
<i>Date of communication:</i>	1 June 2007 (initial submission)
<i>Subject matter:</i>	Spelling of author's name according to Latvian orthography in identity documents
<i>Procedural issue:</i>	Non-exhaustion of domestic remedies
<i>Substantive issues:</i>	Arbitrary and unlawful interference with private life; prohibition of discrimination; protection of minorities
<i>Articles of the Covenant:</i>	17, alone and read in conjunction with article 2, paragraph 1; 26 and 27
<i>Articles of the Optional Protocol:</i>	1; 2; 5, paragraph 2 (b)

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

Meeting on 28 October 2010,

Having concluded its consideration of communication No. 1621/2007, submitted to the Human Rights Committee by Mr. Leonid Raihman (also known as Leonīds Raihmans) 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 author of the communication, dated 1 June 2007, is Leonid Raihman (also known as Leonīds Raihmans), a Latvian national, member of the Jewish and Russian-speaking minorities. He was born "Leonid Raihman" in 1959, and both his name and surname were registered as such by the Soviet Union public authorities, and used since then until January 1998, when the Latvian authorities changed his name and surname to the non-Russian, non-Jewish form of "Leonīds Raihmans", although the author did not consent to

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin. An individual opinion signed by Committee members Mr. Krister Thelin and Mr. Rafael Rivas Posada is appended to the text of the present Views.

this change. He claims to be a victim of violations by Latvia of article 17, read alone and in conjunction with article 2, paragraph 1, article 26 and article 27 of the International Covenant on Civil and Political Rights. He is represented by counsel, Aleksejs Dimitrovs. The International Covenant on Civil and Political Rights entered into force for Latvia on 14 July 1992, and the Optional Protocol on 22 September 1994.

1.2 On 30 January 2008, the Special Rapporteur on new communications and interim measures decided that the admissibility of the communication should be considered jointly with the merits.

The facts as submitted by the author

2.1 The author is a Latvian national, and a member of the Jewish and Russian-speaking minorities. He was born “Leonid Raihman” in 1959, and both his name and surname were registered as such by the Soviet Union public authorities, and used since then, including on his USSR passport, until January 1998. At that time, the author received a passport as a “non-citizen of Latvia” with his name and surname changed to the non-Russian, non-Jewish form of “Leonīds Raihmans”, although the author did not consent to this change. In January 2001, after becoming a citizen of Latvia through naturalization, he received a Latvian passport bearing the same name of “Leonīds Raihmans”. The author claims that Raihman is a Jewish surname, which was used at least by his father, grandfather and grand-grandfather before him. His son was also born a Raihman in 1989.

2.2 The author has sought unsuccessfully to have his name officially recorded in accordance with its original Russian and Jewish origins, namely “Leonid Raihman” instead of its Latvian form. On 10 February 2004, the author applied to the State Language Centre,¹ asking this entity to adopt a decision authorizing his name (Raihman) to be spelled without the ending “s” required under Latvian grammar rules for masculine names. He also asked that such decision allow him to spell his first name (Leonid) with an “i” instead of a “ī”. The author argued that the imposition by the State party’s authorities of a Latvian spelling for his name was in breach of article 91 (non-discrimination), and article 114 (right to preserve cultural and ethnic identity) of the Constitution of the Latvian Republic, articles 17, 26 and 27 of the Covenant, as well as articles 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. On 20 February 2004, his application was dismissed because the State Language Centre determined that the Centre’s decision could not be considered as an administrative act which may create obligations for the passport-issuing body.

2.3 On 18 March 2004, the author challenged the State Language Centre decision before the District Administrative Court, which rejected his claim on 11 May 2004. On 16 July 2004, this decision was upheld by the Regional Administrative Court. On 3 August 2004, the Supreme Court sent the case back to the District Administrative Court, recognizing that the State Language Centre decision was an administrative act, and that the case should be considered on the merits. On 5 November 2004, the District Administrative Court rejected the author’s claim, arguing that the State Language Centre adopted its decision based on the Official Language Law (1999) and the Regulation No. 295 on spelling and identification of names and surnames (22 August 2000). The Court ruled that the Centre did not have the power to decide on the spelling of a name, as personal names can only be written in the Latvian language, based on the applicable legislative scheme. The Administrative Court also referred to a judgement of the Constitutional Court of Latvia,² in which it upheld the

¹ Observance of the Official Language Law (1999) is monitored by the State Language Centre, which is run by the Ministry of Justice.

² Case No. 2001-04-0103 of 21 December 2001.

constitutionality of section 19 of the Official Language Law (1999).³ In that judgement, the Constitutional Court had found that the imposition of a Latvian spelling for all personal names on official documents was a restriction necessary to meet the legitimate aim “to ensure the rights of other residents of Latvia to freely use Latvian on the whole territory of the Republic, and to protect the democratic state system, as well as to contribute to the Latvian language system stability”.

2.4 On 21 November 2005, the Regional Administrative Court upheld this decision, deferring to the Constitutional Court decision of 21 December 2001. The Court also noted that based on section 19, paragraph 2, of the Official Language Law, a person can request to have his/her name also reproduced in its original form on official documents.⁴ The Court further stressed that a personal name mainly reflected the belonging to a certain family and motherland, but could only in exceptional circumstances be such as to reflect belonging to an ethnic group. The Court considered the restriction imposed by the State Language Law to raise issues related to privacy rather than the right to ethnic identity. The Court further noted that such restriction did not aim at a “Latvianisation” of names, but was only an adjustment to the specific features of Latvian grammar.

2.5 On 16 May 2006, the Supreme Court (Department of Administrative Cases) upheld the decision of the Regional Administrative Court for the same reasons, with regard to the addition of the ending “s” to the author’s surname. Concerning the spelling of his first name with “ī” instead of “i”, the case was sent back to the Regional Administrative Court for consideration on the merits. Therefore, the author claims that he has exhausted domestic remedies with regard to the spelling of his surname with an “s”. The Supreme Court confirmed that the legislative restriction impugned was proportionate to the legitimate aim sought, and that it did not raise issues regarding equality, as it treated all names equally, regardless of their origin.

The complaint

3.1 The author claims that the legal requirement imposing a Latvian spelling for his name in official documents constitutes a breach of his rights under article 17, read alone and together with article 2, paragraph 1, article 26 and article 27 of the Covenant. Regarding article 17, the author affirms that the right to retain his given and family name, including its graphical representation in writing, is an essential element of his identity. He argues that his right to have his name spelled according to its original spelling is an integral part of his right not to be subjected to arbitrary or unlawful interference with his privacy.⁵ In the present case, the author considers that his name was changed

³ Section 19 of the Official Language Law provides:

(1) Names of persons shall be presented in accordance with the traditions of the Latvian language and written in accordance with the existing norms of the literary language, observing the provisions of Paragraph two of this Section.

(2) There shall be set out in a passport or birth certificate, in addition to the name and surname of the person presented in accordance with the existing norms of the Latvian language, the historic family name of the person, or the original form of the personal name in a different language, transliterated in the Roman alphabet, if the person or the parents of a minor person so wish and can verify such by documents.

(3) The written form and identification of names and surnames, as well as the written form and use in the Latvian language of foreign language personal names, shall be regulated by Cabinet regulations.

⁴ *Ibid.*, para. 2.

⁵ The author refers to the Committee’s communication No. 453/1991, *Coeriel and Aurik v. The Netherlands*, Views adopted on 31 October 1994, para. 10.2.

unilaterally and without his consent, so as to comply with Latvian spelling. He considers that such interference with his privacy is arbitrary. He adds that the Latvian spelling of his name and surname “looks and sounds odd” as it does not reflect a Jewish, a Russian, nor a Latvian name. It gives rise to various consequences in his daily endeavours, such as failed banking transactions, delays in immigration controls at airports, as well as other inconvenience in daily life. The author also claims that not being entitled to use his original name also has a significant bearing in private settings, notably regarding his interactions with his Russian-speaking and Jewish community.

3.2 The author further contends he was given a less favourable treatment than other Latvian residents because of his language and ethnic origin. Unlike him, persons belonging to the Latvian-speaking community (mainly ethnic-Latvians) can use their own names without any change. He argues that the interference by the State party with his privacy is therefore discriminatory, on the basis of language and, indirectly, ethnic origin, in violation of article 17, read in conjunction with article 2, paragraph 1. The author adds that such interference is disproportionate and unreasonable, as it has no bearing with the officially stated aim of ensuring that Latvians are able to use their own language. As such, he contends that the measure is arbitrary.

3.3 With regard to article 26, the author argues that this provision provides for an autonomous right, and prohibits direct and indirect discrimination. He notes that legislation adopted by the State party, which may appear to be neutral, may nevertheless result in discrimination under article 26 if it adversely impacts a certain category of persons, while not being based on objective and reasonable criteria.⁶ Latvian is the native language of some 58 per cent of the population. Therefore, the legislative restrictions aimed at modifying foreign names for these to conform with Latvian grammar impact negatively on a significant proportion of the non ethnic-Latvian population, who are de facto denied the same advantage enjoyed by most ethnic Latvians, i.e. the use of their own name and surname. According to the author, this effect is disproportionate with the aim sought by the State party, which is dubious in itself.

3.4 Concerning article 27, the author affirms that the Russian linguistic minority has existed in Latvia for centuries, and represents some 37.5 per cent of the population. He adds that Russian is the mother tongue for 79 per cent of Latvian Jews. The author stresses that a personal name, including the way it is spelled, is an essential cultural element for ethnic, religious and linguistic communities, and is strongly linked to their identity. He adds that the right to use one’s own language, among members of a minority, is an essential right covered by article 27 of the Covenant. According to the author, the refusal by the State party’s authorities to accept the original spelling of his name and surname amounts to a denial of his right to use his own language with other members of his community, both Russian and Jewish. He adds that he faces a form of assimilation pressure, which is not compatible with the aim and purpose of article 27.⁷

⁶ The author refers to the Committee’s general comment No. 18 (1989) on non discrimination, *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40*, vol. I (A/45/40 (Vol. I)), annex VI, sect. A, para. 12.

⁷ The author refers to the Committee’s general comment No. 23 (1994) on the rights of minorities, *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 40*, vol. I (A/49/40 (Vol. I)), annex V, para. 9, and to Manfred Nowak, *UN Covenant on Civil and Political Rights. CCPR Commentary*, (Kehl am Rhein, Engel, 1993), p. 502.

State party's submissions on admissibility

4.1 On 28 January 2008, the State party challenged the admissibility of the communication. First, it alleged that the author did not exhaust domestic remedies, as required by article 2 of the Optional Protocol and rule 90 (f) of the Committee's rules of procedure. The author had an effective remedy available before the Constitutional Court. The State party claims that in its judgment of 21 December 2001, the Constitutional Court was seized with the issue of the constitutionality of article 19 of the Language Law, as well as three relevant, associated regulations.⁸ While the Court upheld the constitutionality of article 19 of the Official Language Law, it found the three regulations challenged to be unconstitutional. As a result, they were all repealed, and replaced by new legislative provisions,⁹ which have not yet been challenged on their constitutional legality. The author has therefore not exhausted domestic remedies at his disposal.

4.2 The State party further submits that the author's complaint under article 17 should be held inadmissible under articles 1 and 2 of the Optional Protocol as incompatible *ratione personae*, as the author failed to demonstrate that he was a "victim" of a violation of article 17 of the Covenant. The State party emphasizes that following the decision of the Constitutional Court of 21 December 2001, it undertook a number of mitigation measures, such as establishing that the original or historical form of the identity document-bearer be reproduced on page 4 of the passport. Pursuant to article 10 of Regulation No. 295 on spelling and identification of names and surnames (which was applicable at the time when the author was issued a new passport), the form of a personal name in the Latvian language had identical legal force with its original, historical or transliterated form. The same principle continues to prevail through articles 145 and 146 of Regulation No. 114 on spelling and usage of personal names in the Latvian language, as well as identification. The State party contends that the author did not suffer a prejudice as a result of the reproduction of his name in its Latvian form on his passport. He has failed to show that the Latvian State authorities disregarded or disputed the original form of his name, or what inconvenience he suffered as a result. The inconvenience encountered by the author during his travels may be attributed to other States, the responsibility of which cannot be imputed to the State party. As a result, it cannot be held that the Latvian authorities breached the author's right to privacy under article 17 of the Covenant.

4.3 Similarly, the State party is of the view that the author failed to show, for purposes of admissibility, that he was the victim *ratione personae* of a violation under article 27 of the Covenant. He has not demonstrated that the State party was guilty of omissions, which precluded his enjoyment of the rights guaranteed under this article. The requirement of reproduction of personal names in accordance with Latvian grammar only relates to official documents. The author remains free to use his original name in his private life, professional activities, and with his family and community members. As such, the State party considers that his claim is inadmissible under article 2 of the Optional Protocol. Subsidiarily, the State party argues that the author's claim is ill-founded.

4.4 With regard to article 2, paragraph 1, of the Covenant, the State party considers that this provision cannot be invoked directly and in isolation. As he failed to show that he was

⁸ Regulations No. 295 on spelling and identification of names and surnames, No. 310 on Latvian citizens' passports and No. 52, on the procedure for implementation of Regulation No. 310.

⁹ Regulation No. 114 on spelling and usage of personal names in the Latvian language, as well as identification; Law on personal identification documents; and Regulation No. 378 on citizens' identification documents, non-citizens' identification documents, citizens' passports, non-citizens' passports and stateless persons' travel documents (which provides that the original form of personal names shall be entered in the passport's fourth page)

the victim of a violation of article 17, the author cannot allege a violation of article 2, paragraph 1, alone.

4.5 Regarding the author's claims under article 26, the State party argues that he failed to show, for admissibility purposes, that he was discriminated against on the basis of language and ethnic origin. The legal provisions providing for the reproduction of personal names in Latvia are equally applicable to all personal names registered in passports.

State party's submissions on merits

5.1 On 27 May 2008, the State party argues that there is no violation of article 17, taken alone or in conjunction with article 2, paragraph 1. The author's name was not changed, but merely reproduced by applying relevant statutory provisions applicable to names of foreign origin. Article 17 of the Covenant does not protect the right to a name, as the text of the provision does not make a direct reference to the name, and neither Human Rights Committee general comment No. 16 (1988) on the right to privacy,¹⁰ nor the jurisprudence, clearly defined the scope of the right to privacy. It cannot therefore be said that this right encompasses the graphical representation of a name, which was solely modified to adapt it to the particularities of the Latvian language. Therefore, this measure did not infringe the author's rights under article 17. Subsidiarily, the State party submits that should the Committee conclude otherwise, the right to privacy is not an absolute right, and the interference suffered by the author had the legitimate aim to ensure the proper functioning of the Latvian language as in integral system, which is a social necessity. The State party further stresses that the measure undertaken is reasonable in relation to the goal sought. It adds that the measure was provided for by law, and was, as such, lawful and not arbitrary.

5.2 Regarding article 2, paragraph 1, the State party argues that the author failed to demonstrate that he has been discriminated against on the basis of language or ethnic origin. It affirms that the author was treated in the same way as all other ethnic Latvians, whose names are also subjected to grammatical declinations on the basis of gender.

5.3 Similarly, in relation to article 26, the State party reiterates that the provisions governing the reproduction of names in official documents are equally applicable to all personal names, regardless of their language or ethnic origin.¹¹ As a result, the State party submits that the author's claim under article 26 is ill-founded.

5.4 On article 27, the State party reiterates that section 19 of the Official Language Law only regulates the reproduction of personal names on official documents. This does not extend to the use of the original or historic form of an individual's name in private contexts, including in ethnic communities. The author failed to show that he was denied the right to use his name in its original form among the Jewish or Russian-speaking community, nor could he name any institution or persons who prevented him from using his name in such context. On the contrary, the State party notes that the author used his name in its original form on internet websites, as well as in publications and researches. It concludes that his complaint under article 27 is manifestly ill-founded or, alternatively, that there has been no violation of article 27.

¹⁰ *Official Records of the General Assembly, Forty-third Session, Supplement No. 40 (A/43/40)*, annex VI.

¹¹ The State party refers to jurisprudence of the European Court of Human Rights (ECHR), notably the case of *Kuharec v. Latvia*, application No. 71557/01, where the ECHR found that declinable gender endings are added to all personal names equally, irrespective of whether they are of Latvian language or other language origin. As a consequence, the Court held that the treatment impugned could not be held discriminatory.

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

6.1 On 18 February 2009, the author submitted comments in response to the State party's observations on both admissibility and merits. Regarding the question of exhaustion of domestic remedies, he argues that in the light of the Constitutional Court decision of 21 December 2001, no remedy was available that would have offered him a reasonable prospect of success.¹² He stresses that in that decision, the Constitutional Court upheld the constitutionality of the policy of "Latvianisation" of names, and while it outlawed the legal provision specifying the place where the original names of passport-holders' could appear, it simply means, in practice, that the historic/original form of the name can now appear on the fourth page of passports. The author stresses that decisions of the Constitutional Court are legally binding, and should he have brought a complaint before this instance on the legality of section 19 of the Official Language Law, which was already considered by the Court, his case would have been declared inadmissible. The fact that throughout the legal proceedings he undertook, this decision of the Constitutional Court was extensively referred to, is an additional indication of this.

6.2 The author reiterates that the imposed restriction on the writing of his name is an arbitrary measure inconsistent with article 17, and that a personal name, including the way it is spelled, is an essential element of personal identity. The declinable endings added to his name and surname disclose a change in his name, not only in its graphic representation, but also in its pronunciation. The derogation permitted by article 19, 2, of the Official Language Law, allowing the original form of the name to appear on passports and birth certificates, only extends to these specific documents. Also, there is no indication that the historic form of the name has the same legal value as the official version under that law. The author contests the fact that he is free to use his original name in private endeavours, such as banking transactions, and provides an example of instances where despite his request, he had to use the official form of his name to be able to renew his credit card and his driving licence. Referring to the *Coeriel and Aurik* decision of the Committee,¹³ the author contends that if article 17 protects the right to change one's name, it *a fortiori* protects the right to restore forcibly changed names. In conclusion, he invites the Committee to hold that the State party breached article 17 in his regard. To the extent that the language policy affects only the non Latvian-speaking minority, which represents a significant proportion of the State party's population, the author also reiterates that the State party breached article 17, read in conjunction with article 2, paragraph 1, of the Covenant.¹⁴

6.3 Regarding article 26, the author reaffirms that the Official Language Law de facto results in discrimination for the ethnic and linguistic minorities in Latvia, which are denied the right to use their own name and surname in accordance with their own language rules, an advantage guaranteed and enjoyed by ethnic Latvians. The author reaffirms that such restriction is disproportionate to the aim sought. As a conclusion, he reiterates that the State party breached article 26 in his regard.

6.4 Concerning article 27, the author reaffirms that his rights under article 27 have been breached by the denial to use his name in daily and professional activities, and in his interactions with members of his community.

¹² The author refers to communication No. 437/1990, *Patiño v. Panama*, decision on admissibility adopted on 21 October 1994, para. 5.2.

¹³ See note 5 above.

¹⁴ The author also refers to the Committee's concluding observations (CCPR/CO/79/LVA), para. 19, in which the Committee expressed concern over the impact of the language policy on minorities, including the significant Russian-speaking minority.

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 and procedures, decide whether or not it is admissible under the Optional Protocol of 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 the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

7.3 With regard to the requirement laid down in article 5, paragraph 2 (b), of the Optional Protocol, and the State party's argument that the author did not exhaust domestic remedies at his disposal, the Committee notes that the author unsuccessfully sought to have his name officially recorded in its original Russian and Jewish form, namely "Leonid Raihman" instead of its Latvian form currently used on his official identity documents. The author applied to the State Language Centre, to the District Administrative Court, the Regional Administrative Court, and ultimately to the Supreme Court, which upheld the decision of the Regional Administrative Court with regard to the addition of the ending "s" to the author's surname. The Committee also took note of the decision of the Constitutional Court of 21 December 2001, which upheld the constitutionality of article 19 of the Language Law, which provides that "names of persons shall be presented in accordance with the traditions of the Latvian language, and written in accordance with the existing norms of the literary language" (para. 1). The Committee notes that this decision was applied as a binding precedent throughout the legal decisions adopted against the author. It recalls that only domestic remedies, which are both available and effective, must be exhausted. In the present case, the author's complaint relates directly to the same issue already considered by the Constitutional Court in 2001. It is therefore reasonable to assume that should the author lodge an appeal before this instance, it would in all likelihood be rejected. In these circumstances, the Committee finds that article 5, paragraph 2 (b), of the Optional Protocol does not preclude it from considering of the communication.

7.4 Regarding the State party's argument that the author could not establish that he was a "victim" in the sense of article 1 of the Optional Protocol, concerning his allegations relating to articles 17 and 27 of the Covenant, the Committee recalls that a person may not claim to be a victim within the meaning of article 1 of the Optional Protocol unless his or her rights have actually been violated, and that no person may contest a law or practice which that person holds to be at variance with the Covenant in theoretical terms by *actio popularis*.¹⁵ In the instant case, the Committee finds that the author has shown sufficient standing, in that he has sufficiently substantiated that the legislation and policy on State language have directly impaired his rights under article 17, read alone and in conjunction with article 2, paragraph 1, article 26 and article 27 of the Covenant. It therefore proceeds to the examination of these allegations on the merits.

Consideration of merits

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

¹⁵ See communications No. 318/1988, *E.P. et al. v. Colombia*, decision on inadmissibility adopted on 25 July 1990, para. 8.2; No. 35/1978, *Aumeeruddy-Cziffra et al. v. Mauritius*, Views adopted on 9 April 1981, para. 9.2, and No. 1746/2008, *Goyet v. France*, decision on admissibility adopted on 30 October 2008, para. 6.3.

8.2 Regarding the alleged violation of article 17, the Committee has taken note of the author's argument that the legal requirement imposing a Latvian spelling for his name in official documents, after 40 uninterrupted years of use of his original name, resulted in a number of daily constraints, and generated a feeling of deprivation and arbitrariness, since he claims that his name and surname "look and sound odd" in their Latvian form. The Committee recalls that the notion of privacy refers to the sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others, or alone. The Committee further expressed the view that a person's surname constitutes an important component of one's identity, and that the protection against arbitrary or unlawful interference with one's privacy includes the protection against arbitrary or unlawful interference with the right to choose and change one's own name.¹⁶ In the present case, the author's name was modified so as to comply with the Latvian grammatical rules, in application of section 19 of the Official Language Law and other relevant regulations. The interference at stake cannot, therefore, be regarded as unlawful. It remains to be considered whether it is arbitrary.

8.3 The Committee recalls its general comment on the right to privacy,¹⁷ where it established that the expression "arbitrary interference" can also extend to interference provided for under the law. The Committee notes that section 19 of the State party's Official Language Law provides for the broad and general principle that all names must comply with the Latvian language, and be written according to the Latvian rules. No exception is contemplated for names of different ethnic origin. The Committee recalls that the introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.¹⁸ It took note of the State party's stated aim for such interference, said to be a measure necessary to protect the Latvian language and its proper functioning as an integral system, including through guaranteeing the integrity of its grammatical system. The Committee further took note of the difficulties to which the Latvian language was exposed during the Soviet rule, and considers that the objective stated is a legitimate one. The Committee however finds that the interference entailed for the author presents major inconveniences, which are not reasonable, given the fact that they are not proportionate to the objective sought. While the question of legislative policy, and the modalities to protect and promote official languages is best left to the appreciation of State parties, the Committee considers that the forceful addition of a declinable ending to a surname, which has been used in its original form for decades, and which modifies its phonic pronunciation, is an intrusive measure, which is not proportionate to the aim of protecting the official State language. Relying on previous jurisprudence, where it held that the protection offered by article 17 encompassed the right to choose and change one's own name, the Committee considers that this protection *a fortiori* protects persons from being passively imposed a change of name by the State party. The Committee therefore considers that the State party's unilateral modification of the author's name on official documents is not reasonable, and thus amounted to arbitrary interference with his privacy, in violation of article 17 of the Covenant.

8.4 Having found a violation of article 17, with respect to the unilateral change of the author's name by the State party, the Committee does not consider it necessary to address whether the same facts amount to a violation of article 26, article 27, or article 2, paragraph 1, read in conjunction with article 17.

¹⁶ See *Coeriel and Aurik v. The Netherlands* (note 5 above), para. 10.2.

¹⁷ General comment No. 16 (note 10 above), para. 4.

¹⁸ See Communication No. 558/1993, *Canepa v. Canada*, Views adopted on 3 April 1997, para. 11.4.

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 17 of the International Covenant on Civil and Political Rights.

10. Pursuant to article 2 of the Covenant, the State party is under an obligation to provide Mr. Raihman with an appropriate remedy, and to adopt such measures as may be necessary to ensure that similar violations do not occur in the future, including through the amendment of relevant legislation.

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 when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. In addition, it requests the State party to publish the Committee's Views.

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

Appendix

Individual opinion of Committee members Mr. Rafael Rivas Posada and Mr. Krister Thelin (dissenting)

The majority has found a violation in this case. We respectfully disagree. The reasoning and conclusions on the merits should in our view instead read as follows:

8.2 Regarding the alleged violation of article 17, the Committee has taken note of the author's argument that the legal requirement imposing a Latvian spelling for his name in official documents, after 40 uninterrupted years of use of his original name, resulted in a number of daily constraints, and generated a feeling of deprivation and arbitrariness, since he claims that his name and surname "look and sound odd" in their Latvian form. The Committee recalls that the notion of privacy refers to the sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others, or alone. The Committee further expressed the view that as person's surname constitutes an important component of one's identity, and that the protection against arbitrary or unlawful interference with one's privacy includes the protection against arbitrary or unlawful interference with the right to choose and change one's own name.¹⁶ In the present case, the author's name was modified so as to comply with the Latvian grammatical rules, in application of section 19 of the Language Law and other relevant regulations. The interference at stake cannot, therefore, be regarded as unlawful. It remains to be considered whether it is arbitrary.

8.3 The Committee recalls its general comment on the right to privacy,¹⁷ where it established that the expression "arbitrary interference" can also extend to interference provided for under the law. The Committee notes that section 19 of the State party's Official Language Law provides for the broad and general principle that all names must comply with the Latvian language, and be written according to the Latvian rules. The Committee recalls that the introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.¹⁸ The Committee takes note of the difficulties to which the Latvian language was exposed during the Soviet rule, and accepts the State party's argument that the linguistic policy and laws adopted are necessary to protect the Latvian language, including the integrity of its grammatical system. The Committee stresses that the question of legislative policy and the modalities to protect and promote official languages are best left to the appreciation of States, and finds the State party's objective to be a legitimate one in the circumstances. The Committee further finds that the interference entailed for the author was proportional to the aim sought, and concludes that it was reasonable. As such, the State party's modification of the author's name on official documents does not amount to arbitrary interference with his privacy within the meaning of article 17 of the Covenant.¹⁹

¹⁶ See *Coeriel and Aurik v. The Netherlands* (note 5 above), para. 10.2.

¹⁷ General comment No. 16 (note 10 above), para. 4.

¹⁸ See communication No. 558/1993, *Canepa v. Canada*, Views adopted on 3 April 1997, para. 11.4.

¹⁹ Cf. the European Court of Human Rights in *Kuhareca v. Latvia*, application No. 71557/01 (7 December 2004), and *Mencena v. Latvia*, application No. 71074/01 (7 December 2004).

8.4 Regarding article 26, the Committee takes note of the author's argument that the Official Language Law, while it may appear to be neutral, results in discrimination under article 26 on the basis of language and ethnic origin in his regard, as it adversely impacts the non-ethnic Latvian and non Latvian-speaking minority. He claims that unlike the Latvian majority, he cannot use his name in its original form. The Committee recalls that a violation of article 26 may result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate. However, such indirect discrimination can only be said to be based on the grounds set out in article 26 of the Covenant if the detrimental effects of a rule or decision exclusively or disproportionately affect persons having a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, rules or decisions with such an impact do not amount to discrimination if they are based on objective and reasonable grounds.²⁰ In the circumstances of the present case, the Committee notes that the imposition, through section 19 of the Official Language Law, of a name spelling, which is in conformity with the Latvian grammar, applies to all individuals equally, be it ethnic Latvians or members of minorities such as the Jewish and Russian-speaking minority. Accordingly, the Committee considers that the restriction imposed is based on objective and reasonable grounds. As a result, such interference does not constitute differential treatment contrary to article 26.

8.5 With regard to the claim under article 2, paragraph 1, raised by the author in conjunction with article 17, the Committee similarly considers that the law impugned, which equally applies to all persons under the State party's jurisdiction, is based on objective and reasonable grounds and, as such, does not raise issues under article 2, paragraph 1, invoked in connection with article 17 of the Covenant.

8.6 Finally, with regard to article 27, the Committee first notes that it is undisputed that the author is a member of the Jewish and Russian-speaking minorities in Latvia. The Committee, referring to its earlier jurisprudence,²¹ recalls that States parties to the Covenant may regulate activities that constitute an essential element in the culture of a minority, provided that the regulation does not amount to a de facto denial of this right.²² In the circumstances of the case, the Committee considers that the imposition of a declinable termination on his name and surname did not adversely affect his right, in community with the other members of the Jewish and Russian speaking minorities of Latvia, to enjoy his own culture, to profess and practice the Jewish religion, or to use the Russian language. In such circumstances, the Committee concludes that the restriction involved does not amount to a violation of article 27 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 do not disclose a violation of any of the provisions of the International Covenant on Civil and Political Rights.

²⁰ See general comment No. 18 (note 6 above); see also communications No. 1474/2006, *Prince v. South Africa*, Views adopted on 31 October 2007, para. 7.5; and No. 998/2001, *Althammer et al. v. Austria*, Views adopted on 8 August 2003, para. 10.2.

²¹ See, inter alia, communications No. 879/1999, *Howard v. Canada*, Views adopted on 26 July 2005, para. 12.7; No. 197/1985, *Kitok v. Sweden*, Views adopted on 27 July 1988; No. 511/1992, *Länsman et al. v. Finland*, and No. 671/1995, *Länsman et al. v. Finland*, Views adopted on 30 October 1996.

²² See communication No. 511/1992, *Länsman v. Finland*, Views adopted on 26 October 1994, para. 9.4.

(Signed) Rafael **Rivas Posada**

(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.]

**HH. Communication 1633/2007, Avadanov v. Azerbaijan
(Views adopted on 25 October 2010, 100th session)***

<i>Submitted by:</i>	Khilal Avadanov (not represented by counsel)
<i>Alleged victims:</i>	The author and his wife, Simnara Avadanova
<i>State party:</i>	Azerbaijan
<i>Date of communication:</i>	31 July 2007 (initial submission)
<i>Decision on admissibility</i>	28 July 2009
<i>Subject matter:</i>	Failure to prosecute a private individual who harmed the author's family and failure to conduct an adequate investigation into the allegations of police ill-treatment of the author and his wife
<i>Procedural issues:</i>	<i>Ratione temporis</i> , exhaustion of domestic remedies
<i>Substantive issues:</i>	Torture, cruel, inhuman or degrading treatment or punishment; arbitrary interference with the family; protection of the family; right to equal protection of the law
<i>Articles of the Covenant:</i>	7; 17; 23, paragraph 1; and 26
<i>Articles of the Optional Protocol:</i>	1 and 5, paragraph 2 (b)

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

Meeting on 25 October 2010,

Having concluded its consideration of communication No. 1633/2007, submitted to the Human Rights Committee by Mr. Khilal Avadanov in his own name and on behalf of Ms. Simnara Avadanova 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:

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Mahjoub El Haiba, Mr. Ahmed Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Motoc, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

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

1.1 The author of the communication, Mr. Khilal Avadanov, an Azerbaijani national born in 1950, is the husband of Ms. Simnara Avadanova, also an Azerbaijani national born in 1953. On 14 March 2006, he and his wife were granted refugee status in Greece, where they are currently living. The author acts on his own behalf and on behalf of his wife, and claims a violation by Azerbaijan of his and his wife's rights under article 7; article 17; article 23, paragraph 1, and article 26, of the International Covenant on Civil and Political Rights. The author is unrepresented. The Optional Protocol entered into force for Azerbaijan on 27 February 2002.

1.2 On 19 May 2009, 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.

Factual background

2.1 On 27 October 1999, a part of the author's house in Baku, Azerbaijan, was demolished by his nephew, Mr. B.G., allegedly upon instigation of the author's sister. In the course of the same incident, Mr. B.G. allegedly verbally insulted and beat the author's wife. The same day, she complained about the insults, beatings and demolition of the property to the 29th police division of the Yasamal District Police Department of Baku (29th police division) and requested that criminal proceedings be opened against Mr. B.G. According to a forensic medical examination of the author's wife on 28 October 1999, she sustained light bodily injuries that did not result in short-term damage to her health.

2.2 On 10 November 1999, an investigator at the 29th police division, Mr. T.G., opened criminal proceedings against Mr. B.G. under article 105, part 2 (deliberate infliction of less serious bodily injury), and article 207, part 2 (hooliganism), of the Criminal Code then in force, on the basis of the testimony of the author, his wife and other witness statements. The investigator sent the case to the Yasamal District Prosecutor's Office for approval and subsequent transmittal to the Yasamal District Court. On an unspecified date, the Deputy Prosecutor of the Yasamal District Prosecutor's Office returned the case back to the 29th police division. Subsequently, on an unspecified date, the case was transmitted to the Yasamal District Court. This time, criminal proceedings against Mr. B.G. were opened only under article 106, part 1 (deliberate infliction of light bodily injury), of the Criminal Code.

2.3 On 14 December 1999, the Yasamal District Court discontinued criminal proceedings against Mr. B.G. under article 106 of the Criminal Code, on the basis of an amnesty law adopted by the Milli Majlis (Parliament) on 10 December 1999. On 17 May 2000, the Baku City Prosecutor lodged an objection against the decision of the Yasamal District Court and, on 9 June 2000, its decision was revoked by the Baku City Court, which ordered a new examination of the case by the same court of first instance. On 25 August 2000, the Yasamal District Court dismissed the request to open criminal proceedings against Mr. B.G. and discontinued the proceedings for a second time. It established that, although there were constituent elements of *corpus delicti* set out in article 106, part 1, of the Criminal Code in Mr. B.G.'s actions, the incident was of a domestic nature, the bodily injuries sustained by the author's wife did not result in short-term damage to her health and the author's wife had, without a valid reason, failed to appear in court.

2.4 On an unspecified date, the author's wife appealed the decision of the Yasamal District Court of 25 August 2000 to the Court of Appeal of Azerbaijan (Court of Appeal). On 30 November 2000, the Court of Appeal revoked the decision of the lower court, because under articles 108 and 109 of the Criminal Procedure Code, the Yasamal District Court had to initiate criminal proceeding prior to their discontinuance, and because there

was no material to suggest that the author's wife and Mr. B.G. had been duly summoned to appear in court on the day in question. The Court of Appeal nonetheless dismissed the request to open criminal proceedings against Mr. B.G., applying article 13 of the amnesty law of 10 December 1999. This decision became executory.¹

2.5 On 12 December 2000, the author's wife appealed the decision of the Court of Appeal to the Judicial Chamber for Criminal and Administrative Cases of the Supreme Court. On 11 January 2001, the Deputy Chairperson of the Supreme Court replied that the cassation appeal was unfounded and that there were no grounds to lodge an objection against the decision of the Court of Appeal. On 2 February 2001, the author submitted a complaint to the Chairperson of the Supreme Court. On 21 February 2001, the Deputy Chairperson of the Supreme Court replied that the author's wife could file a cassation appeal to the Judicial Chamber for Criminal and Administrative Cases of the Supreme Court, against the decision of the Court of Appeal.

2.6 On 27 June 2001, the Judicial Chamber for Criminal and Administrative Cases of the Supreme Court upheld the decision of the Court of Appeal and dismissed the cassation appeal of the author's wife. The author claims that, during the hearing, the prosecutor stated that there were constituent elements of *corpus delicti* set out in article 128 (deliberate infliction of light damage to health), article 186, part 2 (deliberate destruction or damage of property), and article 221, part 2 (hooliganism), of the new Criminal Code in Mr. B.G.'s and his mother's actions. Fearing, however, that a decision not in their favour would prompt Mr. B.G. and his mother to commit a more serious crime, the prosecutor allegedly suggested upholding the decision of the Court of Appeal.

2.7 On 2 August 2001, the author and his wife filed a supplementary cassation complaint with the Plenum of the Supreme Court, requesting that the decision of the Judicial Chamber for Criminal and Administrative Cases of the Supreme Court of 27 June 2001 be revoked, and that a new examination of the case by the appellate instance be ordered. On 12 September 2001, this request was dismissed by the Chairperson of the Supreme Court.

2.8 On 22 July 2003, the author submitted a complaint to the Constitutional Court. On 21 August 2003, the Head of the Department on the Reception of Citizens and Examination of Petitions of the Constitutional Court replied that, although article 130 of the Constitution of Azerbaijan allowed citizens to apply directly to the Constitutional Court, the law then in force did not yet define the procedure for the examination of complaints submitted by citizens. For this reason, the author's complaint could not be acted upon yet by the Constitutional Court.

2.9 The author's disagreement with the way in which the State party authorities and courts handled his case prompted him to seek redress before the European Court of Human Rights (ECHR). On 28 October 2003, the author's complaint against Azerbaijan to the ECHR, dated 18 September 2003, was registered as case No. 34014/03. The registration letter was received by the author on 4 November 2003.

2.10 The author claims that the officers of the 29th police division to which the author's wife initially complained about Mr. B.G. somehow learned that the complaint about their actions was registered by the ECHR and requested that he give the registration letter to them. The author refused to do so. For approximately 40 days, he lived at his friends' places in an attempt to avoid any encounter with the police. On 10 December 2003, he was allegedly caught at home by the police. He claims that the police severely beat him, smashed his teeth, leaving scars on his nose and under his left eyebrow. In the end, he was

¹ See article 407.2. of the Criminal Procedure Code of the Republic of Azerbaijan.

brought to the police division where he was allegedly subjected to electric shock. While subjected to torture, he was told by the police that he was being punished for daring to “make public the secrets about methods of work of Azerbaijani law enforcement and judicial systems”. The author claims that, on the same day, four police officers raped his wife in his presence. While the author had never before seen three of the police officers, he recognized the fourth officer as being the district inspector. The author was also threatened by the same police officers that the next one to be raped would be his daughter, but the police did not succeed in finding her. The author states that the police’s actions were not recorded anywhere, as the officers were trying to absolve themselves from any responsibility.

2.11 In the early morning of 11 December 2003, the author was allegedly transported from the police division in a car to the outskirts of Baku and left at a waste ground. He did not go to the hospital for a medical examination and a certificate because, according to the author, any forensic medical examination had to be conducted in the presence of a police officer. Neither he nor his wife raised the allegations of torture and rape before the State party authorities or courts, allegedly for fear of reprisal and because, in any case, the police would collectively defend itself since its reputation as a whole was at stake.

2.12 Allegedly on the advice of their defence lawyer, the author and his wife left Azerbaijan on 3 January 2004. He was informed by the lawyer that if he stayed in Azerbaijan, he would be physically “exterminated” by the police. On 8 January 2004, the author and his wife reached the Netherlands, surrendered to the authorities and applied for asylum.

2.13 On 20 January 2004, the author informed ECHR about the fact that he had to leave Azerbaijan and provided his contact details in the Netherlands. In mid-February 2004, he was informed that, on 6 February 2004, a Committee of three judges of the Court declared his application No. 34014/03 inadmissible *ratione temporis*, pursuant to article 35, paragraph 3, of the European Convention for the Protection of Human Rights and Fundamental Freedoms because the facts of the case in question occurred prior to the entry into force of the Convention in respect for Azerbaijan.

2.14 On an unspecified date, the Dutch authorities rejected the asylum applications of the author and his wife on the grounds that they had entered the Schengen territory with visas issued by Greek authorities. On an unspecified date, they were deported to Greece under the Dublin Regulation.

2.15 On 24 May 2005, the author underwent a medical and clinical examination by the Medical Director of the Medical Rehabilitation Centre for Torture Victims in Athens. The medical report issued on 20 July 2005 states that, according to the author, he was arrested more than 50 times by Azerbaijani police in Baku, where he lived with his family, during the period of 1999 to 2003. He claimed to have been subjected to beatings on his head and chest, as a result of which he has a 6 cm horizontal scar and another 4 cm vertical scar on his eyebrow from the beatings. A total of 14 teeth, 6 in the upper jaw and 8 in the lower jaw, were broken as a result of the beatings. The author also claimed to have been subjected to electric shock. He described how the police tied him up to an iron chair, poured water over his body, connected electrodes to the iron chair and switched on the current. He alleged to have been subjected to torture four times, while his wife was raped by four police officers. The report concludes that the author was a torture victim and that he continued to suffer from physical and psychological effects of the torture.

2.16 On 14 March 2006, the author and his wife were granted refugee status in Greece.

The complaint

3. The author claims a violation by Azerbaijan of his wife's rights and of his own rights under article 7; article 17; article 23, paragraph 1, and article 26, of the Covenant.

State party's observations on admissibility

4.1 On 2 February 2009, the State party confirms the facts summarized in paragraphs 2.1-2.7 above and challenges the admissibility of the communication.

4.2 Firstly, the State party submits that all the events related to the case in which the author and his wife were requesting the authorities to open criminal proceedings against Mr. B.G. occurred prior to the State party's accession to the Optional Protocol on 27 November 2001 and its entry into force for it.

4.3 Secondly, as to the author's allegations of having been subjected to torture by the police in Azerbaijan, the State party argues that, contrary to the requirements of article 5, paragraph 2 (b), of the Optional Protocol, this issue was never raised in the domestic courts. It concludes that the communication should be declared inadmissible for failure to exhaust all available domestic remedies.

Author's comments on the State party's observations

5.1 In his comments of 4 March and 14 May 2009, the author submits that in the State party's observations on admissibility, reference is made only to article 106, part 1, of the Criminal Code, whereas the author's wife and their lawyer requested the authorities to open criminal proceedings against Mr. B.G. under three provisions of the Criminal Code. In the author's opinion, had the criminal proceedings been opened under three articles of the Criminal Code, it would have subsequently been impossible to relieve Mr. B.G. from responsibility on the basis of the amnesty law.

5.2 As to the State party's *ratione temporis* argument, the author submits that, in fact, his complaint to the Constitutional Court and the Court's reply are respectively dated 22 July 2003 and 21 August 2003.

5.3 With regard to the State party's argument that the author's torture allegations were never raised in the domestic courts, the author refers to his initial submission of 31 July 2007 in which he explained why it was impossible for him to exhaust domestic remedies prior to his departure from Azerbaijan. He submits that he attempted to exhaust domestic remedies in Azerbaijan from abroad by submitting an individual communication to the Human Rights Committee on 14 May 2004 and by seeking the advice of a lawyer who was appointed by the Greek authorities to assist him and his wife with their asylum application. The author claims that the lawyer refused to "address the issue of police violence" in the author's country of origin, explaining that it was beyond his mandated duties. The author does not have the financial means to hire another lawyer in Greece. As to the possibility of his representation by a family member in Azerbaijan, the author argues that it would put his relatives' lives in danger. He concludes that, for him, domestic remedies in Azerbaijan are unavailable. He requests the Committee to exempt him from the requirement to exhaust them.

Decision on admissibility

6.1 During its ninety-sixth session on 28 July 2009, the Committee considered the admissibility of the communication. As required by article 5, paragraph 2 (a), of the Optional Protocol, the Committee had ascertained that a similar complaint submitted by the author was declared inadmissible *ratione temporis* by a Committee of three judges of the European Court of Human Rights on 6 February 2004 (application No. 34014/03).

Therefore, the Committee concluded that it was not precluded by article 5, paragraph 2 (a), of the Optional Protocol from examining the present communication, as the issue was no longer being examined by ECHR.

6.2 The Committee took note of the State party's objection that the communication was inadmissible *ratione temporis* insofar as it related to events which took place prior to the accession of Azerbaijan to the Optional Protocol on 27 November 2001. In this regard, the Committee recalled its previous jurisprudence that it could not consider alleged violations of the Covenant that occurred before the entry into force of the Optional Protocol for the State party, unless these violations continue after that date or continue to have effects which in themselves constitute a violation of the Covenant.² In the present communication, the Committee noted that the insults, beating of the author's wife and demolition of the author's property on 27 October 1999 and the executory decision of the Court of Appeal of 30 November 2000 not to open criminal proceedings against Mr. B.G. all predated the entry into force of the Optional Protocol for the State party. The Committee did not consider that these alleged violations continued to have effects after 30 November 2000 which in themselves would have constituted violations of the author's and his wife's Covenant rights. Accordingly, the Committee considered that this part of the communication was inadmissible *ratione temporis* under article 1 of the Optional Protocol.

6.3 The State party had argued that the author's torture allegations have never been raised in the domestic courts, which rendered this part of the communication inadmissible for failure to exhaust all available domestic remedies. The author conceded that neither he nor his wife, or anyone acting on their behalf, have ever raised these allegations before the State party authorities or courts, either before or after their departure from Azerbaijan. He explained that such failure was due to fears of reprisal, a lack of financial means to hire a lawyer, and partly to the alleged futility of the exercise since, in any case, the police would collectively defend itself. The author claimed that, for him, domestic remedies in Azerbaijan were ineffective and unavailable.

6.4 The Committee observed that the State party had merely stated *in abstracto* that, contrary to the requirements of article 5, paragraph 2 (b), of the Optional Protocol, the author's torture allegations have never been raised in the domestic courts, without addressing the alleged threats made against the author and his family. The Committee concluded that, in the circumstances and in the absence of further information from the State party, it could not be held against the author that he had not raised these allegations before the State party authorities or courts for fear that this might result in his victimization and the victimization of his family. The Committee also considered relevant in this regard that the author had been successful in obtaining refugee status in a third State. Therefore, the Committee accepted the author's argument that, for him, domestic remedies in Azerbaijan were ineffective and unavailable and considered that it was not precluded by article 5, paragraph 2 (b), of the Optional Protocol from examining the communication.

6.5 The Committee therefore decided that the communication was admissible insofar as it raised issues with respect to article 7 of the Covenant for events that took place after the entry into force of the Optional Protocol for the State party.

State party's observations on the merits

7.1 On 4 March 2010, the State party submitted its observations on the merits. It reiterated the facts regarding the infliction of light bodily injury to the author's wife by Mr.

² Communications No. 24/1977, *Lovelace v. Canada*, Views adopted on 30 July 1981, para. 7.3; and No. 1060/2002, *Deisl v. Austria*, Views adopted on 27 July 2004, para. 10.3.

B.G. and ensuing criminal proceedings. The State party also recalled that the author's complaint against Azerbaijan of 15 September 2003 was registered by ECHR on 23 October 2003 and rightly found inadmissible *ratione temporis* by a Committee of three judges on 6 February 2004.

7.2 The State party drew the Committee's attention to the fact that the author has never claimed in his complaints to State bodies, courts, the Ombudsman's Office or representatives of human rights organizations that he had been subjected to torture or any other unlawful actions by police officers. It stated that, according to article 214.1.1 of the Criminal Procedure Code, criminal proceedings could be initiated exclusively on the basis of a written declaration or an oral statement of a natural person. The State party added that the author was fully aware of this legal requirement after his experience with Mr. B.G. but failed to make use of this right by not approaching any State or non-State bodies with a claim about torture or other unlawful actions by police.

7.3 The State party argued that the author's claim about the unavailability of domestic remedies in relation to the alleged ill-treatment and exertion of pressure on his family by police officers was "perplexing" because in his case against Mr. B.G., he had exhausted all domestic remedies without any hindrances and without any pressure being exerted on him.

7.4 The State party submitted that the author's claim about being persecuted by the police as a result of complaining to ECHR was "completely unfounded", since not a single person who has complained against Azerbaijan to ECHR³ has ever claimed that he or she was subjected to unlawful actions for this reason. The State party challenged the veracity of the author's claims summarized in paragraph 2.10 above by arguing that the type of injuries allegedly inflicted on him must have necessarily prompted the author seek medical assistance and that, subsequently, a doctor would have been obliged by law to report the case to law-enforcement bodies.

7.5 The State party submitted that a visit to the author's home by police officers was unrelated to his allegations and was connected to the opening of criminal proceedings under article 194, part 2, of the Criminal Code against the author's son, who was accused of using fake documents for the purpose of exiting from military service. Since the author's son was wanted by the police, officers of the 29th police division visited the author's home several times during the period of 1999 to 2003 and drew up relevant reports with the participation of members of the author's family.

7.6 The State party further argued that the author could have complained about alleged abuse of power by police officers to the prosecutorial authorities under article 215.3.2 of the Criminal Procedure Code. It is improbable that the author was unaware of this avenue, since he "complained to different bodies for many years". Therefore, in the State party's view, the author's claim that he was afraid of referring to the State bodies was baseless. It added that, according to article 204.6 of the Criminal Procedure Code, the submission of an unsigned written declaration or of a written declaration with a false signature, as well as of an anonymous declaration, are the only possible impediments to the opening of criminal proceedings. Thus, the State party submitted that, even if the author had feared police persecution in Azerbaijan, he could have certified his signature by a notary in a country of his residence and filed a complaint to law-enforcement bodies from abroad.

7.7 As to the author's claim that between 1999 and 2003, he was arrested by police officers more than 50 times (see para. 2.15 above), the State party argued that it was unclear why he could not remember the names of any police officers other than that of the district

³ The State party referred to 70 decisions and judgments delivered by ECHR concerning Azerbaijan, including 23 judgements in which finding of a violation was found.

inspector. The State party also challenged the author's claim that any forensic medical examination had to be conducted in the presence of a police officer. It added that under the State party's law, forensic medical examinations were conducted in medical institutions in the absence of the police.

7.8 The State party concluded that despite the existence of domestic remedies and their accessibility even from abroad, the author's family has never availed itself of these remedies. Therefore, the Committee's decision on admissibility was at variance with article 5, paragraph 2 (b), of the Optional Protocol.

7.9 In its further observations on the merits dated 8 April 2010, the State party referred to article 25 of the Law on the activities of the State forensic examination service, according to which only parties to the criminal proceedings could take part in the conduct of a forensic examination. These parties could not interfere with the conduct of the examination but they could pose their questions to an expert and provide their own clarifications. According to article 5 of the Law, should an individual consider that his or her rights and freedoms were violated by activities of the State forensic examination service, he or she could appeal such actions either to the head of the forensic examination service or to a court. The State party referred to article 268.1.6. of the Criminal Procedure Code and provided a list of rights that a criminal suspect or accused has during a forensic examination. The State party added that these rights also pertained to an individual who was subjected to compulsory medical measures, provided that his or her mental state allowed for such participation.

7.10 The State party also referred to article 66 of the Constitution, according to which no one may be forced to testify against himself or herself, their spouse, child, parent or sibling. Under article 7.0.32, of the Criminal Procedure Code, one's spouse, grandparents, parents, siblings and children, were considered among others to be close relatives. According to article 20 of the Criminal Procedure Code, no one may be forced to testify against him or herself or against close relatives, nor may one be persecuted for doing so. An individual who was invited to testify against him or herself, or close relatives during the pretrial investigation or in court, had the right to retract this testimony without fearing any adverse legal consequences. The State party added that the Criminal Code contained provisions⁴ that, in specific circumstances, excluded criminal liability for witnesses or injured persons who deliberately gave false testimony or refused to testify.

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

8.1 On 25 June 2010, the author commented on the State party's observations. He reiterated his claims summarized in paragraphs 2.1–2.8 and 5.1–5.2 and challenged the State party's contention that the exhaustion of domestic remedies in his case against Mr. B.G. was without any hindrances.

8.2 The author refuted the State party's argument that he had never claimed in his complaints to State bodies, courts, the Ombudsman's Office or representatives of human rights organizations that he had been subjected to torture or any other unlawful actions by police officers. He submitted that he had complained about torture to all these bodies both in writing and orally and that it could not be held against him if these bodies had unduly discarded his complaints. As to the last ill-treatment by the police of 10 December 2003, the author explained that the lack of complaints by him and his wife were due to despair

⁴ Reference is made to the annotation to articles 297 and 298 of the Criminal Code, according to which an individual who refused to testify against him or herself or a close relative is exempt from criminal liability. Equally exempt is an individual who deliberately gave false testimony if he or she was forced to testify against him or herself or a close relative.

and fear of reprisals. He recalled that they were advised by their defence lawyer to leave Azerbaijan, because they could be physically “exterminated” (see para. 2.12 above).

8.3 As to the State party’s argument that criminal proceedings could be initiated exclusively on the basis of a written declaration or an oral statement and that the author could have complained to the prosecutorial authorities under article 215.3.2 of the Criminal Procedure Code, the author submitted that all of his and his defence lawyer’s complaints to the courts and prosecutorial authorities in the case against Mr. B.G. have resulted in further violence, intimidation and humiliation by the police, Mr. B.G. and State officials who patronized Mr. B.G.’s family. The author added that after his complaints he would be taken for a “talk” with the deputy head of the 29th police division nicknamed “bone-breaker” and beaten up to “calm him down”. The author would then complain about the beatings to his defence lawyer, who would in turn go to the police and demand an explanation. The police, however, “closed ranks”.

8.4 The author drew the Committee’s attention to the contradiction between the State party’s arguments summarized in paragraphs 7.4 and 7.7 above, and reiterated his earlier claim that any forensic medical examination had to be conducted in the presence of a police officer. He added that when his defence lawyer tried to obtain such a medical certificate, he was told by a doctor that he could issue a certificate only in the presence of a police officer. The lawyer then went to the 29th police division but police officers refused to accompany him to the medical institution.

8.5 The author refuted the State party’s claim that the visits to the author’s home by police during the period of 1999 to 2003 were connected to the opening of criminal proceedings against his son. He added that the timing of the visits coincided with the start of his “problem” with the police, whereas his son was demobilized from the military service two years earlier in December 1997.

8.6 The author claimed that all he and his family have been through was “punishment” for his role in Mr. M.A.’s case and, in substantiation of this claim, he provided a copy of the article entitled “Tragedy in Kusar: a mistake of investigation or ...”, which was published in *The Mirror* newspaper on 4 April 1998. The article related to the conduct of the criminal investigation with regard to Mr. M.A., a brother of the author’s wife. Mr. M.A. was accused and subsequently found guilty by the Kusar District Court of having killed Mr. S.B. on 15 November 1997 in the course of a drunken fight. The article questioned the version of the events presented by the investigation and highlighted some irregularities in its conduct.

8.7 In his explanatory letter to the Committee, the author stated that after Mr. M.A.’s conviction by the court of first instance, the author had hired two lawyers “who have expediently found the real murderer”, a brother of the Head of the Road Traffic Inspection, Mr. G.G. It appeared that Mr. G.G. bribed the head of police, the prosecutor and judge in order to keep his brother out of trouble and found the “scapegoats”, Mr. M.A. and another co-defendant, to stand trial instead of him. Strong evidence in support of Mr. M.A.’s innocence collected by the lawyers hired by the author prompted the Supreme Court of Azerbaijan to quash Mr. M.A.’s conviction by the Kusar District Court and to send it for re-trial to the Cuba District Court. Despite strong evidence in support of Mr. M.A.’s innocence, he was again found guilty of having killed Mr. S.B. but this time released in the courtroom after serving 13 months in detention.

8.8 The author stated that “his acquaintance from the General Prosecutor’s Office” had warned him about possible revenge and “extermination” by the Kusar law-enforcement officials for his role in Mr. M.A.’s case. Apparently, the author “angered those who had to pay a lot to buy out” Mr. G.G.’s brother and he “would not be forgiven for that”. The author was warned to “be careful and not to be trapped”. The author further submitted that

nine months later, in October 1999, “they” succeeded in setting his sister against him by threatening to imprison her son (who worked with the Road Traffic Inspection) should she refuse to cooperate. The author considered that this was all orchestrated by the Deputy Prosecutor of the Yasamal District, Mr. B.P. “They” had hoped that the author would react violently to the demolition of his house and beating of his wife, so that he could be imprisoned and eventually punished for his activism.

8.9 As to the State party’s argument that the author could have filed a complaint from abroad, the author recalled his earlier claim that a lawyer appointed by the Greek authorities to assist him and his wife with their asylum application refused to “address the issue of police violence” in Azerbaijan and that the author did not have the financial means to hire another lawyer (see para. 5.3). The author therefore requested the Committee to uphold its position that, due to the impossibility to obtain legal aid, he should be exempt from the requirement to exhaust domestic remedies in Azerbaijan.

8.10 The author stated that he did not understand the relevance of the State party’s further observations dated 8 April 2010 for the present communication.

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 provided in article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee has taken note of the State party’s observations of 4 March 2010, which challenge the admissibility of the communication. It considers that the arguments raised by the State party are not of such a nature as to require the Committee to review its admissibility decision, owing in particular to the lack of new relevant information with regard to the alleged threats made against the author and his family.⁵ The Committee therefore sees no reason to review its admissibility decision and proceeds to consider the case on its merits.

9.3 The Committee recalls that, when it found the present communication admissible insofar as it raised issues with respect to article 7 of the Covenant for events that took place after the entry into force of the Optional Protocol for the State party,⁶ it requested the State party to submit to the Committee written explanations or statements clarifying the matter, and indicating the measures, if any, that may have been taken. In this regard, the Committee also recalls its general comment No. 20 on (1992) on the prohibition of torture and cruel treatment or punishment, which states that the text of article 7 allows for no limitation or no derogations from it, even in situations of public emergency.⁷ Therefore, in order for a prohibition of ill-treatment contrary to article 7 to be of an absolute nature, the State parties have an obligation to investigate well-founded allegations of torture and other gross violations of human rights promptly and impartially.⁸ Where investigations reveal

⁵ See communication No. 1382/2005, *Salikh v. Uzbekistan*, Views adopted on 30 March 2009, para. 9.2.

⁶ The author’s claims under article 17; article 23, paragraph 1, and article 26 of the Covenant are related exclusively to the demolition of the part of his house by Mr. B.G. and the way in which the State party authorities and courts handled his case against Mr. B.G., that is, events that took place before the entry into force of the Optional Protocol for the State party.

⁷ *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A, para. 3.

⁸ *Ibid.*, para. 14.

violations of certain Covenant rights, States parties must ensure that those responsible are brought to justice.⁹

9.4 In the present case, the author provided a detailed description of his and his wife's alleged ill-treatment by the police on 10 and 11 December 2003 and corroborated these allegations by a copy of the report issued by the Medical Rehabilitation Centre for Torture Victims in Athens on 20 July 2005, according to which the author was a torture victim and he continued to suffer physical and psychological effects of torture. The State party refuted this allegation by stating that the author had never made these complaints to State bodies, courts, the Ombudsman's Office or representatives of human rights organizations in Azerbaijan that he had been subjected to torture or any other unlawful actions by police officers. The Committee notes, however, that it accepted in the decision on admissibility the author's argument that for him domestic remedies in Azerbaijan were ineffective and unavailable and observes that the arguments provided by the author in the context of the present communication necessitated at the very minimum an investigation of the potential involvement of the State party's law-enforcement officers in the ill-treatment of the author and his wife.

9.5 The Committee also recalls its jurisprudence that the burden of proof cannot rest alone on the authors of the communication, especially considering that the authors and the State party do not always have equal access to evidence and that frequently the State party alone has access to relevant information.¹⁰ While the Committee, on the material before it, is unable to make a positive finding of the ill-treatment of the author and his wife by the State party's law-enforcement officers, 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 violation of the Covenant made against it and its authorities, and to furnish to the Committee the information available to it. The State party, however, did not provide any information as to whether any inquiry was undertaken by the authorities in the context of the present communication to address the detailed and specific allegations advanced by the author in a substantiated way. In these circumstances, due weight must be given to these allegations. The Committee considers, therefore, that the State party has failed in its duty to adequately investigate the allegations put forward by the author and concludes that the facts as presented disclose a violation of article 7, read in conjunction with article 2, paragraph 3, 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 the State party of article 7, read in conjunction with article 2, paragraph 3, 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 in the form, inter alia, of an impartial investigation of the author's claim under article 7, prosecution of those responsible and appropriate compensation. 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

⁹ 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. 18.

¹⁰ Communications No. 30/1978, *Bleier v. Uruguay*, Views adopted on 29 March 1980, para. 13.3; and No. 84/1981, *Dermit Barbato et al. v. Uruguay*, Views adopted on 21 October 1982, para. 9.6.

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 it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. In addition, it requests the State party to publish the Committee's Views.

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

II. Communication Nos. 1642-1741/2007, *Jeong et al. v. Republic of Korea* (Views adopted on 24 March 2011, 101st session)*

<i>Submitted by:</i>	Min-Kyu Jeong et al. (represented by counsel, André Carbonneau)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Republic of Korea
<i>Date of communication:</i>	21 September and 6 November 2007 (initial submissions)
<i>Subject matter:</i>	Conscientious objection
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to freedom of thought, conscience and religion
<i>Article of the Covenant:</i>	18, paragraph 1
<i>Article of the Optional Protocol:</i>	5, paragraph 2 (b)

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

Meeting on 24 March 2011,

Having concluded its consideration of communication No. 1642-1741/2007, submitted to the Human Rights Committee on behalf of Messrs. Min-Kyu Jeong 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 communications are 100 persons,¹ all nationals of the Republic of Korea. They claim to be victims of a violation by the Republic of Korea of their rights under article 18, paragraph 1, of the International Covenant on Civil and Political Rights.² The authors are represented by counsel, Mr. André Carbonnier.

* 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. Helen Keller, Ms. Iulia Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

An individual opinion signed by Committee members Mr. Yuji Iwasawa, Mr. Gerald L. Neuman and Mr. Michael O'Flaherty is appended to the text of the present Views.

¹ The list of the authors and their respective communication number is annexed at the end of the Views.

² The Optional Protocol entered into force for the Republic of Korea on 10 April 1990.

1.2 On 24 March 2011, pursuant to rule 94, paragraph 2, of the Committee's Rules of Procedure, the Committee decided to join the 100 communications for decision in view of their substantial factual and legal similarity.

The facts as presented by the authors

2.1 All 100 authors are Jehovah's Witnesses, who have been sentenced to one and a half years of imprisonment for refusing to be drafted for military service, based on their religious belief. None of the authors appealed their cases to higher courts as the Supreme Court of Korea, on 15 July 2004, and the Constitutional Court of Korea on 26 August 2004, decided that conscientious objectors must serve in the army or face prison terms. Since the highest courts of the Republic of Korea made a final decision on this issue, any further appeal would be totally ineffective.

2.2 In its ruling, the Constitutional Court rejected a constitutional challenge to article 88 of the Military Service Act on the grounds of incompatibility with the protection of freedom of conscience protected under the Korean Constitution. The Court reasoned, *inter alia*:

“the freedom of conscience as expressed in Article 19 of the Constitution does not grant an individual the right to refuse military service. Freedom of conscience is merely a right to make a request to the State to consider and protect, if possible, an individual's conscience, and therefore is not a right that allows for the refusal of one's military service duties for reasons of conscience nor does it allow one to demand an alternative service arrangement to replace the performance of a legal duty. Therefore the right to request alternative service arrangement cannot be deduced from the freedom of conscience. The Constitution makes no normative expression that grants freedom of expression a position of absolute superiority in relation to military service duty. Conscientious objection to the performance of military service can be recognized as a valid right if and only if the Constitution itself expressly provides for such a right”.

2.3 Following the decisions of the Supreme and Constitutional courts, more than 700 conscientious objectors have been sentenced and imprisoned for one and a half years for refusing to bear arms. An additional 50 to 70 persons are convicted and imprisoned each month.

Mr. Min-Kyu Jeong's case

2.4 On 12 December 2006, Mr. Jeong received an enlistment notice from the State party's Military Manpower Administration. He refused to perform military duty on account of his personal religious convictions. He agreed to perform alternative service. On 25 April 2007, the Gunsan Branch of Jeonju District Court rejected his claim and sentenced him to one and a half years of imprisonment in violation of the Military Service Law. During the police and prosecutor's investigation, he explained his religious belief and the fact that he did not want to evade national duty. He pointed out that the Constitution protected freedom of religion. During the hearing, he requested the Court to postpone the judgement until the Government of the State party adopt an alternative service system. His claim was rejected. He served his time in prison and describes the two years of both investigation and prison time as stressful and emotional.

Mr. Hui-Sung Gu's case

2.5 On 12 December 2005, Mr. Gu received a draft notice of the Military Manpower Administration ordering him to be drafted into military service at the Choonchun military

camp. Mr. Gu refused to be drafted within the three-day-prescribed period of time because of his religious beliefs. On 11 May 2006, the Incheon District Court sentenced him to one and a half years imprisonment.

Mr. Jin-Mo Yeon's case

2.6 On an unspecified date, Mr. Yeon called the Military Manpower Administration to explain his standing as conscientious objector. He submitted all the documents requested, including a document proving that he was a Jehovah's Witness and a written statement explaining his religious beliefs. At the Court hearing, he informed the judge of his readiness to perform alternative service as long as he would be exempt from the compulsory two-week military training session. His claim was rejected. On 26 May 2006, the Court (unspecified name) sentenced him to one and a half years imprisonment.

Mr. Il-Joo Lee's case

2.7 On 31 October 2005, Mr. Lee received a notice of draft for military service. He replied that he would not perform military service because of his religious beliefs. He was interrogated by the police and prosecutor and taken into custody from 16 May 2006. The Western Section of the Seoul District Court rejected his claim on the basis that due reason exempting from military service could only include compelling reasons such as those that were health related. To Mr. Lee's argument that the Military Service Law violated freedom of conscience, which is protected by the Constitution of the Republic of Korea, the judge replied that such freedom is protected as long as it remains private and personal but not when it enters in conflict with other protected rights and obligations. The Court concluded that freedom of conscience was not an absolute right and could therefore be restricted. The Court added that the absence of any alternative to active military service was a measure which could not be considered disproportionate. On 26 April 2006, Mr. Lee was sentenced to one and a half years imprisonment.

Mr. In-Hwan Jo's case

2.8 Mr. Jo received a draft notice for military service on 22 September 2006. He wrote a statement to the Military Manpower Administration explaining his religious convictions. He was interrogated by the police and detained for 37 days. On 10 January 2007, the Jeonju District Court sentenced him to one and a half years imprisonment.

Mr. Jung-Rak Kim's case

2.9 Mr. Kim received a draft notice for military service in February 2006. He notified the Military Manpower Administration of his decision to be a conscientious objector and submitted the requested documents. He attended the Changwon District Court hearing as a free man but was eventually sentenced to one and a half years imprisonment.

Mr. Jong-Wook Kim's case

2.10 Mr. Kim received a notice of enlistment for military service in October 2006. Although he had declared himself a conscientious objector, the Court reproached him for not having given justifiable reasons for not reporting to military duty within three days upon receipt of the draft notice. On 17 January 2007, he was sentenced by the Suwon District Court to one and a half years imprisonment.

Mr. Dong-Hun Shin's case

2.11 Mr. Shin received a notice of enlistment for military service on 18 September 2006 ordering him to enter the military camp of Yonghyun-Dong within three days. He objected

to military service to the Military Manpower Administration, which rejected his claim. He was arrested and detained from 16 November 2006. On 28 December 2006, he was sentenced to one and a half years of imprisonment by the Incheon District Court.

Mr. Ju-Gwan You's case

2.12 Mr. You received a draft notice for military service on 18 October 2006 but did not enter the military training camp within the prescribed period of time because of his religious beliefs. He was sentenced to one and a half years of imprisonment by the Jeonju District Court on 10 April 2007.

Mr. Jae-Hyung Jung's case

2.13 On 29 August 2006, Mr. Jung received a draft notice of enlistment for military service. On 11 October 2006, he informed the Suwon Military Manpower Administration of his refusal to enlist for military service due to his religious beliefs. He provided all the documents to justify his position. He was arrested and detained from 13 November 2006. On 21 December 2006, the Suwon District Court sentenced him to one and a half years imprisonment.

Mr. Uok Heo's case

2.14 Mr. Heo received his enlistment notice on 6 April 2006. He notified his objection to military service. The police investigation started on 9 June 2006 and the prosecutor's investigation on 30 August 2006. He was not detained prior to being sentenced. On 10 November 2006, the Incheon District Court sentenced him to one and a half years imprisonment.

Mr. Jong-Keun Park's case

2.15 On 1 October 2006, Mr. Park received an enlistment notice for military service. He went to the Military Manpower Administration office to submit his statement of conscientious objector. He was summoned and investigated in April 2007. On 30 May 2007, the Incheon District Court sentenced him to one and a half years imprisonment.

Mr. Un-Hyun Baek's case

2.16 Mr. Baek objected to military service enrolment for religious reasons after he received his draft notice on 12 September 2006. He was detained from 25 October 2006 while being investigated. The Chungju District Court sentenced him to one and a half years imprisonment on 30 November 2006.

Mr. Jung-Rok Lim's case

2.17 Mr. Lim received a draft notice of active military service on 8 August 2006 but he refused to enrol in the army because of his religious beliefs. During the trial, the prosecution demanded three years' imprisonment. On 1 February 2007, the Daegu District Court sentenced him to one and a half years in prison.

Mr. Myung-Ki Shin's case

2.18 Mr. Shin was called up for military service on 27 January 2006, which he refused because of his religious beliefs. He later went to the Military Manpower Administration to provide a written statement on his religious convictions. After a police investigation in March and the prosecutors' investigation in May 2006, he was heard by the Court. On 22 June 2006, the Ueijeongbu District Court sentenced him to one and a half years' imprisonment.

Mr. Jae-Ha Cha's case

2.19 On 2 October 2006, Mr. Cha received his enlistment notice. He filed a letter of conscientious objection along with a letter confirming his status in his congregation and a registration certificate of the congregation. He was investigated upon but the judge did not request him to be detained before the trial. During the Court hearing, the prosecutor requested two years' of imprisonment for failing to perform military service. On 28 March 2007, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Ju-Hyun Park's case

2.20 Mr. Park received a draft notice of enlistment on 3 July 2006. He provided his written statement of conscientious objection and was investigated in September 2006. During the trial he mentioned his readiness to perform alternative service. His claim was rejected. On 20 October 2006, the Ueijeongbu District Court sentenced him to one and a half years' imprisonment.

Mr. Tae-Eung Kim's case

2.21 Mr. Kim received his enlistment notice on 26 December 2006. In Court he expressed his readiness to perform alternative service. On 22 June 2007, the Daegu District Court sentenced him to one and a half years' imprisonment.

Mr. San Seo's case

2.22 On 22 September 2006, Mr. Seo was notified of his enlistment into military service. He refused on the basis of his religious beliefs. He provided the necessary documents to the Military Manpower Administration. On 11 January 2007, the Changwon District Court sentenced him to one and a half years' imprisonment.

Mr. Ho Cho's case

2.23 Mr. Cho received his draft notice of enlistment on 2 August 2006. He objected to it because of his religious beliefs. On 23 November 2006, the Changwon District Court sentenced him to one and a half years' imprisonment.

Mr. Jung-Hoon Kim's case

2.24 On 8 June 2006, Mr. Kim received his draft enlistment notice. He provided the necessary documents to the Military Manpower Administration and fully cooperated with the police and prosecutors. In Court, he expressed his readiness to perform voluntary alternative service. His claim was rejected. On 25 October 2006, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Jae-Hun Lee's case

2.25 Mr. Lee was called-up for military service on 18 March 2007. He objected to it as a Jehovah's Witness. On 27 June 2007, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Hangle Yoon's case

2.26 On 25 August 2006, Mr. Yoon received a draft notice of enlistment. He went to the Military Manpower Administration and informed them of his conscientious objection. He was interrogated by the police and then detained at the Suwon Detention Centre, while waiting for his trial. On 15 December 2006, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Hwan-Ho Jung's case

2.27 On 31 July 2006, Mr. Jung received a draft notice of enlistment. He was questioned and detained pending his trial. On 22 November 2006, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Do-Hyun Kim's case

2.28 On 20 June 2006, Mr. Kim was called up for military service. He refused and notified his position on 18 August 2006. In Court, he expressed his readiness to perform alternative service. His request was rejected. On 10 November 2006, the Ansan Branch of the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Gang-Wook Kim's case

2.29 Mr. Kim received his draft notice of enlistment on 11 May 2006. He refused as a conscientious objector. On 8 November 2006, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Hun Kim's case

2.30 Mr. Kim received his draft notice from the Military Manpower Administration on 14 December 2006. As he did not report to service within the prescribed period of time he was summoned by the police and investigated. He submitted a written statement on his religious beliefs. He was detained pending trial. At trial, he expressed his readiness to perform alternative service. His request was rejected. On 20 March 2007, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Young-Won Lee's case

2.31 Mr. Lee received a draft notice of enlistment on 4 April 2006. He was detained before and during the trial. On 31 August 2006, the Suwon District Court sentenced him to one and a half years imprisonment.

Mr. Tae-Soo Moon's case

2.32 Mr. Moon received a draft notice of enlistment on 10 May 2006. He refused to be drafted and explained his position to the Military Manpower Administration on 30 June 2006. He was arrested and detained pending trial. On 20 October 2006, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Ji-Hyun Jung's case

2.33 Mr. Jung received a draft notice of enlistment on 24 October 2006. He refused to be drafted and explained his position to the Military Manpower Administration. He was detained pending trial. In Court, he expressed his readiness to perform alternative service. His request was rejected. On 30 January 2007, the Changwon District Court sentenced him to one and a half years' imprisonment.

Mr. Doo-On Kang's case

2.34 Mr. Kang was called up for military service on 3 October 2006. He refused to bear arms and was therefore sentenced by the Ansan Branch of the Suwon District Court on 17 April 2007 to one and a half years' imprisonment.

Mr. Sung-Ryul Kang's case

2.35 Mr. Kang received his notice for enrolment on 28 August 2006. He refused to do the army duty because of his religious beliefs. On 23 January 2007, the Busan District Court sentenced him to one and a half years' imprisonment.

Mr. Yong-Dae Kim's case

2.36 Mr. Kim was called up for military service on 14 March 2006. He contacted the Military Manpower Administration to inform them of his position as a conscience objector. On 8 August 2006, the Daejeon District Court sentenced him to one and a half years' imprisonment.

Mr. Seung-Yob Lee's case

2.37 Mr. Lee received his notice of enlistment on 12 July 2006. He went to the Military Manpower Administration to express his religious convictions. He was interrogated twice and imprisoned at the Suwon detention centre. On 1 December 2006, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Jae-Won Seo's case

2.38 Mr. Seo received his notice of enlistment on 4 May 2006. Because of his convictions, he refused to bear arms. The prosecutor demanded two years of imprisonment. On 30 August 2006, the Guchang Branch of the Changwon District Court sentenced him to one and a half years' imprisonment.

Mr. Woo-Jin Choi's case

2.39 Mr. Choi received his notice of enlistment on 28 July 2006. He filed a letter of conscientious objection. On 7 December 2006, the Changwon District Court sentenced him to one and a half years' imprisonment.

Mr. Sung-Jin Hwang's case

2.40 Mr. Hwang received a draft notice for military service on 21 April 2006. He refused to abide by the notice. He was arrested and detained. On 25 September 2006, the Busan District Court sentenced him to one and a half years' imprisonment.

Mr. Sung-Joong Jeon's case

2.41 Mr. Jeon received a draft notice for military service on 16 October 2006. He refused to be enrolled and was therefore arrested and detained from 4 December 2006, pending trial. On 7 February 2007, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Dae-Jin Kim's case

2.42 Mr. Kim received his draft notice of enlistment on 6 July 2006. He notified the Military Manpower Administration of his decision to be a conscientious objector. He was arrested and detained pending trial. On 3 November 2006, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Eun-Woo Kim's case

2.43 Mr. Kim received his enrolment notice on 16 June 2006. He refused as a conscientious objector. At trial he expressed his readiness to perform alternative service.

His request was rejected. On 4 May 2007, the Southern Section of the Seoul District Court sentenced him to one and a half years' imprisonment.

Mr. Ji-Hoon Lim's case

2.44 Mr. Lim received a draft notice for military service on 11 July 2006. He refused as conscientious objector. On 3 November 2006, the Daegu District Court sentenced him to one and a half years' imprisonment.

Mr. Sung-Ho Lee's case

2.45 Mr. Lee was called up for military service on 21 September 2006. Three days before the enlistment day, he called the Military Manpower Administration to inform them that he was a conscientious objector. On 12 January 2007, in 10 minutes, the hearing took place and the Changwon District Court sentenced Mr. Lee to one and a half years' imprisonment.

Mr. Dae-Jun Shin's case

2.46 Mr. Shin was called to perform military service on 23 September 2005. He explained his refusal to bear arms as a conscientious objector during the police and prosecutor's investigation. On 18 May 2006, the Daegu District Court sentenced him to one and a half years' imprisonment.

Mr. She-Woong Park's case

2.47 Mr. Park received his draft notice of enrolment into the army on 16 May 2006. He objected for religious reasons. As an authorized herb doctor, he was exempted from active military service duty and able to perform alternative service (working in a public health centre) as long as he accepted to go for a four-week basic military training session. Because of his religious beliefs he had to refuse. On 27 September 2006, the Gunsan Branch of the Jeonju District Court sentenced him to one and a half years' imprisonment.

Mr. Jin-Moo Kwan's case

2.48 Mr. Kwan was called up for military service on 8 May 2006. He filed his letter regarding conscientious objection. Despite explaining at large his religious convictions, the Busan District Court sentenced him to one and a half years' imprisonment on 26 October 2006.

Mr. Ki-Joon Kim's case

2.49 Mr. Kim was called up for military service on 26 May 2006. He refused for religious reasons. On 1 November 2006, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Young-Ki Lee's case

2.50 Mr. Lee received a draft notice of enlistment for military service on 4 September 2006. He refused as conscientious objector. On 23 November 2006, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Kang-Hyeok-Kang Seo's case

2.51 Mr. Seo received his writ for active military service on 12 October 2006. He called the Military Manpower Administration, explaining his refusal to enrol for religious reasons. He was arrested, investigated and detained pending trial. At trial, he expressed his readiness

to perform alternative service. His request was rejected. On 18 January 2007, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Chong-Bin Wee's case

2.52 Mr. Wee received a draft notice of enrolment into the army on 10 April 2007. He notified the Military Manpower Administration of his status as a conscientious objector. He was arrested, interrogated and detained at the Suwon detention centre, pending trial. On 4 June 2007, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Sang-Yong Oh's case

2.53 Mr. Oh received a draft notice for active military service on 10 May 2006. He refused for religious reasons. On 27 October 2006, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Hyun Young's case

2.54 Mr. Young was called up for military service on 31 August 2006. He called the conscription office to inform them of his status as a conscientious objector. He was investigated and detained until he went to court. On 16 March 2007, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Jae-Sung Lee's case

2.55 Mr. Lee received a draft notice for enrolment into the army on 21 August 2006. He refused for religious reasons. On 5 January 2007, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Bum-Hyuk Huh's case

2.56 Mr. Huh received a draft notice for active military service on 21 September 2006. He revealed his position to the Military Manpower Administration. He was investigated, arrested and detained until he went to trial. He expressed his readiness to perform alternative service. His request was rejected. On 19 January 2007, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Gang-Il Kim's case

2.57 Mr. Kim received a draft notice for military service on 13 June 2006. He refused to be enrolled for religious reasons. He was investigated, arrested and detained until he faced trial. He expressed his readiness to perform alternative service. His request was rejected. On 20 October 2006, the Ansan Branch of the Suwon District Court sentenced him to one and a half years' of imprisonment.

Mr. Jong-Hoon Kim's case

2.58 Mr. Kim received a draft notice for military service on 5 July 2006. He informed the conscription office about his status as conscientious objector. He was investigated, arrested and detained until he went to trial. He expressed his readiness to perform alternative service. His request was rejected. On 28 November 2006, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Hyun-Woo Jung's case

2.59 Mr. Jung was called to perform military service on 22 March 2006. He refused for religious reasons. He was investigated, arrested and detained until he went to trial. He

expressed his readiness to perform alternative service. His request was rejected. On 11 July 2006, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Jun-Hee Ha's case

2.60 Mr. Ha was called up for military service on 2 August 2006. He objected to it for religious reasons. He was investigated, arrested and detained until he went to trial. He expressed his readiness to perform alternative service. His request was rejected. On 1 December 2006, the Ansan Branch of the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Min-Gu Kang's case

2.61 Mr. Kang received a draft notice of enlistment on 27 July 2006. He objected to it for religious reasons and informed about his religious convictions to the Military Manpower Administration. He was investigated, arrested and detained until he went to trial. He expressed his readiness to perform alternative service. His request was rejected. On 15 November 2006, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Il-Gu Kang's case

2.62 Mr. Kang received a draft notice of enlistment in the beginning of November 2006. He objected to it for religious reasons to the Gyeonggi Military Manpower Administration. At trial, he expressed his readiness to perform alternative service. His request was rejected. On 3 April 2007, the Ansan Branch of the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Sang-Hyun Gwak's case

2.63 Mr. Gwak was called up to perform military service on 30 April 2006. He objected to it for religious reasons. At trial, he expressed his readiness to perform alternative service. His request was rejected. On 27 October 2006, the Ansan Branch of the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Sun-Hong Choi's case

2.64 Mr. Choi was called-up for military service on 31 March 2006. He objected to it for religious reasons. At trial, he expressed his readiness to perform alternative service. His request was rejected. On 19 July 2006, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Chang-Hyo Lee's case

2.65 Mr. Lee received a writ for active military service on 10 October 2006. He objected to it for religious reasons and called the Military Manpower Administration to inform them about his position. On 17 April 2007, the Daegu District Court sentenced him to one and a half years' imprisonment.

Mr. Chan-Hee Kim's case

2.66 Mr. Kim received a writ for active military service on 4 February 2006. He objected to it for religious reasons. He was investigated, arrested and detained until he went to trial. He expressed his readiness to perform alternative service. His request was rejected. On 20 July 2006, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Joon-Suk Kang's case

2.67 Mr. Kang received his enlistment notice on 23 August 2006. He objected to it for religious reasons. At trial, he expressed his readiness to perform alternative service. His request was rejected. On 22 December 2006, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Sung-Hee Lee's case

2.68 Mr. Lee received his notice for enlistment on 13 March 2006. He objected to it for religious reasons. On 13 July 2006, the Ansan Branch of the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Gang-Min Lee's case

2.69 Mr. Lee received his enrolment writ on 27 July 2006. He objected to it for religious reasons. On 23 November 2006, the Ansan Branch of the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Seul-Yong Park's case

2.70 Mr. Park received his writ for military service on 14 March 2006. He expressed his conscientious objection to the Military Manpower Administration. He said he would be ready to perform alternative service. On 10 October 2006, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Du-Hyun Jeon's case

2.71 Mr. Jeon was called-up for military service on 27 July 2006. He objected to it for religious reasons. On 8 December 2006, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Chan-Wook Park's case

2.72 Mr. Park received his writ to perform military service on 14 April 2004. As he refused to enrol for religious reasons, the Suwon District Court sentenced him on 30 August 2006 to one and a half years' imprisonment.

Mr. Seung-Ho Suk's case

2.73 Mr. Suk received his writ for military service on 26 June 2006. He expressed his conscientious objection to the Military Manpower Administration. He was arrested and detained until he was tried. On 31 October 2006, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Hyun-Il Nam's case

2.74 Mr. Nam received his draft notice for military service on 28 July 2006. He refused for religious reasons. On 17 November 2006, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Hyun-Soo Hong's case

2.75 Mr. Hong received his writ for military service on 27 April 2006. He expressed his position as conscientious objector. He was arrested and detained until the trial started. On 18 October 2006, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Woong-Hee Lee's case

2.76 Mr. Lee received his writ for military service on 6 November 2006. He refused for religious reasons. On 25 April 2007, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Nam-Hee Lee

2.77 Mr. Lee received his writ for military service on 12 July 2006. He refused for religious reasons. On 18 January 2007, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Young-Guk Ju's case

2.78 Mr. Ju received his writ for military service on 22 July 2006. He refused for religious reasons. He was arrested and remained in detention until the trial. On 13 December 2006, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Jin-Young Kim's case

2.79 Mr. Kim received his writ for military service on 25 May 2006. He refused for religious reasons. On 29 September 2006, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Hyuk Park's case

2.80 Mr. Park received his writ for military service on 22 March 2006. He refused for religious reasons. He was arrested and detained pending the trial. He said he would be ready to perform alternative service. His request was rejected. On 29 August 2006, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Myung-Jae Kim's case

2.81 Mr. Kim received his writ for military service on 22 July 2006. He invoked his status as a conscientious objector. On 9 July 2007, the Ansan Branch of the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Yoon-Soo Kim's case

2.82 Mr. Kim received his writ for military service on 5 April 2007. He refused for religious reasons. He was detained pending trial. He said he would be ready to perform alternative service. On 25 July 2007, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Ji-Ho Yoon's case

2.83 Mr. Yoon received his writ of enlistment for military service on 16 February 2007. He refused for religious reasons. He said he would be ready to perform alternative service. On 22 June 2007, the Ansan Branch of the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Jin-Hyung Park's case

2.84 Mr. Park received his writ of enlistment for military service on 25 October 2006. He objected to it for religious reasons. On 13 April 2007, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Hee-Hwan Park's case

2.85 Mr. Park received his writ of enlistment for military service on 22 September 2006. He refused for religious reasons. He was detained pending trial. On 7 February 2007, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Gi-Uk Lee's case

2.86 Mr. Lee received his writ of enlistment for military service on 15 September 2006. He objected to it for religious reasons. On 15 February 2007, the Ansan Branch of the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Ki-Up Kim's case

2.87 Mr. Kim received his writ of enlistment for military service on 23 August 2006. He objected to it for religious reasons. He provided all the necessary documents. He was arrested and detained pending trial. In Court, he expressed his readiness to perform alternative service. His request was rejected. On 21 February 2007, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Seng-Jae Ro's case

2.88 Mr. Ro received his writ of enlistment for military service on 5 July 2006. He objected to it for religious reasons. He was interrogated and later released. On 10 November 2006, the Daegu District Court sentenced him to one and a half years' imprisonment.

Mr. Bo-Hyun Kim's case

2.89 Mr. Kim received his writ of enlistment for military service on 17 October 2006. He objected to it for religious reasons. He was detained pending trial. On 6 February 2007, the Changwon District Court sentenced him to one and a half years' imprisonment.

Mr. Seung-Jin Lee's case

2.90 Mr. Lee received his writ of enlistment for military service on 14 December 2005. He objected to it for religious reasons. At trial he expressed his readiness to perform alternative service. On 10 August 2006, the Daegu District Court sentenced him to one and a half years' imprisonment.

Mr. Hoe-Min Kim's case

2.91 Mr. Kim received his writ of enlistment for military service on 23 December 2006. He objected to it for religious reasons. At trial, he expressed his readiness to perform alternative service. On 23 March 2007, the Changwon District Court sentenced him to one and a half years' imprisonment.

Mr. Suk-Jin Kwon's case

2.92 Mr. Kwon received his writ of enlistment for military service on 12 May 2006. He objected to it for religious reasons. At trial, he expressed his readiness to perform alternative service. On 15 September 2006, the Daegu District Court sentenced him to one and a half years' imprisonment.

Mr. Do-Hee Han's case

2.93 Mr. Han received his writ of enlistment for military service on 4 July 2006. He objected to it for religious reasons. He was arrested and detained pending trial. On 18

January 2007, the Daejeon District Court sentenced him to one and a half years' imprisonment.

Mr. Dae-Hee Bae's case

2.94 Mr. Bae received his writ of enlistment for military service on 28 July 2006. He objected to it for religious reasons. He was detained pending trial. He expressed his readiness to perform alternative service. On 15 December 2006, the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Mu-Myoung Kang's case

2.95 Mr. Kang received his writ of enlistment for military service on 10 May 2006. He objected to it for religious reasons and submitted all relevant documents to the Military Manpower Administration. He was detained pending trial. In Court, he expressed his readiness to perform alternative service. On 8 September 2006, the Incheon Bucheon District Court sentenced him to one and a half years' imprisonment.

Mr. Eun-Geol Cho's case

2.96 Mr. Cho received his writ of enlistment for military service on 10 May 2006. He objected to it for religious reasons and submitted all relevant documents to the Military Manpower Administration. He was detained pending trial. On 5 September 2006, the Ansan Branch of the Suwon District Court sentenced him to one and a half years' imprisonment.

Mr. Woo-Young Park's case

2.97 Mr. Park received his writ of enlistment for military service on 28 March 2006. He objected to it for religious reasons. He was detained pending trial. In Court, he expressed his readiness to perform alternative service. On 18 July 2006, the Busan District Court sentenced him to one and a half years' imprisonment.

Mr. Jong-Woo Jeong's case

2.98 Mr. Jeong received his writ of enlistment for military service on 19 May 2006. He objected to it for religious reasons and submitted all relevant documents to the Military Manpower Administration. He was detained pending trial. On 25 August 2006, the Busan District Court sentenced him to one and a half years' imprisonment.

Mr. Chang-Win Park's case

2.99 Mr. Park received his writ of enlistment for military service on 4 August 2006. He objected to it for religious reasons. On 22 January 2007, the Busan District Court sentenced him to one and a half years' imprisonment.

Mr. Myung-Woong Park's case

2.100 Mr. Park received his writ of enlistment for military service on an unspecified date. He objected to it for religious reasons. At trial, he expressed his readiness to perform alternative service. On 31 October 2006, the Sooncheon Branch of the Gwangju District Court sentenced him to one and a half years' imprisonment.

Mr. Su-Heon Choi's case

2.101 Mr. Choi received his writ of enlistment for military service in February 2007. He objected to it for religious reasons and submitted all relevant documents to the Military

Manpower Administration. On 11 July 2007, the Incheon District Court sentenced him to one and a half years' imprisonment.

Mr. Won-Kyung Lee's case

2.102 Mr. Lee received his writ of enlistment for military service on an unspecified date. He objected to it for religious reasons. He submitted a written statement justifying his position. On 8 March 2007, the Daejeon District Court sentenced him to one and a half years' imprisonment.

Mr. Kwang-Yoo Kim's case

2.103 Mr. Kim received his writ of enlistment for military service in the summer of 2006. He objected to it for religious reasons and submitted all relevant documents to the Military Manpower Administration. He was detained pending trial. In court, he expressed his readiness to perform alternative service. On 20 December 2006, the Goyang Branch of Uijeongbu District Court sentenced him to one and a half years' imprisonment.

The complaint

3.1 The authors complain that the absence in the State party of an alternative to compulsory military service, under pain of criminal prosecution and imprisonment, breaches their rights under article 18, paragraph 1, of the Covenant.

3.2 The authors refer to the Committee's Views in communication Nos. 1321/2004 and 1322/2004, *Yeo-Bum Yoon and Myung-Jin Choi v. the Republic of Korea*, Views adopted by the Committee on 3 November 2006, in which the Committee found a violation of article 18, paragraph 1, of the Covenant, by the State party, on the basis of similar facts as those in the present communications and in which the State party was obliged to provide the authors with an effective remedy.

State party's observations on admissibility and merits

4.1 By submission of 14 November 2008, the State party responds on the merits of the communications, referring to the Committee's Views in *Yeo-Bum Yoon and Myung-Jin Choi*³ and requesting the Committee to reconsider this decision taking into account the security environment in the State party.

4.2 The State party focuses on certain aspects of the Committee's earlier decision. As to the Committee's argument therein that, "an increasing number of States parties to the Covenant, which have retained compulsory military service, have introduced alternatives to compulsory military service", the State party points out that the legal systems of Germany and Taiwan Province of China, where alternatives have been introduced, are quite different from those of the State party. For example, the State party has remained divided since the end of the Second World War, whereas there has been no war in Germany since 1945 and reunification was achieved there in 1990.

4.3 Taiwan never waged war against China following the establishment of the Taiwanese government in 1955. The Korean War was fought across the Korean peninsula and lasted for three years and one month from 25 June 1950 to July 1953, when a ceasefire agreement was finally signed. It left one million dead from the south and more than 10 million Koreans were separated from their families at the end of the war. The State party submits that its painful history of war constitutes one of the reasons why its Government

³ See para. 3.2 above.

places such emphasis on national security as the most significant priority in its national policy agenda. From a legal perspective, the State party submits that a ceasefire agreement is still effective in the State party, which distinguishes it from other areas such as Taiwan Province of China. This agreement has not yet been superseded by a new legal framework such as a declaration ending the war or a peace agreement to ensure non-aggression and peace, despite the continued efforts to this end. In the State party's view, the security environment is not comparable to that of either Germany or Taiwan, as it shares a border with the Democratic People's Republic of Korea which spans 155 miles. There have been numerous clashes between vessels from the Democratic People's Republic of Korea and those from the Republic of Korea, which occurred on 15 June 1999 and 19 June 2002. Thus, this demonstrates that the outbreak of war remains a possibility even in the midst of a relatively reconciliatory environment between the two countries and reaffirms the State party's need to build military means for the reasons of defence.

4.4 As to the Committee's argument that the, "Republic of Korea has failed to show what special disadvantage would be involved for it if the rights of the authors under article 18 were fully respected", the State party submits that conscientious objection or the introduction of an alternative service arrangement is closely linked to national security, which is the very prerequisite for national survival and the liberty of the people. It fears that alternative military service would jeopardize national security. It highlights that 70 per cent of the Korean Peninsula is mountainous, making it all the more necessary to be equipped with enough ground forces to face guerrilla warfare. However, the number of soldiers in the State party remains at around 680,000, only 58 per cent of that of the Democratic People's Republic of Korea, which amounts to about 1,170,000. Furthermore, in the latter, between 2000 and 2005 there was a significant decrease in the number of male soldiers between 15 and 25 years. This trend is expected to continue in the future and makes it even more difficult to accept cases of exception from conscription.

4.5 According to the State party, there have always been those who are intent on "evading" conscription due to the relatively challenging conditions often required in the military, or concern over the effect such an interruption will have on one's academic or professional career. Thus, it is even more necessary to maintain its current system of a no-exception policy in mandatory military service to ensure sufficient ground forces. It submits that if it were to accept claims of exemption from military service, in the absence of public consensus on the matter, it would be impeded from securing sufficient military manpower required for national security by weakening the public's trust in the fairness of the system, leading the public to question its necessity and legitimacy. In addition, any exceptions based on religious belief would have to apply to people of all religious faiths and, given that persons of religious faith account for a significant part of the military forces, concerns about the proliferation of requests for exemptions are not groundless. The situation would be further aggravated if the State party were to accept exemptions based on personal conscience alone rather than on a religious basis. Thus, for the State party, the recognition of conscientious objection and the introduction of alternative service arrangements should be preceded by a series of measures: stable and sufficient provisions of military manpower; equality between people of different religions as well as with those without; in-depth studies on clear and specific criteria for recognition of an exemption and consensus on the issue among the general public.

4.6 As to the Committee's argument that, "respect on the part of the State for conscientious beliefs and manifestations thereof is itself an important factor in ensuring cohesive and stable pluralism in society", the State party is of the view that as a unique security environment prevails, fair and faithful implementation of mandatory military service is a determining factor to secure social cohesion. Respect for conscientious beliefs and its manifestations is not something that can be enforced through the implementation of a system alone. It is sustainable only if general agreement on this issue has been achieved

among society. Public opinion polls conducted in July 2005 and in September 2006 show that 72.3 per cent and 60.5 per cent, respectively, expressed opposition to the recognition of alternative service arrangements for conscientious objectors. In the States party's view, the introduction of such an arrangement at a premature stage within a relatively short period of time, without public consensus, would intensify social tensions rather than contribute to social cohesion.

4.7 The State party submits that it is a very difficult task to set up an alternative service system in practice, guaranteeing equality and fairness between those who perform mandatory military service and those who perform alternative service. The majority of the soldiers of the State party perform their duties under difficult conditions and some are involved in life-threatening situations. They face the risk of jeopardizing their lives while performing their duty of defending the country. Indeed, 6 people died and 19 were wounded in the clash between the naval vessels of the Republic of Korea and the Democratic People's Republic of Korea near Yeonpyeong-do in the Yellow Sea on 19 June 2002. Thus, it is almost impossible to ensure equality of burden with those fulfilling military service and those performing alternative service. Assuming that this disparity will continue to exist, it is imperative to gain the understanding and support of the general public before introducing an alternative service system.

4.8 The State party regrets that upon its accession to the Optional Protocol to the Covenant on 10 April 1990, the Committee had not provided a clear position on whether conscientious objection fell within the ambit of article 18. It was only on 30 July 1993, in its general comment 22 (1993), that the Committee announced its position that failure to recognize conscientious objection constituted a breach of this provision.⁴ It refers to the decisions of both its Supreme and Constitutional Courts to the effect that the failure to introduce a system at the present time cannot be interpreted as a breach of the Covenant, and that the requisite article of the Military Service Act punishing conscientious objectors is constitutional.

4.9 The State party informs the Committee that from April 2006 to April 2007, the Ministry of Defence set up a "Joint Committee between the public and private sectors to research the alternative service system". This Committee conducted research on the possibility of revising the Military Service Act and introducing an alternative service system including prospects for the future demand and supply of military personnel, the statements of those who refused military service, the opinions of experts in this field and relevant cases of foreign countries.⁵ It is now conducting research with the aim of following the trend of public opinion from August to December 2008.

4.10 In addition, in September 2007, the State party announced its plan to introduce a system assigning social services to those who refuse conscription due to their religious beliefs once there is a "public consensus" on this issue. The State party informs the Committee that once there is such consensus, "as a result of the research on public opinion and positions of the relevant ministries and institutions, then it will consider introducing an alternative service system". In conclusion, it requests the Committee to reconsider its previous view on this matter in the light of the arguments presented herein.

Authors' comments

5.1 In their comments dated 23 February 2009, the authors challenge the State party's submission. They point out the identical nature of their claims to those of the authors in

⁴ *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40 (A/48/40)*, annex VI, para. 11

⁵ The State party has not provided any indication of the results of this research.

communications 1321-1322/2004, submitted by Yoon Yeo-bum and Choi Myung-jin,⁶ in which the Committee expressed its view that the State party had violated article 18, paragraph 1, of the Optional Protocol. The authors consider therefore that in the present case, their rights under article 18 have also been violated. The authors deplore the State party's failure to implement the national action plan for conscientious objection devised by the National Human Rights Commission, referred to in State party's submissions to both the present communications as well as in previous ones.⁷

5.2 With respect to the State party's alleged necessity to preserve national security, which would be hampered by the recognition of the right of conscientious objection, the authors reply that States such as the United Kingdom of Great Britain and Northern Ireland, the Netherlands, Norway, Denmark and the Russian Federation adopted laws recognizing the rights of conscientious objectors during war time. There is no evidence that these laws weakened these States' national security. Another example is the State of Israel, which since 1948, has been involved in military confrontations that have resulted in a much higher number of casualties than those the Republic of Korea has experienced over the last 50 years. The State of Israel nevertheless exempts conscientious objectors from military service. The authors conclude that recognition of conscientious objection does not compromise a country's national security.

5.3 The authors further contend that the current number of conscientious objectors in the territory of the State party amounts to 2 per cent of those enlisted for military service each year. The authors do not consider this number high enough to have any type of influence on the ability for the State party to defend itself. They further note that these conscientious objectors are not serving the army but serving time in prison, thus suggesting that the State party's refusal to recognize conscientious objectors and to allow alternative service has not contributed to improve or maintain its national security. As for the State party's fear that the recognition of the right to conscientious objection would lead to an increase of requests from Buddhists, Catholics and others from the Christian faith, the authors reply that there is no record in any country which has implemented alternative civilian service for conscientious objectors, of a substantial increase coming from the ranks of Buddhists, Catholics and others from the Christian faith.

5.4 With regard to the State party's argument of the alleged necessity to preserve social cohesion, the authors reply by quoting a 1943 ruling of the Supreme Court of the United States where it has considered that fundamental freedoms do not depend on the outcome of elections.⁸ The authors argue that public opinion cannot excuse a breach of the Covenant or of its own Constitution. In the present case, the State party opted to include in its Constitution the protection of fundamental rights including the right to freedom of conscience and freedom of religion. Thus, domestic law, which includes the Covenant, protects such rights. This law of the land therefore protects the authors' right to conscientious objection. These rights may not be subject to popular vote. The authors further contend that reliance on public polls can be misleading. The State party refers to two polls dated 2005 and 2006 where 73.3 per cent and 60.5 per cent, respectively, expressed opposition to the recognition of alternative service arrangements for conscientious objectors. Yet, on 18 September 2007, when the Ministry of Defence announced that it had decided to introduce alternative civilian service for conscientious objectors, it made reference to another poll which showed that 50.2 per cent of the

⁶ See para. 3.2 above.

⁷ *Yeo-Bum Yoon and Myung-Jin Choi v. the Republic of Korea*, para. 6.5.

⁸ Supreme Court of the United States, *West Virginia State Board of Education et al. v. Barnette et al.*, 319 U.S. 624, 639 (1943).

population consented to introducing an alternative form of national service. The authors quote two other polls showing the same tendency.

5.5 The authors conclude that such contradictions show that fundamental rights cannot be subject to election reasons and that the State party has chosen to protect these freedoms in its Constitution and the Covenant. As for the State party's argument that when it acceded to the Covenant, the Committee had not yet issued its general comment No. 22 broadening the scope of article 18 to the right to conscientious objection, the authors reply that subsequent to the State party's accession to the Covenant, it became a member of the then United Nations Human Rights Commission, which adopted resolutions on the rights of conscientious objectors in 1993, 1995, 1998, 2000, 2002 and 2004. The State party did not object to any of them. The authors therefore request the Committee to consider that article 18, paragraph 1, has been violated in their case.

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 article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

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

6.3 The Committee notes that the authors have not appealed against the judgement of the respective District Courts on the basis that any appeal would have been totally ineffective. The authors contend that the Supreme Court of Korea, on 15 July 2004, and the Constitutional Court of Korea on 26 August 2004, decided that conscientious objectors must serve in the army or face prison terms; and since the highest courts of Korea made a final decision on this issue, any further appeal would be totally ineffective. Taking into account the authors' arguments and in the absence of any objection by the State party, the Committee considers that the authors have exhausted domestic remedies, in accordance with article 5, paragraph 2 (b), of the Optional Protocol.

6.4 The Committee further considers that the authors have sufficiently substantiated their allegations and therefore declares the claims under article 18, paragraph 1, of the Covenant admissible and proceeds to their consideration 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 submitted by the parties, in accordance with article 5, paragraph 1, of the Optional Protocol.

7.2 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 their failure to perform military service led them to criminal prosecution and imprisonment. The Committee notes that in the present cases the State party reiterates arguments advanced in response to the earlier communications⁹ before the Committee, notably on the issues of national security,

⁹ *Yeo-Bum Yoon and Myung-Jin Choi v. the Republic of Korea* (see para. 3.2 above); communication Nos. 1593-1603/2007, *Jung et al. v. the Republic of Korea*, Views adopted by the Committee on 23 March 2010.

equality between military and alternative service, and lack of a national consensus on the matter. The Committee considers that it has already examined these arguments in its earlier Views¹⁰ and thus finds no reason to depart from its earlier position.

7.3 The Committee recalls its general comment No. 22, where it has considered that the fundamental character of the freedoms enshrined in article 18, paragraph 1, 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 believes 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. 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. 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.

7.4 In the present cases, the Committee considers that the authors' refusal to be drafted for compulsory military service derives from their religious beliefs which, it is uncontested, were genuinely held and that the authors' subsequent conviction and sentence amounted to an infringement of their freedom of conscience, in breach of article 18, paragraph 1, of the Covenant. Repression of the refusal to be drafted for compulsory military service, exercised against persons whose conscience or religion prohibit the use of arms, is incompatible with article 18, 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, concludes that the facts before the Committee reveal, in respect of each author, violations by the Republic of Korea of article 18, 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 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, which includes the adoption of legislative measures guaranteeing the right to conscientious objection.

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 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 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.]

¹⁰ Ibid.

Appendix I

Case No.	Complainant	Case No.	Complainant		
1.	1642/2007	JEONG, Min-Kyu	31.	1672/2007	KANG, Doo-on
2.	1643/2007	GU, Hui-sung	32.	1673/2007	KANG, Sung-ryul
3.	1644/2007	YEON, Jin-mo	33.	1674/2007	KIM, Yong-dae
4.	1645/2007	LEE, Il-joo	34.	1675/2007	LEE, Seung-yob
5.	1646/2007	JO, In-hwan	35.	1676/2007	SEO, Jae-won
6.	1647/2007	KIM, Jung-rak	36.	1677/2007	CHOI, Woo-jin
7.	1648/2007	KIM, Jong-wook	37.	1678/2007	HWANG, Sung-jin
8.	1649/2007	SHIN, Dong-hun	38.	1679/2007	JEON, Sung-joong
9.	1650/2007	YOU, Ju-gwan	39.	1680/2007	KIM, Dae-jin
10.	1651/2007	JUNG, Jae-hyung	40.	1681/2007	KIM, Eun-woo
11.	1652/2007	HEO, Uok	41.	1682/2007	LIM, Ji-hoon
12.	1653/2007	PARK, Jong-kpeun	42.	1683/2007	LEE, Sung-ho
13.	1654/2007	BAEK, Un-hyun	43.	1684/2007	SHIN, Dae-jun
14.	1655/2007	LIM, Jung-rok	44.	1685/2007	PARK, She-woong
15.	1656/2007	SHIN, Myung-ki	45.	1686/2007	KWAN, Jin-moo
16.	1657/2007	CHA, Jae-ha	46.	1687/2007	KIM, Ki-joon
17.	1658/2007	PARK, Ju-hyun	47.	1688/2007	LEE, Young-ki
18.	1659/2007	KIM, Tae-eung	48.	1689/2007	SEO, Kang-hyeok
19.	1660/2007	SEO, San	49.	1690/2007	WEE, Chong-bin
20.	1661/2007	CHO, Ho	50.	1691/2007	Oh, Sang-yong
21.	1662/2007	KIM, Jung-hoon	51.	1692/2007	YOUNG, Jo-hyun
22.	1663/2007	LEE, Jae-hun	52.	1693/2007	LEE, Jae-sung
23.	1664/2007	YOON, Hangle	53.	1694/2007	HUH, Bum-hyuk
24.	1665/2007	JUNG, Hwan-ho	54.	1695/2007	KIM, Gang-II
25.	1666/2007	KIM, Do-hyun	55.	1696/2007	KIM, Jong-Hoon
26.	1667/2007	KIM, Gang-wook	56.	1697/2007	JUNG, Hyun-woo
27.	1668/2007	KIM, Hun	57.	1698/2007	HA, Jun-hee
28.	1669/2007	LEE, Young-won	58.	1699/2007	KANG, Min-gu
29.	1670/2007	MOON, Tae-soo	59.	1700/2007	KANG, II-gu
30.	1671/2007	JUNG, Ji-hyun	60.	1701/2007	GWAK, Sang-hyun

Case No.	Complainant	Case No.	Complainant		
61.	1702/2007	CHOI, Sun-hong	81.	1722/2007	PARK, Jin-hyung
62.	1703/2007	LEE, Chang-hyo	82.	1723/2007	PARK, Hee-hwan
63.	1704/2007	KIM, Chan-hee	83.	1724/2007	LEE, Gi-uk
64.	1705/2007	KANG, Joon-suk	84.	1725/2007	KIM, Ki-up
65.	1706/2007	LEE, Sung-hee	85.	1726/2007	RO, Seng-jae
66.	1707/2007	LEE, Gang-min	86.	1727/2007	KIM, Bo-hyun
67.	1708/2007	PARK, Seul-yong	87.	1728/2007	LEE, Seung-jin
68.	1709/2007	JEON, Du-hyun	88.	1729/2007	KIM, Hoe-min
69.	1710/2007	PARK, Chan-wook	89.	1730/2007	KWON, Suk-jin
70.	1711/2007	SUK, Seung-ho	90.	1731/2007	HAN, Do-hee
71.	1712/2007	NAM, Hyun-II	91.	1732/2007	BAE, Dae-hee
72.	1713/2007	HONG, Hyun-soo	92.	1733/2007	KANG, Mu-myoung
73.	1714/2007	LEE, Woong-hee	93.	1734/2007	CHO, Eun-geol
74.	1715/2007	LEE, Nam-hee	94.	1735/2007	PARK, Woo-young
75.	1716/2007	JU, Young-guk	95.	1736/2007	JEONG, Jong-woo
76.	1717/2007	KIM, Jin-young	96.	1737/2007	PARK, Chang-win
77.	1718/2007	PARK, Hyuk	97.	1738/2007	PARK, Myung-woong
78.	1719/2007	KIM, Myung-jae	98.	1739/2007	CHOI, Su-heon
79.	1720/2007	KIM, Yoon-soo	99.	1740/2007	LEE, Won-kyung
80.	1721/2007	YOON, Ji-ho	100.	1741/2007	KIM, Kwang-yoo

Appendix II

Individual opinion by Committee members Mr. Yuji Iwasawa, Mr. Gerald L. Neuman and Mr. Michael O'Flaherty (concurring)

We concur with the majority of the Committee in finding that the facts before the Committee reveal, in respect of each author, violations by the Republic of Korea of article 18, paragraph 1, of the Covenant, in line with its previous jurisprudence in similar cases against the State party. In this case, however, the majority of the Committee adopted reasoning different from the one it used in its previous jurisprudence. We believe that the Committee should use the same reasoning it used before. Accordingly, paragraphs 7.2 to 7.4 of the Views of the Committee should be replaced by the following paragraphs:

7.2 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 result of which their failure to perform military service resulted in their criminal prosecution and imprisonment. The Committee recalls its previous jurisprudence, in similar cases against the State party, that the authors' conviction and sentence amounted to a restriction on their ability to manifest their religion or belief and that, in those cases, the State party had not demonstrated that the restriction in question was necessary, within the meaning of article 18, paragraph 3.⁹

7.3 The Committee notes that in the present cases the State party reiterates arguments advanced in response to the earlier communications¹⁰ before the Committee, notably on the issues of national security, equality between military and alternative service, and lack of a national consensus on the matter. The Committee considers that it has already examined these arguments in its earlier Views¹¹ and thus finds no reason to depart from its earlier position.

7.4 The Committee notes that the authors' refusal to be drafted for compulsory military service was a direct expression of their religious beliefs which, it is uncontested, were genuinely held and that the authors' subsequent conviction and sentence amounted to an infringement of their freedom of conscience and a restriction on their ability to manifest their religion or belief. The Committee finds that as the State party has not demonstrated that in the present cases the restrictions in question were necessary, within the meaning of article 18, paragraph 3, it has violated article 18, paragraph 1, of the Covenant.

(Signed) Yuji Iwasawa

(Signed) Gerald L. Neuman

(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.]

⁹ *Yeo-Bun Yoon and Myung-Jin Choi v. The Republic of Korea*, (see para. 3.2 above); communication Nos. 1593-1603/2010, *Jung et al. v. The Republic of Korea*, Views adopted by the Committee on 23 March 2010.

¹⁰ *Ibid.*

¹¹ *Ibid.*

**JJ. Communication No. 1751/2008, *Aboussedra et al. v. Libyan Arab Jamahiriya*
(Views adopted on 25 October 2010, 100th session)***

<i>Submitted by:</i>	Dr. Adam Hassan Aboussedra (represented by Al Karama for Human Rights)
<i>Alleged victims:</i>	Dr. Mohamed Hassan Aboussedra (brother of the above), Selma Younès (wife of the victim), and T.A. and A.A. (the two children of the victim)
<i>State party:</i>	Libyan Arab Jamahiriya
<i>Date of communication:</i>	10 October 2007 (initial submission)
<i>Subject matter:</i>	Enforced disappearance of a person detained for 20 years
<i>Procedural issue:</i>	State failure to cooperate
<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, right to a fair trial, recognition as a person before the law
<i>Articles of the Covenant:</i>	2, paragraph 3; 6, paragraph 1; 7; 9, paragraphs 1 to 4; 10, paragraph 1; 14, paragraphs 1 and 3 (a) to (d); and 16
<i>Article of the Optional Protocol:</i>	Article 5, paragraph 2 (a) and (b)

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

Meeting on 25 October 2010

Having concluded its consideration of communication No. 1751/2008, submitted by Dr. Adam Hassan Aboussedra 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:

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

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

1. The author of the communication, dated 10 October 2007, is Dr. Adam Hassan Aboussedra, a Libyan national born in 1959 currently residing in Benghazi in the Libyan Arab Jamahiriya. Dr. Aboussedra has submitted the communication on behalf of his brother, Dr. Mohamed Hassan Aboussedra, and also the victim's wife, Selma Younès, and two children, T.A. and A.A. The author maintains that his brother is a victim of violations by the Libyan Arab Jamahiriya 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. He is represented by the non-governmental organization Al Karama for Human Rights. The Covenant and its Optional Protocol entered into force for the Libyan Arab Jamahiriya on 15 August 1970 and 16 August 1989 respectively.

The facts as presented by the author

2.1 The author, Dr. Adam Hassan Aboussedra, is the brother of Mohamed Hassan Aboussedra, a medical doctor and biologist living in Al Bayda, Libyan Arab Jamahiriya, who is married to Selma Younès and has two children, T.A. and A.A. He states that Dr. Mohamed Hassan Aboussedra (the "victim") was arrested by the internal security forces at his home during the night of 19 January 1989, without being shown a warrant or being informed of the grounds for his arrest. The author maintains that he and his three other brothers were also arrested in the same circumstances as the victim. All five were detained incommunicado in different places for a period of three years, during which time their parents received no further news of them.

2.2 All attempts on the part of the father, Mr. Hassan Salah Aboussedra, to ascertain what had happened to his sons and where they were being held proved fruitless, and it was not until April 1992 that he learned that his five sons were still alive and were all being held in Abu Salim prison in Tripoli. He and his wife were thus able to visit their sons for the first time in April 1992. During these visits, the father learned that his five children had been tortured, that none of them had been brought before the courts, and that no judicial proceedings had been initiated against them. Furthermore, none of them knew the reasons for their detention.

2.3 On 2 March 1995, after six years of incarceration, the victim's four brothers were released, without ever having appeared in court or had any judicial proceedings brought against them. However, Dr. Mohamed Hassan Aboussedra continued to be detained without judicial process, without access to legal counsel and without being able to challenge the lawfulness of his detention. After the events at Abu Salim prison on 28 and 29 June 1996, when several hundred prisoners were killed in their cells, the victim had been chosen by his co-detainees to serve as a go-between in their attempts to persuade the authorities to cease using force against them. It is alleged that his role in these events made him the subject of serious threats from senior officers who were present, and that thereafter the conditions of his detention worsened considerably. For several years Mohamed Hassan Aboussedra was again completely cut off from the outside world, without family visits or any possibility of contact with a lawyer.

2.4 Before his death in 2003, the victim's father had tried in vain to ascertain whether his son was still alive or had been one of the victims of the events of June 1996. Initially, he approached the prison authorities—first in summer 1996 and on several occasions thereafter—but failed to obtain any news of his son. He also approached a number of

popular committees,¹ likewise without success. He also endeavoured to appoint a legal counsel to initiate legal proceedings but all the lawyers he contacted advised him to attempt to resolve the issue amicably with the authorities. They also reportedly informed him that it would not in any case be possible either to file a complaint or to initiate any judicial process.

2.5 It was not until 2004, 15 years after his arrest, that Mohamed Hassan Aboussedra was brought before a court for the first time. The court in question—the People’s Court in Tripoli, a special court with jurisdiction to hear political cases²—sentenced him to life imprisonment.³ According to the author, the hearing was not public and the victim’s family was not informed of the trial date. Mohamed Hassan Aboussedra was never given access to his criminal file and was not informed of the charges against him. He was not permitted to appoint a lawyer of his choosing, either in person or through the intermediary of his family. Furthermore, in the course of his trial, no precise facts of a criminal nature were charged against him. He was simply questioned about his political beliefs and sentenced on that basis.

2.6 After lodging an appeal against this decision, Mohamed Hassan Aboussedra was retried on 2 June 2005, again behind closed doors but this time before an ordinary court, the People’s Court having been abolished in January of that year. This time he was sentenced to 10 years’ imprisonment, a sentence he had long since served as he had already been detained for 16 years. The presiding judge thus ordered his immediate release.

2.7 While his family were waiting for him to be released, they learned from former detainees of the same prison that Mohamed Hassan Aboussedra had been removed from Abu Salim prison by officers of the internal security forces on 9 June 2005. Despite making a number of further inquiries of the court and various authorities, they were unable to ascertain why he had been transferred or where he had been taken. It was only through a telephone call from the Gaddafi International Charity and Development Foundation, which the author had approached for assistance, that the family learned that their son was “on the list of persons awaiting release”.

2.8 On 31 January 2007, the family learned that Mohamed Hassan Aboussedra was being detained incommunicado at the headquarters of the internal security forces in Tripoli, that the conditions of his detention were deplorable, and that he had been subjected to torture for several months, to the extent that his life was apparently in danger. On the same day, the family filed an urgent appeal to the Working Group on Enforced or Involuntary Disappearances, the Working Group on Arbitrary Detention and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, asking them to intervene with the Libyan authorities in order to secure his release.

2.9 The author adds that, on 30 January 2007, his counsel also wrote to the Permanent Representative of the Libyan Arab Jamahiriya to the United Nations Office and other international organizations at Geneva about his brother’s case. His counsel received a response on 20 February 2007, advising him that the communication “had been duly forwarded to the relevant Libyan authorities in order to obtain clarification”.

¹ Local executive committees, which report to the General People’s Congress (Parliament) and to the different General People’s Committees (ministries).

² According to the author, numerous NGOs working to defend human rights had criticized this court for its unfair judgements.

³ The author alleges that he does not know the exact date of the decision.

2.10 The family were left without news until the last week of January 2009, when they received authorization to visit him in prison. They made two visits, on 31 January 2009 and 4 March 2009.

2.11 On 7 June 2009, more than 20 years after his arrest, Mohamed Hassan Aboussedra was released. However, he was forbidden to leave Tripoli.⁴ In spite of the victim's release, the author's legal counsel has been expressly authorized to pursue the case before the Committee.⁵

The complaint

3.1 The author alleges that the facts supporting his petition demonstrate that his brother was a victim of enforced disappearance⁶ from the time of his initial arrest on 19 January 1989 until April 1992,⁷ and from 9 June 2005⁸ until his release on 7 June 2009. According to the author, his brother's arrest by the State party's security agents was followed by a refusal to acknowledge the deprivation of liberty and concealment of the fate he had suffered. Whereas he should have been released following the judgement issued on 2 June 2005, instead he was removed by agents of the State from an official place of detention, the Abu Salim prison.

3.2 The author maintains that, as a victim of enforced disappearance, his brother was prevented de facto from exercising his right of appeal to challenge the lawfulness of his detention. His family did everything in their power to ascertain the truth about what had happened to him but the State party failed to respond to their inquiries. In so doing, the State party violated article 2, paragraph 3, of the Covenant in relation to Mohamed Hassan Aboussedra and in relation to his wife and their two children.

3.3 The author also asserts that the enforced disappearance of his brother constituted in itself a serious threat to his right to life, which gave his family legitimate grounds to fear for his life. Even though the State party had been officially notified of the disappearance of Mohamed Hassan Aboussedra, the petitions that the family submitted to both the prison authorities and the popular committees, between the time of his arrest in 1989 and his release 20 years later, met with no response. Referring to the Committee's general comment No. 6 (1982) on the right to life,⁹ the author maintains that the serious threat to his brother's right to life that resulted from his enforced disappearance is a violation by the State party of article 6, paragraph 1, of the Covenant.

3.4 The author further maintains that his brother's enforced disappearance constitutes inhuman or degrading treatment, in violation of article 7 of the Covenant. The victim was subjected to torture for several months following his arrest, as he himself informed his family at the time of their first visit to Abu Salim prison in April 1992. According to witness reports received by the family, he was subjected to further torture at the security forces headquarters in Tripoli following his transfer from Abu Salim prison on 9 June 2005.

⁴ The author states that he does not know whether this prohibition continues to apply.

⁵ Communication from the author's counsel to the Committee dated 8 September 2010.

⁶ The author refers to the definition of "enforced disappearance" contained 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.

⁷ The date on which the victim's father reportedly learned that his sons (including the victim) were alive and detained in Abu Salim prison (see para. 2.2 above).

⁸ The date on which the victim was reportedly removed from Abu Salim prison by officers of the internal security forces after being sentenced to 10 years' imprisonment (see para. 2.7 above).

⁹ *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40), annex V.*

3.5 For his wife, Selma Younès, and his two children, T.A. and A.A., the victim's disappearance was a frustrating, painful and stressful ordeal inasmuch as they had no information whatsoever concerning his fate for the first three years of his detention, then had to wait a further 15 years (until 31 January 2007) before learning that he was being held at the internal security forces' headquarters, and then a further two years before they were permitted to visit him in 2009, shortly before his release. At no time during the 20 intervening years did the authorities take the trouble to inform his brother's wife and children of his whereabouts, in order to alleviate their suffering. The author claims that in so doing the State party acted in violation of article 7 of the Covenant in respect of the victim's wife and children.

3.6 With regard to article 9 of the Covenant, the author notes firstly that his brother was arrested by the internal security forces without a warrant and without being informed of the grounds for his arrest, in violation of the guarantees set forth in article 9, paragraphs 1 and 2, of the Covenant. He was then arbitrarily detained and held incommunicado from the time of his arrest on 19 January 1989 until April 1992, and continued to be held incommunicado until his release on 7 June 2009, despite a court order for his release on 2 June 2005, which is a further violation of the guarantees established in article 9, paragraph 1, of the Covenant. The author reiterates that his brother was not brought before a judge until 15 years after his arrest, in blatant violation of the right to be brought promptly before a judge or other officer authorized by law to exercise judicial power, guaranteed under article 9, paragraph 3.

3.7 The author also recalls that, because his brother was held incommunicado for more than 20 years and was subjected to torture, he was not treated with humanity and with respect for the inherent dignity of the human person. He therefore maintains that his brother was victim of a violation by the State party of article 10, paragraph 1, of the Covenant.

3.8 The author further points out that, as a victim of enforced disappearance, his brother's right to be recognized as the subject of rights and obligations, in other words, as a human being deserving of respect, was denied. He adds that, as a victim of enforced disappearance, his brother was deprived of the protection of the law, and his right to recognition as a person before the law was denied, in violation by the State party of article 16 of the Covenant.

3.9 As to the exhaustion of domestic remedies, the author refers to his father's numerous attempts to ascertain the fate or whereabouts of Mohamed Hassan Aboussedra. Because it was impossible in Libya to find a lawyer that would have agreed to represent him in proceedings of this kind, he had not been able to file a legal complaint for disappearance. The author asked the Gaddafi International Charity and Development Foundation for assistance, but the only response he received was that "Dr. Aboussedra is on the list of persons due to be released", with no further follow-up. There was also no satisfactory response to the inquiries that the author's counsel addressed to the Permanent Mission of the Libyan Arab Jamahiriya on 31 January 2007. According to the author, all possible means of attempting to find his brother therefore proved fruitless and totally ineffective. He adds that domestic remedies in the State party are neither available nor effective, and he should thus no longer be obliged to continue with actions and proceedings at domestic level in order for his communication to be admissible by the Committee.

State party's failure to cooperate

4. On 15 September 2008, 20 January 2009 and 24 July 2009, the State party was asked to submit information on the admissibility and merits of the communication.¹⁰ The

¹⁰ On 24 March 2008, the State party stated that it was challenging the admissibility of the

Committee notes that the information requested has not been received. It regrets the State party's failure to provide any information regarding 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 it may have adopted. 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.¹¹

Additional submission by the author

5. On 8 September 2010, the author, through his counsel, informed the Committee that his brother had been released by the State party's authorities on 7 June 2009, and that he had been ordered not to leave Tripoli. The Committee was also informed that the author's counsel had been expressly authorized to pursue the case concerning Mohamed Hassan Aboussedra before the Committee.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

6.3 With regard to the exhaustion of domestic remedies, the Committee reiterates its concern that, in spite of three reminders addressed to the State party, no observations on the admissibility or merits of the communication have been received from the State party. In the circumstances, the Committee finds that it is not precluded from considering the communication under article 5, paragraph 2 (b), of the Optional Protocol. The Committee finds no reason to consider the communication inadmissible and thus proceeds to its consideration on the merits, inasmuch as the claims under article 2, paragraph 3; article 6, paragraph 1, read in conjunction with article 2, paragraph 3; article 7; article 9, paragraphs 1 to 4; article 10, paragraph 1; and article 16 are concerned. It also notes that issues may arise under article 14, paragraphs 1 to 3 (a) to (d), as well as under article 7, read in conjunction with article 2, paragraph 3, with respect to the wife and children of the victim.

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

communication, but did not set out the grounds for the challenge. On 8 April 2008, it stated that it would submit its observations on the admissibility and merits of the communication to the Committee before the deadline initially set, i.e. 22 July 2008. These observations were not received, despite three reminders.

¹¹ See, inter alia, communications No. 1640/2007, *El Abani v. Libyan Arab Jamahiriya*, Views adopted on 26 July 2010, para. 4; 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.

7.2 As to the alleged incommunicado detention of the author's brother, 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 and cruel treatment or punishment, which recommends that States parties should make provision against incommunicado detention.¹² It notes that, like his four brothers, Mohamed Hassan Aboussedra was detained incommunicado in different places of detention, where he was subjected to torture from the time of his arrest on 19 January 1989 until his family was able to visit him in Abu Salim prison in April 1992. Subsequently, although his four brothers had been released on 2 March 1995, he continued to be held incommunicado virtually without interruption until he was brought before the People's Court in Tripoli in 2004, that is, 15 years after his arrest. After being sentenced to life imprisonment by this special court, on 2 June 2005 the author's brother was retried before an ordinary court, which sentenced him to 10 years' imprisonment. Even though he had already been detained for 16 years and the court had ordered his immediate release, on 9 June 2005 Dr. Aboussedra was removed from Abu Salim prison and detained incommunicado at the internal security forces headquarters in Tripoli, where he suffered further torture. He was detained on these premises until obtaining authorization for his family to visit him in January and March 2009, before being finally released on 7 June 2009.

7.3 The Committee recalls its Views in the case of *El Abani v. Libyan Arab Jamahiriya*¹³ and notes that the State party has provided no response to the author's allegations. It also reaffirms that the burden of proof should not rest on the author of a 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.¹⁴ 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.

7.4 The Committee concludes, on the basis of the available evidence, that to have exposed the author's brother to acts of torture, to have kept him in captivity for more than 20 years, and to have prevented him from communicating with his family and the outside world constitutes a violation of article 7 of the Covenant in respect of Dr. Mohamed Hassan Aboussedra.¹⁵

7.5 With regard to the victim's wife, Selma Younès, and his two children, T.A. and A.A., the Committee notes the anguish and distress that they suffered as a result of the disappearance of Mohamed Hassan Aboussedra, about whom they were left without news between 1989 and 1992, and then for several years between 1995 and 2005. Moreover, although he had been tried in 2004 and 2005, and he had served his sentence in full, Dr. Aboussedra's fate remained unknown to his family, who were able to find out only in January 2007 that he was being held incommunicado at the internal security forces' headquarters. The family then had to wait a further two years before finally being permitted

¹² *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A.

¹³ *El Abani v. Libyan Arab Jamahiriya* (note 11 above), para. 7.3.

¹⁴ See *El Hassy v. Libyan Arab Jamahiriya* (note 11 above), para. 6.7; communications No. 139/1983, *Conteris v. Uruguay*, Views adopted on 17 July 1985, para. 7.2; and No. 1297/2004, *Medjouné v. Algeria*, Views adopted on 14 July 2006, para. 8.3.

¹⁵ See *El Alwani v. Libyan Arab Jamahiriya* (note 11 above), para. 6.5; *El Hassy v. Libyan Arab Jamahiriya* (note 11 above), para. 6.2; communications No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996, para. 8.5; and No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994, para. 9.4.

to visit him in January and March 2009. The Committee is therefore of the opinion that the facts before it reveal a violation of article 7 of the Covenant, read in conjunction with article 2, paragraph 3, with regard to the victim's wife and his two children.¹⁶

7.6 Regarding the complaint of a violation of article 9, the information before the Committee shows that the author's brother was arrested by agents of the State party without a warrant, then held incommunicado without access to a defence counsel and without being informed of the grounds for his arrest or the charges against him until he was brought before the People's Court in Tripoli, a court with special jurisdiction, for the first time in 2004, that is, 15 years after his arrest. 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 his or her detention is declared incompatible with the provisions of the Covenant, in particular those of article 9, paragraph 1. In the case in question, the author's brother was held in detention until he was brought before a judge in 2004, without being able to appoint legal counsel or being able to instigate any form of legal process through which the lawfulness of his detention could be challenged. Furthermore, after being retried in 2005 before an ordinary court, which ordered his release since he had served his sentence in full, the victim was again detained incommunicado until his release on 7 June 2009. In the absence of any appropriate explanation by the State party, the Committee finds a multiple violation of article 9.¹⁷

7.7 Regarding the author's complaint under article 10, paragraph 1, that his brother was held incommunicado for almost 20 years and subjected to torture, 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 State party information on the treatment of the author's brother in Abu Salim prison and at the internal security forces' headquarters in Tripoli, where he was detained, the Committee finds a violation of article 10, paragraph 1, of the Covenant.¹⁸

7.8 Although the author does not invoke article 14 of the Covenant, the Committee is of the opinion that the information before it regarding the first sentence handed down against Mohamed Hassan Aboussedra in 2004 raises issues under article 14, paragraphs 1 and paragraph 3 (a) to (d), of the Covenant. The Committee observes that Dr. Aboussedra was not tried until 15 years after his arrest, and sentenced to life imprisonment in a closed trial on a date unknown to his family. He was never given access to his criminal file, or to the charges against him, and never had the opportunity to appoint a counsel of his choice to assist him. The Committee therefore concludes that the trial and sentencing of Mohamed Hassan Aboussedra to life imprisonment by the People's Court in Tripoli constitute a violation of article 14, paragraph 1 and paragraph 3 (a) to (d), of the Covenant.

7.9 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 his or her right to recognition as a

¹⁶ See *El Abani v. Libyan Arab Jamahiriya* (note 11 above), para. 7.5; *El Hassy v. Libyan Arab Jamahiriya* (note 11 above), para. 6.11; communications No. 107/1981, *Almeida de Quinteros v. Uruguay*, Views adopted on 21 July 1983, para. 14; and No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003, para. 9.5.

¹⁷ See *El Abani v. Libyan Arab Jamahiriya* (note 11 above), para. 7.6; and *Medjnoune v. Algeria* (note 14 above), para. 8.5.

¹⁸ See general comment No. 21 (1992) on humane treatment of persons deprived of liberty, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. B, para. 3; communication No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2; and *El Hassy v. Libyan Arab Jamahiriya* (note 11 above), para. 6.4.

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 effective remedies, including judicial remedies (Covenant, art. 2, para. 3), have been systematically impeded.¹⁹ In the present case, the author alleges that his brother was arrested on 19 January 1989 without a warrant and without being informed of the legal grounds for his arrest. He was then taken to various undisclosed places and none of his family's subsequent attempts to obtain news about him produced results until January 2009. Although they had acknowledged his detention in Abu Salim prison in authorizing his family to visit him in April 1992, the Libyan authorities failed to provide the family with any further information about him. The Committee therefore concludes that the enforced disappearance of Mohamed Hassan Aboussedra during the greater part of his detention denied him the protection of the law for the same period 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 also 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 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) on the nature of the general legal obligation imposed on States parties to the Covenant, 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.²⁰ In the present case, the information before it indicates that the author's brother did not have access to an effective remedy, and the Committee therefore concludes that the facts before it reveal a violation of article 2, paragraph 3, of the Covenant, read in conjunction with article 6, paragraph 1, and article 7.²¹

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 2, paragraph 3, read in conjunction with article 6, paragraph 1, and article 7; article 7 standing alone; article 9; article 10, paragraph 1; article 14, paragraph 1 and paragraph 3 (a) to (d); and article 16 of the Covenant with regard to the author's brother. The facts also reveal a violation of article 7, read in conjunction with article 2, paragraph 3, with regard to the victim's wife and two children.

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 a thorough and effective investigation into the disappearance of Dr. Aboussedra, adequate information about the results of its inquiries, and adequate compensation for the victim, his wife and his children for the violations suffered. The Committee considers the State party duty-bound to conduct thorough investigations into the alleged violations of human rights, particularly enforced disappearances and acts of torture, and also to prosecute, try and punish those held responsible for such violations.²² The State party is also under an obligation to take steps to prevent similar violations in the future.

¹⁹ See communications No. 1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007, para. 7.8; and No. 1495/2006, *Zohra Madaoui v. Algeria*, Views adopted on 28 October 2008, para. 7.7.

²⁰ *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III, paras. 15 and 18.

²¹ See *El Hassy v. Libyan Arab Jamahiriya* (note 11 above), para. 6.9; and communication No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 9.9.

²² See *El Hassy v. Libyan Arab Jamahiriya* (note 11 above), para. 8; *Boucherf v. Algeria* (note 21

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.

[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.]

above), para. 11; and *Medjnoune v. Algeria* (note 14 above), para. 10.9.

KK. Communication No. 1756/2008, Moidunov and Zhumbaeva v. Kyrgyzstan (Views adopted on 19 July 2011, 102nd session)*

<i>Submitted by:</i>	Turdukan Zhumbaeva (represented by counsel, Tair Asanov, with the assistance of the Open Society Justice Initiative)
<i>Alleged victims:</i>	The author and her deceased son, Tashkenbaj Moidunov
<i>State party:</i>	Kyrgyzstan
<i>Date of communication:</i>	4 January 2008 (initial submission)
<i>Subject matter:</i>	Death in police custody
<i>Procedural issue:</i>	N/A
<i>Substantive issues:</i>	Right to life, prohibition of torture, right to an effective remedy
<i>Articles of the Covenant:</i>	2, paragraph 3; 6, paragraph 1; 7
<i>Article of the Optional Protocol:</i>	N/A

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

Meeting on 19 July 2011,

Having concluded its consideration of communication No. 1756/2008, submitted to the Human Rights Committee on behalf of Mr. Tashkenbaj Moidunov (deceased) and Ms. Turdukan Zhumbaeva, 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 4 January 2008, is Ms. Turdukan Zhumbaeva, a Kyrgyz national. She submits the communication on her own behalf and on behalf of her deceased son, Mr. Tashkenbaj Moidunov, born in 1958. She claims that they are victims of violations by Kyrgyzstan¹ of articles 6, paragraph 1 and 7 read alone and in conjunction with article 2, paragraph 3, of the Covenant. The author is represented by counsel, Mr. Tair Asanov, who is assisted by the Open Society Justice Initiative.

* 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. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

¹ The Covenant and the Optional Protocol entered into force for the State party on 7 January 1995.

Facts as presented by the author

2.1 On 24 October 2004, Mr. Tashkenbaj Moidunov, the author's son, and his wife were quarrelling on the street, when a police car approached them and requested that they follow them to the Bazakorgon police station for public disturbance. At the police station, the author's son and his wife were questioned separately. According to the testimony by Mr. Moidunov's wife, she was pressured by the police officer to write a complaint against her husband stating that he was threatening her with a knife and saying that he was going to kill her. Being afraid of the police, she wrote the statement. She was released but soon thereafter she was called back to the police station and was asked whether she was aware that her husband had heart problems. When she arrived at the police station, she saw her husband's body lying on the floor.

2.2 An ambulance doctor was called with a message that Mr. Moidunov (the victim) had hanged himself at the police station. In the doctor's testimony dated 18 November 2004, she stated that she carefully examined the victim's neck but didn't observe any traces of a rope. She stated that she noticed red fingers marks on the victim's neck and that she asked whether the man was strangled, to which a police officer replied that the victim seemed to have heart problems. When she inquired as to the reason why it was reported to the ambulance dispatcher that a man had hanged himself, the officer replied that "they all panicked and told the ambulance about hanging".

2.3 A forensic expert conducted a preliminary examination the same day. He stated that the victim did not show any broken bones, scratch or cut wounds. On 25 October 2004, an autopsy was performed by the same forensic expert, who described injuries on the eyebrow, lower lip, and neck and concluded that the death was caused by mechanical asphyxiation by hanging on a soft fabric. Alcohol was found in the victim's blood and urine (3.27‰ in the blood and 3.49‰ in the urine). During an interrogation on 25 April 2005, the forensic expert stated that the injuries on the victim's neck could have been caused by any blunt object, including fingers; however that he did not find any strangulation marks on the victim's neck. The investigator asked if the mechanical asphyxiation could have been the result of strangulation, to which the forensic expert replied that the injuries on the neck could have been caused by human finger nails but that histological examination of some neck tissue did not reveal any signs of haemorrhaging, which would have been an indicator of strangulation. He also stated that the thyroid horn fracture could result from the application of force by hand.

2.4 In the first statement dated 24 October 2004, the head inspector of the police station, Mr. Mantybaev, stated that the victim and his wife had been brought in after a quarrel on the street, which continued in the premises of the police station and that the victim was under the influence of alcohol. He stated that the victim's wife wished to file a complaint against her husband and requested that her husband be kept in custody to avoid further contact. The victim, who was sitting in the corridor, suddenly fell on the floor after holding his chest in pain. The first sergeant, Mr. Abdulkaimov, made the same statement, except that he said that the victim's wife had witnessed the author's death and thereafter lost consciousness.

2.5 On 9 November 2004, after a preliminary examination of the facts, the deputy prosecutor opened a criminal investigation under article 316 of the Criminal Code (negligent performance of duties). On 17 November 2004, the head inspector of the police station, Mr. Mantybaev, was interrogated and provided a different account of the facts, stating that when he came out of the room after taking the victim's wife's complaint, the victim was no longer sitting in the corridor. After some searching, they found him in the

administrative detention cell having hanged himself with his sport trousers.² After performing cardio-pulmonary resuscitation, an ambulance was called. Both the head inspector and the first sergeant had conspired to say that the victim had died of a heart attack and only decided to reveal the truth in the investigation, as they were afraid of the consequences. On 21 December 2004, the victim's wife testified that her husband never wore sport trousers and did not possess any.

2.6 On 16 May 2005, the head inspector of the police station Mr. Mantybaev, was charged with: (a) abuse of office, namely overstepping his official powers resulting in a person's death; (b) forgery while performing official duties and (c) negligence, which inadvertently led to a person's death. He was also charged with a violation of an order by the Ministry of Interior, which obliges a police officer on duty to organize a medical examination of a person who is in a state of intoxication. The forgery charge was based on Mr. Mantybaev's cover-up actions, namely the fact that he wrote in the official registry that the body of the victim was found on the street without traces of a violent death.

2.7 On 21 September 2005, the Suzak District Court found Mr. Mantybaev guilty of negligent performance of duties, which resulted inadvertently in the death of a person under article 316 (2) of the Criminal Code. The other charges were considered not applicable. According to the court, Mr. Mantybaev failed to organize a medical examination of the victim and to take measures to prevent the victim, who was under the influence of alcohol, from committing suicide. Due to the reconciliation between Mr. Mantybaev and the family of the victim, the defendant was exempted from criminal liability.³ During the court hearing the brother of the victim confirmed having received compensation (30,000 Kyrgyz som, approximately US\$ 860) from the head inspector of the police station, however he insisted that the case be sent for additional investigation, as he believed that the victim was killed by the police officers.

2.8 The author filed an appeal to the Zhalalabad Regional Court. The Regional Court held that the first instance court had failed to evaluate the contradictions between the testimonies of Mr. Mantybaev and other witnesses. It also held that the first instance court when applying the reconciliation procedure, did not take into account, the position of the victim's family members. The Zhalalabad Court reversed the decision of the Suzak District Court and ordered a retrial of the case. This decision was appealed to the Supreme Court by Mr. Mantybaev.

2.9 On 27 December 2006, the Supreme Court quashed the decision of the Zhalalabad Regional Court and upheld the decision of the Suzak District Court. It held that the guilt of the defendant Mr. Mantybaev was established by the first instance court and that his actions were lawfully characterized as negligence. It considered that the author's arguments regarding the deficiencies of the investigation and the existence of evidence indicating a homicide were speculations.

The complaint

3.1 The author submits that the State party is responsible for the death of the victim, who was arbitrarily deprived of his life while in police custody. The author recalls the Committee's jurisprudence, according to which the State party has a special responsibility of care for an individual's life when in custody and that it has to take adequate and

² The term sport trouser is used to describe long underwear that is worn underneath trousers.

³ Article 66 of the Criminal Code states that: "A person who has committed a crime of small gravity or misdemeanour can be exempt from criminal liability, if he has reconciled with the victim and indemnified inflicted damages."

appropriate measures to protect his/her life.⁴ She also recalls the principle of the reversal of the burden of proof in cases of death in custody.⁵ The author claims that the victim died in police custody as a result of the use of force by police officers, which was excessive and unnecessary and therefore in violation of article 6, paragraph 1, of the Covenant. The author recalls the autopsy report, in which it is stated that the victim died because of mechanical asphyxiation. During the investigation however, the forensic expert did not provide a conclusive view as to whether this mechanical asphyxiation was a result of hanging or manual strangulation. The author underlines that the victim was in good mental and physical health when he was taken to the police station and that the investigation did not gather any evidence to the contrary. The ambulance doctor who first examined the victim's body had noted that there were red finger marks visible on the victim's neck, which was confirmed by the autopsy report. She notes that these facts officially established by the investigation reveal the most probable explanation of the victim's death by manual strangulation. She also notes that the theory of suicide is not plausible, because the victim's wife had testified that he did not possess any sport trousers and no forensic examination was performed on the sport trousers that were allegedly used. The victim did not suffer from any mental condition making him prone to committing suicide; and in the light of the high level of alcohol intoxication, the victim neither had the physical capacity, nor the time, as he was left unobserved for a very short period of time, to commit suicide. She also underlines that the police officers, who are the primary suspects, made several efforts to mislead the investigation. They first informed the ambulance that the victim hanged himself, then reported that he had a heart attack, then made an official record that he was found dead on the street and then testified that he hanged himself on his sport trousers.

3.2 The author further claims that the State party failed to provide effective remedies for the victim's death. The author recalls the Committee's jurisprudence, according to which in circumstances that led to the loss of life, a thorough investigation needs to be carried out by an impartial body,⁶ that perpetrators need to be brought to justice,⁷ and that compensation needs to be paid to the victim's family.⁸ The author submits that the authorities never investigated the arbitrary killing of the victim but stated in the decree of 9 November 2004 ordering a criminal investigation that a criminal case was opened upon the fact of discovering the victim who hanged himself. The author contends that at that moment, no evidence suggesting the cause of death could have been suicide had been available, because the written statements by the police officers stated that the victim died of a heart attack. It was only on 13 December 2004, when the autopsy report stated that the mechanical asphyxiation could have been caused by hanging. Furthermore, the investigation gave full credit to the police officers' last testimony that the victim had hanged himself and did not take into account the testimonies by the author and the ambulance doctor. The author highlights that the investigation failed to obtain a detailed description of the position of the victim's body during the alleged hanging, it failed to conduct a mock hanging

⁴ See communications No. 84/1981, *Dermit Barbato v. Uruguay*, Views adopted on 21 October 1982; and No. 30/1978, *Bleier v. Uruguay*, Views adopted on 29 March 1982.

⁵ See *Bleier v. Uruguay*, para. 13.3; and communication No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994.

⁶ See communications No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996; No. 449/1991, *Mojica v. Dominican Republic*, Views adopted on 15 July 1994; No. 194/1985, *Miango Muiyo v. Zaire*, Views adopted on 27 October 1987; No. 181/1984, *Sanjuán Arévalo v. Colombia*, Views adopted on 3 November 1989; and No. 161/1983, *Herrera Rubio v. Colombia*, Views adopted on 2 November 1987.

⁷ See communication No. 563/1993, *Bautista de Arellana v. Colombia*, Views adopted on 27 October 1995.

⁸ See communication No. 868/1999, *Wilson v. Philippines*, Views adopted on 30 October 2003.

reconstructing the act of the alleged suicide, it did not establish the exact timing and sequence of events, it did not request medical records to establish if the victim had any suicidal tendencies, it also did not order a forensic expertise of the sport trousers, which were allegedly used by the victim to hang himself and it did not locate the cash (6,000 Kyrgyz som, approximately US\$ 170) which, according to the author, the victim carried in his pocket. She submits that the police officers were never investigated for the killing of the victim. Mr. Mantybaev was punished for a far lesser crime of negligent performance of his duties and the police sergeant on duty, Mr. Abdulkaimov, was never charged or prosecuted. The author submits that this amounts to a violation of article 2, paragraph 3 read in conjunction with article 6, paragraph 1, of the Covenant.

3.3 The author furthermore claims that the family of the victim never received appropriate compensation for his death. She states that the compensation paid by Mr. Mantybaev was inadequate. The victim's brother received compensation of 30,000 Kyrgyz som in the framework of the procedure of reconciliation before the Suzak District Court. The author explains that according to domestic law, State liability for the unlawful killing of the victim is dependent on the criminal conviction of the police officers acting on behalf of the State and that the two police officers were never charged or convicted for the killing of the victim. She could therefore not sue the State party for the violations of article 2, paragraph 3 read in conjunction with article 6, paragraph 1, of the Covenant.

3.4 The author further claims that the use of unlawful force by the police officers amounts to a violation of article 7, of the Covenant.⁹ She notes the Committee's jurisprudence, according to which it is incumbent on the State party to provide a plausible explanation of how injuries occurred of a person deprived of liberty and produce evidence refuting the allegations.¹⁰ The author claims that the evidence shows that the victim received numerous injuries on his face and neck and the competent authorities of the State party failed to give any explanation on how such injuries might have occurred and what would have been the legitimate law enforcement purpose for the use of force by the police officers. The author submits that the victim did not have any injuries on his neck and face prior to his detention and that the explanation of the death provided, namely suicide by hanging, does not explain the infliction of multiple bruises and injuries described in the autopsy report.

3.5 The author finally submits that the prosecution failed to investigate whether the victim's death was the result of torture and/or ill-treatment, despite strong evidence, such as multiple injuries on his face and body. She also submits that the large sum of money which the victim carried in his pocket (6,000 Kyrgyz som, approximately US\$170) has never been located. She claims that this amounts to a violation of article 2, paragraph 3 read in conjunction with 7 of the Covenant. She also notes that despite the criminalization of the crime of torture since 2003, the Suzak District Court had held that for charges of abuse of power the head inspector of the police station did not fall into the category of an "official person" and this decision was upheld by the Supreme Court. The police officers could therefore not be held accountable for the crime of torture.

State party's observations on the admissibility and the merits

4.1 On 16 June 2010, the State party submitted information provided by the General Prosecutor's Office and the Supreme Court. The General Prosecutor's Office states that on 24 October 2004, at 1700 hours, the body of the victim was found in the administrative holding cell of the Bazarkorgon police station. The body showed marks of someone having

⁹ See communication No. 1416/2005, *Alzery v. Sweden*, Views of 25 October 2006.

¹⁰ See communication No. 907/2000, *Siragev v. Uzbekistan*, Views of 1 November 2005.

hanged himself. According to the autopsy, the death of the victim was caused by mechanical asphyxiation of the upper respiratory tracks. On 9 November 2004, the prosecution opened a criminal case against the head inspector of the police station, Mr. Mantybaev, on the grounds of negligence which resulted in the accidental death of a person. On 16 May 2005, the head inspector of the police station, Mr. Mantybaev, was charged with negligence, and abuse of power. On 21 September 2005, the Suzak District Court, sentenced Mr. Mantybaev for negligence. This decision was upheld by the Supreme Court.

4.2 The Supreme Court states that on 21 September 2005, Mr. Mantybaev was found guilty of negligence (art. 316, para. 2 of the Criminal Code) and was exempted from criminal liability due to the reconciliation agreement with the victim's family (art. 66 of the Criminal Code). The Court explained to the author the procedure for filing a civil suit for moral and material damages. Upon an appeal by the author, the second instance court considered the case. On 5 September 2006, the Zhalalabad Regional Court reversed the first instance decision and a retrial was ordered. The Zhalalabad Regional Court decision was challenged pursuant to the Supervisory Review Procedure before the Supreme Court. On 27 December 2006, the Supreme Court reversed the second instance court decision and upheld the first instance court judgment, which became final.

The author's comments

5.1 On 11 January 2011, the author submitted her comments on the State party's observations. She notes that the State party has merely reiterated that an individual had been charged with criminal negligence but had been absolved from criminal liability due to a reconciliation with the victim's family; however it does not present any arguments with regard to the alleged human rights violations. The author reiterates her initial complaint and states that there still has not been any effective investigation into the death of her son and that the legal proceedings had been terminated on the basis of payment to assist with the funeral expenses. She underlines that the State party cannot avoid its international legal obligations to conduct an effective and impartial investigation into the death of the victim and hold accountable those responsible for it, by the application of a process that avoids criminal liability.

5.2 The author notes that the Suzak District Court judgment is inconsistent in its consideration of the purported reconciliation between Mr. Mantybaev and the victim's family. In its summary of the evidence, it reflects Mr. Mantybaev's statement that he reconciled with the victim's family and also notes the statement of the victim's brother, according to which the death of his younger brother could be clarified if Mr. Abdukaimov was found and therefore he requested that additional investigation be carried out to solve the case. Despite the contradiction, the Suzak District Court concluded that there had been a reconciliation and thus exempted the defendant from criminal liability. Upon appeal at the Zhalalabad Regional Court, the author testified that she believed that her son had been killed by Mr. Abdukaimov, who is on the run, and requested that legal measures be taken to apprehend him. The author notes that there is no record that the prosecutor disagreed with her statement. The author further notes that the second instance court accepted that no reconciliation had been reached and requested a retrial requiring that discrepancies and drawbacks of the investigation needed to be clarified.

5.3 The author notes article 66 of the Criminal Code, on the basis of which Mr. Mantybaev was exempted from criminal liability and notes that both the District Court and the Supreme Court have accepted that charges arising from the death of a person in police custody can be qualified as a "crime of small gravity" and that a small payment to assist with the funeral cost was sufficient to cover the financial losses arising from the death of a family member.

5.4 The author recalls the Committee's jurisprudence and notes that the State party has a duty to bring perpetrators to justice and to adapt the sentence to the seriousness of the human rights violation. Purely disciplinary or administrative remedies were not considered sufficient or effective by the Committee.¹¹ The author argues that she has not waived her rights to establish the truth of how her son died and to hold the perpetrators accountable. The fact that the family did not refuse a small payment to assist with the funeral expenses cannot be deemed to be an unequivocal waiver of their rights, on the basis of informed consent and in full knowledge of the facts. The author's pursuit of justice through appeals and her submission to the Committee make it clear that no waiver was intended.

5.5 In conclusion, the author reiterates that due to the failure to provide a plausible explanation for the death of her son by means of an independent and effective investigation, the Committee should find that the death of the victim was an arbitrary killing. She also reiterates the numerous failings in the investigation and adds that Mr. Abdukaimov was never located after his initial statement and it is not clear if any attempts were made to trace him. Furthermore, the large sum of money (6,000 Kyrgyz som) that had been in possession of the victim was never found. Moreover, the family were not involved in the investigation and the results of the investigation were never made public.

Additional information by the State party

6. On 18 July 2011, the State party provided additional information. It recalls extensively the facts and the proceedings concerning the death of the son of the author, reiterates its previous observations on the merits¹² and contends that there are no grounds to review the court's decisions in the present case.

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 has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 Concerning the requirement of exhaustion of domestic remedies, the Committee notes that according to the information submitted by the author, all available domestic remedies, including the Supreme Court, have been exhausted. 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.

7.4 In the Committee's view, the author has sufficiently substantiated, for purposes of admissibility, her claims under articles 6, paragraph 1 and 7 read alone and in conjunction with article 2, paragraph 3, of the Covenant and therefore proceeds to their examination on the merits.

¹¹ See communication No. 778/1997, *Coronel et al. v. Colombia*, Views adopted on 29 September 1996, para. 6.2; see also communication submitted to the Committee against Torture, No. 212/2002, *Guridi v. Spain*, decision adopted on 17 May 2005, para. 6.7.

¹² The State party's submission consists of information prepared by the Ministry of Interior, the State party's Committee on National Security, and the General Prosecutor's Office.

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

8.2 The Committee notes that, while the State party has provided information regarding the domestic proceedings and the facts of the communication, it has not provided any information about the merits of the specific claims made by the author. In the circumstances, due weight must be given to the author's allegations to the extent that they have been substantiated.

8.3 The Committee notes that, on 24 October 2004 in the afternoon (16.30 according to the resolution on criminal charges of 16 May 2005), the victim and his wife were requested to follow the police officers to the Bazarkorgon police station after a quarrel that was qualified as a public disturbance. The victim was kept in custody, while his wife was released. According to the information provided by the State party, the author's son died on 24 October 2004 at 17.00 (17.20 according to the Suzak District Court judgment). The Committee notes from the testimony by the ambulance doctor dated 18 November 2004, that she concluded that the victim did not have any strangulation marks but red finger marks on his neck. The Committee also notes from the interrogation testimony by the forensic expert dated 25 April 2005, who examined the victim's body on 25 October 2004, in the presence of doctors and two of the victim's relatives, that scratches on the eyebrow, under the chin, on the neck and the right upper arm, as well as a bloody wound on the left side of the victim's neck were observed. The forensic expert stated that the wounds could appear from something hard such as fingernails or a wrist and that the histological examination of body tissues led to the conclusion that the victim died of mechanical asphyxiation. The mechanical asphyxiation could have been caused by hanging from a soft fabric. When asked if manual strangulation could have been the cause of the victim's death, the forensic expert mentioned that no scratches on the cervical fabrics or skin were found but that the fracture of the horn of the thyroid could result from pressure by hands.

8.4 The Committee further notes the Suzak District Court decision of 21 September 2005, which relied on the testimony of Mr. Mantybaev holding that the victim had hanged himself on his sport trousers in the administrative detention cell. The decision however does not indicate if other evidence has been evaluated and does not reconcile the different statements by Mr. Mantybaev. It notes that the victim's brother insisted that the assistant police officer be found and that the case be retried. Nevertheless, the court concluded that there had been reconciliation between the defendant and the victim's family exempting Mr. Mantybaev from criminal liability. On appeal, the Zhalalabad Regional Court found, on 5 September 2006, that during the preliminary investigation, Mr. Mantybaev, Mr. Abdukaimov and the victim's wife had given different versions of the victim's death, and that these contradictions had not been resolved during the court proceedings. It also held that the victim's family did not appear to agree with the reconciliation as they requested a retrial. It concluded that the case should be retried based on a complete and objective study of all circumstances. The Committee notes that the Supreme Court, in its judgment of 27 December 2006, found that the fact of criminal negligence had been proven by testimonies of the victim's representative, witnesses, medical expertise and other materials in the case file, without however explaining further how the court evaluated the material it considered. The Supreme Court also noted that by payment of 30,000 Kyrgyz som to the victim's family, reconciliation was reached between the defendant and the victim's family and that the arguments by the victim's counsel about the discrepancies in the investigation were speculations.

8.5 The Committee notes the author's claim that the victim died in police custody as a result of the excessive and unnecessary use of force by police officers, given that the victim

was in good physical and mental health before being taken into custody, that according to his wife he did not possess any sports trousers which had allegedly been used to hang himself, that the sport trousers used as evidence were never forensically examined and that due to the victim's high alcohol level, he neither had the physical capacity nor the time to hang himself. The Committee further notes the author's statement according to which the acceptance of a small payment to assist with the funeral cost has not waived her rights to establish the truth of how her son died and to hold perpetrators accountable.

8.6 As to the author's claim in relation to the arbitrary deprivation of her son's life, the Committee recalls its general comment No. 6 (1982) on the right to life¹³ and its jurisprudence, that the State party by arresting and detaining individuals takes the responsibility to care for their life,¹⁴ and that criminal investigation and consequential prosecution are necessary remedies for violations of human rights such as those protected by article 6.¹⁵ It further recalls its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, that where investigations reveal violations of certain Covenant rights, States parties must ensure that those responsible are brought to justice.¹⁶

8.7 The Committee 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.¹⁷ 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 the information available to it.

8.8 The Committee observes that the State party and its judicial authorities have not explained on which basis the conclusion was drawn that the victim had committed suicide in police custody. This in particular considering the testimony by the forensic expert, who stated that fracture in the horn of the thyroid could have been caused by hanging from a soft fabric or by pressure by hands, as well as the testimony of the ambulance doctor who did not find any signs of strangulation but observed red finger marks on the victim's neck. It also notes that Mr. Mantybaev gave three different versions of the victim's death; however the State party's first instance court and the Supreme Court appear not to have evaluated the discrepancies in these statements and relied solely on the last statement indicating that he found the victim in the administrative detention cell having hanged himself from his sport trousers. The Committee further observes that the State party's judicial authorities did not consider any testimony from the first sergeant, Mr. Abdukaimov. The Committee concludes that, in the circumstances of the present case and in the absence of persuasive arguments by the State party rebutting the suggestion by the author that her son was killed in custody and in the light of the information in the forensic expertise inconsistent with the State party's

¹³ *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40)*, annex V, para. 1.

¹⁴ See communication No. 763/1997, *Lantsov v. the Russian Federation*, Views adopted on 26 March 2002, para. 9.2.

¹⁵ See communications No. 1436/2005, *Sathasivam et al. v. Sri Lanka*, Views adopted on 8 July 2008, para. 6.4; and No. 1275/2004, *Umetaliev and Tashtanbekova v. Kyrgyzstan*, Views adopted on 30 October 2008, para. 9.2.

¹⁶ *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III, para. 18.

¹⁷ Communications No. 30/1978, *Bleier v. Uruguay*, Views adopted on 29 March 1980, para. 13.3; No. 84/1981, *Dermat Barbato v. Uruguay*, Views adopted on 21 October 1982, para. 9.6.

arguments, the State party is responsible for arbitrary deprivation of the victim's life, in breach of article 6, paragraph 1, of the Covenant.¹⁸

8.9 The Committee notes that author's claim that the autopsy report of her son's body revealed various injuries on the victim's face and neck and that the State party has not explained how such injuries may have occurred in police custody. The Committee notes that the author's allegations of the victim's injuries are confirmed by the post mortem autopsy report of 25 October 2004. It also notes that the State party's authorities have not addressed the cause for such injuries. The Committee recalls that a State party is responsible for the security of any person in custody and, when an individual is injured while in detention, it is incumbent on the State party to produce evidence refuting the author's allegations.¹⁹ The State party did not provide any information as to whether any inquiry was undertaken by its authorities both in the context of the criminal investigations or in the context of the present communication to address the specific allegations advanced by the author in a substantiated way. In these circumstances, the Committee concludes that the author's claims are substantiated and have been corroborated by the official autopsy report and finds, therefore, that there has been a violation of article 7, of the Covenant with regard to the author's son.

8.10 As to the claims under articles 6, paragraph 1 and 7 on the ground that the State party failed in its procedural obligation to properly investigate the victim's death and allegations of torture, and to take appropriate investigative and remedial measures, the Committee recalls its constant jurisprudence that criminal investigation and consequential prosecution are necessary remedies for violations of human rights such as those protected by articles 6, paragraph 1 and 7, of the Covenant.²⁰ The Committee observes that the investigation order of 9 November 2004 considers as established that the victim had hanged himself and therefore does not take into account the author's position that the victim was killed arbitrarily. The head inspector of the Bazarkorgon police station, Mr. Mantybaev, was sentenced for criminal negligence, but was exempted from criminal liability due to presumed reconciliation between the defendant and the victim's family. The Committee notes the author's allegations regarding the authorities failure to obtain a detailed description of the position of the victim's body, that a mock hanging was not conducted, that the exact timing and sequence of events was not established, that medical records to establish if the victim had any suicidal tendencies were not requested, that a forensic expertise of the sport trousers was not ordered, that the cash the victim allegedly carried in his pocket was never located and that it was never established if the victim's death was a result of torture or ill-treatment. The Committee further notes that the police sergeant, Mr. Abdukaimov, was never charged or prosecuted. In the absence of any explanation by the State party on discrepancies in the criminal investigation and the reason why one of the alleged perpetrators was never charged or prosecuted and in view of the detailed material placed before it, the Committee concludes that the State party failed to properly investigate the circumstances of the author's son's death and the allegations of torture and ill-treatment and thus effectively denied the author a remedy, in violation of her rights under article 2, paragraph 3, read in conjunction with articles 6, paragraph 1 and 7.

¹⁸ See *Sathasivam v. Sri Lanka* (note 15 above), para. 6.2; communications No. 1186/2003, *Titiahonjo v. Cameroon*, Views adopted on 26 October 2007, para. 6.2; No. 888/1999, *Telitsin v. Russian Federation*, Views adopted on 29 March 2004, para. 7.6; and *Dermi Barbato v. Uruguay* (note 17 above), para. 9.2.

¹⁹ Communications No. 907/2000, *Siragev v. Uzbekistan*, Views adopted on 1 November 2005, para. 6.2; and No. 889/1999, *Zheikov v. Russian Federation*, Views adopted on 17 March 2006, para. 7.2.

²⁰ See general comment No. 20 (1992) on the prohibition of torture and cruel treatment or punishment, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A, para. 14; and general comment No. 31, para. 18.

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 by Kyrgyzstan of the author's son's rights under article 6, paragraph 1, and article 7, and of the author's rights under article 2, paragraph 3 read in conjunction with articles 6, paragraph 1 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. The remedy should include an impartial, effective and thorough investigation into the circumstances of the author's son's death, prosecution of those responsible, and full reparation including appropriate compensation. The State party is also under an obligation to prevent similar violations in the future.

11. 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.

[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.]

**LL. Communication No. 1758/2008, *Jessop v. New Zealand*
(Views adopted on 29 March 2011, 101st session)***

<i>Submitted by:</i>	Emelysifa Jessop (represented by counsels, Tony Ellis and Alison Wills)
<i>Alleged victim:</i>	The author
<i>State party:</i>	New Zealand
<i>Date of communication:</i>	16 October 2007 (initial submission)
<i>Subject matter:</i>	Arrest, trial and conviction of a juvenile offender
<i>Procedural issues:</i>	Non-substantiation of claims; non-exhaustion of domestic remedies; victim standing; inadmissibility <i>ratione materiae</i>
<i>Substantive issues:</i>	Right to an effective remedy; arbitrary detention; right of persons deprived of their liberty to be treated with humanity and respect; right of juvenile persons to be tried as speedily as possible; right to a fair hearing; right to a defence; impartiality of judges; equality of arms; right to examine witnesses; expeditious proceedings; presumption of innocence; right not to be compelled to testify against oneself; juvenile persons; right to review of conviction and sentence; right to recognition as a person before the law; right to privacy; children's right to measures of protection; prohibition of discrimination
<i>Articles of the Covenant:</i>	2, paragraph 3; 9, paragraph 1 and 3; 10, paragraphs 2 (b) and 3; 14, paragraphs 1, 2, 3 (a) to (e) and (g), 4 and 5; 16; 17; 24; and 26
<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 29 March 2011,

Having concluded its consideration of communication No. 1758/2008, submitted to the Human Rights Committee on behalf of Ms. Emelysifa Jessop under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

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. The author of the communication is Ms. Emelysifa Jessop, born in 1983, who was aged 15 when she was convicted and sentenced to four years' imprisonment for aggravated robbery. She claims that her rights under the following articles of the Covenant were violated by the State party: article 2, paragraph 3; article 9, paragraph 1 and 3; article 10, paragraphs 2 (b) and 3; article 14, paragraphs 1, 2, 3 (a) to (e) and (g), 4 and 5; article 16; article 17; article 24; and article 26. The Optional Protocol entered into force for New Zealand on 26 May 1989. The author is represented by counsels Mr. Tony Ellis and Ms. Alison Wills.

The facts as presented by the author

2.1 The author is an immigrant to New Zealand, born in 1983 of Niuean parents,¹ with whom she came to New Zealand at the age of two months. She was charged with aggravated robbery on 2 June 1998, which involved a violent attack and robbery of an 87-year-old man, in his home, which took place on the same day. Around 3 p.m., the author and her cousin, aged 15, had visited a friend of the latter, drank and became intoxicated. The author's cousin later left the author with her friend, and exited the apartment. Around 6 p.m., the victim was attacked and robbed. Shortly after, a neighbour reported to the police having seen two girls outside his apartment. He could describe their clothing but not their faces. The author and co-accused were arrested around 7:30 p.m.

2.2 The crime of attack and robbery was later admitted by the author's cousin (the co-offender), whose evidence at trial stated that the author was not present when the offence was committed.² This coincides with the victim's initial statement that one girl robbed him.³ After the author was arrested, together with her cousin, the victim alleged that he was robbed by two girls. Due to his ill-health, he could not testify at trial.

2.3 The author, who was aged 14 years and nine months at the time of the offence, has always proclaimed her innocence. She claims that she was detained arbitrarily upon arrest, while she was intoxicated, for the purpose of a police identity parade, shortly after the crime had taken place. The neighbour who witnessed the crime identified the author and co-offender as perpetrators.

2.4 A few hours later at the police station, the author initially denied the offence, in a recorded interview.⁴ Compelled by the pressure of both the police and her mother, she

¹ The author specifies that Niue is a remote Polynesian island in the Pacific Ocean with 2,166 inhabitants. It is self-governing, in free association with New Zealand, with Niue being fully responsible for its internal affairs. New Zealand retains control over the country's external affairs and defence.

² It appears from the file, however, that upon arrest, the co-offender did initially implicate the author.

³ It however appears from the file that the victim entered a subsequent statement, in which he affirmed having been assaulted by two attackers.

⁴ It appears from the file that she initially admitted to the detective, before the video commenced, her involvement in the offence, and having hit the victim (see the Court of Appeal of New Zealand judgement of 19 December 2005, para. 29). She thereafter provided different information during the first interview, denying her participation in the crime, followed by a new admission of involvement in the second recorded interview.

however entered a second “confession”⁵ of the crime, which began with the words “I am going to lie now”, spoken in the author’s native Niuean language, and recorded on a video tape. Immediately after this confession, the author was formally arrested and charged.

2.5 A family conference was convened on 15 June 1998 and did not reach agreement on the appropriate jurisdiction for trial. On 30 June 1998, the Otahuhu Youth Court Judge delivered a judgment on jurisdiction,⁶ but remanded the case to the High Court of New Zealand, which sentenced the author and the co-offender to four years’ imprisonment on 22 July 1998.⁷ The author, who was then aged 14 years and 10 months, contends that this jurisdiction does not apply child-friendly procedures.

2.6 On 2 March 1999, the Court of Appeal of New Zealand allowed the author’s appeal, as it found that the Youth Court proceedings were not held in conformity with the Summary Proceedings Act,⁸ which provides that the charge to which the defendant is required to plead shall be read to him and s/he shall then be called upon to plead either guilty or not guilty. As this was not done by the Youth Court, the Court of Appeal set aside the conviction and sentence imposed by the High Court, and remitted the matter to the Youth Court for a plea to be taken by the author according to the law.⁹

2.7 On 24 June 1999, the author entered a not-guilty plea in the Youth Court, and established a prima facie case. The Youth Court recommitted the case to the High Court of New Zealand for trial. The author elected trial by jury.

2.8 On 8 October 1999,¹⁰ the High Court adopted a pretrial ruling, in which it declared the videotaped police interview to be admissible evidence. The Court found the confession of guilt entered by the author during the second interview to be a true and voluntary one under the Evidence Act,¹¹ as it did not result from any inducement, pressure, and was not tainted by unfairness.¹²

2.9 After a second pretrial ruling rejecting the author’s application for discharge, the trial Judge, Justice Potter, instructed the jury on 14 October 1999, and the latter found the author guilty of the charge of aggravated robbery. The High Court delivered its judgement on 14 December 1999, in which it sentenced the author to four years and eight months imprisonment. She was then aged 16 years, and was 6 months pregnant.

2.10 On 14 December 1999, the same day she received the High Court sentence, the author appealed before the Court of Appeal of New Zealand, on the ground that her confession was not a genuine one, and should not have been presented as evidence to the jury.

2.11 On 1 February 2000, legal aid was declined, and this decision was confirmed upon review on 3 March 2000. Reasons for dismissal of legal aid were provided to the author’s trial Counsel, but not to her. On 30 March 2000, the Court of Appeal dismissed the appeal against conviction in an ex parte decision.

⁵ The quotation marks are the author’s.

⁶ Oral Judgment of Judge R.N. Gilbert, 30 June 1998, District Court, held at Otahuhu.

⁷ High Court of New Zealand, Sentence of Justice Potter, Auckland Registry S.27/98, 22 July 1998.

⁸ Section 153A(4) of the Summary Proceedings Act (1957).

⁹ *The Queen v. Emelysifa Jessop*, Court of Appeal of New Zealand, CA 404/98, 2 March 1999.

¹⁰ *The Queen v. Emelysifa Jessop*, High Court of New Zealand, T.1411/99, 8 October 1999.

¹¹ Section 20 of the Evidence Act (1908).

¹² The author’s contention is that she was pressured into confessing her guilt, and that pressure came from the concerted disbelief of her mother and the police, coupled with the advice to her that the co-offender had implicated her

2.12 On 26 March 2000, the author gave birth to her son, being handcuffed for several hours while in labour, the handcuffs being finally removed for the actual birth only. Immediately after the birth, the author had to accept the presence of a prison officer observing her while taking a shower. Her baby was then taken away from her after 24 hours.¹³

2.13 In January 2002, the author completed her sentence and was released.

2.14 On 19 March 2002, in *R. v. Taito*,¹⁴ the Privy Council considered applications made by a number of unsuccessful appellants before the Court of Appeal of New Zealand, including the author. The Privy Council found the process of ex parte dismissal of appeals to be illegal, including the author's appeal of March 2000. As a result of this decision, the author's case was remitted back to the Court of Appeal of New Zealand.

2.15 On 19 December 2005, the Court of Appeal dismissed the appeal against conviction and sentence.

2.16 On 27 March 2006, the author's application for leave to appeal to the Supreme Court was dismissed without an oral hearing.¹⁵ Both the author's grievances, and the Supreme Court reasons for dismissing them, were similar to the Court of Appeal's earlier decision.

2.17 On 16 August 2007, the author filed a subsequent application before the Supreme Court, to set aside its dismissal of leave to appeal (decision of 27 March 2006), on the ground that the Court had not acted impartially, based on its composition.¹⁶

The complaint

3.1 The author alleges several breaches of the Covenant by the State party in her regard, vis-à-vis the following events and substantive rights:

Police identification parade and transporting to the police station

3.2 The author alleges that she was arbitrarily detained by the State party's police authorities for the purpose of unlawful criminal investigations, in breach of article 9, paragraph 1, of the Covenant, up until the time she was formally charged and arrested. She could not have "consented" to attend the police identification parade as a 14-year-old child under the influence of alcohol. Her parents were not contacted by the police to provide consent on her behalf for the police parade.

The interview at the police station

3.3 The author claims that once in the police station, and despite the police's claim that they advised her of her right to a lawyer, the police failed to ensure that she adequately understood her right and need to consult with a lawyer, in breach of article 9, paragraph 1, article 10, paragraph 1, and article 14, paragraphs 3 (b) and 4, of the Covenant.

¹³ The author annexes a letter from her to her lawyer, dated 24 March 2000, in which she describes her being in labour while handcuffed, and the efforts of her family to have the handcuffs removed, to no avail. She also annexes a letter from her father to the manager of the Mt Eden Women's Prison, complaining against the same issue (letter dated 27 March 2000).

¹⁴ [2003] 2 NZLR 577. The Privy Council was then New Zealand's highest jurisdictional instance. Since 1 July 2004, it is the Supreme Court of New Zealand.

¹⁵ [2006] NZSC 14, 27 March 2006.

¹⁶ The author invoked, inter alia, the fact that one of the Supreme Court judges who denied leave to appeal was sitting on the Court of Appeal's bench at the time of the author's ex parte hearing of 30 March 2000 (see para. 2.11 above).

3.4 The author further alleges that the State party failed to ensure that the “support person”, nominated under the Children, Young Persons and their Families Act (1989), who was her mother in the circumstances, acted in her best interests.

Right not to be compelled to testify against oneself or to confess guilt

3.5 The author contends that she was compelled to confess guilt to a crime she did not commit, due to pressure exerted by the police, her mother acting as support person, and the lack of safeguards in respect to her vulnerability as a child. She initially adamantly denied her involvement in the offence, but was later implicated by the co-offender during a statement to the police. Her statement, prior to the confession, “I am going to lie now” was ignored by the police and her own mother, who was scared of the police. Consequently, the admission of her confession in the trial was in violation of her rights under article 14, paragraph 3 (g), of the Covenant.

Breach of the right to the presumption of innocence and right to an effective remedy

3.6 The author claims that her right to the presumption of innocence was breached by the State party when she was sentenced to four years imprisonment without entering a guilty plea. Despite the fact that her case was remitted back to the Youth Court for a new trial because of this initial defect, her sentence was upheld. By so doing, the State party breached article 14, paragraph 2, read in conjunction with article 2, paragraph 3, of the Covenant, as it failed to ensure an effective remedy for breach of her right to the presumption of innocence.

Committal of the case to the High Court and fair hearing

3.7 The author contends that the committal of her case to the High Court on 30 June 1998 and 24 June 1999 by the Youth Court was in breach of her right to a fair trial. Without application by either party, the Youth Court should have exercised its discretion to assess whether this was in the author’s best interest, and analysed the ensuing consequences of proceedings in the High Court for her.¹⁷

3.8 The author adds that no attempt was made to ensure that she could participate effectively in the criminal proceedings, in respect to her specific status as a child and corresponding ability, in psychological terms, to comprehend and participate in the proceedings. Through this omission, the author claims that the State party acted in breach of article 14, paragraph 2, paragraph 3(d), paragraph 4, article 16, article 24 and article 26 of the Covenant.

Delays in proceedings

3.9 The author contends that the re-committal of her case to the High Court entailed an undue total trial delay of 16 months, which is attributable to the substantive error made in the relation to the author’s plea, her subsequent appeal to the Court of Appeal, and the decision of the Youth Court to remit the case to the High Court jurisdiction. This significant delay was aggravated by the fact that she had been detained for one year at the time before her trial.

3.10 She adds that a further two-year undue delay was imposed on her from the date of the ex parte decision in her second appeal, on 30 March 2000, to the date of the Privy Council decision of 19 March 2002 in *R. v. Taito*.

¹⁷ The author refers, inter alia, to the Guidelines for Action on Children in the Criminal Justice System.

3.11 Furthermore, the author contends that she was then exposed to yet an additional delay of three years between the Privy Council decision in March 2002 and her subsequent case before the Court of Appeal on 19 December 2005, at least one year of which can be attributed to the Court for lack of proper Court documentation such as the summing up, sentencing notes, and a complete case on appeal. The author adds that as a whole, from the date of her second appeal in March 2000, to the date of her fifth appeal, filed in August 2007 with the Supreme Court, 6.5 years elapsed, 4.5 years of which were undue delay. For these reasons, she contends that the State party breached article 9, paragraph 3, article 10, paragraph 2 (b), and article 14, paragraphs 3 (c), 4 and 5, of the Covenant in her regard. The author adds that such violations were exacerbated in that she was detained throughout the Court of Appeal proceedings, from March 2000 to January 2002. She had already served her sentence by the time her third domestic appeal took place.

Judicial bias

(i) High Court

3.12 The author alleges that Justice Potter, who had previously sentenced her to four years in the High Court, later presided over her jury trial for the same offence.¹⁸ While her Counsel at the time did not request that this Judge recuse herself, the author herself was not consulted, and did not provide any informed waiver. This amounted to a breach of article 14, paragraphs 1 and 5, of the Covenant in her regard. She also states that Justice Robertson was unfit to sit on the High Court pretrial application for discharge of October 1999, as she was a member of the Court of Appeal proceedings in March 1999.

(ii) Court of Appeal

3.13 The author further contends that the Court of Appeal comprised of two permanent Judges of the Court, and one Judge of the High Court, (Justice Panckhurst), who was nominated by the Chief Justice. The author requested a copy of the appointment warrant, but this was rejected. Her challenge to this decision was also dismissed. She thereafter requested the Acting President of the Court of Appeal, Justice Glazebrook, to recuse herself in relation to the nomination of the Justice Panckhurst, on the ground that she was *parti pris* and displayed apparent bias, but the Judge declined to do so. The Court also declined the author's request that the appeal be referred to a full Court, and heard the appeal. By doing so, and in the circumstances described above, the author claims that the Court was hostile.¹⁹

(ii) Supreme Court

3.14 The author also claims that her appeal before the Supreme Court, which was heard in March 2006, also suffered from defects under article 14 of the Covenant. She claims that Justices Elias and Tipping were *parti pris*. To support her allegation, the author explains that the Supreme Court Chief Justice Elias was a member of the Court of Appeal upon overturning of her sentence on 2 March 1999. Also, Justice Tipping was one of those who declined her appeal *ex parte* in March 2000, and who had, among other Judges, provided evidence to a parliamentary law reform Committee in respect of the reform of criminal appellate procedure considered in the *Taito* decision. According to the author, these

¹⁸ 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, para. 21, and to Principle 2 of the Bangalore Principles of Judicial Conduct (2001).

¹⁹ The author refers to general comment No. 32 (note 18 above), para. 25.

elements amounted to a further violation of article 14, paragraphs 1 and 5, of the Covenant in her regard.

Inability to examine witnesses

3.15 The author claims that the State party failed to ensure that the victim of the crime, Mr. K., was available to be cross-examined at her trial. This had grave consequences for the author in the light of the two inconsistent statements made by Mr. K. In the first statement, made on 3 June 1998, Mr. K. said that he was almost blind but had heard only one girl yelling at him. In his second statement he said that two girls had come to his flat and both were yelling at him. Mr. K. was considered unfit to give evidence at trial due to health problems. Requests made to the prosecutor by defence counsel that Mr. K. be interviewed by an independent counsel were rejected. The prosecutor held that the author and her co-accused had admitted that they had both been present in Mr. K's flat. Even if Mr. K. was to say that he was now unsure, that would be understandable given the nature of the assault upon him, the lapse of time and his poor eye sight. Similarly, an application under section 347 of the Crimes Act (1961) for discharge of the author based on the injustice that would result from Mr. K's absence from trial was dismissed by the Court. The latter should have canvassed whether Mr. K. could have given his evidence from home or adjourned the trial until such time as he could. It did not and, thereby, prevented any possibility of a fair trial. These facts constitute a violation of article 14, paragraph 3 (e), of the Covenant.

Penalty imposed

3.16 The sentencing Judge failed to deduct the 11 months of detention she had spent, on the ground that pretrial detention spent in Youth Justice Detention facilities could not be taken into account, as a matter of statutory law.²⁰ She also contends that the four year and 8 months' sentence is strictly punitive, as opposed to rehabilitative, disproportionate to the circumstances and gravity of the offence, and in contradiction with the principle that deprivation of liberty of juveniles should be a measure of last resort. According to the author, this amounted to a breach of her rights under article 9 paragraph 3, article 10 paragraph 3, article 14, paragraph 4, and article 24 of the Covenant.

Right to review sentence and conviction by a higher tribunal

3.17 The author argues that she was denied her right to a review of her conviction by a higher tribunal according to the law, in breach of article 14, paragraphs 3 (d), 3 (e), and 5, and article 26 of the Covenant when her appeal was declined *ex parte*, without hearing, by the Court of Appeal. Reasons for this denial were only communicated to her Counsel.

3.18 The author also alleges that the dismissal, by the Supreme Court, of her appeal on 27 March 2006 was also in breach of article 14, as it consisted of four paragraphs only, and was devoid of an oral hearing.

Right to privacy

3.19 The author's name was published since the first sentencing in the High Court in July 1998, overturned by the Court of Appeal in March 1999, then reaffirmed in the jury trial in October 1999 and in her March 2000, October 2005 appeals, and subsequent leave to appeal to the Supreme Court in March 2006. Should she have been tried by the Youth Court, her name would not have been disclosed, given the application of special protection

²⁰ Section 81 of the Criminal Justice Act (1985) [repealed in 2002], cited in *R. v. Emelysifa Jessop*, High Court of New Zealand 14 December 1999, para. 11.

to juvenile litigants. Therefore, the committal of the case to the High Court entailed a breach of article 14, paragraph 4, and of article 17 of the Covenant for the author.

Absence of opportunities for educational and cultural activities in detention

3.20 The author stresses the impact of a full-time custodial sentence on a 16-year-old child, particularly on her right to education and development. During her pretrial detention in a youth facility, she was preparing to take School Certificate. However, being placed in an adult prison after her sentencing, she was unable to meaningfully continue her education. The author also emphasizes her distress in losing her Niuean culture while being detained,

Author's supplementary submissions

4.1 On 18 March 2008, the author informs the Committee, inter alia, that her application of 16 August 2007, for review of the Supreme Court's decision of 27 March 2006, declining leave to appeal, was dismissed on 30 November 2007. The author therefore exhausted domestic remedies at her disposal in New Zealand.

4.2 The author claims that the quorum of the Supreme Court in this last decision consisted of two of the very same judges who had already dismissed her application in March 2006 (Justices Elias and Blanchard). She claims that the involvement of Justice Elias (who also sat in her 1999 appeal), went beyond technical issues, and resulted in a breach of her rights under article 14, paragraph 1, of the Covenant. She also challenges the participation of Justice Tipping in the Supreme Court decision of 27 March 2006, who had previously been involved in the author's appeal in 2000, and also in parliamentary lobbying regarding the question of ex parte appeal decisions. As Supreme Court judges did not disclose their involvement in the lobbying, full recusal applications could not be made. The Supreme Court rejected the author's allegations related to bias, on the ground that there was no objective and real ground for questioning the ability of judges to hear the case.

4.3 In the same submission, the author informs the Committee that on 11 March 2008, she had submitted a complaint to the Special Rapporteur on the independence of judges and lawyers. The submission reiterates her initial allegations.

4.4 On 28 October 2009, the author submits additional information, in which it drew the Committee's attention to the Committee on the Rights of the Child's general comment No. 10 (2007) on children's rights in juvenile justice,²¹ and concluding observations pertaining to the administration of juvenile justice. She reiterates that her right to the presumption of innocence, her right to be heard, and her right to privacy were breached by the State party.

State party's observations on admissibility and merits

5.1 On 7 August 2008, the State party submitted that the communication should be declared inadmissible, mainly on the ground that several allegations raised were already remedied by domestic Courts, and considering the principle that the Committee cannot act as a "fourth instance".

5.2 The State party is of the view that the failure to obtain a formal plea in the author's first appearance before the Youth Court, and the invalid procedure which followed were remedied by the first Court of Appeal decision, which remitted the case back to the Youth Court for a plea to be entered. Similarly, the author's subsequent substantive appeal to the

²¹ *Official Records of the General Assembly, Sixty-third Session, Supplement No. 41, (A/63/41), annex IV.*

Court of Appeal in March 2000, which was determined *ex parte*, was held invalid in March 2002, following an appeal by the author and 11 others to the Privy Council. As a result, a rehearing of her substantive appeal before the Court of Appeal was directed. As such, these two parts of the communication should also be declared inadmissible under article 1 of the Optional Protocol, as the author lacks the standing of a victim to the extent of these allegations.

Complaint regarding the police identity parade

5.3 The State party considers that the author's allegations, that she did not consent to the identity parade as she was intoxicated, that she could not consult with a lawyer, was forced to testify against herself and was arbitrarily detained should be declared inadmissible by the Committee. The Court of Appeal determined that there was no evidential basis for the proposition that the author was arrested or detained before the identification process took place. That conclusion was reiterated by the Supreme Court. No evidence was presented in the author's trial in support of the claim that she was intoxicated, or that she did not agree to the identification parade.

5.4 The State party further submits, on the merits, that no issues arise under articles 14, paragraph 3 (b) and (g), as the author was not subject to any criminal charge.

Transporting to the police station

5.5 Regarding the author's allegations under articles 9, paragraph 1, 14, paragraph 3 (b) and (g), and 14, paragraph 4, contending that she had been arbitrarily detained, the State party provides that they should be declared inadmissible, having thoroughly been determined by domestic courts, and being unsubstantiated. This complaint was raised in the Court of Appeal, which rejected it on the facts, on the basis that there was no evidential basis for the assertion that she had been unlawfully arrested. The Supreme Court confirmed this finding.

Interview at the police station

5.6 The State party rejects the author's allegations, under articles 14, paragraph 3 (b) and (g) and article 10, paragraph 1 as inadmissible, in so far as they do not substantiate that she was exposed to pressure to confess guilt from her mother, the police and the co-accused, or that she did not understand her right to have a lawyer present. The facts show that she willingly went to the police station, and properly understood her rights as communicated to her by the police, including her right to have a lawyer, and her right to leave at any moment. Her mother was nominated as a support person, in conformity with the law. She was again informed of her rights in the presence of her mother, and was only interviewed in the latter's presence. No suggestion was made, at any time in the hearings, that she did not, in fact, understand this. In so far as the author also invoked article 10 paragraph 1, the State party contends that this provision is not engaged, as she was not detained. The High Court, considering all relevant elements, found on the facts that the author was treated appropriately during the investigation in the light of her age.

Admissibility of the confession of guilt

5.7 On the issue of the confession of guilt, the State party further notes that a pretrial hearing was specifically devoted to the question of the admissibility of this confession as evidence. The judge took into account the author's vulnerability as a child, and her initial statement in Niuean language, but ruled that the police had taken appropriate precautions, and evidence did not reveal that she was overborne or overwhelmed as a result of any pressure. As such, the judge found that the second interview was voluntarily made. Both the Court of Appeal and the Supreme Court also found that the author's mother had

properly understood her role as nominated person, and there is no reason to challenge this determination. The State party also notes that the author failed to challenge the admissibility of the confession under the Children, Young Persons and Their Families Act before the High Court, or in the first or second appeals to the Court of Appeal. It is only in the third appeal before the Court of Appeal, and later before the Supreme Court, that these allegations were made, and dismissed.

Committal of the case to the High Court

5.8 The State party, referring to the Court of Appeal judgement of 19 December 2005, notes that the author never applied to forego trial by jury, or otherwise challenge the referral of the case to the High Court by way of judicial review, although this option was available to her at the time. Nor was there any suggestion later made, before the Court of Appeal, that there was any flaw in the processes adopted by the High Court during the jury trial. As a result, the State party is of the view that the author failed to exhaust domestic remedies on this count. Regarding the author's allegations under articles 2, paragraph 3 (a), and 14, paragraph 2, the State party observes that the author consented, in a memorandum, to the appeal being allowed, and the matter remitted back to the Youth Court for the author's plea to be properly taken. The author should have reasonably anticipated that the matter, being too serious to be dealt with by the Youth Court, would be again referred to the High Court once the plea was taken.

Determination of charge

5.9 The State party recalls the author's criminal background, noting that she had previously been convicted of two counts of aggravated robbery in 1997 for incidents involving knives. This case had at the time been considered by the Youth Court, which had imposed its maximum penalty of three months' residence order, followed by a three-month supervision order. In the light of this background, and the seriousness of the offence at stake, the author was referred to the High Court, and charged with aggravated robbery under section 235 of the Crimes Act (1961), an indictable offence with a penalty of up to 14 years imprisonment. As the author was under the age of 15 at the time of the offence, the only options available to the Youth Court were (a) to impose the maximum penalty of three months' residence followed by three months' supervision; or (b) refer the case to the High Court which could impose a more substantial sentence. The Court of Appeal rejected the suggestion that the Youth Court may have been an appropriate jurisdiction for trial, in the light of the gravity of the offence.

Sentencing

5.10 The State party notes that the Court of Appeal upheld the sentence imposed by the High Court. The initial sentence took account of sentencing principles applicable to children, and the Court of Appeal determined that there was nothing inappropriate for the sentencing judge in the High Court to have given little weight to the age of the author at the time of the offence as a rehabilitative factor, given her past criminal record.

Failure to take into account time spent by the author in youth justice facilities

5.11 The author's contention that by imposing in December 1999 a second sentence of four years and eight months, the High Court failed to take into account the 11 months she spent in youth justice facilities was never presented before domestic courts and is, as such, inadmissible according to the State party. Furthermore, the State party brings the following clarifications: The author was in care, under the Children, Young Persons and Their Families Act, after her arrest on 3 June 1998, and until her sentencing on 22 July 1998. By law at that time, the time spent in a youth justice residential facility prior to sentencing did

not count as time served toward the final sentence, but that was a matter which could be taken into account by the sentencing judge in setting the term of imprisonment. This is what happened in the author's case, as the High Court Judge gave her a four-month credit.

5.12 From 22 July to 4 August 1998 the author commenced serving her sentence at Mt Eden Prison in Auckland. This period counted toward time served on her sentence. On 5 August 1998, she was transferred to a youth justice facility in Christchurch pursuant to section 142A of the Criminal Justice Act (detention of young persons serving a sentence of imprisonment), and continued to serve her sentence in that youth justice residential facility until her successful appeal to the Court of Appeal in March 1999. This period counted towards her time served.

5.13 When her conviction and sentence were overturned by the Court of Appeal on 2 March 1999, the author remained in the youth justice facility, pursuant to section 142A of the Criminal Justice Act, although she was moved from the secure unit to the open unit on 8 March 1999. This period from 2 March to 7 April 1999 would in theory not necessarily count towards time served, but was in fact counted in the Department of Corrections as time served on remand in the calculation of her release date.

5.14 On 7 April 1999, she was transferred back to Mt Eden prison in Auckland to appear before the Youth Court to enter her plea. On 13 April 1999, she applied for bail, and was released on bail on 15 April 1999. The period of 7 to 15 April counted as time served on remand in the calculation of her release date.

5.15 The author remained on bail until her conviction in the High Court in October 1999, when she was remanded to Mt Eden prison in Auckland pending sentencing on 14 December 1999. This period on remand counted in the calculation of her release date. She then continued to serve her sentence of four years and eight months, until her release on parole in January 2002, i.e. two years and one month after her second sentencing, and three years and six months after her first sentence was imposed, five months of which was spent on bail. In total, she served a sentence of 37 months, representing two thirds of her final sentence in accordance with usual practice at this time, taking into account days of loss of remission for disciplinary offences committed in prison.

5.16 The author's final release date was calculated from the date of her initial sentencing on 22 July 1998, and all time since that date spent in any facility, including the Youth Justice residential facility, are in fact taken into account in calculating her time served. She therefore spent only a maximum of 49 days (from charge to sentencing) in a youth justice facility that was not counted as time served toward her sentence. This is significantly less than the 11 months claimed in the author's communication. Further, the sentencing judge allowed a reduction of four months in the sentence for the Youth Court processes.

Undue delay

5.17 Referring to the Committee's jurisprudence and general comment No. 32, the State Party rejects the author's allegations. In respect of allegations of delay during the High Court jury trial, it was open for the author to apply to have the charges against her stayed or dismissed because of delay by the Youth Court (under sect. 322 of the Children, Young Persons and Their Families Act) or by the High Court (under sect. 347 of the Crimes Act or sect. 25(b) of the Bill of Rights Act). No such application was made, hence the author failed to exhaust domestic remedies on that count.

5.18 Regarding her claim on the 16-month-period from the offence to the High Court jury trial, the State party reviews the chronology of the judicial process, noting that she had been sentenced in July 1998, i.e. less than one month after being remitted to the High Court for sentencing. The author did not appeal until four months later (24 November 1998), and her Counsel accepted responsibility for that delay, having been approached to lodge an appeal

in August 1998. After the appeal was filed, a consent memorandum was signed on 27 February 1999, and the Court of Appeal entered a judgement in the author's favour two working days later, on 2 March 1999.

5.19 The author was then released on bail pending trial. The case was called in the Youth Court on various occasions in April, May and June 1999 while evidential depositions were taken. A formal plea was entered on 24 June 1999, and the case was referred to the High Court for trial on the same day. The author elected trial by jury in August 1999, two pretrial applications were heard, and the trial took place in October 1999.

5.20 The author's claim of undue delay was rejected by the Court of Appeal in 2005, which ruled that, on the facts, seven months from the first appeal (March 1999) to the High Court jury trial (October 1999) could not be qualified as undue delay.

5.21 The State party rejects the author's factual allegation that she was detained for one year before her trial, which aggravated the delay suffered, in breach of article 10, paragraph 2 (b), of the Covenant. She was detained, under sentence, from her conviction in July 1998 until her first (successful) appeal in March 1999. From that appeal to the trial, the author was in custody for a total of one month and 11 days, which she spent in a youth justice residential institution. Only six days of that period were spent in a secure unit. She was otherwise released on bail (on 2 March 1999) pending trial.

5.22 The author's (second) appeal was rejected *ex parte* in March 2000. In June 2000, the author filed an application for judicial review in the High Court. In approximately November 2000, she proposed to pursue the same issue by joining an existing application for leave to appeal by appellant Fa'afete Taito. The application was considered by the Privy Council in February 2001, and judgement was given in March 2002. The period between the leave decision and the substantive hearing allowed for the preparation of the record and submissions in respect of all 12 appellants.

5.23 The rehearing directed by the Privy Council was not heard by the Court of Appeal for over three years. The author's Counsel accepted responsibility for two thirds of that period (two years and nine months). Her allegations that the remaining one-year delay must be attributed to the Court for systemic delay and failure to provide proper documentation are not correct. During the 11 months before the hearing, the Court was actively seeking progress in the case. Several letters were sent from the Court to Counsel between May 2004 and January 2005, but the author's Counsel repeatedly requested material from the Court, and sought to adjourn the case. On 23 June 2005, the Court allocated a hearing date of 27 October 2005. On 26 October 2005 (the day before the hearing as scheduled), Counsel for the author requested that the meeting be adjourned, reallocated, or referred to a Court of five judges (rather than the usual three) to allow issues relating to the appointment of the judiciary to be further considered. The hearing proceeded on 27 October 2005.

5.24 On 17 August 2007, i.e. 17 months after the Supreme Court declined to grant the author leave to appeal, the author filed an application to set aside this decision. Further sets of applications were submitted until 14 November 2007. The Supreme Court determined the application in a written decision on 30 November 2007, i.e. two weeks after the filing of the final set of submissions.

5.25 The State party further underlines the author's lack of standing as a victim under article 1 of the Optional Protocol, as the time taken for each appeal did ultimately not change her conviction, and corollary imprisonment. A faster trial or appeals process would not have resulted in her release.

Judicial bias

5.26 Regarding the author's allegation concerning Justice Robertson, that he was unfit to sit on the High Court pretrial application for discharge in October 1999, as he was a member of the Court of Appeal who overturned the author's sentence in March 1999, the State party affirms that it is inadmissible as it was never raised before domestic courts. Subsidiarily, it is without merit: The decision of the Court of Appeal of 2 March 1999 only involved agreement by the Court with the submissions of both Prosecution and the defence, that a formal guilty plea had not been properly entered. The Court did not make a determination of any aspect of the charge against the author.

5.27 Concerning the alleged bias of Justice Potter as presiding judge in the High Court jury trial in 1999, when she had sentenced the author in July 1998, the State party notes that this issue was not raised by the author in the High Court. To the contrary, the author's then-Counsel had specifically requested that Potter J. be the Judge to sentence the author after the jury delivered its guilty verdict. While this claim was raised in the substantive Court of Appeal hearing, it was rejected as unfounded. The Supreme Court also discussed the issue in its decision declining to review its refusal to grant leave. According to the State party, this part of the communication is therefore inadmissible for non-exhaustion of domestic remedies and lack of substantiation. It is also devoid of merit.

5.28 The State party also considered the author's challenge of the statutorily governed procedure, under the Judicature Act (1908), under which Justice Panckhurst was appointed to sit in the Court of Appeal. When her request to see the nomination warrant was denied, the author requested that the Acting President of the Court of Appeal, Justice Glazebrook, recuse herself on the basis that she had been involved in the decision appointing Justice Panckhurst. Justice Glazebrook declined to recuse herself, as her involvement on the nominating warrant had no bearing on the merits of the case. The Court of Appeal determined that the Judicature Act did not contemplate a formal nomination procedure of Judges with warrants, but was instead part of routine judicial administration. There was, consequently, no basis for the author's request.

5.29 The State party equally denied the allegations of the author's Counsel, that the Court of Appeal was "hostile" in his regard, noting that it was rather the latter who acted obstructively and discourteously, by refusing to make oral submissions before the Court.

5.30 The State party rejects the author's allegation that Chief Justice Elias, who was a member of the Court of Appeal that set aside the author's conviction and sentence in March 1999, was subject to bias. This was examined and dismissed by the Supreme Court, in its decision of 30 November 2007, as lacking proper basis for a qualification of reasonable apprehension of bias, considering the fact that the appeal at stake involved the examination of a new trial, as opposed to the procedural defect considered by the Court of Appeal in 1999.

5.31 The State party further notes that Justice Tipping recused himself in the Supreme Court on the 2007 author's application for review of that Court's decision to decline leave to appeal. He was replaced in the reconsideration the author's appeal, even though the Court noted that it was doubtful whether this would give rise to a bias issue.

5.32 The author challenged the fact that three senior Judges provided evidence to members of the New Zealand Parliament in respect of the Crimes (Criminal Appeals) Amendment Bill in late 2000 and mid-2001, which dealt, inter alia, with the issue of ex parte criminal appeals, which would be subsequently invalidated by the Privy Council in 2002. The State party observes that providing evidence before Parliamentary Committees on matters of court procedure and other aspects of judicial administration is an accepted practice, and that such evidence was not secret. The evidence in question included a statement of opinion of the then President of the Court of Appeal, which was a proposition

of a general nature, not related in any manner to the author's case. According to the State party, it follows that there is no basis for the author's claim under 14, paragraph 1, in that respect.

Requirements for leave to appeal to the Supreme Court

5.33 The State party rejects the author's argument that the requirements for leave to appeal to the Supreme Court breach article 14, paragraph 5, on the ground that it is unsubstantiated. The right to appeal to the Court of Appeal against conviction or sentence is provided for in the Crimes Act (1961). Grounds for appeal are extensive, and include an ability to review the factual and legal basis of the conviction. The Supreme Court is a third instance court with constitutional responsibilities, which justifies the fact that appeals are taken by leave on legal issues of sufficient significance under the Supreme Court Act (2003).

Author's right to privacy

5.34 The State party rejects this allegation, noting that the author never, before any jurisdiction, requested that her name be suppressed. As such, she failed to exhaust domestic remedies on that count.

Unavailability of the victim at trial

5.35 The State party rejects the author's claim, under article 14, paragraph 3 (e), arising from the fact that the High Court refused, at a pretrial application, to dismiss the charge and acquit the author as the victim was not available to give evidence. This allegation failed on the facts in domestic courts, and is unsubstantiated. The unavailability of the victim at trial was the subject of a pretrial application heard by Justice Robertson, and was further argued again in the Court of Appeal. The High Court determined that on the facts of this case, and in particular the confession where the author had demonstrated personal knowledge of the offence, it would not cause an injustice for the trial to proceed without the presence of the victim and that the defence could elect to have all or none of his statements produced. The author declined this offer. The author was not convicted on the evidence of the victim. The victim's statements were not read to the jury, even with their apparent contradictions. The author's counsel had the option to bring these statements in and decided not to. The primary evidence against the author was her own confession. The victim's presence or absence did not determine the charge. This claim is therefore unsubstantiated.

The author's experience in giving birth

5.36 The State party claims that this allegation, for which the author does not rely on any Covenant provision, should be declared inadmissible, as she never lodged a complaint in this regard before domestic courts.

5.37 The State party clarifies that in March 2000, the author was a high-medium risk security prisoner, with a history of violent offending and proven drug use. Prison authorities were obliged to put in place appropriate restrictions for her stay in public hospital. The direction to prison staff for the author's delivery were that handcuffs were to be carried and used "if necessary", and that the author had to remain in constant visual observation by a female prison officer, except when in delivery. She was admitted to the hospital, handcuffed by one wrist to a female prison officer, and the handcuff was removed when she was in early stage of labour. She remained in the hospital for three days, and her baby was placed in the care of her parents, with her consent, when she returned to prison. Arrangements were made for her to remain at Mt Eden prison, close to her parents, in order to have daily visits. The author however transferred away from Auckland at her own request in May 2000.

Lack of educational and cultural opportunities in prison

5.38 The State party also rejects the author's allegation that she did not have any provision for rehabilitation and that she could not pursue her education when placed in an adult prison after sentencing. It claims that she was in fact transferred from prison back to a youth justice facility within two weeks of her sentence of 8 August 1998, and continued to have access to the same rehabilitative and educational facilities as she had pre-sentence.

5.39 After her first appeal in March 1999, she was released on bail. Following her conviction, she was remanded to Mt Eden Prison, where she remained after being sentenced in December 1999, pending and after the birth of her child. At the age of 17 years, she was transferred to Arohata Women's prison, where she had access to extensive rehabilitative and educational facilities, and could have continued with her formal education had she wished to do so. The State party therefore concludes that this allegation is unsubstantiated.

Author's comments on the State party's observations

6.1 On 19 December 2008, the author contested the fact that the State party relied on, and referred to the findings of domestic courts. It claimed that the State party's observations failed to respond to her central contention, that proceedings against her were not child-friendly and not consistent with the Covenant. Regarding the allegations under articles 14, paragraph 4, and 24 of the Covenant, and with respect to the High Court trial, the author contends that she, as opposed to her Counsel, was not asked whether she accepted Justice Potter as trial Judge. There should be a legal presumption that a child facing criminal charges does not understand trial proceedings. She also clarifies that she did challenge the admissibility of her confession under both applicable common law and the Bill of Rights (1990) in her third appeal before the Court of Appeal and before the Supreme Court. She claims that she made extensive references, before the Court of Appeal, to relevant doctrinal references, which deal with the issues of the Children, Young Persons and Their Families Act.

6.2 With respect to the sentencing by the High Court, the author reiterates that she should have been tried by the Youth Court and sentenced by another Court, preferably the District Court. It objects to the State party's argument that as she was under 15 years old, she could only be dealt with in the Youth Court of the High Court. A Youth Court trial, with a referral to the District Court for sentencing, would only have been possible for an older defendant. The author finds this result is that fewer rights are granted to a person under 15 years of age.

6.3 Concerning the absence of a properly entered guilty plea by the author, and her related claims under article 2, paragraph 3 (a), article 14, paragraph 2 and article 14, paragraph 5, of the Covenant, the author contests the State party's argument that the issue was remedied by ordering a retrial, as she was not offered an effective remedy and faced undue delays in the proceedings. Regarding the consent memorandum referred to by the State party, which allowed the matter to be sent back to the Youth Court for a proper plea to be entered, the author claims that the Court should not have accepted such memorandum. She also stresses that she was not consulted by her lawyer in this regard, and did not understand fundamental aspects of her trial.

6.4 Regarding the author's claims under article 9, paragraph 3, article 10, paragraph 2 (b), and article 14, paragraph 3 (c), and the issue of the duration of the sentence, the author contests the State party's argument, and reiterates that the period she spent in Social Welfare custody was not taken into account. She also reiterates her contention that she suffered undue appellate delay, and adds that upon determining whether there had been undue delay, the State party failed to apply Covenant principles.

6.5 The author also reaffirms the claims, under articles 14, paragraph 1 and paragraph 5, that her proceedings were tainted by the lack of institutional independence of judges in New Zealand, and specific appearance of bias in the author's specific case, noting specifically that the Court of Appeal was not independent, or did not have that appearance, as it was not possible to know the method of appointment of Justice Panckhurst in the Court of Appeal.

6.6 The author also reiterates that she continues to be ignorant about the exact situation of judges lobbying Parliament. She also stresses that a secret meeting took place between judges and members of Parliament, which was an important issue with an impact on the fairness of her trial, since she could not know which judge was of the opinion that there was no miscarriage of justice in the *Taito* case, resulting from the *ex parte* appeal procedure.

6.7 With respect to a number of specific factual allegations, the author reiterates that she was intoxicated upon the police identification parade, and that it was improper for the State party to require a 14-year-old girl in such condition to participate, and stressed that she failed to understand her rights.

6.8 With regard to the author's assertions in respect to her pretrial detention, the birth of her son, and the lack of educational services and opportunities while serving her sentence, she only mentioned these issues by way of background and does not expect the Committee to consider the potential issues they would raise under the Covenant.

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 it is admissible under the Optional Protocol to the Covenant.

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

7.3 The Committee observes that two of the author's claims were remedied by domestic Courts. It notes, in particular, the author's allegation under article 14, paragraph 2, of the Covenant, invoked in connection with article 2, paragraph 3, of the Covenant, regarding the failure to ensure the entry of a formal plea in her first appearance before the Youth Court, which resulted in the adoption of a defective sentencing decision by the High Court on 22 July 2007. The Committee notes that this conviction was overturned by the Court of Appeal on 2 March 1999. As such, this initial defect was remedied, and, to that extent, the Committee declares this part of the communication inadmissible under article 1 of the Optional Protocol.

7.4 Similarly, with respect to the author's allegation pertaining to the illegality of her *ex parte* appeal in March 2000 under articles 14, paragraphs 3 (d), 3 (e) and 5, and article 26 of the Covenant, the Committee observes that this decision was held invalid in March 2002, following an appeal to the Privy Council, and the author was accordingly granted a new appeal in October 2005. The Committee recalls that a person may not claim to be a victim within the meaning of article 1 of the Optional Protocol unless his or her rights have actually been violated. As such, it declares these two allegations inadmissible under article 1 of the Optional Protocol.

7.5 The Committee also considers that the author failed to substantiate, for purposes of admissibility, her two allegations under article 26 of the Covenant, invoked in connection with the committal of her case to the High Court, and the rejection of her appeal *ex parte* in

March 2000. It thus declares this part of the communication inadmissible under article 2 of the Optional Protocol.

7.6 The Committee similarly finds that the author failed to substantiate, for purposes of admissibility, her allegation under article 9, paragraph 3, and under article 10, paragraph 2 (b), which she invoked in connection with the delay in judicial proceedings. As such, it declares this part of the communication inadmissible under article 2 of the Optional Protocol.

7.7 In the same manner, the Committee finds that the author failed to substantiate, for purposes of admissibility, her allegation under article 16, which she invoked in connection with the second committal of the case to the High Court. Accordingly, the Committee declares this part of the communication inadmissible under article 2 of the Optional Protocol.

7.8 Similarly, the Committee is of the view that the author failed to substantiate her allegation under article 14, paragraph 3 (d), invoked in relation to the second committal of her case to the High Court. The Committee thus declares this part of the communication inadmissible under article 2 of the Optional Protocol.

7.9 With respect to the participation of the author in the police identification parade, her transportation to the police station, and her interview by the police, for which the author invokes articles 9, paragraph 1, 10, paragraph 1, 14 paragraph 3 (b) and (g), and paragraph 4, of the Covenant, the Committee observes that from the moment of the identification parade, until the end of the second video interview, in which she confessed guilt, the author was neither formally arrested, nor detained. It appears from the file that after the identification, by a witness, of the author and co-offender, the author was transported to the police station, and was informed of her right not to accompany the detective, her right to leave at any time, and her right to a lawyer. Her rights were again explained to her upon the arrival of her mother at the police station, and at the commencement of each of the two interviews.

7.10 It is only at the end of the second interview, in which the author confessed guilt, that she was formally charged with aggravated robbery. It therefore cannot be sustained, within the meaning of article 9, paragraph 1, of the Covenant, that the author was arrested, detained, or otherwise deprived of her liberty. Nor, a fortiori, can it be maintained that she was subjected to criminal proceedings at this time, as she had not been charged yet at this point. Consequently, the author's claims under articles 9, paragraph 1, article 10, paragraph 1, article 14, paragraph 3 (b) and (g) and paragraph 4, in so far as they relate to the time period covering the police identification parade, the transportation to the police station and her interview by the police, are inadmissible, *ratione materiae* under article 3 of the Optional Protocol.

7.11 The Committee observes that most of the author's remaining claims relate to the evaluation of facts and evidence by the State party's courts. It notes, firstly, that the admissibility of the author's confession as trial evidence, presented under article 14, paragraph 3 (g), was thoroughly discussed, and dismissed in fact and in law, in particular by the Court of Appeal in its judgement of 19 December 2005, and by the Supreme Court on 30 November 2007. The Committee recalls²² 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

²² See 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, para 39.

the evaluation was clearly arbitrary or amounted to a denial of justice.²³ The material before the Committee does not reveal elements susceptible of demonstrating that the court examination of this issue suffered from any such defect. The Committee thus declares this part of the communication inadmissible under article 2 of the Optional Protocol.

7.12 Similarly, with respect to the author's participation in the High Court trial as a child, the Committee observes that this issue was considered by the High Court and the Court of Appeal. The material before the Committee does not reveal any element susceptible of demonstrating, under article 14, paragraph 4, and under article 24 of the Covenant, that the court examination of the case suffered from any procedural defect, or otherwise resulted in a denial of justice for the author as a child. Accordingly, the Committee considers that the latter failed to substantiate this claim, for purposes of admissibility, under article 2 of the Optional Protocol.

7.13 The author claims that the four year and eight month sentence was strictly punitive, as opposed to rehabilitative, disproportionate to the circumstances and gravity of the offence and in contradiction with the principle that deprivation of liberty of juveniles should be a measure of last resort, and would amount to a breach of her rights under article 10, paragraph 3, article 14, paragraph 4, and article 24. However, in view of the State Party's observations regarding the determination of charge, sentencing and the author's access to rehabilitative and educational facilities, the Committee considers that the author failed to substantiate this claim, for purposes of admissibility, and considers it inadmissible under article 2 of the Optional Protocol.

7.14 The author alleges that, by imposing a sentence of four years and eight months on 14 December 1999, the High Court failed to take into account the 11 months she spent in youth justice facilities prior to her second sentence. The Committee took note of the State party's contention that the author never brought such allegations before its domestic jurisdictions. The author did not adduce evidence to the contrary. Presenting this allegation before the State party's jurisdictions would have clarified the facts, which are in dispute in relation to the calculation of the time spent in youth justice facilities. Accordingly, the Committee declares this part of the communication inadmissible under article 5, paragraph 2 (b) of the Optional Protocol.

7.15 Furthermore, the Committee notes the author's claims that her right to privacy was breached when her name was published since the first sentencing in the High Court in July 1998, and throughout the duration of the proceedings, in violation of articles 14, paragraph 4, and 17 of the Covenant. It appears, however, that the author failed to request, before domestic jurisdictions, that her name be kept confidential, which it appears would have been feasible. The author did not contest this. The committee thus declares this part of the communication inadmissible under article 5, paragraph 2 (b) of the Optional Protocol.

7.16 The Committee further observes that the author's allegation, under article 14, paragraphs 1 and 5, that Justice Potter, who had previously sentenced her to four years of jail in the High Court, later presided over her jury trial for the same offence, was not challenged by way of an application for recusal. While expressing doubts about the propriety of having the same judge sentencing the accused on two occasions, and for the same offence, the Committee refers to the express request of author's then Counsel, that Justice Potter preside over the jury trial, which is available in the file. In these circumstances, it declares this part of the communication inadmissible under articles 1 and article 5, paragraph 2 (b), of the Optional Protocol.

²³ See, inter alia, communication No. 541/1993, *Simms v. Jamaica*, decision on inadmissibility adopted on 3 April 1995, paragraph 6.2.

7.17 With respect to the author's contention concerning Justice Robertson, that he was unfit to sit on the High Court pretrial application for discharge in October 1999, as he was a member of the Court of Appeal who overturned the author's sentence in March 1999, it appears that the author did not raise this issue at any moment in the procedure. Accordingly, the Committee declares this part of the communication inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

7.18 As far as the author's allegation concerning judges sitting in the Court of Appeal during the March 2005 proceedings is concerned, the Committee observes that the author contests the nomination of the High Court Justice Panckhurst in the Court of Appeal. She requested access to the nomination warrant but this was rejected. As a result, she asked that the Acting President of the Court of Appeal, Justice Glazebrook recuse herself. The Committee observes that the nomination of High Court judges to sit before the Court of Appeal is contemplated by statute under the State party's law. It notes that the author has not substantiated her allegation that this nomination affected the fairness of her appeal under article 14, paragraph 1 or paragraph 5. Nor did she successfully demonstrate that the failure to produce the nomination warrant of Justice Panckhurst in turn generated any reasonable apprehension of bias vis-à-vis the Acting President of the Court of Appeal. The Committee equally considers that the author failed to demonstrate, for purposes of admissibility, her allegation that the Court of Appeal was "hostile" in her regard. Accordingly, the Committee finds these parts of the communication inadmissible under article 2 of the Optional Protocol.

7.19 In the same manner, the Committee finds that the author could not demonstrate how the contribution by Justice Tipping - along with other judges - of evidence to members of Parliament in respect of amendments to the criminal appeal system, which would subsequently be invalidated by a decision of the Privy Council, had any bearing on the consideration of the merits of her case. Accordingly, the Committee also finds this allegation inadmissible under article 2 of the Optional Protocol.

7.20 Similarly, the Committee is of the view that the author's allegation under article 14, paragraphs 1 and 5, of the Covenant, vis-à-vis the participation of Chief Justice Elias in the Supreme Court proceedings of March 2006, is insufficiently substantiated for purposes of admissibility. The Committee notes that Chief Justice Elias was a member of the Court of Appeal, which set aside the author's conviction and sentence in March 1999 on the basis of a procedural defect. The trial thus started de novo. The author failed to demonstrate, for purposes of admissibility, that Chief Justice Elias, upon consideration of the author's application for judicial review in this new trial, was not impartial or otherwise harboured preconceptions about the case. The Committee thus declares this part of the communication inadmissible under article 2 of the Optional Protocol.

7.21 With regard to the author's contention, that the second committal of the case to the High Court on 24 June 1999 breached articles 14, paragraphs 2 and 4, and article 24 of the Covenant, the Committee makes the following observations. It appears from the file that she raised this issue before the Court of Appeal, but that it was outside the Court's statutory attributions to consider it. No earlier request was made by the author for the Youth Court Judge to exercise his discretion under the Children, Young Persons and Their Families Act to give the author the opportunity to forego her right to trial by jury and elect to have the case heard in the Youth Court. The Committee is not persuaded by the author's argument, that the Youth Court should have unilaterally assessed that this was in the author's best interest that her case remain within this jurisdiction. Being represented by Counsel, and having failed to take advantage of an effective remedy which would have allowed her to forego her right to trial by jury, or to challenge, by way of judicial review, the committal of the case to the High Court, the Committee is of the view that the author is precluded from presenting this issue before the Committee for non-exhaustion of domestic remedies. It thus

declares this part of the communication inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

7.22 Regarding the author's allegation of judicial bias, with respect to the participation of Justice Tipping in the Supreme Court in March 2006, the Committee notes that Justice Tipping did not participate in the decision of the Supreme Court adopted on 30 November 2007. Accordingly, the Committee considers that the author failed to substantiate this claim, for purposes of admissibility, and considers it inadmissible under article 2 of the Optional Protocol.

7.23 Regarding the author's allegation that the delay in the proceedings constituted a violation of article 9, paragraph 3 and article 10, paragraph 2 (b), of the Covenant, the Committee considers that the author failed to substantiate this claim, for purposes of admissibility, and considers it inadmissible under article 2 of the Optional Protocol.

7.24 Finally, the Committee took note of the author's assertion that she only addressed the issue of the birth of her son, and the lack of educational services and opportunities while serving her sentence by way of background, and does not expect the Committee to consider the potential issues they would raise under the Covenant

7.25 The Committee considers that the remaining issues have been sufficiently substantiated. It therefore proceeds to the examination, on the merits, of the following parts of the communication: The author's allegation of delay in the proceedings under article 14, paragraphs 3 (c), 4 and 5; the inability of the author to interrogate the victim at trial, under article 14, paragraph 3 (e); and the dismissal of her appeal by the Supreme Court, under article 14, paragraph 1, of the Covenant.

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

8.2 With respect to the author's allegation of delay in the proceedings under article 9 paragraph 3, article 10 paragraph 2 (b), and article 14, paragraphs 3 (c), 4 and 5, the Committee recalls that juveniles are to enjoy at least the same guarantees and protection as those accorded to adults under article 14 of the Covenant.²⁴ The Committee took note of the author's contention that the second committal of her case to the High Court resulted in undue delay, as the Youth Court would have proceeded faster. The Committee recalls its jurisprudence that the right to a fair trial guaranteed by this provision includes the expeditious rendering of justice, without undue delay.²⁵ The issue of delay must be assessed against the overall circumstances of the case, including an assessment of the factual and legal complexity of the case.

8.3 The Committee notes, in this respect, that after the case was committed for trial in the High Court on 24 June 1999, the author was sentenced on 14 December 1999, following two pretrial applications and jury trial. The duration of these initial High Court proceedings was therefore less than six months from the time of the second committal of the case by the Youth Court. Upon rejection of the author's appeal ex parte in March 2000

²⁴ General comment No. 32 (note 22 above), para. 42, and communications No. 1209/2003, 1231/2003 and 1241/2004, *Rakhmatov, Safarov and Salimov, and Mukhammadiev v. Tajikistan*, Views adopted on 1 April 2008, para. 6.6.

²⁵ Communications No. 203/1986, *Muñoz Hermoza v. Peru*, Views adopted on 4 November 1988, para. 11.3; No. 514/1992, *Fei v. Colombia*, Views adopted on 4 April 1995, para 8.4, and No. 263/1987, *González del Río v. Peru*, Views adopted on 28 October 1992, para. 5.2.

by the Court of Appeal, the author immediately filed an application for judicial review, which her lawyer decided to merge with existing applications in November 2000. These applications were considered by the Privy Council in February 2001, and judgment was eventually rendered in March 2002. The State party attributes this time lapse to the preparation of records and submissions in respect of the 12 appellants in the case.

8.4 The Committee observes that following the decision of the Privy Council of 19 March 2002, ordering the rehearing of the author's case, the Court of Appeal hearing only took place in October 2005. The Committee notes that the author's lawyer accepted responsibility for two years and nine months out of this delay, i.e. around two thirds of this period, as he was overseas. The Committee also notes the efforts of the Court of Appeal to fix a date for the hearing, and the repeated requests from the author, for documentation, as well as requests on her part for the adjournment of the case.

8.5 Regarding the Supreme Court hearing, it transpires from the file that after the dismissal of her case by the Court of Appeal in December 2005, the author sought leave to appeal before the Supreme Court in January 2006, which was rejected on 27 March 2006. It is only in August 2007, i.e. 17 months after the Supreme Court decision, that she filed an application to set aside that decision. The Supreme Court rendered its decision on 30 November 2007. In the specific circumstances of the case, the Committee considers that the delay in determining the author's appeal does not amount to a violation of article 14, paragraphs 3 (c), 4 or 5 of the Covenant.

8.6 Regarding the author's contention that she was unable to interrogate the victim during the High Court trial, which resulted in a breach of her rights under article 14, paragraph 3 (e), the Committee observes that the victim, who was nearly 89 years old at the time of the High Court trial in 1999, was found unable to attend the hearing for health reasons. The Committee observes the importance of the evidence of the victim for the trial, magnified by the fact that he had provided contradictory statements, initially claiming that there was only one assailant when the robbery occurred, while later stating that there were two, thereby implicating the author. The Committee recalls that article 14, paragraph 3 (e), guarantees the right of accused persons to examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them.²⁶ The Committee observes that a reading of the victim's statement to the jury could have fallen short of the requirement, under article 14, paragraph 3 (e), to be given a proper opportunity to question and challenge witnesses, a fortiori where their evidence is of direct relevance for the resolution of the case, and where the charges faced are of such serious nature. However, in the particular circumstances of the case, the fact that the author, as claimed by the State party and uncontested by the author, was convicted based on her own confession and without the victim's statement having been read to the jury, does not support a finding of violation of the principle of equality of arms under article 14, paragraph 3 (e).

8.7 The author also alleges that the dismissal, by the Supreme Court, of her appeal on 27 March 2006 was in breach of article 14, paragraph 1, as it consisted of four paragraphs only, and was without an oral hearing. The Committee observes that it is not disputed that the author's trial and appeal were openly and publicly conducted, and recalls its previous jurisprudence that the disposition of an appeal does not necessarily require an oral hearing.²⁷ Accordingly, the Committee is of the view that the Supreme Court proceedings

²⁶ See the Committee's general comment No. 32 (note 22 above), para. 39.

²⁷ Communications No. 1347/2005, *Dudko v. Australia*, Views adopted on 23 July 2007, para. 7.2, No. 301/1988, *R.M. v. Finland*, decision on inadmissibility adopted on 23 March 1989, para. 6.4; and No. 819/1998, *Kavanagh v. Ireland*, Views adopted on 4 April 2001, para. 10.4.

of March 2006 do not disclose a violation of article 14, paragraph 1, of the Covenant for 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 facts before it do not reveal a breach of any provision of 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.]

**MM. Communication No. 1760/2008, *Cochet v. France*
(Views adopted on 21 October 2010, 100th session)***

<i>Submitted by:</i>	Jean-Pierre Cochet (represented by Antoine Garnon)
<i>Alleged victim:</i>	The author
<i>State party:</i>	France
<i>Date of communication:</i>	4 December 2007 (initial submission)
<i>Subject matter:</i>	Retroactive effect of a law on the existence of an offence, monitoring of compliance and the penalties incurred
<i>Procedural issue:</i>	None
<i>Substantive issues:</i>	Principle of the retroactive effect of the less severe criminal statute
<i>Article of the Covenant:</i>	15
<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 21 October 2010,

Having concluded its consideration of communication No. 1760/2008, submitted to the Human Rights Committee on behalf of Mr. Jean-Pierre Cochet 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. The author of the communication is Mr. Jean-Pierre Cochet, born on 22 May 1948 in Saint-Hilaire-le-Petit, France. He claims that France has violated his rights under article 15 of the Covenant. The author is represented by Mr. Antoine Garnon. The Covenant and its Optional Protocol entered into force for France on 4 February 1980 and 17 February 1984, respectively.

* The following members of the Committee participated in the consideration of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Ms. Christine Chanut did not participate in the adoption of the present decision.

The text of individual opinion signed by Committee members Sir Nigel Rodley and Mr. Prafullachandra Natwarlal Bhagwati is appended to the text of the present Views.

The facts as submitted by the author

2.1 Between November 1987 and March 1988, the Coopérative Agricole de l'Arrondissement de Reims (CAAR, which subsequently became the cooperative COHESIS), of which the author was the director, imported over 1 million kilos of protein peas from the Netherlands and the United Kingdom of Great Britain and Northern Ireland. These peas were classified for tariff purposes as "other than those intended for sowing", a category which benefited from European Community aid. The peas were imported through three customs brokers, including the firm Dalsace Frères, represented by Mr. Eric Dalsace. Since the peas imported by CAAR were actually intended for sowing, a category that did not benefit from European Community aid, the customs administration initiated proceedings against the author and Mr. Dalsace for making false statements with the intent or effect of profiting from the importation. The author was additionally charged with making a false declaration of origin because the customs administration deemed that a portion of the peas had come from Hungary and not the Netherlands. The cooperative CAAR, subsequently renamed COHESIS, and the firm Dalsace Frères were held liable under civil law.

2.2 The Criminal Court of Reims applied the less severe criminal statute and handed down a ruling on 6 February 1996 annulling the proceedings brought by the customs administration, which appealed. All the administration's applications were dismissed on 5 May 1999 by the Court of Appeal of Reims. The Court ruled that the offences referred to in the proceedings had been abrogated by Act No. 92-677 of 17 July 1992, which implemented European directive No. 91-680, stipulating that the Customs Code was no longer to apply to the entry of merchandise from within the Community. The Court of Appeal also stated that article 110 of the Act of 17 July 1992, whereby the Act does not impede the prosecution, under previous legislation, of customs violations committed prior to the Act's entry into force, was applicable only to proceedings under way at the time the Act came into effect. In this case, the proceedings were not instituted until 1 August 1994, in other words, 18 months after the Act came into force. The Court of Appeal ruling was quashed on 18 October 2000 by the Criminal Chamber of the Court of Cassation. The view of this Court was that, under article 110 of the Act of 17 July 1992, the abolition of customs controls and duties as of 1 January 1993 did not impede prosecution, on the basis of previously existing legislation, of customs violations committed prior to the entry into effect of the Act; and that the date upon which such proceedings were instigated had no bearing on the applicability of the Act.

2.3 The case was remanded to the Court of Appeal of Paris, which on 14 November 2001 judged the defendants, including the author, to be guilty as charged and sentenced them, jointly with the companies deemed civilly liable, to a fine of approximately 2 million French francs to the customs administration as well as another sum of about 2 million French francs in lieu of confiscation of the imported goods. That sentence was overturned by the Criminal Chamber of the Court of Cassation on 5 February 2003 on the grounds that the defendants had not had the last word. Before the Court of Appeal of Paris, the designated remand court, COHESIS and the author explicitly cited the abolition of the criminal offence and invoked article 15 of the Covenant. In its ruling of 6 July 2006, the Court of Appeal of Paris took the view that article 110 of the Act of 17 July 1992 did not contradict the provisions of article 15 of the Covenant and, finding the defendants, including the author, guilty as charged, sentenced them, jointly with the companies held civilly liable, to a fine of approximately €300,000 and an additional sum of approximately €300,000 in lieu of confiscation of the imported goods.

2.4 In its ruling of 19 September 2007, the Criminal Chamber of the Court of Cassation declared, inter alia, that the Act of 17 July 1992 had a bearing only on the procedures for monitoring compliance with the rules governing aid for protein pea imports and the origin

of such imports and not on the existence of the offence or the severity of the penalties and rejected the appeal, which had also been based on the provisions of article 15 of the Covenant.

The complaint

3.1 The author considers that the State party violated article 15 of the Covenant by misinterpreting the Act of 17 July 1992 on the cessation of the application of the Customs Code within Community territory. The author notes that, under the principle of the retroactive effect of a less severe criminal statute, only acts constituting an offence on the date they were committed are punishable and only those penalties legally applicable on that date may be imposed. New legal provisions do apply, however, to offences committed before they entered into force and that are not yet subject to a final sentence, when those provisions are less severe than the old ones.¹ The author also cites article 112-4 of the French Criminal Code, which states that the immediate application of a new statute has no bearing on the status of actions carried out under the old legislation. Execution of a penalty, on the other hand, ceases where it was imposed for an act that ceases to be a criminal offence under legislation that post-dates the judgement.

3.2 The author refutes the argument put forward by the Court of Cassation that, in this case, the changes introduced by the Act of 17 July 1992 have a bearing only on the procedures for monitoring compliance with the rules governing aid for protein pea imports and the origin of such imports and not on the existence of the offence or the severity of the penalties. According to the author, this argument is flawed because, under article 110 of the Act, the offence ceased to exist the moment the Customs Code ceased to apply within Community territory. The author interprets article 15, paragraph 1, of the Covenant as referring not only to the principle of the retroactive effect of the lighter penalty, but also, by extension, the principle that a law abolishes an offence inasmuch as it abolishes all penalties.

3.3 By failing to apply the less severe statute, the author claims, the State violated the principle of the primacy of international law over domestic law. The author refers to the jurisprudence of the Court of Justice of the European Communities (CJEC), which upholds the principle of the retroactive effect of the lighter penalty, which should be applied in the national laws that implement Community law.² CJEC subsequently ruled that the same principle must be applied by domestic courts where they have to impose penalties established in Community regulations.³ CJEC invoked the principle in a case in which the change in the law affected not only the penalties, but also the conditions for bringing proceedings. The author notes that the Court of Cassation has always held that the lighter penalty principle applies only to penalties and not to offences.⁴

3.4 The author recalls that the Act of 17 July 1992 implements the Community directive on the abolition of border controls. This directive specifically provides that, from 1 January 1993, controls for tax purposes at internal borders are eliminated for all operations carried out by member States. The Act of 17 July 1992 thus had a bearing on the existence of the offence because it resulted in the abolition of the legal provision contained in the Community directive, and not just of the procedures for monitoring compliance with the rules governing aid for protein pea imports, as maintained by the Court of Cassation.

¹ French Criminal Code, art. 112-1.

² The author cites CJEC ruling of 3 May 2005, Berlusconi, case C-387/02.

³ The author cites the ruling of 8 March 2007, Campina, case C-45/06.

⁴ The author cites two rulings of the Court of Cassation: Cass 6 October 2004, application No. 0384827; and Cass 5 December 2001, application No. 0181228.

State party's observations

4.1 After declaring in a letter dated 28 April 2008 that it did not question the admissibility of the complaint, the State party submitted its observations on the merits of the case on 27 August 2008. With reference to the facts, the State party explains that the acts which the author was accused of constituted an offence of importing prohibited goods without declaring them and a category 1 customs violation, offences that are specified and sanctioned by the Customs Code, the Code of Criminal Procedure and the regulations of the European Council and the European Commission. In the light of the pertinent legal provisions on the subject and the constitutional status of the principle of the retroactive effect of a less severe statute, the State party notes that article 15, paragraph 1, of the Covenant provides, *inter alia*, that if, subsequent to the commission of an offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit.

4.2 The State party asserts that, contrary to what the author claims in his communication, the Court of Cassation's interpretation of the principle of the retroactivity of a less severe criminal law under article 15, paragraph 1, of the Covenant is not relevant in this case. What is relevant is the interpretation of the scope of the Act of 17 July 1992 in this case, in view of the customs violations committed by the author. The disagreement between the author and the State party basically revolves around whether article 110 of the Act of 17 July 1992 should be considered to have abolished the criminal offence invoked by the French domestic courts. The applicability of article 15 hinges on the answer to this question. The State party recalls that the Court of Cassation's rejection of the author's argument of misinterpretation of article 15 of the Covenant was based not on the case law challenged by the author but on the fact that the changes introduced by the Act of 17 July 1992 had a bearing only on the procedures for monitoring compliance with the rules governing aid for protein pea imports and the origin of such imports and not on the existence of the offence or the severity of the penalties.

4.3 The author's argument that the Court of Cassation's case law contradicts article 15 of the Covenant was flawed because it was not applied in this case. The State party recalls the Human Rights Committee's view that it is not the Committee's task to decide in the abstract whether or not the national law of a State party is compatible with the Covenant, but only to consider whether or not there has been a violation of the Covenant in the particular case submitted to it.⁵ The prejudgement report for the Court of Cassation, presented on 9 May 2007, clearly proposed the solution adopted by the Court in its ruling of 19 September 2007. The ruling set out the issue that the court would need to resolve: namely, if the Criminal Chamber of the Court of Cassation decided that the principle established by both article 15 of the Covenant and the Court of Justice covers not only situations in which the penalty is lighter but also those in which the offence is abolished, then the court would have to determine whether the latter situation is the one that applies in this case. The State party notes that, prior to the passing of the Act of 17 July 1992, the Customs Code provided for the control of merchandise imported by the author, *i.e.*, peas packed in new 12.5 kg packages. The Act of 17 July 1992 did away with such controls. The question then is whether the principle of the retroactivity of a less severe criminal statute applies to provisions governing controls and not the substance of the infractions. In this case the Court of Cassation's ruling of 19 September 2007 did not consider article 15 of the Covenant to apply only to the penalties but was based on the fact that the changes made by the Act of 17 July 1992 had a bearing only on the procedures for monitoring compliance with the rules governing aid for protein pea imports and the origin of such imports and not on the existence of the offence or the severity of the penalties.

⁵ Communication No. 55/1979, *MacIsaac v. Canada*, Views adopted on 14 October 1982, para. 10.

4.4 In the alternative, the State party points out that the Court of Cassation rigorously upholds the principle of the less severe criminal statute, even in financial and tax law, which means that all sanctions are lifted when the violated legislation is repealed, suspended or amended. However, the principle applies in the absence of specific provisions to the contrary. The State party stresses that a provision such as that set forth in article 110 of the Act of 17 July 1992 constitutes, not an exception to the principle of the retroactive effect of the less severe criminal statute, but a means of implementing a transitional or short-term rule. The rationale for the provision is the desire to preserve the deterrent effect and efficacy of the criminal penalty in a field where the regulations are contingent and temporary. Even legal opinion that is critical of the case law of the Court of Cassation on this point acknowledges that article 110 of the Act of 17 July 1992 was useful, or even necessary. Alerted in November 1991 to the elimination of borders from 1 January 1993, smugglers could count on over a year of what would be not just lucrative but clearly, by virtue of the retroactive less severe statute principle, unpunishable illegal trade. It is understandable, then, that the legislature would wish to impede such schemes even at the risk of coming into conflict with the Constitutional Court or the Covenant. The State party also points out that not all opinion is critical of the Court of Cassation's position: some recognize the importance of a literal interpretation of article 15 of the Covenant, which, strictly speaking, refers only to penalties and not to offences or to non-criminal laws that simply define concepts used in upholding criminal law.

Author's comments on the State party's observations

5.1 On 22 September 2008, the author, through counsel, rejected the arguments of the State party. To begin with, he refers to the initial summons to appear before the Criminal Court which he received on 11 August 1994. According to this summons, he was charged with importing prohibited goods without declaring them and a category 1 customs violation, punishable under articles 410, 426-4, 435, 414, 399, 382 and 404 to 407 of the Customs Code. In accordance with article 2 bis of the Customs Code, as derived from articles 111 and 121 of the Act of 17 July 1992, the Code does not apply to Community merchandise entering the customs territory. As it happens, only the articles mentioned above, specifying the penalties incurred, were referred to in the summons of 11 August 1994, so, since these provisions were no longer applicable from 1 January 1993, the author takes the view that the Court of Cassation's ruling misinterpreted article 110 of the Act of 17 July 1992 in finding that the article has a bearing only on the monitoring procedure and not on the penalties, when it is undeniable that the legal definition of the offence no longer exists. The author adds that, even though article 110 indeed refers only to the procedures for monitoring violations, articles 111 and 121 of the Act effectively provide for abolition of the legal definition of the offence. Under these conditions, it was impossible to hand down a conviction.

5.2 Having highlighted once again the contradictions in the case law of the Court of Cassation, the author insists that customs matters are criminal matters, as demonstrated by the referral of the case to the criminal courts, and that, consequently, the principle of the retroactivity of the less severe criminal statute is applicable in this case. The author notes that the State party itself has acknowledged that the Court of Cassation's interpretation of article 110 of the Act of 17 July 1992 contravened the Covenant, since it said that it was understandable that the legislature would wish to impede such schemes even at the risk of coming into conflict with the Constitutional Council or the Covenant. As the author sees it, this clearly constitutes an acknowledgement of a violation of article 15 of the Covenant by the State party. He also recalls that the damages he has suffered to date have been considerable because his bank accounts have been blocked by the customs administration.

5.3 On 3 October 2008, the author referred once more to the arguments put forward by the Court of Cassation in its ruling of 19 September 2007 in which it declared that

European Economic Community directive EEC 91/680 mandated the elimination of customs controls and that it was in order to implement this directive that article 111 of the Act of 17 July 1992 stated that the provisions of the Customs Code no longer applied to Community merchandise. With this finding, the Court of Cassation established a close link between customs controls and the existence of the offence, and the offence had ceased to exist because the articles of the Customs Code relating to the offence no longer applied. The author therefore claims that the Court of Cassation had resorted to subterfuge to avoid contradicting its previous ruling of 18 October 2000 on the same matter. For a long time the Court has stated that a less severe statute has retroactive effect unless it contains a specific provision to the contrary. However, this distortion of constitutional principle was in practice not serious because, prior to the Act of 17 July 1992, no less severe statute had ever actually ruled out retroactive application. Then, when the Act of 17 July 1992 stipulated the opposite, the Court of Cassation, in its ruling of 19 September 2007, chose not to directly contravene the principle of the retroactivity of criminal law by disregarding it, but did in fact do so by claiming that the Act had a bearing only on monitoring procedures and not on the offence itself.

5.4 The author closes by citing the reference made by the rapporteur in the Cochet case to the Court of Justice of the European Communities decision of 3 May 2005 in the Berlusconi case, recalling the principle of the retroactive application of the lighter penalty. The author notes that the wording of the Berlusconi decision shows that what CJEC calls the principle of the application of the lighter penalty covers not only laws that establish penalties but also laws that abolish offences. On the one hand, the decision states that article 2 of the Italian Criminal Code establishes the principle of the retroactive application of the lighter penalty, whereas in fact it gives retroactive effect to a law whose provisions are more favourable to the person found guilty; on the other hand, it invokes the principle of the application of the lighter penalty in general, even though the preliminary rulings referred in part to Italian legal provisions that in some cases abolished offences. Therefore, if CJEC uses the expression “the lighter penalty” to refer in general to a criminal statute that is less severe both in terms of the magnitude of the penalty and because it narrows or even abolishes the offence, the wording of article 15 of the Covenant should no longer be understood to refer strictly to laws that reduce the penalty. The author therefore insists that the principle of the retroactive effect of a less severe criminal statute must be applied a fortiori to cases in which a law does not merely reduce the penalty but actually abolishes the offence.

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 Regarding the exhaustion of domestic remedies, the Committee notes that, according to the information provided by the author, all available domestic remedies have been exhausted. In the absence of any objection by the State party, the Committee finds that the conditions referred to in article 5, paragraph 2 (b), of the Optional Protocol have been met.

6.4 In the Committee’s View, the author has sufficiently substantiated, for purposes of admissibility, the claims made under article 15, paragraph 1, of the Covenant and therefore proceeds to its examination of the merits.

Consideration of the merits

7.1 The 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 With regard to the claim made under article 15, paragraph 1, of the Covenant, the Committee notes that, according to the summons submitted by the author, the acts committed between November 1987 and March 1988 constituted an offence of importing prohibited goods without declaring them and a category 1 customs violation, offences specified and penalized under articles 410, 426-4, 435, 414, 399, 382 and 404 to 407 of the Customs Code, article 750 of the Code of Criminal Procedure, and EEC Council regulations No. 1431/82 and No. 2036/82 and Commission regulation No. 3540/85. The Committee notes, as the author stated, that these provisions ceased to be applicable after 1 January 1993, the date upon which the regime established by the Act of 17 July 1992 entered into force. It also notes that the criminal proceedings brought against the author on the basis of those violations were instituted 18 months after the entry into force of the said regime, on 1 August 1994. The Committee observes that these facts are not disputed by the State party. The issue here is therefore clearly the disappearance of an offence and the corresponding penalties, since the acts that were the subject of the charges brought by the State party ceased to constitute criminal offences on 1 January 1993. The Act of 17 July 1992 therefore clearly refers to a regime of offences and the associated penalties and not just monitoring procedures as claimed by the State party.

7.3 As regards the scope of the application of article 15, paragraph 1, of the Covenant, the Committee finds that the article should not be interpreted narrowly: since the article refers to the principle of the retroactive effect of a lighter penalty, it should be understood to refer a fortiori to a law abolishing a penalty for an act that no longer constitutes an offence. Moreover, reference is made to article 112-4 of the French Criminal Code, which provides that execution of a penalty ceases where it was imposed for an act that ceases to be a criminal offence under legislation that post-dates the judgement.

7.4 The Committee finds that the principle of the retroactive effect of the lighter penalty and, in this case, the non-existence of a penalty, is applicable in this case and that, consequently, article 110 of the Act of 17 July 1992 violates the principle of the retroactive effect of the less severe criminal statute under article 15 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 information before it discloses a violation of article 15, 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, 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 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 Committee's 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.]

Appendix

Individual opinion of Committee members Sir Nigel Rodley and Mr. Prafullachandra Natwarlal Bhagwati

We agree that there was a violation of the Covenant, involving article 15, but not for the reasons given by the Committee, which we believe go well beyond what was necessary to decide the case and which over-interpret article 15.

The committee's reasoning, particularly in paragraph 7.3, would make it possible for the gravest violations of, say, United Nations Security Council sanctions or rules adopted within the framework of the Convention on International Trade in Endangered Species of Wild Fauna and Flora to enjoy impunity just as long as their acts or their responsibility for the acts remained undetected until the sanctions were eventually lifted once the situation justifying them had been resolved or the previously endangered species no longer required protection.

We find this preposterous and suspect that not many national customs laws would be consistent with it. Nor is it dictated by the plain terms of the third sentence of article 15, paragraph 1. This refers to the "criminal offence", rather than the acts or omissions constituting the criminal offence (see article 15, paragraph 1, first sentence). The criminal offence of making a false customs declaration persists.

Rather, for us the crux of the case lies in the fact that, *as a matter of French law*, the normal situation in the event of a change in the customs regulations in question would have been that the author would indeed have benefited from the application of the "less severe criminal statute" (see para. 4.4). The fact that the Act of 17 July 1992 expressly excluded such a benefit, however understandable the purpose – to exclude abuse during the transitional period between the passage of the Act and its entry into force – hardly justifies including the authors in the same category. Accordingly, it seems to us that the law as it applied to the author was incompatible with article 15, paragraph 1, read together with article 26 (equality under the law).

However, if French law had not, in general, taken the expansive view of article 15, paragraph 1, third sentence, we should have had no difficulty in finding a non-violation. For the alternative, at least if one follows the approach of the Committee, would mean that impunity of the sort we have mentioned would flourish.

(Signed) Sir Nigel **Rodley**

(Signed) Prafullachandra Natwarlal **Bhagwati**

[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.]

**NN. Communication No. 1761/2008, *Giri et al. v. Nepal*
(Views adopted on 24 March 2011, 101st session)***

<i>Submitted by:</i>	Yubraj Giri (represented by the Advocacy Forum)
<i>Alleged victims:</i>	The author, his wife (Dhanamaya Giri) and their two children (Yashoda and Yogesh Giri)
<i>State party:</i>	Nepal
<i>Date of communication:</i>	14 January 2008 (initial submission)
<i>Subject matter:</i>	Arbitrary arrest and detention, and acts of torture against a farmer, on suspicion of membership in the Communist Party (Maoist)
<i>Procedural issue:</i>	Non-exhaustion of domestic remedies
<i>Substantive issues:</i>	Arbitrary arrest and detention; torture and ill-treatment; incommunicado detention; enforced disappearance; conditions of detention; right to an effective remedy; state of emergency
<i>Articles of the Covenant:</i>	2, paragraph 3; 7; 9; and 10, paragraph 1
<i>Article of the Optional Protocol:</i>	5, paragraph 2 (b)

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

Meeting on 24 March 2011,

Having concluded its consideration of communication No. 1761/2008, submitted to the Human Rights Committee on behalf of Mr. Yubraj Giri, his wife and two children 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. The author of the communication is Mr. Yubraj Giri, a Nepalese national, born on 1 February 1983. He claims to be a victim by Nepal of violations under article 7; article 9 and article 10, read in conjunction with article 2, paragraph 3, of the Covenant. He is represented by the Advocacy Forum. The Optional Protocol entered into force for the State party on 4 March 1996.

* 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. Helen Keller, 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.

The facts as presented by the author

2.1 The author is a farmer and lives in Rajagadawa Bankhet, Banke District, in the Bheri Zone, in Nepal. He is married to Dhanmaya Giri, and they have two children, Yashoda, aged 7 and Yogesh, aged 5.¹ On 29 April 2004, he was visiting the village of Laknawar, and playing a board game with villagers on the roadside in the afternoon. He had been playing for 10 minutes when a member of the Communist Party of Nepal (Maoist) joined the game. After about five minutes, the author heard a man shouting to another person to “look at the Maoist activist”. The author turned and saw two men dressed in civilian dress and armed with pistols, riding on bicycles. The Maoist activist began running away and the two men got off their bicycles, opened fire and gave chase to him.

2.2 After about 20 minutes, the two men in civilian dress returned to the village, got back on their bicycles and rode away. Most of the people who had been playing had dispersed, but the author was still by the roadside as he was buying tobacco from a shopkeeper. After finishing his purchase, he went to the home of an acquaintance, and saw an army truck, in which there were 20-25 men wearing army uniforms and carrying guns and bags, driving through the village. After some 20 minutes, the author left his acquaintance’s place and began cycling home. Just as he was leaving Laknawar, he encountered a dozen men in army uniforms, whom he believed were Royal Nepal Army (RNA) soldiers. One RNA soldier asked the author where he was from, and where he was going. While he was answering, the two men in civilian dress who had earlier chased the Maoist activist came over. One of them told the soldiers that he had seen the author with the Maoist activist who had escaped. This man kicked the author three times in the chest and stomach with his boots. While kicking the author, he also pointed his pistol at the author and told him he was a Maoist. After the third kick, the author fell on the ground. The man kicked the author a fourth time in the chest, and the latter lost consciousness.

2.3 When he regained consciousness, the author was in a moving truck, lying face down. He was not blindfolded or handcuffed. As he had difficulty breathing, he asked if he could sit, and was allowed to do so. The RNA soldiers did not inform him of the reasons for his arrest, nor of his rights at the time of his arrest. He noticed men in uniforms around him, but the men in civilian dress were not in the truck. When the truck reached the highway, the author was blindfolded. Some RNA soldiers called him names and pulled his beard. About 30 minutes later, the truck stopped and the author was ordered to get down from the truck. His blindfold was moved, and the author could see that he was in an army barrack, and later heard soldiers refer to it as the Imamnagar Barracks. The soldiers then replaced his blindfold again and cuffed his hands behind his back.

2.4 The author was forced to walk for about 10 to 15 minutes to a building, and locked in a room called the “medical detention room”. It was about 3 metres by 4 metres, devoid of light, had a filthy smell and lots of mosquitoes. There were two steel beds but no bedding. There was a toilet attached to the room, but no water. There was a small window, but it was covered with plastic and jute sacks. The author’s hands were cuffed behind his back for the first three to four days of his detention, and were cuffed in front of him after that. The author was sharing his cell with at least one co-detainee, sometimes more, leading to overcrowding. He was not provided with adequate water, food, bedding, natural light or recreational facilities. For the first three months of his detention, both detainees were allowed to remove their blindfold and undo their handcuffs during mealtimes. Food and water would be passed by the sentry through the cell window. After the first three months of his detention, the sentries stopped undoing the author’s handcuffs at mealtime. He was told that the sentries had lost the keys for his handcuffs and could no longer undo them. He

¹ Age of the children at the time of the initial communication.

was therefore blindfolded and handcuffed throughout the remainder of his detention at the army barracks, which led to considerable difficulties for him to eat and use the toilet. He adds that he was only allowed to shower on two occasions during his detention, and had to ask the sentry for drinking water, which was rationed. He was never provided with a change of clothes.

2.5 The author was detained at the Imamnagar Army Barracks incommunicado from 29 April 2004 to 12 May 2005, i.e. for almost 13 months. At no point during his detention was he allowed to contact his family or a lawyer. RNA soldiers tortured him and subjected him to cruel, inhumane and degrading treatment. He was tortured daily for one week, usually during the day. After one week, the torture stopped for three or four days, was resumed for a few days, and then stopped again for a few days. This pattern continued for about three months, after which the frequency of the torture decreased, but it nevertheless continued for around seven months. Torture occurred during interrogations, and would include beatings on the shoulders, the back and legs with a plastic pipe and a hard wooden stick. The author was also slapped in the face, punched on the head and ears with the fist, kicked in the back with army boots, including on parts that had been beaten the previous day. The interrogator would ask the author about his involvement with the Maoists. During the torture sessions, the author would be blindfolded and handcuffed. He once recognized the voice of one of the torturers as sounding like the voice of one of the men dressed in civilian clothes, who had beaten him upon arrest. When the author denied any involvement, the torture would be intensified. The first day of his detention, after the interrogation and beating session, the author was told to rest because he would be killed the next day by being taken up in a helicopter and thrown out of it. During his detention, he was alternatively told by some sentries that he would be freed, while others would tell him that he would be killed. Other acts of torture included rubbing his body against ice blocks, and piercing with needles of his back, his chest near his nipples and underneath his toenails. The author was moved at least twice from the medical detention room to other areas in the barracks. RNA soldiers told him that he was being moved to hide him from the International Committee of the Red Cross or the National Human Rights Commission (NHRC).

2.6 After the seventh month of his detention, the author was forced to write a confession, stating that he was a Maoist activist, that the RNA had seized documents related to the Communist Party of Nepal (Maoist) from him, and that he now wanted to "surrender". The author was forced to put his thumbprint on the document. Later, he was also forced to write and sign similar statements. After the eighth month of his detention, he was tortured on one occasion only. However, RNA soldiers would continue to verbally abuse him, some telling him he would be killed, while others would tell him he would be released. The author estimates that in total, he was tortured about 100 times. He was afraid to ask for medical assistance while in detention, and was only seen once by a doctor. As a result of the torture, he continues to suffer from constant headaches and dizziness, pain in his jaw, head, shoulders, back, hips and legs and was diagnosed with spinal osteoarthritis. He also experiences post traumatic symptoms such as depression, difficulty concentrating, episodes of anger, fear and anxiety, including fear of uniforms, and has flashbacks.

2.7 On 12 May 2005, the author was transferred by the RNA to the Banke District Police ("DPO") in Nepalgunj. He was forced, at gunpoint, to write and sign a similar statement to the ones previously signed. On 12 May 2005, the Lieutenant of Kalidal Battalion, Imamnagar Barracks, wrote a letter to the DPO regarding the author, and recommending that he be preventively detained pursuant to section 9 of the Terrorist and

Destructive Activities (Control and Punishment) Ordinance (2004).² In the letter, the Lieutenant stated that the author was involved in Maoist terrorist activities and that he had assisted the Maoists in transporting goods and carrying out abductions.

2.8 On 12 May 2005, District Police Office Police Instructor B.D.K. wrote a note to which he attached a statement written by the police inspector, and signed by the author, in which the latter confessed to the crimes referred to by the Lieutenant in his letter of 12 May 2005, and having spied on behalf of the Maoists. The author maintains that he was forced, at gunpoint, to write and sign such a confession.

2.9 On 13 May 2005, the Superintendent of Police, S.L., wrote a letter to the District Administrative Office, advising that the author had been transferred to police custody by the RNA on 12 May 2005. The Superintendent specified that the author had been found to have been involved in “Maoist terrorist activities”, and requested that the author be preventively detained under section 9 of the Terrorist and Destructive Activities Ordinance.

2.10 On 13 May 2005, the author was accordingly taken to the District Administrative Office, where a preventive detention order was issued under the Ordinance, on the basis of the correspondence received from both the Nepalese Army and the Banke District Police. The author was transferred to the Banke District Jail on the same day, and provided with a letter confirming that he was being preventively detained under section 9 of the 2004 Ordinance.

2.11 On 29 June 2005, the author filed a writ petition of habeas corpus in the Appellate Court in Nepalgunj, Banke District, in which he referred to his arbitrary arrest, his illegal and incommunicado detention, and the physical and mental torture to which he was subjected while detained by the RNA. The writ named as respondents the District Police Office, the District Administrative Office, the Chief District Administrative Officer and the District Jail. In the writ, the author denied being a Maoist activist, and challenged his continued detention under the Terrorist and Destructive Activities Ordinance 2004. On 1 July 2005, the Appellate Court requested written replies from the respondents within three days. Replies from the District Police Office, the District Administrative Office and the District Jail denied that the author was detained illegally, referring to valid requests in this regard, including from the Royal Nepalese Army. On 14 September 2005, the Appellate Court in Nepalgunj ordered that the author be brought before the District Court and released. It concluded that the Chief District Administrative Officer did not have the power to issue preventive detention orders under the 2004 Ordinance. It ordered the release of the author on this procedural ground. The author was released on 15 September 2005, after 126 days of detention in the District Jail.

2.12 Regarding the requirement of exhaustion of domestic remedies, the author stresses that upon the filing by the author of his habeas corpus petition of 29 June 2005, the authorities were aware of his allegations of torture. Under the Appellate Court Regulations No 29 and 30, the Court has the discretion to create an investigative committee if it has any evidence of torture. The Court did not exercise such discretionary powers in this case. Similarly, despite being cognisant of the allegations of torture brought by the author, the police failed to initiate a criminal investigation to identify and prosecute perpetrators. The author contends that the lack of any investigation, more than two years after the filing of the

² Section 9 reads: “In case where there exists appropriate grounds for believing that a person had to be stopped from doing anything that may cause a terrorist and destructive act, the Security officer may issue an order to keep him under preventive detention up to six months in “any humane place”. If there are reasonable grounds to believe that any person has to be prevented from committing any terrorist activities for longer than that, on the approval of His Majesty the Government’s Home Ministry, the Security Officer can issue additional six months of preventive detention.”

writ of habeas corpus, constitutes an undue delay, and demonstrates that any further complaint would be futile and lack any prospect of success.

2.13 The author also mentions that he tried to file a complaint at the District Police Office of Banke. However, the police refused to accept it, stating that this was not the appropriate agency. The author refers, generally, to various attempts by victims, relatives of victims and non-governmental organizations, who sought to file complaints for past and ongoing human rights violations by security forces, which were rejected by the police. He affirms that there are no further available and effective remedies for the breach of his human rights, which would result in the identification and punishment of those responsible.

2.14 The author stresses that under Nepalese law, there are no provisions which set out the individual criminal liability for arbitrary detention, torture or ill treatment, except a very vague and ineffective provision of the Police Act.³ He also mentions that the Police Act introduces immunity for the District Administrative Officers and any police personnel “for action taken (...) in good faith while discharging (...) duties”.⁴ A similar provision was enacted in the Army Act (2006),⁵ and perpetrators are de facto placed outside the ambit of any punishment, since investigations of cases of torture and disappearances are dealt with by a Special Committee, while prosecution takes place before a Special Court Martial. Also, provisions of the former Army Act (1959), which regulate the conduct, and establish the responsibility of the Royal Nepalese Army, do not apply to arrests carried under the Terrorist and Destructive Activities Ordinance of 2004.

2.15 The author also refers to the four transitional mechanisms established pursuant to the Comprehensive Peace Agreement signed in 2006, but states that none of these mechanisms is likely to lead to any investigation and criminal prosecution. Regarding civil remedies, the author points to the ineffectiveness of the Compensation relating to Torture Act,⁶ as well as to fear of intimidation and reprisals on part of victims. The other possibility offered under this Act would be an administrative remedy by way of an appeal to the police authorities, which would lead to disciplinary sanctions. Regarding complaints lodged with the National Human Rights Commission (533 in total in 2007), and the Commission’s recommendation that the State party should pay compensation to the victims and take legal action with respect to 14 complaints, only two of the victims received the recommended compensation.

2.16 Regarding his family, the author states that after four or five months searching for him, they informally received information that the author was alive in the army barracks. However, as they heard no subsequent news, they lost hope that he would return home, and became convinced that the author was dead. As his children were very young, his wife only told them their father had gone to India. She was depressed and had frequent headaches. When he was in the District Jail, the author wrote a letter to his family to let them know that he was still alive. The family did not believe that the letter was from the author and sent his grandfather to the jail to verify that he was really alive. The author also refers to the economic impact of his arrest, detention and torture for his family, as he has been physically unable to work since his release.

The complaint

³ Section 34 (n), which provides liability for up to five years imprisonment, or suspension of salary for up to one year if “he unjustly harasses any person through arrogance or intimidation or causes loss or damage to the property of any person”.

⁴ Section 37.

⁵ Section 22.

⁶ The author refers to the report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Nepal (E/CN.4/2006/6/Add.5), p. 3 and para. 26.

3.1 The author claims that the State party violated article 7; article 9; and article 10, all read in conjunction with article 2, paragraph 3, of the Covenant.⁷

3.2 The author alleges that the State party breached article 7 of the Covenant in his regard by: (a) exposing him to severe and systematic beatings and other acts of torture and ill-treatment during his detention at the Imamnagar Army Barracks, for a period of seven months, including for the purpose of extracting confessions;⁸ (b) keeping him in incommunicado detention for 13 months (from 29 April 2004 to 12 May 2005);⁹ (c) denying him the right to contact his family; (d) exposing him to inhumane and degrading detention conditions at Imamnagar Army Barracks;¹⁰ (e) failing to investigate his allegations of torture and ill-treatment at the Imamnagar Army Barracks; and (f) subjecting his family¹¹ to mental distress and anguish caused by the continuing uncertainty concerning his fate and whereabouts from the date of his arrest on 29 April 2004 until 13 May 2005, the day he was moved to the District Jail and could write to let them know that he was still alive and detained in jail. The author's effective disappearance for 13 months facilitated gross breaches of his rights under article 7.

3.3 The author further claims a violation of article 10 by the State party, in the light of the ill-treatment he was exposed to during detention, the material conditions of his detention, and his incommunicado detention.

3.4 The author considers that he is also the victim of a violation of article 9, paragraphs 1,¹² 2 and 3, of the Covenant, with respect to his arbitrary arrest and detention. On 29 April 2004, he was beaten, arrested and taken away by RNA soldiers, without being informed of the reasons for his arrest, nor being charged of a crime or otherwise brought before a judicial instance, and his incommunicado detention lasted for 13 months (from 29 April 2004 to 12 May 2005). The author alleges a further breach of article 9, paragraph 1, through the disproportionate and excessive use of force by RNA soldiers upon his arrest which breached his right to the security of his person. With regard to article 9, paragraph 4, the author contends that his incommunicado detention precluded him from challenging the legality of his detention.¹³

3.5 With respect to remedies, the author invites the Committee to request the State party to initiate an impartial investigation by an autonomous and independent body, and prosecute State actors found responsible for his arbitrary arrest, incommunicado detention

⁷ The author refers to the Committee's general comment No. 20 (1992) on the prohibition of torture and cruel treatment or punishment, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A, para. 14.

⁸ The author refers to communication No. 973/2001, *Khalilov v. Tajikistan*, Views adopted on 30 March 2005.

⁹ The author refers to communications No. 577/1994, *Polay Campos v. Peru*, Views adopted on 6 November 1997; No. 115/1982, *Wight v. Madagascar*, Views adopted on 1 April 1985; and No. 449/1991, *Mojica v. Dominican Republic*, Views adopted on 15 July 1994.

¹⁰ The author refers to communication No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994.

¹¹ The author refers to communications No. 107/1981, *Almeida de Quinteros v. Uruguay*, Views adopted on 21 July 1983, No. 992/2001, *Bousroual v. Algeria*, 30 March 2006, para. 9.8; and No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003, para. 9.5.

¹² The author refers, inter alia, to *Mukong v. Cameroon* (note 10 above), para. 9.8; *Sarma v. Sri Lanka* (note 11 above), para. 9.4; No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996, para. 8.6; and No. 563/1993, *Bautista de Arrellana v. Colombia*, Views adopted on 27 October 1995, para. 8.5.

¹³ The author refers to communication No. 1128/2002, *Marques de Morais v. Angola*, Views adopted on 29 March 2005.

and torture. He further asks the Committee to direct the State party, in conducting its investigation, to protect the author and other complainants and witnesses from intimidation and reprisals, and to inform them on the progress and result of the investigation. It also invites the Committee to request the State party to remove any impediments to investigation and prosecution, such as immunities, and to suspend the army Chief of Staff from office pending the outcome of investigations against him. He also asks that the State party pay him and family adequate compensation and provide rehabilitation for their medical and psychological needs, as well as assistance with the author's education as restitution.

State party's observations on admissibility and merits

4.1 On 21 August 2009, the State party submitted its observations on the admissibility and merits of the communication. It first contends that the author did not exhaust the domestic remedies at his disposal. The habeas corpus recourse is limited to a decision on the legality of the detention, and did not, as such, require the State party to initiate an investigation as the author stated. The author failed to file a compensation claim with the District Court within 35 days from the date of the torture infliction, under the 1996 Compensation relating to torture Act, section 5. Such an application would have allowed the District Court to order a physical and mental examination of the author within three days, and any medical treatment needed would have been arranged by the Government. Such a decision would also have opened the possibility that compensation be granted to the author within 35 days. Upon a finding of infliction of torture, the District Court would also have ordered the concerned body to take departmental action against the government employee responsible. The author failed to use this prompt and effective domestic remedy.

4.2 The State party further contends that the author failed to file a petition with the NHRC, an independent commission established under the Human Rights Commission Act (1997), which is vested with the statutory power to conduct inquiries into human rights violations, forward recommendations to national authorities, order appearances and production of evidence before the Commission, and may even order compensation to victims of human rights violations. The author failed to register a petition with the NHRC, and thus failed to exhaust domestic remedies at his disposal. The State party therefore requests the Committee to declare that the communication is inadmissible on this ground, and to establish that the author abused his right of submission by failing to use available and effective remedies.

4.3 On the merits, the State party rejects the author's allegations, stating that his arrest and detention must have been based on reliable intelligence information that he was actively involved in terrorist and destructive activities as accomplice. Security officers of the RNA were empowered under the Terrorist and Destructive Activities Ordinance of 2004 to arrest and detain an individual for a maximum period of one year, subject to periodic review upon request of a Committee. The State party refers to the armed conflict prevailing in the country, and which prompted the declaration of the state of emergency. Informing families of the arrest of individuals a long time after arrest was dictated by a state of necessity, to ensure the security of detainees and their families, as well as the security of places of detention.

4.4 With respect to the author's conditions of detention, the State party contends that such conditions, as described, were "fairly humane" in view of the general standards of living of the Nepalese people. It adds that conditions were similar to those provided to soldiers of the RNA. Regarding the author's specific allegations of torture, the State party affirms that when he was handed over to the police on 12 May 2005, the police officer did not record any mention of torture in the receipt of hand-over and take-over, which shows that there was no occurrence of torture. Also, medical prescriptions and certificates

submitted by the author do not mention evidence of torture. The State party also observes that the author waited eight months after his release of 15 September 2005 to undergo a medical checkup. Such evidence cannot be used as a basis to prove torture during custody. Finally, the State party contends that contrary to the author's allegations, the Terrorist and Destructive Activities Ordinance 2004 does not grant immunity to security forces. Section 19(4) provides that if the Act is applied with *malafide* motives, the aggrieved party shall be paid a reasonable compensation, and departmental action is engaged against the relevant official, who shall be punished. Also, section 9 of the Evidence Act provides that confessions derived from torture are inadmissible.

Author's comments on the State party's submission

5.1 On 2 December 2009, the author rejects the arguments submitted by the State party. It reiterates that he was tortured about 100 times in total, during a period of approximately seven months. The author also recalls the conditions of his detention, and reaffirms that they amounted to cruel, inhuman or degrading treatment under article 7 of the Covenant.

5.2 Regarding exhaustion of domestic remedies, the author rejects the State party's allegation that he did not use all available remedies. He stresses that on 29 June 2005, he submitted a petition for a writ of habeas corpus. This was the earliest possible opportunity at which he could have made a complaint about his detention and treatment, as he was still detained in the Banke District Jail. In this petition, the author raised the baseless nature of his detention, his enforced disappearance in the military barracks, his incommunicado detention and the torture and other ill-treatment to which he was subjected. The Appellate Court of Nepalgunj only ordered his release, although it had the jurisdiction to initiate an investigation when torture or ill-treatment is alleged, by creating an investigative Committee, or by ordering the Executive to elect an officer to carry out the investigation. The Court did not elect any of these avenues, and failed to initiate an investigation.

5.3 The author stresses that the other body empowered under Nepalese law to investigate the actions of the police or the army is the police. In the present case, both the Chief District Officer and District Police were on notice of his allegations, as the author named them as respondents in his writ of habeas corpus. They however failed to act. On release, the author further sought to make a complaint to the police, but the latter refused to register his complaint. Four years after the violations were brought to its attention, the State party has yet to fulfil its duty to investigate the author's allegations. The author claims that this constitutes an unreasonably prolonged delay. He further contends that he should not be required to exhaust ineffective or futile local remedies such as the one under the Compensation relating to Torture Act. The author underlines the strict time limitation criteria for applications, which is 35 days from the date of infliction of torture. The author could not materially bring a complaint within this time frame while held incommunicado at the Immamnagar Army Barracks or the Banke District Jail. He adds that while detained in the District Jail, he could not meet his lawyer in private and engage in conversations about his torture, which would have allowed him to prepare an application under the Compensation relating to Torture Act. The Act also requires the production of medical records, which the author was unable to secure while detained. In the 35 days following his release, the author did not feel confident enough to make a complaint under the Act, because of the prevailing climate of fear, and his continuing fear of being re-arrested and tortured. The author also reiterates the ineffective nature of this recourse, which only led to four individuals being compensated, out of 200 cases filed. He also stresses that only two per cent of cases filed under the Act are complaints against the army. Regarding the National Human Rights Commission, the author stresses that it is not a judicial remedy, and only has recommendatory powers, and is hence not appropriate for serious allegations such as his. Further obstacles to the effectiveness of this recourse are the fact that the State party

largely failed to implement the Commission's recommendations and its lack of independence at the time of the author's detention.

5.4 Responding to the State party's observations on the merits, and referring to article 4 of the Covenant, the author stresses that the political situation in the country cannot be used to justify the treatment inflicted on him, as the prohibition against enforced disappearance is absolute, and cannot be derogated from under any circumstance. The same can be said about incommunicado detention, which falls within the ambit of article 7 of the Covenant, the protection of which is absolute and cannot be derogated from.¹⁴

5.5 Regarding the basis for the author's arrest, the author stresses that he was only arrested under the Terrorist and Destructive Activities Ordinance of 2004 on 13 May 2005, i.e. 12 1/2 months after his initial arrest. The State party failed to provide any information on the basis for his detention prior to this date. The decision of the Appellate Court of Nepalgunj itself confirmed that his arrest and entire detention in the Immamnagar Barracks and Banke District Jail were arbitrary and unlawful. The author also stresses that the formal derogation on preventive detention under article 4 of the Covenant had ended when he was informed, on 13 May 2005, that he was subject to preventive detention. Under section 9 of the Ordinance, preventive detention is reviewed after a period of six months. As the author was detained for five months under the Ordinance, his detention was not subject to review.

5.6 The author reiterates that his treatment was contrary to article 7 in several respects, and recalls the absolute character of the prohibition.¹⁵ The argument of the State party, that the Nepalese police would have mentioned any visible sign of torture upon its taking over from the RNA is inconclusive, considering the subordination of the police to the army. With respect to medical documentation, the author could not access an independent medical practitioner before his release. It adds that the medical examination of detainees, without fear of reprisals, is the State party's responsibility. While the Compensation relating to Torture Act requires the examination of detainees at the time of arrest and release, and a copy of the report to be sent to the District Court, this was not done in the author's case, so as to avoid documenting the torture to which he was subjected. The State party also failed to order a medical examination after the author petitioned the Appellate Court in habeas corpus, in which he specifically referred to acts of torture. The reason why he waited almost eight months after his release to visit a doctor are mainly the fact that he could not afford a medical consultation, and his fear to go to Nepalganj (where the closest public hospital was) due to the heavy army and police presence there. It is only in May 2006 that he managed to secure some money, and visited a doctor. The author mentions that as a result of the prolonged blindfolding, his sight has decreased and he experiences unease when exposed to light.

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

¹⁴ The author refers to *Sarma v. Sri Lanka* (note 11 above), para. 9.5.

¹⁵ The author refers to the Committee's general comment No. 20 (note 7 above), para. 3.

6.3 Regarding exhaustion of domestic remedies, the Committee recalls that for the purposes of article 5, paragraph 2 (b), of the Optional Protocol, domestic remedies must both be effective and available, and must not be unduly prolonged.¹⁶ The Committee took note of the State party's argument that the author failed to avail himself of the relief offered by the Compensation relating to Torture Act. The Committee observes, however, the strict limitation period provided in the Act, whereby a complaint must be filed within 35 days from the date of the infliction of torture. The Committee observes that it would have been materially impossible for the author to avail himself of this mechanism, as he was still being detained incommunicado at the Immamnagar Army Barracks and at the Banke District Jail within this time. The Committee further notes that despite the filing, by the author, of a writ in habeas corpus with the Appellate Court of Nepalgunj, in which both the Chief District Officer and District Police were on notice of his allegations, no investigation of these allegations was undertaken by the State party four years after the violations were brought to its attention. The Committee concludes that this constitutes an unreasonably prolonged delay. It finally recalls that national human rights institutions, such as the National Human Rights Commission in Nepal, are not considered a judicial remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol. The authors therefore needed not to file a petition with that body to fulfil the requirement set forth in article 5, paragraph 2 (b), of the Optional Protocol.

6.4 The Committee sees no further obstacles to the consideration of the communication and therefore proceeds to the examination on the merits of the author's allegations under articles 7, 9, and 10, read in conjunction with article 2, paragraph 3, of the Covenant.

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 With respect to the alleged detention incommunicado of the author, 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, which recommends that States parties should make provision against incommunicado detention. It notes the author's allegation, that he was detained incommunicado from 29 April 2004 to 12 May 2005, i.e. for a duration of 13 months, while being prevented from communicating with his family and the outside world. The State party did not provide contrary information in this respect.

7.3 The Committee further took note of the author's claim that his conditions of detention amounted to cruel, inhumane or degrading treatment. The author was detained in a dark and filthy cell of 3 by 4 metres, drinking water was rationed, there was no water for the toilets, and he could only bathe twice during his detention. He was handcuffed and blindfolded for 10 months out of his 13-month detention. The author also provided detailed information about the torture and ill-treatment to which he was exposed, estimating that he was tortured for 100 times in the 13 months of his incommunicado detention in the Immamnagar Army Barracks.

7.4 The Committee 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. In cases where the allegations are corroborated by credible evidence submitted by the author and where further clarification

¹⁶ Communications No. 1560/2007, *Marcellana and Gumanoy v. The Philippines*, Views adopted on 30 October 2008, para. 6.2; and No. 1469/2006, *Sharma v. Nepal*, Views adopted on 28 October 2008, para. 6.3.

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 convincing explanations from the State party, due weight must be given to the author's allegations.¹⁷

7.5 The Committee recalls its general comment No. 20, in which it indicated that it did not "consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied".¹⁸ Nevertheless, the Committee considers it appropriate to identify treatment as torture if the facts so warrant. In so doing, it is guided by the definition of torture found in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which states in its article 1, paragraph 1, that "'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind ...". The Committee is mindful that this definition differs from that in the prior Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which described torture as "an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment". Accordingly, its general approach is to consider that the critical distinction between torture on the one hand, and other cruel, inhuman or degrading treatment or punishment, on the other, will be the presence or otherwise of a relevant purposive element.

7.6 On the basis of the information at its disposal, and recalling that article 7 allows no limitation, even in situations of public emergency,¹⁹ the Committee finds that the torture and ill-treatment to which the author was exposed, his incommunicado detention and his conditions of detention, reveal singular and cumulative violations of article 7 of the Covenant.

7.7 The Committee notes the anguish and distress caused to the author's family by his disappearance, from the time of his arrest in April 2004 until May 2005, when he was transferred to the District Jail, and was able to write them a letter informing them that he was still alive and imprisoned. The family never obtained an official confirmation of his detention. The Committee is therefore of the opinion that the facts before it reveal a violation of article 7 of the Covenant, read in conjunction with article 2, paragraph 3, with regard to the author's wife and his two children.²⁰

7.8 With regard to the alleged violation of article 9, the Committee notes that on 29 April 2004, the author was violently arrested without a warrant by soldiers of the Royal Nepalese Army. He was detained in the Mid-Western Divisional headquarters (Immamnagar Barracks), and held incommunicado without being informed of the reasons for his arrest or the charges against him. The Committee recalls that the author was never

¹⁷ See communications No. 1295/2004, *El Awani v. Libyan Arab Jamahiriya*, Views adopted on 11 July 2007, para. 6.5; and No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para. 6.2; *Celis Laureano v. Peru* (note 12 above), para. 8.5; and *Mukong v. Cameroon* (note 10 above), para. 9.4.

¹⁸ See note 7 above, para. 4.

¹⁹ *Ibid.*, para. 3.

²⁰ See communication No. 1640/2007, *El Abani v. Libyan Arab Jamahiriya*, Views adopted on 26 July 2010, para. 7.5; *El Awani v. Libyan Arab Jamahiriya* (note 17 above), para. 4; *Quinteros v. Uruguay*, (note 11 above), para. 14; and *Sarma v. Sri Lanka* (note 11 above), para. 9.5.

brought before a judge during his incommunicado detention, and could not challenge the legality of his detention until he filed a writ in habeas corpus with the District Appellate Court of Nepalgunj on 29 June 2005. The Committee took note of the State party's contention that the author was arrested under the Terrorist and Destructive Activities Ordinance of 2004, adopted in the context of the state of emergency declared by the State party, and allowing the arrest and detention of suspects for a period of up to one year. It transpires from the file, however, that the author was only arrested on this basis on 13 May 2005, after he was handed over to the police. In the absence of any pertinent explanations from the State party on the author's arrest and detention from 29 April 2004 to 13 May 2005, the Committee finds a violation of article 9.²¹

7.9 With respect to article 10, and while taking note of the State party's argument, that conditions of detention should be assessed in light of the overall standards of living in Nepal, the Committee recalls that treating persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party.²² The Committee further recalls its view that, while it is not separately mentioned in the list of non-derogable rights in article 4, paragraph 2, this norm of general international law is not subject to derogation.²³ In the light of the information at its disposal, and reiterating its findings under article 7, which are closely related, the Committee finds a violation of article 10, paragraph 1.

7.10 The author also invokes article 2, paragraph 3, of the Covenant, under which States parties are required to ensure that individuals have accessible, effective and enforceable remedies for asserting the rights recognized in the Covenant. 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.²⁴ 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.²⁵ In the present case, the information before the Committee indicates that the author did not have access to an effective remedy, and 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.

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 articles 7; 9 and 10, paragraph 1, read in conjunction with article 2, paragraph 3 of the Covenant vis-à-vis the author. The Committee is also of the view that article 7, read in conjunction with article 2, paragraph 3, of the Covenant was breached with regard to the author's wife, Ms. Dhanmaya Giri, and their two children, Yashoda and Yogesh Giri.

²¹ See communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.5; and *Sharma v. Nepal* (note 16 above), para. 7.3.

²² General comment No. 21 (1992) on humane treatment of persons deprived of liberty, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. B, para. 4.

²³ General comment No. 29 (2001) on states of emergency, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40*, vol. I (A/56/40 (Vol. I)), annex VI, para. 3.

²⁴ *Ibid.*, para. 14.

²⁵ 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. 15.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author and his family with an effective remedy, by ensuring a thorough and diligent investigation into the torture and ill-treatment suffered by the author, the prosecution and punishment of those responsible, and providing the author and his family with adequate compensation for the violations suffered. In doing so, the State party shall ensure that the author and his family are protected from acts of reprisals or intimidation. The State party is also under an obligation to prevent similar violations in the future.

10. 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 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.]

**OO. Communication No. 1763/2008, Pillai et al. v. Canada
(Views adopted on 25 March 2011, 101st session)***

<i>Submitted by:</i>	Ernest Sigman Pillai et al. (represented by counsel, Richard Goldman)
<i>Alleged victims:</i>	Ernest Sigman Pillai, his wife Laetecia Swenthi Joachimpillai and their three children, Steffi Laettitia, Markalin Emmanuel George and Izabelle Soheyla Pillai
<i>State party:</i>	Canada
<i>Date of communication:</i>	29 February 2008 (initial submission)
<i>Subject matter:</i>	Deportation to Sri Lanka
<i>Procedural issue:</i>	Non-substantiation and non-exhaustion of domestic remedies
<i>Substantive issues:</i>	Risk of being of being detained and tortured if returned to Sri Lanka; risk of violation of the right to life; protection of minor children and right to family life
<i>Articles of the Covenant:</i>	6, paragraph 1; 7, 9, paragraph 1, 23, paragraph 1 and 24, 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 25 March 2011,

Having concluded its consideration of communication No. 1763/2008, submitted to the Human Rights Committee on behalf of Mr. Ernest Sigman Pillai 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 are Mr. Ernest Sigman Pillai and Ms. Laetecia Swenthi Joachimpillai, both Sri Lankan nationals born in 1969. The authors claim to be

* 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. Helen Keller, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

The texts of three individual opinions signed by Committee members Mr. Krister Thelin, Ms. Helen Keller, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Sir Nigel Rodley and Mr. Yuji Iwasawa are appended to the present Views.

victims, together with their three children, Steffi Lettitia, a Sri Lankan national born in 2002, Markalin Emmanuel George, a Canadian national born in 2004, and Izabelle Soheyla Pillai, a Canadian national born in 2005, of a violation of articles 6, paragraph 1; 7; 9, paragraph 1; 23, paragraph 1; and 24, paragraph 1 of the International Covenant on Civil and Political Rights.¹ The authors are represented by counsel, Mr. Richard Goldman.

1.2 On 3 March 2008, the Committee, pursuant to rule 92 of its rules of procedure, acting through its Special Rapporteur on new communications and interim measures, requested the State party not to remove the authors and their children to Sri Lanka while the communication was under consideration by the Committee.

Facts as presented by the authors

2.1 In 1993, the authors married in Sri Lanka. Their eldest child, Steffi, was born on 4 July 2002, while they were living in Mattakuliya (Colombo). The family is of the Christian Tamil faith. Since their arrival in Canada on 8 May 2003, their son Emmanuel and their daughter Izabelle were born in April 2004 and November 2005, respectively. They are both Canadian citizens. The authors' life was relatively calm until 1999, when they found themselves caught between the Liberation Tigers of Tamil Eelam (LTTE), on one side, and the Sri Lankan police, on the other. They were subjected to a series of threats and extortion by the Tigers. In particular because Ms. Joachimpillai originated from Jaffna (in the north), the Tigers targeted her because they believed she would be likely to be sympathetic to their cause, whereas the police targeted her because they presumed she would be sympathetic to the Tigers. The authors were twice arrested by the police, on suspicion of lending support to the Tigers, in July 2001 and in February 2003. During their detention by the police, both were tortured.

2.2 During the first period of detention in 2001, Mr. Pillai was kicked in the groin, and threatened at gunpoint by a police officer. Ms. Joachimpillai was beaten and sexually abused by the police. They were released after two days, following the intervention of Mr. Pillai's mother. During their detention in 2003, the officer interrogating Mr. Pillai punched him in the stomach and stomped on Mr. Pillai's foot with his boot. Then another officer brought in a pot of burning charcoal. They put some dried chillies in the pot and held Mr. Pillai's head in the smoke. He choked and was burned by the smoke and felt like he was going to die. Ms. Joachimpillai allegedly also suffered during those four days they were detained. She was beaten, dragged around by her hair, and they put a gun in her mouth and threatened to kill her. She was again sexually abused. After their release from this second period of detention, which was secured by Mr. Pillai's family's intervention, they left Sri Lanka. They arrived in Canada with visitors' visas on 8 May 2003 and applied for political asylum on 21 May 2003.

2.3 Among the evidence filed before the Immigration and Refugee Board (IRB) were a Diagnostic Interview Report by a psychotherapist (David Woodbury), containing a diagnosis of post-traumatic stress disorder for Mr. Pillai, attributed to threats by the Tigers to himself and his wife, extortion by the Tigers from himself and his wife, his own and his wife's arrest, detention and abuse. The report further noted that "the symptoms of [post-traumatic stress disorder] PTSD often mimic the behaviours that we associate with shiftiness, mendacity or lying", the differential in apparent power between the Refugee Board Commissioners and the applicant may recall the torturer-victim relationship for the applicant, thus "exacerbating the already intense symptoms of anxiety and panic". According to the report, this could provoke "confusion due to extremely elevated autonomic arousal (and) difficulty concentrating", among other symptoms. The report

¹ The Optional Protocol entered into force in relation to Canada on 19 May 1976.

considered it crucial that any judgements about the trustworthiness of Mr. Pillai's testimony take this into account. The report's final recommendation was that the victim must perceive his environment as safe, which could only occur far from the victim's torturer. The report therefore recommended that the authors remained in the territory of the State party to start a new life and enable a recovery process. Also filed in evidence before the Immigration and Refugee Board was a letter from the authors' doctor, Pierre Dongier, which recommended that Mr. Pillai's wife represent both of them before the Immigration and Refugee Board, as she was considered stronger and less traumatized than her husband.

2.4 The refugee claim was heard on 24 January 2005 and rejected on 15 February 2005. The presiding Board member mentioned Dr. Dongier's recommendation that the tribunal question Ms. Joachimpillai rather than Mr. Pillai, but then disregarded it. According to the authors, the Board member reproached Dr. Dongier for failing to indicate what tests he administered, but provided no medical basis for rejecting his recommendation. The Board member allegedly also preferred her own appreciation of Mr. Pillai's ability to testify to that stated in the diagnostic interview report of Mr. Woodbury. Without providing any medical basis for rejecting the expert's opinion or raising any question about his professional qualifications, the Board member concluded that Mr. Pillai had some difficulty with the dates concerning his trips abroad and the alleged money extortion by the LTTE, but he believed these difficulties were linked to the credibility of his allegations, rather than to his psychological state.

2.5 The authors filed an application for leave to commence Judicial Review at the Federal Court but the leave application was denied on 24 May 2005, without reasons. They recall that the Judicial Review process with regard to asylum claims in Canada is a two-step process. During the first stage, the applicant must apply for "leave", meaning permission to commence Judicial Review. Only if "leave" is granted can the applicant proceed to the second stage, an oral hearing before the Federal Court. When leave is denied, no reasons are provided and the decision is without appeal. Leave is only granted in 10 per cent of applications. Furthermore, questions of credibility and appreciation of evidence are only reviewed on a standard of "patent unreasonableness", rather than a standard of "correctness", as in a true appeal on the merits.

2.6 The authors submitted their pre-removal risk assessment (PRRA) application on 11 April 2007, which was rejected on 28 December 2007 (communicated to the authors on 13 February 2008) on the basis that there was no evidence that the LTTE pursued people who refused to carry out low-level ancillary activities and that the authors therefore could not be considered at risk in case of return to their country of origin. They applied for a permanent residence permit on humanitarian and compassionate (H&C) grounds. Their request was rejected on 28 December 2007 and communicated to them on 13 February 2008. The authors explain that within the context of the H&C decision, a PRRA officer re-visits the "risk" analysis he carried out in the initial PRRA decision. According to them, in the circumstances, "not surprisingly", his analysis closely mirrored that of his PRRA decision. However, the H&C decision acknowledged a risk of detention to the applicants, where the PRRA did not.

The complaint

3.1 The authors consider themselves to be victims of violations by the State party of articles 6, paragraph 1; 7; 9, paragraph 1, 23, paragraph 1 and 24, paragraph 1 of the Covenant.

3.2 With regard to the hearing before the IRB dated 24 January 2005, the authors contend that Mr. Pillai had difficulty in testifying before the Board, and his failure to remember dates or details, as well as internal inconsistencies or contradictions with his wife's testimony were used to reject the refugee claim on the basis of lack of credibility.

According to the authors, this alleged “lack of credibility” was in large part due to the Board member wrongly substituting her own opinion of Mr. Pillai’s capacity to testify for that of two health-care professionals. Further, the inconsistencies and memory lapses relied upon by the Board Member did not relate to the essential elements of the claim – i.e. whether the authors were actually the targets of extortion, detention and torture, but rather to peripheral details such as dates of events and how many Tamil Tigers were present at certain point of time. The authors further contend that the abuse and mistreatment they alleged was consistent with all human rights reports available at the time, including those filed in evidence before the Board. They recall the Committee’s position, according to which, in cases of imminent deportation, the material point for assessing an issue is at the moment the complaint is examined.² Consequently, even if the Board member’s conclusion that Tamils were not being persecuted by the LTTE in Colombo was correct at the time of the IRB decision (February 2005), the evidence currently available shows there has been a significant change of circumstances since that time. According to the authors, evidence shows that, at the current time, they would face a considerable risk of abuse at the hands of Sri Lankan State authorities in Colombo.

3.3 With regard to the authors’ application for leave to commence Judicial Review at the Federal Court, which was denied on 24 May 2005, they contend that there is no true appeal on the merits of an IRB decision in Canada, at the present time even though the current Immigration and Refugee Protection Act contains provisions creating a Refugee Appeal Division of the IRB, which was intended to create such an appeal. These provisions however have never been enacted. The authors therefore consider they were never afforded a fair opportunity to contest the merits of their negative IRB decision.

3.4 The authors further contend that the PRRA, which is a procedure offered to dismissed asylum-seekers in Canada once the State party believes they are ready to be deported, was never intended to serve as an appeal to the IRB decision. They consider it a problematic recourse, mainly due to the fact that it is decided by civil servants who are employees of Citizenship and Immigration, and not an independent tribunal. According to the authors, the main conclusions of the PRRA officer were inconsistent with the evidence available. For instance, the PRRA officer concluded that the authors had failed to demonstrate that they would be at greater risk than the general population. The authors refer to a report of the Office of the United Nations High Commissioner for Refugees (UNHCR) dated December 2006 on the risk facing Tamils in Colombo, where the Pillai family resided. The report refers to increased risks of being arrested or at least being more regularly subjected to security checks. UNHCR also refers to a great risk of forced disappearances and killings for Tamils residing in the area of Colombo. As for Tamils originating from the north and east, in particular from LTTE-controlled areas, they are perceived by authorities as potential LTTE members or supporters and are more likely to be subjected to arrests, detention, abductions or even killings. The UNHCR report recommends that no Tamil from the north or east should be returned forcibly until there is a significant improvement in the security situation in Sri Lanka. According to the authors, the UNHCR report in question was available to the PRRA officer at the time he rendered his decision on 28 December 2007. The officer however overlooked the report, despite the fact that he did refer to some nine other governmental and non-governmental sources.

3.5 The authors also refer to the position of the European Court of Human Rights (ECHR), which, at the time of submission, had granted interim measures in all requests from Tamils facing removal to Sri Lanka. ECHR also issued a letter to France and the

² Communication No. 1069/2002, *Bakhtiyari v. Australia*, Views adopted on 29 October 2003, para. 9.7.

United Kingdom of Great Britain and Northern Ireland asking those State parties to cease issuing removal orders to Tamils who fear returning to Sri Lanka. UNHCR has welcomed these decisions by the Court. The authors consider that such position clearly indicates that both UNHCR and ECHR believe Tamils to be at greater risk “then the general population” of Sri Lanka.

3.6 The authors further contest the PRRA officer’s analysis according to which there is no evidence that persons who face prosecution for serious offences would be unfairly treated under Sri Lankan law. The authors refer to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, who concluded his visit to Sri Lanka in October 2007 and stated that torture was widely practiced in Sri Lanka. As with the above-cited UNHCR report, this statement by the Special Rapporteur on torture, which was issued two months before the PRRA officer issued his decision, was allegedly overlooked by the PRRA officer. In response to the PRRA officer’s contention that there is no evidence that the LTTE pursue people who refuse to carry out low-level ancillary activities, the authors refer to the 2006 UNHCR report which states, *inter alia*, that those who refuse to support the LTTE and those who are perceived as supporters or sympathizers of the Government, risk serious violations of human rights from the LTTE. Tamils who are perceived as opposing the LTTE, including those suspected of being government informants, those who are active in other political parties, and even those occupying low-grade government positions, are at risk of assassination. Thus, according to the authors, mere refusal to support the LTTE can lead to severe repercussions, and this is consistent with the authors’ accounts of being the victims of threats and extortion at the hands of the LTTE.

3.7 The authors further note the PRRA officer’s conclusion that the Sri Lankan State authorities are capable of providing sufficient protection for Tamils in areas they control. They claim that this statement overlooks the fact that the State of Sri Lanka is an agent of persecution for ethnic Tamils and particularly for those who have moved from LTTE-controlled areas to areas under State control. Further, torture by State authorities is widespread and practiced by several arms of government. Tamils can hardly be expected to rely on the Government of Sri Lanka for State protection. The authors contend that if the meaning of the PRRA officer’s statement is to be construed more narrowly as “Sri Lankan State authorities are able to prevent the LTTE from carrying out attacks on individuals in areas under state control” then even this is inaccurate. The authors re-affirm that the LTTE can track down and attack opponents “throughout the country”.

3.8 The authors further argue that they are at risk of being arbitrarily detained if returned to Sri Lanka. The PRRA officer within the H&C process concluded that given the current state of alert, the possibility exists for the authors to be temporarily detained by the Sri Lankan authorities in Colombo. However the authors’ involvement in the LTTE was incidental and it is therefore unlikely that they would be subject to prosecution. While the authors’ Tamil origins make them a target for detention, the available evidence does not show that such discrimination has severe consequences. According to the authors, the initial conclusion to be drawn from the above passage is that the officer has acknowledged that they are indeed at particular risk of abuse due to their Tamil ethnicity, contrary to the finding in the PRRA decision that the authors “are at no greater risk than the general population”. A second conclusion is, according to the authors, that, notwithstanding the fact that the officer questionably characterizes arbitrary detention as mere “discrimination” and ultimately finds that it is insufficient to warrant a positive decision on the H&C application, the right not to be subjected to arbitrary detention is a right protected under article 9, paragraph 1, of the Covenant. The officer, thus, acknowledged that the authors’ rights under the Covenant were at risk of being violated if they were returned to Sri Lanka. A final conclusion is, to the authors’ opinion, that the officer once again ignored the evidence of torture and other abuse of persons who are detained by Sri Lankan authorities, in

concluding that “the available evidence” does not show that such detention “has severe consequences”.

3.9 The authors note that the PRRA officer, in ruling upon an H&C application, was required to take into account the best interests of the minor children affected by the decision. They claim, however, that instead of identifying or discussing whether it would be in the best interests of the three minor children to remain in Canada, rather than be returned to the “violence and chaos of Sri Lanka”, the PRRA officer merely stated that because the children are young, and “the family remains the centre of their social development”, he is “satisfied they will be able to transition successfully into Sri Lankan society”. According to the authors, the PRRA officer did not even begin to engage in a proper examination of the children’s best interests, in the light of the threats to their well-being they would face in Sri Lanka, even based on the limited threat he acknowledged (arbitrary detention due to their Tamil ethnicity), much less the threats from the considerable evidence he ignored, as detailed above. The authors consider that they did not benefit from a fair evaluation. In these circumstances, the authors allege that the return of their three minor children to Sri Lanka would constitute a violation of their rights under article 24, paragraph 1, of the Covenant.

3.10 The authors further note that, to the extent that removal to Sri Lanka would endanger the well-being of the parents, particularly the father, who has been diagnosed as suffering from post-traumatic stress disorder, thus potentially depriving the children of their parents’ care and protection, the authors’ removal would also constitute a violation of the children’s rights under article 23, paragraph 1, of the Covenant. Although the two younger children are Canadian citizens, and thus not subject to removal from Canada, the only alternative to their accompanying the other family members to Sri Lanka, if the other family members are removed, would be for the two younger children to remain in Canada with no one to care for them. This alternative would constitute a violation of their rights under articles 23, paragraph 1, and 24, paragraph 1, of the Covenant.

3.11 Finally, the authors refer to an opinion issued by the francophone section of Amnesty International Canada dated 27 February 2008, which considered the Pillai family to be at risk if forcibly returned to Sri Lanka, either to the north, from where Ms. Joachimpillai hails, or to Colombo, where the family lived for many years. The Canadian francophone section further considered that the family’s request that its forcible removal at this time not occur should be respected, and that Canada should find a way to offer the family protection so as to fulfil its international obligations.

State party’s observations on admissibility and authors’ comments thereon

4. On 7 August 2008, the State party contested the admissibility of the communication on the basis that the authors had not exhausted domestic remedies. On 27 February 2008, the authors applied to the Federal Court for leave and judicial review against both the PRRA and H&C decisions dated 28 December 2007.³ On 29 February 2008, before the Federal Court had decided whether to grant leave, the authors submitted the present communication to the Committee. On 3 July 2008, the Federal Court granted both of the author’s applications for leave to apply for judicial review. The hearing of both applications for judicial review was scheduled for 30 September 2008. The State party therefore requested the Committee to declare the communication inadmissible for non-exhaustion of domestic remedies, in accordance with article 5, paragraph 2 (b), of the Optional Protocol.

³ See para. 2.6 above.

5. On 20 October 2008, the authors provided comments on the State party's observations on admissibility. They argued that they had filed the communication to the Committee prior to the date scheduled for the hearing of the judicial stay application because they feared that, if the stay were denied, they would be left with little or no time to file a communication before the Committee. Indeed, in some cases, a judicial stay may be rendered just hours before a scheduled removal. The authors further point out that the filing of applications for judicial review of a negative PRRA or H&C decision did not, in and of themselves, suspend the effect of a removal order. In other words, legally, their removal orders remain in effect.

6. On 1 December 2008, the State party informed the Committee of the dismissal of the authors' judicial review applications, putting an end to internal judicial proceedings. The State party therefore informed the Committee of its intention to provide observations on the admissibility and merits of the communication, provided the Committee extended its deadline to do so.

State party's further observations on admissibility and observations on the merits

7.1 In its submission on the admissibility and merits of the communication transmitted on 17 February 2009, the State party contends that the authors' allegations with respect to articles 6, paragraph 1; 7; 23, paragraph 1; and 24, paragraph 1, are inadmissible on the ground of non-substantiation, in that they have failed to establish a prima facie case. The State party argues that the communication is based on the same facts and evidence as were presented to the Canadian tribunals and risk assessment officer, whose decisions were reviewed and upheld by the Federal Court. There is nothing new to suggest that the authors are at personal risk of torture or any ill-treatment in Sri Lanka. The State party recalls that it is not the role of the Committee to re-evaluate facts and evidence unless it is manifest that the domestic tribunal's evaluation was arbitrary or amounted to a denial of justice. The material submitted by the authors cannot lead to such conclusion. As for the authors' allegations in relation to article 9, the State party submits that they are incompatible with the provisions of the Covenant or, in the alternative, that they are inadmissible on the ground of non-substantiation. The State party is of the view that article 9 has no extraterritorial application and does not prohibit a State from deporting a foreign national to a country where he alleges he faces a risk of arbitrary arrest or detention. In the event that the Committee would declare part or all of the allegations admissible, the State party requests that the Committee finds them without merits.

7.2 The State party observes that in their refugee claim dated 21 May 2003, the authors alleged that they had been subjected to threats and extortion by the LTTE, particularly because Ms. Joachimpillai is from Jaffna, where support for the Tigers is strong. For the same reason, they claimed they were targeted by the police, who presumed them to be sympathetic to the Tigers. In January 1999, Mr. Pillai started a business named Emanuel Communication which, according to the authors, became the source of the problems which ultimately forced them to flee the country. They allege that in October 1999, three young Tamils claiming to be Tigers came into the communication centre and recognized Ms. Joachimpillai from when she had lived in Jaffna. They returned a few days later and asked her to hide one of their members, taking her gold chain when she refused. In 2000, the Tigers allegedly returned three times to extort money from the authors. At that same time, various Tamils would come to Emanuel Communication to make phone calls. The police often came to the company asking Mr. Pillai to report anyone he suspected may be a Tiger.

7.3 On 28 July 2001, the LTTE attacked Sri Lanka's international airport. A few days later, the authors claimed that they were brought to the police station for questioning. Mr. Pillai was allegedly kicked and threatened with a gun. Ms. Joachimpillai was allegedly

beaten and sexually harassed. They were released two days later. In January 2003, Mr. Pillai allegedly added a new service to his communication centre, namely the distribution of videocassettes. On 2 February 2003, six young Tamils allegedly came to the communication centre and told Mr. Pillai to distribute LTTE videocassettes. Despite his objections they said they would soon bring him those cassettes. Two days later, the authors were arrested by the police due to their presumed support to the Tigers. They claimed Mr. Pillai was tortured and Ms. Joachimpillai was beaten, sexually harassed and threatened with a gun. They were released four days later and were ordered to report to the police weekly, which they did until their coming to Canada in May 2003. In their refugee claim, the authors argued that should they be returned to Sri Lanka, they feared that the LTTE would continue to extort money from them and the police may again detain and torture or even kill them.

7.4 On 24 January 2005 the authors' refugee claim was heard by the Refugee Protection Division of Canada's IRB, which, the State party emphasizes, is an independent and specialized tribunal. The authors had a chance to be heard to dissipate any possible misunderstanding. In its decision, the IRB found that the authors were neither refugees nor persons in need of protection and that their claim did not have a credible basis. The IRB came to the conclusion that the authors had not established that Mr. Pillai owned the communication centre which was at the source of all their problems. The State party emphasizes that Mr. Pillai's ownership of the communication centre between 2001 and 2003 was a central element of the claim, as the problems leading to their departure from the country were closely linked to it. However, even if Mr. Pillai did register a communication centre in 1999, he did not establish, on a balance of probabilities, that he continued to be its owner between 2001 and 2003. Among the factors that led to substantial doubts regarding Mr. Pillai's ownership of the centre was that the only document proving the ownership was a Certificate of Registration of an Individual Business dated 23 January 1999. In addition, neither of the authors was able to give the communication centre's address. On the other hand, Mr. Pillai had no problem remembering his own home address or even his uncle's business address.

7.5 The State party further notes that in 2001, Mr. Pillai started a new business venture, importing textiles and spare auto parts. In 2001 or 2002 (conflicting evidence was provided with respect to the dates) he travelled to India, Indonesia and the Congo in connection with this business. From this fact and the conflicting testimony of the dates of Mr. Pillai's business travel, the IRB drew a negative inference as to the credibility of the claim that he was also still running his communication centre in 2001. Moreover, on his visitor visa application in 2003, Mr. Pillai indicated that his present employer was Muthuwella Motors Store. In his interview, he told the Canadian visa officer that he had worked in spare parts for five years. He did not tell the visa officer that he had owned a communication centre. In his testimony before the IRB, however, Mr. Pillai claimed that he had stopped working in the motor business in 2002. He could not reasonably explain the inconsistency in his answers to the visa officer and the IRB.

7.6 The State party adds that the IRB considered that the authors' credibility was greatly damaged due to inconsistencies between what they considered fundamental elements reported in their Personal Information Form for persons claiming refugee protection in Canada and their testimony before the IRB. For these factual inconsistencies the authors were unable to give satisfactory justifications. Despite these inconsistencies, the IRB assessed the authors' risk of being persecuted and found that possible extortion of money by the LTTE could not be the reason the authors had left the country, since these extortions occurred in 2000, that is three years before their arrival in Canada. On 24 May 2005, the Federal Court denied the authors' application for leave to apply for judicial review of the IRB decision on the ground that there was no fairly arguable case or a serious question to be determined.

7.7 With regard to the H&C application, the State party submits that the assessment of an H&C application consists of a broad, discretionary review by an officer to determine whether a person should be granted permanent residence in Canada for humanitarian and compassionate reasons. When allegations of risk upon return are made, as in the authors' case, the officer assesses the risk a person may face in the country to which he would be returned. In cases such as the authors' where the application is based on risk in the country of origin, a specifically trained pre-removal risk assessment officer assesses the H&C application. On 28 December 2007, the H&C applications were rejected. The officer found that, although the ceasefire in Sri Lanka had in effect been abandoned, the main incidents of insecurity occurred in the Northern and Eastern parts and not in the Colombo area where the authors used to reside. The officer, who is required to take into account the best interest of the child, also considered that the authors' children would have access to health care and education and would be able to transition successfully into Sri Lankan society.

7.8 As for the PRRA application, the State party emphasizes that the risk assessment is performed by highly trained officers who consider the Canadian Charter of Rights and Freedoms, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the American Declaration of the Rights and Duties of Man. They also keep up-to-date with new developments in the areas concerned and have access to most recent information on the matter. On 28 December 2007, the PRRA application was rejected. The PRRA officer recognized that the security situation had deteriorated since the applications' IRB hearing, though principally in the north and east of Sri Lanka rather than in Colombo. He considered however that none of the information provided supported the allegation of a personal risk of being persecuted, killed or tortured. The authors therefore did not demonstrate that they would be at greater risk than the general population. The officer considered that extortion of money by the LTTE, even if proven, could not amount to persecution. As for the risk to be tortured by the Sri Lankan authorities, the officer found that it was unlikely they would target the authors, given their limited involvement with the LTTE. On 25 November 2008, the Federal Court dismissed the authors' Judicial Review applications, upholding the finding of the PRRA officer.

7.9 The State party contends that the authors' allegations related to articles 6, paragraph 1; 7; 23, paragraph 1; and 24, paragraph 1, are insufficiently substantiated for purposes of admissibility. The State party insists on the importance for the Committee not to re-evaluate findings of credibility made by competent tribunals.⁴ Nor should it be the Committee's role to weigh evidence or re-assess findings of fact made by domestic courts or tribunals.⁵ However, should the Committee decide to re-evaluate findings with respect to the authors' credibility, the State party submits that a consideration of the totality of the evidence permits only one conclusion which is that the authors' allegations are not credible. In addition to the inconsistencies referred above, the State party refers to the authors' assertion that, in evaluating Mr. Pillai's testimony, the IRB took insufficient account of his diagnosis of post-traumatic stress disorder. The authors had submitted to the IRB a psychological report and a note from a medical doctor. The psychological report indicates that the symptoms of such disorder include anxiety and panic, confusion and psychic numbness,

⁴ The State party refers to communications No. 891/1999, *Tamihere v. New Zealand*, decision on inadmissibility adopted on 15 March 2000; and No. 728/1996 *Paul v. Guyana*, Views adopted on 1 November 2001, para. 9.3.

⁵ The State party refers to communications No. 215/1986, *van Meurs v. The Netherlands*, Views adopted on 13 July 1990, para. 7.1; No. 485/1991, *V.B. v. Trinidad and Tobago*, decision on inadmissibility adopted on 26 July 1993, para. 5.2; No. 949/2000, *Keshavjee v. Canada*, decision on inadmissibility adopted on 2 November 2000, para. 4.3; No. 934/2000, *G. v. Canada*, decision on inadmissibility adopted on 17 July 2000, paras. 4.2-4.3; No. 761/1997, *Singh v. Canada*, decision on inadmissibility adopted on 29 July 1997, para. 4.2.

and that these symptoms may be mistakenly attributed to “shiftiness, mendacity or lying”. The report recommended that any judgments with respect to the trustworthiness of Mr. Pillai’s testimony take this into account. Contrary to the authors’ accounts, the IRB did take the report into account in evaluating Mr. Pillai’s testimony. Because of Mr. Pillai’s diagnosis, the panel avoided asking him any questions related to his alleged torture in detention. The State party notes however that during the hearing, Mr. Pillai’s speech was coherent and intelligent rather than confused. After weighing both Mr. Pillai’s testimony and the psychological report, the panel judged that the reason for Mr. Pillai’s difficulty to testify arose from a want of credibility in the allegations themselves. None of the information provided by the authors gives rise to a doubt about a possible arbitrariness in the procedure before the IRB.

7.10 The State party acknowledges the authors’ submission of a number of reports describing the human rights situation in Sri Lanka, from, among others, UNHCR, Amnesty International and the International Crisis Group. It submits however that the authors have not submitted any evidence that Tamils in Colombo who are suspected of having provided low-level support to LTTE are at risk of torture or death. Even if human rights abuses against some Tamils in Sri Lanka, particularly high-profile militants, continue to be reported, this is not sufficient by itself to be the basis of a violation of the Covenant if the authors are returned there. Quoting reports from the United Kingdom Home Office on the human rights situation in Sri Lanka, the State party contends that neither the LTTE nor the Sri Lankan authorities are likely to target low-level LTTE supporters; that while some Tamils suspected of being LTTE members or supporters are still detained, most are released quickly as the authorities are generally not concerned with individuals who have provided low-level support.⁶ The State party insists that these statistics confirm that an extremely low proportion of Tamils are at risk of detention in Colombo and this risk of detention depends primarily on the individual’s profile. The State party quotes the Committee against Torture, which has held that Tamils may be deported to Sri Lanka irrespective of whether a consistent pattern of gross, flagrant or mass violations of human rights can be said to exist there, where there is no evidence of personal risk.⁷ It also quotes the jurisprudence of the European Court of Human Rights (ECHR), which has found that despite the renewal of open hostilities in the civil war, Sri Lankan Tamils do not face a generalized risk of ill-treatment.⁸

7.11 In relation to article 6, paragraph 1, the State party maintains that the authors have not shown that the necessary and foreseeable consequence of the deportation⁹ would be that they would be killed or that the State could not protect them; nor have they established that, even if their lives were in danger in Colombo, they would not have an internal flight alternative in Sri Lanka. The State party therefore concludes the communication with regard to article 6, paragraph 1, of the Covenant to be inadmissible. As far as article 7 is concerned, the State party maintains that even if it is accepted that the authors were tortured by the Sri Lankan authorities in the past, which the State party considers has not been established, this is not of itself proof of a risk of torture in the future. With respect to the

⁶ The State party particularly refers to a report from the United Kingdom Home Office, namely “Operational Guidance Note: Sri Lanka”, August 2008, paras. 3.6.24, 3.7.19 and 3.7.20.

⁷ The State party refers to Committee against Torture jurisprudence in communications No. 182/2001, *A.I. v. Switzerland*, decision adopted on 12 May 2004, para. 6.4; and No. 191/2001, *S.S. v. The Netherlands*, decision adopted on 5 May 2003, para. 6.2.

⁸ The State party quotes inter alia, ECHR, *N.A. v. The United Kingdom*, 17 July 2008, application No. 25904/07, para. 125.

⁹ The State party quotes the jurisprudence of the Human Rights Committee in communications No. 692/1996, *A.R.J. v. Australia*, Views adopted on 26 July 1997, paras. 6.11-6.13; and No. 706/1996, *G.T. v. Australia*, Views adopted on 4 November 1997, paras. 8.1-8.2.

possibility of mistreatment by the LTTE, the State party adopts the finding of the IRB panel that, even if accepted as true, the three incidents of extortion by the LTTE did not constitute persecution, and in any event ended three years before the authors left Sri Lanka. The State party therefore concludes that the authors have not sufficiently substantiated their claim with regard to article 7 of the Covenant.

7.12 With respect to article 23, paragraph 1, whereby the authors' deportation would endanger their well-being thereby potentially depriving the children of their parents' care and protection, the State party considers that the lack of substantiation of the authors' claims under articles 6 and 7 renders article 23, paragraph 1, entirely devoid of substantiation. As for the authors' allegations with respect to article 24, paragraph 1, the State party submits that it has taken the necessary measures to meet its obligations, as the best interests of the authors' children were explicitly considered in the authors' H&C application, as required by statute.¹⁰ After consideration of the evidence, the officer concluded that the children would benefit from the extensive public education and health care systems in that country. The State party concludes to the inadmissibility of articles 23, paragraph 1 and 24, paragraph 1, for non-substantiation.

7.13 As for the authors' allegations related to article 9, paragraph 1, the State party reiterates that this part of the communication should be declared incompatible with the provisions of the Covenant. The authors have not alleged that the State party has arrested or detained them in violation of article 9, paragraph 1, but that by deporting them to Sri Lanka where they might be arbitrarily detained, the State party would violate this provision. It emphasizes the limited number of rights to which the Committee has given extraterritorial application, article 9, paragraph 1, not being one of those. The State party quotes general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant,¹¹ which states that only the most serious breaches of fundamental rights can constitute exceptions to the power of the State to determine the conditions for allowing foreigners to enter and remain on its territory. The State party submits that arbitrary arrest or detention does not rise to the level of grave, irreparable harm contemplated in general comment No. 31. The State party therefore requests that article 9, paragraph 1, be considered inadmissible as incompatible with the provisions of the Covenant. In the alternative, it requests the Committee to find it inadmissible for non-substantiation.

7.14 The State party reminds the Committee that it is not within its competence to consider the Canadian system in general, but only to examine whether, in the present case, it complied with its obligations under the Covenant. It also reminds the Committee that it has, in the past, with respect to similarly unsubstantiated allegations considered that the author had not substantiated how the Canadian authorities' decisions failed thoroughly and fairly to consider his claim that he would be at risk of violations of articles 6 and 7 of the Covenant.¹²

¹⁰ The State party refers to jurisprudence of the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817, where the Supreme Court of Canada emphasized the importance of and need to consider the best interests of the child in humanitarian and compassionate grounds applications.

¹¹ *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III.

¹² The State party refers to the Committee's jurisprudence in communication No. 1302/2004, *Khan v. Canada*, decision on inadmissibility adopted on 25 July 2006, para. 5.5; and *Singh v. Canada*, (note 5 above).

Authors' comments on State party's observations

8.1 On 23 April 2009, the authors provided comments on the State party's submission. Contrary to State party's contention, they consider that the Committee's jurisprudence is clearly to the effect that Covenant rights, other than those contemplated in articles 6 and 7, do apply in the context of removals of non-citizens from a State party's territory.

8.2 With regard to the authors' allegations related to articles 6, 7 and 9, the authors maintain that it is within the Committee's competence to revisit negative credibility findings by the IRB, where a denial of justice has occurred as stated by the Committee against Torture in its jurisprudence *Falcon Ríos v. Canada*.¹³ In this case, the Committee against Torture found that the IRB had erred in failing to give proper weight to the psychological report tendered as evidence to corroborate that the author had been a victim of torture. The authors submit that the State party, through the IRB, committed the very same error in their case. In addition, even if the IRB had been correct in finding in 2005 that the authors were not in danger if returned to Sri Lanka, the relevant moment for the Committee's assessment of alleged violations of the Covenant is the present. In that regard, the authors note that the State party has failed to comment directly on the findings of the "UNHCR position on the international protection needs of asylum-seekers from Sri Lanka", provided by the authors in the present communication.

8.3 The UNHCR report states that the significant majority of reported cases of human rights violations in Sri Lanka involve persons of Tamil ethnicity who originate from the north and east, such as Ms. Joachimpillai. As stated earlier, the report refers to increased arrests, detention as well as systematic police registration of Tamils originating from the north and east. With regard to internal flight/relocation alternatives, UNHCR finds that because of the activities and affiliations frequently attributed to Tamils from the north and east, Tamils from these regions continue to be at risk of human rights violations in other parts of the country and are, therefore, without reasonable internal flight/relocation alternatives in Sri Lanka. The report also finds that many of the abductions involve civilians who are suspected to be LTTE members or sympathizers. With regard to torture, ill-treatment and arbitrary detention, the report refers to the extensive use of torture by police, security or armed forces in Sri Lanka and states that Tamils, particularly from the north, face a substantial risk of violation of their rights under articles 6, 7 and 9, paragraph 1, of the Covenant simply on the basis of their ethnicity. The authors observe that the three cases of the Committee against Torture¹⁴ cited by the State party were rendered prior to the above-mentioned report, the termination of the ceasefire, and the severe deterioration of the country situation.

8.4 The authors further allege that they face a substantial and personal risk of violation of their rights under articles 6, 7 and 9, paragraph 1 of the Covenant. They face several of the risk factors identified by the European Court of Human Rights in *N.A. v. The United Kingdom*, most notably the authors were twice arrested and detained by Sri Lankan police on suspicion of lending support to the LTTE, Ms. Joachimpillai is from the north of Sri Lanka, putting her at higher risk of suspicion of supporting the LTTE, both spouses and the eldest child have made asylum claims abroad and effectively alerted the Sri Lanka authorities to this situation by applying, at the request of the State party, to the Sri Lanka High Commission in Canada to renew their passports. The authors further reject the State party's analysis that only high-profile support to the LTTE is sanctioned by Sri Lankan authorities. The use of the term "high profile" in the ECHR decision *N.A. v. The United*

¹³ Communication No. 133/1999, *Falcon Ríos v. Canada*, decision adopted on 23 November 2004.

¹⁴ See para. 7.10 above.

Kingdom refers to the risk of abuse emanating from the LTTE and not from Sri Lankan authorities.

8.5 As for the authors' allegations under articles 23, paragraph 1, and 24, paragraph 1, they submit that the best interest of the children were not a primary consideration before the PRRA officer. Under the refugee-immigration legislative scheme, the only application in which the best interest of the child is considered is the H&C application. In the authors' case, both PRRA and H&C applications were considered at once, by the PRRA officer. Rather than considering where the best interest of the children lay, the officer merely concluded that the children could adapt to life in Sri Lanka. The question of whether the child can adapt to a situation is far different than the question of whether it is the child's best interest to be obliged to do so. The officer took no account of the country conditions that would pose a threat to the children's security in Sri Lanka. The result has been a denial of justice to the children and a violation of their rights under article 24, paragraph 1 of the Covenant. The authors further submit that even a threat that falls short of a violation of their rights under articles 6 and 7, but which affects their capacity to act as parents and to protect their children violates the rights of the family under articles 23, paragraph 1, and 24, paragraph 1, of the Covenant. The findings of the psychological report on Mr. Pillai stated that his perceived safety could only be found far from his torturers. It was recommended that Mr. Pillai stay in Canada where he could establish a new life and begin the recovery process. The authors conclude that any harm befalling the parents, whether amounting to a violation of their rights under articles 6 and 7, or otherwise impairing their capacity to care for and protect their children, would constitute a violation of the provisions mentioned above.

8.6 The authors reject State party's argument that it is not within the Committee's competence to consider the Canadian system in general. They recall paragraph 17 of the Committee's general comment No. 31, where it stated that it has been frequent practice of the Committee in cases under the Optional Protocol to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State party's laws or practices. In paragraph 15 of general comment No. 31, the Committee adds that remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children. In their original submission, the authors pointed out a certain number of shortcomings in the Canadian system, such as the absence of an appeal on the merits of negative refugee determination decisions, the requirement of applying for "leave" for Judicial Review at the Federal Court, the inherent limitations of judicial review (as opposed to a true appeal on the merits), even when "leave" is granted, and the limited scope of the PRRA examination.

8.7 The authors consider that the inadequate training of PRRA officers, their lack of independence and the highly discretionary nature of H&C decision-making in Canada, which are systemic problems, have also contributed to the denials of justice which they consider themselves victims of. The authors quote a recommendation issued by the Parliamentary Standing Committee that the Government remove the PRRA from the jurisdiction of Citizenship and Immigration Canada officials and instead mandate the IRB to carry out PRRAs. With regard to the H&C decision-making in Canada, the authors quote the Committee against Torture in its jurisprudence *Falcon Ríos* where it stated that the H&C process depended on the discretion of the executive branch of the government and was thus "ex gratia" in nature. It could therefore not be considered a domestic recourse that must be exhausted prior to lodging a complaint before the Committee against Torture. As the best interest of the child is assessed during this highly discretionary process, the authors doubt that a fair application of country conditions within the context of the best interests of the child analysis can be carried out. The authors propose a series of legislative reforms which would enable a fair process of asylum consideration.

State party's additional observations on admissibility and merits

9.1 On 3 December 2009, the State party provided further observations in response to the authors' comments. It refers to the authors' argument with regard to article 9, paragraph 1, and remarks that neither of the two cases the authors cite is an example of extraterritorial application, as in neither of them did the Committee determine a State party responsible for a violation of the Covenant in another State. In both cases, the Committee found that the deportation of a parent would have violated the Covenant because it would have forced the other members of the family either to live separately or to move to a country they did not know. It was the action of the removing State which would have been responsible for the resulting interference in family life, not any action by the receiving State. Thus, these cases do not support the further extension of extraterritorial application of the Covenant in the removals context beyond articles 6 and 7.

9.2 With regard to the "UNHCR position on the international protection needs of asylum-seekers from Sri Lanka", as support to their argument that the authors would face a personal risk of torture and persecution upon return to Sri Lanka, the State party notes that the report was compiled before the formal end of hostilities in Sri Lanka with the military defeat of the LTTE in May 2009. It refers to an updated "Note on the Applicability of the 2009 Sri Lanka guidelines" issued by UNHCR in July 2009 and acknowledges that since the military defeat of the LTTE, the general human rights situation for Tamils in Sri Lanka has remained of concern. It considers however that there are indications that the situation of failed Tamil asylum-seekers returning to Colombo, such as the authors, is not such as to warrant the finding that the authors would be at risk of a violation of their rights under articles 6 and 7. The State party further submits that although the authors can be expected to be questioned upon their arrival in Colombo, and may be subjected to spot checks within Colombo, security checks can be expected during the transitional post-war period by all Tamils. There is no reason to believe that the authors would be more at risk on the grounds of their previous arrests, or because they are returning failed asylum-seekers.

9.3 As for the authors' allegations under articles 23, paragraph 1, and 24, paragraph 1, the State party reiterates that the PRRA officer did in fact address the best interest of the child. The authors' citation of the Committee's jurisprudence in *Madafferi v. Australia* is not relevant in the present communication since the children involved were 11 and 13 and given their integration in Australia there was no real prospect of them following their father to Italy. In the current communication, by contrast, both parents and the elder child are Sri Lankan nationals. The younger children were born in 2004 and 2005 and would accompany their parents were they to be removed from Canada. Given their young age, the fact that they would follow their parents and the availability of public health care and education in Sri Lanka, the PRRA officer reasonably concluded that the children would be able to successfully re-integrate into Sri-Lankan society.

9.4 As for Canada's refugee protection system, which the authors criticize in their submission, the State party firmly considers that there is no need for a systemic review by the Committee of a system that the High Commissioner for Refugees has called one of the best in the world. It adds that the Committee has consistently found that the PRRA and the H&C procedures are effective mechanisms for the protection of refugees and that the judicial review in the Federal Court is an effective means of ensuring the fairness of the system.¹⁵ In the alternative, should the authors wish to raise general claims against the Canadian refugee protection system, they should first exhaust domestic remedies, which they have not.

¹⁵ The State party refers inter alia to *Khan v. Canada* (note 12 above), para. 5.5.

9.5 With respect to the authors' allegations that PRRA decision-makers are not adequately trained, the State party informs the Committee that the Government of Canada provided a response to the Parliamentary Standing Committee's report mentioned by the authors. With respect to the allegation that PRRA decision-makers are not independent, the State party refers the Committee to several decisions of the Supreme Court, including *Say v. Canada (Solicitor General)*,¹⁶ where the Court concluded that in a substantial number of cases, the independence of PRRA decision-makers could not be challenged. This decision occurred before the 2004 legislative change that has placed PRRA officers under the authority of the Minister of Citizenship and Immigration, thereby further reinforcing the Officers' independence. As for the authors' allegations that the decision-making with respect to applications made on H&C grounds do not adequately take account of the best interest of the child, the State party responds that the Supreme Court of Canada has made clear that the decision-maker must be alert, alive and sensitive to those interests. The Federal Court has on many occasions overturned H&C decisions as unreasonable because the decision-maker was not sufficiently alert, alive or sensitive to the children's best interests. In the present case, both PRRA and H&C application processes, with the attendant possibility of judicial review by the Federal Court, were fully consistent with State party's obligations under articles 6, 7, 23 and 24 of the Covenant.

Proceedings before the Committee

Consideration of admissibility

10.1 Before considering any claims 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.

10.2 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 international procedure of investigation or settlement.

10.3 The Committee notes the State party's challenge to the admissibility of the communication on the ground of failure to substantiate the authors' claims under articles 6, paragraph 1; 7; 9; 23, paragraph 1; and 24, paragraph 1, of the Covenant. As far as article 6 is concerned, the Committee notes that the authors have not explained why they believe that their expulsion to Sri Lanka would expose them to a real risk of a violation of their right to life. The Committee therefore finds that this part of the communication is insufficiently substantiated for purposes of admissibility, pursuant to article 2 of the Optional Protocol.

10.4 With regard to the authors' claims under article 9, paragraph 1, the Committee notes the State party's argument that this provision has no extraterritorial application and does not prohibit a State from deporting a foreign national to a country where he alleges he faces a risk of arbitrary arrest or detention. The Committee takes note of the authors' allegations that the extraterritorial application of the Covenant in the removals context is not limited to articles 6 and 7 of the Covenant. The authors have not however explained why they would face a real risk of a serious violation of article 9 of the Covenant. The Committee therefore finds this part of the communication inadmissible, pursuant to article 2 of the Optional Protocol.

10.5 Regarding the authors' claims under article 7, the Committee notes that the authors have explained the reasons why they feared to be returned to Sri Lanka, giving details about the extortion they were allegedly victims of by the LTTE, the arrest and detention by the Sri

¹⁶ The State party refers to *Say v. Canada (Solicitor General)*, 2005 FC 739, para. 39.

Lankan authorities on two occasions and the treatment they allegedly both suffered in the hands of the authorities. The Committee also notes that the authors have provided evidence, such as the Diagnostic Interview Report by a psychotherapist, containing a diagnosis of post-traumatic stress disorder as well as a medical certificate for Mr. Pillai. The Committee considers that such claims are sufficiently substantiated for purposes of admissibility and that they should be considered on their merits. As for the allegations concerning violations of articles 23, paragraph 1, and 24, paragraph 1, the Committee considers them intimately linked to the authors' allegations under article 7, which need to be determined on the merits. The Committee accordingly finds the authors' claims under articles 7, 23, paragraph 1, and 24, paragraph 1, admissible and proceeds to their consideration 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 received, in accordance with 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.¹⁷ The Committee recalls that it is generally for the instances of the States parties to the Covenant to evaluate facts in such cases.

11.3 The Committee takes note of the authors' arguments that the IRB member did not sufficiently take account of the Diagnostic Interview Report, containing a diagnosis of post-traumatic stress disorder for Mr. Pillai, and of the opinion of two health-care professionals regarding his capacity to testify. The Committee also takes note of the State party's argument that the IRB member did take the Diagnostic Interview Report into consideration during the hearing; that because of Mr. Pillai's diagnosis, the panel avoided asking him any questions related to his alleged torture in detention; that during the hearing, Mr. Pillai's speech was coherent and intelligent rather than confused; and that after weighing both Mr. Pillai's testimony and the psychological report, the panel judged that the reason for Mr. Pillai's difficulty to testify arose from a lack of credibility.

11.4 With regard to the authors' claim that, should the State party deport them to Sri Lanka, they would be exposed to a real risk of torture, the Committee notes the argument invoked by the State party regarding the harm being the necessary and foreseeable consequence of the deportation. In that respect the Committee recalls its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, 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.¹⁸ The Committee further notes that the diagnosis of Mr. Pillai's post-traumatic stress disorder led the IRB to refrain from questioning him about his earlier alleged torture in detention. The Committee is accordingly of the view that the material before it suggests that insufficient weight was given to the authors' allegations of torture and the real risk they might face if deported to their country of origin, in the light of the documented prevalence of torture in Sri Lanka.¹⁹ Notwithstanding the deference given to the immigration authorities to appreciate the

¹⁷ See Human Rights Committee general comments No. 6 (1982) on the right to life and No. 20 (1992) on the prohibition of torture and cruel treatment or punishment.

¹⁸ *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III, para. 12.

¹⁹ See for instance paragraphs 3.4 to 3.6 above.

evidence before them, the Committee considers that further analysis should have been carried out in this case. The Committee therefore considers that the removal order issued against the authors would constitute a violation of article 7 of the Covenant if it were enforced.

11.5 In the light of its findings on article 7, the Committee does not deem necessary to further examine the authors' claims under articles 23, paragraph 1, and 24, paragraph 1, 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 authors' removal to Sri Lanka would, if implemented, violate their rights under article 7 of the Covenant.

13. 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 a full reconsideration of the authors' claim regarding the risk of torture, should they be returned to Sri Lanka, taking into account the State party's obligations under the Covenant.

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 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.]

Appendix

Individual opinion by Committee member Mr. Krister Thelin (dissenting)

The majority has found some of the authors' claims admissible and considered them on the merits. I disagree. The Views should, in my opinion, in paragraph 10.5 read as follows.

“10.5 Regarding the remainder of the authors' claims, the Committee notes the State Party's argument that it is not for the Committee to re-evaluate findings of credibility made by competent tribunals, nor to weigh evidence or re-assess findings of facts made by domestic courts or tribunals. The Committee recalls its jurisprudence that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it is found that evaluation was clearly arbitrary or amounted to a denial of justice.¹ This jurisprudence has also consistently been applied to deportation proceedings.² The material before the Committee does not show that the domestic proceedings suffered from any such defects, including the important assessment of the risk of a violation of the authors' rights under the Covenant, were they to be deported to Sri Lanka. Accordingly, the Committee holds that the authors have failed to substantiate their claims, for the purpose of admissibility, and concludes that the communication is inadmissible under article 2 of the Optional Protocol.”

Having been outvoted on the issue of admissibility, I join Committee member Mr. Yuji Iwasawa in his dissenting opinion on the merits.

(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.]

¹ Communications No. 541/1993, *Simms v. Jamaica*, decision on inadmissibility adopted on 3 April 1995; No. 1544/2007, *Hamida v. Canada*, Views adopted on 18 March 2010; No. 1551/2007, *Tarlue v. Canada*, decision on inadmissibility adopted on 27 March 2009; No. 1455/2006, *Kaur v. Canada*, decision on inadmissibility adopted on 30 October 2008; No. 1540/2007, *Nakrash and Liu v. Sweden*, decision on inadmissibility adopted on 30 October 2008; No. 1494/2006, *A.C. v. The Netherlands*, decision on inadmissibility adopted on 22 July 2008; and No. 1234/2003, *P.C. v. Canada*, decision on inadmissibility adopted on 20 March 2007.

² *Tarlue v. Canada*, *Kaur v. Canada* and *A.C. v. The Netherlands*.

Individual opinion by Committee members Ms. Helen Keller, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O’Flaherty and Sir Nigel Rodley (concurring)

The Committee’s usual conciseness may make it difficult for some readers to understand a passage in its Views that we regard as particularly significant. For that reason, we write to set forth our own understanding of the issue.

The Committee has long recognized that article 7 of the Covenant prohibits States parties from removing individuals to countries where they face torture or cruel, inhuman or degrading treatment or punishment. The Committee’s general comment 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant expressed this principle in terms of “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”.^a

In the early 1990s, however, when the Committee was first exploring the principle of States parties’ responsibility for consequences of their removal decisions, it began by articulating a narrower version of the obligation. Thus, in *Kindler v. Canada* (1993), which involved the extradition of a convicted capital defendant to the United States of America, the Committee observed that:

a State party’s duty under article 2 of the Covenant would be negated by the handing over of a person to another State (whether a State party to the Covenant or not) where treatment contrary to the Covenant is certain or is the very purpose of the handing over. For example, a State party would itself be in violation of the Covenant if it handed over a person to another State in circumstances in which it was foreseeable that torture would take place. The foreseeability of the consequence would mean that there was a present violation by the State party, even though the consequence would not occur until later on.^b

The Committee repeated the idea that transfer of the individual could violate article 6 or article 7 of the Covenant if the feared harm *would take place* in the receiving country in a few other cases of the 1990s such as *Cox v. Canada* (1994) (involving extradition of a capital defendant to the United States).^c In *G.T. v. Australia* (1997), the Committee observed that it was not “a foreseeable and necessary consequence of [the author’s] deportation that he *will be* tried, convicted and sentenced to death,” or subjected to corporal punishment in Malaysia.^d

The degree of certainty suggested by these early Views contrasts with the standard set forth in article 3, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which prohibits sending a person to “another State where there are substantial grounds for believing that he would be *in danger*

^a *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III, para. 12.

^b Communication No. 470/1990, Views adopted on 30 July 1993, para. 6.2.

^c Communication No. 539/1993, Views adopted on 31 October 1994, paras. 10.4 and 16.1.

^d Communication No. 706/1996, Views adopted on 4 November 1997, paras. 8.4 and 8.6 (emphasis added).

of being subjected to torture” (emphasis added). The focus on danger, or risk, has characterized the approach of both the Committee against Torture and the European Court of Human Rights to the question of return to torture.^e

This Committee has also concluded that article 7 requires attention to the real risks that the situation presents, and not only attention to what is certain to happen or what will most probably happen. General comment No. 31, quoted above, demonstrates this focus. So do the Committee’s Views and decisions of the past decade. The phrasings have varied, and the Committee continues to refer on occasion to a “necessary and foreseeable consequence” of deportation. But when it inquires into such consequences, the Committee now asks whether a necessary and foreseeable consequence of the deportation would be a real risk of torture in the receiving State, not whether a necessary and foreseeable consequence would be the actual occurrence of torture.^f

In its submissions on the present Communication, the State party has referred without distinction to early Views of the Committee such as *Kindler* and to more current Views, and it has described the relevant issue as whether the necessary and foreseeable consequence of the deportation would be the killing or torture of the authors. That is not the proper inquiry. The question should be whether the necessary and foreseeable consequence of the deportation would be a *real risk of* the killing or torture of the authors. The other factors identified by the Committee in its present Views suggest that this misunderstanding of the relevant standard may have deprived the authors of a proper evaluation of their claims under article 7 of the Covenant.

(Signed) Helen **Keller**

(Signed) Iulia Antoanella **Motoc**

(Signed) Gerald L. **Neuman**

(Signed) Michael **O’Flaherty**

(Signed) Sir Nigel **Rodley**

[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.]

^e See for example Committee against Torture, general comment No. 1 (1997) on implementation of article 3 of the convention in the context of article 22, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 44 (A/53/44)*, annex IX, para. 6; *Saadi v. Italy* [GC], App. No. 37201/06, ECHR 2008, para. 125 (2008); *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989).

^f See for example communications No. 1539/2006, *Munaf v. Romania*, Views adopted on 30 July 2009, para. 14.2 (“the risk of an extraterritorial violation must be a necessary and foreseeable consequence...”); No. 1205/2003, *Bauetdinov v. Uzbekistan*, Views adopted on 3 April 2008, para. 6.3 (“substantial grounds for believing that, as a necessary and foreseeable consequence of the transfer to Kazakhstan, there was a real risk that he would be subjected to treatment prohibited by article 7.”).

Individual opinion by Committee member Mr. Yuji Iwasawa (dissenting)

1. I am unable to associate myself with the Views of the Committee for the following reasons.

2. In *A.R.J. v Australia*, the Committee stated that “what is at issue in this case is whether by deporting Mr. J. to Iran, Australia exposes him to a real risk (*that is, a necessary and foreseeable consequence*) of a violation of his rights under the Covenant” and that “the risk of such treatment must be real, *i.e. be the necessary and foreseeable consequence of deportation to Iran*”.^a Such statements have led some States parties to claim that the Committee has equated “a necessary and foreseeable consequence” with “a real risk.”^b

While general comment No. 31 (2004) refers only to “a real risk,” the Committee has continued to use references to “a necessary and foreseeable consequence,” even after 2004. The formula used by the Committee in recent years is whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of the author’s removal, there is a real risk that the author would be subjected to a violation of his rights under the Covenant (e.g. torture).^c

In addition, the risk must be personal as well, although the Committee does not articulate it clearly. The Committee against Torture explicitly requires that “the risk of torture must be foreseeable, real and personal”.^d

The concurring opinion of Ms. Keller and others points out that the Human Rights Committee in the recent decade asks whether the necessary and foreseeable consequence of the deportation would be a real risk of torture, rather than the actual occurrence of torture. The jurisprudence of the Committee is, however, not consistent. Even in recent years, the Committee asks whether the necessary and foreseeable consequence would be a violation of rights, rather than a real risk of a violation.^e Moreover, the Committee constantly cites as the authority *A.R.J. v Australia*,^f which sets out a necessary and foreseeable consequence of a violation as the test. Thus, the test of the Committee needs clarification.

In any event, in the present case, whether the necessary and foreseeable consequence of the deportation would result in the killing or torture of the author was not the test used by the State party’s authorities. In the removal risk assessment procedures, the authorities assessed whether the authors would face a personal *risk* of being persecuted, killed or tortured (para. 7.8, emphasis added), thus applying the test recognized as proper by the above-mentioned concurring opinion.

^a Communication No. 692/1996, *A.R.J. v Australia*, Views adopted on 28 July 1997, paras. 6.8 and 6.14 (emphasis added). See also communication No. 706/1996, *G.T. v Australia*, Views adopted on 4 Nov. 1997, para. 8.1.

^b See, for example, communication No. 1324/2004, *Shafiq v. Australia*, Views adopted on 31 Oct 2006, para. 4.5 (State party’s observations on merits).

^c See, for example, communication No. 1540/2007, *Nakrash and Liu v. Sweden*, decision on inadmissibility adopted on 30 Oct. 2008, para. 7.3.

^d See, for example, Committee against Torture communication No. 326/2007, *M.F. v. Sweden*, decision adopted on 14 November 2008, para. 7.3.

^e Communication No. 1539/2006, *Munaf v. Romania*, Views adopted on 30 July 2009, para. 7.5.

^f See, for example, communication No. 1544/2007, *Hamida v. Canada*, Views adopted on 18 March 2010, para. 8.7, note 19.

3. It has been the constant practice of the Committee in removal proceedings to recall its jurisprudence that “it is generally for the courts of the States parties to the Covenant to evaluate *facts and evidence* of a particular case, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice”.^g Moreover, the Committee has explicitly acknowledged that “[this] jurisprudence has been applied to removal proceedings”.^h

In the present Views, however, the Committee changed the formula without explanation as follows: “it is generally for the instances of the States parties to the Covenant to evaluate *facts* in such cases [expulsion of non-citizens]” (para. 11.2, emphasis added). The Views, however, acknowledge in a following paragraph that “deference [is] given to the immigration authorities to appreciate the *evidence* before them” (para. 11.4, emphasis added). Under the circumstances, I can only reasonably interpret the present Views as not having changed the established jurisprudence of the Committee that it is generally for the courts of the States parties to the Covenant to evaluate *facts and evidence* of a particular case, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice. The Committee should refrain from acting as a fourth instance tribunal to re-evaluate facts and evidence before the authorities in the State party in removal proceedings, unless there are clear and specific reasons for doing so.

4. In the present communication, I take note of the conflicting arguments provided by the authors and the State party on the extent to which the Diagnostic Interview Report, containing a diagnosis of post-traumatic stress disorder for Mr. Pillai, was taken into account by the Immigration and Refugee Board (IRB). I also take note of the State party’s arguments that major inconsistencies arose in the testimonies provided in the Personal Information form and during the hearing before the IRB; that Mr. Pillai did not establish that he owned the communication centre which was at the source of all their problems; that possible extortion of money by the LTTE could not be the reason the authors had left the country, as these extortions occurred three years before their arrival in Canada; that the authors’ claims were not credible based on the consideration of the evidence; that the authors have not proven that they are at a greater risk than the general population nor that Tamils in Colombo suspected of having provided low-level support to LTTE are at risk of torture or death by the Sri Lankan authorities; that even if their lives were in danger in Colombo, they would have an internal flight alternative in Sri Lanka; and that the authors have not proven that they face a personal risk of torture or ill-treatment if returned to Sri Lanka.

While I agree that during the refugee claim determination process insufficient weight seems to have been given to the conclusion of the Diagnostic Interview Report, I cannot conclude that the material before the Committee demonstrates that the evaluation of facts and evidence carried out by the authorities of the State party was arbitrary or amounted to a denial of justice. Thus, I consider that the facts before the Committee do not disclose a violation of the Covenant.

(Signed) Yuji Iwasawa

^g Ibid., para. 8.4 (emphasis added). See also communications No. 1551/2007, *Tarlue v. Canada*, decision on inadmissibility adopted on 27 March 2009, para. 7.4; No. 1455/2006, *Kaur v. Canada*, decision on inadmissibility adopted on 30 October 2008, para. 7.3; *Nakrash and Liu v. Sweden* (note c above), para. 7.3; No. 1494/2006, *A.C. v. The Netherlands*, decision on inadmissibility adopted on 22 July 2008, para. 8.2; No. 1234/2003, *P.C. v. Canada*, decision on inadmissibility adopted on 20 March 2007, para. 7.3.

^h *Tarlue v. Canada, Kaur v. Canada, A.C. v. The Netherlands.*

[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.]

**PP. Communication No. 1769/2008, *Ismailov v. Uzbekistan*
(Views adopted on 25 March 2011, 101st session)***

<i>Submitted by:</i>	Natalya Bondar (not represented by counsel)
<i>Alleged victim:</i>	Sandzhar Ismailov
<i>State party:</i>	Uzbekistan
<i>Date of communication:</i>	16 January 2008 (initial submission)
<i>Subject matter:</i>	Detention and trial of the author's husband
<i>Procedural issue:</i>	Degree of substantiation of claims
<i>Substantive issues:</i>	Arbitrary detention, fair trial, right to defend oneself through legal assistance of one's own choosing, right to examine witnesses, self-incrimination, unlawful interference with privacy and family life
<i>Articles of the Covenant:</i>	9, paragraphs 1, 2 and 3; 14, paragraphs 1 and 3 (b), (d), (e), (g); 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 25 March 2011,

Having concluded its consideration of communication No. 1769/2008, submitted to the Human Rights Committee on behalf of Mr. Sandzhar Ismailov 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. The author of the communication, dated 16 January 2008, is Ms. Nataliya Bondar, an Uzbek national. She submitted the communication on behalf of her husband, Mr. Sandzhar Ismailov, an Uzbek national born in 1970 who is serving a prison sentence. She claims that her husband is a victim of violation by Uzbekistan¹ of his rights under article 9, paragraphs 2 and 3; article 14, paragraph 1 and paragraph 3 (b), (d), (e), (g); and article 17, paragraph 1, of the International Covenant on Civil and Political Rights.

* 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. Helen Keller, 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. Krister Thelin and Ms. Margo Waterval.

¹ The Optional Protocol entered into force for Uzbekistan on 28 December 1995. The author is unrepresented.

The facts as presented by the author

2.1 From 2002 to 2005, Mr. Ismailov served in the Ministry of Defence as Head of the Central Intelligence Department of the Joint Staff of the Armed Forces of Uzbekistan. On 29 June 2005, he was invited to the Central Administration of the National Security Service (hereinafter NSS) on the pretext to undergo an interview for admission to the High School of the NSS. Upon his arrival, Mr. Ismailov was interrogated by agents of the NSS. Shortly after, his apartment was searched, but no evidence that would have served as a basis for bringing criminal charges against him was found. Mr. Ismailov was not provided with a lawyer during his interrogation and home search, in violation of the Uzbek legislation. The same day he was arrested by NSS agents and taken to the pretrial detention facility of NSS without being informed of any charges against him.

2.2 On 1 July 2005, by a decision of the investigator, Mr. Ismailov was informed about his status as an accused in a criminal trial. His remand in detention was approved by the Deputy General Prosecutor of the Military Prosecutor's Office of Uzbekistan. The same day Mr. Ismailov's family hired a lawyer for his defence. However, the NSS investigator, in violation of article 116 of the Constitution and of criminal procedure legislation, did not allow the privately retained lawyer to represent the interests of the accused, invoking the confidential nature of the case. He assigned another lawyer to the case.

2.3 On 26 January 2006, the Military Court of the Republic of Uzbekistan found Mr. Ismailov guilty of offences under article 157 (treason) and article 248 (illegal ammunition storage) of the Uzbek Criminal Code. He was sentenced to 20 years' imprisonment. According to the judgment, Mr. Ismailov revealed State secrets (in particular information regarding the Uzbek Intelligence Service) and handed over files containing cryptograms related to secret negotiations to a representative of the Russian Embassy. Although Mr. Ismailov held the meeting with the Russian attaché at his place of work, he was accused of not reporting the Russian agent's interest in these issues.

2.4 On 5 February 2007, Mr. Ismailov filed a cassation appeal to the Judicial Chamber of the Military Court of the Republic of Uzbekistan. On 22 February 2007, the court dismissed his appeal, stating that his guilt had been properly established by the court of first instance.

2.5 The author (wife of Mr. Ismailov) and Ms. Gavkhar Ismailova (Mr. Ismailov's mother) lodged numerous complaints with the President of Uzbekistan.² However, all these complaints were redirected to the Prosecutor's Office and dismissed, without any explanations as to the lawfulness of Mr. Ismailov's arrest and conviction.³ On 3 December 2007, Ms. Gavkhar Ismailova lodged a complaint with the Supreme Court on behalf of her son, which was dismissed on 24 December 2007.

2.6 The author contends that all available and effective domestic remedies have been exhausted.

The complaint

3.1 The author claims that her husband was arrested on 29 June 2005 without being informed of any charges against him, in violation of article 9, paragraph 2, of the Covenant.

² From the materials on file, it transpires that the author complained unsuccessfully on several occasions to the Minister of Foreign Affairs of the Russian Federation and the Federal Security Service of the Russian Federation, as well as to the Ambassador of the Russian Federation in Uzbekistan.

³ According to documents on file, the complaints were dismissed by the Prosecutor's Office on 17 March 2006, 23 April and 10 May 2007, respectively.

She further claims that her husband's arrest was authorized by the Deputy General Prosecutor of the Military Prosecutor's Office of Uzbekistan on 1 July 2005, in violation of article 9, paragraph 3, of the Covenant.

3.2 The author alleges that her husband's rights under article 14, paragraph 3 (b) and (d) were violated, as the investigating officer, invoking the confidential nature of the case, denied her husband's right to have the legal assistance of the lawyer hired by his family, and assigned another lawyer to the case. The author maintains that her husband met the newly assigned lawyer twice only, the first time on 1 July 2005. She claims that he was not present during the investigation acts, but signed all the reports of interrogation on 23 July 2005, after her husband had confessed guilt under pressure. Thereby, the accusation restricted Mr. Ismailov's constitutional and procedural rights to appeal against the acts and decisions of the investigator, including against the decision in relation to his illegal arrest, due to the fact that he was prevented from having the assistance of a lawyer of his own choosing for the preparation of the respective appeals. The author submits that it was only during the trial that the privately retained lawyer was able to represent Mr. Ismailov.

3.3 The author further alleges that the criminal investigation was incomplete and refers to the inconsistency between the conclusions of the courts and the factual circumstances of her husband's case. During the pretrial investigation as well as at the time of court proceedings, her husband's requests to summon and examine several witnesses who would have testified in his favour and whose testimonies were important for the outcome of the criminal case, were repeatedly denied, in violation of article 14, paragraph 3 (e), of the Covenant. The courts refused, *inter alia*, to issue a subpoena to hear the testimony of citizens of the Russian Federation to whom Mr. Ismailov allegedly revealed State secrets. She claims that it would have been possible for the court to do so in accordance with the Minsk Convention on Judicial Assistance and Legal Relations in Civil, Family and Criminal Cases (1993). Furthermore, her husband's requests to thoroughly examine all documents and evidence on file were unreasonably denied by the courts, in violation of article 14, paragraph 1, of the Covenant. She affirms that the court was biased as it assumed Mr. Ismailov's guilt before examining all the evidence, in violation of article 26 of the Constitution and article 22 and 23 of the Code of Criminal Procedure.

3.4 The author claims that the pretrial investigation and the trial itself were conducted with important breaches of procedural norms and of Mr. Ismailov's constitutional and procedural rights. During the pretrial investigation, her husband was subjected to psychological pressure, in violation of article 26 of the Constitution, article 17 and article 88 of the Criminal Procedure Code, and, as a result, he was compelled to confess guilt. While Mr. Ismailov was in detention, NSS agents conducted five searches in his and his close relatives' apartments, none of which were authorized by a prosecutor, and exerted psychological pressure on them. The author claims that NSS agents searched lawfully her car and decided it was not related to the criminal case against her husband. Thereafter, however, they seized the car and told the author that it would be returned if her husband confessed that he was spying for a foreign country and revealed his code name. Furthermore, NSS agents attempted to prevent the departure of her husband's sister to the United States of America for permanent residence, threatening her with opening a criminal case against her and with confiscation of her apartment and car if her brother did not confess guilt. Thus, the author claims that her husband confessed guilt in order to stop the pressure on his family.⁴ During the proceedings her husband changed his initial deposition

⁴ It transpires from the documents on file that these allegations of psychological pressure on Mr. Ismailov and his family members were raised in the trial court, the cassation appeal of 5 February 2007 and the complaint lodged with the General Prosecutor's Office of Uzbekistan on 3 April 2007. The judgments handed down by the Military Court of the Republic of Uzbekistan (first instance

that had been obtained by way of psychological pressure. Nevertheless, according to the judgment of 26 January 2006, the court considered Mr. Ismailov's allegation of psychological pressure as unfounded and unconvincing and decided that the self-incriminating testimony given at the time of pretrial investigation could be used as a basis for his sentence. Thus, the judgment is based solely on his false confession, in breach of articles 26, 455 and 463 of the Code of Criminal Procedure. The author submits that, with the exception of her husband's self-incriminating testimony, the court did not present any other evidence in support of his guilt. These facts constitute a violation of her husband's rights under article 14, paragraph 3 (g), and article 17, paragraph 1, of the Covenant.

3.5 The author claims that the above-mentioned facts as well as other violations of criminal procedure laws that were admitted during the pretrial investigation and in court led to the trial being biased and violated her husband's right to defence and to a fair trial.

State party's observations on admissibility and merits

4. In a note verbale of 16 February 2009, the State party points to the groundlessness of the author's allegations as regards the alleged violations admitted during the criminal investigation and the alleged victim's trial. It submits that in 2005, Mr. Ismailov, abusing his position as a civil servant in the Ministry of Defence of Uzbekistan, was engaged in unauthorized disclosure of State secrets to representatives of a diplomatic mission of a foreign country, thereby putting at risk the interests of national security of Uzbekistan. It further submits that Mr. Ismailov was charged with offences under article 157, paragraph 1 (treason), article 248, paragraph 1 (illegal ammunition storage), and article 301, paragraph 1 (abuse of power) of the Uzbek Criminal Code. On 26 January 2006, the Military Court of the Republic of Uzbekistan found him guilty of the above-mentioned criminal offences and, after the application of the Senate of Oliy Majlis⁵ Decree of 2 December 2005 on amnesty on the occasion of the 13th anniversary of the Constitution of the Republic of Uzbekistan, sentenced him to 15 years of imprisonment. Further consideration of the author's case by the investigation bodies and the Military Court as well as its examination within cassation proceedings did not reveal any violation of the law or of Mr. Ismailov's rights during the pretrial investigation or the trial.

Authors' comments on the State party's observations

5.1 On 20 February 2009, the author submitted her comments on the State party's observations on admissibility and merits. She reiterates her allegation that the investigation and the trial of her husband have been conducted in violation of national legislation and of his constitutional rights as well as of international norms. The Uzbek authorities have not presented any sound and motivated answer to the claims raised in her numerous complaints, namely: (a) on the late presentation of charges; (b) on the refusal to allow her husband to have the assistance of a lawyer of his own choosing as well as on the conduct of investigation actions (interrogations, confrontations etc.) in the absence of the lawyer assigned to the case by the investigating officer; (c) on the psychological pressure to which Mr. Ismailov and his family were exposed by blackmail, deceit and numerous home searches; (d) on the court's unreasonable and groundless refusal to call and examine the defence witnesses; (e) on the violation of criminal procedure legislation in relation to the evaluation of evidence in her husband's case as well as on the imposition of a sentence

court) and the Judicial Chamber of the Military Court that heard the cassation appeal did not deal in substance with the claim before dismissing it. It seems that the Prosecutor did not address the substance of the claim either.

⁵ The Senate of Oliy Majlis is the Upper Chamber of the Uzbek Parliament.

based solely on self-incrimination. The author recalls that all these allegations have been reflected in her original submission to the Committee.

5.2 The author submits that the State party failed to address in its observations the question of admissibility and merits of her communication under the Optional Protocol. She contends that her husband's persecution by the non-application of the annual amnesty laws is an indication of the State party's intention to delay his release from prison.

5.3 By letter dated 15 April 2010, the author submits that the persecution of her husband continues through the non-application of annual amnesty laws, ongoing psychological and physical pressure, denial of access to qualified medical aid and worsening of his imprisonment conditions. On 24 March 2010 Mr. Ismailov was transferred from the Bekabad prison Uya 64/21 to the Tashkent prison and, on 9 April 2010, to the colony of strict regime Uya 64/71 in Zhaslyk city (Karakalpakstan). The transfer confirms the authorities' intention to worsen his conditions of imprisonment.

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 article 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 any other procedure of international investigation or settlement. With respect to the requirement of exhaustion of domestic remedies, the Committee notes the various complaints and appeals filed by Mr. Ismailov. It also notes that the State party has not challenged the admissibility of the present communication on such grounds. Accordingly, the Committee considers that the requirement of article 5, paragraph 2 (b), of the Optional Protocol has been met.

6.3 With respect to the author's allegation that the home searches conducted without the authorization of the prosecutor constitute a violation of article 17, paragraph 1, of the Covenant, the Committee observes that the author has not provided sufficient information to substantiate this claim, including information on whether this allegation was brought before the judicial authorities. Accordingly, the Committee considers this claim inadmissible under article 2 of the Optional Protocol, for lack of substantiation.

6.4 The Committee considers that the author has sufficiently substantiated, for purposes of admissibility, her claims under articles 9, paragraphs 2 and 3; and article 14, paragraphs 1 and 3 (b), (d), (e) and (g), of the Covenant, and therefore proceeds to their examination 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 from the parties, in accordance with article 5, paragraph 1, of the Optional Protocol. It notes that the State party has not provided any information related to the substance of the communication, and has not addressed in detail the specific violations alleged to have occurred. In the absence of any pertinent information from the State party on the substance of the author's claims, due weight must be given to the author's allegations, to the extent that these have been properly substantiated.

7.2 The Committee takes note of the author's claim that, on 29 June 2005, her husband was arrested and taken to the pretrial detention facility of the National Security Service without being informed of any charges against him. It was only on 1 July 2005 that he was

informed of criminal charges. The Committee recalls that article 9, paragraph 2, requires that anyone arrested shall be informed at the time of arrest of the reasons of arrest and of any charges. In the absence of any observation by the State party regarding the author's allegations, the Committee considers that the facts, as submitted, reveal a violation of this provision.⁶

7.3 The Committee notes the author's claim that, after her husband's arrest on 29 June 2005, his remand into detention was authorized by the Deputy General Prosecutor of the Military Prosecutor's Office of Uzbekistan in violation of article 9, paragraph 3, of the Covenant. The Committee recalls its established jurisprudence⁷ that paragraph 3 of article 9 entitles a detained person charged with a criminal offence to judicial control of his/her detention. It is inherent in 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 can 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 concludes, therefore, that the facts as submitted reveal a violation of this provision.

7.4 The Committee takes note of the author's allegations that her husband's rights under article 14, paragraph 3 (b) and (d), were violated, as he was not provided with a lawyer during the interrogation and his right to have the assistance of the lawyer of his own choosing was denied by the investigator, who assigned another lawyer to the case. The Committee further notes the author's claims that the lawyer assigned met her husband only twice and that, although the investigation actions were carried out in his absence, he signed all the interrogation reports at the end of the criminal investigation. The Committee recalls that subparagraph 3 (b) of article 14 provides that accused persons must have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing. This provision is an important element of the guarantee of a fair trial and an application of the principle of equality of arms.⁸ It further recalls that the right of all accused of a criminal charge to defend themselves in person or through legal counsel of their own choosing, or to have legal assistance assigned to them free of charge whenever the interests of justice so require, is provided for by article 14, paragraph 3 (d). The Committee stresses that the counsel provided by the competent authorities on the basis of this provision must be effective in the representation of the accused, and that, in certain cases, the counsel's misbehaviour or incompetence may entail the responsibility of the State concerned of a violation of article 14, paragraph 3 (d).⁹ In the absence of any observations from the State party, the Committee concludes that the denial of access to a lawyer of choice until the trial stage constitutes a violation of Mr. Ismailov's rights under article 14, paragraph 3 (b) and (d), of the Covenant.

7.5 The author claims that her husband had no opportunity to obtain the attendance and examination of important witnesses on his behalf, as the court refused to summon them. The Committee recalls that, as an application of the principle of equality of arms, the guarantee laid down in article 14, paragraph 3 (e), is important to ensure an effective

⁶ Communication No. 1348/2005, *Ashurov v. Tajikistan*, Views adopted on 20 March 2007, para. 6.4.

⁷ 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; *Ashurov v. Tajikistan*, para. 6.5.

⁸ Human Rights Committee 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. 32.

⁹ *Ibid.*, paras. 37 and 38.

defence by the accused and their counsel and guarantees the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.¹⁰ In the absence of any information from the State party as to the reasons for the refusal to allow the presence and examination of defence witnesses, the Committee concludes that the facts as presented by the author amount to a violation of Mr. Ismailov's right under article 14, paragraph 3 (e), of the Covenant.

7.6 The Committee notes the author's claim that her husband was subjected to psychological pressure and that he confessed guilt in order to stop the persecution and psychological attacks upon his family by the NSS agents. It further observes that these allegations were raised both at the trial and cassation proceedings and were dismissed by the Military Court and the Judicial Chamber of the Military Court without the substance of the claim being dealt with. It also seems that the Prosecutor did not address the substance of the claim when dismissing the complaint of 3 April 2007. The State party has not commented on these allegations. The Committee also notes the author's assertion that, although her husband retracted his self-incriminating deposition during the court proceedings, the court ignored this fact and handed down a judgment based solely on his false confession obtained through psychological pressure. The Committee recalls that the safeguard laid down in article 14, paragraph 3 (g), of the Covenant must be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt.¹¹ In the absence of any observations from the State party in this respect, the Committee concludes that the facts, as submitted by the author, disclose a violation of Mr. Ismailov's right under article 14, paragraph 3 (g), of the Covenant.

7.7 Having come to a conclusion in the previous paragraphs, the Committee does not consider it necessary to address the possible violation of article 14, 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 before it disclose a violation of Mr. Ismailov's rights under article 9, paragraphs 2 and 3; and article 14, paragraph 3 (b), (d), (e), and (g), 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. The State party is also under an obligation to consider a retrial in compliance with all guarantees enshrined in the Covenant, or release, as well as appropriate reparation, including compensation. The State party is also under an obligation to take steps to prevent similar violations occurring 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 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

¹⁰ Ibid., para 39.

¹¹ Ibid., para. 41. See also communications No. 330/1988, *Berry v. Jamaica*, Views adopted on 7 April 1994, para. 11.7; No. 1033/2001, *Singarasa v. Sri Lanka*, Views adopted on 21 July 2004, para. 7.4; No. 912/2000, *Deollall v. Guyana*, Views adopted on 1 November 2004, para. 5.1.

Committee's Views. In addition, the State party is requested 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.]

QQ. Communication No. 1776/2008, *Ali Bashasha and Hussein Bashasha v. Libyan Arab Jamahiriya* (Views adopted on 20 October 2010, 100th session)*

<i>Submitted by:</i>	Salem Saad Ali Bashasha (represented by the World Organisation Against Torture and Libyan Human Rights Solidarity)
<i>Alleged victims:</i>	The author and Milhoud Ahmed Hussein Bashasha (the author's cousin)
<i>State party:</i>	Libyan Arab Jamahiriya
<i>Date of communication:</i>	8 March 2008 (initial submission)
<i>Subject matter:</i>	Enforced disappearance
<i>Procedural issues:</i>	State failure to cooperate, another procedure of international investigation or settlement
<i>Substantive issues:</i>	Prohibition of torture and cruel, inhuman and degrading treatment, right to liberty and security of the person, arbitrary arrest and detention, right of all persons in custody to be treated humanely, absence of effective remedy
<i>Articles of the Covenant:</i>	2, paragraph 3; 6; 7; 9, paragraphs 1 to 5; and 10, paragraph 1
<i>Article of the Optional Protocol:</i>	5, paragraph 2 (a)

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

Meeting on 20 October 2010,

Having concluded its consideration of communication No. 1776/2008, submitted to the Human Rights Committee on behalf of Mr. Salem Saad Ali Bashasha and Mr. Milhoud Ahmed Hussein Bashasha, 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:

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Mr. Mahjoub El Haiba, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

Pursuant to article 90 of the Committee's rules of procedure, Committee member Mr. Michael O'Flaherty did not participate in the examination of the present Views.

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

1.1 The author of the communication is Mr. Salem Saad Ali Bashasha, a Libyan citizen, born in 1942, and currently residing in Switzerland, where he was granted asylum in 1998. He is acting on his own behalf and on behalf of his cousin, Mr. Milhoud Ahmed Hussein Bashasha, also a Libyan national born on 5 September 1966 and who is said to have disappeared in the Libyan Arab Jamahiriya in October 1989. The author claims to be a victim of a violation by the Libyan Arab Jamahiriya¹ of article 7, of the Covenant, and that his cousin is a victim of a violation of articles 2, paragraph 3, 6 (see paras. 3.2 and 5.2 below), 7, 9, paragraphs 1 to 5, and 10, paragraph 1, of the Covenant. He is represented by the World Organisation Against Torture and the Libyan Human Rights Solidarity.

1.2 On 5 June 2008, the State party was informed that, in the absence of any substantiation of its challenge to the admissibility, the admissibility of the communication will be examined together with the merits.

The facts as presented by the author

2.1 The author's cousin Milhoud Ahmed Hussein Bashasha was living with his family in the Shabna district of Benghazi, where he ran a food shop. He was not known to be politically active. The author and his cousin lived in the same house from 1966 to 1977 and had a very close relationship; the author was like a father to his younger cousin. The victim's father is deceased.

2.2 In October 1989, Milhoud Ahmed Hussein Bashasha was arrested for unknown reasons by plain-clothes agents of the Libyan Internal Security Agency. The agents arrived armed at the family home in Benghazi in unmarked cars and did not produce an arrest warrant. His family witnessed the arrest but was not informed where the author's cousin was being taken. The following day, the internal security police searched the author's cousin's house and seized most of his personal belongings, including books, cassettes and papers, without giving any explanations to his family.

2.3 Milhoud Ahmed Hussein Bashasha's arrest coincided with the mass arrests carried out by the Libyan authorities in 1989, when the regime was cracking down on perceived dissidents. Many young persons were arrested in a seemingly indiscriminate manner at that time. Most of them were detained at the Abu Salim prison and then disappeared.²

2.4 Milhoud Ahmed Hussein Bashasha's family and the author made numerous attempts to locate him. Given that the Milhoud Ahmed Hussein Bashasha had been arrested by persons in civilian clothing, his family strongly suspected that he was arrested on political, rather than criminal grounds, as none of the minimal procedural formalities were maintained. Therefore, the family could only inquire with the political authorities about Milhoud Ahmed Hussein Bashasha's fate. They approached the Libyan Internal Security Agency and its various local offices, the office of the Revolutionary Committee and the military police station in Benghazi, a well-known interrogation centre and transit point to Tripoli for political detainees, however always in vain. The family and the author were threatened with arrest and detention if they continued their efforts to locate the victim. The family consequently changed its strategy and used informal channels to try to obtain information about the victim's whereabouts. The author explains that the practice of informally approaching persons known to work for the internal security agency is the customary way for Libyan citizens to get information about missing family members.

¹ The Optional Protocol entered into force for Libyan Arab Jamahiriya on 16 May 1989.

² See Amnesty International Report, Libya Amnesty International's prisoner concerns in the light of recent legal reforms, June 1991, pp. 2-3, 8.

2.5 More than half a year after his arrest, the family suspected that Milhoud Ahmed Hussein Bashasha was being detained at the Abu Salim prison outside Tripoli, where many persons arrested in the fall of 1989 were detained. The family's requests to visit Milhoud Ahmed Hussein Bashasha were all denied. While refusing to confirm Milhoud Ahmed Hussein Bashasha's presence at the prison, the prison guards regularly accepted food and clothing brought by the family for him. The family understood this as a confirmation of Milhoud Ahmed Hussein Bashasha's detention at the prison, without knowing, however, if the items they had brought were reaching him.

2.6 Over the years, the family periodically received confirmation from released detainees that Milhoud Ahmed Hussein Bashasha was detained at Abu Salim prison. In 1994, a released detainee³ confirmed that he had heard that he was detained at Abu Salim prison. He also reported on the extremely poor conditions of detention, severe overcrowding, systematic beatings and undernourishment.

2.7 In the summer of 1996, special military forces killed a large number of detainees at the Abu Salim prison. The poor prison conditions that sparked the Abu Salim "riot" have been widely documented, for example in a report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment,⁴ according to which the prison conditions are harsh, overcrowded and unsanitary and available information indicated that the lack of adequate food, medical care and the use of torture and other forms of ill-treatment had resulted in the deaths of political prisoners.

2.8 On 24 May 2003, the author submitted his cousin's case to the Working Group on Enforced or Involuntary Disappearances. The case was registered as case No. 1002049 and transmitted to the Government of the Libyan Arab Jamahiriya on 29 August 2003. On 17 September 2003, the Working Group informed the author that the Government of the Libyan Arab Jamahiriya had failed to respond to its request for clarification. The author has received no further information from the Working Group.

The complaint

3.1 The author claims that his cousin is a victim of a violation of article 2, paragraph 3, of the Covenant as the State party failed to investigate his disappearance and, since 1989, the State party has not provided any information to his family as to his whereabouts or fate.⁵

3.2 The author submits that he does not invoke a violation of article 6, of the Covenant, as he does not know if his cousin is dead and continues to hope that he is still alive.

3.3 The author further submits that his cousin is a victim of a violation of articles 7 and 10, paragraph 1, because he has been held in incommunicado detention since 1989. The author refers to the Committee's Views in *El-Megreisi v. Libyan Arab Jamahiriya*,⁶ confirmed in *El Alwani v. Libyan Arab Jamahiriya*⁷ and *El Hassy v. Libyan Arab Jamahiriya*,⁸ in which the Committee found that prolonged incommunicado detention in an

³ The name of this detainee is known to the author but his identity is not disclosed for fear of retaliation.

⁴ E/CN.4/1999/61, para. 448.

⁵ See 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. 4; communication No. 107/1981, *Almeida de Quinteros v. Uruguay*, Views adopted on 21 July 1983, para. 16.

⁶ Communication No. 440/1990, Views adopted on 23 March 1994, para. 5.4

⁷ Communication No. 1295/2005, Views adopted on 11 July 2007.

⁸ Communication No. 1422/2005, Views adopted on 24 October 2007.

unknown location amounted to a violation of articles 7 and 10, paragraph 1, of the Covenant.

3.4 Referring to the Committee's jurisprudence,⁹ the author claims to be, himself, a victim of a violation of article 7, because of the acute, long and chronic mental anguish that he has suffered due to the uncertainty of his cousin's fate. The author further recalls that he had a very close relationship with his cousin, similar to that of a father and that he has been trying to inquire about his cousin's fate since his arrest in 1989.

3.5 He further claims that his cousin is a victim of violation of article 9, because he was arbitrarily arrested without an arrest warrant and held incommunicado for a prolonged period of time, without being charged or convicted of a crime or other offence (art. 9, para. 1), informed of the reasons for his detention and of the charges against him (art. 9, para. 2) and never brought before a judge (art. 9, para. 3). By disappearing him, the State party made it impossible to challenge the legality of the author's cousin's detention (art. 9, para. 4) and to seek compensation for his unlawful arrest and detention (art. 9, para. 5).

3.6 On admissibility, the author submits that the same matter has not been examined by another procedure of international investigation or settlement. He argues that the procedure before the Working Group on Enforced or Involuntary Disappearances cannot be considered a "procedure of international investigation or settlement" for the purpose of article 5, paragraph 2 (a), of the Optional Protocol.

3.7 As regards exhaustion of domestic remedies, the author recalls the Committee's jurisprudence, according to which the exhaustion requirement of article 5, paragraph 2 (b), of the Optional Protocol applies only to the extent that local remedies are available, effective and not unreasonably prolonged.¹⁰ He argues that there are no effective remedies for human rights violations in the Libyan Arab Jamahiriya because the judiciary is not independent from the Government of Colonel al-Gaddafi. The author refers to communications No. 440/1990, *El-Megreisi v. Libyan Arab Jamahiriya*, No. 1295/2004, *El Alwani v. Libyan Arab Jamahiriya* and No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya* and argues that the Committee had accepted that in the Libyan Arab Jamahiriya no effective remedies exist against public officials and that the victims or persons acting on their behalf would face unreasonable high risks of harm by attempting to invoke any remedies. The author further argues that the failure of Libya to provide information on the implementation of the Committee's Views in communication No. 440/1990 (*El-Megreisi v. Libyan Arab Jamahiriya*)¹¹ is further evidence of the ineffectiveness of the Libyan legal system and the unavailability of legal remedy against public officials. The author submits that domestic remedies are neither effective, nor available and that, therefore, he should not be required to exhaust them, as they are objectively futile.¹² The author further submits that he was not in a position to appeal to the judicial authorities to request for an investigation to be carried out into the fate of the victim, because of a general climate of fear,¹³ particularly surrounding the fate of political detainees at Abu Salim prison and the unreasonable high risk of harm to which he would have exposed himself and the victim's family.

⁹ *Almeida de Quinteros v. Uruguay* (note 5 above), para. 14.

¹⁰ See for example communication No. 147/1983, *Arzuaga Gilboa v. Uruguay*, Views adopted on 1 November 1985, para. 7.2.

¹¹ The Committee's concluding observations on the fourth periodic report of the Libyan Arab Jamahiriya (CCPR/C/LBY/CO/4), para. 7.

¹² See communication Nos. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989.

¹³ See communication No. 594/1992, *Phillip v. Trinidad and Tobago*, Views adopted on 20 October 1998, para. 6.4.

State party's observations

4.1 On 2 June 2008, the State party submitted that it wishes to challenge the admissibility pursuant to rule 97, paragraph 3, of the Committee's rules of procedure, without however adducing any arguments.

4.2 On 3 April 2008, 22 January 2009, 12 August 2009 and 16 December 2009, the State party was requested to submit information on 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 substantive information with regard to the admissibility 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 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.

4.3 On 28 August 2010, the State party informed the Committee that the author is sought by the Libyan justice.

Further information by the author

5.1 On 17 July 2009, the author submitted a death certificate issued on 12 April 2008, which had been given to the family on 20 June 2009. According to the certificate, the death of the victim occurred on 18 June 1996 in Tripoli and the cause is unknown.

5.2 On 20 August 2010, the author submitted that there appears no longer to be any hope to find Milhoud Ahmed Hussein Bashasha alive. He, therefore, claims that his cousin is also a victim of a violation of article 6, of the Covenant, as there is no evidence that his cousin died of a natural cause, but as a consequence of his enforced disappearance.

5.3 On 16 September 2010, the author referred to the State party's submission of 28 August 2010 and argued that the State party's explanations appeared to be contradictory with the information in the author's possession, including his cousin's death certificate. The author expressed concern at the State party's failure to cooperate and reiterated that he wished to be informed of the true cause of his cousin's death by means of an independent and impartial investigation. The investigation should be carried out by a competent body and the findings should be made public.

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 of the Covenant.

6.2 The Committee notes that the author submitted his cousin's case to the Working Group on Enforced or Involuntary Disappearances, which informed him on 17 September 2003 that the Libyan Arab Jamahiriya failed to provide any information as requested. The Committee, however, recalls that extra-conventional procedures or mechanisms established by the Commission on Human Rights, and assumed by the Human Rights Council, or the Economic and Social Council, and 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 a procedure of international investigation or

settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.¹⁴ The Committee recalls that the study of human rights problems of a more global character, although it might refer to or draw on information concerning individuals, cannot be seen as being the same matter as the examination of individual cases within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.¹⁵ Accordingly, the Committee considers the fact that Milhoud Ahmed Hussein Bashasha's case was registered before the Working Group on Enforced or Involuntary Disappearances does not make it inadmissible under this provision.

6.3 With respect to the requirement of exhaustion of domestic remedies, the Committee reiterates its concern that in spite of three reminders addressed to the State party no substantive information or observations on the admissibility, which the State party challenged without providing any arguments, or merits of the communication have been received from the State party. In the circumstances, the Committee finds that it is not precluded from considering the communication under article 5, paragraph 2 (b), of the Optional Protocol. The Committee finds no other reason to consider the communication inadmissible and thus proceeds to its consideration on the merits, in as much as the claims under article 6; article 7; article 9; article 10, paragraph 1; and article 2, paragraph 3, are concerned.

Consideration of merits

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

7.2 The Committee recalls paragraph 7.3 of the communication *El Abani v. Libyan Arab Jamahiriya*,¹⁶ in which it stated that any act leading to an enforced disappearance of a person constitutes a violation of many of the rights enshrined in the Covenant. It also notes that the State party has provided no response to the author's allegations regarding the enforced disappearance of his cousin. It reaffirms 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 evidence and that frequently the State party alone has access to the relevant information.¹⁷ 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 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 an author's allegations substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party.¹⁸

7.3 With respect to the alleged violation of article 6, paragraph 1, the Committee recalls its general comment No. 6, in which it states, inter alia, that States parties should take

¹⁴ See communication No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996, para. 7.1.

¹⁵ See communication No. 1495/2006, *Zohra Madoui v. Algeria*, Views adopted on 28 October 2008, para. 6.2.

¹⁶ See communication No. 1640/2007, Views adopted on 26 July 2010, para. 7.3.

¹⁷ See communications No. 1640/2007, *El Abani v. Libyan Arab Jamahiriya*, Views adopted on 26 July 2010, para. 7.4; *El Hassy v. Libyan Arab Jamahiriya* (note 8 above), para. 6.7; No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.3; and No. 139/1983, *Conteris v. Uruguay*, Views adopted on 17 July 1985, para. 7.2.

¹⁸ See Communication No. 1439/2005, *Aber v. Algeria*, Views adopted on 13 July 2007, para. 7.2.

specific and effective measures to prevent the disappearance of individuals and establish facilities and procedures to investigate thoroughly, by an appropriate impartial body, cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.¹⁹ The Committee observes that on 20 June 2009, the family was provided with Milhoud Ahmed Hussein Bashasha's death certificate, without any explanation as to the cause or the exact place of his death or any information on any investigations undertaken by the State party. In the circumstances, the Committee finds that the right to life enshrined in article 6 has been violated by the State party.

7.4 In the present case, the Committee notes that the author's cousin was reportedly arrested in October 1989 by what clearly appears to be internal security officers, armed and in plain clothes. The victim's family witnessed the arrest and was present the following day when agents of the Internal Security Police returned and confiscated Milhoud Ahmed Hussein Bashasha's belongings. The Committee notes that the State party has not provided any explanation for these allegations, thus making it impossible to shed the necessary light on the victim's arrest and subsequent incommunicado detention. The Committee recognizes the degree of suffering entailed in being detained indefinitely and deprived of all contact with the outside world. In this connection, the Committee recalls its general comment No. 20 (1992) on the prohibition of torture and cruel treatment or punishment, in which it recommends that States parties should make provisions against incommunicado detention.²⁰ In the absence of any satisfactory explanation by the State party concerning the disappearance of the author's cousin, his detention since 1989, having been prevented from communicating with his family and the outside world and his unexplained death in 1996, the Committee considers that Milhoud Ahmed Hussein Bashasha's enforced disappearance constitutes a violation of article 7 of the Covenant.²¹

7.5 The Committee also takes note of the anguish and distress caused by the disappearance of the author's cousin to his close family, including the author, since October 1989. It therefore considers that the facts before it disclose a violation of article 7 of the Covenant with regard to the author.²²

7.6 With regard to the alleged violation of article 9, the information before the Committee shows that the author's cousin was arrested without a warrant by plain clothes agents of the State party, was then held incommunicado without access to defence counsel and without ever being informed of the reasons for his arrest or the charges against him. The Committee recalls that the author's cousin was never brought before a judge and never could challenge the legality of his detention. In the absence of any pertinent explanation from the State party, the Committee finds a violation of article 9 of the Covenant.²³

7.7 Regarding the author's complaint under article 10, paragraph 1, that his cousin was held incommunicado at Abu Salim prison, under poor conditions of detention, severe overcrowding, systematic beatings and undernourishment, the Committee reiterates that

¹⁹ Note 5 above, para. 4.

²⁰ See *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A.

²¹ See *El Abani v. Libyan Arab Jamahiriya* (note 17 above), para. 7.4; *El Hassy v. Libyan Arab Jamahiriya* (note 8 above), para. 6.2; *El Awani v. Libyan Arab Jamahiriya* (note 7 above), para. 6.5; *Celis Laureano v. Peru* (note 14 above), para. 8.5; and communication No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994, para. 9.4.

²² *Almeida de Quinteros v. Uruguay* (note 5 above), para. 14; communication No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003, para. 9.5; communication No. 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006, para. 9.8; *El Hassy v. Libyan Arab Jamahiriya* (note 8 above), para. 6.11.

²³ See *Medjnoune v. Algeria* (note 17 above), para. 8.5.

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 cousin in Abu Salim prison and noting what has been reported on the general conditions in that prison,²⁴ the Committee concludes that his rights under article 10, paragraph 1, were violated.²⁵

7.8 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 enshrined in the Covenant. The Committee reiterates the importance it attaches 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, 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.²⁶ In the present case, the information before the Committee indicates that the author's cousin did not have access to such effective remedy, and the Committee therefore concludes that the facts before it reveal a violation of article 2, paragraph 3, read in conjunction with article 7.²⁷

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 reveal violations by the State party of articles 6 and 7 alone and read in conjunction with article 2, paragraph 3, article 9, article 10, paragraph 1, of the Covenant with regard to the author's cousin; and of article 7 of the Covenant with regard to the author himself.

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. The Committee therefore urges the State party: (a) to conduct a thorough and effective investigation into the disappearance and death of the author's cousin; (b) to provide adequate information resulting from its investigation; (c) to return to the family the mortal remains of Milhoud Ahmed Hussein Bashasha, provided that the State party has not already done so; (d) to prosecute, try and punish those held responsible for the violations; and (e) to provide adequate compensation for the author and Milhoud Ahmed Hussein Bashasha's family for the violations suffered by the author's cousin. 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 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

²⁴ E/CH.4/1999/61, para. 448.

²⁵ See general comment No. 21 (1992) on humane treatment of persons deprived of liberty, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. B, para. 3; communication No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2; and *El Hassy v. Libyan Arab Jamahiriya* (note 8 above), para. 6.4.

²⁶ See general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40, vol. I (A/59/40 (Vol. I))*, annex III, paras. 15 and 18.

²⁷ See *El Hassy v. the Libyan Arab Jamahiriya* (note 8 above), para. 6.9; and communication No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 9.9.

effect to the Committee's Views. The State party is also requested 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.]

**RR. Communication No. 1777/2008, *Crochet v. France*
(Views adopted on 25 October 2010, 100th session)***

<i>Submitted by:</i>	Roger Crochet (represented by Manuel Riera and Alain Lestourneaud)
<i>Alleged victim:</i>	The author
<i>State party:</i>	France
<i>Date of communication:</i>	28 December 2007 (initial submission)
<i>Decision on admissibility</i>	5 October 2009
<i>Subject matter:</i>	Allegation of bias on the part of the courts and of a denial of justice
<i>Procedural issues:</i>	Status of victim, exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to a fair trial, equality of arms
<i>Article of the Covenant:</i>	5, paragraph 2 (b)
<i>Article of the Optional Protocol:</i>	14, paragraph 1

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

Meeting on 25 October 2010,

Having concluded its consideration of communication No. 1777/2008, submitted to the Human Rights Committee on behalf of Mr. Roger Crochet 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 author of the communication is Mr. Roger Crochet, a French national born on 15 April 1928. He considers himself and his limited company SA Celogen to be victims of a violation by the State of France of article 14, paragraph 1, of the Covenant. He is represented by counsel, Mr. Manuel Riera and Mr. Alain Lestourneaud.¹

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Ms. Christine Chanet did not take part in the adoption of the present decision.

¹ The Covenant and its Optional Protocol entered into force for France on 4 February 1981 and 17 May 1984, respectively.

1.2 On 12 June 2008, at the request of the State party, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, decided to consider the admissibility of the communication separately from the merits.

The facts as submitted by the author

2.1 On 12 October 1994, tax officers conducted a search on the premises of Le Macumba discotheque in Saint-Julien-en-Genevois, pursuant to an order issued on 11 October 1994 by the President of Thonon-les-Bains regional court. The search was conducted as part of an investigation into suspected company and turnover tax fraud by SA Celogen.² On that occasion, the officers seized a duplicate set of admission tickets with identical colours, prices and serial numbers.

2.2 On 7 February 1995, in implementation of an order issued by the President of the Bordeaux regional court on 17 January 1995, a search was also carried out on the premises of the Laborde printing works in Bordeaux. Various documents relating to the set of duplicates found on 12 October 1994 were seized on that occasion. On 21 March 1995, a police report³ was filed on the existence of a double ticketing operation (regulations on entertainment facilities that charge an admission fee).

2.3 On 12 January 1996, the author and SA Celogen were summoned by the tax authorities to appear before the Thonon-les-Bains Criminal Court to answer charges involving 305,000 admission tickets. On 10 October 1997, the accused filed an application with the President of the Thonon-les-Bains regional court seeking an annulment of all the procedures carried out further to the President's order of 11 October 1994. Following several appeals brought by the author and his company, adjournments before the Thonon-les-Bains Criminal Court and the serving of several writs of summons by the tax authorities,⁴ the Court of Cassation ruled in a judgement of 16 January 2002 that this application concerned the merits of the case.⁵

2.4 The hearing finally took place before the regional court, sitting as a criminal court, on 3 April 2002. The accused,⁶ acting jointly and severally, drew attention to a series of procedural errors committed by the tax authorities which ought to have voided the procedure.⁷ The author also cited article 6, paragraph 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which guarantees the right to a fair trial.

2.5 In its judgement of 18 September 2002, the Thonon-les-Bains regional court, sitting as a criminal court, convicted the author and his company jointly and severally.⁸ On 13 November 2003, Chambéry Appeal Court rejected the line of argument that the accused

² Book of Tax Procedures, art. 16 B.

³ General Tax Code, art. 290 quater and annex IV, arts. 50 sexies B ff.

⁴ Writs served on 10 November and 4 December 1998.

⁵ The court that rules on the merits is the court of first instance or the court of appeal.

⁶ The author and SA Celogen.

⁷ The accused argued, *inter alia*, that the tax authorities had committed a procedural abuse by obtaining authorization for a search on the premises of the discotheque pursuant to article L16 B of the Book of Tax Procedures, an article which does not apply to indirect taxation or to the offences that were actually prosecuted. Originally, the search had in fact been authorized to seek evidence of fraud on the part of SA Celogen, which was suspected of evading company tax and turnover taxes (direct taxation).

⁸ Mr. Crochet and SA Celogen were sentenced severally to pay the Tax Office a fine of €305,000 and a penalty of €109,581, and had €328,000 confiscated out of a potential total of €2,096,173.99. They were also sentenced to enforcement by committal.

presented for a second time at appeal. The Court upheld the guilty verdict and the sentence handed down at first instance. In statements dated 14 and 18 November 2003, the author and SA Celogen filed an appeal with the Court of Cassation against the Appeal Court judgement. In support of the appeal, the accused submitted a supplementary memorial which concluded with a series of distinct points of law claiming, on various grounds, a violation of the fair trial principle enunciated in article 6, paragraph 1, of the European Convention on Human Rights. In a judgement delivered on 1 December 2004, the Court of Cassation dismissed the appeal, thus terminating the procedure before the ordinary courts.

2.6 A second round of proceedings, this time before the domestic administrative courts, was the subject of a judgement handed down by the Lyon Administrative Appeal Court on 11 October 2007.⁹

The complaint

3.1 The author maintains that the State party breached article 14, paragraph 1, of the Covenant, inasmuch as the courts that heard the case failed to establish that an offence had actually been committed and that there was a case to answer on the basis of the legally applicable rules of evidence, without arbitrarily distorting the evidentiary system and by means that would ensure that any sentence handed down was legally consistent with the proven offence. The author maintains that the harsh sentence imposed on him and SA Celogen was arbitrary and also amounted to a denial of justice.

3.2 The conviction is based essentially on the seizure by administrative officials of a set of allegedly illegal admission tickets. Yet, no one has ever claimed that these duplicate tickets were ever put on the market or that they generated the slightest income. Hence, there were no grounds for allowing the charge to stand when the alleged offence was referred to the courts.

3.3 The author claims that the confiscation “arbitrated” by the domestic courts of the sum of €328,000 was calculated on the basis of an income that both the administrative authorities and the courts themselves acknowledge as being purely fictitious, since it was a hypothetical calculation based on the revenue that the seized tickets “might have generated” had they actually been put on the market.

3.4 Moreover, even though it is recognized that the seized tickets were never put on the market and thus no tax was owed on them at the time when they were seized, the proportional penalty applied with regard to the hypothetical confiscation included value added tax at a rate of 18.6 per cent.

3.5 Lastly, the author considers the evidentiary system used by the tax authorities and the domestic courts to be based entirely on a reversal of the burden of proof, which is not appropriate in criminal proceedings. On 21 March 1995, the authorities filed the contested police report, which was subsequently laid against the author and SA Celogen, imposing on them, the author claims, a disproportionate requirement to prove that they had not committed an offence. A preliminary examination conducted in the presence of both parties would have guaranteed the author and his company a better defence. This breach of the principle of equality of arms amounts to a violation of the right to a fair trial.

⁹ The tax authorities initiated proceedings for a punitive tax assessment before the Grenoble administrative court, which acceded to their requests in a judgement dated 3 April 2003. SA Celogen, the respondent in the proceeding, appealed this judgement. The Administrative Appeal Court dismissed the appeal on 11 October 2007. SA Celogen lodged an appeal with the Council of State. At the time of consideration of the present communication, the Council of State had not yet delivered its decision.

State party's observations

4.1 In a note dated 3 June 2008, the State party contested the admissibility of the communication from the author on two grounds. First, it is claimed that the communication is partially inadmissible insofar as SA Celogen is concerned. The State party makes this claim based on article 1 of the Optional Protocol, which acknowledges "the competence of the Committee to receive and consider communications from individuals". Since SA Celogen is a commercial enterprise subject to private law and endowed with legal personality, it cannot be considered an "individual" within the meaning of the Optional Protocol.

4.2 Second, the State party contends that the author has not exhausted all domestic remedies. The State party explains that, as the author has stated, two procedures were initiated: one before the civil courts¹⁰ and another before the administrative courts. The case file documents confirm that the administrative procedure is still pending. It follows, the State party argues, that the communication should be declared inadmissible on the ground of non-exhaustion of domestic remedies.

Author's comments

5.1 On 7 August 2008, the author submitted comments on the State party's observations regarding the inadmissibility of the communication with respect to SA Celogen. He argued that, since the capital of SA Celogen is owned and controlled, directly or indirectly, by the family of Mr. Crochet, the term "individuals" allows groups of individuals to submit communications to the Committee. The author goes on to cite Fact Sheet No. 7/Rev.1 issued by the Office of the United Nations High Commissioner for Human Rights which states that "anyone may bring a human rights problem to the attention of the United Nations" and that the procedures are "open to individuals and groups who want the United Nations to take action on a human rights situation of concern to them". According to the author, while public bodies corporate may not be allowed to benefit from article 1 of the Optional Protocol, because they are not made up of individuals, private bodies corporate made up of individuals ought to be allowed to submit communications to the Committee.

5.2 As to the claim regarding non-exhaustion of domestic remedies, the author states that, contrary to the State party's assertions, there is no domestic "procedure before the civil courts" under way. The communication submitted by the author and his limited company challenges a criminal procedure initiated by the tax authorities which culminated in the judgement handed down by the criminal division of the Court of Cassation on 1 December 2004. This judgement dismissed the joint appeal lodged by the author and his limited company. Therefore, there is no civil procedure in this case.

5.3 Following the criminal procedure against both the author and his limited company, the tax authorities initiated an administrative procedure for a punitive tax assessment of SA Celogen alone, based on evidence from the aforementioned criminal procedure. The authorities demanded payment of various taxes, surcharges and penalties, together with a fine for failing to report one or more persons who may have benefited from a distribution of profits.

5.4 The author maintains that there are two possibilities in the present case. Either SA Celogen is entitled to submit communications to the Committee, in which case it can be argued that domestic remedies have not been exhausted, or Celogen is not entitled to

¹⁰ The Committee understands the term "civil courts", as used by the State party, to mean the ordinary courts, since the case brought by the tax authorities against the author and SA Celogen clearly involved criminal procedure.

submit a communication to the Committee, in which case there is no point in waiting for the outcome of the administrative procedure in order to take a decision on the violations alleged by the author, since he has no further remedies available.

The Committee's decision on admissibility

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

6.2 The Committee noted that the State party considered the communication to be partially inadmissible *rationae personae* in respect of SA Celogen, a limited company. The Committee also noted the author's argument that criminal proceedings had been brought against the author and SA Celogen jointly and severally. The Committee further noted the author's contention that the capital of SA Celogen was wholly owned and controlled, directly or indirectly, by the family of Mr. Crochet and that the wording of article 1 of the Optional Protocol implied that groups of individuals were authorized to submit communications. The Committee recalled its consistent prior jurisprudence¹¹ and the unambiguous terms of article 1 of the Optional Protocol providing that individuals, and not bodies corporate, may submit a communication to the Human Rights Committee. The Committee found that the author, in referring to the Committee violations of his company's rights, rights which were not protected under the Covenant, was not entitled to lay the matter before the Committee as far as the communication pertained to SA Celogen. The Committee considered that the communication was admissible only with respect to the author, who, in the present case, claimed that he was a victim of a violation of his right under the Covenant to a fair trial.

6.3 With regard to the obligation to exhaust domestic remedies, the Committee took note of the State party's contention that two procedures had been initiated in this case: one before the civil courts and another before the administrative courts. Since the administrative procedure was still pending, the State party considered the communication inadmissible on this ground. The Committee took note of the author's argument that the Court of Cassation judgement of 1 December 2004 terminated the procedure brought against the author and his company jointly and severally and thus left the author with no further remedies and that the tax authorities then initiated an administrative procedure for a punitive tax assessment in respect of SA Celogen alone, based on evidence presented during the aforementioned criminal procedure.

6.4 The Committee recalled that, for a communication to be declared admissible for the purpose of article 5, paragraph 2 (b), of the Optional Protocol, the author must make use of all judicial or administrative avenues that offer him a reasonable prospect of redress.¹² In the present case, the Committee noted that the administrative procedure for a punitive tax assessment which was initiated against SA Celogen, and not against the author, did not entail, and was not in any case designed to offer, a remedy with respect to the irregularities which the author claimed vitiated the criminal procedure. The procedure before the administrative courts concerned a matter that was incidental but not similar to the case before the ordinary courts. Since the author had no other recourse open to him offering a prospect of compensation for the alleged violation of article 14, paragraph 1, of the

¹¹ Communications No. 502/1992, *S.M. v. Barbados*, decision on inadmissibility adopted on 31 March 1994, and No. 737/1997, *Lamagna v. Australia*, decision on inadmissibility adopted on 7 April 1999.

¹² Communication No. 437/1990, *Colamarco Patiño v. Panama*, decision on inadmissibility adopted on 21 October 1994, and communication No. 1533/2006, *Ondracka v. the Czech Republic*, Views adopted on 31 October 2007.

Covenant by the ordinary courts, the Committee considered that article 5, paragraph 2 (b), did not preclude it from considering the communication.

6.5 The Committee considered that the author's allegations, which raise questions under article 14, paragraph 1, of the Covenant, had been sufficiently substantiated for the purposes of admissibility and therefore declared these allegations to be admissible.

State party's observations on the merits

7.1 On 7 May 2010 the State party submitted its observations on the merits, in which it recalled the facts submitted in the communication. It added that, subsequent to the seizure of the unlawful tickets on the premises of the author's company, the printer Mr. Laborde had acknowledged acts that constituted an offence against the law. Before the hearing finally took place before the regional court, sitting as a criminal court, on 3 April 2002, Mr. Laborde had been convicted in a final judgement handed down by Bordeaux Criminal Court on 16 November 2000 for the offences he had committed. During the hearing, he had confirmed his previous statements and explained that his acts had been prompted by his financial dependence on SA Celogen, which was a very large customer. The documents concerning the case against the Laborde printing works were added to the case file against the author and SA Celogen. The author and SA Celogen did not call Mr. Laborde during the hearing before the Thonon-les-Bains Criminal Court on 3 April 2002. The author and his company were convicted by a judgement of 18 September 2002.

7.2 The State party refers to article 290 quater of the General Tax Code in the version applicable at the time the acts were committed, which provides that, in entertainment facilities that charge an admission fee, the operator must issue a ticket to each spectator before he or she enters the theatre. It provides furthermore that offences against this provision or against its implementing legislation shall be investigated, established, prosecuted and punished as matters of indirect taxation. Under article 50 sexies B of annex IV of the General Tax Code, all tickets issued before the spectators enter the theatre must be numbered in an uninterrupted series and used in their numerical order. A ticketing operation that consists of duplicate sets of identical tickets is therefore unlawful. The State party maintains that the aim of these provisions is to avoid concealment of receipts and thus tax evasion.

7.3 Article 1791 of the General Tax Code in its version applicable to the case in question provides that any offence against legislation governing indirect taxation or its implementing acts is liable to a fine (the number of fines imposed being equal to the number of tickets found to be unlawful), and a penalty payment of between one and three times the duty, taxes, fees, monetary compensation or other assessments evaded or sought to be evaded, without prejudice to the confiscation of any unlawful objects, products or merchandise seized. Lastly, under article 1804B of the General Tax Code, the court orders the payment of sums fraudulently or improperly obtained as a result of the offence.

7.4 Regarding the provisions applicable to the proceedings before the criminal court, article L235 of the Book of Tax Procedures provides that offences in respect of indirect taxation are subject to prosecution before the criminal court, which hands down the sentence; and that the administrative authorities investigate and present the case brought before the court. Under article L236, the writ of summons provided for in article 550 of the Code of Criminal Procedure must be served within three years of the date of the official report of the offence. Article L238 provides that the official reports by administrative officials shall be considered authoritative in the absence of evidence to the contrary. The person against whom proceedings have been instituted may ask for refuting evidence to be included in the official report. The State party emphasizes that the proceedings are subject to the guiding principles for trials laid down in the preambular article of the Code of Criminal Procedure, which provides that the proceedings must be fair, allow due

participation of the contending parties and maintain the balance between the rights of the parties; it must guarantee separation between the prosecuting authorities and the judicial authorities. Persons in similar conditions who are prosecuted for the same offences should be judged according to the same rules. The authorities ensure that these rights are safeguarded, and the person being prosecuted has the right to be informed of the charges against him or her and to be assisted by a defence counsel.

7.5 On the question of the evidence considered by the criminal court, the State party notes that it was the tax authorities that in fact submitted the first evidence of the offence in support of their direct summons by producing an official report. Secondly, the provision in article L238 of the Book of Tax Procedures that the official report shall be considered authoritative in the absence of evidence to the contrary applies only to the facts given in that report as drawn up by sworn officials, and not to any classification of those facts as crimes. In that connection, the State party recalls that the official report noted, first of all, the seizure from the premises of the companies SA Celogen and Laborde of duplicate sets of entrance tickets and/or related documents. The author did not contend that the seizures had not taken place or that there were no duplicate sets of tickets. Indeed, the seized items were produced in court.

7.6 The official report then mentioned the statements by Mr. Laborde concerning the duplicate ticketing system. The State party considers that, if the author intended to challenge the veracity of Mr. Laborde's statements, then, as the Thonon-les-Bains Criminal Court observed, he should have summoned him as a witness to dispute the content of his statements, which the author did not do. As the law applied in this case contains no derogation from ordinary law in respect of the admissibility of evidence, the court may indeed reach a reasonable certainty of the guilt of the accused based on its sole discretion to assess the evidence argued before it by the parties. The State party also notes that the author had been aware of the content of the report since 1996, and thus had had sufficient time to bring evidence in his favour before the court. Thus the fact that the proceedings were brought by direct summons in no way impaired his right to a fair trial.

7.7 The State party challenges the author's argument that there was no offence because the tickets were never put on the market. Indeed, the Chambéry Appeal Court noted that a duplicate ticketing system "currently in operation and comprising 9,800 tickets, has been discovered in the possession of SA Celogen". The State party adds that the duplicate ticketing system discovered involved a total of 305,000 tickets, of which only a portion was "in operation" when the search and seizure was carried out. As to the method used to calculate the amount to be confiscated, the State party notes that, in the case of an offence against the regulations governing ticketing operations, it is the receipts represented by the unlawful tickets on which tax or inspection was evaded that constitute the instrument of fraud and they are therefore liable to confiscation. Hence the Appeal Court calculated the receipts by multiplying the sales price of each ticket by the total number of unlawful tickets. As concerns value added tax, the penalty applied was an amount of between one and three times the duty, taxes, fees, monetary compensation or other assessments evaded or sought to be evaded. In the present case, the effect of a duplicate ticketing system was that the receipts in question escaped value added tax, which amounts to tax evasion.

Author's comments on the State party's observations

8.1 In comments dated 25 June 2010, the author notes that, during the criminal hearing before the Thonon-les-Bains Criminal Court on 3 April 2002, he argued that the authorities had committed a procedural abuse by obtaining authorization for a search of the premises pursuant to article L16 B of the Book of Tax Procedures, an article which does not apply to indirect taxation or to the offences that were actually prosecuted. He then argued that the summons on the basis of the official report of 12 January 1996 was not admissible for the

reason that the Tax Administration is not the same as the Tax Office and that the name of the civil party was not included in the summons. Furthermore, the offence had lapsed, insofar as the writ of 12 January 1996 must be considered null and void, meaning that more than three years had thus passed between the official report of 21 March 1995 and the summons of 10 November 1998. The author also argued that, to be admissible, the proceedings, originally based on evasion of value added tax, should first have been referred to the Tax Offences Commission.

8.2 During the hearing, the author also noted that the final judgement handed down by Bordeaux Criminal Court in November 2000 in respect of the printer Laborde had fully redressed the harm caused to the administration; that the search and seizure of 12 October 1994 were null and void because of the lack of standing of the two administrative officials; that the official report of 21 March 1995 was null and void because the two signatories had not personally taken part in the findings noted; that the search and seizure at the premises of the Laborde printing works were null and void because the pressure brought to bear by the officials made Mr. Laborde contradict himself; and that there was no official report and thus no evidence establishing that a duplicate numbered ticketing system had actually been in operation.

8.3 In respect of the arguments put forward by the State party, the author notes that the tickets had not been used, as they were on the premises of SA Celogen, and that tickets that have not been seized cannot legally be used as a basis for any conviction, in that they do not exist. The author also challenges the domestic court's application of article 1791 of the General Tax Code, since the criminal court could not order the proportional penalty without determining exactly the total tax actually evaded or sought to be evaded. As to the text of article 1804B of the General Tax Code cited by the State party, it also requires there to have been actual sums fraudulently or improperly obtained as a result of the offence, which has not occurred in this case.

8.4 As to the criminal court proceedings, the author considers that here the administration is acting as victim, complainant, investigator and prosecutor in the criminal process. It thus has excessive powers, and the effect of this multiplication of powers is a violation of the principle of equality of arms and of fair trial. The author also points out that the tickets that have not been used cannot constitute an element of the offence. The author then repeats his arguments in respect of the method used to calculate the amount to be confiscated, saying that the prosecuting officials should first have determined precisely the number of duplicate tickets sold before then calculating the tax evaded. The author raises the same objection in the matter of value added tax.

8.5 Finally, the author mentions that the system derived from article L16B of the Book of Tax Procedures was called into question by the European Court of Human Rights in its judgement in *Ravon and others v. France*, in which it found that article L16B of the Book of Tax Procedures on searches related to tax matters conflicts with article 6 of the European Convention on Human Rights.

Consideration of the merits

9.1 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.

9.2 The Committee notes the arguments of the author, which are that the conviction is based essentially on the seizure of a series of admission tickets that had never been put on the market and thus could not have generated the slightest income; that the confiscation was calculated on the basis of an income acknowledged as being purely fictitious, since it was a hypothetical calculation based on the revenue that the tickets might have generated had they

actually been put on the market; that, even though the tickets were never put on the market and thus no tax was owed on them at the time when they were seized, the proportional penalty applied with regard to the hypothetical confiscation included value added tax at a rate of 18.6 per cent; and finally that the evidentiary system used by the tax authorities and the domestic courts was based entirely on a reversal of the burden of proof, which is not appropriate in criminal proceedings. The Committee also notes the arguments of the State party that the rules of representation of both parties were respected by the competent courts, that the evidentiary system was used in accordance with existing legislation, that the offence of a duplicate ticketing system was established when the facts occurred, that the penalties such as the amount to be confiscated and the issue of value added tax could only be calculated on the basis of the income that would have resulted from all the duplicate tickets being put on the market, and thus that the courts were right in pronouncing the sentence challenged by the author.

9.3 The Committee observes that the author's challenges as to form and substance were heard by the competent courts, and were all subject to detailed argumentation before being rejected. Regarding the allegation of procedural abuse, in particular, the Thonon-les-Bains regional court responded that the fact that the tax authorities had found offences in respect of indirect taxation as a result of the searches and seizures carried out with the authorization of the President of the regional court pursuant to article L16B of the Book of Tax Procedures did not establish a procedural abuse but, rather, constituted incidental findings; while the Tax Administration added that, in line with previous domestic jurisprudence, the search of business premises for violations of indirect taxation could have been carried out without any prior formalities. In respect of the lapse of time between the official report establishing the offence and the serving of the summons, and the application to set aside some of the earlier summonses, the court responded that the summons of 10 November 1998 was issued, not as insurance against a possible annulment of the previous one, but rather in order to prevent the offence becoming time-barred, which was clearly what the repeated appeals to the Court of Cassation were intended to achieve were the administrative authorities or the court not to remain alert. Concerning the reversal of the burden of proof, the State party observed that the tax authorities had in fact submitted the first evidence of the offence, in support of the direct summons, by producing an official report. Lastly, according to the State party, the provision in article L238 of the Book of Tax Procedures that the official report shall be considered authoritative in the absence of evidence to the contrary applies only to the facts given in that official report, as drawn up by sworn officials, and not to any classification of those facts as crimes.

9.4 The Committee recalls its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial¹³ and its consistent prior jurisprudence by which article 14 guarantees only procedural equality and fairness. It is generally for the courts of State parties to the Covenant to review facts and evidence, or the application of domestic legislation, in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice, or that the court otherwise violated its obligation of independence and impartiality.¹⁴ In the present case, the material before the Committee, and more particularly the decisions of the Thonon-les-Bains regional court, the Chambéry Appeal Court and the Court of Cassation, contain

¹³ *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI.

¹⁴ See communications No. 207/1986, *Moraël v. France*, Views adopted on 28 July 1989, para. 9.4; No. 541/1993, *Simms v. Jamaica*, decision on inadmissibility adopted on 3 April 1995, para. 6.2; No. 1537/2006, *Gerashchenko v. Belarus*, decision on inadmissibility adopted on 23 October 2009, para. 6.5.

no element to demonstrate that the court proceedings suffered from such defects or that the classification as a crime of the existence of a duplicate ticketing system — a fact not challenged by the author — amounted to a manifest error. The Committee therefore finds that the author's allegations do not disclose a violation of article 14, paragraph 1, of the Covenant.

10. In the light of the above, 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 any violation of the Covenant.

[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.]

**SS. Communication No. 1780/2008, *Aouabdia et al. v. Algeria*
(Views adopted on 22 March 2011, 101st session)***

<i>Submitted by:</i>	Mériem Zarzi (represented by TRIAL – Swiss Association against Impunity)
<i>Alleged victims:</i>	Brahim Aouabdia (the author's husband), the author herself, and their six children, Mohamed Salah Aouabdia (31), Abderaouf Aouabdia (30), Abdelatif Aouabdia (25), Seif Eddine Aouabdia (24), Shoaïb Aouabdia (19) and Sabah Aouabdia (18)
<i>State party:</i>	Algeria
<i>Date of communication:</i>	29 October 2007 (initial submission)
<i>Subject matter:</i>	Enforced disappearance of a person detained for nearly 17 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
<i>Articles of the Covenant:</i>	2, paragraph 3; 6, paragraph 1; 7; 9, paragraphs 1–4; 10; 16
<i>Article of the Optional Protocol:</i>	5, paragraph 2 (a) and (b)

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

Meeting on 22 March 2011,

Having concluded its consideration of communication No. 1780/2008, submitted to the Human Rights Committee by Mériem Zarzi 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:

* The following members of the Committee participated in the examination of the present communication: Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Krister Thelin and Ms. Margo Waterval.

Pursuant to rule 90 of the Committee's rules of procedure, Mr. Lazhari Bouzid did not participate in the adoption of the Views.

The texts of individual opinions signed by Committee members Mr. Rafael Rivas Posada and Mr. Fabián Omar Salvioli are appended to the present decision.

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

1.1 The author of the communication, dated 29 October 2007, is Mériem Zarzi, an Algerian national. She submits this communication on behalf of her husband, Brahim Aouabdia, who was born on 8 July 1943 in Ain Mlila and formerly worked as a tailor in Constantine. The author also submits the communication on behalf of herself and the couple's six children, Mohamed Salah Aouabdia (31), Abderaouf Aouabdia (30), Abdelatif Aouabdia (25), Seif Eddine Aouabdia (24), Shoaïb Aouabdia (19) and Sabah Aouabdia (18). The author claims that her husband is the victim of violations by Algeria of articles 2, paragraph 3; 6, paragraph 1; 7; 9, paragraphs 1–4; 10; and 16 of the Covenant. She is represented by TRIAL (Swiss Association against Impunity). The Covenant and its Optional Protocol entered into force for Algeria on 12 September 1989.

1.2 On 12 March 2009 the Special Rapporteur on new communications and interim measure, acting on behalf of the Committee, decided to reject the request by the State party of 3 March 2009 that the Committee consider the admissibility of the communication separately from the merits.

The facts as submitted by the author

2.1 The author claims that her husband, Brahim Aouabdia, was arrested at his workplace on 30 May 1994 at 9 a.m. by police officers in uniform who asked him to get into his own car along with three of the officers. These police officers did not present an arrest warrant and did not inform him of the reasons for the arrest. Many other people, including members of local councils, representatives elected in the latest cancelled parliamentary elections, militants and supporters of the Front Islamique du Salut (Islamic Salvation Front) (FIS), a banned political party, had been arrested in Constantine in the previous days or would be on the following days in the course of an extensive police operation.¹ All these people were taken to the central police station of Constantine and at least some of them were transferred, after being held incommunicado for some days or weeks, to the Centre territorial de recherches et d'investigations (Territorial Centre for Research and Investigation) (CTRI) of military area No. 5, under the Département de la recherche et de la sécurité (Research and Security Department) (DRS), the army's intelligence service. All these people vanished after being arrested. Brahim Aouabdia was arrested in front of numerous witnesses, but they left the scene swiftly, fearing that they would also be taken away. An employee at the tailoring shop where the victim worked and his brother-in-law stayed on the scene and were later able to describe the circumstances of the arrest to the author.

2.2 Later the same day, after learning of her husband's arrest, the author went to Coudiat police station, judicial police headquarters for the *wilaya* (governorate) of Constantine, hoping to see her husband or get news of him but not daring to enter. She saw her husband's vehicle parked in front of the police station, which confirmed that he was in fact being held there. For several days, alone or with her children, she went regularly to stand in front of the police station, hoping that her husband would be released. His vehicle remained parked nearby. The author's children also claimed that they regularly saw plain-clothes police officers driving through the city's streets in their father's car.

¹ The author names 10 other individuals who were allegedly arrested in the course of this operation, one of whom is the subject of communication No. 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006. She also mentions some one thousand victims of abductions and arrests in the region, by various security forces that have been catalogued by the Association of Families of Disappeared Persons of Constantine and submitted to the Working Group on Enforced or Involuntary Disappearances.

2.3 After waiting for two weeks, the author began to visit the courthouse regularly, hoping that her husband would be brought before the public prosecutor and thus placed under the protection of the law. In June she asked the registrar at the court of Constantine on a number of occasions when her husband might appear in court. At the end of June 1994 she wrote to the public prosecutor of the court of Constantine, who had jurisdiction, asking to know the reasons why her husband was being held in incommunicado detention given that the legal time limit for police custody was 12 days for the most serious crimes of subversion and terrorism.² The public prosecution service refused to record her request on the grounds that it was not a formal complaint; however, when the author formally submitted a new complaint for abduction and unlawful imprisonment, she did not receive a reply.

2.4 The author nevertheless continued to contact all the official bodies that might be able to intervene in order to shed light on what had happened to her husband. She wrote to the Minister of the Interior, the Minister of Justice and the President, but to no avail. She also wrote to the National Human Rights Observatory, a government body responsible for overseeing and promoting human rights, and was told that it had no information concerning her husband.

2.5 Only on 29 March 1997, nearly three years after her husband's arrest and disappearance, was the author summoned by a police officer to the central police station of Constantine, where she was handed a report according to which Brahim Aouabdia had been "brought to the police and then handed over to the CTRI in military area No. 5 of Constantine on 13 July 1994". The report does not mention the date of the arrest or the reasons for it. The author therefore went to the CTRI barracks to enquire about her husband's fate and was told that he had never been seen there. She again applied to the public prosecutor to follow up on the report, but to no avail. She would learn later that her husband and 22 other individuals, most of whom had been arrested and had disappeared during the same period and under the same circumstances, had been sentenced to death in absentia by the criminal court of Constantine³ on 29 July 1995. She asked the prosecution service for information concerning this sentence but received no reply. Furthermore, the public prosecution service refused to provide her with a copy of the judgement.

2.6 The author did succeed in obtaining a copy of the decision by the indictments chamber of Constantine of 6 June 1995, ordering Brahim Aouabdia and 22 other accused persons to be brought before the criminal court as they were all considered to be fugitives, and issuing a warrant for their arrest. According to the decision they were all wanted for crimes allegedly committed in the region, following a request by the public prosecutor of Constantine dated 12 July 1994 to open criminal proceedings. The author maintains that this information, according to which Brahim Aouabdia was a fugitive on that date, is inconsistent with the report she received on 29 March 1997, according to which he had been handed over to the CTRI on 13 July 1994 and was thus still being held at the police station on 12 July 1994.

2.7 The author maintains that as she herself submitted a criminal complaint and informed the public prosecutor at the end of June 1994 that her husband was being detained by the police at the central police station, the prosecutor could not be unaware of her husband's incommunicado detention at the police station for 43 days and his subsequent transfer to the DRS, after which he had disappeared. All the more so as the public prosecutor is, under the Code of Criminal Procedure, the legal authority with oversight of police custody. The author maintains that the public prosecutor should have requested a

² Article 22 of the Counter-Terrorism Act of 30 September 1992.

³ The author refers to *Bousroual v. Algeria*, (note 1 above), para. 6.

judicial investigation or ordered an investigation as soon as he was presented with evidence of abduction and unlawful imprisonment. Although the prosecution service finally requested the police to provide the author with a written notice of detention, it never took action as required by law on the basis of that document.

2.8 While the author and her children have never stopped looking for her husband and trying to learn the truth regarding his fate, because of the red tape associated with his disappearance she was obliged to launch a procedure to obtain an official finding of presumed death under Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation (27 February 2006). She requested a “disappearance report”, which was issued on 19 March 2007 by the police of the *wilaya* (governorate) of Constantine under article 28 of the Ordinance, which states: “Mr. Brahim Aouabdia is considered to have disappeared following the investigation and unsuccessful searches conducted by this service.” The author stresses that the services which provided her with this report are the very services behind Brahim Aouabdia’s disappearance. On the basis of this report, the author received a finding of presumed death from the court of Constantine dated 23 May 2007. A death certificate was issued thereafter. The author notes that the date of death to which the judge refers (30 May 1994) is the date of Brahim Aouabdia’s arrest by the police, even though according to the police report he had been handed over to the CTRI on 13 July 1994 and was therefore still alive on that date.⁴ Despite the court decision, the author maintains that she and her children have not been able to find peace of mind or properly grieve for their father and husband. Although time has passed, they still believe that Brahim Aouabdia may be alive and may be held incommunicado in some camp. The author adds that his disappearance has had incalculable psychological and material consequences for the family.

The complaint

3.1 The author claims that the facts supporting her petition demonstrate that her husband has been a victim of enforced disappearance⁵ since his arrest on 30 May 1994 and that he remains so to date. He was arrested by Government officials, who then refused to admit that he had been deprived of liberty or to say what had happened to him. Thirteen years⁶ since his disappearance, the chances of finding Brahim Aouabdia alive are shrinking by the day, and the fact that a declaration of disappearance has been issued makes the author fear that her husband died as a result of the enforced disappearance that followed his arrest. Noting that in this particular case the State party has not made any effort to shed light on his fate, and with reference to the Committee’s general comment on article 6, the author claims that Brahim Aouabdia was the victim of a violation of article 6 of the Covenant, read alone and in conjunction with article 2, paragraph 3.

3.2 The author also claims that the enforced disappearance of Brahim Aouabdia and the resultant suffering and distress constitute treatment violating article 7 of the Covenant.

3.3 With regard to herself and her children, the author claims that the disappearance of Brahim Aouabdia was and is a paralysing, painful and distressing experience as they know nothing of his fate and, if he is in fact dead, of the circumstances of his death or where he is buried. This uncertainty, which continues to cause the whole family deep suffering, has lasted since 29 May 1994. Since that date, the authorities have at no point sought to relieve

⁴ Para. 2.5 above.

⁵ 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.

⁶ Now almost 17 years.

the family's suffering by conducting effective investigations. The author claims that the State party has thereby acted in violation of article 7 of the Covenant with regard to the author and her children.

3.4 With regard to article 9 of the Covenant, the author recalls that her husband was arrested by the Constantine police without a warrant and without informing him of the reasons for his arrest. He has not been seen since. He was then detained arbitrarily and incommunicado from 30 May to 13 July 1994 — a total of 43 days — by the police before being handed over to the DRS, which also detained him for an unknown period. The author maintains that the State party thereby acted in violation of the provisions of article 9, paragraph 1, in respect of Brahim Aouabdia.

3.5 She adds that as he was at no point informed of the criminal charges against him and was tried and found guilty in absentia, when he had never been released, article 9, paragraph 2, of the Covenant was also violated. Furthermore, despite the legal proceedings instituted against him, Brahim Aouabdia was not brought promptly before a judge or other judicial authority and was detained incommunicado. The author therefore maintains that her husband was also the victim of a violation of article 9, paragraph 3. Lastly, the author claims that Brahim Aouabdia was also the victim of a violation of article 9, paragraph 4, having been deprived of the right to contest the lawfulness of his detention as he was deprived of all contact with the outside world during his detention, first at the police station and then at the DRS from 13 July 1994, and therefore could not contest the legality of his detention or ask a judge to set him free.

3.6 Furthermore, the author maintains that her husband, who was detained incommunicado in violation of article 7 of the Covenant, was not treated with humanity or with respect for the inherent dignity of the human person. She therefore claims that he was the victim of a violation by the State party of article 10, paragraph 1, of the Covenant.

3.7 In addition, the author claims that, as a victim of enforced disappearance, Brahim Aouabdia was denied the right to be recognized as having rights and obligations — in other words, was reduced to the status of “non-person”, in violation of article 16 of the Covenant, by the State party.

3.8 The author furthermore maintains that as all the steps she took to shed light on her husband's fate were unsuccessful, the State party did not fulfil its obligation to guarantee Brahim Aouabdia an effective remedy, since it should have conducted a thorough and diligent investigation into his disappearance. She claims that the absence of an effective remedy is compounded by the fact that a total and general amnesty has been declared guaranteeing impunity to the individuals responsible for violations. By so doing, in her view, the State party acted in violation of article 2, paragraph 3, of the Covenant with regard to her husband.

3.9 Concerning the issue of exhaustion of domestic remedies, the author stresses that after 13 years,⁷ all her efforts have been in vain: the authorities have never conducted an investigation into her husband's disappearance or reacted to the serious accusations against the police officers responsible for his disappearance. The letters she has sent regularly since 1994 to the highest levels of State authority have prompted no action. Moreover, she 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, which prohibits under penalty of imprisonment the pursuit of legal remedies to shed light on the most serious crimes such as enforced disappearances.⁸ Not only did all

⁷ Now almost 17 years.

⁸ The author points out that the Charter rejects “all allegations holding the State responsible for

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 in order to ensure that her communication is admissible before the Committee as doing so would expose her to criminal prosecution.

State party's observations on the admissibility of the communication

4.1 On 3 March 2009 the State party contested the admissibility of the present communication and 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, namely, from 1993 to 1998, must be considered in the wider domestic socio-political and security context that prevailed during a period in which the Government was struggling to fight terrorism.

4.2 During that period the Government had to fight against groups that were not formally organized. As a result, 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. Thus there are numerous cases of enforced disappearance but, according to the State party, 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 who were 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. 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.

deliberate disappearances". Furthermore, the fact that Ordinance No. 06-01 of 27 February 2006 prohibits the pursuit of legal remedies under penalty of criminal prosecution frees victims of the obligation to exhaust domestic remedies. According to the Ordinance, it is prohibited to file any 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, moreover, that legal action can be taken against anyone who, "through his spoken or written statements or any other act, uses or makes use of the wounds caused by the national tragedy to undermine national institutions, weaken the State, impugn the honour of its agents (...) or tarnish Algeria's international reputation" (art. 46).

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-judicial remedies pursued through advisory or mediation bodies, and judicial remedies pursued through the competent courts of justice. The State party observes that, as may be seen from the authors' statements,⁹ 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 judicial review. 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 that would have enabled the victims to institute criminal proceedings and compelled the investigating judge to launch 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 competent 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.¹⁰

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

⁹ 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.

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

international right to peace, the Committee should support and consolidate peace and encourage national reconciliation with a view to strengthening States affected by internal crises. As part of this effort to achieve national reconciliation, the State party adopted the Charter. The ordinance implementing the Charter 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. In addition, social and economic measures have been put in place, including the provision of employment placement assistance and compensation for all persons considered victims of the national tragedy. Lastly, the ordinance prescribes political measures, such as a ban on holding political office for any person who in the past exploited religion 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 establishing 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 the settling of political scores. 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.

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. It points out in this regard that the author is taking advantage of the procedure enabling her to have her husband officially declared dead, which entitles her to receive compensation, yet at the same time condemns the system.

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 Brahim Aouabdia 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.¹¹ Accordingly, the Committee considers that the examination of Brahim Aouabdia's case by the Working

¹¹ Communication No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996, para. 7.1.

Group on Enforced or Involuntary Disappearances does not render it inadmissible under this provision.

6.3 The Committee notes that, according to the State party, the author has not exhausted domestic remedies, since she did not consider the possibility of bringing the matter before the investigating judge and bringing a civil action. The Committee notes that at the end of June 1994, the author wrote to the public prosecutor of the court of Constantine to enquire about the reasons for her husband's incommunicado detention and then lodged a formal complaint for the crimes of abduction and unlawful imprisonment, but that this complaint was not taken up. On 29 March 1997 she was provided with a report according to which her spouse had been brought to the police and then handed over to the Territorial Centre for Research and Investigation (CTRI) of military area No. 5, Constantine, on 13 July 1994. Her attempts to follow up on this report with the public prosecutor were in vain. Allegedly an arrest warrant had been issued for her husband and he had been condemned to death in absentia. Nevertheless, the author had not been able to obtain any confirmation of the sentence or an official copy of the judgement. 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 author.¹² Under the circumstances, the Committee considers that bringing a civil action for offences as serious as those alleged in the present case cannot be considered a substitute for the proceedings that should have been brought by the public prosecutor, especially given that the author had filed a criminal complaint with the prosecutor regarding her husband's disappearance. 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.

6.4 The Committee finds that the author has sufficiently substantiated her allegations insofar as they raise issues under articles 6, paragraph 1; 7; 9, paragraphs 1–4; 10; 16; 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 the written information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

7.2 Clearly, 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 prevailing domestic socio-political and security conditions during a period when the Government was struggling to fight terrorism and that, consequently, they should not be examined by the Committee under the individual complaints mechanism. The Committee wishes to recall the concluding observations that it addressed Algeria at its ninety-first session,¹³ as well as its jurisprudence,¹⁴ 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

¹² 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.

¹³ CCPR/C/DZA/CO/3, para. 7 (a).

¹⁴ Communication No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 11; and communication No. 1588/2007, *Benaziza v. Algeria*, Views adopted on 26 July 2010, para. 9.2.

have submitted or may submit communications to the Committee. As emphasized in its concluding observations concerning Algeria,¹⁵ the Committee considers 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. The Committee rejects, furthermore, the argument of the State party that 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.

7.3 The Committee recalls its Views in previous communications¹⁶ and notes that the State party has provided no response to the author's allegations on the merits. It further reaffirms that the burden of proof cannot rest on the author of a communication alone, especially since an author and a State party do not always have equal access to the evidence, and that it is frequently the case that the State party alone has the relevant information.¹⁷ 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 violation of the Covenant made against it and its authorities and to furnish to the Committee the information available to it.

7.4 Concerning the claim that the author's husband was 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 the prohibition of torture or cruel, inhuman or degrading treatment or punishment, which recommends that States parties should make provisions against incommunicado detention.¹⁸ It notes that Brahim Aouabdia was arrested on 30 May 1994, taken to the central police station of Constantine and then transferred to the CTRI of military area No. 5. This was officially confirmed to the author in a police report of 13 July 1994. During this whole period Brahim Aouabdia was held incommunicado. Allegedly he was sentenced to death in absentia by the criminal court of Constantine on 29 July 1995, but the author has never been able to obtain confirmation of this sentence.

7.5 The Committee concludes, on the basis of the material before it, that the incommunicado detention of Brahim Aouabdia since 1994 and the fact that he was prevented from communicating with his family and the outside world constitute a violation of article 7 of the Covenant in his regard.¹⁹

7.6 Regarding his wife, Mériem Zarzi, and their six children, the Committee acknowledges the suffering and distress caused to them by the disappearance of Brahim Aouabdia, of whom they have had no news for almost 17 years. Although they learned indirectly that Brahim Aouabdia had been sentenced to death in absentia, they have never been able to obtain official confirmation of this but had to decide to request a "disappearance report" and then a declaration of death without any effective investigation

¹⁵ CCPR/C/DZA/CO/3, para. 7.

¹⁶ See, inter alia, communication No. 1640/2007, *El Abani v. Libyan Arab Jamahiriya*, Views adopted on 26 July 2010, para. 7.3.

¹⁷ See communications No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para. 6.7; No. 139/1983, *Conteris v. Uruguay*, Views adopted on 17 July 1985, para. 7.2; and No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.3.

¹⁸ *Official Records of the General Assembly, Forty-seventh Session*, Supplement No. 40 (A/47/40), annex VI, sect. A.

¹⁹ See communication No. 1295/2004, *El Alwani v. Libyan Arab Jamahiriya*, Views adopted on 11 July 2007, para. 6.5; *El Hassy v. Libya* (note 17 above), para. 6.2; *Celis Laureano v. Peru* (note 11 above), para. 8.5; and communication No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994, para. 9.4.

being conducted to establish the victim's fate. The Committee therefore considers that the facts before it reveal a violation of article 7 of the Covenant, read alone and in conjunction with article 2, paragraph 3, with regard to the author and her six children.²⁰

7.7 With regard to the alleged violation of article 9, the information before the Committee shows that Brahim Aouabdia was arrested without a warrant by agents of the State party, then detained incommunicado without access to defence counsel and without being informed of the grounds for his arrest or the charges against him. He was allegedly sentenced to death in absentia on 29 July 1995 by the criminal court of Constantine. 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 their detention is declared incompatible with the provisions of the Covenant, in particular those of article 9, paragraph 1. In the absence of any appropriate explanation by the State party, the Committee finds the detention of Brahim Aouabdia to be a violation of article 9.²¹

7.8 Regarding the author's complaint under article 10, paragraph 1, the Committee reiterates that persons deprived of their liberty must 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 State party information on the treatment of Brahim Aouabdia during his incommunicado detention at the central police station of Constantine and the CTRI of military area No. 5, the Committee finds a violation of article 10, paragraph 1, of the Covenant.²²

7.9 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 judicial remedies, have been systematically impeded.²³ In the present case, the State authorities, despite having acknowledged Brahim Aouabdia's detention by providing his wife with a report stating that he had been arrested by the police, held under their control and then transferred to the CTRI of military area No. 5, have not given the family any other information. The Committee therefore concludes that the enforced disappearance of Brahim Aouabdia for nearly 17 years denied him the protection of the law for the same period 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 also 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 enshrined in the Covenant. The Committee reiterates the importance that it attaches to States parties' establishment of appropriate judicial and administrative mechanisms for addressing alleged violations of rights under domestic law. It refers to its

²⁰ See *El Abani v. Libyan Arab Jamahiriya* (note 16 above), para. 7.5; *El Hassy v. Libyan Arab Jamahiriya* (note 17 above), 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*, Views adopted on 31 July 2003, para. 9.5.

²¹ See *Medjnoune v. Algeria* (note 17 above), para. 8.5.

²² See 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 and communication No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2; and *El Hassy v. Libyan Arab Jamahiriya* (note 17 above), para. 6.4.

²³ See communications No. 1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007, para. 7.8; and No. 1495/2006, *Zohra Madaoui v. Algeria*, Views adopted on 28 October 2008, para. 7.7.

general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, 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.²⁴ In the present case, the information before the Committee indicates that Brahim Aouabdia did not have access to an effective remedy, in that the State party failed in its obligation to protect his life, and the Committee therefore concludes that the facts before it reveal a violation of article 6 of the Covenant, read in conjunction with article 2, paragraph 3.

7.11 Having adopted a decision on the violation of article 6 of the Covenant, read in conjunction with article 2, paragraph 3, the Committee does not consider it necessary to examine separately the complaints relating solely to article 6.

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 violations by the State party of article 6, read in conjunction with article 2, paragraph 3; article 7; article 9; article 10, paragraph 1; and article 16 of the Covenant with regard to Brahim Aouabdia. Moreover, the facts reveal a violation of article 7 alone and read in conjunction with article 2, paragraph 3, with regard to the author (the victim's wife) and their six children.

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 (a) conducting a thorough and effective investigation into the disappearance of Brahim Aouabdia; (b) providing his family 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 responsible for the violations committed; and (f) providing adequate compensation for the author and her children for the violations suffered, and for Brahim Aouabdia if he is alive. 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 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 should it be established 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 its 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.]

²⁴ *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III, paras. 15 and 18.

Appendix

Individual opinion of Committee member Mr. Rafael Rivas Posada (partially dissenting)

In paragraph 7.11 of its Views on *Aouabdia et al. v. Algeria* the Human Rights Committee states that having adopted a decision on the violation of article 6 of the Covenant, read in conjunction with article 2, paragraph 3, the Committee does not consider it necessary to examine separately the complaints relating solely to article 6. In paragraph 7.10, however, it states that since the victim Brahim Aouabdia did not enjoy the protection of the right to life to which he was entitled by the State party, the latter directly violated article 6 of the Covenant, read in conjunction with article 2, paragraph 3. Furthermore, in paragraph 8, the Committee again finds a violation of article 6, to which it refers in the same terms.

I disagree with the Committee's jurisprudence which leads to the conclusion that cases of enforced disappearance should be qualified as direct violations of article 6 of the Covenant in cases of enforced disappearance where the State party has not fulfilled its obligation to protect the right to life of the individuals concerned and has not duly investigated the circumstances of their disappearance but where there is no conclusive evidence of the victim's death. In my opinion, the interpretation of article 6 as applying even to cases where there has not been deprivation of life is a misinterpretation that unduly extends the scope of article 6. There is no doubt that there must be a connection between a violation by the State party and the right to life, but not necessarily in order to conclude that there has been a direct violation of this right if the death of the victim has not been proved.

For the above reason, I consider that paragraph 8 of the Committee's decision should have been worded as follows: "is of the view that the facts before it disclose violations by the State party of article 2, paragraph 3, of the Covenant, read in conjunction with article 6", and not the wording "violations by the State party of article 6, read in conjunction with article 2, paragraph 3" currently used by the Committee.

In all other respects I agree with 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.]

Individual opinion of Committee member Mr. Fabián Omar Salvioli (partially dissenting)

1. I generally concur with the Committee's decision in the case of *Aouabdia et al. v. Algeria* (communication No. 1780/2008). Nevertheless, in view of the arguments put forward in the decision, I feel obliged to set out some thoughts on the violation of article 6 of the International Covenant on Civil and Political Rights with regard to the enforced disappearance of persons, elaborating on the partially dissenting opinion that I expressed in the case of *Benaziza v. Algeria* (communication No. 1588/2007). I will also take this opportunity to raise some issues relating to redress in cases where a legal norm is applied that the Committee considers to be incompatible with the Covenant.

I. Enforced disappearances and article 6 of the International Covenant on Civil and Political Rights

2. In my view, the Committee should have concluded that the State party was responsible for a violation of article 6 of the International Covenant on Civil and Political Rights in respect of Mr. Brahim Aouabdia without needing to refer, in this connection, to article 2.

3. In its general comment No. 6, the Committee says that States parties should take specific and effective measures to prevent the disappearance of individuals and should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.^a These specific measures ought to consist not only of the application of effective legal remedies in response to arbitrary detentions, but also, in light of the duty to guarantee the right to life, of the prevention of any action by State agents that could result in enforced disappearances.

4. In the present case, the Committee has taken as proven a series of allegations made by the author that have not been refuted or denied by the State party, namely that Brahim Aouabdia was arrested at his workplace by police officers in uniform and taken away by them in his own car, which was parked outside the police station and was even used by police officers. The author was later officially informed in writing that Brahim Aouabdia had been taken into police custody and subsequently transferred to the Territorial Centre for Research and Investigation of military area No. 5, Constantine, on 13 July 1994.

5. In cases such as this, where the responsibility of the State for the detention of the victim has been demonstrated, the burden of proof regarding the guarantee to the right to life rests with the State. Brahim Aouabdia is still missing 17 years later, and so it seems logical to conclude, from the perspective of contemporary international law on the protection of human rights, that the facts of the case as submitted reveal a violation of article 6, paragraph 1, inasmuch as the State party failed to guarantee the right to life of Brahim Aouabdia.

6. I have already argued in my individual opinion in the case of *Benaziza v. Algeria* that the duty to guarantee the rights established in the Covenant is referred to in three ways: firstly, article 2, paragraph 1, establishes the duty to guarantee the rights of all persons without distinction of any kind, thus embodying (obviously) the principle of non-discrimination in the enjoyment of rights; secondly, article 2, paragraph 3, refers to the

^a General comment No. 6 (1982), para. 4.

effective remedy to which all persons are entitled when any of their rights under the Covenant are violated; and, thirdly, there is the duty to guarantee each right in itself.

7. I must stress that there is no need for the provisions pertaining to each right recognized in the Covenant to begin with a statement that it must be guaranteed by the State. It would be absurd to say that the duty to guarantee those rights refers only to the obligation to not discriminate or to the obligation to provide a remedy in the case of a violation. The duty to guarantee, in itself, is not established in article 2, paragraph 2, of the Covenant either. That paragraph refers to legislative or other measures to give effect to the rights established in the Covenant and embodies the principles that human rights are self-executing and have useful effect, both of which are intrinsically related to the general duty to guarantee those rights but which do not fully characterize it.

8. Logic dictates that there is a duty to guarantee all the rights established in the Covenant for each person under a State party's jurisdiction. This duty to guarantee is in itself legally enshrined in the specific provision on each right established in the Covenant.

9. Consequently, in the case at hand, article 6, paragraph 1, was violated because the State party did not guarantee the right to life of Brahim Aouabdia; in no way does this necessarily imply that the victim has died, as there is no evidence of this in the file. The State party must restore the right and, consequently, take the necessary steps to ensure that the victim is released if still alive, as the Committee rightly indicates in paragraph 9 of its Views. In the meantime, the family must be allowed to file the pertinent civil action suits, including those regarding succession- and assets-related matters arising from the enforced disappearance of Brahim Aouabdia rather than from his presumed death.

II. Redress in cases where a legal norm that is incompatible with the Covenant is applied

10. Since joining the Committee, I have been concerned about the need to be more specific about redress in order to help States fulfil their obligations under the Covenant.

11. In the present case, of *Aouabdia et al. v. Algeria*, the Committee has rightly indicated that 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 may submit communications to the Committee. I am of the view that the Committee should also have indicated that some of the provisions of the aforementioned Charter are clearly incompatible with the Covenant, which constitutes a violation of article 2 of the Covenant read in conjunction with other provisions. Consequently, the Committee should have clearly affirmed that redress must include the amendment by the State party of the Charter for Peace and National Reconciliation, in fulfilment of its obligation to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the Covenant and to prevent a repetition of incidents like those which gave rise to the communication under consideration. A decision of this nature undoubtedly falls within the remit of the Committee, and aims both to improve the protection of individuals and to give due effect to the provisions of the Covenant.

(Signed) Mr. 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.]

**TT. Communication No. 1783/2008, *Machado Bartolomeu v. Portugal*
(Views adopted on 19 October 2010, 100th session)***

<i>Submitted by:</i>	Fernando Machado Bartolomeu (represented by Rui Ottolini Castelo-Branco and Maria João Castelo-Branco)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Portugal
<i>Date of communication:</i>	24 March 2008 (initial submission)
<i>Subject matter:</i>	Discriminatory tax legislation against casino croupiers
<i>Procedural issues:</i>	Violation of the principle of equality before the law and the prohibition of discrimination
<i>Substantive issues:</i>	None
<i>Articles of the Covenant:</i>	2, paragraphs 1 and 2; 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 19 October 2010,

Having concluded its consideration of communication No. 1783/2008, submitted to the Human Rights Committee on behalf of Mr. Fernando Machado Bartolomeu 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. The author of the communication is Mr. Fernando Machado Bartolomeu, born on 21 December 1953, a Portuguese national, living in São Domingos de Rana, Portugal. He claims to be victims of a violation by Portugal of article 26, read in conjunction with article 2, paragraphs 1 and 2, of the Covenant. He is represented by Dr. Rui Ottolini Castelo-Branco and Dr. Maria João Castelo-Branco. The Optional Protocol entered into force for the State party on 3 August 1983.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Mahjoub El Haiba, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

The facts as submitted by the author

2.1 Mr. Bartolomeu is a croupier working in a casino in Portugal. He refused to declare the income resulting from tips received from his customers (casino players) during the fiscal years of 1999 and 2000. He considered that these amounts had been given purely out of generosity, and could therefore be regarded as charitable donations. They were not, strictly speaking, pay and, as a result, were not taxable.

2.2 According to article 2, paragraphs 1 and 3 (h), of the Personal Income Tax Code (CIRS), earned income from employment comprises all payments from or made available by the employer under a contract of employment or any other legal equivalent. Gratuities received for or on account of services provided, when not distributed by the employer, must be considered as part of earned income from employment. In its ruling 497/97 of 7 July 1997, the Constitutional Court declared this article to be unconstitutional. However, the Budget Act for 1999, 87-B/98, of 31 December 1998, contradicts this ruling, stipulating in article 29 that sums of money received by casino bank staff from players, depending on their winnings, are considered as gratuities received for or on account of services provided.

2.3 The author considers that this has led to discriminatory practice against croupiers, arguing that it constitutes a violation of the principle of taxing legality, equality and justice. They also contend that such practice violates the author's right to family life.¹ Croupiers are the only staff who are taxed on their tips, whereas waiters working in the same casinos, who likewise tend to receive tips from customers, are not taxed. The discriminatory nature of such differentiation was recognized by the Court of Justice of the European Communities (CJEC).² In an opinion issued by the Centre for Financial Studies, the tax authorities themselves argued that the provision violated the principle of equality and justice. Their conclusion was not, however, followed by the courts hearing the case (see below).

2.4 The author also notes that sickness and unemployment benefits are not calculated on the basis of their total income, but only on the basis of the salary paid directly by the employer. He points out that they have nonetheless to deduct 12 per cent of their monthly tips for a special social security fund but derive no benefit from that contribution or, at any rate, no greater assistance in the event of illness or unemployment. On this count, tips are not considered as earned income from employment. Furthermore, according to the author, the State's inability to monitor the tips received by other categories of employees, whereas monitoring croupiers' tips is simpler, should not work to their disadvantage. If monitoring tips is not possible and this gives rise to inequality among the professions, the State must quite simply refrain from creating the tax.

2.5 The author filed a complaint before the Administrative and Tax Tribunal of Sintra, which dismissed it on 7 July 2006, ruling that the taxation of croupiers did not infringe the constitutional principle of equality. An appeal against this decision was dismissed by the Central Administrative Tribunal for the South on 12 June 2007, which reiterated the reasoning of the Court of first instance. Finally, on 29 October 2007, the Constitutional Court, ruling on the author's appeal, rejected the assertion that the provisions in question were unconstitutional.

¹ No more details are provided on that count, nor is any relevant provision of the Covenant invoked in that regard.

² The author cites in particular a CJEC judgement of 23 November 2000, which considered a gratuity to be a sum of money which a customer is willing to pay spontaneously for a service provided by one or more croupiers and which cannot be included in the taxable amount, since it is like a sum of money given to a street musician.

The complaint

3. The author considers that the State party has violated his right to equality before the law, guaranteed by article 26, read in conjunction with article 2, paragraphs 1 and 2, of the Covenant. He argues that the adoption of Act 87-B/98 changed the scope of ruling 497/97 of the Constitutional Court, thereby placing croupiers at a disadvantage vis-à-vis other professions. The situation violates the principle of equal taxation. Furthermore, while croupiers pay additional contributions of 12 per cent of their tips into the special social security fund, they receive no additional assistance in the event of illness or unemployment.

State party's observations

4.1 In its observations of 21 October 2008, the State party challenges the merits of the communication submitted by the author. It refers to the legislative history of taxation on croupiers' tips and stresses that the original version of the Professional Tax Code (CIP) contained no provision on the taxation of tips. The tax authorities therefore attempted, based on the legal definition of earned income, to include as part of taxable income tips paid by third parties to staff working in casinos. This sparked strong opposition from croupiers. In order to clarify the situation, Decree-Law No. 138/78 of 12 June 1978 was amended to include article 1, paragraph 2, of the CIP, according to which sums received as gratuities or tips by employees in the course of the performance of their work would henceforth be considered as earned income, even when such sums were not distributed by the employer. This provision was declared unconstitutional because it had no basis in law (decree passed by the Government but not validated by Parliament).

4.2 The legislature again attempted to introduce the provision through Decree-Law No. 297/79 pursuant to article 18 of Act No. 21-A/79, which said that the regulations governing the scope of income tax should be revised so as to include all earned or work-related income. The expression "tips and gratuities" was no longer used: the new legislation merely referred to "sums received by employees in the course of the performance of their work, even those not distributed by the employer". This new text was also declared unconstitutional for want of the signature of the Prime Minister in office on the date of promulgation. Decree-Law No. 183-D/80 reinstated the provision, the substance of the text having been correctly adopted. In 1982, however, the legislature decided that the Decree-Law should be repealed and did not reintroduce the wording on tips and gratuities until 1988. The new provision of the CIP stipulated that half of any sums received by employees in the course of the performance of their work, irrespective of their nature, would be taxable when the sums were not distributed by the employer.

4.3 When the country moved from a system of two codes (Professional Tax Code and Supplementary Tax Code) to the more modern system, more in line with the European Community, of the Personal Income Tax Code (CIRS), Act No. 106/88 of 17 September 1988 provided, in article 4, paragraph 2 (a), that "all payments stemming from work done on behalf of third parties, whether performed by servants of the State and other public-law entities or in consequence of a contract of employment or other contract legally equivalent to a contract of employment" would be considered as earned income. Article 2 of the CIRS concerning the tax base of category A income, specifies in paragraph 3 (h), that "[...] gratuities received for or on account of services provided, when they are not distributed by the employer, are also earned income".

4.4 The constitutionality of this provision was called into question by the Mediator, who referred the matter to the Constitutional Court. Responding to the question of whether a gratuity was a donation that might be exempt from employment tax regulations, the Constitutional Court found the provision to be constitutional. The Court considered that the specific nature of the profession of croupier made for a special arrangement which could not be considered unconstitutional. A consequence of this unique framework was a

differentiation in the pattern of remuneration. Since this Constitutional Court ruling, No. 497/97 of 9 July 1997, the legislature and Government have been in favour of making tips subject to tax. Article 29, paragraph 5, of Act No. 87-B/98 of 31 December 1998, containing the State budget for 1999, stipulates that article 8 of the CIRS should make explicit reference to the income of casino croupiers that does not come from the employer. The croupiers are up in arms against this provision, since they consider it a new development, inasmuch as their profession is referred to directly.

4.5 Before expressing its views on the merits of the allegations made by the author, the State party analyses the legislation governing croupiers' incomes and, more particularly, gratuities. Casinos are private entities subject to a strong tax regime. They are inspected by the Inspectorate-General of Gambling. Regulatory Decree No. 82/85 of 28 August 1985 governs the system for distributing gratuities received by staff in gaming rooms. As can be seen, these gratuities are not given *intuitu personae* to a certain croupier to whom a player takes a liking. They are deposited into a fund for this purpose and distributed every two weeks to croupiers according to the category to which they belong (more senior croupiers receive more). Since the issuance of Decree No. 24/89 of 15 March 1989, a Commission for the Distribution of Gratuities (CDG) has been established. This fact attests to the size of the sums of money involved and their sensitive nature. The equitable, legal and transparent distribution of these gratuities must be ensured. The State party goes on to say that the social security system also has an interest in gratuities. Under the laws governing the system, gratuities are considered as earned income.

4.6 The State party insists that gratuities are income stemming from the employment relationship, contrary to the author's claims that they are donations, and thus exempt from tax. Croupiers receive tips because of their contracts of employment. Tips are not income obtained *intuitu personae* and are subject to social security deductions. The State party cites a study by law professors which argues that the adoption of an overarching, comprehensive concept of income, including tips, is not only in keeping with social practice but is also a natural consequence of the principle of capacity to pay. It notes that earned income comprises several elements, including basic pay, seniority bonuses, various gratuities such as holiday and Christmas allowances, extras such as payments for special duties and overtime, night work and shifts, etc. This complex set of types of income counts towards various uses of different kinds, all legitimate. For example, only basic pay and seniority bonuses count towards severance pay; for accidents at work, only regular monthly benefits apply. There is nothing to preclude the taxation of tips, which are gratuities awarded for the performance of work.

4.7 The State party notes that the author invokes Court of Justice of the European Communities (CJEC) case law, according to which the performance of music in the street prompts voluntary donations of indeterminate amounts of money. In one case, it had been established that no legal relationship existed between the performer and the recipient. There was thus no need to tax the very variable income of street musicians, which consisted solely of such gratuities. The State party is in agreement with this case law, but considers that the author invokes it wrongly because it is not relevant to this case.

4.8 The State party bases itself on the jurisprudence of the Constitutional Court, which has analysed the principle of equality from three angles. First, formal equality provides that all citizens are equal before tax legislation, which means that all taxpayers in the same situation as defined by tax legislation must be subject to the same tax regime. Second, substantive equality requires the law to ensure that all citizens with an equal income must bear an equal tax burden, thereby contributing equally to public expenses. Lastly, equality through the tax system aims to achieve a fair distribution of income and wealth besides satisfying the financial requirements of the State and other public entities, since one purpose of income tax is to reduce inequalities among citizens. Therefore, although

croupiers receive considerable amounts in the form of gratuities, these gratuities are not donations but customary gifts, and it makes no sense to relieve croupiers of taxes on such gratuities if the tax burden on other people at work is not alleviated.

4.9 The State party notes that, according to the Human Rights Committee, not every differentiation of treatment will constitute discrimination, 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. It follows that the criteria adopted by the Portuguese courts are fully in accordance with those established by the Committee. For all these reasons, the State party considers that the sums of money in question are earned income which is legitimately subject to tax and that no provision of international law, including article 26 of the Covenant, has been violated.

Author's comments on the State party's submission

5. In his comments dated 25 November 2008, the author reiterates the arguments expounded in the initial communication. He requests the Committee to find a violation of articles 26 and 2 of the Covenant, read together, to order the State party to repeal article 2, paragraphs 1 and 3 (h), of the Personal Income Tax Code, and to pay him 50,000 euro in damages.

Additional submission by the State party

6. On 2 June 2009, the State party reiterated that under the meaning of article 26 of the Covenant, a differentiation, which is based on reasonable and objective criteria does not amount to prohibited discrimination. It further reiterates that the legislative evolution, which led to the taxation of croupiers, is legitimate, both with respect to domestic and international law. The State party also maintains that such taxation is not arbitrary, as the relevant gratifications are governed by a strict legislative framework, are not granted *intuitu personae*, and are considered as earned income. As such, the State party reiterates that the taxation of Casino croupiers is not in violation of the principle of equality, and cannot be held to breach article 26 of the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

7.3 In the absence of objections by the State party to the admissibility of the communication or reasons indicating that the communication might be wholly or partly inadmissible, the Committee declares that the allegations under article 26 of the Covenant, regarding the right to equality before the law, are admissible.

Consideration of the merits

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

8.2 The Committee notes the author's arguments that croupiers are discriminated against vis-à-vis the members of other professions because they alone pay taxes on their tips; that tips are given by customers purely out of generosity and that they can therefore be regarded as charitable donations; that such tips cannot, strictly speaking, be considered as pay and are therefore not taxable. The Committee notes that, according to the author, in the event of unemployment or sickness he would not receive any additional benefits in consideration of the tax to which he is subject.

8.3 The Committee also notes the arguments of the State party that taxation on tips earned by croupiers is the result of a legislative development intended to re-establish equality between the professions; that tips earned by croupiers cannot be compared with those of other professions because of the large sums of money involved; that, for that reason, a Commission for the Distribution of Gratuities has been established to manage the large sums received in tips; and that those sums are placed in a common fund and redistributed among the croupiers according to their rank. The Committee notes that, according to the State party, gratuities are income stemming from the employment relationship, contrary to the author's claims that they are donations, and thus exempt from tax. Furthermore, earned income comprises several elements, including basic pay, seniority bonuses and various gratuities, and this complex set of types of income counts towards various uses of different kinds, all legitimate. For example, only basic pay and seniority bonuses count towards severance pay. The Committee further notes that, according to the State party, laws governing gratuity-related matters consider such income as earned income for social security purposes. Finally, the Committee notes that, according to the State party, all taxpayers in the same situation as defined by tax legislation must be subject to the same tax regime; that all citizens with an equal income must bear an equal tax burden; and that the ultimate objective of tax legislation is to reduce social inequalities.

8.4 The Committee recalls its communication No. 1565/2007, *Gonçalves et al. v. Portugal*,³ which is identical in the facts, and where it observed the unique and specific nature of the tax regime for croupiers. The Committee reiterates that is not in a position to conclude that this taxation regime is unreasonable in the light of such considerations as the size of tips, how they are distributed, the fact they are closely related to the employment contract and the fact that they are not granted on a personal basis. Accordingly, the Committee concludes that the information before it does not show that the author has been victim of discrimination within the meaning of article 26 of the Covenant.

8.6 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 disclose a violation by Portugal of the provisions of the Covenant.

[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.]

³ Views adopted on 18 March 2010.

**UU. Communication No. 1812/2008, *Levinov v. Belarus*
(Views adopted on 26 July 2011, 102nd session)***

<i>Submitted by:</i>	Pavel Levinov (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	31 March 2008 (initial submission)
<i>Subject matter:</i>	Arbitrary arrest; degrading treatment; fair trial; freedom of expression; discrimination.
<i>Procedural issue:</i>	Level of substantiation of claims
<i>Substantive issues:</i>	Unjustified restrictions on freedom to impart information; non-respect of fair trial guarantees in an administrative case; lack of adequate medical treatment of a detainee; discrimination on political grounds
<i>Articles of the Covenant:</i>	articles 7 and 10; article 9, paragraph 3; article 14, paragraphs 1, 2, and 3 (b); article 19; and article 26
<i>Articles of the Optional Protocol:</i>	2 and 5, para 2 (b)

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

Meeting on 26 July 2011,

Having concluded its consideration of communication No. 1812/2008, submitted to the Human Rights Committee by Mr. Pavel Levinov 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. Pavel Levinov, a Belarusian national born in 1961. He claims to be a victim of a violation by Belarus of his rights under article 7; article 9, paragraph 3; article 10, paragraph 1; article 14, paragraphs 1, 2, and 3 (b); article 19, paragraphs 1 and 2; and article 26, of the International Covenant on Civil and Political

* 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, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

Rights. The Optional Protocol entered into force for Belarus on 30 December 1992. The author is unrepresented by counsel.

The facts as presented by the author

2.1 The author was a representative of the Belarus Helsinki Committee association for the Vitebsk region in Belarus. He explains that the association participated in a long-term independent monitoring of the 2007 elections for Local Councils of Deputies (local elections). During the monitoring, it became clear that in 34 (out of 40) electoral constituencies, only one candidate was registered for the elections. Two candidates were registered in each of the remaining four constituencies. The author decided to carry out a campaign against the lack of choice in the elections. He distributed leaflets and disclosed posters containing the slogan: “Stop! No to the voting without a choice” at visible places. Representatives of the electoral commissions were removing such posters and the police was observing the activities of those disclosing posters and distributing leaflets.

2.2 The day before the ballot, on Saturday, 13 January 2007, the author was disseminating leaflets in mailboxes with the call to boycott the elections. Shortly after 9 p.m., he was stopped by a police patrol when he was placing a poster on an advertisement board near his home, and he was brought to the Pervomaisky District Department of Internal Affairs in Vitebsk.

2.3 In the police premises, the author was charged with minor hooliganism under article 156 of the Code of Administrative Offences, for allegedly having used insulting language against the police officers and having ignored the police instructions. He was placed in a temporary detention facility (IVS, Temporary Detention Isolator) in Vitebsk, pending the examination of his case by a court. He claims that his detention was arbitrary, and that he could have been released on bail – a possibility provided by the law – particularly in the light of the fact that during his arrest, he was in possession of the necessary amount of money to pay for his bail. His request to this effect was rejected by the police. He states that he asked the police to be represented by the individuals of his choice (his brother and two other individuals who came to the police centre after his arrest), but his request was denied.

2.4 The author notes that he was detained without taking into consideration article 33 of the Belarus Constitution and article 45 of the Belarus Electoral Code.¹ He claims that the police officers used the charge in order to have him arrested, and affirms that he did not commit any offence.

2.5 The author contends that while in detention, he suffered a hypertonic crisis, and an ambulance was called in emergency. The police, according to the author, refused his hospitalization and failed to provide him with medication. He complained about this to the Office of the Prosecutor (no further information is provided). Furthermore, on 24 April 2007, he requested the Prosecutor to open a criminal case against the police officers, with regard to these facts.²

¹ Article 33 of the Constitution of Belarus guarantees freedom of thoughts and beliefs and their free expression. The author refers to the last sentences in article 45 of the Electoral Code, which reads as follows (unofficial translation): “Agitation (including appeals to boycott the elections, referendum) on the ballot day shall not be allowed. Agitation printed materials displayed earlier outside the rooms for voting shall remain in their former places” (source: <http://ncpi.gov.by/elections/eng/legal/code.htm>).

² The author provides a copy of a complaint to the Prosecutor of Vitebsk Region, dated 24 April 2007. According to this document, the author refused the administration of an injection as he suffered allergies and did not have the list of substances he was allergic to with him. The medical doctor then

2.6 On Monday, 15 January 2007, the author was brought before the Court of the Pervomaisky District in Vitebsk. The court hearing continued also on 19 and 23 January 2007. From the documents available on file, it transpires that the author was released by the court on 15 January 2007.³ On 23 January 2007, the author was found guilty of minor hooliganism by the Pervomaisky District Court of Vitebsk, and sentenced to a fine of 62 000 Belarusian roubles.

2.7 The author claims that the judge of the Pervomaisky District Court of Vitebsk in charge of his case has failed in her duty of independence and impartiality. Immediately before the beginning of the trial, two high-level police officers were consulting the content of the author's case in the judge's office, in the judge's presence. At the end of the trial, the judge announced a 20-minute break prior to the deliberations, went to her office, and never came back. The decision of the court was never officially pronounced to the author, he was not informed of the possibility to appeal against the decision, and the closure of the court's session was never announced.⁴ The author's complaints to the court in this respect remained without reply. The author claims that, in general, judges are not independent in Belarus.

2.8 The author further claims that the trial transcript contained formulations such as: "explanation of the offender", "signature of the offender", and also indicated that he had "committed an administrative offence", which appeared more than 30 times.

2.9 In the meantime, on 16 January 2007, the author wrote to the Prosecutor of the Vitebsk Region, claiming that the police officer who prepared the report on his administrative offence had falsified evidence, because, according to the author, during his transportation to the Pervomaisky District Department of Internal Affairs in Vitebsk, on 13 January, he had discovered in the police car a one-page document, which disclosed the photographs of six individuals, including his own, all political activists, and three of them (including him) were charged under article 156 of the Belarus Code on Administrative Offences on 13 and 14 January 2007. Thus, according to the author, the hooliganism charges served as a pretext for his arrest.

2.10 The author affirms that he has exhausted all available and effective domestic remedies. Thus, on 17 July 2007, he appealed against the decision of the Pervomaisky District Court of 23 January 2007 to the Vitebsk Regional Court (which due to legislative changes was directed his appeal to the Supreme Court). He also complained to the Chairperson of the Supreme Court. On 26 December 2007, a Deputy-Chairperson of the Supreme Court, and on 5 February 2008, the First Vice-Chairperson of the Supreme Court, rejected his appeals and affirmed that the decision of the first instance court was grounded, the author was fined lawfully, and his guilt was duly established.

The complaint

3.1. The author claims a violation of his rights under articles 7 and 10, of the Covenant, because during his detention in the Temporary Detention Centre in Vitebsk, the police refused to allow his hospitalization following a hypertonic crisis and failed to provide him with adequate medication.

asked to have him hospitalized, but after a discussion with the Detention Centre's officials, the ambulance left. No information is contained on file concerning the outcome of these complaints.

³ The material on file does not permit to verify whether the author has been released on bail.

⁴ The author submits a copy of the decision of the Pervomaisky District Court of 23 January 2007, without, however, explaining when and how he received it.

3.2 He contends that his arrest and subsequent detention were unlawful and arbitrary, in violation of article 9, paragraph 3, of the Covenant, and claims that individuals awaiting trial should not be detained as a general rule and that he should have been released on bail.

3.3 According to the author, article 14, paragraph 1, was also violated in his case, as the judge was not independent and failed in her duty of impartiality, the presiding judge never read out her decision in his case, the end of the trial was not officially announced, and the individuals present at a public trial were ordered to leave the court room at the end of the hearing without justification.

3.4 The author invokes a violation of his right to be presumed innocent, in violation of article 14, paragraph 2, of the Covenant, as the trial transcript, as signed by the judge, designated him as “the offender” and not as an accused.

3.5 The author further claims that his right to defence as protected under article 14, paragraph 3 (b), of the Covenant has been violated, as he was refused the option to be represented by the representative of his choice immediately after his arrest.

3.6 The author claims that by arresting him and preventing him from distributing information leaflets and posters, he was prevented from expressing his opinions, in violation of the provisions of article 19, paragraphs 1 and 2, of the Covenant.

3.7 Finally, he claims to be a victim of discrimination, in violation of article 26 of the Covenant, as he was arrested and fined based on his opinions.

State party’s observations on admissibility and merits

4.1 By note verbale of 26 October 2008, the State party informed the Committee that the Supreme Court of Belarus had examined the author’s communication and verified Mr. Levinov’s (administrative) case file content. According to the State party, it transpired that the author’s allegations on irregularities concerning his administrative case were not confirmed.

4.2 The State party contends that the conclusion of the Court of the Pervomaisky District (Vitebsk City) of 23 January 2007 (by which the author was found guilty of minor hooliganism and fined 62 000 roubles), corresponded to the factual circumstances of the case and the court decision was grounded.

4.3 According to the State party, the author’s allegations concerning the failure of the judge to read out the court’s decision, to explain how the decision could be appealed, and on the closed nature of the trial, are groundless as they are refuted by the content of the trial transcript.⁵

4.4 The State party explains that the author was fined because on 13 January 2007, at 9 p.m., near his home in Vitebsk, he used offensive language against police officers and disturbed the public order and the tranquillity of the citizens, which constitutes an offence under article 156 of the Code of Administrative Offences – minor hooliganism.

4.5 The State party points out that the author’s guilt has been confirmed by four witnesses, all questioned in court, and by the material on file. On this basis, the Court of the Pervomaisky District of Vitebsk found the author guilty of the offence charged and decided to impose a fine. The author appealed against this decision to the Supreme Court of Belarus. The author’s appeals were rejected by the Chairperson of the Supreme Court of 26 December 2007, and the First Deputy-Chairperson of the Supreme Court of 5 February 2008, respectively.

⁵ The State party does not provide a copy of the trial transcript in question.

4.6 Finally, the State party explains that the author could have also appealed the District Court decision with the General-Prosecutor's Office, with a request for the Prosecutor to introduce a protest motion with the Supreme Court, under the supervisory proceedings. According to the State party, the author has failed to appeal with the Prosecutor's Office, and thus domestic remedies have not been exhausted in the present case.

Author's comments on the State party's observations

5.1 On 23 April 2009, the author explained that pursuant to the provisions of the Code on Administrative Offences, court rulings concerning administrative discipline (fining) are final and not subjected to appeal (art. 266, part 2, of the Code).

5.2 He acknowledges that he had the right to appeal, under the supervisory proceedings, against the court ruling once it entered into force to the Chairperson of the Supreme Court and the Prosecutor-General. According to him, however, such appeals cannot be seen as effective remedies, as they depending on the discretionary power of a judge or prosecutor. In addition, in politically motivated cases, neither the Supreme Court's Chairman, nor the Prosecutor-General generally accept such appeals.

5.3 The author further notes that supervisory appeals to the Prosecutor-General are not compulsory under Belarusian Administrative law, for purposes of exhaustion of domestic remedies. He had already appealed twice with the Supreme Court, under the supervisory proceedings, against the district court's decision, without success. Thus, he had exhausted the domestic remedies, even ineffective ones.

5.4 On the merits, the author points out that the State party in its reply has contended that his guilt has been duly established, without refuting his allegations of the present communication.

5.5 He further contends that the State party's explanation that his allegations concerning the failure of the judge to read out the decision and inform him of the possibilities to file an appeal were refuted by the content of the trial transcript is groundless. This contention, according to the author, is refuted by a copy of collective appeal (copy provided) signed by several individuals and sent in support of his case to the Ministry of Justice and the Supreme Court, and also by reports in printed and electronic media (copies provided), as well as the author's own appeal to the presiding judge in his case, with a request to have the decision read out to him.

Additional observations by the State party

6.1 By note verbale of 21 September 2009, the State party provided additional information concerning another conviction of the author for minor hooliganism, for acts committed in March 2008, where Mr. Levinov was sentenced to 10 days of administrative arrest.

6.2 The State party further contested the author's allegations on the independence of Belarusian judiciary. It explains that according to the Constitution and the laws, judges are independent in administrating justice, and no interference in their work is permitted. In addition, judges of the Supreme Court and the Supreme Economic Court are appointed by the President of Belarus following the agreement of the Council of the Republic of the National Assembly, at the proposal of the Chairman of the Supreme Court and the Supreme Economic Court, respectively.

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 it is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has noted that the same matter is not being examined under another procedure of international investigation or settlement. Accordingly, it considers that the requirements of article 5, paragraph 2 (a) have been met in the present case.

7.3 The Committee has also noted the author's explanation that he had exhausted all available domestic remedies, up to the Supreme Court of Belarus. It has also noted the State party's contention that the author could have further appealed to the Prosecutor-General with a request to have a protest motion filed under the supervisory proceedings. The Committee recalls its jurisprudence that such remedies do not constitute a remedy, which has to be exhausted for purposes of article 5, paragraph 2 (b), of the Optional Protocol.⁶ Accordingly, the Committee considers that the requirements of article 5, paragraph 2 (b), of the Optional Protocol, have been met in the present case.

7.4 The author has claimed that while in detention, in violation of article 7 and 10 of the Covenant, the police refused his hospitalization after a hypertonic crisis and failed to provide him with adequate medication. The Committee notes that while the State party has not addressed this particular claim, the material on file shows that the author himself refused to be administered an injection by the emergency unit called, invoking medical reasons. In the circumstances, and in the absence of any other pertinent information on file in this connection, the Committee considers that this part of the communication, in connection to the author's claims under articles 7 and 10, of the Covenant, is insufficiently substantiated, for purposes of admissibility, and that it is therefore inadmissible under article 2, of the Optional Protocol.

7.5 The Committee has noted the author's claim that his arrest was in violation of the requirements of article 9 of the Covenant, and also that he was not released on bail in spite of his request. The Committee notes that from the information before it, it transpires that the author was notified on the reasons of his arrest and subsequent detention – i.e. minor hooliganism - even if he affirms that police officers had misrepresented the circumstances of his arrest in order to have him detained. The Committee further notes that the author asked to be released on bail during the night of 13 January 2007 (Saturday), and that his release was ordered on 15 January 2007 (Monday) when he was brought before a court. From the material before it, the Committee notes that it also transpires that the court interrogated the police officers who had arrested the author, as well as other individuals, concerning the exact circumstances and reasons of the author's arrest, and found their explanations credible and mutually corroborating. The Committee therefore considers that the author has failed to substantiate his claims under article 9 of the Covenant, for purposes of admissibility, and that this part of the communication is inadmissible under article 2 of the Optional Protocol.

7.6 The Committee has further noted the author's claim that his right to be presumed innocent has been violated, as the trial transcript contained qualifications such as "the offender", and not "the accused". The Committee notes that there is no indication in the information before it which shows how the transcript would have affected the author's right

⁶ See, for example, communication No. 1537/2006, *Gerashchenko v. Belarus*, decision on inadmissibility adopted on 23 October 2009, para. 6.3.

to be presumed innocent, and considers that this part of the communication, concerning the author's claim under article 14, paragraph 2, of the Covenant, is inadmissible under article 2, of the Optional Protocol, as insufficiently substantiated.

7.7 The Committee has taken note of the author's further allegations, raising issues under articles 19 and 26, of the Covenant. It notes that the State party has not refuted them directly, but has stated that Mr. Levinov's guilt of minor hooliganism was duly established and his sentence was grounded. The Committee notes that the information before it does not show that the author has raised these particular allegations before the national courts. It notes that neither in his appeal to the Vitebsk Regional Court of 17 July 2007, nor in his request for a supervisory review to the Supreme Court of Belarus of 5 January 2008, has the author formulated such allegations. In the circumstances, the Committee considers that the author's claims under articles 19 and 26, of the Covenant, are insufficiently substantiated, for purposes of admissibility, and are inadmissible under article 2, and also under article 5, paragraph 2 (b), of the Optional Protocol.

7.8 The Committee considers that the remaining part of the author's claim, raising issues under article 14, paragraphs 1 and 3 (b), of the Covenant, have been sufficiently substantiated for purposes of admissibility, and declares it admissible.

Consideration on the merits

8.1 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.

8.2 The author has claimed that his rights under article 14, paragraph 1, of the Covenant have been violated, in particular as the ruling of the Pervomaisky District Court of 23 January 2007 was never read out to him, he was not informed on the possibilities to appeal it, and because the judge ordered the public to leave the court room shortly prior to the conclusion of the trial without justification. The State party has contended that these allegations were groundless and refuted by the content of the trial transcript. The Committee notes first, that the author has explained that the decisions concerning fines under article 156 of the Code of Administrative Offences are final and not subject to appeal (see para. 5.1 above). It further notes that, even if he claims that he was never informed on the possibilities to appeal against the decision of the court to fine him for hooliganism, the author has complained to the Vitebsk Regional Court and to the Supreme Court, under a supervisory review procedure, invoking the alleged irregularities made by the presiding judge. The Committee notes also that from the material on file, as provided by the author, it transpires that on 23 January 2007, the presiding judge did explain to him what her decision in his case would be.⁷ In the light of these circumstances, the Committee considers that the facts before it do not permit it to conclude that Mr. Levinov's rights under article 14, paragraph 1, of the Covenant, have been violated.

8.3 The author has further invoked a violation of his defence rights under article 14, paragraph 3 (b), of the Covenant, as immediately after his arrest, the police refused to allow a relative or acquaintances of the author, present at the police station after his arrest, to act as his representative, or to give him the possibility to designate a lawyer. The Committee notes that the author was represented by a counsel at his trial, and that it does not appear from the material before it that investigation acts were carried out before the beginning of

⁷ The author has submitted a copy of a collective appeal prepared on an unspecified date by a number of individuals in his support, to the attention of the Supreme Court. The appeal contains the explanation that the author was informed by the judge of her decision in his administrative case, in her office, on 23 January 2007.

the author's trial. In the circumstances, the Committee considers that the facts before it do not show that Mr. Levinov's rights to defence have been violated in the present case.

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 do not reveal a breach of any provision of 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.]

**VV. Communication No. 1813/2008, *Akwanga v. Cameroon*
(Views adopted on 22 March 2011, 101st session)***

<i>Submitted by:</i>	Ebenezer Derek Mbongo Akwanga (represented by counsel, Kevin Laue, The Redress Trust)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Cameroon
<i>Date of communication:</i>	20 June 2008 (initial submission)
<i>Subject matter:</i>	Torture and ill-treatment in detention; unfair trial
<i>Procedural issues:</i>	Same matter being examined under another procedure of international investigation or settlement; non-exhaustion of domestic remedies
<i>Substantive issues:</i>	Prohibition of torture; right to liberty and security of the person; humane treatment in detention; fair trial
<i>Articles of the Covenant:</i>	7, 9, 10 and 14
<i>Articles of the Optional Protocol:</i>	5 (2a); 5 (2b)

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

Meeting on 22 March 2011,

Having concluded its consideration of communication No. 1813/2008, submitted to the Human Rights Committee by Mr. Ebenezer Derek Mbongo Akwanga on his own behalf, 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:

* 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. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

The texts of individual opinions signed by Committee members Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Ms. Zonke Zanele Majodina, Ms. Iulia Motoc, Sir Nigel Rodley, Ms. Margo Waterval and Mr. Fabián Omar Salvioli are appended to the present Views.

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

1. The author of the communication, dated 20 June 2008, is Mr. Ebenezer Derek Mbongo Akwanga, a Cameroonian national born on 18 November 1970 in Southern Cameroons and currently residing in the United States of America. He alleges violations by Cameroon¹ of articles 7, 9, 10 and 14. The author is represented by counsel, Mr. Kevin Laue, The Redress Trust.

The facts as submitted by the author

2.1 Since his student days, the author was a political activist and leader of the Southern Cameroons Youth League (SCYL) and campaigned peacefully for the rights of the people of Southern Cameroons. On 24 March 1997, the author was travelling as a passenger in a car which was stopped in Jakiri, Bui Division, North-West Province.² Without warning, the State party's security agents fired shots at the tyres of the vehicle. The author recognized among the security agents a plain-clothes member of the political security network of the Yaoundé police. Large numbers of people swarmed around the car and in the resulting chaos, the author managed to escape. Later that night, the author was detained by about 10 armed police officers. He was handcuffed and led towards a van without being told why he was being arrested. When he asked questions, he was hit with a rifle butt, causing him to faint. He regained consciousness in a cell at the Jakiri Gendarmerie Brigade where he was questioned about his identity. His legs were chained and he was kicked and beaten with batons and doused with stinking water until he fainted. In total, he was detained for about 13 hours at Jakiri Gendarmerie Brigade.

2.2 On 25 March 1997, the author was driven to the Kumbo Gendarmerie, where he was stripped naked and, with his chained legs forcibly stretched out, he was beaten with a machete on the soles of his bare feet and then forced to dance on sharp gravel, singing the praise of President Biya in French. He was then placed in a very hot cell and subjected to a constant loud thumping noise. He spent five hours at Kumbo Gendarmerie. In the afternoon of that same day, he was driven to the Gendarmerie Legion at Up Station, Bamenda, where plastic bags were melted over his bare thighs, he was paraded naked in front of female officers, mocked and denied food and water. He was also suspended upside down from an iron bar between his knees and beaten on the soles of his bare feet. During these periods of torture, the author was interrogated and asked to confess to the crime of trying to divide the country. He was repeatedly accused of being part of an armed and violent secessionist movement, which he consistently denied. He spent five days in this place of detention.

2.3 On 29 March 1997, the author was taken to the National Headquarters of the Gendarmerie, Secretariat of the State for Defence in Yaoundé. He was identified as an "*élément très dangereux*" and put in a cell with hardened criminals, who had been instructed by the gendarmerie to make him "uncomfortable". For 25 days he was forced to sleep near the toilet on a urine-soaked bare floor and he was not allowed to bathe. He was only able to crawl, as standing with his chained legs was painful. After the third day, he was interrogated and again consistently accused of being involved in an armed and violent secessionist movement.

¹ The Covenant and the Optional Protocol entered into force for Cameroon on 27 June 1984.

² According to Amnesty International, AFR 17/03/1999, more than 50 people from Cameroon's English-speaking provinces were detained for over two years in connection with violent events in North-West Province in March 1997 before being brought before a military court in the capital Yaoundé.

2.4 On 2 June 1997, the author was taken to Kondengui Maximum Security Prison in Yaoundé, accused of activities incompatible with State security and attempting to split Southern Cameroons from Cameroon, however the allegations were confused and constantly changing. He was forced to share an overcrowded cell with 40 to 50 inmates, with wood-plank bunks for only 15. The prison was infested with rats and insects. After two weeks in this prison, the author became ill with a high fever and amoebic dysentery. The prison hospital he was taken to was under-resourced and lacked medicine. The author was assaulted by guards and other prisoners on numerous occasions. He spent nearly three months in this prison.

2.5 On 29 August 1997, the author was taken to Mfou Special Prison in the department of Méfou-et-Afamba, where he was placed in a dark, filthy cell with no windows. A few hours later he was placed in a communal cell, where other inmates abused him when they found out that he was involved in Southern Cameroons activities. Food in prison was always inadequate both in quantity and quality. On 6 June 1998 after 10 months in prison, the author became very ill.³ He managed to alert some colleagues who publicized his illness and as a result he was hospitalized. In Mfou District Hospital, he was diagnosed as suffering from excessive torture and trauma with partial paralysis. A month later he was returned to prison. During the following 18-month period, the author was held incommunicado with no access to family, friends or lawyers. On 4 February 1999, he was transferred back to Kondengui Maximum Security Prison.

2.6 On 8 April 1999, the author was given papers in prison that he was to be arraigned at Yaoundé military court on 14 April 1999. The documents were in French and, although he could not understand them, he had to sign them. No lawyers were present. The charges were: aggravated theft, assassination, hostilities against the nation, attempted secession, non-denunciation of criminal activities, insurrection, revolution and complicity. The evidence presented consisted of a map of Southern Cameroons, Southern Cameroons National Council membership cards, fund-raising collection boxes, bows and arrows, and four "den guns".⁴ There was only one Southern Cameroonian officer on the bench, who, when he agreed with the defence on the issue of translation, was replaced by a supporter of the Government. On the second day of the trial, the charges were changed and neither the accused nor the defence could understand them as they remained unclear. These new charges included offences under laws passed two years after the offences were said to have been committed, and were based on the evidence of those officers who had arrested and tortured the author. The author denied and continues to deny that he had committed any crimes. On 6 October 1999, the author was sentenced to 20 years' imprisonment.

2.7 The author remained in Kondengui Maximum Security Prison to serve his sentence. He became ill with a pulmonary infection and spent nine months in the prison infirmary in 2001. In March 2003, he was admitted to Yaoundé Central Hospital. On 9 July 2003, the author escaped from hospital to Nigeria, where he remained for two and a half years. In Nigeria he was hospitalized and a doctor noted in his file that he had been subjected to physical and psychological torture.

2.8 The author was recognized as a refugee by the Office of the United Nations High Commissioner for Refugees. In February 2006, he was granted refugee status in the United States. In November 2007, a psychotherapist recorded the psychological impact of the

³ He had difficulties moving the right side of his body and speaking. He vomited and defecated blood. He suffered from loss of vision.

⁴ Traditionally made guns which do not use bullets but gunpowder and are fired during traditional ceremonies.

torture the author had suffered and referred to persistent nightmares, extreme anxiety, fear, panic attacks, depression and insomnia.

The complaint

3.1 The author submits that the ill-treatment and torture he suffered during his arrest and at the various places of detention where he was held constitute a breach of article 7. These places were Jakiri Gendarmerie Brigade;⁵ Kumbo Gendarmerie; Bamenda Gendarmerie; Yaoundé Gendarmerie Headquarters, where the author was required to sleep in sordid conditions and the authorities failed to intervene when fellow prisoners tormented him physically and psychologically;⁶ the Kondengui Maximum Security Prison in Yaoundé, where the author was subjected to inhuman conditions, as a direct result of which he fell seriously ill and could not obtain proper treatment;⁷ and lastly, the Mfou Special Prison, where the author was held incommunicado from 29 August 1997 to 4 February 1999, which facilitated the practice of torture and ill-treatment.⁸ The author submits that the treatment he suffered during his arrest and in successive places of detention amounts to torture or at least cruel, inhuman or degrading treatment, contrary to articles 7 and 10 of the Covenant.

3.2 The author states that the events described constitute a violation of his rights under article 9 as he was never informed at the time of his arrest of the reasons for his arrest; he was not brought promptly before a judicial body and was severely tortured; he was deprived of his liberty for more than two years before being brought before a military court and during this period he had no opportunity to challenge any aspect of his detention.

3.3 With respect to article 10, the author refers to the Committee's jurisprudence, according to which the Standard Minimum Rules for the Treatment of Prisoners are effectively incorporated in article 10.⁹ The author submits that he was held in a cell with 55 people sharing 15 beds, in violation of rule 9. Moreover, contrary to rules 10 to 21, he did not have adequate bedding, clothing, food and hygiene facilities. Furthermore, he did not receive adequate medical care (rules 22 to 26). In addition, in breach of article 10, paragraph 2, the author, who was a remand prisoner, was not segregated from convicted prisoners. He was denied access to the outside world for 18 months and therefore contends that his incommunicado detention was in breach of article 10.¹⁰

3.4 As regards article 14, the author submits that the composition of the military court and the conduct of the trial violated his rights to a fair trial, as the military court operated

⁵ See communications No. 334/1988, *Bailey v. Jamaica*, Views adopted on 12 May 1993; No. 255/1987, *Linton v. Jamaica*, Views adopted on 22 October 1992.

⁶ See communication No. 868/1999, *Wilson v. the Philippines*, Views adopted on 30 October 2003, para. 2.1.

⁷ See communications No. 115/1982, *Wight v. Madagascar*, Views adopted on 1 April 1985, para. 15.2-17; Nos. 1152/2003 and 1190/2003, *Bee and Obiang v. Equatorial Guinea*, Views adopted on 30 November 2005, para. 6.1; No. 458/1991, *Mukong v. Cameroon*, Views adopted on 10 August 1994, para. 9.4; No. 188/1984, *Portorreal v. Dominican Republic*, Views adopted on 5 November 1987, para. 9.2.

⁸ See communications No. 704/1996, *Shaw v. Jamaica*, Views adopted on 4 June 1998; No. 449/1991, *Mojica v. Dominican Republic*, Views adopted on 10 August 1994, para. 5.7; and 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. 11.

⁹ See for example *Mukong v. Cameroon* (note 7 above), para. 9.3; and concluding observations on the United States of America, CCPR/C/79/Add.50, para. 34.

¹⁰ See communication No. 917/2000, *Arutyunyan v. Uzbekistan*, Views adopted on 13 May 2004.

under the authority of the Ministry of Defence, which also has authority over the persons who tried, detained and charged the author. Moreover, he asserts that the information used by the prosecutor was obtained by torture. The author had no access to a lawyer during his pretrial detention and during the trial he had little opportunity to communicate with his lawyer, who had no access to the indictment and was therefore not able to prepare the author's defence adequately. Moreover, the prosecution relied on written evidence proving that armed attacks had been planned; however, this evidence was not produced in court. The author also submits that he was tried by a military court although he was a civilian.¹¹

3.5 With regard to the exhaustion of domestic remedies, the author submits that during his incarceration, petitions were made by political parties, such as the Social Democratic Front (SDF) and international NGOs calling for his release, but these were ignored. The author was not allowed any visits by his family, friends or lawyers who, because of their genuine fear of intimidation, could not take any steps to have access to him, nor was it possible for him to bring any legal action from prison. Due to the fact that the author subsequently escaped from prison and fled abroad, he is prevented from returning to the State party to pursue any local remedies.

3.6 The author further submits that one of the defence lawyers tried to obtain the judgement or sentencing papers from the Military Court and Appeals Court of Centre Province, which confirmed the initial sentence, but without success. Proceedings to challenge the jurisdiction of the Military Court and for the trial to be heard under the jurisdiction of the common law and in a language which the author could understand, filed before the Supreme Court on 10 December 1997, were ignored by the Military Court, which proceeded with the trial. To date, the motion before the Supreme Court is still pending. The author submits that it would be futile and dangerous for him to do any more than he already attempted while in custody. He recalls the Committee's jurisprudence according to which the effectiveness of remedies against ill-treatment cannot be dissociated from the author's portrayal as a political opposition activist.¹² He adds that his isolation in prison prevented him from availing himself of remedies, in particular as he was detained incommunicado in inhumane conditions. He further submits that, even if he had been allowed access to remedies, any attempt to sue the State would have been futile, as the judiciary is not independent.¹³ He adds that claims for compensation would also be ineffective, as the law on compensation came into force after the events concerned had occurred and the perpetrator must stand trial for torture. Therefore, the author claims that he has no adequate or available remedy in Cameroon either in law or practice.

State party's observations on admissibility and merits

4.1 On 8 July 2009, the State party submitted its observations on admissibility and merits. The State party refers to the facts as submitted by the author and notes that on 23 March 1997, dynamite, detonators and nitrate were stolen from a powder magazine. On 27 March 1997, administrative buildings in Jakiri were attacked causing death, serious injury and kidnapping. The investigations led to the arrest of 67 persons. The author had stated in his testimony of 5 April 1997 that as the president of the youth of the Southern Cameroon's National Council (SCNC), he was in charge of stealing explosives, which were then hidden at the home of a member of the SCNC in Jakiri. The author was arrested when he was on

¹¹ See concluding observations by the Human Rights Committee, Cameroon (CCPR/C/79/Add.116), para. 21.

¹² See *Mukong v. Cameroon* (note 7 above), para. 8.2; and communication No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 10 May 2005, para. 4.11.

¹³ See United States Department of State Report on Human Rights, 1997 and 1999, and the report of the Special Rapporteur on torture (E/CN.4/2000/9/Add.2), para. 58.

the way to retrieve the explosives. The State party further submits that the author was part of a military trial against 67 members of the SCNC and that he was sentenced on 5 October 1999 to 20 years' imprisonment and a fine of 100,000 francs for the possession of illegal weapons and war munitions and aggravated theft. While the case was pending before the Court of Appeal, the author took advantage of a medical evacuation at the Central Hospital and escaped on 9 July 2003. On 15 December 2005, the Court of Appeal confirmed the first instance judgement and issued an arrest warrant against the author. Counsel for the author filed an appeal to the Supreme Court.

4.2 The State party submits that the communication should be declared inadmissible under article 5, paragraph 2 (a) of the Optional Protocol, as the same matter has been submitted on behalf of the author and 17 others to the African Commission on Human and Peoples' Rights. On 25 November 2006, during the Commission's fortieth session, the case was heard; however, a decision remains pending.

4.3 Furthermore, the State party submits that the communication should be declared inadmissible for the author's failure to exhaust domestic remedies under article 5, paragraph 2 (b) of the Optional Protocol.¹⁴ The author could have brought an application to the competent criminal court ("*tribunal répressif compétent*") on the basis of article 132 bis of the Criminal Code to complain about the torture he had suffered, or on the basis of article 332 et seq. of the Code of Criminal Procedure to request that the proceedings be annulled because of the absence of an interpreter and of generally fair trial guarantees. In order to justify why he failed to exhaust domestic remedies, the author claims that permission for visits was not given and that he cannot return to Cameroon to introduce an application because of his escape. The State party submits that no instructions to refuse visits to the author have been issued to the competent authorities and that the author was hospitalized twice under surveillance and could have introduced his court actions at that time.

4.4 On the merits, the State party submits that investigations into this grave incident were carried out in full respect of the legislation in force at the time. Referring to the Committee's jurisprudence, the State party notes that it is for the national authorities to decide how to investigate a crime, as long as the investigation is not conducted in an arbitrary manner.¹⁵ Torture and ill-treatment are of a criminal nature and therefore the onus of proof is on the author. The State party argues that the medical certificate issued by a Nigerian doctor only states that the author has an ulcer and diabetes, without establishing a link between this diagnosis and the violence that the author alleges he has suffered.

4.5 With regard to the author's allegations that his rights to liberty and security have been violated, the State party argues that the SCNC is a secessionist movement, all actions of which are illegal and prohibited. The author is being untruthful when he alleges that he did not know the reasons for his arrest, when it was thanks to his testimony that the person holding the stolen goods could be identified.

4.6 With regard to detention conditions, the State party acknowledges the problems of detention conditions in its prisons, in particular dilapidation, overcrowding, criminality and a lack of means to finance the construction of new prisons. Nevertheless, with the help of the European Union, prison conditions in Douala and Yaoundé have been significantly

¹⁴ See communications No. 1010/2001, *Aouf v. Belgium*, Views adopted on 17 March 2006; No. 1103/2002, *Castro v. Colombia*, decision on inadmissibility of 28 October 2005; No. 1218/2003, *Platonov v. Russian Federation*, Views adopted on 1 November 2005; No. 1302/2004, *Khan v. Canada*, decision on inadmissibility adopted on 25 July 2006; No. 1374/2005, *Kurbogaj v. Spain*, decision on inadmissibility adopted on 14 July 2006.

¹⁵ See communication No. 1070/2002, *Kouidis v. Greece*, Views adopted on 28 March 2006.

improved since June 2002. In the Kondengui Prison, detainees receive a daily food ration that can be supplemented by visitors. It also has an infirmary, run by a medical doctor, and a referral system has been established with Yaoundé Central Hospital. With regard to the allegations of torture in Mfou Prison, the author himself acknowledged that the torture was committed by his fellow detainees. In the absence of any proof that this treatment has been instigated by the authorities, the State party submits that it cannot be held responsible for acts by private individuals and recalls that it paid for the author's medical treatment following these acts of violence.

4.7 With regard to the author's allegations that his right to a fair trial was violated, the State party underscores that the trial was conducted in accordance with the legislation in force. With regard to the author's complaint relating to article 14, paragraph 3 (f) of the Covenant, the State party explains that French was used at the hearings; however those parties who did not speak or understand French benefited from the services of an official interpreter.

Author's comments on the State party's submission

5.1 On 22 September 2009, the author submitted his comments on the State party's observations on the admissibility and merits. He reiterates that he was held for two years without trial and that neither he nor his defence lawyer could properly understand the initial charges or the subsequent modified charges. He further claims that he was sentenced for crimes that had not been clearly explained and that he never saw the judgement.

5.2 With regard to admissibility, the author argues that he is not aware of any complaint submitted on his behalf to the African Commission on Human and Peoples' Rights. He notes that he never authorized any lawyer to submit such a complaint. He further notes that the State party has not submitted any documentation in this regard and that the alleged complaint is not available in the public domain. Recalling the Committee's jurisprudence,¹⁶ according to which the "same matter" in article 5, paragraph 2 (a) of the Optional Protocol must be understood as including the same claim concerning the same individual, submitted by him or by someone else capable of acting on his behalf before the other international body, the author submits that the allegedly pending complaint before the African Commission on Human and Peoples' Rights does not constitute the "same matter" as it does not concern the same persons: the State party mentions that the complaint before the African Commission was submitted on behalf of 18 persons, while the author is the sole complainant in the present communication. Furthermore, the facts of the author's complaint in the present communication relate to his detention from 24 March 1997 to 9 July 2003, while the facts on which the alleged complaint before the African Commission on Human and Peoples' Rights is based remain unclear.

5.3 With regard to the State party's argument that the author failed to exhaust domestic remedies, the author disputes the State party's statement that he did not exhaust any remedies before submitting his communication to the Committee. He notes that he was tried by a military court and that his appeal was decided on 15 December 2005. With regard to bringing a complaint of torture under Act No. 97/009 of 10 January 1997, the author argues that the court considered only a few matters and that once an official is found guilty, the Government usually dissociates itself from that official, making it impossible for the victim to obtain compensation. Moreover, the author was held incommunicado and therefore did not have the possibility to file any complaint. The author also submits that the

¹⁶ See communications No. 75/1980, *Fanali v. Italy*, Views adopted on 31 March 1983, para. 7.2; No. 1155/2003, *Unn et al. v. Norway*, Views adopted on 23 November 2004, para. 13.3; No. 6/1977, *Millan Sequeria v. Uruguay*, Views adopted on 29 July 1980, para. 9.

remedy is not effective in view of the grave nature of the torture and ill-treatment that he suffered.¹⁷ He further notes that the State party did not dispute that he was not allowed to receive visits but only said that it had given no instructions in this regard. Furthermore, the author argues that it is unreasonable to suggest that he could have engaged in any proceedings during the rare moments when he had access to medical treatment for his ill health, for which the State party is responsible.

5.4 The author argues that the fair trial protection guarantees under the Criminal Procedure Code are not applicable because his case was tried before a military court. On 10 December 1997, the author filed a motion before the Supreme Court to challenge the jurisdiction of the military court and to request that the trial be heard under common-law jurisdiction and in a language that the author could understand; however, this motion remains pending. Recalling the Committee's jurisprudence,¹⁸ the author of a communication does not need to resort to remedies that objectively have no prospect of success.

5.5 With regard to the merits, the author denies any involvement in any theft of explosives or other illegal activity and denies having given any testimony on 5 April 1997. On the contrary, he claims that 5 April 1997 falls within the period during which he was tortured at the National Gendarmerie headquarters in Yaoundé. Furthermore, he underlines that all of the evidence brought against him was unreliable either because torture had been practised or because due process was not applied.

5.6 With regard to the torture and ill-treatment suffered by the author, he recalls the Committee's jurisprudence, according to which the State party has an obligation to investigate torture and that the investigation must be prompt, impartial, thorough and independent.¹⁹ The author further argues that the State party has not responded to the specific allegations he has made and that its observations amount to a broad denial.²⁰ Moreover, with regard to the medical certificate issued by a Nigerian doctor in 2003, he disputes the State party's argument that it relates only to a stomach ulcer and diabetes. He refers to two additional medical reports of 2007 and 2009 in which the psychological impact of the torture was recorded and argues that these three medical reports, together with his detailed narrative, exonerate him from the burden of proof and demonstrate beyond any shadow of a doubt that torture had taken place.

5.7 The author further notes that the State party acknowledged that detention conditions are bad when it referred to improvements made from June 2002 to December 2006. The State party has also admitted that the author was physically and mentally abused by other inmates. With reference to the Committee's general comment, the author underlines that the State party failed in its obligation to comply with the Standard Minimum Rules for the Treatment of Prisoners and that it failed to prevent him from being attacked by others.²¹

¹⁷ See communications No. 612/1995, *Vicente et al. v. Colombia*, Views adopted on 19 August 1997, para. 5.2; No. 778/1997, *Coronel et al. v. Colombia*, Views adopted on 29 November 2002, para. 6.4.

¹⁸ See communications Nos. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 7 April 1989, para. 12.3; No. 147/1983, *Arzuaga Gilboa v. Uruguay*, Views adopted on 1 November 1985, para. 7.2.

¹⁹ See *Kouidis v. Greece* (note 15 above), paras. 7.4 and 9; general comment No. 20 (note 8 above), para. 14; communication No. 107/1981, *Almeida de Quinteros et al. v. Uruguay*, Views adopted on 21 July 1983, para. 15.

²⁰ See communication No. 992/2001, *Bousroual v. Algeria*, Views adopted on 24 April 2006, para. 9.4.

²¹ 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.

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 The Committee notes the State party's argument that the communication should be declared inadmissible pursuant to article 5, paragraph 2 (a) of the Optional Protocol, as the same matter is pending before the African Commission on Human and Peoples' Rights. It also notes that the author claims that he never authorized anybody to submit a complaint on his behalf to the African Commission on Human and Peoples' Rights and that he does not have any knowledge of such a submission. The Committee recalls its jurisprudence, according to which article 5, paragraph 2 (a) of the Optional Protocol cannot be so interpreted so as to imply that an unrelated third party, acting without the knowledge and consent of the alleged victim, can preclude the latter from having access to the Human Rights Committee.²² Accordingly and in absence of any documentation from the State party, the Committee concludes that article 5, paragraph 2 (a) of the Optional Protocol is not an impediment to the admissibility of the present communication.

6.3 The Committee also notes the State party's argument that the author failed to exhaust domestic remedies, as he could have introduced an application under the Code of Criminal Procedure to complain about the torture that he suffered and about the trial proceedings. It also notes the author's contention that he was unable to file a complaint of torture as he was held incommunicado and that the remedy is not effective in view of the grave nature of the torture and ill-treatment that he suffered. With regard to remedies concerning the trial proceedings, the Committee notes the author's argument that the Code of Criminal Procedure is not applicable in a trial before a military court and that on 10 December 1997 he filed a motion to the Supreme Court challenging the proceedings, which, however, remains pending.

6.4 The Committee recalls 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 appear to be effective in the given case and are de facto available to the author.²³ With regard to the author's failure to raise claims of torture and unfair proceedings before the domestic courts, the Committee observes that the State party has merely listed in abstract terms the existence of remedies under the Code of Criminal Procedure, without relating them to the circumstances of the author's case and without showing how they might provide effective redress. The Committee notes that during the author's detention from 24 March 1997 to 9 July 2003, he was allegedly held incommunicado, a fact that the State party has refuted with the general statement that no instructions had been given to the competent authorities to refuse visits to the author. In the present case, the Committee considers that the remedy under the Code of Criminal Procedure was de facto not available to the author. With regard to the author's claims concerning the fairness of the proceedings, the Committee notes that on 10 December 1997, he filed a motion before the Supreme Court to challenge the jurisdiction of the military court and to request that the trial be heard under common-law jurisdiction in a language that he could understand. The Committee notes that this motion remains

²² See communication No. 74/1980, *Estrella v. Uruguay*, Views adopted on 29 March 1983, para. 4.3.

²³ See communications No. 1003/2001, *P.L. v. Germany*, decision on admissibility adopted on 22 October 2003, para. 6.5; and No. 433/1990, *A.P.A. v. Spain*, decision on admissibility adopted on 25 March 1994, para. 6.2.

unanswered and, therefore, considers that the delay in responding to the author's motion of 1997 to the Supreme Court is unreasonable. Accordingly, the Committee concludes that article 5, paragraph 2 (b) of the Optional Protocol does not preclude it from examining the author's communication.

6.5 The Committee finds that, for purposes of admissibility, the author has sufficiently substantiated his claims under articles 7, 9, 10 and 14, of the Covenant and therefore proceeds to its consideration of the 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 Committee notes the author's detailed description of the torture he suffered in different places of detention, particularly at the time of his arrest, at the Jakiri Gendarmerie Brigade and at the Kumbo Gendarmerie. It notes the State party's argument that torture and ill-treatment are matters of criminal law and that the onus of proof therefore lies on the author. In light of the information provided to the Committee and, in particular, the detailed allegations of torture suffered by the author and the impact on his health shown by the three medical certificates submitted, the Committee concludes that the State party has violated article 7 of the Covenant.

7.3 The Committee notes that the State party has not contested the information concerning the author's conditions of detention and ill-treatment by fellow prisoners, and particularly the ill-treatment to which he was subjected in detention. 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.²⁴ It considers, as it has repeatedly found in respect of similar substantiated claims,²⁵ that the author's conditions of detention, as described, violate his right 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. Furthermore, the Committee finds that the fact the author was detained with convicted prisoners during his pretrial detention constitutes a violation of article 10, paragraph 2, of the Covenant.

7.4 With regard to the alleged violation of article 9, the Committee notes the State party's argument that the author knew the reasons for his arrest, as it was thanks to his testimony that the holder of the stolen goods could be identified. The Committee notes that this does not clarify whether the author was informed of the reason for his arrest at the time of his arrest. It further notes that the State party has not contested the author's prolonged pretrial detention from 24 March 1997 to 5 October 1999, without an opportunity to challenge the lawfulness of his detention. Recalling its general comment No. 8 (1982) on the right to liberty and security of persons,²⁶ the Committee finds that nothing suggests that at the time of arrest, the author was informed of the reasons for his arrest, that he was ever brought before a judge or judicial officer, or that he ever was afforded the opportunity to challenge the lawfulness of his arrest or detention. In the absence of relevant State party

²⁴ General comment No. 21 (note 21 above), paras. 3 and 5; communication No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2.

²⁵ See for example: communications No. 908/2000, *Evans v. Trinidad and Tobago*, Views adopted on 21 March 2003; and No. 1173/2003, *Abdelhamid Benhadj v. Algeria*, Views adopted on 20 July 2007.

²⁶ *Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 40 (A/39/40)*, annex VI.

information on these claims, the Committee considers that the facts before it indicate a violation of article 9, paragraphs 2, 3 and 4, of the Covenant.

7.5 The Committee notes the State party's argument that the author's trial was conducted according to the legislation in force and that he benefited from an official interpreter during the hearings. It also notes the author's argument that the court was not independent, that he had little opportunity to communicate with his lawyer, who had no access to the indictment and was therefore not able to prepare his defence adequately, and that the written evidence on which the indictment was based was not produced in court. The Committee recalls its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial,²⁷ in which it considers that the State party must demonstrate, with regard to the specific class of individuals at issue, that the regular civilian courts are unable to undertake the trials, that other alternative forms of special or high-security civilian courts are inadequate for the task and that recourse to military courts is unavoidable. The State party must further demonstrate how military courts ensure the full protection of the rights of the accused pursuant to article 14. In the present case, the State party has not shown why recourse to a military court was required. In commenting on the gravity of the charges against the author, it has not indicated why the ordinary civilian courts or other alternative forms of civilian court were inadequate for the task of trying him. Nor does the mere invocation of conduct of the military trial in accordance with domestic legal provisions constitute an argument under the Covenant in support of recourse to such courts. The State party's failure to demonstrate the need to rely on a military court in this case means that the Committee need not examine whether the military court, as a matter of fact, afforded the full guarantees of article 14.²⁸ The Committee concludes that the trial and sentencing of the author by a military court discloses a violation of article 14 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 the rights of Mr. Akwanga under article 7; article 10, paragraphs 1 and 2; article 9, paragraphs 2, 3 and 4; and article 14.

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 include a review of his conviction with the guarantees enshrined in the Covenant, an investigation of the alleged events and prosecution of the persons responsible, as well as adequate reparation, including compensation. The State party is under an obligation to avoid 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 guarantee 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.

²⁷ *Ibid.*, Sixty-second Session, Supplement No. 40, vol. I (A/62/40 (Vol. I)), annex VI, para. 22.

²⁸ See communication No. 1172/2003, *Madani v. Algeria*, Views adopted on 28 March 2007, para. 8.7.

[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.]

Appendix

Individual opinion of Committee members Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Ms. Zonke Zanele Majodina, Ms. Iulia Motoc, Sir Nigel Rodley and Ms. Margo Waterval

The signatories of this concurring opinion wish to reaffirm that they consider that military courts should not in principle have jurisdiction to try civilians.

Military functions fall within the framework of a hierarchical organization and are subject to rules of discipline that are difficult to reconcile with the independence of judges called for under article 14 of the Covenant and reaffirmed in the Bangalore Principles of Judicial Conduct.

Furthermore, whenever States give military courts jurisdiction to try non-military persons, they must explain in their reports under article 40 of the Covenant or in a communication under the Optional Protocol the compelling reasons or exceptional circumstances that force them to derogate from the principle laid out above.

In all cases, military courts that try persons charged with a criminal offence must guarantee such persons all the rights set out in article 14 of the Covenant.

(Signed) Ms. Christine **Chanet**

(Signed) Mr. Ahmad Amin **Fathalla**

(Signed) Ms. Zonke Zanele **Majodina**

(Signed) Ms. Iulia **Motoc**

(Signed) Sir Nigel **Rodley**

(Signed) Ms. Margo **Waterval**

[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.]

Individual opinion of Committee member Mr. Fabián Omar Salvioli

1. I concur with the Views of the Human Rights Committee on communication No. 1813/2008 submitted by Mr. Ebenezer Derek Mbongo Akwanga, but feel obliged to place on record my thoughts on an issue about which, regrettably, my views differ from those of the majority of Committee members. I am referring to the scope of military jurisdiction within the framework of the International Covenant on Civil and Political Rights, and follow the same reasoning expressed in my individual opinion on communication No. 1640/2007 (*El Abani v. Libyan Arab Jamahiriya*).

2. In paragraph 7.5 of its Views on the present communication, the Committee stresses that there was a violation of article 14 because the State party was unable to justify the need to have the author tried by a military court and that, consequently: “The State party’s failure to demonstrate the need to rely on a military court in this case means that the Committee need not examine whether the military court, as a matter of fact, afforded the full guarantees of article 14.^a The Committee concludes that the trial and sentence of Abbassi Madani by a military court discloses a violation of article 14 of the Covenant.”

3. I must state unequivocally that the treatment of this point in general comment No. 32 is most regrettable. In its decision on the Akwanga case, the Committee has missed a clear opportunity to declare that the trial of civilians by military courts is incompatible with article 14 of the Covenant and to correct this regressive aspect of human rights law. A close reading of article 14 would indicate that the Covenant does not go so far as even 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. The Committee’s reasoning in drafting general comment No. 32 should have been the exact opposite of what it was: since the trial of civilians by military courts is an exceptional exercise of jurisdiction (the trial of non-members of the military in the military justice system) and, moreover, since it takes place at an exceptional court (as military justice represents an exception to ordinary justice), it is a doubly exceptional exercise of jurisdiction and, as such, should have been explicitly provided for in the Covenant in order to be compatible with the Covenant, as it obviously removes civilians from the purview of those who are their natural judges.

5. Lest we forget, exceptions to and restrictions on rights (in this case, a restriction on the right to be judged by a “natural judge” as part of the right to justice and due process) must in turn be interpreted restrictively and should not be so readily deemed to be compatible with the Covenant.

6. The idea is not — nor is it the Committee’s role — to adapt the interpretation of the Covenant to take account of actual practices on the part of States that in fact entail proven human rights violations, but rather to help States parties to meet modern standards of due process by explicitly indicating what modifications, if any, must be made to domestic legislation in order to bring it into line with the Covenant.

7. Military jurisdiction, as applied throughout the world since the Second World War, with tragic results, has led without exception to the entrenchment of impunity for military personnel accused of serious mass violations of human rights. Moreover, when the military

^a See communication No. 1172/2003, *Madani v. Algeria*, Views adopted on 28 March 2007, para. 8.7.

criminal justice system is applied to civilians, the outcome is convictions obtained on the basis of proceedings vitiated by abuses of all kinds, in which not only does the right to a defence become a chimera but much of the evidence is obtained by means of torture or cruel and inhuman treatment.

8. The Covenant does not prohibit the use of military courts, nor is it the intention of this opinion to call for their elimination. The jurisdiction of the military criminal justice system should, however, be contained within suitable limits if it is to be fully compatible with the Covenant: *ratione personae*, military justice should apply to serving military personnel, never to civilians or retired military personnel; *ratione materiae*, military courts should be competent to try disciplinary offences, never ordinary offences and certainly not human rights violations. Only under these conditions can military jurisdiction be compatible with the Covenant.

9. General comment No. 32 is an important legal document with respect to the human right to due process, but its treatment of the issue under discussion here is highly regrettable. Almost four years have passed since it was adopted, and the Committee should take steps to correct the notion that military courts may try civilians; its current position is completely out of step with modern standards of international human rights protection and with the most enlightened doctrine on the subject.

10. The Committee does not need to draft a new general comment in order to move forward *pro homine* on this particular point, but merely to take account of developments in the system of human rights protection. Individual communications under the Optional Protocol involving cases before the Committee in which, as in the Akwanga case, a civilian is tried by a military court and concluding observations on State party reports under article 40 of the Covenant also provide appropriate opportunities to perform this indispensable legal task and thereby contribute to the better fulfilment of the object and purpose of the Covenant.

11. As soon as this position is adopted, States parties, as members of the international community, will in good faith adjust their domestic legislation, and military courts with the power to try civilians will become part of a sad past that has happily been left behind.

12. Throughout its history, the Committee has made notable contributions to international human rights law and has been a source of inspiration to other international and regional jurisdictions. On the issue addressed in this opinion, however, the Committee is moving — for not much longer, I hope — in exactly the opposite direction.

13. As has been seen in thousands of cases and, regrettably, once again here, in the Akwanga case — although the Committee did not find it necessary to consider it in greater depth, in the absence of any justification by the State party of the need to try the victim in a military court — the abolition of military courts' jurisdiction over civilians is an outstanding issue in urgent need of a clear and appropriate response from the Human Rights Committee.

14. Moreover, the Committee ought to have pointed out, in paragraph 9 of its Views, that the State party should amend its domestic legislation so as to ensure that military courts have no jurisdiction whatsoever over civilians, as a way to avoid a repetition of incidents such as those described in the present communication.

(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.]

**WW. Communication No. 1818/2008, *McCallum v. South Africa*
(Views adopted on 25 October 2010, 100th session)***

<i>Submitted by:</i>	Bradley McCallum (represented by counsel, Egon Aristidie Oswald)
<i>Alleged victim:</i>	The author
<i>State party:</i>	South Africa
<i>Date of communication:</i>	7 July 2008 (initial submission)
<i>Subject matter:</i>	Collective punishment in detention
<i>Procedural issue:</i>	None
<i>Substantive issues:</i>	Torture, cruel, inhuman or degrading treatment or punishment; right of all persons in custody to be treated humanely; right to remedy
<i>Articles of the Covenant:</i>	7; 10 alone and read in conjunction with 2, paragraph 3
<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 25 October 2010,

Having concluded its consideration of communication No. 1818/2008, submitted to the Human Rights Committee by Mr. Bradley McCallum on his own behalf, 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. The author of the communication, dated 7 July 2008, is Mr. Bradley McCallum, born on 18 April 1979. He is currently held at the St. Albans Correctional Centre in the Eastern Cape. He claims to be a victim of violations by South Africa¹ of articles 7 and 10, alone and read in conjunction with article 2, paragraph 3, of the Covenant. The author is represented by counsel, Mr. Egon Aristidie Oswald.

* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Krister Thelin.

Pursuant to article 90 of the Committee's rules of procedure, Committee member Ms. Zonke Zanele Majodina, did not participate in the examination of the present Views.

¹ The Covenant and the Optional Protocol entered into force for South Africa on 10 December 1998 and on 28 August 2002 respectively.

The facts as presented by the author

2.1 The author is a detainee at the St. Albans Correctional Centre in Port Elizabeth, Province of Eastern Cape. On 15 July 2005, a cleaner of Section C of the correctional facility informed the author and the other inmates of cell No. C2 that a fellow inmate had stabbed Warder N. in the section's dining hall and that the warder had passed away. On the same day, warders of Section B assaulted inmates in that section.

2.2 On 17 July 2005, the author, together with the other inmates of his cell, were ordered to leave their cell while being insulted by Warder P. When the author inquired about the reason, the warder hit him with a baton on his upper left arm and left side of his head. A second warder, M., intervened and forcibly removed the author's shirt. In the corridor, Warder M. kicked the author from behind causing him to fall on the ground. The warder then requested that the author remove his pants and forced him on the ground, which caused a dislocation of his jaw and his front teeth. In the corridor, there were about 40 to 50 warders in uniform. The author recognized five of them. They beat inmates indiscriminately and demanded that they strip naked and lie on the wet floor of the corridor. Warder P. requested that the inmates lie in a line with their faces in the inner part of the anus of the inmate lying in front of them.

2.3 Around 60 to 70 inmates were lying naked on the floor of the wet corridor building a chain of human bodies. Inmates who looked up were beaten with batons and kicked. Around 20 female warders were present and walked over the inmates, kicking them in their genitals and making mocking remarks about their private parts. Thereafter, the inmates were sprayed with water, beaten by the warders with batons, shock boards, broomsticks, pool cues and pickaxe handles. They were also ordered to remove their knives from their anus.² As a result of the shock and fear, inmates urinated and defecated on themselves and on those linked to them in the human chain.

2.4 At some point, Warder P. approached the author and while insulting him, he inserted a baton into the author's anus. When the author tried to crawl away, the warder stepped on his back forcing him to lie down on the floor. The author still experiences flashbacks of what he felt like rape. Meanwhile, some of the warders went into the cells and took some of the inmate's belongings. Thereafter, the inmates were ordered to return to their cells. This however created chaos, as the floor was wet with water, urine, feces and blood and some inmates fell over each other.

2.5 Injured inmates were not allowed to see a doctor until September 2005. Prisoners resorted to treating their wounds themselves with ashes as disinfectant and sand to stop the bleeding. The author was able to obtain medical attention only in late September 2005.³ The prison doctor, however, did not administer any treatment on him, as he considered the author's complaints to be of an "internal" nature and therefore not covered by his duties.⁴ The author requested HIV testing for fear of having contracted the virus from other inmates' bodily fluids on 17 July 2005. However, he was unable to obtain it. HIV is widespread in South African prisons.⁵ In October 2005, the author received treatment for his dislocated jaw and loose teeth.⁶ Between March and November 2006, the author's teeth

² According to the author, it is not unusual for inmates to hide a knife in their anus.

³ According to the medical history on file, on 31 August 2005, the author went to the hospital in the morning, however, there is no mention of the nature of the consultation.

⁴ According to information provided by the author, unofficial protocol dictates that medical treatment is not administered to inmates in respect of "internal" matters.

⁵ See concluding observations by the Committee against Torture (CAT/C/ZAF/CO/1), para. 22.

⁶ Complaint about teeth and jaw injuries reported on 11 October 2005 according to the medical history on file.

were extracted one by one, adversely affecting his diet and health. On 3 April 2008, the author requested that the prison authorities provide him with a teeth prosthesis, without however receiving any answer to his request.

2.6 After the assault, the correctional facility was locked down and, as a result, the author was denied contact with his family and counsel for about a month. His telephone and exercise privileges were also taken away. Thereafter, he was allowed visits of 5 to 10 minutes at a time.

2.7 On 20 November 2006, the author's counsel requested HIV testing for the author and the other victims. He wrote to the Head of the Correctional Facility, the Minister of Correctional Services, the National and Provincial Commissioner in the Department of Correctional Services and the State Attorney. On 13 December 2006, the Office of the State Attorney replied that the Department of Correctional Services denied all allegations of torture and ill-treatment raised by the author and the other alleged victims and that it had no objection to HIV testing provided that the inmates gave their written consent and advice on the payment of the test. The author wrote back to the State Attorney invoking sections 27 and 35 of the Constitution⁷ on the right to have access to health care and emergency medical treatment for persons deprived of their liberty. Despite several exchanges of correspondence, the State Attorney has not provided any response on the author's allegations of torture, nor has he responded to the author's request for free HIV testing. He simply indicated that he awaited instructions from the Department of Correctional Services. During the examination of the State party's initial report before the Committee against Torture on 15 November 2006, a member of the State party's delegation acknowledged that "on the date of the murder in St. Albans maximum correctional facility, the officials were overcome with the situation and assaults took place". On 18 February 2008, the author

⁷ **27. Health care, food, water and social security**

1. Everyone has the right to have access to
 - a. health care services, including reproductive health care;
 - b. sufficient food and water; and
 - c. social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
3. No one may be refused emergency medical treatment.

35. Arrested, detained and accused persons

...

2. Everyone who is detained, including every sentenced prisoner, has the right
 - a. to be informed promptly of the reason for being detained;
 - b. to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
 - c. to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
 - d. to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;
 - e. to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and
 - f. to communicate with, and be visited by, that person's
 - i. spouse or partner;
 - ii. next of kin;
 - iii. chosen religious counsellor; and
 - iv. chosen medical practitioner.

requested the Office of the Inspecting Judge to disclose its findings with respect to the assault. Despite several reminders, he has received no information.

2.8 Shortly after the incident, the author lodged a complaint to the prison authorities, which was however not accepted. During August/September 2005, the Office of the Inspecting Judge visited the prison and noted the author's and other inmates' grievances. In September 2005, an inspector of the South African Police Service recorded the author's statement, in which he complained of the treatment he had received. The inspector promised to open an investigation; however, the author has no knowledge of any such investigation into the matter.

2.9 In May 2006, the author was made aware of a legal representative, who was prepared to assist victims of torture. Up until then, the author had been unable to secure legal representation. On 12 May 2006, the author lodged a civil suit to demand compensation for the damages suffered. The author made a plea of exception to the State party's plea (Minister of Correctional Services) on the basis that their plea amounted to bare denial of liability. The Magistrate Court, however, upheld the State's plea, which denies the author's allegations of torture, inhuman and degrading treatment or punishment occurred on 17 July 2005. Furthermore, the State invoked Section 3 of Act 40 of 2002 on the institution of legal proceedings against certain organs of State, according to which the plaintiff (the author) was obliged to serve the defendant, as an organ of the State, with written notice within six months of the alleged cause of action and the facts on which State's liability arose. The author withdrew his action and re-instituted proceedings in the High Court. However, he argues that his civil action may fail in the High Court, as he did not comply with the six months rule above-mentioned.

The complaint

3.1 The author submits that his exposure to severe beatings and other ill-treatment during his detention at the St. Albans Correctional Centre, his exposure to inhuman and degrading conditions of detention, the failure to properly investigate his allegations of ill-treatment and holding him incommunicado for a month after the assault amounts to a violation of article 7.

3.2 In particular, he claims that he was subjected to severe beatings with batons and shock shields while lying naked on the wet floor of the corridor and to rape with a baton forced into his anus. The physical abuse was such that it resulted in dislocation of his jaw and irreversible damage to his teeth, to the point that they had to be removed. Furthermore, he was raped with a baton, forced to strip naked, endure remarks about his private parts and required to insert his nose into the anal cavity of a fellow prisoner. Being forced to lie in urine, feces and blood was done deliberately to make him fear of an infection with the HIV virus. The subsequent denial by the authorities for HIV testing exacerbated the author's trauma. The author argues that these facts amount to torture and constitute a violation of article 7, of the Covenant.⁸

3.3 Furthermore, the author submits that he was kept incommunicado after the event and his privileges to telephone communication, exercise and his rights to access medical care, legal representation and family visits were denied for one month. He submits that this also breached article 7.

⁸ The author submits that he requests the Committee to make a specific finding that his treatment amounted to torture under article 7, as opposed to making a general finding of a violation of article 7 which would not specify which aspect of that article was violated.

3.4 The author cites the Committee's jurisprudence, according to which for punishment to be degrading, the humiliation or debasement involved must exceed a particular level and must, in any event, entail other elements beyond the mere fact of deprivation of liberty.⁹ The author submits that the conditions of detention went far beyond those inherent in the deprivation of liberty and therefore amounted to a breach of article 7.

3.5 With regard to his conditions of detention, the author recalls the Committee's numerous statements according to which the Standard Minimum Rules for the Treatment of Prisoners are effectively incorporated in article 10. He claims that the overcrowding in St. Albans Correctional Centre amounts to a violation of article 10, insofar as, instead of one prisoner per cell pursuant to rule 9 of the Standard Minimum Rules for the Treatment of Prisoners, the author was incarcerated in a cell of 60 to 70 inmates. Some of his cellmates had to share beds, and the author was exposed to a lack of privacy and he did not have access to adequate sanitary facilities. He further submits that the overpopulation in the prison amounted to 300 per cent, which is confirmed in a report by the Portfolio Committee of the Department of Correctional Services. Moreover, contrary to rules 10 to 21 of the Standard Minimum Rules for the Treatment of Prisoners, adequate bedding, clothing, food and hygiene facilities were not supplied and, contrary to rules 22 to 26, adequate medical care was not provided.

3.6 The author further submits that the State party has failed to properly investigate his claims of ill-treatment and to provide him with a remedy. He recalls the Committee's general comment No. 20 (1992) on the prohibition of torture and cruel treatment or punishment,¹⁰ according to which complaints invoking article 7 must be investigated promptly and impartially by competent authorities so as to make the remedy effective. The State party's failure therefore amounts to a violation of the author's rights under articles 7 and 10 read in conjunction with article 2, paragraph 3.

3.7 With regard to the exhaustion of domestic remedies, the author claims that the South African Police failed to properly investigate his case, that the Prosecuting Authority failed to prosecute the matter and that no disciplinary action has been taken against the perpetrators by the Department of Correctional Services. The author further submits that the State party has enacted legislation requesting that applicants in civil suits against the State institute proceedings within six months, when the normal deadline is three years. Therefore, his civil suit is likely to fail, due to his difficulties in corroborating physical, psychological and medical evidence, to his indigence, which negatively impacts on the quality of his legal representation, and to the six-month time limitation for the notification of civil suits against the State.

State party's failure to cooperate

4. On 16 October 2008, 7 July 2009, 15 December 2009, 6 May 2010 and 18 August 2010, the State party was requested to submit to the Committee information 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 the admissibility or the substance of the author's claims. It recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol that States parties examine in good faith all allegations brought against them, and that they make available to the Committee all information at their disposal. In the absence of a reply from the State

⁹ See communication No. 265/1987, *Vuolanne v. Finland*, Views adopted on 7 April 1989, para. 9.2.

¹⁰ *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A, para. 14.

party, due weight must be given to the author's allegations, to the extent that they are substantiated.

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 article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 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.

5.3 In the light of the author's complaints to the prison administration, the police, the Office of the Inspecting Judge, the Magistrate Court and the High Court, which, it would appear, have not been investigated, and the absence of any observations from the State party, the Committee considers that the provisions of article 5, paragraph 2 (b), of the Optional Protocol do not preclude the admissibility of the communication.

5.4 Having found no impediment to the admissibility of the author's claims under articles 7 and 10 alone and read in conjunction with article 2, paragraph 3, of the Covenant, the Committee proceeds to their examination on the merits.

Consideration of merits

6.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it, as required under article 5, paragraph 1, of the Optional Protocol. It notes that the State party has not addressed the author's allegations. In the circumstances, due weight must be given to such allegations to the extent that they have been sufficiently substantiated.

6.2 The Committee notes the author's claim that, on 17 July 2005, warders of the St. Albans Correctional Centre beat him with batons and shock shields while he was lying naked on the wet floor of the prison corridor, and that, as a consequence, he suffered from several physical injuries, such as a dislocated jaw, irreversible damage to his teeth and wounds on his left arm and left side of his head. The Committee further notes the author's allegation that he experiences flashbacks of the rape with a baton, that he has endured ugly remarks about his private parts, that he was required to insert his nose into the anal cavity of a fellow prisoner, and forced to lie in urine, feces and blood coupled with the fear of contracting HIV. It also notes the author's allegation that following the incident, he was held incommunicado for one month and was deprived of access to a physician, lawyer or his family. The Committee also notes the author's allegation that his conditions of detention went beyond those inherent in the deprivation of liberty, including that he was held in a cell of 60 to 70 inmates, that he lacked privacy, did not have access to adequate sanitary facilities, bedding, clothing, food, as well as medical care, and that the prison's overpopulation amounted to 300 per cent. To support his claim, the author provides a copy of his medical history, press clippings about the incident of 17 July 2005 and an outline of his cell.

6.3 The Committee further notes the author's allegation that his claims have not been investigated and that he has therefore been deprived of an effective remedy. In support of his allegation, the author has provided copies of letters, confirmations of fax messages and various reminders submitted to the authorities requesting the investigation of the incident of 17 July 2005, as well as free HIV testing. The Committee further notes that the author commenced a civil suit against the Department of Correctional Services in the Magistrate

Court, which he decided to withdraw and to re-institute in the High Court. It also notes the author's argument that his civil action is unlikely to be successful due to his difficulties in obtaining evidence, his inability to afford proper representation and the fact that the six-month time limitation for the notification of a complaint against a State organ has already elapsed.

6.4 The Committee notes the author's detailed description of the incident of 17 July 2005, during which he was allegedly subjected to ill-treatment, as well as his identification by name of five warders who allegedly participated in the incident. It also notes the author's medical history and press clippings on the incident of 17 July 2005. The Committee observes that in the present case the arguments provided by the author necessitated at the very minimum an independent investigation of the potential involvement of the State party's warders in the author's ill-treatment. The Committee considers, therefore, that the author's allegations not having been addressed by the State party warrant the finding that there has been a violation of article 7 of the Covenant.¹¹

6.5 Regarding the author's claim that the St. Alban's Correctional Centre was locked down after the incident of 17 July 2005 and that he was held incommunicado for a month without access to a physician, a lawyer or his family, the Committee recalls its general comment No. 20, which recommends that States parties should make provisions against incommunicado detention¹² and notes that the total isolation of a detained or imprisoned person may amount to an act prohibited by article 7. In view of this observation, the Committee finds an additional violation of article 7 of the Covenant.

6.6 With regard to the author's complaint that despite several requests to various authorities he was not tested for HIV, which he feared to have contracted as a result of the incident of 17 July 2005, the Committee finds that the prevalence of HIV in South African prisons, as attested by the Committee against Torture in its concluding observations of the State party's initial report,¹³ which had been brought to the Committee's attention by the author, as well as the particular circumstances of the incident of 17 July 2005 warrants the finding of a violation of article 7, of the Covenant.

6.7 The Committee notes the content of the complaints submitted by the author to different authorities, such as the prison administration, the police, the Office of the Inspecting Judge, the Magistrate Court and the High Court, none of which, it would appear, have been investigated. The Committee recalls its general comment No. 20¹⁴ and general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant,¹⁵ as well as its constant jurisprudence,¹⁶ according to which complaints alleging a violation of article 7 must be investigated promptly, thoroughly and impartially by competent authorities and appropriate action must be taken against those found guilty. In the present circumstances and in the absence of any explanation from the State party, due weight must be given to the author's allegations. Accordingly, the

¹¹ See communication No. 962/2001, *Mulezi v. Democratic Republic of the Congo*, Views adopted on 8 July 2004, para. 5.4.

¹² Note 10 above, para. 11.

¹³ CAT/C/ZAF/CO/1, para. 22.

¹⁴ Note 10 above, para. 14

¹⁵ *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III, para. 18.

¹⁶ See for example communications No. 1436/2005, *Sathasivam et al. v. Sri Lanka*, Views adopted on 8 July 2008, para. 6.4; No. 1589/2007, *Gapirjanov v. Uzbekistan*, Views adopted on 18 March 2010, para. 8.3; No. 1096/2002, *Kurbanov v. Tajikistan*, Views adopted on 6 November 2003, para. 7.4; No. 322/1988, *Rodríguez v. Uruguay*, Views adopted on 19 July 1994, para. 12.3.

Committee concludes that the facts before it constitute a violation of article 7 read in conjunction with article 2, paragraph 3, of the Covenant.

6.8 With regard to the author's complaint alleging a denial to access to medical care after the author's ill-treatment on 17 July 2005, the Committee notes the information in the author's medical history, according to which he was taken to the prison hospital on 31 August 2005. 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 in accordance with, inter alia, the Standard Minimum Rules for the Treatment of Prisoners.¹⁷ The Committee reiterates that it is the State party's obligation to provide for the security and well-being of persons deprived of their liberty.¹⁸ It observes that despite the author's request to see a doctor immediately after the incident of 17 July 2005, according to the medical record before the Committee, he received his first medical attention only on 31 August 2005. The Committee considers that the delay between the author's request for medical examination and the prison authorities response is such that it amounts to a violation of the author's rights under article 10, paragraph 1, 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 facts before it disclose a violation of the rights of Mr. McCallum under article 7 alone and read in conjunction with article 2, paragraph 3, and article 10, paragraph 1, 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, including a thorough and effective investigation of the author's claims falling under article 7, prosecution of those responsible and full reparation, including adequate compensation. As long as the author is in prison, he should be treated with humanity and with respect for the inherent dignity of the human person and should benefit from appropriate health care. The State party is also under an obligation to prevent similar violations 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 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.

¹⁷ General comment No. 21, (1992) on humane treatment of persons deprived of liberty, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. B, paras. 3 and 5; Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977; see also for example communications No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2; and No. 1173/2003, *Benhadj v. Algeria*, Views adopted on 20 July 2007, para. 8.5.

¹⁸ See communications No. 907/2000, *Siragev v. Uzbekistan*, Views adopted on 1 November 2005, para. 6.2; No. 889/1999, *Zheikov v. Russian Federation*, Views adopted on 17 March 2006, para. 7.2; and No. 1284/2004, *Kodirov v. Uzbekistan*, Views adopted on 20 October 2009, para. 9.2.

[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.]

**XX. Communication No. 1876/2009, *Singh v. France*
(Views adopted on 22 July 2011, 102nd session)***

<i>Submitted by:</i>	Ranjit Singh (represented by Christine Bustany of O'Melveny & Myers)
<i>Alleged victim:</i>	The author
<i>State party:</i>	France
<i>Date of communication:</i>	15 December 2008 (initial submission)
<i>Subject matter:</i>	Refusal to renew a residence permit in the absence of an identity photograph showing the applicant bareheaded
<i>Procedural issue:</i>	Failure to exhaust domestic remedies
<i>Substantive issues:</i>	Freedom of religion, non-discrimination, liberty of movement
<i>Articles of the Covenant:</i>	2, 12, 18 and 26
<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 22 July 2011,

Having concluded its consideration of communication No. 1876/2009, submitted to the Human Rights Committee on behalf of Mr. Ranjit Singh 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 Mr. Ranjit Singh, an Indian national of Sikh origin who has had refugee status in France since 1992. He claims to be the victim of a violation by the State party of articles 2, 12, 18 and 26 of the International Covenant on

* The following members of the Committee participated in the consideration of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, 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 Ms. Christine Chanet did not participate in the adoption of the present decision.

The text of an individual opinion signed by Committee member, Mr. Fabián Omar Salvioli is appended to the present Views.

Civil and Political Rights.¹ He is represented by counsel, Ms. Christine Bustany of O'Melveny & Myers.

1.2 On 23 July 2010, the Chairperson, acting on behalf of the Committee, decided that the admissibility of the communication should be considered jointly with its merits.

The facts as submitted by the author

2.1 The author is an Indian citizen who has had refugee status and a permanent French residence permit since 1992. In 2002, his permanent residence permit was due for renewal. On 13 February 2002, the author submitted an application to renew his residence permit and provided two photographs showing him wearing a turban, as he had done when filing his previous application. On 22 February 2002, the Prefect of Paris informed him that the photographs which he had provided failed to meet the requirements of articles 7 and 8 of Decree No. 46-1574 of 30 June 1946 governing the conditions applying to foreign nationals' admission to and residence in France, which require individuals to appear full face and bareheaded. On 11 April 2002, the author sent a letter to the Prefect of Paris requesting an exemption from those provisions of the decree. This request was rejected in May 2002. He then wrote to the Minister of the Interior on 12 July 2002 and requested authorization to appear in a turban in his identity photographs. He received no reply.

2.2 On 20 July 2006, the Administrative Court of Paris rejected the application filed by the author, who was contesting the authorities' refusal to renew his residence card. On 24 May 2007, the Administrative Appeal Court of Paris rejected his appeal. In August 2007, he lodged an appeal in cassation with the Council of State. His appeal was rejected on 23 April 2009.

The complaint

3.1 The author explains that wearing a turban is a religious obligation and an integral part of Sikhism,² his religion. It is the outward manifestation of Sikhism and is closely intertwined with faith and personal identity. The removal of his turban could be viewed as a rejection of his faith, and its improper use by third parties is deeply insulting. Appearing bareheaded in public is deeply humiliating for Sikhs, and an identity photograph showing him bareheaded would produce feelings of shame and degradation every time it was viewed.³ It is not just that the author would have to appear bareheaded for the photograph to be taken; the State party is, in essence, asking Mr. Singh to repeatedly humiliate himself whenever proof of his identity is requested. This is why the author has refused to comply with the requirement to remove his turban for his residence card photograph.

3.2 The author submits that Decree No. 46-1574 of 30 June 1946, which requires all identity photographs accompanying residence card applications to show applicants full face and bareheaded, takes no account of the fact that members of the Sikh community are bound by their religious beliefs to cover their heads in public at all times. He claims to be a victim of indirect discrimination by the State party in violation of article 18, paragraph 2.⁴

¹ The Covenant and the relevant Optional Protocol entered into force for France on 4 February 1981 and 17 May 1984, respectively.

² Sikh code of conduct, Sikh Rehat Maryada, section 4, chapter X, article XVI, indent (t).

³ The author cites a number of countries which have adapted their legislation in recognition of the importance attached by Sikhs to wearing a turban. These countries include Canada, Germany, the United Kingdom and the United States of America. He also cites the United Nations, which allows Sikhs to wear a turban rather than a helmet during peacekeeping missions.

⁴ See 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

He explains that, without his residence card, he is considered to be living illegally in France. As a result, he has also lost access to the free public health-care system.⁵

3.3 Moreover, because the Government of France has refused to renew his residence permit, the author no longer has access to unemployment benefits, housing benefits or reduced transit fares for older persons even though, under French law, the author's straitened financial circumstances entitle him to Government assistance, such as housing and unemployment benefits. The author last received such assistance in May 2005. His benefits were then discontinued following his refusal to remove his turban for his identity photographs. He submits that the withdrawal of his social benefits, when such benefits are received by other residents in France in a similar financial situation, amounts to indirect discrimination, which is prohibited under article 18, paragraph 2.⁶

3.4 The author points out that article 18, paragraph 3, of the Covenant permits restrictions on the freedom to manifest one's religion only if such limitations are prescribed by law and are necessary to achieve one of the aims referred to in article 18, paragraph 3.⁷ He explains that an identity photograph showing him bareheaded would very probably lead to repeated situations in which he would be ordered to remove his turban for ease of comparison with the photograph. The author would thus suffer a double humiliation: each time that the authorities require him to remove his turban for ease of identification and each time that the photograph showing him bareheaded is examined by the French authorities. This repeated humiliation is not a proportionate measure for purposes of identification. He submits that requiring a person to be photographed bareheaded is not necessary in order to maintain public safety. The State party requires a photograph showing a person bareheaded, but has no objection to one showing a person with a beard covering half of the face. His first residence card bore a photograph showing him with a turban, while Decree No. 46-1574 of 30 June 1946, which requires individuals to appear bareheaded in identity photographs, was already in existence. He also notes that other European countries have issued residence cards with photographs of Sikhs wearing turbans⁸ and that it is difficult to understand how a person wearing a turban can be considered identifiable in some European countries but not in France.

3.5 He submits that the authorities' explanation that a turban would prevent them from distinguishing facial features and would thus make identification more difficult is not a valid argument, since he wears a turban at all times. He would therefore be more readily identifiable from a photograph showing him wearing a turban than from one showing him bareheaded. He submits that requiring him to appear without his turban in identity photographs is disproportionate to the aims pursued.⁹

VI, para. 5.

⁵ The author cites a report by the Paris public hospital system (Assistance Publique des Hôpitaux de Paris) which establishes that non-renewal of a residence card results in the loss of all rights to health insurance.

⁶ See general comment No. 22. See also communication No. 931/2000, *Hudoyberganova v. Uzbekistan*, Views adopted on 5 November 2004, paras. 6.2 and 7.

⁷ See general comment No. 22.

⁸ For example, Belgium, Germany, Italy, Norway, Portugal and Sweden.

⁹ The author cites the case of *Phull v. France*, application No. 35753/03, ECHR 2005-I, decision of 11 January 2005, but maintains that the State's objective was not the same as in his case. In the Phull case, the purpose of requiring a Sikh to remove his turban at an airport security check was to ensure the safety of the other passengers; however, in the communication that he has submitted to the Committee, the purpose of requiring the removal of his turban is his identification.

3.6 He also submits that the State party's refusal to renew his residence card constitutes a breach of article 12 of the Covenant on the liberty of movement. Unless his residence card is renewed, the author cannot obtain valid travel documents and cannot leave France.¹⁰

3.7 Furthermore, he maintains that the requirement to appear bareheaded in identity photographs also violates article 26 of the Covenant. Under Decree No. 46-1574 of 30 June 1946, as applied by the French authorities, he does not receive the same treatment as the majority of the population, since wearing a turban is an integral part of a Sikh's identity.¹¹ The author is compelled to choose between his religious duty and access to the public health-care system, a choice which most French citizens are not forced to make.

3.8 While taking due account of the State party's reservation to article 27 of the Covenant, the author submits that his communication constitutes an opportunity for the Committee to express its concerns regarding respect for the rights of minorities in France¹² and to recognize the Sikh community as an ethnic and religious minority.¹³

State party's observations on admissibility

4.1 On 22 April 2010, the State party contested the admissibility of the communication. It clarifies the facts as presented by the author and notes that in 1992 the author received a residence card, valid for 10 years, under article 15-10 of Ordinance No. 45-2658 of 2 November 1945 relating to the conditions applying to foreign nationals' admission to and residence in France. In his renewal application, the author refused to provide photographs showing him full face and bareheaded, as required since 1994 by article 11-1 of Decree No. 46-1574 of 30 June 1946 governing the conditions applying to foreign nationals' admission to and residence in France. On 12 July 2002, the Minister of the Interior implicitly rejected the author's appeal. On 24 May 2007, the Administrative Appeal Court of Paris rejected his appeal, ruling that the provisions at issue were not liable to make identification of the author during identity checks more difficult merely because he was wearing a turban and would not necessarily result in his having to remove his turban. The State party maintains that the one-off nature of the requirement to bare one's head in order to have a photograph taken is not disproportionate to the objective of public safety and does not involve discrimination.

4.2 The State party submits that the author brought his case to the Committee prior to 23 April 2009, when the Council of State ruled on his appeal. It maintains that, in his appeal before the Council of State, the author did not allege a violation of the provisions of the Covenant, but instead invoked articles 9 (freedom of religion) and 14 (non-discrimination) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. He has not, however, brought the matter before the European Court of Human Rights, evidently believing that the case law of the Court would not be favourable to him. On 13 November 2008, the Court had rejected as manifestly unfounded an appeal against a decision of the Council of State which alleged violations of articles 9 and 14 of the Convention.¹⁴ The State party argues that the author chose to submit his complaint only to the Committee in an attempt to obtain a different decision from that reached by the Court.

¹⁰ 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.

¹¹ See general comment No. 18 (1989) on non-discrimination, *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40*, vol. I (A/45/40 (Vol. I)), annex VI, sect. A, para. 9.

¹² Concluding observations of the Committee on Economic, Social and Cultural Rights, (E/C.12/1/Add.72), paras. 15 and 25.

¹³ The author cites the House of Lords decision in *Mandla v. Dowell Lee*, [1983] AC548.

¹⁴ Ruling of the Council of State of 15 December 2006, *Association United Sikhs and Mr. Singh Mann* (No. 289946); decision of the European Court of Human Rights, No. 24479/07 of 13 November 2008.

The State party considers that the author should have referred to the Covenant in the proceedings before the Council of State, since the case law of the European Court of Human Rights cannot be applied to complaints brought before the Committee because of the singular nature of the Covenant.

4.3 As to the alleged violation of article 12 of the Covenant, the State party submits that the author has never brought his claim regarding freedom of movement before the domestic courts, neither in a broad sense nor specifically on the basis of the Covenant. Consequently, this claim is not admissible.

State party's observations on the merits

5.1 On 23 August 2010, the State party submitted its observations on the merits. It considers that communication No. 931/2000, *Hudoyberganova v. Uzbekistan*,¹⁵ which has been cited by the author, is not comparable to his situation. Unlike the circumstances in that case, the author has not been prohibited from wearing religious clothing. He has only been asked to provide identity photographs showing him bareheaded so that a residence permit can be issued, which involves removing religious clothing only while the photographs are being taken. The State party recalls the case law of the European Court of Human Rights, which has maintained that article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (freedom of thought, conscience and religion) does not protect every act motivated or inspired by a religion or belief and does not confer on people who behave in a manner governed by a religious belief the right to disregard rules that have proved to be justified.¹⁶ The Court has found, for example, that neither the requirement that a student of the Muslim faith must provide a photograph showing her bareheaded for the purpose of the award of a degree certificate¹⁷ nor the requirement that people remove their turban or veil for security checks at airports or consulates¹⁸ interferes with the exercise of the right to freedom of religion.

5.2 The State party submits that, in a case very similar to the author's in which the applicant considered that the requirement to appear bareheaded in a driving licence photograph constituted a violation of privacy and of freedom of religion and conscience, the European Court of Human Rights rejected the application (No. 24479/07) as manifestly unfounded, without communicating the matter to the Government. The Court accepted the proposition that identity photographs showing people bareheaded are needed by the authorities responsible for ensuring public safety and for maintaining law and order and that the arrangements made for implementing security checks fall within the scope of the discretion of the State. It also maintained that the requirement to remove a turban for security checks or the issuance of a driving licence arises only occasionally.

5.3 The State party refers to article 18, paragraph 3, of the Covenant and to general comment No. 22 of the Committee,¹⁹ which specify what limitations the State may place on the freedom to manifest one's religion. It submits that the measure at issue is prescribed by law, in particular article 11-1 of 1994 of the decree of 30 June 1946. The requirement to provide two identity photographs showing applicants bareheaded is designed to minimize the risk of fraud or falsification of residence permits and is justified in order to protect

¹⁵ Views adopted on 5 November 2004.

¹⁶ *Leyla Sahin v. Turkey*, application No. 44774/98, ECHR 2005 XI, para. 104.

¹⁷ *Karaduman v. Turkey*, application No. 16278/90, decision of the Commission of 3 May 1993, Decisions and reports (DR) 74, p. 93; *Araç v. Turkey*, application No. 9907/02, 19 September 2006.

¹⁸ *Phull v. France*, application No. 35753/03, ECHR 2005-I; *El Morsli v. France*, application No. 15585/06, 4 March 2008.

¹⁹ Para. 8.

public order and public safety. It also considers that this regulation spares the administrative authorities the difficult task of trying to assess to what extent a specific type of headgear covers the face and facilitates or impedes the identification of an individual, thus ensuring security and equality before the law.

5.4 While acknowledging that the requirement to provide identity photographs in which people appear bareheaded may be an imposition for some individuals, the State party submits that such an imposition is of a limited nature. People who are accustomed to wearing a turban are not compelled to stop wearing it on a permanent or regular basis, but only on a very occasional basis in order for a photograph to be taken. It also submits that any resulting discomfort for the author should be balanced against the public interest in combating the falsification of residence permits. Moreover, the fact that some States have adopted different measures in this area and the fact that the author was previously authorized to appear with a turban in the photograph affixed to his residence permit cannot be used as a justification. In conclusion, the State party maintains that the author has not been the victim of a violation of article 18 of the Covenant, since the domestic legislation at issue is justified by the need to protect public safety and order and since the means used are proportionate to the aims.

5.5 As to the alleged violation of articles 2 and 26 of the Covenant, the State party recalls the Committee's general comment No. 18²⁰ and submits that the author has not been discriminated against in any way, since the decree of 30 June 1946 applies to all residence permit applicants, without distinction. The State party points out that, in the present case, there are no grounds for exempting certain individuals on the basis of their religious views from rules that apply to everyone and that are designed to ensure public order and safety or for taking affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination.²¹ As to the author's complaint regarding the loss of entitlement to a number of social benefits, it points out that some benefits are subject to a condition of legal residence, but that others are not, such as State medical assistance, emergency treatment and benefits connected with an occupational accident or disease. Furthermore, the State party points out that the author himself is responsible for the situation. It considers, therefore, that the author has not been a victim of a violation of articles 2 or 26 of the Covenant.

5.6 The State party submits that the author's complaint under article 12 of the Covenant raises no issue other than those figuring in the other complaints and that any restrictions on freedom of movement caused by the failure to issue a residence permit to the author are a result of his refusal to comply with the general rules governing the issuance of such permits. In conclusion, the State party submits that the Committee should reject the author's complaints under articles 2, 12, 18 and 26 of the Covenant as unfounded.

The author's comments on the State party's observations on admissibility and the merits

6.1 On 3 January 2011, the author argued that the requirement that domestic remedies must be exhausted as set forth under article 5, paragraph 2 (b), of the Optional Protocol had been fully met. In his first submission, made in English, on 15 December 2008, he referred to the Committee's case law, which indicates that the requirement to exhaust all domestic remedies does not necessarily oblige the complainant to obtain a decision from the highest national court. This exception applies if all the remedies have already been exhausted by

²⁰ Para. 7.

²¹ General comment No. 18, paras. 8 and 10.

another complainant in a case on the same subject.²² On 15 December 2006, the Council of State issued a decision enforcing a very similar law under almost identical circumstances. The French authorities had refused to renew a driving licence because the identity photographs provided by the applicant showed him wearing a Sikh turban. On 26 January 2010, when the French translation of the initial complaint was submitted, the author referred to the negative decision of the Council of State dated 14 April 2009. As to the provisions invoked by the author before the national courts, he recalls the case law of the Committee, which indicates that authors must invoke the substantive rights contained in the Covenant before the national courts, but that they are not required, under the Optional Protocol, to refer to articles of the Covenant.²³ In the proceedings before the Council of State, the author claimed that his right to freedom of religion and the principle of non-discrimination had been violated, and his complaint was based on the same circumstances as those presented to the Committee.

6.2 With regard to his complaint under article 12 of the Covenant, the author recalls the case law of the Committee, which states that remedies that are manifestly futile need not be exhausted in order to meet the requirements of article 5, paragraph 2 (b), of the Optional Protocol.²⁴ He submits that the decision of the Council of State would not have been different if he had raised the issue of a violation of the freedom of movement because that violation is closely connected to the violation of his freedom of religion.

6.3 On the merits, the author maintains that the State party has failed to demonstrate, under the circumstances of the case in question, the legitimate aim of Decree No. 46-1574 of 30 June 1946 or the necessity and proportionality of the restriction of his freedom of religion as set forth in article 18 of the Covenant.²⁵ The State party claims that the requirement to appear bareheaded in an identity photograph is a way of minimizing the risk of fraud and falsification of residence permits, but it makes no case for the need for such a measure in order to achieve that aim. The author reiterates that the requirement to appear bareheaded in an identity photograph is arbitrary and is also applied to situations in which head coverings do not hinder identification. The author maintains that a turban which is worn at all times does not impede identification in any way, unlike the case of people who radically change their appearance by cutting, growing out or colouring their hair or beards, wearing a wig, shaving their head or wearing heavy make-up.

6.4 In 1992, the author was allowed to appear in his turban in the identity photograph taken for his first residence permit, even though Decree No. 46-1574 of 30 June 1946, which requires photographs showing applicants bareheaded, was already in force. During the 10-year validity period of his residence permit, no identification problems arose. Moreover, most European countries that have the same concerns about fraud and public security allow religious head coverings to be worn in the photographs affixed to identity documents. As to the State party's argument that the regulation spares the authorities the

²² See communication No. 24/1977, *Lovelace v. Canada*, Views adopted on 30 July 1981.

²³ See communications No. 273/1989, *B.d.B. et al. v. The Netherlands*, decision on admissibility of 30 March 1989, para. 6.3; No. 305/1988, *van Alphen v. The Netherlands*, Views adopted on 23 July 1990.

²⁴ See, for example, communications No. 1184/2003, *Brough v. Australia*, Views adopted on 17 March 2006, para. 8.6; No. 1156/2003, *Escolar v. Spain*, Views adopted on 28 March 2006, paras. 5.2, 6; No. 1036/2001, *Faure v. Australia*, Views adopted on 31 October 2005, para. 6.1.

²⁵ See communications No. 202/1986, *Ato del Avellanal v. Peru*, Views adopted on 28 October 1988, para. 14; No. 30/1978, *Bleier v. Uruguay*, Views adopted on 29 March 1982, para. 13.1–13.3; communication No. 107/1981, *Almeida de Quinteros v. Uruguay*, Views adopted on 21 July 1983, para. 11; No. 1085/2002, *Taright et al. v. Algeria*, Views adopted on 15 March 2006; Nos. 146/1983 and 148–153/1983, *Baboeram-Adhin et al. v. Suriname*, Views adopted on 4 April 1985, para. 14.2.

difficult task of assessing to what extent a specific type of headgear covers the face and facilitates or impedes the identification of an individual, the author submits that the State party could easily establish administrative guidelines that would enable public officials to determine whether headgear also covers the face or not.²⁶

6.5 The author submits that, even if the regulation were to be considered legitimate, it would still be disproportionate to the aim pursued. The author reiterates his deep attachment to using a turban because of his religion and rejects the State party's argument that the restriction would be applied only on an occasional basis. He points out that a photograph showing him without a turban would exist on a continuing basis and would be an affront to his religion and ethnic identity. He also submits that a photograph showing him bareheaded would, in all probability, result in repeated requests from the authorities for him to remove his turban for ease of identification and, even if that were not the case, he would feel humiliated and feel like a traitor to his faith whenever the authorities examined his residency card containing a photograph in which he appeared bareheaded. He also points out that the State party has not established that a regulation prohibiting any head covering at all for everyone is the least restrictive measure for achieving the objective. He maintains that he is a victim of a continuing violation of his rights under article 18, paragraph 3, of the Covenant.

6.6 The author also restates that his case is comparable to that of *Hudoyberganova v. Uzbekistan*²⁷ because a complete ban on appearing in an identity photograph with a head covering, including religious head coverings, is a ban on wearing clothes that have a religious connotation. Moreover, as in the *Hudoyberganova v. Uzbekistan* case, France has not cited any specific reason why the restriction on the author is necessary within the meaning of article 18, paragraph 3. As to the case law of the European Court of Human Rights cited by the State party, the author stresses that it is not comparable with the Committee's case law, in particular with regard to the scope of discretion which the European Court accords to its member States. He also maintains that the case law in question cannot be applied to his situation because the aims invoked to justify the limitation of freedom of religion in the cases in question are not at issue in this instance. In the case of *Leyla Sahin v. Turkey*,²⁸ the Court was dealing with the principles of secularism, religious indoctrination and gender equality; in the case of *Phull v. France*,²⁹ the issue was ensuring the safety of air travellers. With respect to the case of *Shingara Mann Singh v. France*,³⁰ the Court had agreed that the regulation requiring Sikhs to appear bareheaded in identity photographs for driving licences interfered with their freedom of religion. While noting that the Court had rejected that complaint, the author maintains that it differs from his case, which involves an identity photograph for a residency card. Moreover, the Court had not considered the merits of that issue.

6.7 The author reiterates that he is the victim of indirect discrimination under articles 2 and 26 of the Covenant because Decree No. 46-1574 of 30 June 1946, which is supposed to be neutral, is an affront to the Sikh minority in France.³¹ The majority of the population in

²⁶ See, for example, the instructions provided by the United States of America for passport applicants, para. 7, available from http://travel.state.gov/passport/get/first/first_830.html.

²⁷ See also communication No. 931/2000, *Hudoyberganova v. Uzbekistan*, Views adopted on 5 November 2004, paras. 6.2 and 7.

²⁸ *Leyla Sahin v. Turkey*, application No. 44774/98, para. 104 ECHR 2005 XI, see, in particular, the dissenting opinion of Judge Tulkens, para. 8.

²⁹ *Phull v. France*, application No. 35753/03, ECHR 2005-I.

³⁰ *Shingara Mann Singh v. France*, application No. 24479/07, ECHR 1523, 27 November 2008.

³¹ See communications No. 998/2001, *Althammer v. Austria*, Views adopted on 8 August 2003, para. 10.2; and No. 208/1986, *Bhinder v. Canada*, Views adopted on 9 November 1989.

France is Christian and is not bound by that religion to wear a religious item and is therefore not affected by the regulation in question. Once the author has established a prima facie case of discrimination, the State party must establish either that the effects of the regulation are not discriminatory or that the discrimination is justified. Yet the State party has merely argued that the regulation is not discriminatory in intent and is not applied in a discriminatory fashion, which does not rule out the presence of indirect discrimination.³² The author emphasizes that fully equal treatment is achieved, not by applying a regulation to everyone, but by applying it to similar situations and by handling different situations in different ways. The author also maintains that this discrimination continues to affect him and that it is false to say that he has had access to medical treatment other than emergency care. The author also maintains that the observations that he has made with regard to necessity and proportionality in relation to his claim under article 18 also apply to his complaint under articles 2 and 26 of the Covenant.

6.8 As to his claim under article 12 of the Covenant, the author reiterates that freedom of movement may be subject to restrictions only if they are necessary in order to safeguard national security and that any restrictive measure must be the least intrusive instrument amongst those which might achieve the desired result.³³ He restates his comments regarding necessity and proportionality and maintains that he is the victim of a violation under article 12 of the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

7.3 With regard to the question of the exhaustion of domestic remedies, the Committee takes note of the State party's argument that, at the time that the case was submitted to the Committee, the Council of State had not yet issued a decision concerning the author's complaint and that he had not invoked the Covenant before the Council of State but had instead based his claims on articles 9 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Committee refers to its jurisprudence and recalls that, when examining complaints, it seeks to determine whether or not all remedies have been exhausted at the time that a communication is taken under consideration.³⁴ On 23 April 2009, the Council of State dismissed the author's appeal on points of law.

7.4 The Committee also recalls that, for the purposes of the Optional Protocol, an author is not required to cite specific articles of the Covenant before domestic courts, but need

³² See communications No. 172/1984, *Brooks v. The Netherlands*, Views adopted on 9 April 1987, paras. 12.3–16; and No. 516/1992, *Simunek et al. v. the Czech Republic*, Views adopted on 19 July 1995, para. 11.7.

³³ General comment No. 27, para. 12.

³⁴ See communications No. 1228/2003, *Lemercier et al. v. France*, decision on inadmissibility adopted on 27 March 2006, para. 6.4; No. 1045/2002, *Baroy v. Philippines*, Views adopted on 31 October 2003, para. 8.3; No. 1069/2002, *Bakhtiyari v. Australia*, Views adopted on 29 October 2003, para. 8.2.

only invoke the substantive rights protected under the Covenant.³⁵ The Committee notes that, in the domestic courts, the author claimed violations of the right to freedom of religion and of the principle of non-discrimination, which are protected under articles 18, 2 and 26 of the Covenant. The Committee is therefore not precluded by article 5, paragraph 2 (b), of the Optional Protocol from considering the case on its merits.

7.5 With regard to the complaint of a violation of article 12 of the Covenant, the Committee, observes that the author did not claim a violation in the domestic courts of his right to liberty of movement as protected under article 12 of the Covenant. The Committee therefore considers that domestic remedies have not been exhausted with respect to the alleged violation of article 12 of the Covenant and finds this part of the communication to be inadmissible under article 5, paragraph 2 (b), 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 in accordance with article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee takes note of the author's claim that the requirement that an individual appear bareheaded in the identity photograph used for a residence permit violates his right to freedom of religion under article 18 of the Covenant and is neither necessary for the protection of public safety and order nor a proportionate measure for purposes of identification. It also takes note of the author's claim that, because he does not have a residence permit, he no longer has access to the public health-care system or to social benefits. It takes note of the State party's view that requiring a person to remove his turban for the specific purpose of taking an identity photograph in which he appears bareheaded is a proportionate measure for the objective of protecting public safety and order and is motivated by a desire to limit the risk of fraud or falsification of residence permits.

8.3 The Committee refers to its general comment No. 22 concerning article 18 of the Covenant and considers that the freedom to manifest a religion encompasses the wearing of distinctive clothing or head coverings.³⁶ The fact that the Sikh religion requires its members to wear a turban in public is not contested. The wearing of a turban is regarded as a religious duty and is also tied in with a person's identity. The Committee therefore considers that the author's use of a turban is a religiously motivated act and that article 11-1 of Decree No. 46-1574 of 30 June 1946 (as amended in 1994), which deals with the conditions applying to foreign nationals' admission to and residence in France and which requires that people appear bareheaded in the identity photographs used on residence permits, interferes with the exercise of freedom of religion.

8.4 The Committee must therefore determine whether the limitation of the author's freedom to manifest his religion or beliefs (art. 18, para. 1) is authorized under article 18, paragraph 3, of the Covenant. The Committee notes that there is no dispute as to the fact that the law requires people to appear bareheaded in their identity photographs and that the purpose of this requirement is to protect public safety and order. It is therefore the responsibility of the Committee to decide whether that limitation is necessary and proportionate to the end that is sought.³⁷ The Committee recognizes the State party's need to ensure and verify, for the purposes of public safety and order, that the person appearing

³⁵ See *B.d.b et al. v. The Netherlands* (note 23 above), , para. 6.3; and *van Alphen v. The Netherlands* (note 23 above), para. 5.5.

³⁶ See general comment No. 22, para. 4.

³⁷ See general comment No. 22, para. 8.

in the photograph on a residence permit is in fact the rightful holder of that document. It observes, however, that the State party has not explained why the wearing of a Sikh turban covering the top of the head and a portion of the forehead but leaving the rest of the face clearly visible would make it more difficult to identify the author than if he were to appear bareheaded, since he wears his turban at all times. Nor has the State party explained how, specifically, identity photographs in which people appear bareheaded help to avert the risk of fraud or falsification of residence permits. Consequently, the Committee is of the view that the State party has not demonstrated that the limitation placed on the author is necessary within the meaning of article 18, paragraph 3, of the Covenant. It also observes that, even if the obligation to remove the turban for the identity photograph might be described as a one-time requirement, it would potentially interfere with the author's freedom of religion on a continuing basis because he would always appear without his religious head covering in the identity photograph and could therefore be compelled to remove his turban during identity checks. The Committee therefore concludes that the regulation requiring persons to appear bareheaded in the identity photographs used on their residence permits is a limitation that infringes the author's freedom of religion and in this case constitutes a violation of article 18 of the Covenant.

8.5 Having ascertained that a violation of article 18 of the Covenant occurred, the Committee will not examine the claim based on a separate violation of the principle of non-discrimination guaranteed by article 26 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 a violation by the State party of article 18 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, including a reconsideration of his application for a renewal of his residence permit and a review of the relevant legislative framework and its application in practice, in the light of its obligations under the Covenant. 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 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 has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to these Views. The State party is also requested to publish the Committee's 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.]

Appendix

Individual opinion of Committee member Mr. Fabián Omar Salvioli

1. I concur with the decision of the Human Rights Committee finding violations of article 18 of the International Covenant on Civil and Political Rights in the case of *Singh v. France*, communication No. 1876/2009. The Committee has correctly determined that the facts reveal violations of the right to freedom of religion, to the detriment of the victim.

2. I nonetheless consider, for reasons explained below, that in this case the Committee ought to have concluded that the State party is also responsible for violations of article 2, paragraph 2, of the Covenant. The Committee also ought to have concluded that as part of the reparations, the State party must amend its legislation to bring it into line with the Covenant.

Violation of article 2, paragraph 2, of the Covenant and the need for the Committee to grant clearer reparations

3. Ever since I became a member of the Committee, I have maintained that possible violations of article 2, paragraph 2, of the Covenant can be found in the context of an individual complaint, in accordance with current standards governing the international responsibility of States in respect of human rights. I have no reason to depart from the observations I made in paragraphs 6 to 11 of the individual opinion appended to communication No. 1406/2005 regarding the emergence of international responsibility through legislative acts, the Committee's capacity to apply article 2, paragraph 2, in the context of individual complaints, the interpretative criteria that should guide the Committee's work when finding and considering possible violations, and the consequences in terms of reparation.^a

4. State parties to the Covenant cannot order action which violates the rights and freedoms established in the Covenant itself; such an action constitutes, in my estimation, a violation in and of itself of the obligations set out in article 2, paragraph 2, of the International Covenant on Civil and Political Rights.

5. In the present case, furthermore; the question of public interest "action" does not arise, since what we have is the actual application, to the detriment of Mr. Ranjit Singh, of legislation (Decree No. 46-1574 of 30 June 1946) governing the conditions applying to foreign nationals' admission to and residence in France.

6. The aforementioned legislation requires applicants to be photographed full face and bareheaded. The latter requirement did not appear in the original version; it was added in 1994 with the amendment of article 11-1 of the decree, as expressly recognized by the State party (see para. 4.1 of the Committee's Views).

7. In 1994, when Decree No. 56-1574 was amended, the Covenant and its first Optional Protocol were fully in force for France.

8. This new legislation itself, irrespective of its application, breaches article 2, paragraph 2, of the Covenant inasmuch as France has not taken the requisite action under its domestic law to give effect to the right covered by article 18 of the International Covenant on Civil and Political Rights. The author expressly cited a violation of article 2 of

^a See partially dissenting individual opinion of Mr. Fabián Salvioli issued in the case of *Anura Weerawansa v. Sri Lanka*, communication No. 1406/2005.

the Covenant and, in its decision, the Committee has remained silent with regard to this allegation.

9. The finding of a violation of article 2, paragraph 2, in a specific case has practical consequences in terms of reparation, especially as regards the prevention of any recurrence. The fact that in the present case there is indeed a victim of the application of a legal standard incompatible with the Covenant vitiates any interpretation relating to a possible ruling *in abstracto* by the Human Rights Committee.

10. Paragraph 10 of the Committee's Views, which informed the State party that "... a review of the relevant legislative framework and its application in practice, in the light of its obligations under the Covenant ..." is a step forward in relation to its previous jurisprudence, but is still insufficient. What would happen if the State party were to "review" the framework but conclude that it does not have to amend its provision? Legislation that the Committee had found to be incompatible with the Covenant would remain in effect.

11. The Committee customarily ends its Views by stating that the State party is "under an obligation to take steps to prevent similar violations in the future". At this stage of progress of the Committee's work, it is vital for the Committee, rather than to talk in general terms, to indicate more explicitly the measures needed to prevent any recurrence of events such as those that led to the violation. This would assist State parties in duly honouring the obligations that they freely assumed on becoming parties to the Covenant and the Protocol.

12. In the present case there is no choice whatsoever: the legislation is in itself incompatible with the Covenant and, as a result, in order to guarantee that such events would not recur, the Committee ought to have indicated that the State party must amend Decree No. 46-1574, dated 30 June 1946, to remove the requirement that applicants must be photographed "bareheaded". This in no way prevents the State party from regulating the measures for the correct identification of persons, provided they are applied reasonably in terms of article 18, paragraph 3, of the Covenant.

(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.]

**YY. Communication No. 1887/2009, *Peirano Basso v. Uruguay*
(Views adopted on 19 October 2010, 100th session)***

<i>Submitted by:</i>	Juan Peirano Basso (represented by counsels Carlos Varela Alvarez and Carlos de Casas)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Uruguay
<i>Date of communication:</i>	5 May 2009 (initial submission)
<i>Subject matter:</i>	Procedural irregularities in the case brought against the author
<i>Procedural issue:</i>	Failure to exhaust domestic remedies; insufficient substantiation
<i>Substantive issues:</i>	Refusal of bail; undue delay in proceedings
<i>Articles of the Covenant:</i>	9, paragraph 3; 14, paragraph 3 (c)
<i>Article 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 19 October 2010,

Having concluded its consideration of communication No. 1887/2009, submitted by Juan Peirano Basso 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. The author of the communication, dated 5 May 2009, is Juan Peirano Basso, a Uruguayan citizen born on 4 November 1949, who claims to be the victim of violations by Uruguay of article 2, paragraphs 1, 2 and 3 (a); article 9, paragraph 3; article 7; article 10; article 14, paragraphs 1, 2 and 3 (a), (b) and (c); and article 26 of the Covenant. The Optional Protocol entered into force for the State party on 23 March 1976. The author is represented by counsel.

* The following members of the Committee participated in the consideration of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Mahjoub El Haiba, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

The facts as submitted by the author

2.1 The author's family formerly owned a number of businesses, including Banco de Montevideo. In 2002, at the behest of the Central Bank of Uruguay, the criminal judge presiding at Montevideo Court No. 8 initiated an investigation that, on 7 August 2002, resulted in the arrest of the author's father, Jorge Peirano Facio¹ and his sons Jorge, Dante and José Peirano Basso. They were accused of offences under article 76² of Act No. 2,230, concerning the responsibilities of directors and administrators of limited companies.

2.2 On 25 June 2002, the author left Uruguay for São Paulo, Brazil, from where he flew to the United States of America the next day. He applied for United States residency in March 2003 and was granted a permanent resident card ("green card") on 29 May 2005. In the intervening period, the judicial authorities in Uruguay issued an international warrant for the author's arrest on the grounds that he had fled the country. As a result, the author was detained in the United States on 19 May 2006 and extradited to Uruguay on 10 September 2008. On 11 September he was brought before the Court of First Instance for the Seventh Circuit on charges of bankruptcy fraud, an offence carrying a prison term of between 12 months and 10 years.

2.3 The author asserts that, since his extradition, he has been refused bail. Bail was initially refused by a court decision dated 15 October 2008 on the following grounds: "Although, because of the appeals that he himself initiated before the United States authorities, the accused has already spent more than 28 months in detention, the trial relating to the prima facie offences of which he is charged is just beginning, and there are evidentiary proceedings pending, as ordered by the Court in the initiating order, which could be obstructed or hindered if the accused were to be released on bail. In addition (...) although the accused (...) was aware that he was sought for the purpose of standing trial, he chose to leave the country and not to return, steadfastly refusing to submit to Uruguayan justice."

2.4 This decision was confirmed by the Court of Criminal Appeal for the Third Circuit, which, in a ruling issued on 27 February 2009, affirmed that: "The administrative detention ordered in connection with the extradition proceedings cannot be considered pretrial detention, since at that time the accused had not yet been arraigned by the Uruguayan authorities; this occurred only once the initiating order was issued. The question of whether the period of administrative detention can be deducted from the sentence imposed, once a verdict is reached, is a different matter altogether."

2.5 The author subsequently applied to the Supreme Court for a release *ex gratia*.³ This application was refused on 25 March 2009. No reason was given for the decision, which contravenes the provisions of the domestic legal system which stipulate that such decisions must be explained. On 11 December 2008, the author applied for "temporary leave", as provided for in procedural law, so that he could spend Christmas and New Year's with his family. This application was refused by a decision dated 22 December 2008. In this

¹ The father died in prison in 2003 at age 82.

² Article 76 stipulates that: "Directors and administrators of limited companies who commit fraud, deception or contravene statutes or any public order law of any kind shall be subject to the penalties established in articles 272 and 274 of the Criminal Code concerning fraudulent bankruptcy." This provision was repealed by Act No. 18,411 of 14 November 2008.

³ "Release *ex gratia*" is a concept defined in article 17 of Act No. 17,726, pursuant to which "At any stage in the proceedings, on the written application of defence counsel, the Supreme Court may grant the defendant a provisional release if he or she has already been held in pretrial detention for a period of time or the trial proceedings have become excessively lengthy, subject to a favourable prior report from the Institute of Forensic Science."

decision the Court recognized that the author had already spent more than two years in prison, including, as is proper, the period of his administrative detention in the United States while the extradition request was being processed. The judge attributed her refusal to “the accused’s efforts to avoid appearing before the Uruguayan courts, which resulted in lengthy proceedings in the United States to secure his extradition. This being so, and with the trial proceedings currently in the early stages, it cannot in any way be argued that the pretrial detention of the author does not serve the purpose for which it is intended, i.e., to prevent him from absconding or obstructing the course of justice. These same risks would apply were the accused’s request for leave under affidavit to be granted”. Appeals against the decision are not permitted and at least 90 days must elapse before any further application for temporary leave may be submitted.

2.6 The author states that the judge in charge of the pretrial proceedings who refused his requests for bail and temporary leave had held that his time in detention or prison should be calculated from the date on which he was taken into custody in the United States on the request of the State party, while the Appeal Court had held that it should be calculated only from the date on which he first appeared in court, i.e., two years later, following completion of the extradition proceedings.

2.7 The author contends that, under the Uruguayan justice system, if the judge hearing the case refuses to grant bail, the only available remedy is a request for review. This request is lodged with the judge who issued the ruling, who then refers it to the Appeal Court. There is no predetermined timetable for this part of the review process. Appeals in cassation, which are considered by the Supreme Court, can be lodged only against final judgements issued by a second-instance court (Appeal Court) or against second-instance decisions that put an end to criminal proceedings or make their continuation impossible. This means that, since the question of bail is incidental to the main proceedings, such applications do not result in decisions that may be considered final judgements. Accordingly, these decisions cannot be challenged through appeals on cassation and the applicant does not have access to the Supreme Court. On this basis, the author maintains that he has exhausted all domestic remedies.

2.8 The author filed a request for review of the initiating order and the committal order in which he alleged due process violations. By a decision dated 12 November 2008, the judge ruled that there was sufficient evidence to begin the pretrial stage of the criminal proceedings, that the accused had had the opportunity to appear before the court but had declined by a choice made of his own free will in the presence of his counsel, that he had not been granted more than 48 hours because the court had sufficient evidence on which to proceed, and that the author was aware of the offences with which he was to be charged, since they were detailed in the extradition warrant issued to the United States authorities. The decision also stated that, when the author was brought before the court, the judge’s first action was to inform him of the charges and ask him to appoint counsel. While being questioned in the presence of his counsel, the author was asked if he would like the hearing to be postponed in order to give him time to prepare his defence more fully, but he had declined that offer. When the prosecutor issued the request for an initiating order, the author was given time to examine the application, together with his counsel. The evidence submitted, on which the judicial decision was based, was specifically identified in the order.⁴

2.9 The author states that, when he was detained, the criminal case instituted against his father and brothers in 2002 was under way. His brothers remained in prison for more than five years, a period in excess of the maximum sentence established by law for the offence

⁴ As set forth in the decision, a copy of which was provided by the author.

for which they were prosecuted. Their case had been referred to the Inter-American Commission on Human Rights, which, in its decision of 1 May 2007,⁵ concluded that the State of Uruguay was guilty of having unreasonably extended the pretrial detention of Jorge, José and Dante Peirano Basso. Consequently, the State was guilty of violating their right to personal liberty, guarantees of due process and its commitment to guarantee that, in decisions concerning rights, the competent authority should enforce such rights, together with the State's obligation to honour and guarantee that such rights are exercised. The Commission recommended that the State should take all necessary measures to release Jorge, José, and Dante Peirano Basso while a sentence was pending, without prejudice to the continuation of proceedings. It also recommended that the State should amend its legal or other provisions in order to make them fully compatible with the rules of the American Convention on Human Rights that ensure the right to personal liberty. The author states that his father died in prison in 2003 at the age of 82 and that his brothers were released on bail in 2007. However, the judicial authorities have yet to pass judgement in the case.

2.10 The author also mentions that a request for his extradition has been issued by Paraguay. On 22 December 2008, in the proceedings associated with this extradition request, the Criminal Court of the Eighth Circuit ordered that he should be placed in pretrial detention; that order would enter into effect immediately upon his release from detention in respect of the case currently pending against him before the Criminal Court of the Seventh Circuit.

The complaint

3.1 The author states that the Uruguayan Code of Criminal Procedure, in which no major amendments have been made since 1980, during the military dictatorship, provides for a written, inquisitorial system. Under this system, the judge who hears and investigates the case is also the one who passes sentence. The principle of immediacy is not observed, as the judge rarely sees the accused, whose freedom of action, as well as that of his or her defence counsel, is strictly limited. Nor is a habeas corpus procedure available. In 1997, a new procedural code was adopted, but a series of laws suspending its application have been enacted and, consequently, it has yet to enter into force.

3.2 The author asserts that his detention and the subsequent proceedings are arbitrary and illegal because the domestic legal system does not meet the minimum standards with regard to impartiality, the right to a fair trial, the second hearing principle, the presumption of innocence or due process of law. It therefore fails to comply with international obligations assumed by the State party upon ratification of the Covenant. This fact, in and of itself, constitutes a violation of article 2, paragraphs 1, 2 and 3 (a), of the Covenant.

3.3 The author further asserts that he is the victim of a violation of articles 9, paragraph 3; 14, paragraphs 1, 2 and 3; and 26 of the Covenant. At the time that the communication was submitted to the Committee, he had been held in custody for three years, had no possibility of being granted bail, was being tried for an offence for which the minimum sentence was 12 months' imprisonment and had no criminal record. The court's ruling of 11 September 2008 had been under appeal before the Appeal Court for seven months. These circumstances constitute a violation of the right to a fair trial and to due process within a reasonable time frame and run counter to the principle that pretrial detention should be ordered only as an exceptional measure and to the principle of the presumption of innocence, both of which are set forth in the Convention.

⁵ Report No. 35/07, Case No. 12,553.

3.4 The author contends that, three years after having been arrested, the Office of the Public Prosecutor has still not issued an indictment. In his appeal, he also argues that he was not informed of the charges against him during his plea hearing. This is a breach of domestic law, which establishes that a clear explanation of the charges must be given to the accused within 24 hours after being brought into custody, and of article 14, paragraph 3, of the Covenant. Nor did he have adequate time to prepare his defence, since his arrest and prosecution began the day after his arrival in the country on 10 September 2006.

3.5 The failure to inform him of the charges and evidence against him and the refusal to provide him with adequate time to prepare to enter a plea and to prepare his defence also constitute a breach of article 26 of the Covenant because they place him in a position of inequality. If the author had presented himself to the authorities along with his father and brothers on 7 August 2002, he would have been charged with the offence defined in article 76 of Act No. 2,230, which has since been repealed and which provided for a lesser sentence. The author, however, is being charged with corporate bankruptcy fraud under article 5⁶ of Act No. 14,095, but on the basis of the same events and evidence. The judge has said that new evidence has come to light, such as the evidence provided in the reports of the liquidators of one of the banks concerned, but does not explain how that evidence would result in a change in the legal classification of the acts in question.

3.6 The author also claims to be the victim of violations of articles 7 and 10 of the Covenant. On 15 September 2008, he was attacked verbally and physically by a group of inmates who attempted to extort money from him and who stabbed him when he refused. This prompted the opening of an investigation. The COMCAR prison, where he is being held, is the most overcrowded prison facility in the country, and the living conditions and the high rate of inter-prisoner violence are alarming, as noted by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment in his report on his mission to the country (A/HRC/13/39/Add.2).

3.7 The author claims to be the victim of a violation of article 9, paragraph 3, of the Covenant. His application for provisional release has been denied because the nearly two years that he spent in detention during the extradition proceedings were not counted as time spent in pretrial detention on the grounds that he had not been arraigned by the State party and that it should therefore be considered as administrative detention rather than pretrial detention. The author contends that this prolonged period of pretrial detention actually constitutes the imposition of a portion of the possible sentence before the fact. He states that he did not flee the country, since, when he left Uruguay on 25 June 2002, he did not conceal his identity. He asserts that the State has the means at its command to ensure and monitor his appearance in court in the country if he is released on bail. Furthermore, none of the evidence is at risk, since the expert evidence is in the possession of the Court.

3.8 The author also claims that his right to be tried without undue delay, as set forth in article 14, paragraph 3 (c), of the Covenant, has been violated. He cites the case law of the European Court of Human Rights, according to which the starting point for measuring any such delay is the moment that formal charges are made; this may include the period starting with the commencement of any interlocutory measures against the presumed accused. It ends at the time that the accused is notified of the sentence or the order that definitively closes the case. The author recalls that the European Court of Human Rights has rejected the arguments that have been advanced by certain States that such delays are attributable to

⁶ This provision states that: "Anyone who conceals, disguises or causes to disappear, either totally or partially, the assets of an enterprise for purposes of unfair gain, for him or herself or for another, and who, in doing so, does harm to a third party, shall be punished by a term of imprisonment of from 12 months to 10 years."

the time required to gather expert evidence or to judicial bodies' backlogs. He also cites the Committee's jurisprudence on the issue. He states that article 136 of the Code of Criminal Procedure establishes that the pretrial phase of the proceedings should not take longer than 120 days and that, if that period is exceeded, the examining magistrate must inform the Supreme Court, in writing, of the reasons for that situation. This notification must be repeated every 60 days after the conclusion of that time period.

State party's observations on admissibility

4.1 By means of a note verbale dated 16 September 2009, the State party challenged the admissibility of the communication. It asserts that the author has been on trial and in prison since 11 September 2008 and is charged with the offence of corporate bankruptcy fraud under article 5 of Act No. 14,095.

4.2 The author had been a fugitive from justice since 8 August 2002. He fled the country following the fraudulent bankruptcy of a number of his banks and, concurrently, the prosecution and arrest of his father, his brothers and other partners, all of whom were members of the same corporate group. The acts for which the author is to be prosecuted are the same ones that led to the prosecution of his family members and partners; these acts concern activities and manoeuvres of the corporate group known as the "Velox Group".

4.3 Between 1993 and August 2002, the Velox Group owned and controlled a number of financial institutions, including the Banco de Montevideo S.A., BM Fondos, Indumex S.A., Banco Velox (Argentina), Velox Investment Company (Argentina), Banco Alemán Paraguayo (Paraguay), Financiera Guaraní (Paraguay), Trade and Commerce Bank (Cayman Islands) and the agent for Trade and Commerce Bank in Uruguay, LATINUR S.A. The Group's modus operandi involved giving a member of the Peirano family control over the finances of these companies. The author headed up the Group and took the most important financial decisions. In late 2001, the economic crisis that broke out in Argentina and then spread to the rest of the region did serious harm to the Group's interests in Uruguay, where clients began to withdraw large sums from the banks in question. In view of these circumstances, the Group took decisions designed to save its assets. In 2002, the Central Bank of Uruguay became aware that the Banco de Montevideo's capital assets were declining, as it had begun to provide assistance to the Group's financial institutions in an irregular manner and to extend personal loans to the author. These operations, which were unlawful, led to the closure of the Banco de Montevideo and to the Group's appropriation of its savers' funds, thereby triggering a financial crisis that endangered the country's entire financial system.

4.4 In view of the author's individual responsibility for these events, the judiciary issued an international arrest warrant on 8 August 2002. While he was a fugitive from justice, the author concealed his identity by using the names John P. Basso, or John P. Vasso or John P. Vazzo. On the day of his arrival in the State party, on 10 September 2008, a hearing was held as required by law and, on 11 September 2008, an initiating order was issued. The Constitution does not permit a person to be tried in absentia, and a person must therefore be physically present in order for a criminal case to be brought against him or her under the laws in force. This was done following the author's transfer from the United States. The author lodged an application for reconsideration, a petition for annulment and an appeal against the committal order, which were denied. The Court of Criminal Appeal for the Third Circuit upheld this decision on 20 July 2009.

4.5 The author applied for provisional release on two occasions. These applications were denied by the judge presiding over the case and by the Appeal Court. His application for release ex gratia was denied by the Supreme Court. He was also denied temporary leave.

4.6 The case against the author is in the pretrial investigation stage, and evidence is being gathered. Consequently, one of the basic requirements for the submission of a communication, i.e., exhaustion of domestic remedies, has not been met. None of the judicial remedies provided for under domestic law has been undertaken or exhausted, since no final judgement has been handed down that attributes criminal responsibility to the author for the acts with which he is charged.

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

5.1 In comments dated 3 December 2009, the author refers to the State party's description of him as being a fugitive from justice. He affirms that he left Uruguay on 25 June 2002 in a flight headed to São Paulo without at any time concealing his identity. From there, he took a flight to New York, where he arrived on 26 June 2002. He did not conceal his identity at that time either. In November of that year, he applied for and obtained a driving licence (an official identity document in the United States) in the State of Tennessee in the name of Juan Peirano Basso. In March 2003, he began the official application procedure for legal residency in the United States and established his domicile at his place of residence (Clarksville, Tennessee). In April 2003, he applied to the tax authorities for a Taxpayer Identification Number. In 2004, he applied for a temporary work permit. The Social Security Service issued a temporary certificate to him in the name of Juan Peirano Basso. On 29 May 2005, he received his permanent residency permit in the same name. When the United States authorities received the extradition request, they looked into his personal situation thoroughly. If he had been deemed to be a "fugitive from justice", the extradition proceedings would not have been undertaken and he would have been handed over immediately.

5.2 The statement that he and his brothers were in the same situation is inaccurate, since his family members were arrested in August 2002, when he was not in the country. The acts for which it was decided that he should be prosecuted are not the same as those for which his family members are being tried either. Whereas his family members are being tried for an offence defined in Act No. 2,230 of 1893, article 76 of which was repealed on 28 November 2008, the author is being prosecuted for the offence of corporate bankruptcy fraud. In addition, in its response, the State adduces circumstances by which it purports to prove the author's guilt, while forgetting that, until such time as a final judgement is handed down, he should be presumed innocent.

5.3 The author reiterates that the minimum penalty for the offence with which he is charged is one year and that he therefore has been in pretrial detention for a period equal to nearly half of the maximum possible penalty. His pretrial detention therefore constitutes the imposition of a portion of the possible sentence before the fact and a serious violation of the principle of presumption of innocence. Furthermore, the State party has not explained why the proceedings have not been completed or what evidence the defence has sought or what steps it has taken that have delayed the trial unreasonably. His situation is like that of his brothers in the sense that, although they have now been released on bail, they are still on trial, and have been so for over seven years, under a law that has been repealed and without a judgement being rendered.

5.4 The author reiterates that there has been a flagrant violation of the right to a fair trial within a reasonable time period as determined on the basis of the type of trial involved. As stated in the extradition papers, the extradition order was issued on the understanding that guarantees of due process under the national laws of Uruguay would be upheld and that international obligations, including observance of the right to be tried without undue delay as provided for in the International Covenant on Civil and Political Rights, to which Uruguay is a party, would be honoured.

5.5 As far as the exhaustion of domestic remedies is concerned, the author used all possible means at his disposal to secure his provisional release. The rights which he claims have been violated (including the right to be tried within a reasonable amount of time or to be placed at liberty and the right to be free of bodily harm) are not conditional upon, and can continue to be enjoyed, whether or not the criminal proceedings continue. The exhaustion of domestic remedies does not refer to the conclusion of criminal proceedings but rather to the exhaustion of all means of remedying the situation. If there are no further means of applying for release during the trial, then that avenue has been exhausted; it is not necessary to await the completion of the criminal proceedings. What is more, no time limit is established by Uruguayan law for any of the stages in the proceedings, and it is therefore highly likely that the proceedings will take as much time as the maximum term of imprisonment provided for.

State party's observations on the merits

6.1 On 11 January 2010, the State party noted that a number of the allegations contained in the communication are directly or indirectly related to the criminal proceedings in question. It would therefore be improper for the State to comment on those points, since this would run counter to the principle of subsidiarity as it applies to the international system and would entail the prejudgement of a trial in which the corresponding judicial authorities have not yet rendered a verdict, as well as, potentially, being prejudicial to the presumption of innocence. The State party therefore confines its observations to two issues: the denial of provisional release and the aggression that occurred in the author's place of detention.

6.2 The author left the country in 2002 and remained a fugitive from justice until 2006, during which time he concealed his identity in the United States by using the names John P. Basso or John Vasso or John P. Vazzo. In the opinion of the judge who is hearing the case, there are consequently substantial grounds for preventing the occurrence of similar behaviour in the future.

6.3 The author is being held in the Santiago Vázquez Prison Complex. A great deal of public attention has been focused on him because of the impact that his and his family's conduct had on large sectors of the Uruguayan population when, in 2002, they lost their bank savings. This gave rise to public alarm and upheaval and may have motivated the attack upon him. The staff of the prison system immediately came to the author's assistance and took him to the hospital for treatment. When he was released from the hospital, he was placed in a wing in a cell of his own as an additional measure to ensure his physical safety. In September 2009, he was transferred to the recently opened Juan Soler prison facility. The transfer was the result of a unilateral decision by the State rather than in response to any request by the author's defence counsel. Its purpose was to provide greater protection in order to ensure his physical safety.

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

7.1 On 5 March 2010, the author submitted his comments on the State party's observations concerning the merits of the communication. He states that none of the judges who denied his applications for provisional release explained why they thought or suspected that the author might flee or obstruct the investigation. According to the jurisprudence of the Inter-American Commission on Human Rights, the judge must demonstrate that a risk of flight exists. If there is no clear declaration of such a risk, imprisonment is unjustified. In addition, if the only ground is a danger of flight, then the release should be granted and measures taken to ensure the defendant's appearance in court. The finding of such risk should also be based on objective circumstances. A mere

allegation, without consideration of the specific case in question, does not meet this requirement.

7.2 The use of pretrial detention as a general rule and the establishment of the limit of its duration as the maximum sentence that would apply is an abuse and contravenes the rules of due process. In the author's case, it is also discriminatory because it is being employed by reason of his social status or economic position.

7.3 The decision to transfer the author to a maximum security facility located 100 kilometres away from Montevideo was taken without consulting the presiding judge, even though she is responsible for upholding the detained person's rights and guarantees.

7.4 The author refers to the report of the Special Rapporteur on torture, who went on mission to the State party in March 2009. The Rapporteur describes the deplorable conditions existing in the prison system, the slowness of the judicial system and the extensive recourse to pretrial detention, which he considers to be contrary to the principle of the presumption of innocence and the use of deprivation of liberty as a last resort.

Additional comments by the author

8. On 1 September 2010, the author stated that on 22 July 2010 his application for temporary leave had again been refused. He also referred to the ruling of 28 September 2009 convicting the two prisoners of having caused him bodily harm at the beginning of his imprisonment.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 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.

9.2 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.

9.3 The Committee takes note of the State party's observations that the author has not exhausted all available domestic remedies because no final judgement has yet been handed down in his case. The Committee considers that the situations which are the subject of the author's complaint primarily have to do with the way in which the case against him is being handled and are independent of the final outcome of that case. Consequently, it concludes that the State party's argument is not germane to the question of admissibility of the various complaints lodged by the author.

9.4 The Committee takes note of the author's claim that his detention and the proceedings against him are arbitrary and illegal because the procedural law in force runs counter to the Covenant and constitutes a violation of article 2, paragraphs 1, 2 and 3 (a), of the Covenant. 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. The Committee therefore considers that the author's contentions in this regard are inadmissible under article 2 of the Optional Protocol.⁷

⁷ See, for example, communication No. 802/1998, *Rogerson v. Australia*, Views of 3 April 2002, para.

9.5 With regard to the author's claims that, upon his arrival in Uruguay on 10 September 2006, he was not promptly informed of the charges against him and that he did not have adequate time to prepare his defence, the Committee takes note of the decision dated 12 November 2008, by which the judge ruled against the author's request for review of the initiating order and the committal order and in which the above-mentioned claims are addressed. The ruling specifically states that the author was aware of the offences with which he was to be charged, since they were detailed in the extradition warrant issued to the United States authorities. It also states that, when the author was being questioned by the court in the presence of his counsel, he was asked if he would like the hearing to be postponed in order to give him time to prepare his defence more fully. In the light of this ruling, the Committee finds that the author's claims in this respect have not been sufficiently substantiated to establish their admissibility and decides that they are inadmissible under article 2 of the Optional Protocol.

9.6 The author claims to be a victim of a violation of article 26 of the Covenant because he is being tried for an offence under a different law than the one under which his father and brothers were brought to trial in 2002 but on the basis of the same facts and evidence. The Committee is of the view that each case on which it is called upon to rule must be considered on the basis of its specific characteristics and that this claim is therefore devoid of substantiation. The Committee therefore finds that this portion of the communication is inadmissible under article 2 of the Optional Protocol.

9.7 The author claims to have been the victim of a violation of articles 7 and 10 of the Covenant because of the conditions of detention in the COMCAR prison and particularly because of the fact that, on 15 September 2008, he was attacked by other prisoners and had to be hospitalized. The Committee observes that, according to the author, these events gave rise to an investigation, as a result of which the inmates responsible had been tried and convicted. The Committee further takes note of the information supplied by the State regarding the steps taken to ensure prison safety. The Committee therefore finds that this claim is inadmissible on the ground that it was ill-founded under article 2 of the Optional Protocol.

9.8 The author claims that he has been denied provisional release, in violation of article 5, paragraph 3, of the Covenant and that his right to be presumed innocent, under article 15, paragraph 2, was not respected, nor, he also claims, was his right, under article 14, paragraph 3 (c), to be tried without undue delay. The Committee is of the view that those claims have been sufficiently substantiated to be considered admissible and that domestic remedies have been exhausted. There being no other obstacles to admissibility, it finds this part of the communication admissible and proceeds with its consideration on the merits.

Consideration of the merits

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

10.2 The Committee takes note of the author's claim regarding the judicial authorities' refusal to grant him provisional release. It observes that the author was taken into custody in the United States on 19 May 2006 and extradited to the State party. Since his arrival in Uruguay on 10 September 2008, he has remained in detention, and his requests to be released from detention while his case is prosecuted have been denied. The Committee recalls its jurisprudence regarding article 9, paragraph 3, to the effect that pretrial detention

7.9.

should be the exception and that bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party.⁸ The Committee takes note of the State party's argument that the accused was a fugitive from Uruguayan justice and that there were therefore substantial grounds for thinking that he might behave in a similar manner in the future. The Committee underscores the nature of the charges against the author, that he left the country on 25 June 2002, that an international warrant for his arrest was issued on 8 August 2002 and that his return to the State party was not voluntary but the result of an extradition process. Consequently, the Committee is of the view that refusal of the State party's authorities to grant him provisional release is not a violation of article 9, paragraph 3, of the Covenant. Having arrived at this conclusion, the Committee does not consider it necessary to reach a decision regarding a possible violation of article 14, paragraph 2, of the Covenant.

10.3 The Committee observes that, after the author had been extradited, an initiating order for the case against him was issued on 11 September 2008. The proceedings have been in the pretrial stage since that time despite the fact that, under article 136 of the Code of Criminal Procedure, that stage may not exceed 120 days in length without an explanation. The State party has not provided an explanation of the reasons for this stage's duration,⁹ nor is there any indication of the date on which the proceedings are expected to be completed. Under these circumstances, the Committee is of the view that there has been a violation of the author's right, under article 14, paragraph 3 (c), to be tried without undue delay.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses a violation by the State party of article 14, paragraph 3 (c), 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 author with an effective remedy. The State party should also take steps to speed up the author's trial. The State party is also under an obligation to prevent similar violations in the future.

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

⁸ See communication No. 526/1993, *Hill v. Spain*, Views of 2 April 1997, para. 12.3.

⁹ *Ibid.*, para. 12.3.

**ZZ. Communication No. 1959/2010, Warsame v. Canada
(Views adopted on 21 July 2011, 102nd session)***

<i>Submitted by:</i>	Jama Warsame (represented by counsel, Carole Simone Dahan)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Canada
<i>Date of communication:</i>	26 July 2010 (initial submission)
<i>Subject matter:</i>	Deportation from Canada to Somalia
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; failure to sufficiently substantiate allegations; incompatibility with the Covenant;
<i>Substantive issues:</i>	Right to an effective remedy; right to life; prohibition of torture or cruel, inhuman or degrading treatment; right to freedom of movement; right to privacy, family and reputation; freedom of thought, conscience and religion; protection of the family
<i>Articles of the Covenant:</i>	2, paragraph 3; 6, paragraph 1; 7; 12, paragraph 4; 17; 18; 23, paragraph 1
<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 21 July 2011,

Having concluded its consideration of communication No. 1959/2010, submitted to the Human Rights Committee on behalf of Mr. Jama Warsame, 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:

* 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. Helen Keller, 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. Krister Thelin and Ms. Margo Waterval.

The texts of five individual opinions signed by Committee members, Mr. Krister Thelin, Mr. Gerald L. Neuman, Mr. Yuji Iwasawa, Sir Nigel Rodley, Mr. Michael O'Flaherty, Ms. Helen Keller and Mr. Cornelis Flinterman are appended to the text of the present Views.

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

1.1 The author of the communication, dated 26 July 2010, is Jama Warsame, born on 7 February 1984, a Somali national, awaiting deportation from Canada to Somalia. He claims that the State party would violate articles 2, paragraph 3, 6, paragraph 1, 7, 12, paragraph 4, 17, 18 and 23 of the International Covenant for Civil and Political Rights if it were to deport him. He is represented by counsel, Ms. Carole Simone Dahan.

1.2 On 27 July 2010, 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. On 29 December 2010 and on 21 April 2011, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided to deny the State party's request of lifting the interim measures.

1.3 On 29 December 2010, pursuant to rule 97, paragraph 3, of its rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided that the Committee should examine the admissibility together with the merits of the communication.

Facts as presented by the author

2.1 The author was born on 7 February 1984 in Riyadh, Saudi Arabia, but he never obtained Saudi Arabian citizenship. He is of Somali descent, however he has never resided in or visited Somalia.

2.2 The author came to Canada on 26 September 1988, at the age of four. On 4 March 1992, he was granted permanent resident status as a dependent of his mother under the Refugee Claims Backlog Regulations, but he was not accorded Convention Refugee status.

2.3 On 2 November 2004, the author was convicted of robbery and sentenced to nine months imprisonment. On 23 January 2006, the author was convicted for possession of a scheduled substance for the purposes of trafficking and sentenced to two years imprisonment. As a result of these convictions, on 22 June 2006, the author received an order of deportation from Canada for "serious criminality" as defined in the Immigration and Refugee Protection Act 2001 (IRPA).

2.4 On 25 October 2006, the author appealed his deportation to the Immigration Appeal Division, but his appeal was rejected on the grounds of lack of jurisdiction under section 64 of the IRPA, which provides that a person sentenced to two years of imprisonment or more has no right to appeal.¹

2.5 On 19 January 2007, the author submitted an application for a Pre-Removal Risk Assessment (PRRA). On 9 February 2007, the PRRA Officer found that the author would face a risk to life and a risk of cruel and unusual treatment or punishment if returned to Somalia. The PRRA Officer based this conclusion *inter alia* on the author's age, gender, lack of family or clan support, lack of previous residence in Somalia and lack of language skills, as well as on documentary evidence. The author's case was then referred to the Minister's Delegate at National Headquarters of the Ministry of Public Safety, who

¹ See section 64, of the Immigration and Refugee Protection Act: 64 (1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality. (2) For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least two years.

determined, on 23 February 2009, that he would not be at personal risk if returned to Somalia and that he represented a danger to the public in Canada and that humanitarian and compassionate hardships did not outweigh the danger to the public.

2.6 On 14 July 2009, the author's application for leave to judicially review the Minister Delegate's decision was dismissed for failure to file an application record. The author was unable to file an application record because he could not afford legal counsel and his application for legal aid had been denied.

2.7 On 21 July 2010, the author was notified by the Canada Border Services Agency that, on 30 July 2010, he would be deported to Bossasso in Somalia.

The complaint

3.1 The author contends that if deported to Somalia he would face a risk of being arbitrarily deprived of his life, in violation of article 6, paragraph 1, of the Covenant and of being subjected to torture and other cruel, inhuman or degrading treatment or punishment in violation of article 7, of the Covenant. The author refers to the concluding observations of the Committee against Torture of July 2005² and of the Human Rights Committee of November 2005³, in which the State party was criticized for failing to recognize the absolute nature of the non-refoulement principle.

3.2 The author submits that he was born outside of Somalia and has never resided in or visited the country. He has no way of identifying himself as a member of a clan originating in the Puntland, because he has very limited language skills, no family in the area, and is not familiar with clan practices or culture. Both of his parents were born in Mogadishu and have no extended family in Bossasso, where he is being returned.

3.3 The author fears that he will be unable to protect himself or survive in Bossasso, or elsewhere in Somalia without family or clan support, that he will be rendered homeless and vulnerable to a wide array of human rights abuses.⁴ Moreover in the absence of any way to establish that he originates from Puntland, the author may be subject to detention and/or deportation to southern or central Somalia, where the risk to his life is even greater. The author refers to documentary evidence on the situation in Somalia, indicating that it is one of the most dangerous places in the world and that all its residents face a serious risk to their lives and of cruel and unusual treatment or punishment.⁵

3.4 The author also submits that these risks are amplified for a person who has no experience in Somalia, very limited language skills and lacking clan and/or family support. He also submits that, as a healthy 26-year-old he would be at a heightened risk of forced recruitment by groups such as Al-Shabaab and Hizbul Islam and even the Transitional Federal Government (TFG) and their allied forces.⁶ He also submits that, if he is deported

² CAT/C/CR/34/CAN, paras. 4 and 5.

³ CCPR/C/CAN/CO/5, para. 15.

⁴ Office of the United Nations High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Somalia", 5 May 2010, UNHCR document HCR/EG/SOM/10/1, p. 9, according to which in the absence of clan protection and support, an individual in the Puntland would face the general fate of internally displaced persons, including "lack of protection, limited access to education and health services, vulnerability to sexual exploitation or rape, forced labor, perpetual threat of eviction, and destruction or confiscation of assets."

⁵ See Canadian Council of Refugees "Call for suspension of removals to Somalia", 16 July 2010, p. 2; report of the independent expert on the situation of human rights in Somalia, 8 March 2010, para. 77.

⁶ UNHCR, "Eligibility Guidelines" (note 4 above) pp. 9 and 16; report of the Secretary-General on children and armed conflict (A/64/742-S/2010/181), pp.27-28.

to Somalia, he would become a victim of the country's severe humanitarian situation.⁷ Furthermore, the author submits that he will be personally targeted upon arrival in Somalia because he is a convert to Christianity.

3.5 The author submits that his deportation to Somalia is equivalent to a death sentence. He maintains that his most serious crime was possession of a scheduled substance for the purposes of trafficking and that a deportation to a real and imminent risk of death is a disproportionate punishment for such an offence and in accordingly contrary to article 6, paragraph 1, of the Covenant.

3.6 The author also submits that his deportation would constitute an arbitrary or unlawful interference with his family and a violation of articles 17 and 23, paragraph 1, of the Covenant, as he never resided in Somalia and all his family live in Canada. He has a very close relationship to his mother and sisters, who regularly travel several hours to visit him at the Central East Correctional Centre.⁸ The author submits that his deportation to Somalia is disproportionate to the State party's goal of preventing the commission of criminal offences. The author's convictions arose as a result of a drug addiction.

3.7 The author further submits that if removed to Somalia his freedom of religion under article 18 of the Covenant would be violated, because religions other than Islam are strictly prohibited in Somalia. He would therefore be facing persecution and serious harm if he does not change his religion.⁹ This claim was subsequently withdrawn (see para. 5.1).

3.8 On 30 November 2010, the author amended his complaint and claimed that his rights under article 12, paragraph 4, would be violated if he was deported to Somalia (see para. 5.11).

State party's observations on the admissibility and the merits

4.1 On 24 September 2010, the State party submits its observations on the admissibility and the merits. The State party submits that the author has a history of violence and, if released, he would pose a serious threat to the Canadian public. It further submits that the author's removal to Somalia would not result in irreparable harm and that he failed to present a prima facie case. The State party emphasizes that it has a right to control the entry, residence and expulsion of aliens and to remove individuals, who have been determined not to be in need of protection, where such individuals pose a significant risk to the safety and security of its citizens.

4.2 The State party adds to the facts as presented by the author and submits that the author's parents are citizens of Somalia and that the author is therefore entitled to Somali citizenship. It further submits that the two criminal convictions mentioned by the author constitute only a small portion of his pattern of criminality, which includes an unprovoked assault of a 60-year-old woman and the repeated stabbing with a stubby screwdriver of a store clerk in the context of a robbery.

4.3 On 1 October 1999, the author was convicted of the assault of a 60-year-old woman and sentenced to 18 months' probation. On 27 March 2002, the author was convicted of failure to attend court and sentenced to 12 days. On 13 September 2002, the author was convicted of robbery with violence and sentenced to 51 days' imprisonment and 18 months probation. On 16 September 2003, the author was convicted of carrying a concealed

⁷ See Human Rights Watch World Report 2010 on Somalia, para. 3; OCHA Consolidated appeal for Somalia 2010, dated 30 November 2009.

⁸ See communication No. 1792/2008, *Dauphin v. Canada*, Views adopted on 28 July 2009, paras. 8.3 and 8.4.

⁹ UNHCR, "Eligibility Guidelines" (note 4 above), pp. 11, 18 and 23.

weapon and sentenced to 1 day of imprisonment, 28 days of pretrial custody and 18 months' probation; he was also convicted of obstructing a police officer and sentenced to 1 day of imprisonment and 18 months' probation. On 26 September 2003, the author was convicted of theft and sentenced to 4 days' imprisonment. On 5 November 2003, the author was convicted of failure to comply with conditions of an undertaking and sentenced to 30 days' imprisonment. On 2 November 2004, the author was convicted of robbery and sentenced to 9 months imprisonment and 2 years probation; he was also convicted of failure to comply with a condition of undertaking or recognizance and a probation order and was sentenced to 2 months on each charge. On 25 January 2005, the author was convicted of assault and was sentenced to 2 years' probation. On 12 August 2005, the author was convicted of possession of a Schedule 1 substance and failure to comply with a probation order and was sentenced to 1 day of imprisonment, 22 days' pretrial custody and 12 months' probation on each charge. On 23 January 2006, the author was convicted of possession of a scheduled substance (crack cocaine) for the purpose of trafficking and sentenced to 2 years' imprisonment. On 23 January 2006, the author was convicted of failure to comply with a probation order and sentenced to 4 months' imprisonment. On 17 August 2006, the author was convicted of failure to comply with a probation order and sentenced to 30 days' imprisonment on each charge. On 23 April 2010, the author was convicted of assault committed while in custody and sentenced to 60 days.

4.4 The State party clarifies the reasons, for which, on 23 February 2009, the Minister's Delegate found that the author did not face a personal or individualized risk of serious harm in Somalia and that the author posed a danger to the Canadian public. With regard to the alleged clan affiliation, the Minister's Delegate noted that the Somali society is characterized by membership of clan-families and that the author's allegation of absence of such affiliation of his parents was unsupported. He further held that statutory requirements for Somali citizenship did not suggest that there would be an impediment for the author to access Somali citizenship through that of his parents. He also noted that the author's assertions that he did not speak the local language and has not lived in Somalia were of negligible relevance, as he did not belong to any vulnerable category, such as women and children. With regard to the ongoing violence and humanitarian concerns, the Minister's Delegate noted that these conditions applied indiscriminately to all citizens of Somalia. Concerning the danger the author poses to the public in Canada, the Minister's Delegate noted the author's extensive criminal record, as well as the nature and severity of his offences and the absence of prospect for rehabilitation.

4.5 On admissibility, the State party submits that the communication should be declared inadmissible for failure to exhaust all available domestic remedies. Recalling the Committee's jurisprudence,¹⁰ the State party submits that this Committee and the Committee against Torture have held that an application for humanitarian and compassionate grounds is an available and effective remedy, which the author failed to exhaust. The State party further submits that the author failed to appeal to the Federal Court the negative decision by the Immigration Appeal Division of 25 October 2006, and therefore failed to exhaust an effective remedy.¹¹ With regard to the dismissal by the Federal Court on 15 July 2009 of the author's appeal against the Minister Delegate's decision, due to the author's failure to file an application record, allegedly owing to a denial of legal aid assistance, the State party notes that the author was represented by counsel in

¹⁰ See communications No. 1578/2007, *Dastgir v. Canada*, decision on inadmissibility adopted on 30 October 2008, para. 4.4; No. 939/2000, *Dupuy v. Canada*, decision on inadmissibility adopted on 18 March 2003, para. 7.3.

¹¹ See communication No. 1580/2007, *F.M. et al. v. Canada*, decision on inadmissibility adopted on 30 October 2008, para. 6.2; *Dastgir v. Canada*, para. 6.2; *Dupuy v. Canada*, para. 7.3.

several previous and subsequent proceedings and that he therefore failed to pursue available domestic remedies with the necessary diligence.

4.6 With regard to the author's claims of an independent violation of article 2, paragraph 3,¹² and provisions of the 1951 Convention relating to the Status of Refugees, the State party submits that these should be declared incompatible with the provisions of the Covenant pursuant to article 3 of the Optional Protocol. In addition to that, it submits that the author has not substantiated, on a *prima facie* basis, a violation of article 2, paragraph 3, as the State party offers many remedies of protection against the return to a country where there might be a risk of torture or cruel, inhuman or degrading treatment or punishment.

4.7 With regard to the author's claim under article 18, the State party observes that the author does not allege that it violates this provision, but that once he is in Somalia, he would be unable to practice his beliefs and/or would receive ill-treatment owing to these beliefs. The State party submits that unlike articles 6, paragraph 1 and 7, article 18 does not have extraterritorial application.¹³ The State party, therefore, submits that this part of the communication should be declared inadmissible *ratione materiae* pursuant to article 3, of the Optional Protocol. It also submits that the author's allegations invoking a violation of article 18 should be deemed inadmissible, as they are based on the exactly same facts as those presented to the Minister's Delegate, and national proceedings did not disclose any manifest error or unreasonableness and were not tainted by abuse of process, bad faith, manifest bias or serious irregularities.

4.8 With regard to the author's allegations under articles 6, paragraph 1 and 7, the State party submits that the author has not sufficiently substantiated his claims for purposes of admissibility, and that it is not sufficient for the author to show that there continue to exist human rights abuses in Somalia without providing a *prima facie* basis for believing that the author himself faces a personal risk of death, torture or cruel, inhuman or degrading treatment or punishment. The author's allegation of a complete lack of clan membership or affiliation has been evaluated as unsupported and unconvincing. It submits that, on 9 April 2010, the author had indicated that his mother's tribe was Darod and the clan Marjertain. It further notes that on 9 June 2010, the author had indicated that he wished to return to Bossasso or Galkayo in the northern part of Somalia. The State party further submits that the author's alleged conversion to Christianity is unsubstantiated, as no supporting evidence has been submitted. Upon admission to different penitentiary institutions, the author had indicated to be a practising Muslim and observing Ramadan. With regard to the humanitarian situation in Somalia, the State party submits that this is a generalized risk faced by all citizens of Somalia. It further notes that the documentary evidence provided by the author indicates an improvement of the situation in the Puntland¹⁴ and that according to UNHCR an individual in Puntland or Somaliland was not at risk of serious harm.¹⁵

4.9 Referring to the Committee's general comments No. 16 and 19 and its jurisprudence,¹⁶ the State party submits that it enjoys wide discretion when expelling aliens

¹² See communications No. 1341/2005, *Zundel v. Canada*, decision on inadmissibility adopted on 20 March 2007, para. 7.6; No. 275/1988, *S.E. v. Argentina*, decision on inadmissibility adopted on 26 March 1990, para. 5.3; Nos. 343, 344, 345/1988, *R.A.V.N. v. Argentina*, decision on inadmissibility adopted on 26 March 1990, para. 5.3.

¹³ 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. 3.

¹⁴ UNHCR, "Eligibility Guidelines" (note 4 above), p. 8.

¹⁵ *Ibid.*, p. 42.

¹⁶ General comment No. 16 (1988) on the right to respect of privacy, family, home and correspondence, and protection of honour and reputation, *Official Records of the General Assembly, Forty-third*

from its territory and that articles 17 and 23 do not guarantee that a person will never be removed from the territory of a State party if that would affect that person's family life. The State party submits that in the present case, its authorities neither acted unlawfully nor arbitrarily. It further notes that the author does not have any children, dependents, spouse or common-law partner in Canada. The author's removal would represent a minimal disruption to his family life and is outweighed by the gravity of his crimes and the danger he poses to public security in Canada. With regard to the Committee's Views in communication No. 1792/2008, *Dauphin v. Canada*, the State party submits that it departs from the Committee's longstanding jurisprudence¹⁷ and that in the present case, the State's interests are more compelling, considering that the author was repeatedly convicted and on numerous occasions failed to comply with the conditions of undertakings or probation orders. The State party submits that the author has failed to substantiate, for purposes of admissibility, his claims under articles 17 and 23.

The author's comments

5.1 On 30 November 2010, the author submits his comments and adds to the claims initially invoked a claim under article 12, paragraph 4, of the Covenant. He submits that he does not further pursue his complaint under article 18, of the Covenant.

5.2 The author reiterates that it is widely acknowledged in the international community that the human rights and humanitarian situation throughout Somalia is extremely severe. He maintains that the security and human rights situation in Puntland is extremely serious and has deteriorated substantially in recent months.¹⁸ In September 2010, the Secretary-General assessed the situation in Puntland as becoming more volatile with fierce clashes between government forces and militia linked to Islamist insurgents.¹⁹

5.3 With regard to the exhaustion of domestic remedies, the author reiterates that he filed an appeal of his deportation order to the Immigration Appeal Division, which was dismissed for lack of jurisdiction on 25 October 2006, he applied for a pre-removal risk assessment (PRRA), which was rejected on 23 February 2009 and he applied for leave to commence judicial review of the negative PRRA, which was dismissed on 14 July 2009. The author claims that there are no further effective and available domestic remedies that he could have pursued.

5.4 The author recalls the Committee's jurisprudence, according to which article 5, paragraph 2 (b), of Optional Protocol does not require resort to remedies which objectively have no prospect of success.²⁰ He submits that he had no objective prospect of success in applying for leave to judicially review the Immigration Appeal's Divisions decision (IAD) of 25 October 2006, which lacked jurisdiction to hear the author's appeal and, therefore, this was not an effective remedy. The author explains that the IAD lacked jurisdiction to

Session, Supplement No. 40 (A/43/40), annex VI; general comment No. 19 (1990) on protection of the family, the right to marriage and equality of the spouses, *ibid.*, *Forty-fifth Session, Supplement No. 40*, vol. I (A/45/40 (Vol. I)), annex VI, sect. B; communications No. 583/1993, *Stewart v. Canada*, Views adopted on 1 November 1996; and No. 558/1993, *Canepa v. Canada*, Views adopted on 3 April 1997.

¹⁷ See communication No. 1222/2003, *Byahuranga v. Denmark*, Views adopted on 1 November 2004, para. 11.9.

¹⁸ See UNHCR, "Eligibility Guidelines" (note 4 above), p. 41.

¹⁹ See report of the Secretary-General on Somalia (S/2010/447), para. 15.

²⁰ See communication Nos. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989, para. 12.3; and communication No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 12.3.

hear the author's appeal on the basis of section 64 of the IRPA,²¹ finding inadmissibility on grounds of serious criminality. Judicial review offered the author no objective prospect of success and was therefore not an effective remedy he should be required to pursue. Domestic jurisprudence interpreting section 64 of the IRPA confirms that an application for leave offered the author no objective prospect of success, as he could not have met the standard of a "fairly arguable case" or "raise a serious question to be determined", and he could not have proven that the IAD made an error in law or jurisdiction by applying section 64 of the IRPA. Moreover, even if a judicial review of the IAD decision had been successful, this would have not provided the author with an effective remedy because there was a second inadmissibility report against the author that arose from a January 2006 conviction for possession of scheduled substance for the purpose of trafficking and for which a sentence of two years' imprisonment was imposed.²²

5.5 The author recalls the Committee's jurisprudence, according to which a remedy may not be considered de facto available if the author with financial needs attempts to exhaust it but is unable to obtain legal aid.²³ The author had requested legal aid to challenge the negative Pre-Removal Risk Assessment decision of 23 February 2009, which was however denied. His appeal against the negative legal aid decision was rejected by the Director of Appeals, Legal Aid Ontario. The author rejects the State party's assertion that, in the past, he would have found means to retain counsel or would have found counsel acting on a pro bono basis; on the contrary, the author has been repeatedly represented through legal aid. In the present communication, the author is represented by counsel who works for a staff office funded by Legal Aid Ontario which operates a limited duty counsel program for persons in detention. Through his efforts to seek judicial review of the Minister Delegate's decision, the author claims to have demonstrated the requisite diligence that is required of complainants in their pursuit of domestic remedies.²⁴

5.6 With regard to the humanitarian and compassionate ground procedure, the author submits that this did not constitute an effective remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol, as it would have not stayed or prevented his deportation to Somalia, it would have been evaluated by the same office which had already assessed humanitarian and compassionate grounds in the PRRA assessment and found these insufficiently compelling, and it would have been an entirely discretionary remedy to obtain the privilege of expediting a permanent residency application and not to vindicate a right.²⁵

5.7 On the merits, the author reiterates that he presented a prima facie case. He maintains that his risk of irreparable harm under articles 6, paragraph 1 and 7 is personalized and distinct of that faced by the general population in Somalia, in particular

²¹ See footnote 1.

²² The issue of how to count the length of the sentence would have not been at stake regarding this inadmissibility decision.

²³ See communications No. 461/1991, *Graham and Morrison v. Jamaica*, Views adopted in 1996; No. 377/1989, *Currie v. Jamaica*, Views adopted on 29 March 1994; No. 321/1988, *Thomas v. Jamaica*, Views adopted on 19 October 1993; No. 1003/2001, *P.L. v. Germany*, decision on inadmissibility adopted on 22 October 2003, para. 6.5.

²⁴ See communications No. 433/1990, *A.P.A. v. Spain*, decision on inadmissibility adopted on 25 March 1994, para. 6.2-6.3; and No. 420/1990, *G.T. v. Canada*, decision on inadmissibility adopted on 23 October 1992, para. 6.3.

²⁵ See Committee against Torture communications No. 133/1999, *Falcon Ríos v. Canada*, decision adopted on 23 November 2004, para. 7.3; No. 166/2000, *B.S. v. Canada*, decision adopted on 14 November 2001, paras. 6.2 and 6.4; and No. 304/2006, *L.Z.B. et al. v. Canada*, decision on inadmissibility adopted on 8 November 2007.

due to his lack of clan protection, his Western identity and appearance, his lack of local knowledge, experience and support networks and the fact that as a young man of Western appearance he would be a target for forced recruitment by pirate or militia groups. He further claims that each of these personal characteristics creates a high probability that, if deported to Puntland, he would subsequently be removed to central or southern Somalia, as Puntland authorities have deported large numbers of persons considered not originating from Puntland.²⁶ He therefore notes that the evaluation of risk should not be limited to those faced in Puntland, but account also for those in central and southern Somalia.

5.8 With regard to the absence of clan protection, the author argues that the State party has overlooked the essential role of genealogical patrilineal ancestry knowledge in proving clan affiliation and obtaining clan protection, as well as the fact that the author was born outside of Somalia and has never lived in Somalia. The author's parents never taught him about his family ancestry. His parents separated when the author was a teenager and the author's turbulent relationship with his father ended in his father disowning him. The absence of any contact to his father would therefore make it impossible for the author to prove his patrilineal ancestry and claim clan affiliation and protection if removed to Somalia. The author cites the UNHCR Eligibility Guidelines for Somalia, which state that the absence of clan protection in Puntland entails limited access to basic services, physical and legal protection.²⁷ He further notes that as a child of the Somali diaspora raised in Canada, he would be unmistakably recognizable as a Westerner, due to his appearance, education, values and mannerisms. His language is English and his Somali is limited and spoken with an English accent.

5.9 The author further notes that the threats posed by al-Shaab and other Islamist insurgent groups operating out of Puntland has substantially increased in 2010.²⁸ The lack of local knowledge or experience to recognize when situations may be dangerous will put him at risk. He further notes that pirates and insurgent groups systematically target young men without family connections or social networks.²⁹

5.10 With regard to the violations of articles 17 and 23, paragraph 1, the author argues that his deportation would result in severe disruption of his family life, considering his close ties to Canada, the fact that he has never lived in Somalia nor possesses any other link with Somalia than his nationality. He reiterates that he is very close to his mother and sisters who visit him once a month in prison. They have offered unconditional support throughout the detention process. He explains that due to his mother's severe mental illness and his father's decision to abandon the family, the siblings have, in effect, raised themselves. The author submits that he has been sober for the past three years and continues to work towards rehabilitation. He also explains that he seeks to support his family, in particular his mother who suffers from mental illness. He submits that his deportation to Somalia would be disproportionate to the State party's goal of preventing the commission of criminal offences. He states that his criminal offences arose from drug addiction, which he has meanwhile overcome. He further submits that other than the two-year sentence imposed for possession of a substance for the purpose of trafficking and nine months with time served for assault, he received minor sentences. With regard to the assaults for which the author was convicted during detention in 2009, he explains that he was involved in an oral dispute between inmates that resulted in an assault between two

²⁶ UNHCR, "Eligibility Guidelines" (note 4 above), p. 35; S/2010/447, para. 24.

²⁷ UNHCR, "Eligibility Guidelines" (note 4 above), p. 48, and UNHCR, "Position on the Return of Rejected Asylum-Seekers to Somalia", January 2004, p. 4.

²⁸ S/2010/447, para. 15.

²⁹ Report of the Secretary-General pursuant to Security Council resolution 1897 (2009) (S/2010/556), para. 4; UNHCR, "Eligibility Guidelines" (note 4 above), p. 16; S/2010/447, para. 24.

inmates. He had pled guilty but the court held that he had not inflicted physical injury on anyone. The author submits that, other than this minor offence in 2009, his last offence took place at the age of 21. Moreover, he notes that his deportation to Somalia would lead to a complete disruption of his family ties, as they could not be maintained by visits to Somalia, considering the Canadian travel advisory.³⁰

5.11 Finally, the author submits that for purposes of article 12, Canada is his “own country”,³¹ as he remained in Canada since the age of 4 and he received his entire education in Canada. He submits, in particular, that his case is to be distinguished from other communications considered by the Committee, as he was neither born nor ever lived in Somalia. Furthermore, he submits that his citizenship status in Somalia is tenuous, as he does not possess any proof of Somali citizenship and he would be sent there on a temporary Canadian travel document without a guarantee that he would be granted citizenship upon arrival.

Additional observations by the State party on the admissibility and the merits

6.1 On 4 February 2011, the State party submitted additional observations on the admissibility and the merits, as well as a second request to lift the interim measures (see para. 1.2). It submits that the author remains in Canada in immigration detention awaiting removal. It reiterates the author’s history of violence and the serious danger he would pose to the public if released. It also reiterates that the deportation of the author would not result in irreparable harm, as the author failed to present a *prima facie* case.

6.2 The State party maintains that judicial review of the negative decision of the Immigration Appeal Division is an effective remedy. It submits that it is of concern that family support has not been forthcoming when the author needed assistance in retaining counsel in order to pursue domestic remedies. It further notes that it is incongruous that the author has been able to retain counsel for the proceedings before the Committee but not to pursue available and effective domestic remedies.

6.3 With regard to the author’s failure to make an application on humanitarian and compassionate grounds (H&C application), the State party clarifies that, while it is true that an application on humanitarian and compassionate grounds does not stay removal, in the event of a negative decision, the author could have made an application for judicial review and requested that his removal be suspended. The State party further notes that an H&C decision is guided by defined standards and procedures and is only technically discretionary. It notes that it is an effective remedy.³² It also notes that changes in family circumstances could have been raised in the humanitarian and compassionate application, which the author failed to pursue.

6.4 The State party further reiterates that the communication is incompatible with the provisions of the Covenant pursuant to article 3 of the Optional Protocol, in particular with regard to the author’s claims under article 2, paragraph 3, and the 1951 Convention relating to the Status of Refugees. It further submits that the author failed to sufficiently substantiate

³⁰ See *a contrario*, *Stewart v. Canada* (deportation to the United Kingdom (country of origin, where his brother resided)) (note 16 above); and *Canepa v. Canada* (deportation to Italy (country of origin, where relatives resided)) (note 16 above).

³¹ See 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. 20.

³² See communication No. 169/2000, *G.S.B. v. Canada*, examination discontinued by the Committee against Torture, after the H&C application had been granted; Inter-American Commission on Human Rights, Report No. 81/05, Petition 11.862, *Inadmissibility, Andrew Harte & Family, Canada* (24 October 2005), paras. 86-87.

his allegations on a prima facie basis with respect to articles 2, paragraph 3, given that there are many remedies offering protection against a return to a country, where he might be at risk.

6.5 With respect to articles 6, paragraph 1 and 7, the State party reiterates that the author failed to establish an individualized or personalized risk faced upon removal to Somalia, as he would be removed to an area, controlled by his own Majertain clan. It notes that the extent of the author's knowledge in relation to his clan affiliation remains unclear. Until April 2010, the author denied having any knowledge of his clan affiliation but then advised that his mother is from the Darod clan or Majertain sub-clan. He had also indicated that he wished to be removed to northern Somalia, Bossasso or Galkayo, which are areas controlled by the Majertain sub-clan. The State party therefore concludes that the author would be able to access clan protection. The State party further notes that the author, an ethnic Somali national, not engaged in aid work, journalism or religious activities would not fit the profile of a "Westerner" at risk. With regard to the author's allegation that he could be deported from Puntland to central or southern Somalia, the State party maintains that these expulsions happened due to security concerns, such as affiliation with Islamic extremist groups or due to the absence of tribal affiliation in Puntland.³³ The State party further reiterates that the hardship resulting from the humanitarian crisis in Somalia is not a personal risk and that the general situation in Puntland does not pose a risk of serious harm.³⁴

6.6 Regarding the author's claim of a violation of article 12, paragraph 4, the State party submits that the provision is not applicable in the case of the author, as Canada is not the author's own country, because of his insufficient link to Canada. It submits that no exceptional circumstances exist establishing a relation of the author to Canada and that no unreasonable impediments were placed on his acquisition of Canadian citizenship.³⁵ It further notes that, even if Canada could be held to constitute the author's own country, his removal cannot be characterized as arbitrary, since the decision was made in accordance with the law, the author benefited from due process and the gravity of the author's crimes result in a clear and present danger to the public safety. The State party submits that the author therefore failed to establish a prima facie violation of article 12, paragraph 4.

6.7 With respect to the author's allegations in relation to articles 17 and 23, paragraph 1, the State party submits that the author's removal is neither unlawful nor arbitrary. Regarding the author's family circumstances, the State party submits that, prior to his detention, the author did not appear to maintain a significant relationship with his family. The author engaged in serious and extensive criminality and his criminal acts have shocked by violence and brutality. The State party notes that, apart from his recent conviction for assault in 2010, the author's last conviction took place more than four years ago, however the author has been incarcerated continuously for the last five years, which reasonably accounts for the pause in his criminal activity and his soberness. The State party submits that the author failed to establish a prima facie violation of articles 17 and 23, paragraph 1.

6.8 Finally, the State party submits that the communication is without merit.

³³ UNHCR, "Eligibility Guidelines" (note 4 above), pp. 9-10 and 34-35.

³⁴ *Ibid.*, p. 39.

³⁵ See *Stewart v. Canada* (note 16 above), para. 12.6.

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 has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 With regard to the exhaustion of domestic remedies, as required under article 5, paragraph 2 (b), of the Optional Protocol, the Committee notes the arguments by the State party that the author failed to make an application on humanitarian and compassionate grounds and that he failed to appeal to the Federal Court the negative decision of the Immigration Appeal Division of 25 October 2006, as well as the negative PRRA decision of the Minister's Delegate of 23 February 2009. It also notes the author's claim that judicial review of the Immigration Appeal Division's decision of 25 October 2006 had objectively no prospect of success and that, in view of the discretionary nature of the assessment on humanitarian and compassionate grounds, these remedies are not effective and therefore do not need to be exhausted. It also notes the author's argument that judicial review of the negative PRRA assessment was de facto not available, as legal aid had been denied.

7.4 The Committee recalls 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 appear to be effective in the given case and are de facto available to the author.³⁶ With regard to the author's failure to make an application on humanitarian and compassionate grounds, the Committee notes the State party's argument that the remedy is only "technically" discretionary, as clear standards and procedures guide the Minister's decision. It also notes the author's argument that an application on humanitarian and compassionate grounds would not have stayed or prevented his deportation to Somalia and that it would have been evaluated by the same office which had already assessed humanitarian and compassionate grounds in the PRRA assessment. It also notes that according to the author, the remedy is discretionary to obtain the privilege of expediting a permanent residency application and not to vindicate a right. The Committee observes that, as acknowledged by the State party, an application on humanitarian and compassionate grounds does not operate to stay removal. The Committee considers that the possibility of the author's removal to Somalia, a country in which the human rights and humanitarian situation is particularly precarious, while his application on humanitarian and compassionate grounds is under review would render the remedy ineffective and does therefore not dispose of the real risk of a threat to life or torture that is of concern to the Committee. It therefore concludes that, for purposes of admissibility, the author did not need to make an application on humanitarian and compassionate grounds.

7.5 With regard to the author's failure to appeal the negative decision by the Immigration Appeal Division, the Committee observes that the decision was based on section 64 of the Immigration Refugee Protection Act (IRPA), which provides that an author has no right of appeal if "he was found to be inadmissible because of serious criminality". In February 2005 and June 2006, "the author was found to be inadmissible" and on this basis a removal order was issued against him on 22 June 2006. The Committee

³⁶ See communications No. 1003/2001, *P.L. v. Germany*, decision on inadmissibility adopted on 22 October 2003, para. 6.5; and No. 433/1990, *A.P.A. v. Spain*, decision on inadmissibility adopted on 25 March 1994, para. 6.2.

observes that an appeal would only have been successful if the author could have raised a “fairly arguable case”, a “serious question to be determined” or an error in law or jurisdiction. It notes that the State party has not explained how the author could have met this threshold considering the clear domestic legislation and jurisprudence. In the specific circumstances of the case, the Committee, therefore, considers that an application for leave to appeal to the Federal Court did not constitute an effective remedy.

7.6 The Committee observes that the author failed to seek review of the negative pre-removal risk assessment decision by the Minister’s Delegate of 23 February 2009 and that, on 9 April 2009, the refusal to grant legal aid to seek judicial review before the Federal Court was upheld by the director of appeals of the Ontario Legal Aid. It notes the author’s argument that in judicial proceedings, he has been repeatedly represented through legal aid, which has been refuted by the State party, without however adducing any evidence to the effect. Although the Committee has consistently held that financial considerations and doubts about the effectiveness of domestic remedies do not absolve authors from exhausting them,³⁷ it notes that the author appears to have been represented through legal aid in his domestic and international proceedings and that he, in vain, tried to obtain legal aid to pursue judicial review of the negative PRRA decision. It therefore concludes that the author has pursued domestic remedies with the necessary diligence and that article 5, paragraph 2 (b), of the Optional Protocol does not preclude the examination of the present communication.

7.7 The Committee notes the State party’s challenge to the admissibility of the communication on the ground of failure to sufficiently substantiate the author’s claims under article 2, paragraph 3 in conjunction with articles 6, paragraph 1, 7, 12, paragraph 4, 17 and 23, paragraph 1, of the Covenant.

7.8 With respect to the author’s claims of a violation of articles 6, paragraph 1 and 7, of the Covenant, the Committee notes that on 9 February 2007, the pre-removal risk assessment officer found that the author would face a risk to life and of cruel and unusual treatment if returned to Somalia. It also notes that, on 23 February 2009, this decision was revised by the Minister’s Delegate finding that the author did not face an individualized risk of serious harm and that he posed a danger to the Canadian public. It also notes that the author has explained the reasons why he fears to be returned to Somalia, giving details about the absence of clan protection, his Western identity and appearance, his lack of local knowledge, experience and support networks and becoming a possible target for recruitment by pirate and Islamist militia groups. The Committee considers that such claims are sufficiently substantiated for purposes of admissibility and that they should be considered on their merits.

7.9 Concerning the claim under article 12, paragraph 4, the Committee considers that there is no a priori indication that the author’s situation could not be subsumed under article 12, paragraph 4, of the Covenant and therefore concludes that this issue should be considered on its merits.

7.10 As to the alleged violations of articles 17 and 23, paragraph 1, the Committee observes that, a priori, there is no indication that the author’s situation is not covered by articles 17 and 23, paragraph 1, and thus concludes that the matter should be considered on their merits.

³⁷ See communications No. 397/1990, *P.S. v. Denmark*, decision on inadmissibility adopted on 22 July 1992, para. 5.4; No. 420/1990, *G.T. v. Canada*, decision on inadmissibility adopted on 23 October 1992, para. 6.3; No. 550/1993, *Faurisson v. France*, Views adopted on 8 November 1996, para. 6.1.

7.11 The Committee declares the communication admissible insofar as it appears to raise issues under articles 6, paragraph 1, 7, 12, paragraph 4, 17 and 23, paragraph 1 read in conjunction with article 2, paragraph 3, of the Covenant, and proceeds to a consideration on the merits.

Consideration of 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 required under article 5, paragraph 1, of the Optional Protocol.

Articles 6, paragraph 1 and 7

8.2 The Committee notes the author's claim that his removal from Canada to Somalia would expose him to a risk of irreparable harm in violation of articles 6, paragraph 1 and 7, of the Covenant. It also notes his arguments that his risk is personalized and distinct from that faced by the general population in Somalia, in the light of the fact that he was born outside of Somalia and never resided there, he has limited language skills, he has no family in the area of Puntland, he lacks clan support, he is at risk of forced recruitment by pirate or Islamist militia groups and he would be exposed to generalized violence. The Committee also notes the observations of the State party, according to which the author has not provided prima facie basis for believing that he himself faces a personal risk of death, torture, or cruel, inhuman or degrading treatment and that his alleged complete lack of clan membership is unsupported, as he had indicated that his mother's tribe is Darod and his clan Majertain and that he wished to be removed to Bossasso or Galkayo in Puntland. It also notes that on 9 February 2007, the PRRA Officer found that the author would face a risk to life and cruel and inhuman treatment or punishment if removed to Somalia and that, on 23 February 2009, the Minister's Delegate found that the author did not face a personal or individualized risk of serious harm in Somalia and that he posed a danger to the public in Canada.

8.3 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.³⁸ The Committee must therefore determine whether the author's removal to Somalia would expose him to a real risk of irreparable harm. The Committee observes that the author, who has never lived in Somalia, does not speak the language, has limited or no clan support, and does not have any family in Puntland would face a real risk of harm under articles 6, paragraph 1 and 7, of the Covenant. The Committee therefore concludes that the author's deportation to Somalia would, if implemented, constitute a violation of articles 6, paragraph 1 and 7, of the Covenant.

Article 12, paragraph 4

8.4 With regard to the author's claim under article 12, paragraph 4, of the Covenant, the Committee must first consider whether Canada is indeed the author's "own country" for purposes of this provision and then decide whether his deprivation of the right to enter that country would be arbitrary. On the first issue, the Committee recalls its General Comment No. 27 on freedom of movement where it has considered that the scope of "his own country" is broader than the concept "country of his nationality". It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims

³⁸ See general comment No. 31, para. 12.

in relation to a given country, cannot be considered to be a mere alien.³⁹ In this regard, it finds that there are factors other than nationality which may establish close and enduring connections between a person and a country, connections which may be stronger than those of nationality.⁴⁰ The words “his own country” invite consideration of such matters as long-standing residence, close personal and family ties and intentions to remain, as well as to the absence of such ties elsewhere.

8.5 In the present case, the author arrived in Canada when he was four years old, his nuclear family lives in Canada, he has no ties to Somalia and has never lived there and has difficulties speaking the language. The Committee observes that it is not disputed that the author has lived almost all his conscious life in Canada, that he received his entire education in Canada and that before coming to Canada he lived in Saudi Arabia and not in Somalia. It also notes the author’s claim that he does not have any proof of Somali citizenship. In the particular circumstances of the case, the Committee considers that the author has established that Canada was his own country within the meaning of article 12, paragraph 4, of the Covenant, in the light of the strong ties connecting him to Canada, the presence of his family in Canada, the language he speaks, the duration of his stay in the country and the lack of any other ties than at best formal nationality with Somalia.

8.6 As to the alleged arbitrariness of the author’s deportation, the Committee recalls its general comment No. 27 on freedom of movement where it has stated that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one’s own country could be reasonable.⁴¹ A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country. In the present case, a deportation of the author to Somalia would render his return to Canada de facto impossible due to Canadian immigration regulations. The Committee therefore considers that the author’s deportation to Somalia impeding his return to his own country would be disproportionate to the legitimate aim of preventing the commission of further crimes and therefore arbitrary. The Committee concludes that, the author’s deportation, if implemented would constitute a violation of article 12, paragraph 4, of the Covenant.

Articles 17 and 23, paragraph 1

8.7 As to the alleged violation under articles 17 and 23, paragraph 1, alone and in conjunction with article 2, paragraph 3, the Committee reiterates its jurisprudence that there may be cases in which a State party’s refusal to allow one member of a family to remain on its territory would involve interference in that person’s family life. However, the mere fact that certain members of the family are entitled to remain on the territory of a State party does not necessarily mean that requiring other members of the family to leave involves such interference.⁴² The Committee recalls its general comments No. 16 and No. 19,

³⁹ General comment No. 27 on freedom of movement, para. 20.

⁴⁰ *Stewart v. Canada* (note 16 above), para. 6.

⁴¹ General comment No. 27 on freedom of movement, para. 21.

⁴² See, for example, communications No. 930/2000, *Winata v. Australia*, Views adopted on 26 July 2001, para. 7.1; No. 1011/2001, *Madafferi v. Australia*, Views adopted on 26 July 2004, para. 9.7; and No. 1222/2003, *Byahuranga v. Denmark*, Views adopted on 1 November 2004, para. 11.5; No. 1792/2008, *Dauphin v. Canada*, Views adopted on 28 July 2009, para. 8.1.

whereby the concept of the family is to be interpreted broadly.⁴³ It also recalls that the separation of a person from his family by means of expulsion could be regarded as an arbitrary interference with the family and a violation of article 17 if, in the circumstances of the case, the separation of the author from his family and its effects on him were disproportionate to the objectives of the removal.⁴⁴

8.8 The Committee observes that the author's deportation to Somalia will interfere with his family relations in Canada. However, it must examine if the said interference could be considered either arbitrary or unlawful. The State party's Immigration and Refugee Protection Act expressly provides that the permanent residency status of a non-national may be revoked, if the person is convicted of a serious offence carrying a term of imprisonment of at least two years. The Committee notes the State party's observation that the authorities acted neither unlawfully nor arbitrary and that the minimal disruption to the author's family life was outweighed by the gravity of his crimes. The Committee observes that the concept of arbitrariness is not to be confined to procedural arbitrariness but extends to the reasonableness of the interference with the person's rights under article 17 and its compatibility with the purposes, aims and objectives of the Covenant.⁴⁵

8.9 The Committee notes the author's criminal record, which started in 1999, at the age of 15, and includes a conviction for an assault of a 60-year-old woman and the repeated stabbing with a screwdriver of a store clerk in the context of a robbery. It also notes that the author's convictions led to two inadmissibility reports and a removal order of 22 June 2006. The Committee further notes the author's claim that he maintains a close relationship to his mother and sisters; that he is planning to support his mother who has a mental illness; that he does not have any family in Somalia and that his deportation would lead to a complete disruption of his family ties due to the impossibility for his family to travel to Somalia. It further notes the author's argument that his criminal offences arose from drug addiction, which he has meanwhile overcome and that apart from the conviction for assault and for possession of a substance for the purpose of trafficking, he has received minor sentences.

8.10 The Committee observes that the author was neither born nor has resided in Somalia, that he has lived in Canada since the age of four years, that his mother and sisters live in Canada and that he does not have any family in Somalia. The Committee notes that the intensity of the author's family ties with his mother and sisters remains disputed between the parties. Nevertheless, the Committee observes that the author's family ties would be irreparably severed if he were to be deported to Somalia, as his family could not visit him there and the means to keep up a regular correspondence between the author and his family in Canada are limited. In addition to that, for a significant lapse of time, it would be impossible for the author to apply for a visitor's visa to Canada to visit his family. The Committee also notes that due to the de facto unavailability of judicial remedies, the author could not raise his claims before the domestic courts. The Committee, therefore, concludes that the interference with the author's family life, which would lead to irreparably severing his ties with his mother and sisters in Canada would be disproportionate to the legitimate aim of preventing the commission of further crimes. It therefore concludes that, the author's deportation to Somalia, if implemented, would constitute a violation of articles 17 and 23, paragraph 1, alone and in conjunction with article 2, paragraph 3, of the Covenant.

⁴³ See general comment No. 16 on the right to respect of privacy, family, home and correspondence, and protection of honour and reputation; and general comment No. 19 on protection of the family, the right to marriage and equality of the spouses..

⁴⁴ See *Canepa v. Canada* (note 16 above), para. 11.4.

⁴⁵ *Ibid.*

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 author's deportation to Somalia would, if implemented, violate his rights under articles 6, paragraph 1, 7, 12, paragraph 4, 17 and 23, paragraph 1, 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, including by refraining from deporting him to Somalia.

11. 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.

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

Appendix

Individual opinion by Committee member Mr. Krister Thelin (dissenting)

The majority has found multiple violations of the Covenant. I disagree.

Firstly, when it comes to a violation of articles 17 and 23, paragraph 1, the case very much resembles *Dauphin v. Canada*,^a where I dissented and found a non-violation. My position remains unchanged, and the majority should, in my view, not have found a violation in the case before us. The author's family ties in Canada are not such that he, in the light of his criminal record, is the subject of a disproportionate interference, if he were to be deported to Somalia.

Secondly, regarding a possible violation of articles 6, paragraph 1, 7 and 12, paragraph 4, I associate myself with the dissenting opinions of Sir Nigel Rodley and Mr. Neuman in this respect and find a non-violation of the Covenant.

(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.]

^a Communication No. 1792/2008, *Dauphin v. Canada*, Views adopted on 28 July 2009.

Individual opinion by Committee members Mr. Gerald L. Neuman and Mr. Yuji Iwasawa (partly dissenting)

We agree with the Committee's finding of potential violations of articles 17 and 23, paragraph 1, but we dissent from its other findings of violation, for the reasons expressed in the individual opinion of Sir Nigel Rodley.

Our disagreement with the majority's interpretation of article 12, paragraph 4, is more fully explained in our dissenting opinion in communication No. 1557/2007, *Nystrom et al. v. Australia*, Views adopted 18 July 2011, paras. 3.1-3.6.

(Signed) Gerald L. Neuman

(Signed) Yuji Iwasawa

[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.]

Individual opinion by Committee member Sir Nigel Rodley

I agree with the Committee's findings in respect of potential violations of articles 17 and 23, paragraph 1, but am doubtful as to its other findings of potential violation.

As to article 12, paragraph 4, the Committee gives the impression that it relies on general comment 27 for its view that Canada is the author's own country. Certainly, the general comment states that "the scope of 'his own country' is broader than the concept of 'country of his nationality'". What the Committee overlooks is that all the examples given in the general Comment of the application of that broader concept are ones where the individual is deprived of any effective nationality. The instances offered by the general comment are those relating to "nationals of a country who have been stripped of their nationality in violation of international law"; "individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them"; and "stateless persons arbitrarily denied the right to acquire the nationality of the country of ... residence" (general comment 27, paragraph 20).

None of the examples applies to the present case. Nor has the author sought to explain why he did not seek Canadian nationality, as implicitly suggested by the State party (para. 6.6). Accordingly, I am not convinced that article 12, paragraph 4, would be violated were the author to be sent to Somalia.

Similarly, the Committee has given little explanation of its conclusion that articles 6, paragraph 1, and 7 would be violated. In particular, it fails to explain why it prefers the author's assertion of the facts and attendant risks, rather than that of the State party. Of course, one must be very sceptical of any compulsion to return someone to a country in the precarious situation of Somalia. Indeed, that is relevant to our findings of a potential violation of articles 17 and 23, paragraph 1. The Committee would have been wise to leave it at that.

(Signed) Sir Nigel **Rodley**

[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.]

**Individual opinion by Committee members Mr. Michael O'Flaherty
and Ms. Helen Keller**

We associate ourselves with the view of Sir Nigel with regard to the issue of the application of article 12, paragraph 4, in this case

(Signed) Michael O'Flaherty

(Signed) Helen Keller

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Individual opinion by Committee member Mr. Cornelis Flinterman

I agree with the Committee's findings in respect of articles 17 and 23, paragraph 1, but I share the doubts of Sir Nigel Rodley and others as to its other findings of potential violation.

As to article 12, paragraph 4, I am not convinced that Canada can be regarded as the author's own country even though I am inclined to give a wider scope to article 12, paragraph 4, than is suggested by Sir Nigel Rodley and others by taking into account the special ties (such as long-standing residence, intentions to remain, close personal and family ties and the absence of such ties with another country) that the author of a communication may have with a given country in each and every case submitted to the Committee.

As to articles 6, paragraph 1, and 7 I join the opinion of Sir Nigel Rodley and others.

(Signed) Cornelis **Flinterman**

[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.]
