



United Nations

Report of the Human Rights Committee

Volume II

**Ninety-fourth session
(13-31 October 2008)**

**Ninety-fifth session
(16 March-3 April 2009)**

**Ninety-sixth session
(13-31 July 2009)**

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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. 1122/2002, *Lagunas Castedo v. Spain* (Views adopted on 20 October 2008, Ninety-fourth session)*

<i>Submitted by:</i>	María Cristina Lagunas Castedo (represented by counsel, Mr. José Luis Mazón Costa)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	23 October 2001 (initial submission)
<i>Subject matter:</i>	Author's disagreement with marks awarded in a public competition to obtain a university lectureship
<i>Procedural issue:</i>	Insufficient substantiation of the alleged violations
<i>Substantive issues:</i>	Right to a fair trial; equal access to the public service
<i>Articles of the Covenant:</i>	14, paragraph 1, and 25 (c)
<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 2008,

Having concluded its consideration of communication No. 1122/2002, submitted to the Human Rights Committee by Ms. María Cristina Lagunas Castedo 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, Ms. Christine Chanet, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Ms. Helen Keller, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

The dissenting opinion signed by Committee members Mr. Edwin Johnson López and Mr. Rafael Rivas Posada is appended to the present decision.

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

1. The author of this communication of 23 October 2001, María Cristina Lagunas Castedo, a Spanish national, claims to be a victim of a violation by Spain of article 14, paragraph 1, and article 25 (c) of the International Covenant on Civil and Political Rights. She is represented by counsel, Mr. José Luis Mazón Costa. The Optional Protocol entered into force for Spain on 25 April 1985.

Factual background

2.1 In 1994, the author applied for a post of assistant lecturer in inorganic chemistry, which was to be awarded on the basis of qualifications, at the University of Murcia, a public university. The selection process was based on clearly defined criteria, involving a strict scoring procedure, which meant that the only point of discussion was whether the duly certified qualifications had been awarded the correct score. The University's Recruitment Commission awarded 60.49 points to the author and 61.22 points to the other candidate, who was given the post. The author submitted a complaint to the University's Appeals Commission, arguing that the system for awarding points had not been applied correctly. On 6 February 1995, the Commission dismissed the complaint.

2.2 The author instituted judicial administrative proceedings before the High Court of Justice, alleging that the University's Recruitment Commission had acted in error or in an arbitrary manner in applying the system for awarding points. In its judgement of 11 October 1997, the Court dismissed the application. However, the Court amended the original scores by awarding 60.74 to the author and 60.82 to the other candidate. The author requested the Court to clarify and amend its judgement, complaining of clear arithmetical errors. The Court responded in a decision of 31 October 1997, in which it recalculated the candidates' points, on this occasion awarding 60.66 to the author and 60.67 to the other candidate. The author appealed against that decision; her appeal was denied in a decision of 9 December 1997, in which it was stated that the judgement contested was not subject to any appeal, since the issue was a personnel matter. The author alleges that when the scores were recalculated for the decision of 31 October 1997 the candidates were not given equal treatment, since her rival's decimal points were rounded up, thereby giving her a higher score, while her own were not. This had serious consequences since it meant that the post was given to the other candidate.¹

2.3 The author alleges that, after having been informed of the Court's judgement, she found out that the reporting judge was an associate lecturer of the Faculty of Law at the university to which she had applied. This should have been brought to the attention of the parties, and the judge in question should not have taken part in the consideration of the appeal.

2.4 The author lodged an *amparo* application with the Constitutional Court, alleging a violation of the right to consistent and reasonable grounds for the judgement, the right to equal access to the public service and the right of access to ordinary courts, as guaranteed by the law. In its judgement of 1 June 1998, the Constitutional Court dismissed the appeal as being devoid of substance.

2.5 The author petitioned the full session of the Constitutional Court to dismiss the judges who had been responsible for the inadmissibility decision, on the grounds that they

¹ The author affirms that, if the calculation had been performed using the same criteria, she would have scored 60.6775 and her rival 60.6692 points.

had violated the principles of impartiality and dignity. On 29 September 1998, the Court rejected the application on the grounds that it was inadmissible.

2.6 The author lodged a complaint with the Criminal Division of the Supreme Court against the judges of the Constitutional Court responsible for the decision on grounds of alleged breach of public trust. On 28 December 1998, the Criminal Division rejected the complaint, holding that the judgement of the Constitutional Court was well founded.

2.7 On 18 January 1999, the author submitted an appeal to the Criminal Division, which was rejected. At the same time, she submitted to the same court an application for reconsideration requesting that the judges who had been responsible for the contested decision should not take part in the examination of the appeal on the grounds of suspected bias. On 25 March 1999, the Criminal Division dismissed the application and agreed to impose a disciplinary sanction on the author's counsel for lack of respect to the Supreme Court.

2.8 The author filed a complaint against the judges who had issued the decision of 25 March 1999 with the Disciplinary Commission of the General Council of the Judiciary. On 9 February 1999, it was agreed to shelve the complaint on the grounds that it involved an issue of jurisdiction which did not come under the Commission's competence.

2.9 The author filed an application for *amparo* with the First Chamber of the Constitutional Court for violation of the right to an impartial tribunal, and for failing to grant her appeal. The application was dismissed on 21 September 2000 on the grounds that it was clearly unfounded.²

2.10 The author claims that all domestic remedies have been exhausted and that the matter is not being examined under another procedure of international settlement.

The complaint

3.1 The author claims that the State party violated article 14, paragraph 1: whereas in a similar case³ the Constitutional Court granted *amparo*, her appeal was not subject to an examination on the merits. She claims that her right to a reasoned decision was violated, since the decision by which the appeal was dismissed was arbitrary.

3.2 The author claims a further violation of article 14 because, in addition to a defence lawyer, she had to use a *procurador* to represent her in the Constitutional Court, which is not required under article 81.1 of the Constitutional Court Act for a person applying for *amparo* who is a law graduate. This difference in treatment has no objective and reasonable justification, since the function of the *procurador* is not connected in any way with the appellant's legal knowledge.

3.3 The author claims another violation of article 14, paragraph 1, on the grounds that she did not benefit from a fair trial, since the judge of the High Court of Justice who had been the reporting judge for the case was also a lecturer at the university to which she had applied. She claims that this circumstance should have been brought to the attention of the parties or should have prompted the judge to disqualify himself.

3.4 The author likewise claims that her right to a hearing by a competent and impartial tribunal was violated in the proceedings before the Supreme Court in respect of the

² The author also reported the matter to the Attorney General, the Prime Minister, the Ombudsman, the President of the Senate, the President of Congress, the President of the Spanish Bar Association and the President of the General Council of the Judiciary.

³ Second Chamber of the Constitutional Court, judgement 5/95 of 10 January 1995.

complaint she had lodged against the judges of the Constitutional Court who had rejected her application for *amparo*. She contends that the Court did not duly investigate the facts and arguments of the application for *amparo*, that those facts and arguments were misrepresented and that her application for reconsideration was dismissed.

3.5 The author alleges a violation of article 25 (c) of the Covenant. She contends that close scrutiny of the scores attributed to the candidates by the High Court of Justice of Murcia reveals that the post was allocated to the candidate with fewer points, thereby infringing the author's right to equal access to the Spanish public service.

State party's observations on admissibility

4.1 In its comments of 15 January 2003, the State party argues that the communication should be declared inadmissible on the grounds that it is not well founded, since there is no real similarity between judgement 5/95 of the Constitutional Court, cited by the author as a precedent, and her case. In the present case, the author did not obtain the highest score in the selection process. In the case that gave rise to judgement 5/95, there was an inherent contradiction in the judgement of the court because, after reviewing the scores and establishing which qualifications should have been allocated points, the final score awarded by the court was wrong and did not tally with the qualifications the court itself had decided should be allocated points. In the present case, the author raises the question of arithmetical errors, to wit multiplication errors when rounding up the decimals. There are considerable differences between the two cases, and the distinction between the two decisions of the Constitutional Court was based on objectively different assumptions; there was thus no discrimination.

4.2 The fact that a lawyer disagrees with court decisions is no justification for qualifying the courts as incompetent, biased and discriminatory, if the allegations are not substantiated. In this case, no violation of article 25 (c) of the Covenant was found.

4.3 According to the State party, the fact that a judge who taught at the University of Murcia sat in the High Court of Justice should have been raised with the competent judicial body and should have been substantiated. In accordance with article 44.1 (a) and (c) of the Constitutional Court Act, the matter cannot be raised *ex novo* in the Constitutional Court.

4.4 The State party claims that the author's complaint concerning the rejection of her appeal was not filed with the domestic courts and, as a result, there was no decision of the domestic courts that could be reviewed by the Committee.

4.5 The State party claims that the alleged violation of the right to equality arising from the participation of the *procurador* in the application for *amparo* is a matter on which the Committee has repeatedly stated its views, holding that the allegation has "not been satisfactorily substantiated for the purposes of admissibility".⁴

Author's comments on the State party's observations

5. In her letter of 25 March 2003, the author reiterates her allegations, insisting that, by failing to resolve her case in accordance with a precedent, the Constitutional Court left her without legal protection. On reviewing the arithmetical calculations performed by the court of first instance, it can be seen that crucial errors were made: without rounding up, the author scored 60.6775 points, and the other candidate 60.6692. By rounding up the second

⁴ It is referring to communications No. 866/1999, *Torregrosa Lafuente, Marina et al. v. Spain*, Views of 16 July 2001, and No. 1005/2001, *Concepción Sánchez González v. Spain*, Views of 21 March 2002.

decimal where the third decimal was greater than five, as the court did for the other candidate only, the final scores were 60.68 (the author) and 60.67 (the accepted candidate).

Consideration of admissibility

6.1 On 8 March 2006, during its eighty-sixth session, the Committee decided that the complaints relating to article 14 of the Covenant, concerning the alleged violation of the author's right to an independent and impartial tribunal with regard to the proceedings before the Constitutional Court and the Supreme Court (paras. 3.1 and 3.4) and concerning the obligation to make use of a *procurador* to represent her before the Constitutional Court (para. 3.2), were inadmissible under article 2 of the Optional Protocol because they were not sufficiently substantiated.

6.2 The Committee declared the communication admissible with regard to the complaints relating to article 25 (c) and article 14, paragraph 1, of the Covenant, the latter article relating to the alleged lack of a fair trial, given the fact that the reporting judge in the decision of the Administrative Chamber of the High Court of Justice was also a lecturer at the University of Murcia. The Committee therefore requested the State party to provide information on (a) whether the assistant lectureship to be filled was a post in the public service; (b) the possibility of an error in the calculation of the score obtained by the author; and (c) the author's allegations relating to the lack of impartiality of the reporting judge in the decision of the High Court of Justice of Murcia.

State party's observations on the merits

7.1 On 25 September 2006, the State party submitted its observations on the merits of the communication. The State party points out that, in accordance with the provisions of Act 11/83 (University Reform Act), assistant lecturers do not have the status of public servants, being simply personnel under contract. The State party adds that assistant lecturers do not have tenure or protection against removal – which public servants do have – and that they are recruited for the purpose of training and introduction to university research and teaching.

7.2 With regard to the existence of a possible calculation error in the judgement of the Administrative Chamber of the High Court of Justice of Murcia, the State party contends that a clear distinction must be drawn between the parts of the decisions of the court that are nothing more than *obiter dicta* and those which constitute the *ratio decidendi*. In this regard, the State party points out that the author uses the clarifying decision of 31 October 1997, which makes a hypothetical calculation, as the basis for modifying the sense of the decision. The alleged arithmetical error on the basis of which the author seeks to make her case was introduced in the course of explaining a hypothesis, which the judgement ultimately does not incorporate. However, the Chamber at all times confirms the proposal of the assessment commission which, in a well-reasoned manner, it does not consider to be arbitrary at all. To reconsider the decision adopted on the basis of arithmetical errors made in a hypothesis and for the purpose of clarification, would be inappropriate.

7.3 The State party also contends that, even if there had been an error which was significant to the decision, that would not have entailed a violation of provisions of the Covenant. Judgements may contain human errors without resulting in any infringement of the Covenant. The State party recalls that the assessment of the facts is primarily the task of the domestic courts, even if they are capable of error, provided that their conclusions are not manifestly arbitrary. The judgement contested cannot be considered manifestly arbitrary or unreasonable simply because it contained an arithmetical error.

7.4 With regard to the alleged lack of impartiality of the court owing to the fact that one of its judges was an associate lecturer at the University of Murcia, the State party considers that there are no actual connections with the parties that might imply a lack of impartiality on the part of the judge. The fact that the judge is an associate lecturer does not presuppose that he will a priori take a particular position in a legal dispute, both because of his objective distance from the matter in hand and the large size of the University of Murcia, and because of the nature of his work as associate lecturer, which is a habitual activity that is compatible with the activities of judges. It is very likely that attorneys, in a region such as Murcia, will know which judges also work as university lecturers. However, at no time did the author challenge the judge, as is required by applicable law.⁵ The State party alleges that there is no link between the judge in question and the department or the persons involved in the administrative proceedings, nor with the participants in the competition or the members of the assessment and appeals commissions. The State party considers it unlikely that the judge in question would have had any interest in or prejudice relating to the lawsuit: the awarding of a temporary post in the Department of Inorganic Chemistry. With regard to the author's reference to the *Pescador Valero* case,⁶ the State party considers that that case cannot be compared with the present one, since the former involved the publicly known and controversial dismissal of the head of the administrative staff of a small university campus, whereas the present case concerns the process of selection for a temporary contract in a department distant from the judge's teaching activity.

Author's comments on the State party's observations

8.1 On 16 January 2007, the author submitted her comments on the merits of the communication. She considers that grant-holding research assistants are public servants, since the post was obtained by means of a public competition on the basis of qualifications; it is subject to administrative law and not to labour law; and the case had been taken to the Constitutional Court, before which article 23, paragraph 2, of the Spanish Constitution was invoked; article 23 applies only to public functions and positions.⁷

8.2 The author contends that the State party misrepresents the substance of the decision of the High Court of Justice of Murcia and that the principal issue is that there was an arithmetical error that benefited one of the candidates to the detriment of the other. In this regard, she reiterates her previous arguments concerning the inconsistent rounding of the scores, which infringed the right to equal access to the public service.

⁵ Organization of Justice Act: Article 217: A judge or magistrate to whom one of the grounds established by law applies shall disqualify himself or herself without waiting to be challenged; Article 219: The following constitute grounds for self-disqualification or challenge: [...] 10. Having a direct or indirect interest in the lawsuit or case; Article 223: 1. The motion challenging a judge shall be filed as soon as the ground on which it is based is known, failing which it shall not be accepted for consideration. Specifically, a motion challenging a judge shall not be accepted in the following cases: (1) If it is not filed within 10 days after notification of the first decision indicating the identity of the challenged judge or magistrate, if the existence of the ground for the challenge was known before the latter; (2) If the motion is filed when proceedings are already pending, if the ground for the challenge was known before the stage in the proceedings at which the motion is filed.

⁶ European Court of Human Rights, *Pescador Valero v. Spain*, judgment of 17 June 2003. The author attached a copy of this case to her comments of 25 March 2003.

⁷ Article 23: 1. Citizens have the right to participate in public affairs, directly or through representatives freely elected in periodic elections by universal suffrage; 2. They also have the right to accede, under conditions of equality, to public functions and positions, in accordance with the requirements established by law.

8.3 With regard to the alleged lack of independence of the judge who was an associate lecturer at the University of Murcia, a circumstance of which the author became aware after the judgement had been pronounced, she states that the judge should have disqualified himself from hearing her case because he had an interest in the lawsuit. She further contends that the judge favoured the University in a suspicious manner, making repeated errors, always to the detriment of the same party. The author again refers to the decision of the European Court of Human Rights in the *Pescador Valero* case,⁸ and also to a judgement of the Constitutional Court of Spain,⁹ which recognizes that the right to an impartial judge has been violated when the court includes a judge who is an associate lecturer at the university involved in the lawsuit.

Consideration of the merits

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

9.2 With respect to the existence of errors in the judgements of the High Court of Justice of Murcia, the Committee takes due note of the author's arguments that the judgements contain an arithmetical error because certain scores were rounded in an inconsistent way, to her disadvantage. The Committee also takes note of the State party's observations that the errors in question are contained in an *obiter dictum* of the decision of the Court and that they do not affect the result of the evaluation made by the assessment commission, which the judgement definitively confirms. The Committee observes that the decision of 31 October 1997 does contain errors in certain calculations which the Court made with a view to clarifying its earlier decision. However, the Committee considers that such calculations were made in supplementary and hypothetical arguments that in no way negate the sense of the judgement, which was to confirm the decision of the assessment commission.

9.3 The Committee is of the view that, while such errors might have created a degree of dissatisfaction in the author, they are insufficient to qualify as manifestly arbitrary a reasoned judgement that analyses in detail the scores awarded to the participants in the competition. Consequently, bearing in mind that there was no inequality in the selection process for the assistant lectureship, the Committee does not consider it necessary to discuss whether or not that position was a post within the public service and decides that there is no basis, in the present case, for claiming a violation of article 25 (c) of the Covenant.

9.4 With regard to the alleged violation of the right to an impartial tribunal stipulated in article 14, paragraph 1, of the Covenant, the Committee takes note of the State party's arguments concerning the large size of the University of Murcia and the presumed lack of personal interest of the judge in question in the lawsuit.

9.5 The Committee recalls its general comment No. 32 (2007) on article 14 (Right to equality before courts and tribunals and to a fair trial), in which it states that the impartiality of the courts has two aspects.¹⁰ First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties

⁸ *Pescador Valero v. Spain* (note 6 above).

⁹ First Chamber of the Constitutional Court, judgement 55/2007 of 12 March 2007.

¹⁰ *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40 (A/62/40)*, Vol. I, annex VI, para. 21. See also communication No. 1437/2005, *Jenny v. Austria*, Views of 9 July 2008, paragraph 9.3 (*ibid.*, annex V).

to the detriment of the other.¹¹ Secondly, the tribunal must also appear to a reasonable observer to be impartial. These two aspects refer to the subjective and objective elements of impartiality, respectively.

9.6 As regards the subjective element, the judge's impartiality must be presumed in the absence of proof to the contrary. In this regard, the Committee takes note of the author's argument that the judge penalized her by committing errors in the judgement that were to her disadvantage. However, the Committee cannot conclude that those errors point to a subjective lack of impartiality of the judge in this case.

9.7 It should also be determined whether, quite apart from the judge's personal mindset, there are ascertainable objective facts which may raise doubts as to his impartiality. Judges must not only be impartial, they must also be seen to be impartial. When deciding whether there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of those claiming that there is a reason to doubt his impartiality is significant but not decisive. What is decisive is whether the fear can be objectively justified.

9.8 The Committee is of the view that, since the reporting judge was an employee of the University, where he worked as an associate lecturer (one of the parties to the proceedings before the High Court of Justice of Murcia), the author could reasonably have harboured doubts as to the impartiality of the court. The Committee considers that, in the circumstances, the author's apprehensions as to the impartiality of the judge are objectively justified and it therefore cannot be considered that there was an impartial court in the meaning 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 facts before it disclose a violation of article 14, paragraph 1, of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to furnish the author with an effective remedy. The State party has an obligation to take the necessary measures to ensure that similar violations do not occur in future.

12. By becoming a party to the Optional Protocol, Spain recognized the competence of the Committee to determine whether there has been a violation of the Covenant. 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 furnish them with an effective remedy should it be proved 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 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.]

¹¹ See communication No. 387/1989, *Karttunen v. Finland*, Views of 23 October 1992, paragraph 7.2.

Appendix

Dissenting opinion of Mr. Edwin Johnson López and Mr. Rafael Rivas Posada

With regard to the communication concerned, we wish to express our opinion dissenting from that of the majority of the Committee.

The Second Division of the Administrative Chamber of the High Court of Justice of Murcia was composed of three judges, one of whom acted as the reporting judge for the judgement which the author is contesting. In our opinion, it cannot be inferred from the mere fact that the reporting judge was an associate lecturer at the University of Murcia that the Court, which reviewed the score attributed to the author by a commission of the University, showed partiality. It cannot be supposed that the judge, who worked as a lecturer in the Department of Procedural Law at the University, could have harboured prejudice or had any personal interest in awarding an assistant lectureship in the Department of Inorganic Chemistry to one candidate or the other. The connection is so remote and implausible that the judge, who was surely aware of the grounds for challenge established by Spanish law, did not consider standing down because he had no direct or indirect interest in the lawsuit. Moreover, it is common for judges to lecture at universities, where they impart their knowledge and share experience acquired in the exercise of their functions.

In the absence of other factors, the circumstances mentioned by the author do not fully and objectively justify her apprehensions as to the impartiality of the judge. Even acknowledging that, in some circumstances, the appearance of partiality may be such as to violate the right to a fair trial by an independent and impartial tribunal, in the present case the facts do not amount to a violation of article 14, paragraph 1, of the Covenant.

(Signed) Mr. Edwin **Johnson López**

(Signed) Mr. 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. 1163/2003, *Isaev and Karimov v. Uzbekistan*
(Views adopted on 20 March 2009, Ninety-fifth session)***

<i>Submitted by:</i>	Ms. Umsinai Isaeva (not represented by counsel)
<i>Alleged victim:</i>	Mr. Abror Isaev (the author's son) and Mr. Nodirbek Karimov
<i>State party:</i>	Uzbekistan
<i>Date of communication:</i>	20 February 2003 (initial submission)
<i>Subject matter:</i>	Imposition of death sentence after unfair trial with resort to torture during preliminary investigation.
<i>Procedural issues:</i>	Evaluation of facts and evidence; substantiation of claim
<i>Substantive issues:</i>	Torture; forced confession; unfair trial
<i>Articles of the Covenant:</i>	6; 7; 9; 10; 14; 16
<i>Articles of the Optional Protocol:</i>	1; 2; 5, paragraph 2 (a)

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

Meeting on 20 March 2009,

Having concluded its consideration of communication No. 1163/2003, submitted to the Human Rights Committee on behalf of Mr. Abror Isaev and Mr. Nodirbek Karimov 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. Umsinai Isaeva, an Uzbek national born in 1956. She submits the communication on behalf of her son, Mr. Abror Isaev, and of an acquaintance of her son, Mr. Nodirbek Karimov, both Uzbek nationals born in 1984 and 1980, respectively. At the time of submission of the communication, both alleged victims were on death row, after having been sentenced to capital punishment, on 23 December 2002, by the Tashkent Regional Court. The author claims that Mr. Isaev and Mr. Karimov are victims, by Uzbekistan, of their rights under article 6; article 7; article 9; article 10;

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Lazhari Bouzid, Ms. Zonke Zanele Majodina, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

article 14, paragraphs 1, 2, 3; and article 16, of the International Covenant on Civil and Political Rights. The author is unrepresented by counsel.

1.2 In her initial submission, the author has not provided a power of attorney to act on Mr. Karimov's behalf. She was requested to present a written authorisation from Mr. Karimov, but no such document was ever received and no explanation was provided in this connection.¹

1.3 While registering the communication, on 20 February 2003, and pursuant to rule 92 of its rules of procedures, the Human Rights Committee, acting through its Special Rapporteur on New Communications and Interim Measures, requested the State party not to execute the death penalties of the alleged victims while their communication is under consideration. On 25 May 2004, the State party informed the Committee that on 16 April 2004, the Supreme Court of Uzbekistan had commuted Mr. Isaev's and Mr. Karimov's sentences to 20 years of imprisonment.

The facts as submitted by the author

2.1 In her initial submission, the author contends that her son and Mr. Nodirbek Karimov were both sentenced to the capital punishment on 23 December 2002 by the Tashkent Regional Court, while their two other co-defendants, Mr. Rustamov and Mr. I. Karimov (Mr. Nodirbek Karimov's brother) were sentenced to 20 years' prison term. The sentence was confirmed on appeal by the appeal body of the Tashkent Regional Court on 19 February 2003. The author's son and Mr. Nodirbek Karimov were found guilty of having murdered, in a particularly violent manner, on 24 May 2002, two individuals, Mrs. M. Mirzokhanova and Mr. R. Mirzokhanov, and of having robbed them.

2.2 According to the author, the court was biased, and based its decision on the confessions obtained by the alleged victims under torture during the preliminary investigation. The author adds, without providing further details, that all complaints filed in connection with the bias and the use of torture on behalf of the alleged victims, both during the preliminary investigation and the court trial, remained without answers.

The complaint

3. The author claims a violation of the alleged victims' rights under article 6; article 7; article 9; article 10; article 14, paragraphs 1, 2, 3; and article 16, of the Covenant.

State party's observations

4. On 31 March 2003, the State party noted that on 23 December 2002, the Tashkent Regional Court found Mr. A. Isaev and Mr. N. Karimov guilty under articles 97 and 164 of the Uzbek Criminal Code and sentenced them to death penalty. On 19 February 2003, the appeal body of the Tashkent Regional Court confirmed the sentence. The case was also examined by the Supreme Court, which, on 20 March 2003 upheld Mr. A. Isaev's and Mr. N. Karimov's sentences. The courts found that the alleged victims had murdered, under aggravating circumstances, R. Mirzokhanov (born in 1971) and M. Mirzokhanova (born in 1972). The guilt of Mr. A. Isaev and Mr. N. Karimov was fully established and their acts were duly qualified. When determining their sanctions, the courts had taken into consideration the gravity of the acts committed.

¹ Please note that for that reason, the Committee declares the communication inadmissible as far as it relates to Mr. Karimov (see paragraph 8.3 below).

Author's comments on the State party's observations

5.1 The author made further submissions on 5 July and 24 November 2003. According to her, her son did not commit the murder of which he was convicted. He was beaten and tortured by investigators and thus forced to confess guilt. In her view, her son's sentence was particularly severe and unfounded and his penalty did not correspond with his personality. He was positively assessed by his neighbours and documents to this effect were submitted to the court. He had no previous convictions.

5.2 According to the author, her son presented himself to the police to report the crime, explaining that he did not take part in the murder. However, he was arrested immediately and beaten by the police, to the point that he had cut his wrists and had to be hospitalised. However, after his stabilisation, the beatings and tortures resumed. The author contends that she witnessed how an investigator called "Nariman" was beating her son at the police station. She complained about this to the Office of the President, the Parliament, and to the Tashkent Region Prosecutor. However, all her complaints were referred to the same service against which she was complaining. Mr. Nodirbek Karimov, who was not contesting his involvement in the murder, was equally subjected to torture. Mr. Isaev's forced confessions were later taken into account by the court, notwithstanding the 1996 Supreme Court's ruling that evidence obtained through unauthorised methods of investigation was inadmissible.

5.3 According to the author, the courts have wrongly concluded that the murder was committed with a particular violence. The author also claims that the courts did not clarify who, among all the co-accused, had taken the initiative in committing the murder, and did not establish what their respective roles in the crime were.

5.4 The author also challenges the courts conclusion that her son had committed the murder guided by selfish motivations. In court, Mr. Isaev had explained that during the murder, he was in a state of deep emotion and did not realise what he was doing; he did not steal anything but the items were taken in order to simulate a robbery.

5.5 The court allegedly did not take into account the fact that immediately prior to the murder, her son was provoked by Mr. and Mrs. Mirzakhonov, who were humiliating and blackmailing his sister. This should have been considered as a mitigating circumstance.

5.6 The author also claims that the court, in determining her son's sentence, had ignored a Ruling of the Supreme Court of 20 December 1996, according to which although the death penalty is provided by law, it is not mandatory.

5.7 According to the author, the investigation and the courts have violated the alleged victims' right to be presumed innocent. The existing doubts in relation to the crime did not benefit the accused.

5.8 The author further contends that the courts examined the case superficially and in a biased manner. Pursuant to article 23 of the Uzbek Criminal Procedure Code, it is not incumbent on the accused to prove his/her innocence, and any remaining doubts are to his/her benefit. The court, however, did not comply with these principles in her son's case. The sentence was based on indirect evidence collected by the investigators that could not be confirmed in court, whereas evidence that could establish Mr. Isaev's innocence was lost during the investigation. In particular, the author contends that if her son was accused of having stabbed the victims with a knife, his hair, hands, and clothes should have disclosed blood marks. However, no expert's examination of his hair, hands, or of the substance under his nails was ever carried out and the knife was not discovered.

5.9 The author reiterates that the investigation was carried out in an unprofessional manner. The courts endorsed all the errors committed, and pronounced an unlawful sentence. In addition, the courts did not find mitigating circumstances in the case of her

son, notwithstanding the fact that he was never sentenced before. In addition, the courts disregarded a ruling of the Supreme Court, according to which in death penalty cases, courts must take into account all circumstances of the crime, as well as extensive data on the personality of both accused and victims.

5.10 The author visited her son on death row in April 2003 and found him in a poor health condition. She was told that he had attempted to commit suicide and was under psychotropic treatment since then. As a consequence, he did not recognize her. He was examined by a psychiatrist, who concluded that he was suffering from an “astrophobical syndrome of reactive character, with a mutation”. According to the author, her son could not receive adequate treatment in prison and should be held in a psychiatric hospital.² The author complained to different instances and requested to have her son hospitalized, without success.³

Additional information from the parties

6. The State party presented a further submission on 11 July 2003. It repeats its previous explanations and adds that the alleged victims’ execution was stopped pending the examination of their requests for Presidential pardon. The alleged victims were detained in accordance with the provisions of Code of the Execution of Criminal Penalties, and their relatives were regularly given the right to visit them in prison.

7.1 In another submission dated 11 December 2003, the State party explained, with reference to the Committee’s request under rule 92 of its rules of procedure, that it had taken measures not to have the executions of Messrs Karimov and Issaev carried out, pending the consideration of their communication.

7.2 On 25 May 2004, the State party informed the Committee that on 16 April 2004, the Supreme Court of Uzbekistan had commuted Mr. Isaev’s and Mr. Karimov’s sentences to 20 years of imprisonment.

7.3 The author was provided with a copy of all State party’s submissions, and was invited to comment on them. Several reminders were addressed to her, with no result. In a reply, dated 6 March 2008, the author informed the Committee that her son was detained in

² On 3 May 2003, Mr. Isaev’s lawyer submitted a request about his client’s health status to the prison in Tashkent where his client was held. By letter of 8 May 2003, the Head of the prison informed the lawyer that Mr. Isaev has not presented any complaints on his health status. On 30 March 2003, he had stopped talking, and was examined by the psychiatric expert of the prison’s medical unit. The diagnosis was: astrophobical syndrome of reactive character, with a mutation. Mr. Isaev was following a treatment with neuroleptics. According to the Head of the prison, the prison’s medical unit is not in a position to order a medical –forensic psychiatric examination of the detainee, as such examinations are ordered by the prosecutor’s office or by the courts. On 13 and 23 May 2003, the author complained about the health status of her son with the Department on the Execution of Penalties (Ministry of Internal Affairs). On 13 June 2003, she received a reply, signed by the Deputy Head of the Department, who informed her that her son was placed under constant observation of the medical psychological personnel of the Medical Unit of the penitentiary institution where he is held, and he was administrated medical assistance. His health status was ameliorating, and no hospitalisation was needed.

³ The author explains in particular that on 27 July 2003, she received a reply from the Chief of the Tashkent prison, according to which her son was ill, and his diagnosis was “Reactive mutation aggravation? Neuro-circulation dystonia. Need to pass a psychiatric experts’ examination, at the court’s request”. According to the author, in a reply to a further letter, she was informed, on 4 September 2003, by the Chief of the prison, that her son’s health status had deteriorated.

the penitentiary colony No. 64/72, his health status and situation were “bad”, there were no “normal” jobs there, and he was receiving a very small salary.

Issues and proceedings before the Committee

Consideration of the admissibility

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

8.2 The Committee notes, as required by article 5, paragraph 2 (a) and (b), of the Optional Protocol, that the same matter is not being examined under any other international procedure of investigation or settlement. It also notes that the State party has not contested that domestic remedies have been exhausted.

8.3 The Committee notes that the author submitted the communication initially on behalf of her son, and on behalf of her son’s co-defendant and acquaintance, Mr. Karimov. It also notes that no written authorization was presented by the author to act on Mr. Karimov’s behalf neither in her initial submission nor at a later stage, despite the fact that she was specifically requested to do so, and no explanation was provided to the Committee on this particular issue. In the circumstances, and as far as it relates to Mr. Karimov, the Committee considers that the communication is inadmissible under article 1 of the Optional protocol.

8.4 The Committee notes the author’s claims that her son’s rights under articles 9 and 16, of the Covenant, have been violated. However, she does not provide sufficient information to illustrate her claims in this respect. Accordingly, this part of the communication is deemed inadmissible, as insufficiently substantiated for purposes of admissibility, under article 2 of the Optional Protocol.

8.5 The Committee has further noted the author’s allegation, which may raise issues under article 10 of the Covenant, on the aggravation of the health status of her son following his imprisonment. It notes that the State party has not commented on this particular issue. However, in the absence of more detailed explanations as to the steps taken in order to exhaust domestic remedies on this particular issue, the Committee considers that this part of the communication is inadmissible as insufficiently substantiated under articles 2 and 5, paragraph 2 (b) of the Optional Protocol.

8.6 The Committee has noted that the author’s allegations about the manner in which the courts handled her son’s case, assessed evidence, qualified his acts, and determined his guilt, may raise issues under article 14, paragraphs 1 and 2, of the Covenant. It observes, however, that these allegations relate primarily 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.⁴ In the present case, the Committee considers that in the absence in the case file of any court records, trial transcript, or other pertinent information which would make it possible to verify whether the trial in fact suffered from the defects alleged by the author, this part of the communication is inadmissible under article 2 of the Optional Protocol as insufficiently substantiated.

⁴ See, inter alia, communication No. 541/1993, *Errol Simms v. Jamaica*, inadmissibility decision adopted on 3 April 1995, paragraph 6.2.

8.7 The Committee considers that the author's remaining allegations, which appear to raise issues under article 6; article 7; and article 14, paragraph 3 (g), of the Covenant, have been sufficiently substantiated, for purposes of admissibility, and declares them admissible.

Consideration of the merits

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

9.2 The author has claimed that her son was beaten and tortured by investigators and was thus forced to confess guilt in the murder; the author provides the name of one of the investigators who allegedly had beaten her son. The author also contended, and this was not refuted by the State party, that her son's explanations in this respect were not taken into account, and his initial confessions were used by the court in determining his role in the crime. The Committee recalls that once a complaint against ill-treatment contrary to article 7 is filed, a State party is duty bound to investigate it promptly and impartially.⁵ In this case, the State party has not specifically, by way of presenting the detailed consideration by the courts, or otherwise, refuted the author's allegations nor has it presented any particular information, in the context of the present communication, to demonstrate that it conducted any inquiry in this respect. In these circumstances, due weight must be given to the author's allegations, and the Committee considers that the facts presented by the author disclose a violation of her son's rights under article 7 and article 14, paragraph 3 (g), of the Covenant.

9.3 The Committee recalls its jurisprudence to the effect that the imposition of a death sentence after a trial that did not meet the requirements for a fair trial amounts also to a violation of article 6 of the Covenant.⁶ In the present case, however, Mr. Isaev's death sentence imposed on 23 December 2002, confirmed appeal on 19 February 2003, was commuted on 16 April 2004, by the Supreme Court of Uzbekistan. Accordingly, the Committee considers that in the particular circumstances of the present case, the issue of the violation of the author's son's right to life has thus become moot.⁷

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of the author son's rights under article 7 and article 14, paragraph 3 (g), of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Isaev with an effective remedy, including compensation and initiation and pursuit of criminal proceedings to establish responsibility for the author son's ill-treatment, and his re-trial. The State party is also under an obligation to prevent similar violations in the future.

⁵ General comment No. 20 (1992) on article 7 *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40), annex VI, paragraph 14.*

⁶ See, for example, communication No. 1150/2003, *Roza Uteeva v. Uzbekistan*, Views adopted on 26 October 2007, paragraph 7.4.

⁷ In this respect, see for example communication No. 1057/2002, *Larisa Tarasova v. Uzbekistan*, Views adopted on 20 October 2006.

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

**C. Communication No. 1178/2003, *Smantser v. Belarus*
(Views adopted on 23 October 2008, Ninety-fourth session)***

<i>Submitted by:</i>	Aleksander Smantser (represented by counsel, Mr. Siarhei Buyakevich)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	27 February 2003 (initial submission)
<i>Subject matter:</i>	Criminal conviction after a long deprivation of liberty; unfair criminal proceedings
<i>Procedural issue:</i>	Lack of substantiation of claim
<i>Substantive issues:</i>	Cruel, inhuman or degrading treatment or punishment; right to humane treatment and respect for dignity; arbitrary arrest; right to be promptly informed of reasons for one's arrest and charges; right to be brought promptly before a judge; trial within a reasonable time; release when awaiting trial; right to be presumed innocent; right to adequate time and facilities for the preparation of defence; impartial tribunal; right to be tried without undue delay; equality before the law
<i>Articles of the Covenant:</i>	7; 10, paragraph 1; 9, paragraphs 1, 2, 3 and 4; 14, paragraphs 1, 2, 3 (b), (c) and (d)
<i>Article of the Optional Protocol:</i>	2
<i>The Human Rights Committee</i> , established under article 28 of the International Covenant on Civil and Political Rights,	
<i>Meeting</i> on 23 October 2008,	
<i>Having concluded</i> its consideration of communication No. 1178/2003, submitted to the Human Rights Committee by Aleksander Smantser under the Optional Protocol to the International Covenant on Civil and Political Rights,	
<i>Having taken into account</i> all written information made available to it by the author of the communication, and the State party,	
<i>Adopts</i> the following:	

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

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

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

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

The facts as presented by the author

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

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

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

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

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

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

2.7 On 3 January 2003, a judge of the Central District Court of Minsk city rejected the complaint on the grounds that under article 126 of the Belarus Criminal Procedure Code, remand in custody is applied to a person suspected of having committed a crime punishable

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

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

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

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

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

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

2.11 On 25 June 2003, the legal qualification of the author's actions was changed to illegal business activities carried out without state registration, combined with a receipt of large quantities of revenues and committed by an organized group (article 233, parts 2 and 3, of the Criminal Code). On 12 August 2003, the Deputy Prosecutor General transmitted the case to the Central District Court of Minsk, which on 13 August 2003 prolonged his custody until 13 September 2003. On 15 August 2003, the case was transferred to the Frunze District Court of Minsk on jurisdiction grounds. That court, on 12 September 2003 extended the author's custody until 13 October 2003, "taking into account nature of the accusation, identity of the accused and in order to provide for due examination of the case by court". The ruling of 12 September 2003 could be appealed to the Minsk City Court through the Frunze District Court of Minsk within 10 days after the receipt of the ruling by the accused. The author claims that this decision violated article 127, part 13, of the Belarus

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

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

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

Criminal Procedure Code,⁶ as he was effectively deprived of the possibility to appeal the decision of 12 September 2003 which he received only after 13 September 2003. On 23 September 2003, the same court scheduled the hearing of the author's case for 7 October 2003 and confirmed his custody.

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

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

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

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

2.16 In the supplementary submission to the court of 29 November 2004, counsel wrote, *inter alia*, that on 20 September 2004, the presiding judge prolonged the author's custody until 1 November 2004. The judge, allegedly, was already aware that the author would be convicted and sentenced on 1 October 2004 but decided to extend custody until 1 November 2004. In counsel's opinion, this proves that the court was pre-determined about the author's guilt. Reportedly, the court tried to rectify its mistake by issuing, on 21 September 2004, yet another ruling signed by another judge, that extended the author's remand in custody until the same date, namely, until 1 November 2004. The author submits that, under article 127, part 13, of the Criminal Procedure Code, the accused in a criminal case who was transferred to court jurisdiction, cannot be kept in custody for more than six months from the date the case was transferred to the court to the date when he is convicted and sentenced. With regard to persons accused of serious and/or particularly serious crimes, this period cannot exceed twelve months. The similar provisions of article 127, part 14, apply to those cases remitted to court for a re-trial. Under the latter provision, the maximum duration of the author's remand in custody expired at midnight on 11 August 2004. The author further submits that the ruling of the Frunze District Court of Minsk of 21 July 2004, extended this maximum duration without legal foundation until 1 September 2004. Counsel appealed this ruling on 27 July 2004 and the author himself on 28 July 2004. The latter appeal was ignored by the Minsk City Court in violation of article 9, paragraph 4, of the Covenant. Counsel's appeal was rejected by a judge of the Minsk City Court on 30 July

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

2004. This judge also glossed over the claims made under article 9, paragraph 1, of the Covenant. On 12 August 2004, counsel filed yet another complaint with the Frunze District Court of Minsk.

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

The complaint

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

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

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

State party's admissibility and merits observations

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

4.2 On the facts, the State submits that on 3 December 2002, the author was declared a suspect under article 210, part 4, of the Criminal Code. At 11.30 a.m. he was so informed and his rights and duties were explained to him. He was arrested at 11.50 a.m. the same day and was informed of the procedure for appealing the decision about his arrest. The author's corporal search was carried out between 11.50 a.m. and 1.45 p.m. Between 2.25 p.m. and 2.36 p.m. he was interrogated by the investigator of the Prosecutor's Office, as a suspect, and then transferred to the temporary confinement ward. On 4 December 2002, he was remanded. On 6 December 2002, the Deputy Prosecutor General endorsed the investigator's decision after the expiry of 72 hours from the time of arrest, as required by article 108, part 3, of the Criminal Procedure Code. On 12 August 2003, the author's charges were replaced by those under article 233, part 3, of the Criminal Code (illegal business activities), which also falls within a category of particularly serious crimes, and, therefore warranted the author's remand. At the time of submission of the State party's first observations, the case was awaiting consideration in the Frunze District Court of Minsk.

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

Author's comments on the State party's observations

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

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

Supplementary submissions by the parties

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

6.2 The author claims that his trial did not comply with the fair trial guarantees of article 14, paragraphs 1, 2 and 3 (c). Firstly, the trial judge arbitrarily refused his counsel's motion to put on record the expert opinions of the four Belarusian lawyers who confirmed that the *actus reus* set out in the indictment did not qualify as "business activities" and, therefore, fell outside the scope of article 233 of the Criminal Code. Secondly, in the judgment of 1 October 2004, the court did not evaluate the testimony given by the Executive Director of "Miramex Limited" to the author's counsel. In it, he had affirmed the author's innocence and presented the report of independent auditors, who certified that "Miramex Limited" did not have business activities in Belarus and duly paid its taxes in the United Kingdom, where the company was registered. Thirdly, a lapse of 22 months between the author's arrest on 3 December 2002 and his conviction on 1 October 2004, does not meet the requirement of article 14, paragraph 3 (c), to be tried without undue delay.

7.1 On 25 April 2005, the State party recalls that its Criminal Procedure Code stipulates the conditions of application, procedure and time limits on one's remand, as well as the procedure for extending the deadlines and for the judicial review of the application of this form of restraint measures and the extension of deadlines. It concludes that the legal requirements and recognized principles of international law were complied with in the author's case. The decision of 12 September 2003 to extend the author's custody complied with article 127, part 13, of the Criminal Procedure Code, because the author's custody ceased to be lawful on 13 September 2003 and had to be extended, as it is required by the above article, 'not earlier than ten days before the expiry of each monthly extension'. The

fact that the author received this decision after 13 September 2003 did not deprive him of the right to appeal, but he did not avail himself of this right. The State party explains why the author's conviction of 12 January 2004 fell outside the scope of the Law "On the amnesty of certain categories of individuals that have committed crimes".

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

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

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

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

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

8. On 2 December 2005, the author refutes the State party arguments. He recalls that article 103, part 3, of the Criminal Procedure Code does not explicitly prohibit counsel from requesting expert opinions on legal issues. Therefore, such evidence is admissible in court. He further notes that the State party failed to explain why: (1) his criminal case was not transmitted from the Frunze District Court to the Minsk City Court for more than three months for the examination of his appeal on cassation; (2) the investigation of his case lasted from 3 December 2002 to 12 August 2004; (3) there were two rulings on the extension of the duration of his remand in custody (paragraph 2.16 above) until 1

November 2001 and (4) it was necessary for the trial judge to prolong his custody to 1 November 2004 rather than only 1 October 2004, when he was convicted and sentenced. The author contests the argument that he should have challenged the court's assessment of the evidence through the supervisory review procedure and notes that he is unaware of any supervisory protest being submitted on his behalf. He argues that this implies that the Belarus Supreme Court, which prepared the State party's submission of 11 August 2005, studied his case and did not find grounds to initiate supervisory review procedure *proprio motu*.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

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

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

9.5 As to the claim under article 9, paragraph 4, the Committee observes that the author complained for the first time about his arrest and remand in custody to the Central District

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

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

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

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

Consideration of the merits

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

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

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

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

⁹ Communication No. 526/1993, *Michael and Brian Hill v. Spain*, Views adopted on 2 April 1997, para. 12.3.

interfere with the investigations or abscond if released on bail does not justify an exception to the rule in article 9, paragraph 3, of the Covenant. In these circumstances, the Committee finds that the author's right under article 9, paragraph 3, was violated.

10.4 As to the claim under article 14, paragraph 3 (c), the Committee recalls its jurisprudence that if bail is denied because the accused is charged with a serious offence, he or she must be tried as expeditiously as possible.¹⁰ The burden of proof for justifying any delay and showing that a case was particularly complex rests with the State party.¹¹ The author was arrested on 3 December 2002, formally charged on 12 December 2002 and his initial criminal charges were changed on 25 June 2003. He was initially convicted on 12 January 2004, his conviction was subsequently quashed and his case remitted for a re-trial resulting in the author's conviction on 1 October 2004. None of the delays in the case can be attributed to the author or to his counsel. The State party has conceded that the author's pretrial investigation and court proceedings were prolonged but argued that the delay was due to the size of the author's criminal case file and because "it required a long time for the prosecution to compile evidence and for it to be examined and evaluated by the judicial authorities". In these circumstances, the Committee cannot, on the basis of the material made available to it, conclude that the delay in the author's trial was such as to amount to a violation of article 14, paragraph 3 (c), of the Covenant.

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

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

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

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

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

¹¹ *Hill v. Spain* (note 9 above), para. 12.4.

**D. Communication No. 1195/2003, *Dunaev v. Tajikistan*
(Views adopted on 30 March 2009, Ninety-fifth session)***

<i>Submitted by:</i>	Mr. Vladimir Dunaev (not represented by counsel)
<i>Alleged victim:</i>	Mr. Vyacheslav Dunaev (author's son)
<i>State party:</i>	Tajikistan
<i>Date of communication:</i>	25 July 2003 (initial submission)
<i>Subject matter:</i>	Imposition of death sentence after unfair trial
<i>Procedural issue:</i>	Level of substantiation of claim
<i>Substantive issues:</i>	Torture; forced confession; unfair trial
<i>Articles of the Covenant:</i>	6; 7; 9; 10; 14, paragraphs 1, 2, and 3 (b), (e), and (g)
<i>Article of the Optional Protocol:</i>	2

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

Meeting on 30 March 2009,

Having concluded its consideration of communication No. 1195/2003, submitted to the Human Rights Committee on behalf of Mr. Vyacheslav Dunaev 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. Vladimir Dunaev, a Russian national born in 1940, currently residing in Tajikistan. He submits the communication on behalf of his son, Vyacheslav Dunaev, also a Russian national born in 1964, who, at the time of the submission of the communication was detained on death row in Tajikistan, following of death sentence imposed by the Sogdiisk Regional Court, on 10 October 2002. The author claims that his son is the victim of a violation, by Tajikistan, of his rights under article 6; article 7; article 9; article 10; and article 14, paragraphs 1, 2, and 3 (b), (c), (e), and (d) of the International Covenant on Civil and Political Rights. The author is unrepresented.¹

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Lazhari Bouzid, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli and Mr. Krister Thelin.

¹ The Optional Protocol entered into force for the State party on 4 April 1999.

1.2 When registering the communication on 29 July 2003, and pursuant to rule 92 of its rules of procedure, the Human Rights Committee, acting through its Special Rapporteur on New Communications and Interim Measures, requested the State party not to carry out Mr. Dunaev's death sentence, pending consideration of his case. On 4 December 2003, the State party informed the Committee that Mr. Dunaev's death sentence was commuted by the Supreme Court of Tajikistan, on 7 November 2003, to 25 years' prison term.

The facts as presented by the author

2.1 On 1 August 2002, one Ms. Khairulina was found murdered in her apartment in the city of Bobodzhon (Tajikistan). Her body revealed marks of violence. According to the author, the murdered woman sold alcoholic drinks in her apartment at night. A medical-forensic expert concluded that the death of Ms. Khairulina occurred as a consequence of "mechanical asphyxia".

2.2 The author's son was arrested, on 4 August 2002, as a suspect in the murder. The author notes that his son had already been convicted twice by that date, including for murder. His son's previous criminal record was allegedly used by the police, in order to accuse him of the above crime.

2.3 The author claims that immediately after his arrest, his son was beaten and was subjected to tortures on premises of the Ministry of Internal Affairs' Department (Bobchon-Gafurovsky District). As a consequence, his son sustained two broken ribs. His son was forced to confess guilt. He was placed in an isolation cell, where he was also beaten, and he was not provided with food or water. His son's repeated requests to be examined by a doctor were ignored. His arrest record was only prepared in the evening of 5 August 2002, and the investigators assigned a lawyer to him on that moment.

2.4 The author claims that his son's case was investigated by one Mr. Aliev, who acted in a superficial and biased manner. The author son's depositions were not reflected correctly in the records prepared by the investigator. The investigator also allegedly made no attempt to verify his son's alibi.

2.5 The author's son was kept for a month and a half in a temporary detention centre of the Bobchon-Gafurovsky District of Internal Affairs. Allegedly, he was constantly beaten there. The author contends in this connection, that throughout the investigation, his son was beaten by police officers and by investigators alike. He was not allowed to meet with anybody, including with his assigned lawyer. As a result, all the evidence in the case file were fabricated. The investigation focused on depositions of one Amonbaev, who was a co-accused in the criminal case. Thus, Amonbaev allegedly gave false depositions, incriminating the author's son. According to the author, his son warned the investigators about this, but his claims were ignored.

2.6 The author adds that his son was unable to meet with his lawyer throughout the preliminary investigation. Following his son's related complaint to the Regional Prosecutor's Office, the investigator and the lawyer then allegedly persuaded his son to sign certain documents without however permitting him to examine the content of his criminal case file. When at some point the family decided to hire another lawyer, the investigator denied him the right to take part in the proceedings. The author allegedly complained about this to the Office of the Prosecutor General and to the Supreme Court, but his letters were referred back to the investigator.

2.7 The author adds that his son had informed him that he was also beaten after his transfer to the pretrial detention centre in Khudzhand city. Allegedly, he was handcuffed to

a radiator there, and beaten, again to force him to confess guilt. The author was only able to meet his son in September 2002.² He contends that his son was all black and blue as a result of the beatings suffered when he saw him for the first time after his arrest. His son explained that he was constantly beaten, that he had difficulties in speaking, and he was complaining about a pain on one side. The meeting took place in the presence of eight policemen and the investigator Aliev.

2.8 The author further claims that up to the date of the court trial, his son was kept in isolation, where he was constantly beaten.

2.9 On 10 October 2002, the Sogdiisk Regional Court found the author's son guilty of the murder, and sentenced him to death. The court allegedly examined the case in an accusatory manner. The author son's depositions were ignored. The court also ignored a number of witnesses' depositions. His co-accused, Amonbaev, was sentenced to 23 years' prison term. The author's case was examined, on appeal, by the Supreme Court of Tajikistan (exact date not specified) and the sentence was upheld.³

The complaint

3.1 The author claims that his son is a victim of a violation of his rights under article 7 of the Covenant, given that he was beaten and tortured by police officers and investigators. He claims that in spite of several complaints, made both by his son and his relatives, no inquiry was ever initiated into the torture allegations.

3.2 The author claims, without providing any detail, that his son's rights under article 9, paragraphs 1, 2, and 3, were violated.⁴

3.3 The author invokes article 10, paragraph 1, of the Covenant, and claims that the conditions of detention during his son's arrest and throughout the preliminary detention were inhuman and degrading, as his son was kept in isolated and constantly subjected to beatings.

3.4 The author claims a violation of his son's right to be presumed innocent, under article 14, paragraph 2, because neither during the investigation nor in court, his son's involvement in the crimes was established beyond doubt, but the tribunals found him guilty and ignored his depositions, as he had two previous criminal convictions. The author's son was convicted only on the basis of the depositions of Mr. Amonbaev, who had a particular interest in the case.

² The author contends, without providing dates, that he could see his son only at the start of the court trial.

³ The author submits a copy of his appeal addressed to the Supreme Court and to the Office of the Prosecutor General, dated 2 July 2003. In this letter, he affirms that he has been beaten, on the third floor of the Gofurovsky Department of the Ministry of Internal Affairs. He had two broken ribs as a result. The beatings have continued also in his cell, where he was kept individually. His requests to receive a medical assistance were ignored. The author's son further contends in his appeal that during a break, at the trial court, his lawyer explained to him that it would be better to accept the version of his co-accused. The lawyer apparently stressed that in this way, he would receive a prison term and not the death penalty. The lawyer also pointed out that afterwards, on appeal, the author's son would be able to write, complain, and obtain justice. The author's son explains in his appeal that as he believed that the trial was programmed, he listened to the lawyer and confirmed some of the depositions of his co-accused.

⁴ This claim was not part of the initial submission but was formulated only on a later stage (see paragraph 5.2 hereafter).

3.5 According to the author, his son's right under article 14, paragraph 3 (b), was violated during the preliminary investigation. His son was prevented from meeting with his appointed counsel and could not prepare his defence properly. In addition, this lawyer allegedly failed to defend his son's interests. The lawyer in question persuaded his son to retract some of his claims and to sign certain procedural documents. The lawyer was often absent and signed the investigation records *post factum* and *pro forma*.

3.6 The author claims that his son's rights under article 14, paragraph 3 (e), were violated, as during the trial, both the court and the investigation allegedly prevented witnesses from being interrogated. The investigator in charge of the case was present in the court room and called witnesses to the bar, allegedly after giving them instructions on how to testify.

3.7 According to the author, his son is a victim of a violation of his right under article 14, paragraph 3 (g), as he was forced to confess his guilt.

3.8 Finally, the author contends that the above facts reveal also a violation of his son's rights under article 6 of the Covenant, as his death sentence was imposed on him after an unfair trial that did not meet the requirements of article 14.

State party's observations on admissibility and merits

4.1 The State party presented its observations on 4 December 2003. It explains that in accordance with information provided by the Government's Commission on the fulfilment of the State party's international human rights' obligations, Mr. Dunaev was sentenced to death on 10 October 2002 by the Sogdiisk Regional Court. He was found guilty of having murdered one Mrs. Khairulina, on 31 July 2002, in order to rob her, acting on agreement with his co-accused, Mr. Amonboev.

4.2 Mr. Dunaev's guilt in the murder and the robbery was established not only on the basis of his depositions in court, but also on the basis of a multitude of other evidence, such as the depositions of Mr. Amonboev and other witnesses, records on the seizure of a mask, gloves, a shirt, biological expert's conclusion (No. 19 of 29 August 2002, pursuant to which the seized shirt disclosed samples of human blood from the same blood group as that of the murdered), as well as the conclusions of a forensic/medical examination (No. 65, of 3 September 2002).

4.3 The State party affirms that according to order No. 83 of 9 August 2002, Mr. Dunaev was assigned a lawyer, Mr. Nasrulloev. It contends that the author's allegations that his son was prevented from meeting with the lawyer are totally groundless, as the lawyer in question was present from the moment when it was decided on whether to place Mr. Dunaev in custody; when his client was given the opportunity to consult his indictment act; as well as during the conduct of other investigation acts.

4.4 At the end of the preliminary investigation, Mr. Dunaev and his lawyer were given the opportunity to familiarize themselves with the content of the criminal case file. This is confirmed, *inter alia*, by the fact that, on this occasion, they made a procedural request, and their request was fully complied with.

4.5 In accordance with the conclusions of a medical-forensic expert act No 1443 of 27 August 2002, Mr. Dunaev's body disclosed no corporal injuries.⁵ Therefore, the author's allegations about beatings and torture inflicted on his son are groundless.

⁵ The State party does not submit a copy of the document in question.

4.6 The State party adds that the author appealed the death sentence to the Supreme Court (no specific date provided). On an unspecified date, the Supreme Court confirmed the death sentence. On 7 November 2003, by decision of the Plenum of the Supreme Court of Tajikistan, the death sentence was commuted to 25 years in prison.

Author's comments on the State party's observations

5.1 On 11 March 2004, the author reiterated his initial allegations. He recalled that all evidence in the criminal case were fabricated by the investigators and were based on the false testimony and perjury of Mr. Amonbaev, whose sister, according to the author, was present in the victims' apartment on 31 July 2002. He adds that his son had an alibi – he had spent the whole night in a bar in Kairakkum city and left only at 5 a.m., on 1 August 2002. The totality of the bar's personnel – the owner, her husband, her children and a nephew all could have confirmed that Mr. Dunaev was there that night; but none of them were interrogated during the preliminary investigation. The court interrogated only the owner of the bar.

5.2 He adds, without further details, that his son's rights under article 9, paragraphs 1, 2, and 3, were also violated.

Issues and proceedings before the Committee

Consideration of the 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) and (b), of the Optional Protocol, that the same matter is not being examined under any other international procedure of investigation or settlement, and that it is uncontested that domestic remedies have been exhausted.

6.3 The Committee has noted the author's claim under article 9 of the Covenant. It observes that the author made this claim in very general terms, without specifying which particular acts committed by the State party's authorities amounted to a violation of his son's rights under article 9. In the absence of any further information in this relation, the Committee considers that this part of the communication is inadmissible as insufficiently substantiated, pursuant to article 2 of the Optional Protocol.

6.4 The Committee has noted that the author has invoked a violation of his son's rights under article 14, paragraph 2, of the Covenant as the tribunals have failed to establish his son's guilt beyond reasonable doubt (see paragraph 3.4 above). It also notes that the State party's has not refuted this allegation specifically, but has contended that Mr. Dunaev's guilt was dully established and his sentence was grounded. In the absence of any further detailed information in this relation on file, that would permit the Committee to verify the author's particular allegations, and, in particular, in the absence of any indication showing that these allegations were ever drawn to the attention of the State party's courts, the Committee considers that this part of the communication is inadmissible, under article 2 of the Optional Protocol, as insufficiently substantiated.

6.5 The Committee noted the author's claims that his son's defence rights, under article 14, paragraph 3 (b), have been violated. The State party has refuted these allegations, by pointing out that Mr. Dunaev has been assigned a lawyer, on 9 August 2002, and this lawyer was present when it was decided to place Mr. Dunaev in custody, and throughout

the preliminary investigation. The Committee considers that in the absence of any other pertinent information and documentation on file in this relation that would permit it shed light on this contradictory information, this part of the communication is inadmissible under article 2 of the Optional Protocol, as insufficiently substantiated.

6.6 The author has also claimed, in general and sometimes contradictory terms that in violation of article 14, paragraph 3 (e), the court refused to, or did not, call a number of witnesses, whose depositions could have been of interest to the solution of case and who could confirm his son's alibi. In the absence of any other pertinent information on file, the Committee declares this part of the communication inadmissible under article 2 of the Optional Protocol, as insufficiently substantiated.

6.7 The Committee notes that the author claims that, in violation of article 7 and 14, paragraph 3 (g), his son was beaten and forced to confess guilt, and that the court ignored this and rejected all claims in this relation. The State party has replied in general terms, by affirming that these allegations are groundless, and that according to the conclusions of a medical-forensic expert of 27 August 2002, Mr. Dunaev's body displayed no injuries. The Committee notes however, that the author has provided a description of the treatment his son was allegedly subjected to; he has claimed, in addition, that his son had two ribs broken as a result. It notes that the author has submitted a copy of his son's appeal to the Supreme Court, where these allegations are invoked directly. In the circumstances, and in the absence of other pertinent information, the Committee considers that due weight must be given to the author's allegations. It also observes that the State party does not dispute the author's contention that the torture allegations were raised at the author son's trial and that the Court did not investigate them. Therefore, it considers that the remaining allegations of the author, in as much as they appear to raise issues under articles 7; 10; and 14, paragraph (g); and article 6, of the Covenant, have been sufficiently substantiated, and declares them admissible.

Consideration on 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 In the present case, the author has claimed that his son was severely beaten, after his arrest, and throughout the preliminary investigation, by police officers and investigators, to the point that he sustained two broken ribs. He claims that as a consequence, his son was forced to confess his guilt, in breach to the requirements of articles 7 and 14, paragraph 3 (g) of the Covenant. The Committee notes that the State party merely replies that these allegations are groundless, and has explained that according to a medical expertise conducted on 27 August 2002, Mr. Dunaev's body disclosed no injuries. The Committee notes, however, that the State party has not provided a copy of the expertise in question nor explains in under what circumstances and in what context the expertise in question was carried out.

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.⁶ It reiterates that, with regard to the burden of proof, it cannot rest alone with the author of a communication, especially considering that the author and the State party do not always have equal access to

⁶ See the Committee's general comment No. 20 (1992) on article 7, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI.

evidence and that frequently the State party alone has access to relevant information.⁷ In light of the fairly detailed description of the author on the circumstances of his son's ill-treatment; the unavailability of any trial transcript or other court records; and in absence of any further explanations from the State party in this connection, the Committee decides that due weight must be given to the author's allegations. Therefore, the Committee concludes that the facts, as presented in the present case, reveal a violation of the author's son's rights under articles 7 and 14, paragraph 3 (g), of the Covenant. In light of this finding, the Committee considers it unnecessary to examine the author's claim made under article 10 separately.

7.4 The Committee notes that the author has invoked a violation of his son's rights under article 6 of the Covenant, as his son's death sentence was imposed on him after an unfair trial that did not meet the requirements of article 14. The Committee recalls that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant. In the present case, however, Mr. Dunaev's death sentence, passed on 10 October 2002, was commuted, on 7 November 2003, by the Supreme Court of Tajikistan. In the circumstances, the Committee considers it unnecessary to separately examine the author's claim under this provision of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the Covenant, is of the view that the facts before it disclose a violation of article 7 and article 14, paragraph 3 (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 Mr. Dunaev with an effective remedy, including the payment of adequate compensation, initiation and pursuit of criminal proceedings to establish responsibility for the author son's ill-treatment, and a retrial, with the guarantees enshrined in the Covenant or release, of the author's son. 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 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.]

⁷ See, for example, communication No. 161/1983, *Emma Rubio de Herrera v. Colombia*, Views adopted on 2 November 1987, paragraph 10.5.

**E. Communication No. 1200/2003, *Sattorov v. Tajikistan*
(Views adopted on 30 March 2009, Ninety-fifth session)***

<i>Submitted by:</i>	Mrs. Gulrakat Sattorova (not represented by counsel)
<i>Alleged victims:</i>	Mr. Zarif Sattorov (the author's son)
<i>State party:</i>	Tajikistan
<i>Date of communication:</i>	18 August 2003 (initial submission)
<i>Subject matter:</i>	Imposition of death sentence after unfair trial.
<i>Procedural issue:</i>	n.a.
<i>Substantive issues:</i>	Torture; forced confession; unfair trial; bias of trial court.
<i>Articles of the Covenant:</i>	6; 7; 9; 10; 14, paragraphs 1 and 3 (g)
<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 30 March 2009,

Having concluded its consideration of communication No. 1200/2003, submitted to the Human Rights Committee on behalf of Mr. Zarif Sattorov 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. Gulrakat Sattorova, a Tajik national born in 1950. She submits the communication on behalf of her son, Zarif Sattorov, also a Tajik national born in 1977, who, at the time of the submission of the communication, was detained on death row following imposition of a death sentence by the Supreme Court of Tajikistan, on 21 November 2002. The author claims that her son is the victim of a violation, by Tajikistan, of his rights under article 6; article 7; article 9, paragraphs 1 and 2; article 10; and article 14, paragraphs 1 and 3 (g), of the International Covenant on Civil and Political Rights. The author is unrepresented.¹

* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Lazhari Bouzid, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli and Mr. Krister Thelin.

¹ The Optional Protocol entered into force for the State party on 4 April 1999.

1.2 When registering the communication on 18 August 2003, and pursuant to rule 92 of its rules of procedures, the Human Rights Committee, acting through its Special Rapporteur on New Communications and Interim Measures, requested the State party not to carry out Mr. Sattorov's death sentence, pending consideration of his case.

The facts as presented by the author

2.1 The author claims that her son was suspected of having participated, since 1997, in an armed gang of one Saidmukhtor Eroev, and having taken part in several crimes, including robberies and murders. She contends that Eroev asked young people to join his gang; those who tried to refuse risked being killed. Her son was one of those who were forced to join the gang, in the spring of 1998. According to the author, her son was mentally retarded and had great difficulty in reading or writing. For that reason, he was a gang member for 25 days only.

2.2 The author contends that her son did not participate in any criminal activity. He was accused of having committed robberies in February and May 1997, in June 1997, and to have participated in a hostage taking in May 1998. According to her, he was not involved in these crimes, as he was not a member of the gang when the crimes were committed.

2.3 The author's son was arrested at 5 a.m. on 11 March 2002, when 15 armed policemen entered the family apartment and forcibly took him to an unknown destination. They showed neither their police ID's nor an arrest warrant. Mr. Sattorov's parents spent two days to locate their son in the Ministry of Internal Affairs' Department of the Zheleznodorozhny District, Dushanbe. Only after a further two days, Mr. Sattorov's father was allowed to see him. Mr. Sattorov was kept at the Internal Affairs' Department for 21 days. He was then transferred to a temporary detention centre; from there, he was transferred to a pretrial detention centre.

2.4 The author contends that her son was detained without any record, to put him under pressure and force him to confess guilt in crimes that he did not commit. During his time in the Zheleznodorozhny District Department of the Ministry of Internal Affairs, i.e. immediately after his arrest, and throughout the preliminary investigation, he was allegedly beaten, tortured, and coerced to confess his guilt in respect of several crimes. In substantiation of her claim, the author explains that her son was beaten with sticks, batons, that he was punched and kicked, was hit with the butt of an automatic rifle, and he was administered electric shocks. His head and his spine were damaged as a result. He was also forced to sign confessions previously drafted by the police, as well as blank forms. The author reiterates that her son could read only with difficulty; thus, he ignored what he was in fact signing. In addition, he signed most of his confessions in the absence of a lawyer. Mr. Sattorov allegedly explained this to relatives during their visits (during the preliminary investigation). He claimed that he often lost conscience because of the torture he had suffered, during the interrogations in the first few days following his arrest. At the time, his body still revealed marks of torture.

2.5 The author adds that her son was formally charged only one month after his arrest. After the arrest, the author's son was not represented by a lawyer and was not informed of his rights. Only one month later, the investigators assigned a lawyer to him, who, according to the author, acted in the best interest of the prosecution. The lawyer did not inform the family of any developments in the criminal case. He also allegedly signed records on several procedural acts that were conducted by the investigators in his absence. He was allegedly aware that his client was subjected to beatings but did not take any steps to prevent this treatment.

2.6 The author adds that numerous procedural acts were carried out not only in the lawyer's absence, but also in the absence of any witnesses, i.e. contrary to the requirements

of the Criminal Procedure Code of Tajikistan. The evidence so collected by the investigators should have been considered inadmissible.

2.7 According to the author, during the preliminary investigation, her son was examined by a psychiatrist who concluded that he was of sound mind. The author reiterates that her son was mentally retarded, as he was unable to communicate properly and to expose his thoughts clearly. Therefore, he should have passed a more detailed psychological and psychiatric examination, with hospitalization in a specialized institution, but the investigators had no interest in ordering such hospitalization.

2.8 Mr. Sattorov's case was examined by the Criminal College of the Supreme Court of Tajikistan on 21 November 2002. According to the author, the court was biased, as the presiding judge simply endorsed the position of the prosecution. The judge often shouted at the accused (and at his relatives), contending that he was a liar and that he had told the truth during the preliminary investigation. The requests of the lawyer of the author's son were constantly rejected. For example, the court refused to call several witnesses who, according to the author, could have confirmed her son's non involvement in the crimes he was accused of. The conviction was based exclusively on the forced confessions of the author's son.

2.9 The author adds that in court, no witness could testify to her son's involvement in any crime, or describe in any way his role within the gang of Erov. There were 70 witnesses in the criminal case, but the court called only 16. The author claims that the case file contained no direct evidence of her son's guilt.

2.10 The author's son has explained to the court that he was tortured to confess guilt. The court ignored this claim. In addition, the court did not order a medical-forensic examination of her son to verify his torture claims, in spite that his lawyer has asked him to remove his shirt and to show his marks of torture visible at his dorsal spine, and despite that he specifically requested the court to order an examination of his client in this connection.

2.11 On 21 November 2002, the Supreme Court found Mr. Sattorov guilty of all charges and sentenced him to the death. The author's appeal was examined by the appeal instance of the Supreme Court on 28 January 2003, which confirmed the sentence.

The complaint

3.1 The author claims that her son's rights under article 7 of the Covenant were violated, as he was beaten and tortured by investigators. As he was forced to confess his guilt under torture and psychological pressure, his rights under article 14, paragraph 3 (g), were also violated.

3.2 The author claims that her son's rights under article 9, paragraphs 1 and 2, were violated, as he was detained unlawfully, he was not informed of the charges against him for a long period of time and was only charged one month after arrest.

3.3 The author claims that her son's rights under article 14, paragraph 1, were violated, as the court failed in its duty of impartiality, was biased and partial in its assessment of evidence, and in particular because the court did not interrogate a number of witnesses.

3.4 Finally, the author claims that given that her son was sentenced to death after a trial that was contrary to the requirements of article 14, his rights under article 6, paragraphs 1 and 2, of the Covenant, were also violated.

State party's observations

4.1 The State party presented its observations on 4 May 2004. It submits detailed factual information obtained from the Supreme Court and the General Prosecutor's Office of Tajikistan, in connection to several crimes, including armed robberies, beatings, murders, and hostage-takings that were committed between February 1997 and August 1999, by the gang with the participation of Mr. Sattorov.

4.2 The State party contends that Mr. Sattorov was arrested on 12 March 2002, and was placed in pre-trial detention on 13 March 2002. He was assigned a lawyer, Mr. Safarov, on 13 March 2002. The same day, in the presence of his lawyer, the author's son was informed of the charges against him. Mr. Sattorov counter-signed the order placing him in custody. According to the State party, all subsequent investigative acts were conducted in the lawyer's presence.

4.3 The State party contends that there is no information that the alleged victim was subjected to any form of unlawful methods of investigation. Neither during the preliminary investigation nor before the court, did the author's son or his lawyer formulate any claim about beatings, torture, or other form of unlawful methods of investigation.

4.4 At the beginning of the preliminary investigation, Mr. Sattorov admitted his membership in the gang of Erov. He admitted that he participated in the commission of several crimes by the gang. During the verification of his deposition at crime scenes, he reconfirmed his confessions in the presence of his lawyer and other witnesses. In addition, he confessed his guilt in crimes that were not known to the investigation at that time.

4.5 The State party contends that, according to the information from the Supreme Court, the allegations that the author's son was subjected to torture and to prohibited methods of investigation are absolutely groundless and are not corroborated by evidence, and were not confirmed during the trial in the Supreme Court. The case was examined on appeal by the appeal body of the Supreme Court, on 28 January 2003, and Mr. Sattorov's sentence was confirmed. On the basis of the above, there is no evidence of any violations of the Covenant.

Author's comments on the State party's observations

5.1 On 6 June 2004, the author commented on the State party's observations. She reiterates her previous allegations and adds that her son's assigned lawyer met with his client only on 17 March 2002. The same day, the lawyer requested Mr. Sattorov's father to pay him for services. The father paid the amount, but when he was calling him, the lawyer was allegedly asking for more money, affirming that he would stop representing Mr. Sattorov. According to the author, the lawyer was not present during a number of important investigation acts.

5.2 The author objects to the State party's contention that her son or his lawyer never complained about torture during the preliminary investigation. She explains that her son could not formulate such complaints through his lawyer, as the later was assigned by the investigator, and was only present towards the end of the investigation, in order to sign records and other investigative acts.

5.3 The author reiterates that her son has indeed claimed that he was tortured, and provided details: he was tortured with electric shocks on his nose, his toes. He was handcuffed to a radiator, and beaten with a rubber baton on his spine. He was also beaten on his kidneys with a wet towel. During the court trial, the family hired a new lawyer to represent him. The author reiterates that her son claimed in court that he was tortured. She adds that the new lawyer asked the court to call the officers who conducted the investigation and allegedly tortured his client, as the accused could have recognized them,

but the court rejected the request. She recalls that during the court trial, in the presence of other lawyers and co-accused, the new lawyer requested the accused to raise his shirt and to show to the judges the marks of torture on his dorsal spine. The lawyer asked the court to order a medical-forensic examination, without success.

5.4 The author provides a copy of the appeal filed by her son's lawyer after his conviction. The lawyer also filed two applications for a supervisory review to the Supreme Court Chairman and to the Supreme Court's Presidium, but his claims were rejected.

5.5 The author adds, on 21 October 2004, that her son was still at Investigation Detention Centre No. 1 in Dushanbe, notwithstanding the fact that there had been a moratorium on the execution of death sentences in Tajikistan in the meantime, and that many of those sentenced to death were transferred to other detention facilities.

Additional information from the State party

6. On 9 March 2006, the State party informed that on 15 July 2004, Mr. Sattorov's death sentence was commuted, by decision of the Supreme Court, to 25 years' prison term.

Issues and proceedings before the Committee

Consideration of the 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 notes, as required by article 5, paragraph 2 (a) and (b), of the Optional Protocol, that the same matter is not being examined under any other international procedure of investigation or settlement, and that it is uncontested that domestic remedies have been exhausted.

7.3 The Committee notes the author's claims under article 9, according to which her son was kept unlawfully for four weeks on premises of the Ministry of Internal Affairs and that he was charged formally only later. The State party has refuted these allegations and has provided the exact sequence of the author son's arrest and placement in custody (see paragraph 4.2 above). In the absence of any further information, in particular on the eventual steps taken by the alleged victim, his representatives, or his family, to bring these issues to the attention of the competent authorities during the investigation and the trial, the Committee considers that this part of the communication is inadmissible as insufficiently substantiated, under article 2 of the Optional Protocol.

7.4 The Committee notes that the author claims that her son was tortured and forced to confess his guilt, and that the court ignored this and refused the claims to call and interrogate the investigators in his case and to order his medical examination. The State party has rejected these claims, by affirming in general terms that no torture was used against the author's son, but without providing further explanations on the matter. In the circumstances, and given that the copy of Mr. Sattorov's appeal contains direct references to alleged forced confessions and torture, the Committee considers that due weight must be given to the author's allegations. Therefore, it considers that the remaining allegations of the author, in as much as they appear to raise issues under articles 6; 7; 10; and 14, paragraphs 1 and 3 (g), of the Covenant, have been sufficiently substantiated, and therefore 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 author has claimed that her son was beaten and tortured by investigators and was thus forced to confess guilt in a number of crimes. She provides a detailed description of the methods of torture used. She contends that in court, her son retracted his confessions made during the preliminary investigation and explained that they had been obtained under torture, but his claims were ignored. He showed marks of alleged torture to the court. His lawyer also asked, without success, to have him examined by a forensic expert to confirm these claims. The author contends that her son's and his lawyer's claims and requests in this respect were simply ignored, and that his initial confessions served as the basis for his conviction.

8.3 The author has provided copies of her son's sentence and his appeal. The Committee notes that the sentence refers to the fact that the author's son retracted his confessions in court, as obtained under coercion. This issue remained however unanswered by the court. The Committee further notes that in his appeal to the appeal instance of the Supreme Court, the author's son's lawyer referred to the fact that his client's confessions were obtained through torture and that in court, Mr. Sattorov had also confirmed this. The lawyer also claimed in the appeal that his request for a medical examination of his client was also ignored by the trial court. The Committee notes that the State party has simply replied, without providing further explanations, that the author's son was not tortured, and that, in addition, neither he nor his lawyer ever complained about torture or ill-treatment.

8.4 The Committee recalls that once a complaint against ill-treatment contrary to article 7 is filed, a State party is duty bound to investigate it promptly and impartially.² In this case, the State party has not specifically, by way of presenting the detailed consideration by the courts, or otherwise, refuted the author's allegations nor has it presented any particular information, in the context of the present communication, to demonstrate that it conducted any inquiry in this respect. In these circumstances, due weight must be given to the author's allegations, and the Committee considers that the facts as presented by the author disclose a violation of her son's rights under article 7 and article 14, paragraph 3 (g), of the Covenant.

8.5 In light of the above finding, the Committee does not find it necessary to address separately the author's claim under article 10 of the Covenant.

8.6 The author also claims that the trial of her son did not meet the basic requirements for a fair trial, in violation of 14, paragraph 1, because of the manner her son was treated when he retracted his confessions during the trial, and because of the court's failure to adequately address his torture allegations, and because the court did not call a number of witnesses. The Committee has noted that State party did not specifically address these issues in its submission. At the same time, the Committee notes however that the case file does not contain any pertinent information in this respect, in particular trial transcripts or other records, which would allow it to shed light on the allegation and allow it to ascertain whether Mr. Sattorov's trial indeed suffered from such fundamental defects. In these particular circumstances, the Committee considers that it cannot conclude to a violation of the alleged victim's rights under article 14, paragraph 1.

² See the Committee's general comment No. 20 (1992) on article 7, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, paragraph 14.

8.7 Finally, with respect to the author's claim under article 6, the Committee notes that in the present case, the alleged victim's death sentence was commuted to long term imprisonment on 15 July 2004. The Committee considers that in these circumstances, the issue of the violation of Mr. Sattorov's right to life has thus become moot.

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 son's rights under article 7 and article 14, paragraph 3 (g), 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. Sattorov with an effective remedy, including the payment of adequate compensation, initiation and pursuit of criminal proceedings to establish responsibility for the author son's ill-treatment, and a retrial, with the guarantees enshrined in the Covenant or release, of the author's son. 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.]

**F. Communication No. 1233/2003, A.K. and A.R. v. Uzbekistan
(Views adopted on 31 March 2009, Ninety-fifth session)***

<i>Submitted by:</i>	A.K. and A.R. (represented by counsel, Mrs. Salima Kadyrova and Mr. Kamil Ashurov)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Uzbekistan
<i>Date of communication:</i>	9 July 2003 (initial submission)
<i>Subject matter:</i>	Conviction for seeking, receiving and imparting information and ideas related to Islam
<i>Procedural issue:</i>	Lack of substantiation of claims
<i>Substantive issues:</i>	Right to freedom of expression, right to impart information and ideas, restrictions necessary for the protection of national security, restrictions necessary for the protection of public order
<i>Articles of the Covenant:</i>	7, 9, 10, 14, 15 and 19
<i>Article of the Optional Protocol:</i>	2

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

Meeting on 31 March 2009,

Having concluded its consideration of communication No. 1233/2003, submitted to the Human Rights Committee on behalf of A. K. and A. R. 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 A. K. and A. R., Uzbek citizens born in 1974 and 1968, respectively, who at the time of submission of the communication were detained in Uzbekistan. They claim to be victims of violations by Uzbekistan of their rights under articles 7, 9, 10, 14, 15 and 19 of the International Covenant on Civil and Political Rights.¹

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Lazhari Bouzid, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

¹ The authors do not invoke article 18 of the Covenant in their communication.

The Optional Protocol entered into force for the State party on 28 December 1995. The authors are represented by counsel, Mrs. Salima Kadyrova and Mr. Kamil Ashurov.

Factual background

2.1 Terrorist bombings took place in Tashkent, the capital of Uzbekistan, on 16 February 1999. The Government blamed them on the Islamic Movement of Uzbekistan led by Mr. Tokhir Yuldashev and Mr. Zhumaboi Khodzhiyev and on the international Sunni pan-Islamist political party known as Hizb ut-Tahrir (Party of Liberation). Some members and alleged members of the organizations were arrested and tried in connection with these events.

2.2 On 25 February 1999, the head of the investigations unit of the Samarkand Regional Prosecutor's Office requested an expert examination of exhibits relating to criminal cases involving various persons including Mr. Mamatov, who was mentioned by the Samarkand Regional Criminal Court, the court of first instance. To this end, all the books, magazines and leaflets written in the Arabic and Cyrillic scripts that had been found during searches of the homes of the detained persons and other citizens were submitted for expert examination by a group of specialists from Samarkand State University, in order to determine whether they were "harmful" or "harmless", whether the acts in question constituted an offence and whether this written material was compatible with the Constitution.

2.3 A. K. was arrested on 12 March 1999 and A. R. on 15 March 1999 after the authorities discovered numerous publications and written materials on religious themes in A. K.'s brother's attic. The authors submit they were prosecuted simply for reading and studying religious texts, particularly the Koran, and meeting with others who had similar interests and views. They reject the charge that they intended to incite hatred or overthrow the constitutional order, and deny that they belonged to any illegal religious or social organization. They point to passages in the Samarkand Regional Court's judgement which refer to them as studying prohibited texts and organizing illegal groups, and claim that such wording is standard – in other words that it is the same as that employed in other judgements delivered in cases involving religious activities, with only the names of the accused, the titles of the works, and the details of meetings being changed to fit the context. They refer to such passages as the common thread in judgements delivered in cases concerning religious activities.

2.4 On 6 May 1999 the group of experts replied to the request from the Regional Prosecutor's Office. It took the view that the books, magazines, leaflets and all the other prohibited literature sold by the accused and used for teaching their students called for anti-constitutional activities to change the established order in Uzbekistan, as well as ideas which ran counter to Uzbek law. They openly called for the establishment of an Islamic State based on the ideology of religious fundamentalism and religious laws through ideological struggle. These documents advocated recourse to violence as part of the "Jihoz". The publications kept and disseminated by the defendants set forth ideas of religious extremism and fundamentalism, and hence fell into the category of materials that threaten public order and security in our country. For example, they contained the idea that "the entire Islamic world must become a single community; all Muslims must be as one body and one spirit, regardless of their ethnic group, nationality or race. Beyond obstacles and artificial borders, all States must join together in a single 'Islamic State'". These writings called upon citizens to strive with devotion for the creation of such a State and even to sacrifice their lives if necessary, that is to achieve the status of *shahid* (martyr). Such notions are, in the view of the experts, typical of religious fundamentalism and extremism.

2.5 On 6 August 1999, the Samarkand Regional Criminal Court convicted the authors of several offences under article 156, part 2 (e) of the Uzbek Criminal Code (Incitement of Ethnic, Racial or Religious Hatred), as well as article 159, part 4 (Attempts to Constitutional Order of Republic of Uzbekistan), article 216 (Illegal Establishment of Public Associations or Religious Organizations), article 242, part 1 (Organization of Criminal Community) and article 244-1, part 3 (a) and (c) (Production and Dissemination of Materials Containing Threat to Public Security and Public Order). Each of the authors was sentenced to 16 years' imprisonment.

2.6 In its judgement of 6 August 1999 concerning the authors, the Samarkand Regional Court refers to the conclusion of the group of experts of 6 May 1999 that Hizb ut-Tahrir is a religious and political association whose goal is to wage political war. The main aims of Hizb ut-Tahrir were to impregnate citizens' minds with Islamic instruction, acquaint them with Islamic ideology through ideological struggle and establish an "Islamic State". One way of doing so was through "Jihoz", that is, eliminating any obstacles to Islam. This required all Muslim countries to unite under the "banner of the Caliphate" and use wide-scale "Jihoz" to spread Islam throughout the world. If, in contrast to citizens living in accordance with the principles of the "Islamic State", rulers do not conduct public affairs in accordance with those principles, citizens have a duty to combat them with the sword.

2.7 The Samarkand Regional Court's judgement states that the authors entered into a criminal conspiracy with the Hizb ut-Tahrir group organized in the Samarkand region in 1997-1998. With an eye to the group's interests, in breach of the Constitution, they openly called for the destruction of the constitutional order and territorial integrity of the Republic of Uzbekistan, the seizure of power and the overthrow of the current order, and they strove to inflame the population by disseminating material to that end. With financial assistance from religious organizations, they committed crimes such as forming cells of a criminal association in order to recruit citizens for criminal activities. The group of conspirators produced material calling for citizens to be forcibly resettled as a means of fomenting discord, enmity and intolerance towards population groups on the basis of their religion or of their national, racial or ethnic background. Together with the other members of Hizb ut-Tahrir, the authors directed over 10 *naqib* and ran more than 174 *khalaka* (cells) to which they recruited more than 520 young people as *dorises*. The cells studied forbidden literature such as the "Precepts of Islam", "Onward towards Honour and Glory", the tenets of Hizb ut-Tahrir, "The End of the Caliphate", other books and leaflets calling for civil disobedience, and "*Al-Waie*", a newspaper devoted to the basic ideals of the party.

2.8 According to the Samarkand Regional Court's judgement, A. R. said during the trial that, since childhood, he had been interested in religion and had prayed assiduously. He had first become acquainted with the ideas of Hizb ut-Tahrir's in December 1997 and had studied the activities of the organization between December 1997 and October 1998. He acknowledged that he had resolved to become a Hizb ut-Tahrir member, organized 6 study groups and taught a total of 22 individuals using the books of Hizb ut-Tahrir. A. K. confirmed that he started to take lessons based on the book "The Precepts of Islam" in February 1997 and had joined Hizb ut-Tahrir in December of the same year. He was in charge of distributing Hizb ut-Tahrir literature and had taught "The Precepts of Islam" in a study group in January and February 1999. During the trial, A. K. repented of his activities, adding that he had not conspired to organize explosions or resettle populations and had had no intention of undermining the Constitution of Uzbekistan. During the trial, the authors stated that their aims had been to acquire a deeper knowledge of Islam and to call on their countrymen to be honest, behave properly and abstain from alcohol. They had not opposed State policy and had not advocated the establishment of a caliphate. The court interpreted these arguments as an attempt to avoid punishment for their "serious offences". The court concluded that the literature the authors had distributed and taught was contrary to the laws of the land and was therefore banned.

2.9 The authors lodged an appeal against their conviction with the Supreme Court of Uzbekistan, which, on 6 October 1999, upheld their appeal against the charges under article 156, part 2 (e), article 242, part 1, and article 244-1, part 3 (c), of the Criminal Code. The Court dismissed the appeal against their conviction under article 159, but reclassified the authors' offences from part 4 of article 159, to part 3 (b) thereof. In what the authors consider to be an oversight,² the Supreme Court did not rule on their conviction under article 216. Despite the partial success of their appeal, the Court left their sentence of a total of 16 years' imprisonment unchanged. In 2002, five applications for review were lodged with the Supreme Court and two with the Office of the Prosecutor-General. All were rejected.

2.10 A. K. was amnestied under a Presidential decree issued on 1 December 2004 to mark the twelfth anniversary of the adoption of the Constitution, and he was freed in the middle of February 2005.

The complaint

3.1 The authors claim that their arrest and conviction constitute violations of articles 7, 9, 10, 14, 15 and 19 of the Covenant.

3.2 The authors claim that the group of experts had no objective point of reference and that, because it received instructions from the prosecutor's office, it was not independent. They make the further general point that no official or published lists of banned works in Uzbekistan existed either before or after their conviction. They submit that they were convicted because of their religious views and activities. They state that they were not afforded the benefit of the presumption of innocence because they were convicted in the absence of any evidence supporting any of the charges. According to them, the convictions amount to breaches of articles 29 and 31 of the Uzbek Constitution, which guarantee freedom of thought and religion.

State party's observations on admissibility and merits

4.1 On 18 October 2006, the State party reiterated the facts related to the authors' conviction and added that from 1994 to 1999, the authors had been members of Hizb ut-Tahrir, an extremist religious organization banned in Uzbekistan. During their membership of this organization, they had engaged in criminal activities by distributing information and written materials with a view to spreading the ideology of religious extremism, separatism and fundamentalism. To that end, they had propounded an ideology advocating the establishment of an Islamic State, the replacement of the existing constitutional order in Uzbekistan by anti-constitutional means and the political and social destabilization of the country.

4.2 According to the above-mentioned group of experts, the written materials seized in the authors' homes were consistent with the ideology of the Hizb ut-Tahrir extremist religious sect. The authors' guilt had been further confirmed by eye-witnesses' testimony, as well as relevant documentary and other evidence. The State party submitted that the court had correctly qualified the offences with which they were charged and had imposed appropriate sentences taking into account the level of "public danger" posed by their crimes. It added that the investigation and the authors' trial had been conducted in conformity with the Uzbek Code of Criminal Procedure, and that all testimony, statements and evidence had been thoroughly examined and assessed.

² The relevant part of the Supreme Court's ruling reads: "to uphold the remaining part of the sentence".

4.3 The State party explained that the authors were serving their sentences in the UYA 64/71 colony in Jaslyk. They had been punished seven times by the prison authorities for breaches of internal regulations, but they had not complained about living conditions in the colony during interviews with the authorities.

4.4 The State party submits that the authors' allegations that they were convicted because of their religious beliefs are groundless. The Constitution of Uzbekistan guarantees the right to freedom of conscience to all citizens. Everyone has the right to profess or not to profess a religion; criminal responsibility does not stem from a person's profession of religious faith or his or her beliefs. As members of Hizb ut-Tahrir, an extremist religious organization banned in Uzbekistan, the authors had pursued criminal activities to overthrow the constitutional order of Uzbekistan and destabilize the country politically and socially.

Authors' comments on the State party's observations

5.1 On 23 February 2007, the authors reiterated the facts of their case. They further argued that the Supreme Court, by dismissing the charges under article 156, part 2 (e), article 242, part 1 and article 244, part 3 (c) of the Criminal Code, implicitly admitted that the charges under article 159, part 3, were groundless and unlawful.

5.2 However, once the charges related to the organization of a criminal association (art. 242, part 1), the production and distribution of material threatening public order and security, with the financial or practical support of religious organizations and of foreign countries, organizations and individuals (art. 244-1, part 3 (c)) and conspiring to incite national, racial or religious hatred (art. 156, part 2 (d)) had been dismissed, the charge under article 159, part 3, could not stand in that it could no longer be held that the conditions required to demonstrate that the acts in question amounted to recidivism or revealed the existence of an organized group were met. The sentence imposed by the Samarkand Regional Court on 6 August 1999 and upheld by the Supreme Court of Uzbekistan on 6 October 1999 is therefore unlawful and should be set aside.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The Committee has ascertained, as it is required to do under article 5, paragraph 2, of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement, and notes that, despite the fact that A. K. did not contest his conviction on appeal and that A. R. accepted partial guilt on appeal, the State party has not denied that domestic remedies have been exhausted in the present case.

6.3 With regard to the authors' allegations under articles 7, 9, 10, 14 and 15 of the Covenant, the Committee notes the absence of any information on these claims and considers that they have not been duly substantiated, for the purposes of admissibility. Hence this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.4 The Committee considers that the authors' remaining claims, under article 19, have been sufficiently substantiated for the purposes of admissibility, and declares them admissible.

Consideration of the merits

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

7.2 The Committee notes that the authors were convicted of offences related to the dissemination of the ideology propagated by Hizb ut-Tahrir. The issue before the Committee is whether the restrictions that the convictions represented were necessary for one of the purposes listed in article 19, paragraph 3. The Committee has carefully studied the report of the group of experts (paragraph 2.4), the judgment of the Samarkand Regional Criminal Court and the appellate Ruling of the Criminal Division of the Supreme Court of Uzbekistan. From these, it is apparent that the courts, while not explicitly addressing article 19 of the Covenant, were concerned with a perceived threat to national security (violent overthrow of the constitutional order) and to the rights of others. The Committee also notes the careful steps, in particular the consultation with the group of experts, engaged in by the judicial process. Moreover, the Committee takes account of the fact that, on appeal, A. K. appears not to have challenged his conviction, but rather appealed for a fairer sentence, while A. R. accepted his conviction under article 216. Under these circumstances, the Committee cannot conclude that the restrictions imposed on the authors' expression were incompatible with article 19, paragraph 3.

7.3 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 articles 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.]

**G. Communication No. 1263/2004, *Khuseynov v. Tajikistan*
Communication No. 1264/2004, *Butaev v. Tajikistan*
(Views adopted on 20 October 2008, Ninety-fourth session)***

<i>Submitted by:</i>	Mrs. Saybibi Khuseynova (1263/2004) and Mrs. Pardakhon Butaeva (1264/2004) (not represented by counsel)
<i>Alleged victims:</i>	Messrs. Ibrokhim Khuseynov (Saybibi Khuseynova's son) and Todzhiddin Butaev (Pardakhon Butaeva's son)
<i>State party:</i>	Tajikistan
<i>Date of communication:</i>	5 March 2004 (Khuseynova) and 10 March 2004 (Butaeva) (initial submissions)
<i>Subject matter:</i>	Imposition of death penalty on complainants after arbitrary detention and use of coerced evidence
<i>Procedural issues:</i>	Non-substantiation of claims, non-exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to life; torture, cruel, inhuman or degrading treatment or punishment; arbitrary detention; fair hearing; impartial tribunal; right to be presumed innocent; right to adequate time and facilities for preparation of defence; right not to be compelled to testify against oneself or to confess guilt
<i>Articles of the Covenant:</i>	6, read together with 14; 7; 9, paragraph 1; 14, paragraphs 1, 3 (b), (e) and (g)
<i>Article of the Optional Protocol:</i>	2

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

Meeting on 20 October 2008,

Having concluded its consideration of communications Nos. 1263/2004 and 1264/2004, submitted to the Human Rights Committee on behalf of Messrs. Ibrokhim Khuseynov and Todzhiddin Butaev under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Ms. Helen Keller, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

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

1.1 The first author is Mrs. Saybibi Khuseynova, a Tajik national born in 1952, who submits the communication on behalf of her son, Mr. Ibrokhim Khuseynov, an Uzbek¹ national born in 1972. The second author is Mrs. Pardakhon Butaeva, a Tajik national born in 1939, who submits the communication on behalf of her son, Mr. Todzhiddin Butaev, a Tajik national born in 1977. At the time of submission of the communications, both victims were detained on death row in Dushanbe, awaiting execution after a death sentence imposed by the Judicial Chamber for Criminal Cases of the Supreme Court on 24 February 2003. The authors claim violations by Tajikistan of the alleged victims' rights under article 6, read together with article 14; article 7; article 9, paragraph 1; article 14, paragraphs 1, 3 (b) and 3 (g), of the International Covenant on Civil and Political Rights. Mrs. Butaeva also claims a violation of article 14, paragraph 3 (e), in her son's case. The authors are unrepresented. The Optional Protocol entered into force for the State party on 4 April 1999.

1.2 Under rule 92 of its Rules of procedure, the Committee, acting through its Special Rapporteur on New Communications and Interim Measures, requested the State party, on 9 March 2004 (Khuseynov) and on 11 March 2004 (Butaev), not to carry out the execution of the authors' sons, so as to enable the Committee to examine their complaints. This request was reiterated by the Committee on 26 April 2004. By note of 20 May 2004, the State party informed the Committee that it acceded to the request for interim measures and that, on 30 April 2004, the President of Tajikistan announced the introduction of a moratorium on the application of death penalty. On 11 June 2004, the Committee lifted its request for interim measures.

The facts as presented by the authors

2.1 Towards the end of 1997,² one Rakhmon Sanginov, created a criminal gang, which began to commit robberies, murders and to take hostages. By force and using death threats, he coerced young men from the district where his gang was operating to join the gang and to commit crimes. Among many others, Messrs Khuseynov and Butaev were thus forced to become members of Mr. Sanginov's gang.

The Case of Mr. Ibrokhim Khuseynov

2.2 On 26 June 2001, Mr. Khuseynov was apprehended by officers of the Criminal Investigation Department (CID) of the Department of Internal Affairs of the Somoni District of Dushanbe (DIA). For two days, he was detained in DIA premises and subjected to beatings with truncheons and electric shocks to various body parts. He was forced to testify against himself and to confess to having committed a number of crimes, including murders and robberies.

2.3 On 28 June 2001, Mr. Khuseynov was interrogated by the Deputy Head of the DIA's Investigation Section. The same day, he was interrogated as a suspect by an officer of the Ministry of Internal Affairs. On the same day, a protocol of Mr. Khuseynov's arrest

¹ Initial submission refers to 'nationality' (*национальность*), which could be translated from Russian into English both as 'ethnic origin' and 'citizenship'.

² According to the court documents, the date should be 1994.

of short duration was drawn up, and he was placed into temporary confinement (IVS). He did not have access to a lawyer, and his rights were not explained to him.³

2.4 Twenty-two days after being placed into IVS custody, Mr. Khuseynov was scheduled to be transferred to the investigation detention centre (SIZO). The SIZO officers, however, refused to accept him because of numerous bruises and injuries visible on his body. Finally, he was transferred to the SIZO on 30 July 2001, after his health condition had been attested by a medical certificate.⁴ Mrs. Khuseynova claims that under IVS regulations, a detained person is to be transferred from the IVS to the SIZO as soon as an arrest warrant is served on him. In exceptional cases and with the prosecutor's approval, a detained person can be kept in the IVS up to 10 days. Mr. Khuseynov was detained at the IVS for a total of 32 days (from 28 June 2001 to 30 July 2001).

2.5 His arrest warrant was issued on 30 June 2001 by the Deputy General Prosecutor of Tajikistan. It referred to the organization of an illegal armed group (article 185, part 2, of the Criminal Code) and murder with aggravating circumstances (article 104, part 2).

2.6 On 8 July 2001, Mr. Khuseynov was formally charged with banditry (article 186, part 2, of the Criminal Code) and murder with aggravating circumstances (article 104, part 2). During the subsequent interrogation as an accused, he was unrepresented. When the interrogation ended, an investigator invited in a lawyer, one Tabarov, who signed the interrogation protocol, although Mr. Khuseynov had never seen this lawyer before and was unaware that he had been assigned to him. There was no document issued in Mr. Tabarov's name in the criminal case file and this lawyer participated in no more than two investigative actions after Mr. Khuseynov was charged.

2.7 According to Mrs. Khuseynova, the investigators had planned the verification of her son's confession at the crime scene in advance. Some days before the actual verification, her son was brought to the crime scene, and it was explained to him where he should stand and what to say. The actual verification was video-taped, and was twice carried out in the absence of a lawyer.

2.8 On 28 August 2001, Mr. Khuseynov was granted access to a lawyer of his choice, one Ibrokhimov, who was retained by the family. Mr. Ibrokhimov, however, was not informed about any of the investigative actions carried out in relation to his client; he could not meet Mr. Khuseynov and prepare his defence.

2.9 The trial of Mr. Khuseynov by the Judicial Chamber for Criminal Cases of the Supreme Court took place from 3 May 2002 to 24 February 2003. Mrs. Khuseynova claims that her son's trial was unfair and that the court was partial. Thus:

(a) Mr. Khuseynov retracted his confessions obtained under duress during the pre-trial investigation in court. He affirmed that the law enforcement officers used unlawful methods during the interrogations and forced him to testify against himself. Mr. Khuseynov's testimony was allegedly ignored by the presiding judge and omitted from the trial transcript. Subsequently, Mr. Khuseynov and his lawyer submitted to the judge a transcript of Mr. Khuseynov's testimony not included in the trial transcript. The court took note of these omissions but did not take them into account when passing the death sentence;

(b) Mr. Khuseynov was sentenced to death exclusively on the basis of his own confessions obtained by unlawful methods during the pre-trial investigation.

³ Reference is made to article 19 of the Tajik Constitution: "Every person is entitled to legal assistance from the moment of his arrest" and article 53 of the Criminal Procedure Code: "Every suspect has the right to defence."

⁴ No further details provided.

2.10 On 24 February 2003, the Judicial Chamber for Criminal Cases of the Supreme Court found Mr. Khuseynov guilty of banditry (article 186, part 2, of the Criminal Code), murder with aggravating circumstances (article 104, part 2) and robbery (article 249, part 4). He was sentenced to 15 years' imprisonment with seizure of property (under article 186) and to death (under articles 104 and 249). Pursuant to article 67, part 3, of the Criminal Code, Mr. Khuseynov's aggregate sentence was the death penalty. On 17 November 2003, the Judicial Chamber for Criminal Cases of the Supreme Court reduced the sentence pursuant to article 249 of the Criminal Code to 20 years' imprisonment, with seizure of property, and upheld the remaining sentence.

2.11 On 24 May 2004, the first author indicated that the death penalty was not the only punishment that could have been imposed under article 104, part 2, of the Criminal Code, as the latter also envisages a sentence of between 15 to 20 years' imprisonment. Under article 18, paragraph 5, of the Criminal Code, murder with aggravating circumstances is qualified as a particularly serious crime. The lawfulness of Mr. Khuseynov's detention was determined by the prosecutor who issued his arrest warrant.

2.12 On an unspecified date, a request for pardon on behalf of Mr. Khuseynov was addressed to the President of Tajikistan. At the time of submission of the communication, no reply to this request had been received.

Case of Mr. Todzhiddin Butaev

2.13 From May to September 1997, Mr. Butaev performed his military service in a military unit under the command of one 'Khochi-Ali', subordinated to Mr. Sanginov (see paragraph 2.1 above). When Mr. Butaev learned that this military unit operated outside the law, he left the unit. In February 1998, the commander of another illegal squadron also subordinated to Mr. Sanginov, forced Mr. Butaev to become a member of his organization, which was implicated in murders and robberies. In September 1998, Mr. Butaev deserted.

2.14 At around 5 a.m. on 4 June 2001, Mr. Butaev was apprehended by law-enforcement officers at his home and taken away. His mother was not given any explanation and was not informed about her son's whereabouts. On 10 June 2001, she visited the Ministry of Security, where she was told that her son was detained on the Ministry of Security premises and was suspected of having committed particularly serious crimes. While detained in the Ministry of Security, Mr. Butaev was interrogated daily, subjected to beatings with truncheons, application of electric shocks and forced to testify against himself.

2.15 On 14 July 2001, legal proceedings were instituted against him. The same day, he was interrogated as a suspect by an investigator of the Ministry of Security, in the absence of a lawyer. On the same day, a protocol of Mr. Butaev's arrest of short duration was drawn up, and he was placed into the IVS. He did not have access to a lawyer, and his rights were not explained to him.⁵ On an unspecified date, Mr. Butaev was transferred to SIZO, where he contracted tuberculosis.

2.16 Mr. Butaev's arrest warrant was issued by a prosecutor on 19 July 2001. On 22 July 2001, he was assigned a lawyer and formally charged.⁶ The ensuing investigative actions, however, were done in the absence of a lawyer: verification of Mr. Butaev's testimony at the crime scene; and conduct of a confrontation with the victims' relatives.

⁵ Reference is made to article 19 of the Tajik Constitution: "Every person is entitled to legal assistance from the moment of his arrest" and article 53 of the Criminal Procedure Code: "Every suspect has the right to defence".

⁶ No further details provided.

2.17 The trial of Mr. Butaev before the Judicial Chamber for Criminal Cases of the Supreme Court, together with that of Mr. Khuseynov as co-accused, ended on 24 February 2003. Mrs. Butaeva claims that her son's trial was unfair and that the court was partial. Thus:

(a) No prosecution witnesses identified Mr. Butaev in court as the person who murdered their relatives;

(b) In court, Mr. Butaev retracted his confessions obtained under duress during the pre-trial investigation. He affirmed that the law enforcement officers used unlawful methods during interrogations and forced him to incriminate himself. Mr. Butaev pleaded his innocence, stated that he was not present at the crime scene when the crime was committed, and that that he wrote down his confession according to the investigator's instructions. Mr. Butaev's lawyer drew the court's attention to the fact that his client's confession contradicted the results of a forensic medical examination. Specifically, during the pre-trial investigation, Mr. Butaev admitted to having shot one Alimov, whereas the forensic medical examination of 13 February 1998 established that the cause of the victim's death was 'mechanical asphyxia'. The court disregarded these contradictions when passing its death sentence;

(c) The court dismissed a motion submitted by Mr. Butaev's lawyer to summon and examine in court the investigator, officers of the Ministry of Security who apprehended Mr. Butaev, as well as the forensic expert who made the examination of 13 February 1998.

2.18 On 24 February 2003, the Judicial Chamber for Criminal Cases of the Supreme Court found Mr. Butaev guilty of banditry (article 186, part 2, of the Criminal Code), murder with aggravating circumstances (article 104, part 2) and robbery (article 249, part 4). He was sentenced to 15 years' imprisonment with seizure of property (under article 186) and to death (under articles 104 and 249). Pursuant to article 67, part 3, of the Criminal Code, Mr. Butaev aggregate sentence was the death penalty. On 17 November 2003, the Judicial Chamber for Criminal Cases of the Supreme Court reduced Mr. Butaev's pursuant to article 249 of the Criminal Code to 20 years' imprisonment, with seizure of property, and upheld the remaining sentence.

2.19 On an unspecified date, a request for pardon on behalf of Mr. Butaev was addressed to the President of Tajikistan. At the time of submission of the communication, no reply to this request had been received.

The complaint

Case of Mr. Ibrokhim Khuseynov

3.1 Mrs. Khuseynova claims that her son was subjected to arbitrary arrest. Firstly, under article 412 of the Criminal Procedure Code, a suspect can be subjected to arrest of short duration only on the basis of an arrest protocol. Those apprehended under suspicion of having committed a crime must be detained in the IVS. Mr. Khuseynov, however, was detained on the DIA premises from 26 June 2001 to 28 June 2001, the protocol of his arrest of short duration was drawn up and he was placed into the IVS only 48 hours after he was apprehended. During this time, he was forced to incriminate himself. The arrest warrant was served on him only on 30 June 2001. Mrs. Khuseynova submits that her son's remand in custody from 26 June to 30 June 2001 violated article 9, paragraph 1, of the Covenant.

3.2 Secondly, under article 83 of the Criminal Procedure Code, the prosecutor may, in exceptional cases, apply a restraint measure, such as arrest, before filing formal charges. The Criminal Procedure Code does not specify, however, what should be deemed to be 'exceptional cases'. Mr. Khuseynov's arrest warrant indicates that he was arrested for

'having committed a crime', although he was formally charged only on 8 July 2001. The first author submits that the issuance of an arrest warrant without the formal filing of charges and without justifying the exceptional nature of the arrest, as required by article 83 of the Criminal Procedure Code, is arbitrary. She invokes the Committee's Views in *Albert Womah Mukong v. Cameroon*,⁷ where the Committee confirmed that "arbitrariness" was not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law. In the present case, Mr. Khuseynov was remanded in custody for fifteen days without being formally charged.

3.3 Mrs. Khuseynova submits that in violation of articles 7 and 14, paragraph 3 (g), her son was beaten and forced to confess guilt.

3.4 Mrs. Khuseynova claims that her son's rights under article 14, paragraph 1, were violated, because the trial court was partial. She adds that her son's rights under article 14, paragraph 3 (b), were violated, because he was interrogated as a suspect, on 28 June 2001, in the absence of a lawyer, and because he was granted access to a lawyer only on 8 July 2001. Under article 51 of the Criminal Procedure Code, anyone suspected of having committed a crime punishable by death must be represented by a lawyer. Under principle No. 7 of the Basic Principles on the Role of Lawyers, 'Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer'.⁸

3.5 Finally, Mrs. Khuseynova claims that her son's right to life protected by article 6, paragraphs 1 and 2, was violated, because the violations of article 14 resulted in an illegal and unfair death sentence, which was pronounced by an incompetent tribunal.

Case of Mr. Todzhiddin Butaev

3.6 Mrs. Butaeva claims that in violation of articles 7 and 14, paragraph 3 (g), her son was beaten and forced to confess guilt. During Mr. Butaev's detention in the Ministry of Security (from 4 June to 14 July 2001) and until he was formally charged on 22 July 2001, he was held incommunicado and in isolation from the outside world for 48 days (4 June to 22 July 2001). Mrs. Butaeva refers to the Committee's general comment No. 20 (1992) on article 7, which recommends that States parties should make provision against incommunicado detention and notes that total isolation of a detained or imprisoned person may amount to acts prohibited by article 7.⁹

3.7 Mrs. Butaeva submits that her son was subjected to arbitrary arrest. He was detained the Ministry of Security from 4 June to 14 July 2001, the protocol of his arrest of short duration was drawn up and he was placed in IVS custody only forty days after he had been apprehended. During this time, he was forced to testify against himself.

3.8 Mrs. Butaeva claims that her son's rights under article 14, paragraph 1, were violated, because the trial court was partial and conducted the trial in an accusatory manner. Article 14, paragraph 3 (e), was violated as the court rejected a motion by Mr. Butaev's lawyer to summon and examine witnesses against his client, as well as the forensic expert who made the examination of 13 February 1998.

⁷ Communication No. 458/1991, Views adopted on 21 July 1994, para. 9.8.

⁸ *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: report prepared by the Secretariat* (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. B.3, annex, para. 118 .

⁹ *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI.

3.9 Mrs. Butaeva claims that her son's rights under article 14, paragraph 3 (b), were violated, because he was interrogated as a suspect, on 14 June 2001, in the absence of a lawyer, and because he was granted access to a lawyer only on 19 July 2001.¹⁰ Each time when Mr. Butaev requested a lawyer, he was beaten by officers of the Ministry of Security. Under article 51 of the Criminal Procedure Code, anyone suspected of having committed a crime punishable by death must be represented by a lawyer. Under principle No. 7 of the Basic Principles on the Role of Lawyers, "Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer".⁸

3.10 Finally, Mrs. Butaeva claims that her son's right to life protected by article 6, paragraphs 1 and 2, was violated, because the violations of article 14 resulted in an illegal and unfair death sentence, which was pronounced by an incompetent tribunal.

State party's observations on admissibility and merits

4. On 27 July 2004, the State party forwarded information that on 20 July 2004, the President of Tajikistan granted presidential pardons to both Messrs. Khuseynov and Butaev and commuted their death sentences to long term imprisonment. No further details were provided by the State party.

Authors' comments on State party's observations

5.1 On 13 December 2004, Mrs. Butaeva submitted that in August 2004, she could not deliver a parcel to her son, whom she believed was then still detained on death row. She was told that her son's death sentence had been commuted and that he had been transferred to a detention facility in Kurgan-Tyube. She claims that she was not officially informed by the State party about the commutation of her son's death sentence. On 16 December 2004, Mrs. Khusyenova submitted that she only learnt about the commutation of her son's death sentence from the Committee's letter she received in October 2004.

5.2 Both authors submit that the commutation of their sons' death sentences does not mean that the State party provided adequate redress for the violation of Messrs. Khuseynov's and Butaev's rights. They insist, therefore, on the continuation of the consideration of their communications before the Committee.

Further submissions from the State party

Case of Mr. Ibrokhim Khuseynov

6.1 On 14 April 2006, the State party forwarded a report from the General Prosecutor of Tajikistan dated 28 March 2006 and a letter of First Deputy Chair of the Supreme Court, dated 31 March 2006. In his report, the General Prosecutor recalls the crimes Mr. Khuseynov was found guilty of,¹¹ and finds that by imposing the punishment, the court took into account both the aggravating and the extenuating circumstances in establishing Mr. Khuseynov's guilt. He concluded that Mr. Khuseynov's sentence was proportionate to the crimes committed, and that there were no grounds to initiate the supervisory review procedure in the case.

¹⁰ In paragraph 2.16 above, Mrs. Butaeva claims that her son was assigned a lawyer on 22 July 2001.

¹¹ The crimes were allegedly committed between 7 August 1994 and 27 June 1999.

6.2 The First Deputy Chair of the Supreme Court reiterates that Mr. Khuseynov's guilt was proven by his own confession made during both the pre-trial investigation and in court, witness testimonies, the protocols of the verification of testimonies at the crime scene, the conclusion of forensic and ballistic examinations, and other evidence. During the pre-trial investigation and in the presence of a lawyer, Mr. Khuseynov described how he murdered two of the victims and pleaded guilty. Moreover, he committed a number of armed robberies in an armed gang of Mr. Sanginov. He thus concluded that Mr. Khuseynov's sentence was lawful and proportionate.

Case of Mr. Todzhiddin Butaev

6.3 In a report also dated 14 April 2006, the General Prosecutor recalls the crimes Mr. Butaev was found guilty of,¹² and finds that by imposing the punishment, the court took into account both the aggravating and the extenuating circumstances in establishing Mr. Butaev's guilt. He specified that Mrs. Butaeva's allegations that her son's testimony was obtained under torture, that his arrest was not followed by a timely protocol and that he was not promptly assigned a lawyer have not been corroborated. Pre-trial investigation and trial materials indicate that during the pre-trial investigation and in court Mr. Butaev gave his testimony freely, without pressure, and in the presence of his lawyer. The General Prosecutor concludes, therefore, that Mr. Butaev's sentence was proportionate to the crimes committed, and that there were no grounds to initiate the supervisory review procedure in the case.

6.4 The First Deputy Chairperson of the Supreme Court also by a letter of 31 March 2006, reiterates that Mr. Butaev's guilt was proven by his own confession made during both the pre-trial investigation and in court, the protocols of the verification of testimonies at the crime scene, and the conclusion of forensic examinations. He thus concludes that Mr. Butaev's sentence was lawful and proportionate.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in the communications, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communications are admissible under the Optional Protocol to the Covenant.

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

7.3 The authors claim that the alleged victims' rights under article 9, paragraphs 1 and 2, were violated, as they were unlawfully arrested and detained for long periods of time without being formally charged. The Committee notes, however, that the material before it does not allow it to establish the exact circumstances of their arrest. It further remains unclear whether these allegations were raised at any time before the domestic courts. In these circumstances, the Committee considers that this part of the communications is not properly substantiated, for purposes of admissibility, and is therefore inadmissible under article 2 of the Optional Protocol.

¹² The crimes were allegedly committed between early February 1998 and 18 October 1998.

7.4 The authors' claim that in violation of article 14, paragraph 1, their sons' tribunal was partial and biased (paragraphs 2.9, 2.17, 3.4 and 3.8 above). The Committee observes that these allegations relate primarily to the evaluation of facts and evidence by the court. It recalls that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice.¹³ In the present cases, the Committee considers that the authors have not been able sufficiently to show that the trial suffered from such defects. Accordingly, the Committee concludes that the authors have failed sufficiently to substantiate their claims under this provision, and that this part of the communications is accordingly inadmissible under article 2 of the Optional Protocol.

7.5 The Committee considers the authors' remaining claims under article 6, read together with article 14; article 7; article 14, paragraphs 3 (b) and 3 (g), in relation to Messrs. Khuseynov and Butaev; and Mrs. Butaeva's allegation under article 14, paragraph 3 (e), in relation to her son, are sufficiently substantiated, 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 communications in the light of all the information made available to it by the parties, as provided for under article 5, paragraph 1, of the Optional Protocol.

8.2 The authors claim that their sons were beaten and tortured by DIA officers (case of Mr. Khuseynov) and officers of the Ministry of Security (case of Mr. Butaev) to make them confess their guilt, contrary to article 7 and article 14, paragraph 3 (g), of the Covenant. They argue that their sons revoked their confessions in court, asserting that they had been extracted under torture; their challenge to the voluntariness of the confessions was dismissed by the court. In the absence of any pertinent explanation on this matter from the State party, due weight must be given to the authors' allegations. 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 In this respect, the Committee recalls the authors' fairly detailed description of the treatment to which their sons were subjected. It considers that in these circumstances, the State party failed to demonstrate that its authorities adequately addressed the torture allegations advanced by the authors, nor has it provided copies of any internal investigation materials or medical reports in this respect.

8.3 Furthermore, as regards the claim of a violation of the alleged victims' rights under article 14, paragraph 3 (g), in that they were 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.¹⁵ The Committee recalls that in cases of forced confessions, the burden is on the State to prove that statements made by the accused

¹³ See, inter alia, communication No. 541/1993, *Errol Simms v. Jamaica*, inadmissibility decision adopted on 3 April 1995, paragraph 6.2.

¹⁴ See, e.g., communication No. 781/1997, *Aliiev v. Ukraine*, views adopted on 7 August 2003, paragraph 7.2.

¹⁵ 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.

have been given of their own free will.¹⁶ 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.¹⁷ The Committee takes into account that the State party did not provide any arguments corroborated by relevant documentation to refute the authors' claim that their sons were compelled to confess guilt, although the State party had the opportunity to do so, and which the authors have sufficiently substantiated. In these circumstances, the Committee concludes that the facts before it disclose a violation of article 7, read together with article 14, paragraph 3 (g), of the Covenant.

8.4 On the alleged violation of article 14, paragraph 3 (b), in that the authors' sons were not informed of their right to be represented by a lawyer upon arrest, that they were assigned a lawyer only 12 days (Mr. Khuseynov) and 48 days (Mr. Butaev), respectively, after being detained and that most of the investigative actions, particularly during the time when they were subjected to beatings and torture, the Committee again regrets the absence of any relevant explanation by the State party. It recalls that, particularly in cases involving capital punishment, it is axiomatic that the accused must effectively be assisted by a lawyer at all stages of the proceedings.¹⁸ In the present cases, the authors' sons were subject to several charges that carried the death penalty, without any effective legal defence, although a lawyer had been assigned to them by the investigator and, at a later stage, retained by the family (case of Mr. Khuseynov). It remains unclear from the material before the Committee whether Mr. Butaev ever requested a private lawyer, or whether Messrs. Khuseynov and Butaev ever contested the choice of the publicly assigned lawyer; however, and in the absence of any relevant explanation by the State party on this particular issue, the Committee reiterates that steps must be taken to ensure that counsel, once assigned, provides effective representation, in the interests of justice.¹⁹ Accordingly, the Committee is of the view that the facts before it reveal a violation of Messrs. Khuseynov's and Butaev's rights under article 14, paragraph 3 (b), of the Covenant.

8.5 The Committee has noted Mrs. Butaeva's claim that her son's lawyer motioned the court to summon and examine in court witnesses against his client, as well as the forensic expert who made an examination of 13 February 1998, and that the judge denied his motion without providing reasons. 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 thus 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.²⁰ It does not, however, provide an unlimited right to obtain the attendance of any witness requested by the accused or counsel, but only a right to have witnesses admitted that are relevant for the defence, and to be given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings. Within such limits, and subject to the limitations on the use of statements, confessions and other evidence obtained in violation of article 7, it is primarily for the domestic legislature of States parties to determine the admissibility of evidence and

¹⁶ Human Rights Committee, general comment No. 32 (2007) on article 14, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40 (A/62/40)*, vol. I, annex VI, para. 49.

¹⁷ Communication No. 30/1978, *Bleier v. Uruguay*, Views adopted on 24 March 1980, para. 13.3.

¹⁸ See, e.g., *Aliiev v. Ukraine* (note 14 above); communication No. 223/1987, *Robinson v. Jamaica*, Views adopted on 30 March 1989; communication No. 775/1997, *Brown v. Jamaica*, Views adopted on 23 March 1999.

¹⁹ See, inter alia, communication No. 253/1987, *Kelly v. Jamaica*, views adopted on 8 April 1991, paragraph 5.10.

²⁰ Human Rights Committee, general comment No. 32 (note 16 above), para. 39.

how their courts assess such evidence.²¹ In the present case, the Committee observes that most of the witnesses and the forensic expert requested in the motion submitted by Mr. Butaev's lawyer, which was denied by the court, could have provided information relevant to Mr. Butaev's claim of being forced to confess under torture at the pre-trial investigation. This factor leads the Committee to the conclusion that the State party's courts did not respect the requirement of equality between prosecution and defence in producing evidence and that this amounted to a denial of justice. Consequently, the Committee concludes that Mr. Butaev's right under article 14, paragraph 3 (e), was violated.

8.6 The Committee recalls its jurisprudence to the effect that the imposition of a death sentence after a trial that did not meet the requirements for a fair trial amounts also to a violation of article 6 of the Covenant.²² In the present case, however, the alleged victims' death sentences imposed on 24 February 2003 were commuted to long term imprisonment on 20 July 2004. The Committee considers that in these circumstances, the issue of the violation of Messrs. Khuseynov and Butaev's right to life has thus become moot.

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 rights of Messrs. Khuseynov and Butaev under article 7, read together with article 14, paragraph 3 (g); and article 14, paragraph 3 (b); and a violation of the right of Mr. Butaev under article 14, paragraph 3 (e), of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Messrs. Ibrokhim Khuseynov and Todzhiddin Butaev with an effective remedy, 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.]

²¹ Ibid.

²² See, inter alia, communication No. 907/2000, *Siragev v. Uzbekistan*, Views adopted on 1 November 2005, paragraph 6.4.

**H. Communication No. 1275/2004, *Umetaliev et al. v. Kyrgyzstan*
(Views adopted on 30 October 2008, Ninety-fourth session)***

<i>Submitted by:</i>	Mr. Anarbai Umetaliev and Mrs. Anarkan Tashtanbekova (represented by counsel, Mr. Sartbai Zhaichibekov)
<i>Alleged victims:</i>	The authors and the authors' deceased son, Mr. Eldiyar Umetaliev
<i>State party:</i>	Kyrgyzstan
<i>Date of communication:</i>	20 January 2004 (initial submission)
<i>Subject matter:</i>	Arbitrary deprivation of the life of a Kyrgyz national in the course of an anti-riot security operation; failure to conduct an adequate investigation and to initiate proceedings against the perpetrator/s; denial of justice.
<i>Procedural issue:</i>	None
<i>Substantive issues:</i>	Right to life; arbitrary deprivation of life; denial of justice; effective remedy
<i>Articles of the Covenant:</i>	6, paragraph 1; 2, paragraph 3 (b) and (c)
<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 30 October 2008,

Having concluded its consideration of communication No. 1275/2004, submitted to the Human Rights Committee by Anarbai Umetaliev and Anarkan Tashtanbekova in their own names and on behalf of Eldiyar Umetaliev 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, Mr. Anarbai Umetaliev, a Kyrgyz national born in 1953, and Mrs. Anarkan Tashtanbekova, also a Kyrgyz national born in 1958, are the parents of Mr. Eldiyar Umetaliev, a Kyrgyz national born in 1979, who died on 18 March 2002 in Kerben, Kyrgyzstan. The authors state that they are acting on their own behalf and

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

on behalf of their son. They claim a violation by Kyrgyzstan of their son's rights and of their own rights under article 6, paragraph 1; and article 2, paragraph 3 (b) and (c), of the International Covenant on Civil and Political Rights. The authors are represented by counsel, Mr. Sartbai Zhaichibekov.

1.2 The Optional Protocol entered into force for the State party on 7 January 1995.

Factual background

2.1 On 5 January 2002, Mr. Azimbek Beknazarov, who was a Member of Parliament (the *Zhogorku Kenesh*) from the opposition party, was detained by police in the Jalalabad region of Kyrgyzstan, accused of failing to investigate a murder in 1995 when he worked as an investigator in the prosecutor's office of the region. His supporters believed that the charges were brought in order to punish him for criticizing the Government, in particular for his criticisms of ceding Kyrgyz territory to China as part of a frontier delineation agreement. On 6 January 2002, his supporters began a campaign to have him released.

2.2 On 17 March 2002, in Bospiek, a demonstration in support of Beknazarov was dispersed by militia, killing four people, and wounding six. On 18 March 2002, in the proximity of the Aksy District Department of the Ministry of the Interior in Kerben, a similar campaign for his release culminated in militia opening fire on demonstrators in an attempt to disperse the crowd, killing Eldiyar Umetaliev and wounding six people. The authors provided six affidavits from eye-witnesses, including from Eldiyar Umetaliev's two friends, who were at the demonstration, in which they described the incident, the use of automatic weapons, and the type of car from which Eldiyar Umetaliev was shot.

2.3 Eldiyar Umetaliev's body was transported to the morgue by an ambulance. An autopsy was then performed by a pathologist from the Jalalabad Regional Forensic Medical Centre in the presence of a pathologist from the Aksy District Forensic Medical Centre. Upon the request of an investigator, who did not introduce himself, the author's lawyer was not allowed to be present during the autopsy. According to the authors, the pathologist from the Aksy District Forensic Medical Centre stated that a fatal bullet was fired at Eldiyar Umetaliev from an automatic weapon. However, the official forensic medical report of 28 March 2002 signed by the pathologist from the Jalalabad Forensic Medical Centre states that Umetaliev was shot dead from a hunting rifle. Eldiyar Umetaliev's death certificate of 4 April 2002 attributes his death to a "perforating firearms pellet wound in the neck and upper lip".¹ The authors submit that the entry and exit bullet holes on their son's body, seen by the lawyer prior to the autopsy, do not correspond to the wounds inflicted by a hunting rifle's pellets.

2.4 On 20 March 2002, the authors submitted a request to the National Security Service for an investigation into their son's death. No response was forthcoming. On 23 October 2002, they submitted a request for an investigation to the Kyrgyz General Prosecutor, copied to Beknazarov, the Member of Parliament of the opposition, whose case had been closed and parliamentary mandate restored on 28 June 2002. On 28 October 2002, Baknazarov petitioned the General Prosecutor to investigate into Eldiyar Umetaliev's death. On 6 November 2002, the authors' request was transmitted by the General Prosecutor's Office to the Head of the Investigation Department of the National Security Service, with a request to take additional measures to establish the circumstances of Eldiyar Umetaliev's death. On 26 November 2002, the authors submitted a further request for an investigation,

¹ For this reason, the authorities were continuously replying to the authors that they were searching for an owner of a hunting rifle.

to the Kyrgyz General Prosecutor, as well as to the Prime Minister and the Chairperson of the National Security Service. No reply was received.

2.5 By a letter from the National Security Service of 3 January 2003, the authors were informed that the criminal case initiated to investigate Eldiyar Umetaliev's death was suspended, as the investigators were unable to identify the perpetrator/s. In the same letter, however, the authors were also informed that special operational units of the National Security Service and of the Ministry of Internal Affairs were tasked to conduct a supplementary investigation into the circumstances of their son's death. Subsequently, the authors submitted a request for an investigation to the Head of the Department of Public Security of the Ministry of Internal Affairs. On 16 January 2003, the Head of the Department replied that on an unspecified date, a joint criminal case on the events in Bospiek (17 March 2002) and Kerben (18 March 2002) was opened by the Aksy District Prosecutor. On 22 March 2002, the General Prosecutor transferred further investigation in the case to the National Security Service. On 28 December 2002, four officers were sentenced to various terms of imprisonment by the Kyrgyz Military Court. According to the authors, these convictions only related to the events which took place in Bospiek on 17 March 2002.

2.6 On 26 February 2003, the Deputy Head of the Investigation Department of the National Security Service sent a letter to the authors, confirming inter alia that those responsible for the Bospiek incident on 17 March 2002 were identified and brought to justice; whereas their son's criminal case was split from that of the Bospiek incident and investigated separately. The investigation was however suspended, as the investigators could not identify the perpetrator/s responsible for Eldiyar Umetaliev's death. In the same letter, Eldiyar Umetaliev's parents were again informed that special operational units of the National Security Service and of the Ministry of Internal Affairs were tasked with conducting a supplementary investigation into the circumstances of their son's death and that the supplementary investigation was still on-going.

2.7 On 22 April 2003, and on an unspecified date, the authors submitted further requests to the Kyrgyz President and to the Chairperson of the National Security Service, in which they asked specific questions on the status of the investigation. On 12 June 2003, the National Security Service replied that a criminal case initiated to establish the circumstances of Eldiyar Umetaliev's death was investigated by the Investigation Department of the Jalalabad Regional Department of the National Security Service. Therefore, further information should be requested from the Investigation Department of the Jalalabad Regional Department of the National Security Service.

2.8 On 17 June 2003, a further request for an investigation was submitted by the authors to the Kyrgyz President; it was subsequently transmitted to the Chairperson of the Supreme Court by the Deputy Head of the Legal Department of the Presidential Administration. On 27 June 2003, the Deputy Chairperson of the Supreme Court replied that the investigation in the criminal case initiated to investigate Eldiyar Umetaliev's death was still on-going; therefore, further information should be obtained from either the investigation bodies or the prosecutor's office. On 12 August 2003, the authors submitted another request for an investigation, to the Kyrgyz Prime Minister. On 27 August 2003, the Deputy Head of the Prime Minister's Office replied that because of the separation of powers, the Government could not interfere in the examination of criminal cases by the judiciary.

2.9 On 10 September 2003, the authors submitted requests for information on the investigation to the Head of the Aksy District Department of the National Security Service and to the Head of the Aksy District Department of Internal Affairs. No reply was received to any of these requests. On 10 September 2003, they submitted another request for information to the Aksy District Prosecutor. On 12 September 2003, this request was

transmitted with a covering letter to the Head of the Investigation Department of the National Security Service by the Aksy District Prosecutor.

2.10 On 25 December 2003, the authors' lawyer requested the Head of the Jalalabad Forensic Medical Bureau to provide him with copies of the medical certificates on the cause of the death of the five individuals who died on 17 and 18 March 2002, including that of Eldiyar Umetaliev. On an unspecified date, the Jalalabad Forensic Medical Bureau refused to provide any documents in connection with the Aksy events.

2.11 On 25 December 2003, the authors submitted a motion to the General Prosecutor, copied to Beknazarov, the opposition Member of Parliament, to recognize them as victims in the criminal investigation in their son's death and requested specific information on the investigation. On the same day, similar motions were submitted to the Chairperson of the National Security Service and to the Head of the Investigation Department of the National Security Service, to which no replies were received.

2.12 On 8 January 2004, the Deputy Prosecutor General transmitted the authors' motion of 25 December 2003 to the Jalalabad Regional Prosecutor and requested him to inform the authors, Beknazarov (who supported the authors' petition) and the General Prosecutor's Office about the measures taken. On an unspecified date, the Jalalabad Regional Prosecutor replied that the criminal case was investigated by the Investigation Department of the Jalalabad Regional Department of the National Security Service, but was suspended on 3 May 2003, as the perpetrator/s could not be identified. He also stated that on 4 December 2003, the Jalalabad Regional Prosecutor's Office reviewed the case and indicated that the investigation would be reinforced.

2.13 On an unspecified date, the authors submitted a civil claim to the Aksy District Court, requesting compensation for their son's death and for the moral and material damages sustained. On an unspecified date, the Aksy District Court dismissed the authors' claim.

The complaint

3.1 The authors claim that the State party violated their and their son's rights under article 6, paragraph 1; and article 2, paragraph 3 (b) and (c), of the Covenant, by arbitrarily depriving Eldiyar Umetaliev of his life; by subsequently failing to take appropriate measures to investigate the circumstances of his death and by failing to bring those responsible to justice.

3.2 The authors further claim that, as a result of the State party's failure to take appropriate measures to investigate the circumstances of Eldiyar Umetaliev's death, they are deprived of the possibility of obtaining compensation for his death, for the moral and material damages sustained.

State party's submissions on the admissibility and merits of the communication

4.1 On 24 May 2004, the State party submitted that Eldiyar Umetaliev's corpse with a firearms wound in the neck was discovered in the course of the Aksy events on 18 March 2002 in Kerben. The circumstances of his death were investigated within the framework of a criminal case initiated to investigate "mass riots". According to the requirements of the Criminal Procedure Code, while transmitting this criminal case to the court, materials related to Eldiyar Umetaliev's death were separated from the rest of the case file. The separate criminal case initiated to establish the circumstances of Eldiyar Umetaliev's death is being investigated by the Investigation Department of the Jalalabad Regional Department of the National Security Service. The investigation, however, was suspended for failure to

identify the perpetrator/s; “operational measures” nevertheless continue in order to identify and bring to justice those responsible for Eldiyar Umetaliev’s death.

4.2 As for the authors’ civil claim for compensation from the State party’s authorities for their son’s death and for the moral damages sustained, the State party submits that these proceedings were also suspended pending completion of the criminal case.

Authors’ comments on the State party’s submissions

5.1 On 5 August 2004, the authors submit that contrary to the State party’s assertion that “operational measures” continue to identify and bring to justice those responsible for Eldiyar Umetaliev’s death, the State party is effectively doing nothing to pursue the investigation. Neither a meaningful reply nor any relevant information was received from the State party’s authorities, before the submission of the communication to the Committee.

5.2 After the present communication was submitted to the Committee, the authors were allowed, on 14 May 2004, to access the materials of the criminal case initiated to investigate the circumstances of Eldiyar Umetaliev’s death for the first time. On 7 June 2004, the authors received a copy of the case file materials from the investigation. From this, the authors learnt that the criminal case was suspended by the investigator on 15 September 2002, because it was impossible to identify the perpetrator/s responsible for their son’s death, as well as due to the expiry of the time limit allocated for the investigation. The materials also showed that, on 3 May 2003, the investigation was resumed by the prosecutor, and that, on an unspecified date, the investigator requested information from the Jalalabad Regional Department of Internal Affairs and the Aksy District Department of Internal Affairs. There was no indication on the file that any reply to his request was received from any of the Departments.

5.3 In examining the investigation file, the authors noted that there were in fact two forensic medical reports, one by the Jalalabad Forensic Medical Centre dated 28 March 2002 (paragraph 2.3) and one by the Republican Forensic Medical Bureau dated 25 April 2002. The authors refer to the certificate of 25 April 2002, according to which the wound in Eldiyar Umetaliev’s neck resulted from bullet of 5–6 mm in diameter that contained copper. The expert concluded that such a bullet could be a 5.45 mm bullet from a AK-74 machine-gun (Kalashnikov’s machine-gun), a PSM pistol (compact self-loading pistol) or a 5.6 mm bullet from a “Bars carbine” (hunting rifle). According to the authors, bullets from “Bars carbine” do not contain copper, so in their view it must have come from a machine gun or pistol, which they claim are being used exclusively by military personnel. The authors also argue that the same medical report refers to a pellet having been removed from Eldiyar Umetaliev’s “back and buttocks” which appeared to result from ammunition of 3–4 mm, containing lead. According to Eldiyar Umetaliev’s father and affidavits submitted by the two witnesses who were present during the autopsy, not one but three metal pieces of 3–4 mm each were extracted from Eldiyar Umetaliev’s back and buttocks. The authors also challenge the conclusion of the Jalalabad Regional Forensic Medical expert of 28 March 2002 which stated that Eldiyar Umetaliev sustained “a perforating firearms pellet wound of the neck and upper lip”.

5.4 The authors argue that the State party failed to take effective measures to identify those responsible for Eldiyar Umetaliev’s death, such as, to conduct a ballistic expert examination of the weapons used by the law-enforcement officers and machine-gun and pistol shells collected from the crime scene. They submit that in the course of investigation not a single officer of the special militia or of the regular militia was interrogated, despite overwhelming testimony that militia officers opened fire on the day in question.

5.5 The authors further submit that on 30 March 2004, the Chairman of the Aksy District Court decided to suspend their civil suit for compensation, because the respective

criminal case had not been completed. The decision of 30 March 2004 was not challenged in the court of appeal. On 5 July 2004, the decision of the Aksy District Court was upheld through the supervisory review by the Presidium of the Jalalabad Regional Court, on the same grounds.

Supplementary submissions by the State party on the authors' comments

6. On 11 November 2004, the State party submits that on an unspecified date, the decisions of the Aksy District Court of 30 March 2004 and of the Jalalabad Regional Court of 5 July 2004 were again appealed by the authors through the supervisory review procedure. On 8 October 2004, the civil case was transmitted to the Supreme Court, where it will be examined in compliance with the civil law procedure. The criminal case initiated to establish the circumstances of Eldiyar Umetaliev's death remains suspended. The General Prosecutor's Office might, however, resume investigation in the future upon receipt of supplementary information.

Authors' comments on the State party's supplementary submissions

7.1 On 24 January 2005, with reference to the State party's argument that the authors' civil case is still pending before the Supreme Court (paragraph 6 above), the authors submit a copy of the Supreme Court decision of 26 November 2004, upholding the decision of the Jalalabad Regional Court of 5 July 2004 on the ground that the respective criminal case has not yet been completed.

7.2 The authors also provide a copy of a letter of 24 August 2004, sent to Beknazarov, the Member of Parliament, by the First Deputy General Prosecutor, which informs him *inter alia*, that in the opinion of the prosecutor's office, "the use of firearms by the Ministry of Interior's officers [during the Aksy events] was entirely lawful".

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in the communications, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communications are admissible under the Optional Protocol to the Covenant.

8.2 The Committee notes that the same matter is not being examined under any other international procedure, in line with the requirements of article 5, paragraph 2 (a), of the Optional Protocol. In the absence of any State party's objection, the Committee considers that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have been met.

8.3 The Committee considers that the authors' claims under article 6, paragraph 1, and article 2, paragraph 3 (b) and (c), of the Covenant, have been sufficiently substantiated, for purposes of admissibility, and declares them admissible.

Consideration of the merits

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

9.2 With regard to the authors' claim that article 6, paragraph 1, was violated, the Committee recalls its general comment No. 6 (1982) on article 6, which states that the right enshrined in this article is the supreme right from which no derogation is permitted even in

time of public emergency which threatens the life of the nation.² The Committee recalls its jurisprudence that criminal investigation and consequential prosecution are necessary remedies for violations of human rights such as those protected by article 6.³ It further recalls its general comment No. 31 (2004), that where investigations reveal violations of certain Covenant rights States parties must ensure that those responsible are brought to justice.⁴

9.3 The Committee notes that the State party concedes that Eldiyar Umetaliev's corpse was discovered on 18 March 2002 in the course of the Aksy events in Keben, with a wound on his neck from a firearm. As regards the subsequent investigation, the State party merely states that it was suspended for failure to identify the perpetrator/s responsible. However, the investigation has not been completed, thereby preventing the authors from pursuing their claim for compensation.

9.4 The Committee also notes that in their communication to the Committee and numerous letters to the State party's authorities, the authors attributed their son's arbitrary deprivation of life to the State party's security forces and provided sufficiently substantiated arguments in support of their claim: (a) Eldiyar Umetaliev's death, attested by the death certificate, (b) occurred at the same time and in the same place as the anti-riot security operation conducted by militia officers; (c) the forensic medical report of the Republican Forensic Medical Bureau dated 25 April 2002 does not exclude the possibility that Eldiyar Umetaliev's fatal wound could have been caused by a bullet from a machine gun or pistol (which, according to the authors, were and are being used exclusively by military personnel). The Committee considers that the severe consequences of the use of firearms *as such* for the exercise of one's right to life warranted at the very minimum a separate investigation of the potential involvement of the State party's security forces in Eldiyar Umetaliev's death. In addition, the Committee notes, that the State party has not advanced any arguments that it took effective and feasible measures, in compliance with its obligation to protect the right to life under article 6, paragraph 1, to prevent and to refrain from the arbitrary deprivation of life.

9.5 The Committee recalls its jurisprudence⁵ 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. 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. In addition, the deprivation of life by the authorities of the State is a matter of utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.⁶ The Committee takes into account that the arguments provided by the authors point towards the State party's direct responsibility for Eldiyar Umetaliev's death through an excessive use of force, and considers that these statements, which the State party has not

² Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40), annex VI, para. 1.

³ Communication No. 1436/2005, *Sathasivam v. Sri Lanka*, Views adopted on 8 July 2008, para. 6.4. See also 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 (A/59/40)*, vol. I, annex III, paragraphs 15 and 18.

⁴ General comment No. 31 (note 3 above), para. 18.

⁵ Communications No. 30/1978, *Bleier v. Uruguay*, Views adopted on 24 March 1980, para. 13.3, No. 84/1981, *Dermit Berbatov et al. v. Uruguay*, Views adopted on 21 October 1982, para. 9.6.

⁶ Human Rights Committee, general comment No. 6 (note 2 above), para. 3.

contested, and which the authors have sufficiently substantiated, warrant the finding that there has been a violation⁷ of article 6, paragraph 1, of the Covenant, with regard to Eldiyar Umetaliev.

9.6 The Committee further observes that although over six years have elapsed since Eldiyar Umetaliev's killing, the authors still do not know the exact circumstances surrounding their son's death and the State party's authorities have not indicted, prosecuted or brought to justice anyone in connection with these events. The criminal case remains suspended without any indication from the State party when the case will be completed. The Committee finds that the persistent failure of the State party's authorities properly to investigate the circumstances of Eldiyar Umetaliev's death effectively denied the authors a remedy. The Committee also notes that the authors' civil claim for compensation from the State party's authorities for their son's death was suspended until the completion of the criminal case. The Committee concludes that the State party violated the authors' rights under article 2, paragraph 3, read together with article 6, 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 facts before it disclose a violation by Kyrgyzstan of Eldiyar Umetaliev's rights under article 6, paragraph 1, and of the authors' rights under article 2, paragraph 3, read together with article 6, paragraph 1, of the Covenant.

11. Under article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy in the form, inter alia, of an impartial investigation in the circumstances of their son's death, prosecution of those responsible and adequate 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 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.]

⁷ Communication No. 962/2001, *Mulezi v. Democratic Republic of the Congo*, Views adopted on 8 July 2004, para. 5.4.

**I. Communication No. 1276/2004, *Idiev v. Tajikistan*
(Views adopted on 31 March 2009, Ninety-fifth session)***

<i>Submitted by:</i>	Mrs. Zulfia Idieva (not represented by counsel)
<i>Alleged victim:</i>	Mr. Umed Idiev (the author's deceased son)
<i>State party:</i>	Tajikistan
<i>Date of communication:</i>	13 April 2004 (initial submission)
<i>Subject matter:</i>	Imposition of death penalty and subsequent execution in spite of request for interim measures of protection
<i>Procedural issues:</i>	Non-substantiation of claim; non-exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to life; torture, cruel, inhuman or degrading treatment or punishment; arbitrary detention; fair hearing; impartial tribunal; right to be presumed innocent; right to be informed of the right to have legal assistance; right not to be compelled to testify against oneself or to confess guilt
<i>Articles of the Covenant:</i>	6, paragraphs 1 and 2; 7; 9, paragraphs 1 and 2; 14, paragraphs 1, 2, 3 (d), 3 (e) and 3 (g)
<i>Article of the Optional Protocol:</i>	2

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

Meeting on 31 March 2009,

Having concluded its consideration of communication No. 1276/2004, submitted to the Human Rights Committee on behalf of Mr. Umed Idiev 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 is Mrs. Zulfia Idieva, a Tajik national born in 1957. She submits the communication on behalf of her son, Mr. Umed Idiev, also a Tajik national born in 1979.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Lazhari Bouzid, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

At the time of submission of the communication, the victim was detained on death row in Dushanbe, awaiting execution, after a death sentence imposed on him by the Judicial Chamber for Criminal Cases of the Supreme Court on 24 February 2003. The author claims violations by Tajikistan of her son's rights under article 6, paragraphs 1 and 2; and article 7; article 9, paragraphs 1 and 2; article 14, paragraphs 1, 2, 3 (d) and 3 (g), of the International Covenant on Civil and Political Rights. She is unrepresented. The Optional Protocol entered into force for the State party on 4 April 1999.

1.2 Under rule 92 of its rules of procedure, the Committee, acting through its Special Rapporteur on New Communications and Interim Measures, requested the State party, on 13 April 2004,¹ not to execute the author's son, so as to enable the Committee to examine his case. This request was reiterated by the Committee on 26 April 2004. By note of 11 May 2004, the State party informed the Committee that the Government Commission on Ensuring Compliance with International Human Rights Obligations requested the Supreme Court, General Prosecutor's Office and the Ministry of Justice to consider Mr. Idiev's criminal case and to provide the State party's observations to the Committee within the deadline stipulated. On 20 May 2004, the State party informed the Committee that Mr. Idiev's death sentence had been carried out on an unspecified date, as the Committee's request had arrived too late.

1.3 On 28 May 2004, the author provided a copy of her son's death certificate, stating that Mr. Idiev was executed on 24 April 2004, i.e. 11 days after the Committee's request not to carry out his execution was duly addressed to the State party. On 3 June 2004, the Committee, acting through its Special Rapporteur on New Communications and Interim Measures, requested the State party to provide it with detailed information on the time and circumstances of Mr. Idiev's execution. No reply to this request has been received from the State party.

The facts as presented by the author

2.1 Towards the end of 1997, one Rakhmon Sanginov created a criminal gang, which began to commit robberies, murders and to take hostages. By force and using death threats, he coerced young men from the district where his gang was operating to join the gang and to commit crimes. Among many others, Mr. Idiev was thus forced to become a member of Mr. Sanginov's gang in February 1998. He deserted in April 1998.

2.2 On 12 August 2001, officers of the Organized Crime Department (OCD) of the Ministry of Interior came to Mr. Idiev's home to arrest him. As he was not at home then, the author herself was taken by OCD officers to their premises and kept there for the next two days. On 14 August 2001, Mr. Idiev was arrested by OCD officers; his mother was released the same day. For five days, Mr. Idiev was detained on OCD premises and allegedly subjected to beatings with truncheons and electric shocks to various parts of his body. He was forced to confess to having committed a number of crimes, including murders and robberies. He did not have access to a lawyer, and his rights were not read to him. On 19 August 2001, an OCD officer for the first time officially reported to his supervisors about Mr. Idiev's arrest.

2.3 On 23 August 2001, a protocol of Mr. Idiev's detention of short duration was drawn up. It mentioned murder under aggravating circumstances (article 104, part 2, of the

¹ The Committee's request was sent to the State party's Permanent Mission to the United Nations by ordinary mail, on 13 April 2004. On 14 April 2004, the Committee's request under rules 92 and 97 of its rules of procedure was faxed to the Permanent Mission and to the Ministry of Foreign Affairs of Tajikistan.

Criminal Code). The same day, he was placed in a “temporary confinement ward” (IVS). He was forced to tell a doctor who attested to his health condition prior to the transfer to IVS that he had not been ill-treated while in detention; such medical certificate was a prerequisite for the transfer.

2.4 Mr. Idiev’s arrest warrant was issued by a prosecutor on 26 August 2001. The next day, he was interrogated as a suspect and took part in the reconstruction of the crime at the crime scene, on both occasions in the absence of a lawyer. The author’s criminal case was opened by the General Prosecutor’s Office on 31 August 2001.

2.5 On 3 September 2001, before being formally read the charges against him, Mr. Idiev was for the first time assigned a lawyer, after written request by the investigator. When the interrogation ended, the investigator invited the lawyer, one Kurbonov, who signed the interrogation protocol, although Mr. Idiev had never seen the lawyer before and was unaware that he had been assigned to him. Subsequently, this lawyer participated in no more than two investigative actions, namely, Mr. Idiev’s interrogation as an accused and presentation of an additional count of murder on 12 November 2001. The reconstruction of the crime at the crime scene, however, was carried out on 17 October 2001 in the absence of the lawyer.

2.6 The trial of Mr. Idiev by the Judicial Chamber for Criminal Cases of the Supreme Court took place from 3 May 2002 to 24 February 2003. Although he was represented by a lawyer assigned by the court, the author claims that her son’s trial was unfair and that the court was partial as appearing below:

(a) In court, Mr. Idiev retracted his confessions obtained under duress during the pretrial investigation. He argued that the law enforcement officers had used unlawful methods, including torture, during the interrogations and forced him to testify against himself. His testimony was allegedly ignored by the presiding judge, because he was unable to provide corroborating evidence, such as a medical and/or forensic certificate. In court, he admitted that while he was still a member of Mr. Sanginov’s gang, he had killed the neighbours’ son by inadvertently pulling his rifle’s trigger. He explained that he had no intention to kill, and extended his apologies to the boy’s parents;

(b) Mr. Idiev was sentenced to death exclusively on the basis of his own confessions obtained by unlawful methods during the pre-trial investigation;

(c) The court dismissed a motion submitted by his lawyer to summon and examine in court OCD officers who had arrested him on 14 August 2001 and illegally detained him until 19 August 2001, as also the investigator.

2.7 On 24 February 2003, the Judicial Chamber for Criminal Cases of the Supreme Court found Mr. Idiev guilty of banditry (article 186, part 2, of the Criminal Code), murder under aggravating circumstances (article 104, part 2) and under article 156, part 2 of the 1961 Criminal Code. He was sentenced to 15 years’ imprisonment with seizure of property (under article 186) and to death with seizure of property (under articles and 156). Pursuant to article 67, part 3, of the Criminal Code, his aggregate sentence was the death penalty. On 17 November 2003, the Judicial Chamber for Criminal Cases of the Supreme Court upheld the death sentence.

2.8 The author states that the death penalty was not the only punishment that could have been imposed on her son under article 104, part 2, of the Criminal Code, as this article also envisages a sentence of between 15 to 20 years’ imprisonment. Under article 18, paragraph 5, of the Criminal Code, murder under aggravating circumstances is qualified as a particularly serious crime.

2.9 On an unspecified date, a request for pardon on behalf of Mr. Idiev was addressed to the President of Tajikistan. At the time of submission of the communication, no reply to this request had been received.

The complaint

3.1 The author submits that in violation of articles 7 and 14, paragraph 3 (g), her son was beaten and forced to confess his guilt.

3.2 She claims that her son was subjected to arbitrary arrest. Firstly, under article 412 of the Criminal Procedure Code, a suspect can be subjected to detention of short duration only on the basis of an arrest protocol. Those arrested under suspicion of having committed a crime must be detained in the IVS. Mr. Idiev, however, was detained on OCD premises from 14 August 2001 to 23 August 2001, the protocol of his detention of short duration was drawn up and he was placed into IVS only 9 days after he was arrested. During this time, he was forced to incriminate himself. The arrest warrant was served on him only on 26 August 2001. The author submits that her son's remand in custody from 14 August to 26 August 2001 violated article 9, paragraph 1, of the Covenant.

3.3 Under article 83 of the Criminal Procedure Code, the prosecutor may, in exceptional cases, apply a restraint measure, such as arrest, before filing formal charges. The Criminal Procedure Code however does not specify the meaning and scope of 'exceptional cases'. Mr. Idiev's arrest warrant indicated that he was arrested for 'having committed a crime', although he was formally charged only on 3 September 2001. The author submits that the issuance of an arrest warrant without the formal filing of charges is arbitrary. She invokes the Committee's Views in *Albert Womah Mukong v. Cameroon*,² where the Committee confirmed that "arbitrariness" was not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law. In the present case, Mr. Idiev was remanded in custody for 22 days without being formally charged, contrary to article 9, paragraph 2, of the Covenant.

3.4 The author submits that the issuance of an arrest warrant without formal filing of charges also raises issues under article 14, paragraph 2, of the Covenant.

3.5 The author claims that her son's rights under article 14, paragraph 1, were violated, because the trial court was partial and conducted the trial in a biased way. It ignored Mr. Idiev's withdrawal of his confessions obtained under duress during the pre-trial investigation and dismissed a motion submitted by his lawyer to examine OCD officers and the investigator in court. This latter fact would also appear to raise issues under article 14, paragraph 3 (e), though this provision has not been invoked by the author.

3.6 The author adds that her son's rights under article 14, paragraph 3 (d) were violated, because he was granted access to a lawyer only on 3 September 2001. Under article 51 of the Criminal Procedure Code, anyone suspected of having committed a crime punishable by death must be legally represented. Under principle No. 7 of the Basic Principles on the Role of Lawyers, 'Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer'.³

² Communication No. 458/1991, Views adopted on 21 July 1994, para. 9.8.

³ *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: report prepared by the Secretariat* (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. B.3, annex, para. 118.

3.7 Finally, the author claims that her son's right to life protected by article 6, paragraphs 1 and 2, was violated, since the various breaches of the provisions of article 14 resulted in an illegal and unfair death sentence.

State party's observations on admissibility and merits

4. On 20 May 2004, the State party informed the Committee that Mr. Idiev's death sentence was carried out on an unspecified date, as the Committee's request arrived late and that, on 30 April 2004, the President of Tajikistan had announced the introduction of a moratorium on the application of death penalty. No further details either on the substance of his communication or on the circumstances of the execution of Mr. Idiev were provided by the State party.

Authors' comments on State party's observations

5. On 28 May 2004, the author provided a copy of her son's death certificate, stating that her son had been executed on 24 April 2004, i.e. 11 days after the Committee's request not to carry out his execution was duly addressed to the State party. She refers to another communication against the same State party, which was registered by the Committee with the request not to execute the alleged victim on 23 February 2004 and in which the victim was in fact executed on the same day, as the author's son, i.e. on 24 April 2004. Although the Committee's request was duly addressed to the State party's authorities two months before the actual execution date, the State party justified its failure to respect its obligations under the Optional Protocol by the alleged late arrival of the Committee's request.

Further submissions from the State party

6.1 On 14 April 2006, the State party forwarded to the Committee a report from the General Prosecutor of Tajikistan dated 28 March 2006 and an undated letter of the First Deputy Chairperson of the Supreme Court. In his report, the General Prosecutor states that, as a member of Mr. Sanginov's gang, Mr. Idiev committed a number of serious crimes between January 1997 and July 2001, such as the murder of one Salomov on 25 March 1998, an armed robbery on 23 May 1998, and the murder of a six-year old boy on 12 April 1998. Mr. Idiev's guilt was proven by his confessions made during the pretrial investigation and in court, witness testimonies, protocols of the reconstruction of the case at the crime scenes, and the conclusion of forensic medical examination. The General Prosecutor pointed out that the allegations of Mr. Idiev's sister that her brother was forced to become a member of Mr. Sanginov's gang; that his arrest by OCD officers was arbitrary; that his testimony was obtained under torture and that he was not promptly assigned a lawyer are uncorroborated. Pre-trial investigation and trial materials indicate that during the pretrial investigation and in court Mr. Idiev gave his testimony freely, without pressure, and in the presence of his lawyer. The General Prosecutor concludes, therefore, that the court took into account both the aggravating and the extenuating circumstances in establishing Mr. Idiev's guilt and imposing punishment; that his sentence was proportionate to the crimes committed, and that there were no grounds to initiate the supervisory review procedure in the case.

6.2 The First Deputy Chairperson of the Supreme Court states that Mr. Idiev joined Mr. Sanginov's gang in January 1997 and was an active member until the end of 1998. He pleaded guilty from the first day of his arrest and testified that in 1995 he deserted Russian Border Troops stationed in Tajikistan after the first three months of military service and became a mujahedeen on his own initiative. Since Mr. Idiev admitted his guilt on all counts from the first day of his arrest, there was no need to use coercive methods. It is submitted that on 3 September 2001, Mr. Idiev was formally charged and produced a self-

incriminating testimony in his lawyer's presence. On 12 November 2001, he was formally charged with an additional count of murder and he again produced a self-incriminating testimony, again in his lawyer's presence. A request for pardon on behalf of Mr. Idiev was denied by the President of Tajikistan on 21 April 2004. It is thus argued that there are no grounds to quash Mr. Idiev's sentence.

Issues and proceedings before the Committee

Failure to respect the Committee's request for interim measures

7.1 The author affirms that the State party executed her son 10 days after his communication had been registered under the Optional Protocol and a request for interim measures of protection was duly addressed to the State party.⁴ The Committee notes that the State party does not contest that the execution of the author's son took place on 24 April 2004, i.e. on the date indicated in Mr. Idiev's death certificate provided by the author, but justifies failure to respect its obligations under the Optional Protocol by pleading the alleged "late arrival" of the Committee's request. In this regard, the Committee recalls that on 3 June 2004, the Committee, acting through its Special Rapporteur on New Communications and Interim Measures, requested the State party to provide it with detailed information on the time and circumstances of Mr. Idiev's execution and notes that no reply to this request has been received from the State party. In the circumstances, the Committee concludes that the State party has failed to submit sufficient information that would show that the Committee's request not to carry out the execution of Mr. Idiev came too late and its alleged late arrival could not be attributed to the State party.

7.2 The Committee recalls⁵ that by ratifying the Optional Protocol, a State party to the Covenant recognizes the competence of the Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (Preamble and article 1). Implicit in a State's adherence to the Optional Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider communications, and after examination to forward its Views to the State party and to the individual submitting the communication (article 5, paragraphs 1 and 4). It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the formulation and adoption of its Views.

7.3 Apart from any violation of the Covenant found against a State party in a communication, a State party commits grave breaches of its obligations under the Optional Protocol if it acts so as to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile. In the present communication, the author alleges that her son was denied his rights under several provisions of the Covenant. Having been notified of the communication, the State party breached its obligations under the Optional Protocol by executing the alleged victim before the Committee could conclude its consideration and examination of the case, and the formulation, adoption and transmittal of its Views.

⁴ The initial communication was received on 13 April 2004. The Committee's request for interim measures (included in the Note Verbale informing the State party about the registration of the communication) was transmitted to the State party's authorities, including by fax, on 14 April 2004.

⁵ See communication No. 869/1999, *Piandiong at al. v. the Philippines*, Views adopted on 19 October 2000.

7.4 The Committee recalls⁶ that interim measures pursuant to rule 92 of the Committee's rules of procedure adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Optional Protocol. Flouting of the rule, especially by irreversible measures such as the execution of the death penalty undermines the protection of Covenant rights through the Optional Protocol.

Consideration of admissibility

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

8.2 The Committee notes that the same matter is not being examined under any other international procedure, in line with the requirements of article 5, paragraph 2 (a), of the Optional Protocol. In the absence of any State party's objection, the Committee considers that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have been met.

8.3 The author claims that her son's tribunal was partial and biased in violation of article 14, paragraph 1 (see paragraph 3.5 above). The Committee notes that these allegations relate primarily to the evaluation of facts and evidence by the court. It recalls that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice.⁷ In the absence of any further pertinent information on file in this connection, which would show that the author son's trial did suffer from any such defects, the Committee considers that this part of the communication is insufficiently substantiated and therefore inadmissible under article 2 of the Optional Protocol.

8.4 The author also claims that the issuance of her son's arrest warrant without formal filing of charges raises issues under article 14, paragraph 2. In the absence of any other pertinent information in this respect, the Committee considers that this part of the communication is inadmissible, as insufficiently substantiated, under article 2 of the Optional Protocol.

8.5 The Committee considers the author's remaining claims under article 6, paragraphs 1 and 2; article 7; article 9, paragraphs 1 and 2; and article 14, paragraphs 3 (d), 3 (e)⁸ and 3 (g), are sufficiently substantiated, for purposes of admissibility, and proceeds to their examination on the merits.

Consideration of the merits

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

9.2 The author claims that her son was beaten and tortured by OCD officers to make him confess his guilt, contrary to article 7 and article 14, paragraph 3(g), of the Covenant. She argues that her son retracted his confessions in court, asserting that they had been made under torture; though his challenge to the voluntariness of the confessions was dismissed by the court. In the absence of any pertinent explanation on this matter from the State party, except for its remark that the allegations of Mr. Idiev's sister that her brother's testimony

⁶ See communication No 964/2001, *Saidova v. Tajikistan*, Views adopted on 8 July 2004.

⁷ See, inter alia, communication No. 541/1993, *Errol Simms v. Jamaica*, inadmissibility decision adopted on 3 April 1995, paragraph 6.2.

⁸ On the article 14, paragraph 3 (e) claim, see paragraph 3.5 above.

was obtained under torture have not been corroborated (paragraph 6.1 above), due weight must be given to the author's allegations. 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.⁹ In this respect, the Committee recalls the author's detailed description of the treatment to which her son was subjected. It considers that in the circumstances, the State party failed to demonstrate that its authorities duly addressed the torture allegations advanced by the author. Nor has the State party provided copies of any internal investigation materials or medical reports in this respect.

9.3 Furthermore, as regards the claim of a violation of the alleged victim'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 of 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.¹⁰ The Committee recalls that in cases 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.¹¹ 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.¹² The Committee notes that the State party has not provided any arguments, corroborated by pertinent documentation to refute the author's claim that her son was compelled to confess guilt, although it had the opportunity to do so, and the author has sufficiently substantiated this claim. In the circumstances, the Committee concludes that the facts before it disclose a violation of article 7 and article 14, paragraph 3 (g), of the Covenant.

9.4 The Committee has noted that the author has claimed that on 14 August 2001, her son was arrested arbitrarily, he was detained unlawfully in the premises of the Ministry of Internal Affairs for nine days, without being formally charged (see paragraphs 3.2 and 3.3 above), and during this period of time, he was forced to confess guilt; he was formally charged only on 3 September 2001. The Committee notes that these allegations were not refuted by the State party specifically. In the circumstances, and in the absence of any other pertinent information on file, due weight must be given to the author's allegations. Accordingly, the Committee considers that the facts as presented reveal a violation of the author son's rights under article 9, paragraphs 1 and 2, of the Covenant.

9.5 The Committee has noted the author's claim that her son was not granted access to a lawyer until 3 September 2001, having been detained on 14 August 2001. The Committee notes that although the author's son was facing a number of serious charges which could result in a death sentence, no lawyer was assigned to him before the 3 September 2001. It also notes that the State party has not refuted these allegations specifically but has merely affirmed that on 3 September 2001, as well as in court, Mr. Idiev confessed his full guilt freely, in the presence of a lawyer. The Committee recalls that, particularly in cases involving capital punishment, it is axiomatic that the accused must effectively assisted by a lawyer at all stages of the proceedings. In the absence of any other pertinent information on file, the Committee considers that the facts as presented reveal a violation of the author's

⁹ See, e.g., communication No. 781/1997, *Aliiev v. Ukraine*, Views adopted on 7 August 2003, paragraph 7.2.

¹⁰ 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, *Deollall v. Guyana*, Views adopted on 1 November 2004, para. 5.1.

¹¹ Human Rights Committee, general comment No. 32 (2007), Official Records of the General Assembly, Sixty-second Session, Supplement No. 40 (A/63/40), vol. I, annex VI, para. 49.

¹² Communication No. 30/1978, *Bleier v. Uruguay*, Views adopted on 24 March 1980, para. 13.3.

rights under article 14, paragraph 3 (d), of the Covenant. In light of this conclusion, the Committee does not find it necessary to examine separately the rest of the author's allegations which might raise other issues under this provision.

9.6 The Committee notes the author's claim that her son's lawyer motioned the court to summon and examine OCD officers and the investigator in court, but the judge summarily denied this motion. The Committee recalls that, as an application of the principle of equality of arms, the guarantee of article 14, paragraph 3 (e), which is important for ensuring an effective defence by the accused and their counsel and by guaranteeing the accused the same legal power of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.¹³ It does not, however, provide an unlimited right to obtain the attendance of any witness requested by the accused or counsel, but only a right to have witnesses examined who are relevant for the defence, and to be given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings. Within such limits, and subject to the limitations on the use of statements, confessions and other evidence obtained in violation of article 7, it is primarily for the domestic legislature of States parties to determine the admissibility of evidence and how their courts assess such evidence.¹⁴ In the present case, the Committee observes that all the individuals mentioned in the motion submitted by Mr. Idiev's lawyer and rejected by the court, could have provided information relevant to his claim of being forced to confess under torture during the pre-trial investigation. The Committee therefore concludes that the State party's courts did not respect the requirement of equality between the prosecution and the defence in producing evidence and that this amounted to a denial of justice. The Committee therefore concludes, Mr. Idiev's right under article 14, paragraph 3 (e), was violated.

9.7 The Committee recalls its jurisprudence to the effect that that the imposition of a death sentence after a trial that did not meet the requirements of a fair trial amounts to a violation of article 6 of the Covenant.¹⁵ In the present case, Mr. Idiev's death sentence was passed in violation of the guarantees set out in article 7 and article 14, paragraph 3 (g); and article 14, paragraphs 3 (d) and (e), of the Covenant, and thus also in breach of article 6, paragraph 2, of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of Mr. Idiev's rights under article 7; article 9, paragraphs 1 and 2; article 14, paragraphs 3 (d), (e), and (g); and a violation of article 6, paragraph 2, read together with article 14, paragraph 3 (d), (e) and (g), of the Covenant. The State party also breached its obligations under article 1 of the Optional Protocol.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide an effective remedy, including initiation and pursuit of criminal proceedings to establish responsibility for the ill-treatment of the author's son and a payment of adequate 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 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

¹³ General comment No. 32 (note 11 above), para. 39.

¹⁴ Ibid.

¹⁵ See, inter alia, communication No. 907/2000, *Siragev v. Uzbekistan*, Views adopted on 1 November 2005, paragraph 6.4.

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. 1278/2004, *Reshetnikov v. Russian Federation*
(Views adopted on 23 March 2009, Ninety-fifth session)***

<i>Submitted by:</i>	Yevgeni Reshetnikov (represented by counsel, Ms. Karina Moskalenko)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Russian Federation
<i>Date of communication:</i>	21 February 2004 (initial submission)
<i>Subject matter:</i>	Complainant's detention for attempted murder
<i>Procedural issue:</i>	Exhaustion of domestic remedies, lack of substantiation of claims
<i>Substantive issues:</i>	Arbitrariness of detention; unfair trial.
<i>Articles of the Covenant:</i>	9, paragraph 2, paragraph 3, and paragraph 4; 14, paragraph 1, paragraph 2, and paragraph 3 (a)
<i>Article of the Optional Protocol:</i>	2; 3; 5 (2) (b)

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

Meeting on 23 March 2009,

Having concluded its consideration of communication No. 1278/2004, submitted to the Human Rights Committee on behalf of Mr. Yevgeni Reshetnikov 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. Yevgeni Reshetnikov, a Russian citizen, born in 1965, currently imprisoned in the Russian Federation. He claims to be a victim of violations by the Russian Federation¹ of article 9, paragraphs 2, 3, and 4; and article 14, paragraphs 1, 2 and 3 (a), of the Covenant. He is represented by Ms. Karina Moskalenko.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Lazhari Bouzid, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli and Mr. Krister Thelin.

¹ The Optional Protocol came into force for the Russian Federation on 1 January 1992.

The facts as presented by the author

2.1 The author was arrested on 21 August 1999 in connection with an investigation into ammunition cartridges which the police discovered in his garage in Volgograd. On 24 August 1999, the prosecutor (*prokuror*) ordered that the author be remanded in custody. Under article 96 of the old Code of Criminal Procedure of the Russian Federation, in force at the time of the author's arrest, the prosecutor was responsible for endorsing or approving arrests.

2.2 The author states that, when he was questioned by the police, and for a period of six months following his arrest, he thought he was under investigation only in relation to the ammunition cartridges found in his garage, and that he was unaware that he was in fact being investigated for attempted murder. He was finally charged with attempted murder on 14 February 2000. Only on that day was he advised that, on the day of his arrest on 24 August 1999, an order had been issued for the investigation into his case to be joined to an investigation into the attempted murder of the manager of an oil company in Moscow in 1998.

2.3 On 16 September 1999, he was placed on an identification parade for the attempted murder. He was told that his participation in the parade was as a witness and not as a person accused of the crime in question. Accordingly, he was not entitled to have his lawyer present. He claims that the parade did not meet the legal requirements according to which the participants have to bear some resemblance. In fact, the other participants did not look like him. Some of them later admitted that the police had provided them with artificial beards in order to make them resemble the author, who did have a beard. Not knowing that he was under investigation for attempted murder, and without his lawyer present, he had no opportunity to file a complaint in that respect. As a result, the evidence obtained by the police through the parade was used to declare him guilty in first instance and was not challenged later on appeal.

2.4 On 13 November 2000, the author was sentenced to 11 years' imprisonment for attempted murder by the Moscow city court. He was acquitted of the charge of unlawfully possessing ammunition cartridges. On 17 January 2001, his appeal to the Supreme Court was dismissed, and a further appeal to the Presidium of the Supreme Court was dismissed on 15 August 2001.

The complaint

3.1 The author claims that irregularities during the pretrial detention, investigation and court proceedings constitute violations by the Russian Federation of article 9, paragraphs 2, 3, and 4, and article 14, paragraphs 1, 2, and 3 (a), of the Covenant.

3.2 He argues that his arrest was authorized by a prosecutor and, thus, violated his right under article 9, paragraph 3, of the Covenant. He invokes the Committee's decision in *Zheludkov v Ukraine*, where the Committee concluded that the State party had not provided sufficient information showing that the prosecutor has the institutional objectivity and impartiality necessary to be considered an officer authorized to exercise judicial power within the meaning of article 9, paragraph 3, of the Covenant.² He adds that, in any event, he was not "brought before" a prosecutor and contends that he was not informed of his right to appeal the prosecutor's decision to remand him in custody and that his right under article 9, paragraph 4, of the Covenant was violated.

² Communication 726/1996, views adopted 29 October 2002, para. 8.3.

3.3 The author further claims that he was not informed of the reasons for his arrest for six months after his arrest and submits that this fact amounts to a violation of his rights under article 9, paragraph 2, and article 14, paragraph 3 (a), of the Covenant.

3.4 The author finally submits that the evidence relied on for his conviction was obtained through procedural violations during the identification parade. This is said to amount to a violation of his right to a fair trial under article 14, paragraph 1, of the Covenant.

State party's observations on admissibility and merits

4.1 On 7 October 2004, the State party provided information on the events that led to the arrest of the author as well as on details of the preliminary investigation and the court proceedings. It contends that the inquiry established that the author could have been involved in the crime of attempted murder of the manager of an oil company. It submits that the author was detained as a suspect for unlawful possession of a machine gun and other ammunition, as well as for attempted murder.

4.2 The State party refutes the author's arguments regarding the alleged violations in the composition of the identification parade. It acknowledges that there were differences in the age of those who participated in the parade. However, in compliance with articles 164 and 165 of the Criminal Procedure Code of the Russian Federation, they were of the same height, same body structure and were dressed similarly. The author participated in the parade as a witness as there was a suspicion that he could have committed a crime.³ The State party notes that the participation of a lawyer in this process was not required, as the author did not have the status of a suspect or accused and he did not request the participation of a lawyer himself. The identification parade was conducted in accordance with the law. The State party adds that none of the participants of the identification parade, including the author, presented any complaints or comments regarding the alleged violations during the process.

4.3 The State party recalls that the author was detained for possession of ammunition cartridges found in his garage. The author read the detention protocol and was informed of his procedural rights and duties as a detainee. He entered a note in the protocol that he understood the reasons for his detention. In the protocol, which explained the status of a detainee, the author had entered a note that he did not need a lawyer and this was not due to lack of resources.

4.4 The State party contends that the arrest warrant was issued by the Prosecutor of Volgograd city in compliance with the Criminal Procedure Code then in force. This was an established practice in the Russian Federation until 1 July 2002. From this date onward, all such warrants are issued by court. The State party reiterates that at the end of preliminary investigation the author was given enough time to read the materials of his case in detail together with his lawyer.

4.5 The State party affirms that the case file does not contain any information about whether the decision to remand the author in custody was presented to the author and whether his right to appeal the decision to a court was explained to him.

4.6 The State party notes that the author did not invoke any procedural violations during the court proceedings either at first or at other instances, and such violations could not be established by the State party during the investigation.

³ This statement reflects the exact wording of the State party, which is wholly contradictory.

Author's comments on State party's observations

5.1 By letter of 17 June 2005, the author submits that the State party's observations are vague and imprecise. He notes the State party's statement that the "inquiry" established that he could have been involved in the crime of attempted murder of the manager, and claims that the State party did not specify what type of "inquiry" it refers to. He also refers to affirmations by the State party to the effect that he had been detained as a suspect on two criminal cases: unlawful possession of a machine gun and other ammunition and attempted murder. In reality, the author argues, he was detained under a completely different criminal case initiated as a result of finding only ammunition cartridges in his garage.

5.2 On the State party's observation in relations to the composition of the identification parade, the author submits that the State party itself confirmed that the age difference between the author and one of the persons on the parade, was 12 years. The State party did not refute the fact that participants on the parade wore artificial beards.

5.3 The author reiterates that he was intentionally misled about his status as a detainee. According to Russian law, a witness is informed about his/her criminal liability for refusing to give testimony or for giving false testimony, while a suspect or accused does not incur such responsibility. Russian law does not require the participation of a lawyer for a witness. The author was interrogated as a witness, but then he was identified as a suspect. In reality, the author claims, the investigators already suspected the author for having committed a crime and kept him in custody.

5.4 The author submits that during the additional reconstruction of the crime scene on 17 September 1999, investigators discovered the damages on the wall and found bullets. This occurred almost one year after the initial examination, which took place on 25 November 1998, when nothing had been found.

5.5 On the argument of the State party related to the decision to remand the author in custody, the author reiterates his initial explanations. He contends that the State party implicitly acknowledged that he was not informed of the decision to remand him in custody by stating that there was no information in the case file that the author was informed about the decision.

5.6 The author adds that the State party omitted the fact that when he read the charges, he made a statement to the effect that he required services of a lawyer and wanted that his interests were represented by his lawyer, Mr. Patskov.

Additional State party's observations on admissibility and merits

6.1 On 23 November 2005, the State party submitted its additional observations, where it reiterates its statements in its previous submission that the author was found guilty based on the identification made by the manager of an oil company, witnesses as well as the conclusions of ballistic experts and others. The State party recalls that all the evidence was thoroughly evaluated by courts in compliance with the laws. The author availed himself of the services of his defence lawyer throughout the preliminary investigation and the court proceedings. There were no violations of criminal procedure provisions.

6.2 The case was considered on cassation by the Supreme Court and the Presidium of the Supreme Court, under the supervisory review mechanism. As such, the State party concedes that the author has exhausted all domestic remedies.

6.3 The State party submits that the allegations of the author under articles 9 and 14 of the Covenant should be declared inadmissible for lack of substantiation.

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, of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement and notes that the State party did not contest that domestic remedies in the present communication have been exhausted.

7.3 In relation to the alleged violation of article 9, paragraph 2, and article 14, paragraph 3 (a), the Committee notes the author's claim that he was not presented with the decision to remand him in custody and that for six months after his arrest, he was unaware that he was under investigation for attempted murder. It also notes the State party's argument that the author did not complain in court that his detention was illegal or ungrounded and unreasonably prolonged. The Committee notes that the author has not refuted this argument of the State party. In the circumstances, the Committee considers that this part of the communication is insufficiently substantiated, for purposes of admissibility, and declares it inadmissible under article 2 of the Optional Protocol.

7.4 The Committee notes the author's allegation that he was not informed of his right to appeal the prosecutor's decision to remand him in custody. The author does not however provide, nor does the case file contain information to this effect that he ever addressed this specific claim to the State party authorities. In the absence of any other information, the Committee concludes that this part of the communication is insufficiently substantiated, for purposes of admissibility, and is therefore inadmissible under article 2, of the Optional Protocol.

7.5 The Committee notes the author's allegations under article 14, paragraph 1, that his trial was unfair and biased as the sentence was based on the evidence obtained with procedural violations. The Committee also notes the State party's position refuting this claim as not sufficiently corroborated. It further notes that the author's allegations relate to the evaluation of evidences and reiterates that it is generally for the appellate courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice.⁴ The material before the Committee does not show that the trial indeed suffered from such defects. Accordingly, this part of the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 2 of the Optional Protocol.

7.6 On the alleged violation of article 14, paragraph 2, the Committee notes that the author has not corroborated this claim in any manner. Therefore, he has failed to substantiate his claims. In the absence of any further information, the Committee decides that this part of the communication is inadmissible under article 2 of the Optional Protocol.

7.7 The Committee notes the author's claim that the arrest warrant was issued by a prosecutor contrary to the provisions of article 9, paragraph 3, of the Covenant. This claim was uncontested by the State party. Accordingly, the Committee declares this part of the communication admissible, as raising issues under article 9, paragraph 3, of the Covenant.

⁴ See inter alia, communication No. 541/1993, *Errol Simms v. Jamaica*, inadmissibility decision adopted on 3 April 1995, paragraph 6.2.

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

8.2 The Committee notes that in the present case, the author claims that he was arrested and placed in custody by decision of a prosecutor. The State party has not refuted this, and has explained that this was done in accordance with the law then into force. The Committee notes that the State party has not provided sufficient information, showing that the prosecutor had the institutional objectivity and impartiality necessary to be considered an "officer authorized to exercise judicial power" within the meaning of article 9, paragraph 3, of the Covenant. In the circumstances, the Committee concludes that the facts as submitted reveal a violation of the author's rights under paragraph 3 of article 9 of the Covenant.

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

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 appropriate compensation. The Committee reiterates that the State party should ensure that all persons enjoy both equality before the law and equal protection of the law.

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.

[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.]

**K. Communication No. 1280/2004, *Tolipkhuzhaev v. Uzbekistan*
(Views adopted on 22 July 2009, Ninety-sixth session)***

<i>Submitted by:</i>	Mr. Akbarkhudzh Tolipkhuzhaev (not represented by counsel)
<i>Alleged victim:</i>	Mr. Akhrorkhuzh Tolipkhuzhaev, the author's son (deceased)
<i>State party:</i>	Uzbekistan
<i>Date of communication:</i>	6 May 2004 (initial submission)
<i>Subject matter:</i>	Death sentence imposed after unfair trial and use of torture during preliminary investigation
<i>Substantive issues:</i>	Forced confession; arbitrary deprivation of life following a death sentence imposed after an unfair trial
<i>Procedural issue:</i>	Non-respect of a request for interim measures of protection
<i>Article of the Covenant:</i>	6, paragraphs 1, 4 and 6; 7; 9, paragraphs 1–4; 10; 14, paragraphs 1–4; 16
<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 22 July 2009,

Having concluded its consideration of communication No. 1280/2004, submitted to the Human Rights Committee on behalf of Mr. Akhrorkhuzh Tolipkhuzhaev 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. Akbarkhudzh Tolipkhuzhaev, an Uzbek national, born in 1951. He submits the communication on behalf of his son, Akhrorkhuzh Tolipkhuzhaev, also an Uzbek national, born in 1980, who, at the time of submission of the communication, was imprisoned in Uzbekistan and was awaiting execution of a death

* 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. 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. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

sentence imposed by the Military Court of Uzbekistan on 19 February 2004. The author claims that the State party violated his son's rights under article 6, paragraphs 1 and 4; article 7; article 9; article 10; article 14, paragraphs 1–3; and article 16 of the Covenant.

1.2 On 6 May 2004, pursuant to rule 92 of its rules of procedure, the Human Rights Committee, acting through its Special Rapporteur on New Communications and Interim Measures, requested the State party not to carry out Mr. Tolipkhuzhaev's execution while his case is examined by the Committee. On 27 June 2004, the State party informed the Committee that given that Mr. Tolipkhuzhaev's sentence was quashed by the Military College of the Supreme Court of Uzbekistan on 25 May 2004, his case was referred back to the Military Court of Uzbekistan for further examination.

1.3 On 15 March 2005, the Committee received unofficial information that the author's son might have been executed in early March. The issue was raised during the examination of the State party's second periodic report under the Covenant, on 21 and 22 March 2005. The State party's delegation provided the Committee with information to the effect that Mr. Tolipkhuzhaev's execution had been stayed pending the consideration of his case by the Committee.

1.4 On 13 April 2005, however, the author provided the Committee with a copy of a death certificate, according to which his son had been executed on 1 March 2005. The same day the Committee, acting through its Chairperson, sent a letter to the Permanent Representative of Uzbekistan to the United Nations Office in Geneva, expressing "dismay and utmost concern" about the alleged victim's execution, and requesting prompt written explanations. The State party explained, by Note verbale of 23 April 2008, that on 12 April 2004, Mr. Tolipkhuzhaev had refused to make a request for a presidential pardon. He was executed after the sentence of 19 February 2004 became executory. According to the State party, the Note verbale transmitted by the Office of the High Commissioner for human rights with the request not to execute the alleged victim pending the consideration of his case had reached the Supreme Court of Uzbekistan only after the alleged victim's execution.

1.5 The Optional Protocol entered into force for the State party on 28 December 1995.

The facts as presented by the author

2.1 On 19 February 2004, Mr. Akhrorkhudzh Tolipkhuzhaev, then a military officer, was found guilty and sentenced to death by the Military Court of Uzbekistan, for the murder of the children of one of his former commanders, in order to conceal the theft of jewellery, money and other items from the latter's home on 17 July 2001. After committing the crime, he fled to Kazakhstan where he was subsequently arrested. He was transferred to Tashkent on 13 September 2002.

2.2 On 24 March 2004, the Military College of the Supreme Court of Uzbekistan confirmed Mr. Tolipkhuzhaev's sentence. At the time of submission of the communication, the author contended that a request for pardon had been filed with the Office of the President, but no reply had been received.

2.3 According to the author, his son's death sentence was unlawful, as the courts followed the position of the investigation, failed in their duty of impartiality and objectivity, and based their decisions on his son's confessions obtained under torture at the beginning of the investigation. His son's guilt and involvement in the murder was not established without reasonable doubt either during the preliminary investigation or in court. The sentence was too severe and unfounded, and did not correspond to his son's personality, given that his son was a good and quiet individual and a hard worker who had never

committed a crime before. The court allegedly assessed incorrectly the evidence on file and ignored elements proving his son's innocence.

2.4 The author reiterates that during the preliminary investigation, his son was beaten and tortured by policemen and forced to confess his guilt. He refers to a Ruling of the Supreme Court of 20 November 1996, according to which evidence obtained through unlawful means of investigation is unlawful; in this case, the courts refused to examine the allegations of torture and beatings made by his son.

2.5 In court, the author's son denied having committed the murder. He acknowledged that he went to the home of his former commander on 17 July 2001, but the latter was absent. Given that Tolipkhuzhaev knew the family well, he was invited to wait for his friend in the apartment. Inside, he saw an open wallet with jewellery, and decided to steal it. At one moment, when his friend's daughter left the room, he took the wallet and escaped. Later the same day, he decided to return the jewellery and went back to the apartment. There, he discovered the bodies of his friend's children. Afraid that he would be charged with murder, he fled to Kazakhstan. He was arrested there and returned to Uzbekistan on 13 September 2002. After his return, he was beaten and tortured by investigators and was forced to produce written confessions for the murders.

2.6 The author provides details on how his son was treated by the police: several officers repeatedly lifted him and then violently dropped him on the concrete floor. Mr. Tolipkhuzhaev's started to bleed from the mouth. Later, he discovered blood in his urine, and he started to spit blood. When the investigators brought him to the Investigation Detention Centre (SIZO), both the duty officer at the detention centre and the centre's doctor refused to accept Mr. Tolipkhuzhaev in the centre, in light of his health condition. The author's son was then brought back to the police station and was given medical treatment there.

2.7 The author claims that his son had to be transferred to the Investigation Detention Centre (SIZO) on 16 September, but he was brought there only on 24 September 2002. The officers of the detention centre again refused to admit him, as his body was all black and blue. On 26 September 2002, he was once again brought to the detention centre but was again denied access. This time, however, the author's son asked the detention centre's authorities to keep him there, as otherwise, according to him, the police officers would kill him. He was thus admitted at the centre. At the detention centre, Mr. Tolipkhuzhaev continued to urinate and spit blood, had pain and could not sleep. He asked for help and a doctor (A.) examined him and ordered a treatment. According to the author, all this was documented in the detention centre's medical records. Mr. Tolipkhuzhaev's lawyer asked the trial court to examine these records, but this was not done.

2.8 The author gives other examples of instances where the court refused to examine additional evidence or to interrogate witnesses:

(a) Mr. Tolipkhuzhaev's lawyer requested the court to interrogate the medical doctor and the officer who were on duty in the temporary detention centre between 13 and 26 September, but allegedly his request remained unanswered;

(b) The lawyer produced a document produced by a doctor from the Ministry of Interior, attesting that Mr. Tolipkhuzhaev had been subjected to torture. Instead of initiating an inquiry, however, the court ignored the evidence. In addition, Mr. Tolipkhuzhaev affirmed that he would be able to identify those who tortured him, but the judge refused to inquire into this affirmation;

(c) The court refused to interrogate two nurses from the detention centre in order to verify whether they had information about Mr. Tolipkhuzhaev's rib injury and the existence of other injuries, and to assess whether these injuries were registered in the

medical centre's records. The court refused to interrogate the doctor (A.), who administered a treatment to the author's son;

(d) The court did not take into consideration a document issued by a doctor from institution UYa 64-1 in Tashkent, to the effect that while in detention, Mr. Tolipkhuzhaev had received injuries to the ribs, arms and legs;

(e) The court refused to call four of Mr. Tolipkhuzhaev's cellmates, who allegedly could have testified about the latter's torture and ill-treatment;

(f) Both the author's son and counsel pointed out to the court that Mr. Tolipkhuzhaev was arrested on 13 September 2002, but was only brought to an investigation centre on 26 September 2002, instead of 16 September 2002 as required by law. They claimed that these dates were recorded in the registry of the Tashkent Department of the Ministry of Internal Affairs. They asked the court to examine the registry and the judge allegedly accepted to do so, but never in fact did. The above shows that the trial court has acted in a biased and unprofessional way in this case.

2.9 According to the author, his son's right to defence was also violated. During the early stages of investigation, he was not represented by counsel and was not informed of his procedural rights. According to Uzbek law, the presence of a lawyer is compulsory in all cases that might be punished with death penalty. In addition, when the case was examined on appeal, the appeal instance of the Military Court called as witnesses Mr. Tolipkhuzhaev's former lawyers and the prosecutor interrogated them. The lawyers in question allegedly testified against their former client, thus violating not only the law and the alleged victim's rights but also ethics rules of legal profession.

2.10 The author further adds that a witness affirmed in court that on the day of the crime, two individuals inquired about the exact location of the apartment of the father of the murdered persons. According to this witness, the individuals in question arrived in the neighbourhood in a black car. Shortly afterwards, she saw them leaving precipitously in the car after running out of the flat. This was confirmed by another witness. The court, however, allegedly ignored these depositions.

2.11 The author further contends that all expert's acts and conclusions do not establish who committed the murder. Immediately after the crime, investigators undertook a search with dogs. The dogs went into three different directions. At the crime scene, investigators found 10 sets of fingerprints, but none of them matched those of Tolipkhuzhaev.

The complaint

3. The author claims that his son was sentenced to death unlawfully, after an unfair trial, with use of torture during the investigation to make him confess guilt. He claims that the State party violated his son's rights under article 6, paragraphs 1 and 4; article 7; article 9; article 10; article 14, paragraphs 1-3; and article 16, of the Covenant.

State party's observations on admissibility and merits

4.1 On 27 June 2004, the State party informed the Committee that on 3 July 2002, the Almaty City Court (Kazakhstan) had found Mr. Tolipkhuzhaev guilty of theft and sentenced him to three years in prison.

4.2 On 19 February 2004, the Military Court of Uzbekistan found him guilty of having murdered, with aggravating circumstances, two children, on 17 July 2001 in Tashkent; of having committed a theft in their parent's home; and of having deserted the Uzbek armed forces. For these crimes, he was sentenced to death. On 26 March 2004, the appeal instance of the Military Court upheld the death sentence.

4.3 The State party adds that on 25 May 2004, the Military College of the Supreme Court annulled the decision of the appeal instance of the Military Court, given that a number of circumstances were not examined, and referred the case back for further examination.

4.4 On 23 April 2008, the State party added that on 12 April 2004, Mr. Tolipkhuzhaev refused to file a request for pardon, and a record to this effect was sent to the presidential administration. Once the ruling entered into force, the death sentence was carried out. The State party finally contends that the Committee's request for interim measures was received by Supreme Court of Uzbekistan after the execution has already been carried out.

5. The author was requested to comment on the State party's observations, but no reply was received, in spite of two reminders (sent in 2008 and 2009).

Non-respect of the Committee's request for interim measures

6.1 When submitting his communication on 6 May 2004, the author informed the Committee that at that juncture, his son was detained on death row. On 27 June 2004, the State party informed the Committee that the alleged victim's criminal case was referred back for further investigation. During the examination of the State party's second periodic report under the Covenant, in March 2005, the Committee asked for clarifications on the specific case. The State party replied that Mr. Tolipkhuzhaev's execution had not been carried out. On 23 April 2008, however, the State party contended that the alleged victim's execution had in fact been carried out after the ruling of the Military Court of 19 February 2004 had become executory. The Committee notes that in spite of the manifestly contradictory contentions made by the State party on this particular issue, it remains uncontested that the execution in question took place despite the fact that the alleged victim's communication had been registered under the Optional Protocol and a request for interim measures of protection had been duly addressed, and received, by the State party, as confirmed at least by the State party reply of 27 June 2004, even if it is contended that this information was conveyed to the Supreme Court after the execution.

6.2 The Committee recalls that by adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant.¹ Implicit in a State's adherence to the Protocol is an undertaking to cooperate with the Committee in good faith, so as to enable it to consider such communications, and after examination, to forward its Views to the State party and to the individual concerned (article 5, paragraphs 1 and 4). It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its final Views.

6.3 Apart from any violation of the Covenant found against a State party in a communication, a State party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or to frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile. In the present case, the author alleges that his son was denied his rights under various articles of the Covenant. Having been notified of the communication, the State party breached its obligations under

¹ See, inter alia, communications No. 869/1999, *Piandiong v. the Philippines*, Views adopted on 19 October 2000, paragraphs 5.1–5.4; and No. 1041/2001, *Shevkkhie Tulyaganova v. Uzbekistan*, Views adopted on 20 July 2007, paragraphs 6.1–6.3.

the Protocol by executing the alleged victim before the Committee concluded its consideration and examination of the case, and the formulation and communication of its Views.

6.4 The Committee recalls that requests for interim measures of protection under rule 92 of its rules of procedure adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Optional Protocol. Flouting of the rule, especially by irreversible measures such as, as in this case, the execution of Mr. Tolipkhuzhaev, undermines the protection of Covenant rights through the Optional Protocol.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 communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee notes, as required by article 5, paragraph 2 (a) and (b), of the Optional Protocol, that the same matter is not being examined under any other international procedure of investigation or settlement, and that it is uncontested that domestic remedies have been exhausted.

7.3 The Committee has noted the author's claim under articles 6, paragraph 4; article 9; and article 16, of the Covenant. It observes that the author advances these claims in vague and general terms, without specifying which particular acts/omissions of the State party's authorities amounted to a violation of his son's rights under these provisions of the Covenant. In the absence of any further information in this respect, the Committee considers that this part of the communication is inadmissible as insufficiently substantiated, pursuant to article 2 of the Optional Protocol.

7.4 The author has also invoked a violation of his son's rights under article 14, paragraph 2, of the Covenant. The Committee observes, however, that the author has submitted no further information in this connection. In the circumstances, it also considers this part of the communication inadmissible under article 2 of the Optional Protocol, because of insufficient substantiation.

7.5 The Committee considers that the remaining part of the communication is sufficiently substantiated, for purposes of admissibility, and declares it admissible, as far as raising other issues under article 6; and issues under article 7; article 10; and article 14, paragraphs 1 and 3, of the Covenant.

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 author claims that his son was beaten and tortured by the police immediately after his transfer from Kazakhstan to Uzbekistan, and he was thus forced to confess guilt. The author provides detailed information about his son's ill-treatment, and claims that

² See, for example, communication No. 1044/2002, *Davlatbibi Shukurova v. Tajikistan*, Views adopted on 17 March 2006, paragraphs 6.1–6.3.

numerous complaints made to this effect were ignored by the courts. The State party does not refute these allegations specifically, but rather limits itself in contending that the guilt of the author's son was fully established.

8.3 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.³ Although it transpires from the copy of the decision of the Military Court that Mr. Tolipkhuzhaev's torture allegations were addressed and rejected by the court while re-examining the criminal case on 29 October 2004, 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. Tolipkhuzhaev 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.

8.4 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 and did not pay due attention to the numerous requests of the author's son and his defence counsel to have a number of witnesses interrogated and other evidence examined in court in this connection. The Committee considers that as a consequence, the criminal procedures in Mr. Tolipkhuzhaev's case were vitiated by irregularities, which places in doubt 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 son's rights under article 14, paragraph 1, of the Covenant.

8.5 The author finally claims a violation of article 6 of the Covenant, as Mr. Tolipkhuzhaev's death sentence was imposed after an unfair trial that did not meet the requirements of article 14. The Committee recalls that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant⁴ In the present case, Mr. Tolipkhuzhaev's death sentence was passed and carried out, in violation of the right to a fair trial, as guaranteed by article 14 of the Covenant, and therefore also in violation of article 6 of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 6; article 7; and article 14, paragraphs 1 and 3 (g), of the International Covenant on Civil and Political Rights.

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 the payment of adequate compensation and initiation of criminal proceedings to establish responsibility for Mr. Tolipkhuzhaev's ill-treatment. The State party is also under an obligation to prevent similar violations in the future.

³ General comment No. 20 (1992) on article 7, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VII, para. 14.

⁴ See, for example, communication No. 1044/2002, *Davlatbibi Shukurova v. Tajikistan*, Views adopted on 17 March 2006, paragraph 8.6.

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.

[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.]

**L. Communication No. 1311/2004, *Osiyuk v. Belarus*
(Views adopted on 30 July 2009, Ninety-sixth session)***

<i>Submitted by:</i>	Mr. Ivan Osiyuk (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	11 June 2004 (initial submission)
<i>Subject matter:</i>	Administrative proceedings falling within the ambit of “any criminal charge” within the meaning of the Covenant
<i>Substantive issue:</i>	Admissibility <i>ratione materiae</i>
<i>Procedural issue:</i>	Minimum procedural guarantees of defence in criminal trial
<i>Article of the Covenant:</i>	14, paragraph 3 (b), (d), (e)
<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 30 July 2009,

Having concluded its consideration of communication No. 1311/2004, submitted to the Human Rights Committee by Ivan Osiyuk 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. Ivan Osiyuk, a Belarusian national born in 1932. He claims to be a victim of a violation by Belarus of article 14 of the International Covenant on Civil and Political Rights. The author is unrepresented. The Optional Protocol entered into force for Belarus on 30 December 1992.

The facts as presented by the author

2.1 The author is a pensioner who lives in his native settlement of Borisovka (Belarus), which is approximately one kilometre away from the settlement of Godyn (Ukraine). At around 12 p.m. on 26 June 2003, he crossed, by his privately-owned car registered in

* The following members of the Committee participated in the examination of the present communication: Mr. Mohammed Ayat, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, 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. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

Belarus, the customs and national frontier between Belarus and Ukraine through, respectively, the Mokransy and Domanovo frontier posts. The purpose of this trip was to visit the relatives of his aunt, who passed away on 7 May 2003. On the way back, allegedly unconsciously and in order to save fuel — the main road where the frontier posts are located takes longer — the author took the road through the forest. The national frontier between Belarus and Ukraine runs through this forest, but no one knows where exactly, because there are no demarcation lines, signs, inscriptions or boundary posts to identify it in any way. The forest road is regularly used by local residents from both sides of the frontier, who go to the forest to collect berries and mushrooms, to graze cattle and to mow grass.

2.2 At around 2 p.m., the author's car was ambushed in the forest by a group of young men with submachine guns, who later introduced themselves as frontier guards from Belarus. They rummaged the car from top to bottom, searching for money and goods, but found nothing. They told him that he had unlawfully crossed the national frontier and asked him to provide written explanations. He was dictated what to write, as he was frightened, confused and suffered from a heart pain. The author claims that he had to be given heartache drugs by guards at the Mokransy frontier post, because he was held at gunpoint under the baking sun for six hours, without even being allowed to relieve himself.

2.3 On the same day, an administrative and customs report in relation to the author was drawn up by a customs inspector of the Mokransy frontier post. He was accused of having committed an administrative and customs offence, envisaged by article 193–6 (movement of goods and means of transport across the customs frontier of the Republic of Belarus in evasion of customs control), of the 1984 Belarus Code on Administrative Offences (Code on Administrative Offences).¹ On an unspecified date, he was also accused of having committed administrative offences, envisaged by articles 184–3 (unlawful crossing of the national frontier of the Republic of Belarus) of the Code on Administrative Offences.

2.4 On 9 July 2003, a judge on administrative cases and enforcement proceedings of the Kobrin District Court found the author guilty of having committed an administrative offence under article 184–3 of the Code on Administrative Offences for unlawfully crossing the national frontier and ordered him to pay 14,000 roubles as fine.² This decision is final and executory.

2.5 On 30 July 2003, a judge of the Moskovsky District Court of Brest found that the author had committed an administrative offence under article 193–6 of the Code on Administrative Offences for moving the car across the customs frontier of the Republic of Belarus³ in evasion of customs control and ordered him to pay 700,000 roubles as fine, together with the seizure of the author's car (in the value of 6,177,000 roubles). This decision is final and executory.

2.6 On an unspecified date, the author filed a request for supervisory review of the decision of 30 July 2003 with the Brest Regional Court. On 21 August 2003, the acting Chairperson of the Brest Regional Court revoked the decision of the Moskovsky District Court of Brest, because of the misspelling of the author's family name in the decision, and

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

² The sanction envisaged under article 184–3 of the Code on Administrative Offences is a fine of up to 300 minimal salaries or correctional labour of up to two months, with up to 20 per cent salary deduction.

³ Decision of the Moskovsky District Court of Brest of 30 July 2003 states that the author was arrested by the frontier troops of the Republic of Belarus 40 metres away from the national frontier of the Republic of Belarus.

ordered a new hearing of the case by the same court of first instance but by a different judge.

2.7 On an unspecified date, the author received a summons to appear in court on 15 September 2003 for a new hearing of his case, which he duly signed. On an unspecified date, the author filed a written challenge, claiming that the judge who was scheduled to hear his case on 15 September 2003 was not impartial. On an unspecified date, the author's challenge was granted and his case was assigned to a new judge. On at least three occasions the author made telephone inquiries with the registry of the Brest Regional Court as to when the hearing with the newly assigned judge would take place. On each occasion he was told "to wait for a summons to appear in court". However, he never received one, and when he called the registry of the Brest Regional Court yet again, he was told that the new hearing of his case had taken place a week earlier, on 15 September 2003, in his absence.

2.8 On that date, a judge of the Moskovsky District Court of Brest found that the author had committed an administrative offence under article 193-6 of the Code on Administrative Offences for moving the car across the customs frontier of the Republic of Belarus in evasion of customs control and ordered him to pay 700,000 roubles as fine, together with the seizure of his car. The decision states that the author failed to appear in court, despite being duly notified, as transpires from his own signature on the summons. This decision is final and executory.

2.9 The author submits that he had arranged for numerous witnesses from the settlement of Borisovka to testify on his behalf, particularly in relation to the fact that no one had any knowledge of where the national frontier between Belarus and Ukraine ran and of any rules about crossing the frontier; however these witnesses, like the author, were never heard at the new trial by the Moskovsky District Court of Brest.⁴

2.10 On an unspecified date, the author filed a request for supervisory review of the decision of 15 September 2003 with the Brest Regional Court. In support of this request, he submitted an affidavit from a deputy of the House of Representatives of the National Assembly from the Kobrin electoral constituency, attesting that there were no demarcation and road signs to identify the national frontier between Belarus and Ukraine at the area in question. The author's request was rejected by the acting Chairperson of the Brest Regional Court on 10 October 2003.

2.11 On an unspecified date, the author filed a complaint with the State Customs Committee of the Republic of Belarus. In the reply of 21 October 2003, the Deputy Chairperson of the State Customs Committee informed the author that under article 202 of the Code on Administrative Offences, consideration of cases concerning administrative and customs offences under article 193-6 of the Code on Administrative Offences was within the court's jurisdiction. For this reason, the State Customs Committee did not have a right to revoke or change the court decision. It could be done only on the basis of an objection lodged by either a prosecutor or a higher court upon the author's request.

2.12 On an unspecified date, the author filed a request for supervisory review of the decision of 15 September 2003 with the Supreme Court. This request was rejected by the Deputy Chairperson of the Supreme Court on 15 December 2003. A repeated request from the author to the Supreme Court for supervisory review of the decision of 15 September 2003 was rejected by the First Deputy Chairperson of the Supreme Court on 18 March 2004.

⁴ There is no information in the case file on whether these witnesses gave evidence at the first hearing by the Moskovsky District Court of Brest on 30 July 2003.

The complaint

3. The author claims a violation by Belarus of his rights under article 14 of the Covenant, because the State party's courts have disregarded (a) that he lives in the frontier area between Belarus and Ukraine; (b) his age and state of health; (c) that he did not do any harm or damage to the state's interests; and (d) that there are no demarcation lines, signs, inscriptions or boundary posts to identify the customs and national frontier between Belarus and Ukraine in the forest in question, which is regularly used by local residents from both sides of the frontier. He further submits that the punishment imposed on him by the decision of the Moskovsky District Court of Brest on 15 September 2003 is too harsh, unjust and inadequate, given that his monthly pension, half of which has to be spent on medicines, is only 103,000 roubles.

The State party's observations on admissibility and merits

4.1 On 26 November 2004, the State party reiterates the facts summarized in paragraphs 2.8 and 2.11 above and adds that under article 11 of the Law "On the national frontier of the Republic of Belarus", movement across the national frontier of persons, means of transport and goods is effectuated in the designated frontier posts. The procedure of movement across the frontier of persons, means of transport and goods includes going through the frontier and customs controls, and, whenever necessary, through the sanitary and quarantine, veterinary and other types of control.

4.2 The State party submits that the author's guilt in having committed an offence is established. While being arrested, he stated that he had crossed the frontier between Belarus and Ukraine through the "Mokrany-Domanovo" customs and national frontier post. On the way back from Ukraine to Belarus, he took a detour road without going through the frontier and customs controls. The author did not deny that he took that detour road in order to "save fuel". The fact that the author had moved the means of transport across the frontier without the customs control is corroborated by the plan of the locality where he was arrested, which bears the author's signature, by the reports of frontiers guards that have arrested the author and by other evidence.

4.3 The State party argues that, since the author had crossed the frontier into Ukraine through the customs and national frontier post, he knew where this post was and must have realized the necessity to register the car on the way back to Belarus. For this reason, the court had correctly concluded that he had committed an offence under article 193-6 of the Code on Administrative Offences. The primary and additional penalties were imposed in full compliance with law. The court took extenuating circumstances into account before imposing a minimal fine. Given, however, the value of the car (6,177,000 roubles), which is a direct object of the offence, it can not be qualified as a minor one.

Author's comments on the State party's observations

5. On 24 December 2004, the author reiterates his claim that the decisions of the State party's courts are too harsh and unjust. In addition to the earlier advanced arguments, which according to the author were disregarded by the courts, he submits (a) that as a resident of the frontier area between Belarus and Ukraine, he should be entitled to a simplified frontier crossing procedure; (b) an affidavit from 35 inhabitants of the settlement of Borisovka, attesting that no one knew where exactly was the national frontier between Belarus and Ukraine, and that they were unaware that one could be fined with 50 to 500 minimal salaries and the seizure of the means of transport for crossing the border; (c) the State party's frontier guards, instead of hiding in the forest and ambushing his car, should have informed him that he was about to cross the national frontier and instructed him to go through the customs post.

Supplementary submissions by the State party

6.1 On 26 July 2005, the State party adds that the sanction established under article 193–6 of the Code on Administrative Offences for this offence consists of a fine of between 50 and 300 minimal salaries and a **mandatory seizure of goods and means of transport which are the direct objects of the offence in question** (emphasis added by the State party). Under article 191 of the Customs Code, all goods and means of transport which are moved across the customs frontier of the Republic of Belarus, are subject to the customs control. In his communication to the Committee, the author claimed that he lived in the frontier area, where the national frontier between Belarus and Ukraine was not marked in any way, and that he was unaware about the consequences of crossing it. He argued that the State party's courts did not take into account his age, state of health and the purpose of his visit to Ukraine.

6.2 The State party argues that, when the author's case was considered by the Kobrin District Court, he admitted to have intentionally crossed the national frontier of the Republic of Belarus unlawfully. The legal qualification of the author's actions under article 193–6 of the Code on Administrative Offences was correct, and the primary penalty (a minimal fine) was imposed taking into account the extenuating circumstances referred to by the author. The imposition of the additional penalty, that is the seizure of the means of transport, is mandatory by virtue of article 193–6 of the Code on Administrative Offences. The State party concluded that the author's argument of being ignorant of law does not exempt him from the responsibility.

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 notes that the same matter is not being examined under any other international procedure, in line with the requirements of article 5, paragraph 2(a), of the Optional Protocol. 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 claim that his rights under article 14 of the Covenant were violated, the Committee recalls that the right to a fair and public hearing by a competent, independent and impartial tribunal is guaranteed in cases regarding the determination of criminal charges against individuals or of their rights and obligations in a suit at law. It recalls⁵ that criminal charges relate in principle to acts declared to be punishable under domestic criminal law. The notion, however, may also extend to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity.⁶ In this respect, the Committee notes that the concept of a "criminal charge" bears an autonomous meaning, independent of the categorisations employed by the national legal system of the States parties, and has to be understood within the meaning of the Covenant. Leaving State parties the discretion to transfer the decision over a criminal offence, including imposition of

⁵ See Human Rights Committee, general comment No. 32 (2007), *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40 (A/63/40)*, vol. I, annex VI, paragraph 15.

⁶ Communication No. 1015/2001, *Perterer v. Austria*, Views adopted on 20 July 2004, para. 9.2.

punishment, to administrative authorities and, thus, to avoid the application of the fair trial guarantees under article 14, might lead to results incompatible with the object and purpose of the Covenant.

7.4 The issue before the Committee is, therefore, whether article 14 of the Covenant is applicable in the present communication, that is, whether the sanctions in the author's case related to the unlawful crossing of the national frontier and to the movement of means of transport across the customs frontier concerned "any criminal charge" within the meaning of the Covenant. As to the conditions of "purpose and character" of the sanctions, the Committee notes that, although administrative according to the State party's law, the sanctions imposed on the author had the aims of repressing, through penalties, offences alleged against him and of serving as a deterrent for the others, the objectives analogous to the general goal of the criminal law. It further notes that the rules of law infringed by the author are directed, not towards a given group possessing a special status — in the manner, for example, of disciplinary law, — but towards everyone in his or her capacity as individuals crossing the national frontier of Belarus; they prescribe conduct of a certain kind and make the resultant requirement subject to a sanction that is punitive. Therefore, the general character of the rules and the purpose of the penalty, being both deterrent and punitive, suffice to show that the offences in question were, in terms of article 14 of the Covenant, criminal in nature.

7.5 Consequently, the Committee declares the communication admissible *ratione materiae*, insofar as the proceedings related to the movement of means of transport across the customs frontier, fall within the ambit of "the determination" of a "criminal charge" under article 14, paragraph 1, of the Covenant. It therefore follows that the provisions of article 14, paragraphs 2 to 7, also apply in the present communication.

7.6 The Committee notes that, although the author refers to article 14 of the Covenant only generally, without invoking a violation by the State party of any specific fair trial guarantees, his allegations and the facts as submitted to the Committee appear to raise issues under article 14, paragraphs 3(b), (d) and (e), of the Covenant, with regard to the proceedings related to the movement of means of transport across the customs frontier. The Committee considers that the author has sufficiently substantiated these claims, for purposes of admissibility, and declares them admissible.

Consideration of the merits

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

8.2 The Committee must examine whether the proceedings on the basis of which the Moskovsky District Court of Brest found, on 15 September 2003, that the author had committed an administrative offence under article 193–6 of the Code on Administrative Offences for moving the car across the customs frontier of the Republic of Belarus in evasion of customs control and ordered him to pay 700,000 roubles as fine, together with the seizure of the car, disclose any breach of rights protected under the Covenant. Under article 14, paragraph 3, everyone is entitled to be tried in his presence and to defend himself in person or through legal assistance. This provision and other requirements of due process enshrined in article 14 cannot be construed as invariably rendering proceedings *in absentia* impermissible, irrespective of the reasons for the accused person's absence.⁷ The Committee recalls its jurisprudence, according to which the effective exercise of the rights

⁷ Communication No. 16/1977, *Mbenge v. Zaire*, Views adopted on 25 March 1983, para. 14.1.

under article 14 presupposes that the necessary steps should be taken to inform the accused of the charges against him and notify him of the proceedings.⁸ Judgment *in absentia* requires that, notwithstanding the absence of the accused, all due notifications have been made to inform him or the family of the date and place of his trial and to request his attendance.

8.3 The Committee acknowledges that there must be certain limits to the efforts that can reasonably be expected of the competent authorities with a view to establishing contact with the accused. In the present communication, the Committee notes that, according to the decision of the Moskovsky District Court of Brest of 15 September 2003, the author failed to appear in court, despite being duly notified, as transpired from his own signature on the summons. It also notes the author's statement that he had received and signed the summons to appear in court for a hearing of his case. However, according to the author, the judge initially assigned to the case was subsequently replaced, and the author was not informed of the date of the hearing of his case by the newly appointed judge, despite his regular contact with the registry of the Brest Regional Court (see, paragraph 2.7). These allegations have not been challenged by the State party. The Committee further notes that, as a result of not being informed of the date of the hearing, neither the author himself nor any witnesses on his behalf, were ever heard at the 15 September 2003 trial by the Moskovsky District Court of Brest. In these circumstances, the Committee concludes that the State party failed to make sufficient efforts with a view to informing the author about the impending court proceedings, thus preventing him from preparing his defence or otherwise participating in the proceedings. In the view of the Committee, therefore, the State party has violated the author's rights under article 14, paragraphs 3 (b), (d) and (e), 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 violations of the author's rights under article 14, paragraph 3(b), (d) and (e), 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 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.]

⁸ General comment No. 32 (note 5 above), para. 31.

**M. Communication No. 1334/2004, *Mavlonov and Sa'di v. Uzbekistan*
(Views adopted on 19 March 2009, Ninety-fifth session)***

<i>Submitted by:</i>	Mr. Rakhim Mavlonov and Mr. Shansiy Sa'di (represented by counsel, Mr. Morris Lipson and Mr. Peter Noorlander)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Uzbekistan
<i>Date of communication:</i>	18 November 2004 (initial submission)
<i>Subject matter:</i>	Denial of re-registration of a newspaper published in a minority language by the State party's authorities
<i>Substantive issues:</i>	Right to freedom of expression; right to impart and receive information in print, restrictions necessary for the protection of national security, restrictions necessary for the protection of public order; right to enjoy minority culture
<i>Procedural issue:</i>	None
<i>Articles of the Covenant:</i>	19; 27
<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 March 2009,

Having concluded its consideration of communication No. 1334/2004, submitted to the Human Rights Committee on behalf of Mr. Rakhim Mavlonov and Mr. Shansiy Sa'di 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, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Lazhari Bouzid, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioi, Mr. Krister Thelin and Ms. Ruth Wedgwood.

An individual opinion co-signed by Committee members Sir Nigel Rodley and Mr. Rafael Rivas Posada has been appended to the present Views.

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

1. The authors of the communication are Mr. Rakhim Mavlonov and Mr. Shansiy Sa'di, Uzbek citizens of Tajik origin, dates of birth unspecified, residing in the Samarkand region of Uzbekistan at the time of submission of the communication.¹ They claim to be victims of violations by Uzbekistan² of their rights under articles 19 and 27, read together with article 2, of the International Covenant on Civil and Political Rights. They are represented by counsel, Mr. Morris Lipson and Mr. Peter Noorlander, lawyers employed by the non-governmental organization "Article 19".

Factual background

The case of Mr. Mavlonov

2.1 Mr. Mavlonov is the editor of the newspaper *Oina* and Mr. Sa'di is a regular reader of the same newspaper. *Oina* was published almost exclusively in the Tajik language, principally for a Tajik audience. It was the only non-governmental Tajik-language publication in the Samarkand region of Uzbekistan. Issues of *Oina* were published bi-weekly, and were distributed to dozens of schools that use Tajik as the language of instruction. Each such school received between 25 and 100 copies. In addition to the schools, *Oina* had approximately 3,000 subscribers, and approximately 1,000 copies of the newspapers were sold by street vendors.

2.2 Consistent with the goals of its statutes, *Oina* published articles containing educational and other materials for Tajik-language students and young persons, to assist in their education, to promote a spirit of tolerance and a respect for human values, and to assist in their intellectual and cultural development. In addition to publishing reports on events and matters of cultural interest to this readership (including interviews with prominent Tajik personalities), the newspaper published samples of students' work. It also detailed particular difficulties facing the continued provision of education to Tajik youth in their own language, including shortages of Tajik-language textbooks, low wages for teachers and the forced opening of classes using Uzbek as the language of instruction in some schools where Tajik had previously been the only language of instruction.

2.3 *Oina* was initially registered on 8 November 1999. Its founders were the private firm "Kamol", the Samarkand City Bogishamal District Administration and Mr. Mavlonov, as an editor. In the spring of 2000, the private firm "Kamol" and the Samarkand City Bogishamal District Administration opted out as *Oina*'s founders. In accordance with the Uzbek Law "On Mass Media" of 26 December 1997³ and applicable regulations, it was required that the newspaper re-register. On an unspecified date, *Oina* applied for re-registration, with a public entity, the "Kamolot" Foundation's Samarkand City branch, and "Simo", a private firm formed by Mr. Mavlonov, as the newspaper's two founders. The

¹ On 15 November 2006, the counsel informed the Committee that in the period since the communication was submitted Mr. Mavlonov has had to flee Uzbekistan.

² The Optional Protocol entered into force for the State party on 28 December 1995.

³ The relevant part of article 13 of the Law "On Mass Media" reads: "The application for registration of the mass media organization should specify its: 1. Founder(s); 2. Name, working language(s), and legal address; 3. Aims and tasks; 4. Supposed readership (viewership, audience); 5. Supposed periodicity of publication or broadcast, volume of the publication, sources of funding, material and technical supply. If the said data change, the mass media is obliged to re-register according to existing procedures. If these changes are not essential, the registration entity could make a decision that it is not necessary to re-register this mass media organization."

application was approved by the Press Department of the Samarkand Regional Administration, the entity responsible for the registration of applications in the Samarkand region (hereinafter, "Press Department"), and *Oina* was re-registered on 17 August 2000. It resumed publication shortly thereafter. Its circulation was approximately the same as before the re-registration, and the same schools continued to subscribe to and to receive copies of the newspaper.

2.4 The last issue of *Oina* was published on 7 March 2001. On 23 March 2001, the head of the "Kamolot" Foundation wrote a letter to the Press Department informing it that "Kamolot" was opting out. According to the Press Department, this opt-out triggered a duty on *Oina* to apply for re-registration. Accordingly, in a decision dated 28 March 2001, and apparently pursuant to its authority under article 16 of the Law "On Mass Media" and applicable regulations, the Press Department (a) cancelled *Oina*'s license to publish, (b) directed an order to all printing shops in the region prohibiting them from printing copies of *Oina*, and (c) noted that *Oina* could apply for re-registration and that the Press Department would consider any such submission "in strict compliance with law".

2.5 On 29 March 2001, Mr. Mavlonov and the private firm "Simo" submitted a re-registration application.⁴ According to Mr. Mavlonov, this application was in conformity with Uzbek law.⁵

2.6 On an unspecified date, Mr. Mavlonov received a document by post entitled "Decision of the meeting of the mass media organs registration commission under the Samarkand regional Administration Press Department" dated 27 April 2001. The commission resolved as follows:

"Due to the fact that the newspaper *Oina* grossly violated article 6 of the Law 'On Mass Media' [...]; due to the numerous faults committed as becomes clear from the materials presented, and pursuant to the Law 'On Mass Media' and mass media organs registration Regulations and Resolution of the Cabinet of Ministers of 23 May 2000 devoted to the improvement of mass media activity towards enlightenment and national ideology building, it is unsuitable to re-register the newspaper *Oina*."

The newspaper was considered to have published articles inciting inter-ethnic hostility, as well as to have spread the view that Samarkand was a "city of Tajiks", which allegedly constituted a violation of laws prohibiting calls for changes to the territorial integrity of the country. The decision also stated that the newspaper had published articles suggesting that local officials were "far from enlightened", which was considered to be insulting.

2.7 No specific published articles were referred to in the decision; however, Mr. Mavlonov considers that the only two articles upon which the commission might have based the above comments are a Tajik writer's interview published in *Oina*'s last edition, in which he referred to Samarkand as a "pearl of Tajik culture", and was critical of the low salaries of Tajik teachers; another may have been an open letter published on 23 November 2000, addressed to the mayor of Samarkand, which sought an explanation of why insufficient resources had been allocated to fund the purchase of Tajik schoolbooks. It also questioned whether closing down Tajik classes was consistent with government policy of encouraging equality and the friendly co-existence of all nationalities. Mr. Mavlonov

⁴ Under paragraph 1.3 of "Oina" statutes, "the newspaper is not a legal person and operates using its founder's bank account and official seal/stamp".

⁵ Reference is made to article 13 of the Law "On Mass Media" and to paragraph 4 of a Resolution of the Cabinet of Ministers No. 160 "On the procedures of Registration of the Mass Media in the Republic of Uzbekistan" of 15 April 1998 (hereinafter, "Resolution No. 160") and its annex.

reviewed all publications prior to their release for compliance with the law.⁶ Additionally, each of *Oina*'s issues had been subjected to prior censorship by the representative of the Office of the Chief of State Press Committee's State Secrets Inspectorate. The same Office's representative, who had previously approved the publications in question, was in fact one of the members of the commission under the Samarkand regional Administration Press Department that made the decision not to re-register *Oina*.

2.8 Mr. Mavlonov filed suit on behalf of *Oina* to challenge the Press Department decision in the Temiryul Inter-district Civil Court. On 17 September 2001, the court dismissed the case due to lack of jurisdiction and instructed Mr. Mavlonov to bring his suit to the economic court. Mr. Mavlonov proceeded to the Samarkand Regional Economic Court on behalf of *Oina*, which was replaced by "Simo" during the hearing. In court, he challenged the decision of the Samarkand Regional Administration Press Department of 28 March 2001. On 20 November 2001, this court held that *Oina* was in fact required to re-register, as this requirement was triggered by a founder's opt-out. However, the court ordered the Press Department to register *Oina* within one month, as well as reimbursing it for court fees and related expenses. The Press Department appealed.

2.9 On 20 December 2001 a three-judge appellate panel of the Samarkand Regional Economic Court affirmed that in conformity with article 48 of the Economic Procedure Code, in the case of a change in a party to the proceedings, an examination of the case should start anew. On this basis, the court repealed the decision requiring the re-registration of *Oina*. "Simo" appealed to the Higher Economic Court for cassation review.

2.10 The Higher Economic Court upheld the decision of the regional court, but on a different basis. It held, in particular, that the economic court system did not have subject-matter jurisdiction because under article 11 of the Law "On Mass Media", registration decisions are to be appealed only to the civil courts by the founders or by the editorial board.

2.11 Mr. Mavlonov returned to the Temiryul Inter-district Civil Court where he had begun, but this time as plaintiff himself. He complained, inter alia, about the arbitrary decisions taken by the Head of the Press Department, who required Mr. Mavlonov to find an additional founder for *Oina* after the first opt-out, despite the fact that under paragraph 4 of the annex to Resolution No. 160, a mass media entity could be registered even with just one founder. A decision was rendered on 27 May 2002. The inter-district court noted a new allegation by the Press Department that "Simo"'s financial situation was insecure; it also prominently noted remarks by the Press Department that Mr. Mavlonov was "not a qualified journalist by education". The court held, firstly, that under the authority of paragraph 9 of Resolution No. 160, the founder's opt-out did indeed trigger a new obligation on *Oina* to re-register. Secondly, it upheld the Press Department's denial of the re-registration application. In so doing, it did not advert to any alleged violations of article 6 of the Law "On Mass Media". The basis for its holding, instead, was that there were shortcomings in the re-registration application: specifically, that the date of the newspaper's statute did not correspond with the date of its adoption; four pages of "Simo"'s statutes were missing; and the surname of "Simo"'s director was inaccurate.

2.12 Mr. Mavlonov appealed to the Samarkand Regional Civil Court, which delivered its judgment on 28 June 2002, affirming the decision of the inter-district court. After repeating the technical requirements for registration as set forth in Resolution No. 160 at paragraph 4, the court wrote: "Based on these Regulation requirements and the law "On Mass Media",

⁶ Newspapers cleared for publication were given an official stamp; those without stamps were prohibited from being published.

the newspaper's activity was not compliant with its aims and was contrary to the law, which was correctly mentioned' by the Press Department in its decision. At another point, the court wrote that it "also takes into consideration the financial situation of ['Simo']".

2.13 Before proceeding with further appeals, on 20 August 2002, Mr. Mavlonov submitted another application for *Oina's* re-registration to the Press Department with "Simo" as founder, which was rejected on 20 September 2002. A letter from the Press Department stated that the grounds for refusal were the poor financial situation of the paper, as well as the fact that no changes had been made to the aims and objectives contained in the newspaper's statutes. However, these had not hitherto been the subject of adverse comments, either from the Press Department or the courts. Earlier, they had only alleged that *Oina's* aims and objectives were not consistent with its statutes.

2.14 Mr. Mavlonov then appealed for supervisory review to the President of the Samarkand Regional Court, and the Supreme Court, which dismissed his appeals on 5 November 2002 and 2 May 2003, respectively; further attempts to seek review in the Supreme Court were dismissed, most recently on 23 September 2004. Mr. Mavlonov concluded that further requests to the Supreme Court would be futile, and that, therefore, all domestic remedies had been exhausted.

The case of Mr. Sa'di

3.1 The other author, Mr. Sa'di, a member of the country's Tajik ethnic minority and a regular *Oina* reader, does not presently have, nor has he ever had, any practical possibility of challenging the denial of *Oina's* re-registration application in the courts. He could not have joined with *Oina* in the original suit, because the civil court system denied jurisdiction of the case and sent it to the economic courts, where he, as a reader, had no standing to sue. By the time the case was sent back to the civil court system, eight months had passed. There had been no coverage of the litigation by the media, and so Mr. Sa'di had no way of knowing that a civil case was being initiated. Consequently, he had no reasonable opportunity to participate in the civil litigation at that point. Once he had missed the opportunity to participate at the trial level, he was barred from participating in any of the appellate proceedings. Nor could Mr. Sa'di have litigated the issues thereafter on his own behalf, having been unable to join *Oina* in the original suit, because of the combination of articles 60 and 100 of the Civil Procedure Code, whose effect was to make the decision of the courts regarding the issue of *Oina's* re-registration final as to Mr. Sa'di. The only other hypothetical possibility for him would have been to seek a finding that the registration regime itself was unconstitutional. However, only the Constitutional Court has the jurisdiction to decide regarding the constitutionality of laws; and Mr. Sa'di, as an ordinary citizen, has no standing before this court.

3.2 Mr. Sa'di submits that it would have been perfectly futile for him to have attempted to initiate proceedings in the local courts to vindicate his rights under articles 19 and 27 of the Covenant. As the Committee has explained, it is a 'well established principle of international law and of the Committee's jurisprudence' that one is not required to 'resort to appeals that objectively have no prospect of success'.⁷ Moreover, it does not matter whether the unavailability of a remedy is de jure or de facto; in either case, a victim is excused from the futile exercise of pursuing it.⁸

⁷ See, for example, communications Nos. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989, paragraph 12.3.

⁸ See, for example, communication No. 84/1981, *Dermitt Barbato v. Uruguay*, Views adopted on 21 October 1982, paragraph 9.4.

The complaint

4.1 Mr. Mavlonov claims that the refusal of the Press Department of the Samarkand region to re-register the Oina newspaper (of which he was the editor) amounts to a violation by the State party of his right to freedom of expression (in particular his right to impart information in print), as protected by article 19 of the Covenant. He also claims that he was prevented from enjoying his own culture, in community with other members of the Tajik minority in Uzbekistan, in violation of his rights under article 27 of the Covenant. He finally claims to be a victim of violation of article 2, in conjunction with the articles 19 and 27 in that the State party failed to take measures to “respect and ensure” the rights recognized in the Covenant.

4.2 Mr. Sa’di claims that the refusal of the Press Department of the Samarkand region to re-register the Oina newspaper (that he was buying and reading on a regular basis) amounts to a violation by the State party of his right to freedom of expression (in particular his right to receive information and ideas in print), as protected by article 19 of the Covenant. He further claims to be a victim of a violation of his rights under article 27, as he was prevented from enjoying his own culture, in community with other members of the Tajik minority in Uzbekistan. He finally claims to be a victim of violation of article 2, in conjunction with the articles 19 and 27 in that the State party failed to take measures to “respect and ensure” the rights recognized in the Covenant.

4.3 Both authors also claim that the State party’s registration regime for print media is per se in violation of article 19, paragraph 3, and as such constitutes a restriction of the freedom of expression.

State party’s observations on admissibility and merits

5.1 On 10 December 2004, 27 March 2006, and 2 June 2006, the State party was requested to submit its observations on the admissibility and merits of the communication. On 30 August 2006, the State party recalled the facts of the case and added that article 13 of the Law “On Mass Media”, on the basis of which “Oina’s” license to publish was cancelled by the Press Department on 28 March 2001, stipulated that the application for mass media registration should indicate its (a) founder(s); (b) title and working language(s) and legal address; (c) aims and tasks; (d) targeted readership (audience); and (e) planned periodicity of publication or broadcast, number of copies, as well as sources of funding and material and technical supplies. A change in any of the above data requires a re-registration.

5.2 The State party also refers to paragraph 5 of the fourth Ruling of the Plenum of the Supreme Court of Uzbekistan “On Certain Issues of Conformity in the Consideration of Civil Cases in Court” of 7 January 1994, according to which a registration of mass media or refusal to do so, as well as claims related to the discontinuation of their activities, are within the competency of the courts of general jurisdiction (see paragraph 2.10 above). The State party concludes that the decisions of the domestic courts are substantiated and in accordance with the law.

Authors’ comments on the State party’s observations

6.1 On 15 November 2006, the authors added that the delay in the submission of the State party’s observations, in contravention of the Committee’s rules of procedure, has unreasonably continued the harm to their right to freedom of expression under article 19 of the Covenant: respectively, Mr. Mavlonov’s ability to publish *Oina*, and Mr. Sa’di’s right to receive information and ideas in print. They further submit that this delay also continued the harm to their right under article 27 to enjoy their own culture, read together with article 2, which requires the State party to take proactive measures to ‘respect and ensure’ the

rights recognized in the Covenant. They state that one of the authors, Mr. Mavlonov, has had to flee Uzbekistan since the communication was submitted to the Committee.

6.2 The authors further submit that the State party failed to address any of the specific claims made in their initial submission. While the State party claimed that “the decisions of the domestic courts are substantiated and according to the law”, the authors argue that the substance of their communication before the Committee is not the compliance of the actions taken against them by the State party’s authorities in accordance with domestic law but rather the non compliance of the latter with the law of the Covenant. The State party has confused the notions of its domestic law with the autonomous notion of “law” in article 19, paragraph 3, of the Covenant. The restriction was not “provided by law” as understood under article 19, paragraph 3, and was not “necessary” for the protection of a legitimate aim.

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, of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement. It also notes that the State party did not contest that domestic remedies in the present communication have been exhausted with regard to any of the authors.

7.3 The Committee considers that the authors’ claims have been sufficiently substantiated for purposes of admissibility, 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 under article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee notes that in its submission on the authors’ allegations, the State party has not provided any specific observation on the claims with regard to articles 19 and 27, but it has merely stated that the decisions of the domestic courts are substantiated and in accordance with the law. In the absence of any other pertinent information from the State party, due weight must be given to the authors’ allegations, to the extent that they have been properly substantiated.

8.3 With regard to article 19, the authors claimed in great detail that the refusal to re-register *Oina* by the State party’s authorities is in violation of article 19 of the Covenant in its failure to be “provided by law” and to pursue any legitimate aim, as understood under article 19, paragraph 3. In the Committee’s view, issues related to the registration and/or re-registration of mass media fall within the scope of the right to freedom of expression 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 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 the exercise of must meet a strict test of justification.⁹

8.4 In the present case, the Committee is of the opinion that the application of the procedure of registration and re-registration of *Oina* did not allow Mr. Mavlonov, as the editor, and Mr. Sa'di, as a reader, to practice their freedom of expression, as defined in article 19, paragraph 2. The Committee notes that the State party has not made any attempt to address the authors' specific claims, including Mr. Mavlonov's reference to the decision of the Commission which suggests that the content of the *Oina* is the reason for the denial of the re-registration (see paragraph 2.6 above). 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 authors' case, with any of the criteria listed in article 19, paragraph 3, of the Covenant. The Committee therefore finds that the right to freedom of expression under article 19 of the Covenant, respectively, Mr. Mavlonov's ability to publish *Oina* and to impart information, and Mr. Sa'di's right to receive information and ideas in print, has been violated. The Committee notes that the public has a right to receive information as a corollary of the specific function of a journalist and/or editor to impart information. It considers that Mr. Sa'di's right to receive information as an *Oina* reader was violated by its non-registration.

8.5 As to the authors' claim regarding the mass media registration regime as such constituting an independent violation of article 19, paragraph 3, the Committee concludes that it is not necessary to decide on this issue, in light of the finding of a violation of this provision in the authors' case, and especially with regard to the limited information available before it.

8.6 As for the authors' claim under article 27, the Committee explained in its general comment No. 23 (1994) on this provision, that this article "establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights which ... [individuals] are already entitled to enjoy under the Covenant."¹⁰ It specifically noted that the "protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned."¹¹ Finally, the Committee has emphasized that article 27 requires State parties to employ "[p]ositive measures of protection [...] against the acts of the State party itself, whether through its legislative, judicial or administrative authorities [...]".¹²

8.7 In this respect, the Committee has noted the authors' uncontested claim that *Oina* published articles containing educational and other materials for Tajik students and young persons on events and matters of cultural interest to this readership, as well as reported on the particular difficulties facing the continued provision of education to Tajik youth in their own language, including shortages in Tajik-language textbooks, low wages for teachers and the forced opening of Uzbek-language classes in some Tajik schools. The Committee considers that in the context of article 27, education in a minority language is a fundamental part of minority culture. Finally, the Committee refers to its jurisprudence, where it has made clear that the question of whether article 27 has been violated is whether the

⁹ See, inter alia, communications No. 574/1994, *Kim v. the Republic of Korea*, Views adopted on 3 November 1998; and No. 628/1995, *Park v. the Republic of Korea*, Views adopted on 20 October 1998.

¹⁰ *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 40 (A/49/40)*, vol. I, annex V, para. 1.

¹¹ *Ibid.*, para. 9.

¹² *Ibid.*, para. 6.1.

challenged restriction has an “impact [...] [so] substantial that it does effectively deny to the [complainants] the right to enjoy their cultural rights [...]”.¹³ In the circumstances of the present case, the Committee is of the opinion that the use of a minority language press as means of airing issues of significance and importance to the Tajik minority community in Uzbekistan, by both editors and readers, is an essential element of the Tajik minority’s culture.¹⁴ Taking into account the denial of the right to enjoy minority Tajik culture, the Committee finds a violation of article 27, read together with article 2.

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 authors’ rights under article 19 and article 27, read together with article 2, of the International Covenant on Civil and Political Rights.

10. Under article 2, paragraph 3(a), of the Covenant, the State party is under obligation to provide Mr. Mavlonov and Mr. Sa’di with an effective remedy, including the reconsideration of “Oina’s” application for re-registration, and compensation for Mr. Mavlonov. The State party is also under obligation to take measures 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 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.]

¹³ See communication No. 511/1992, *Länsman et al. v. Finland*, Views adopted on 26 October 1994, paragraph 9.5.

¹⁴ *Ibid.*, paras. 9.2 and 9.3.

Appendix

Separate opinion of Committee members Sir Nigel Rodley and Mr. Rafael Rivas Posada

We do not agree that Mr. Sa'di has been the victim of a self standing violation of article 19(2). On the other hand, we do consider he has been the victim of violation of article 27, read together with article 19.

We find the Committee's literalist reading of the right to receiving information and ideas is unconvincing. The Committee's position would require it to treat every potential recipient of any information or ideas that have been improperly suffered under article 19 as a victim in the same way as the person having been prevented from expressing or imparting the information or ideas. Thus, it could find itself dealing with communication from every reader or viewer or listener of a medium of mass communication that has been improperly closed down or whose content has been improperly suppressed. This is not a "floodgates" argument. Rather it is evident that its literalist approach may simply not be the most plausible interpretation of article 19, paragraph 2. For us, this aspect of Mr. Sa'di's complaint smacks of *actio popularis*.

Moreover, it was simply unnecessary for the Committee to take this far-reaching position in the instant case. There is no disagreement that Mr. Sa'di was a victim of a violation of article 27, paragraph 2. Moreover, we believe that Mr. Sa'di is a victim of a violation of article 19 read together with article 27. This is because of the special nature of article 27 which envisages the enjoyment of rights by persons as members of minority communities. This should have been a sufficient finding for the Committee in this case.

(Signed) Sir Nigel **Rodley**

(Signed) Mr. Rafael **Rivas Posada**

[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.]

**N. Communication No. 1364/2005, *Carpintero Uclés v Spain*
(Views adopted on 22 July 2009, Ninety-sixth session)***

<i>Submitted by:</i>	Antonio Carpintero Uclés (represented by counsel, Francisco Chamorro Bernal)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	4 June 2003 (initial submission)
<i>Decision on admissibility:</i>	1 July 2008
<i>Subject matter:</i>	Evaluation of evidence and scope of the review of a criminal case on appeal by Spanish courts
<i>Procedural issues:</i>	Exhaustion of domestic remedies; insufficient substantiation of the alleged violations
<i>Substantive issue:</i>	Right to have a conviction and sentence submitted to a higher court in accordance with the law
<i>Article of the Covenant:</i>	14, paragraph 5
<i>Article of the Optional Protocol:</i>	5, paragraph 2 (b)

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

Meeting on 22 July 2009,

Having concluded its consideration of communication No. 1364/2005, submitted on behalf of Mr. Antonio Carpintero Uclés 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 4 June 2003 is Antonio Carpintero Uclés, a Spanish citizen born in 1957, who is currently serving a sentence. He claims to be a victim

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Mohammed Ayat, Mr. Prafullachandra Natwarlal Bhagwati, 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. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

The text on an individual opinion signed by Committee member Mr. Krister Thelin is appended to the present document.

of a violation by Spain of article 14, paragraph 5, of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The author is represented by counsel (Francisco Chamorro Bernal).

1.2 On 12 May 2005, the Special Rapporteur on New Communications and Interim Measures, acting on behalf of the Committee, agreed to the State party's request to have the admissibility of the communication considered separately from the merits.

Factual background

2.1 In 1990, the author became acquainted with Ms. R.A., with whom he took up residence one year later. Ms. R.A. had two children from previous unions, and in 1992 she gave birth to the author's son. The couple separated sometime afterward and reconciled in 1996. However, the author's relationship with Ms. R.A. again deteriorated, and in February 2000 Ms. R.A. accused him of having forcibly compelled her to have sexual relations with him since 1997. The author was also accused of forcing Ms. R.A.'s daughter to engage in sex with him.

2.2 The author was detained and assigned a court-appointed lawyer, who submitted no evidence in the author's defence. Subsequently, a lawyer appointed by the author sought to submit evidence, but that evidence was rejected on the grounds that it was time-barred. On 31 May 2001, the Barcelona Provincial High Court sentenced the author to 14 and 10 years' imprisonment for two offences of continued sexual assault. The verdict was based on the testimony of Ms. R.A. and her children.

2.3 The author lodged an appeal in cassation with the Supreme Court, in which he alleged, inter alia, a violation of article 14, paragraph 5, of the Covenant. He also challenged the weight given to the testimony of the alleged victims and the refusal to call an expert witness. In a decision issued on 6 March 2002, the Supreme Court rejected the appeal. The Supreme Court held that the refusal to allow expert testimony was correct since, in addition to the fact that the request was time-barred, the results of the expert testimony would have had no bearing on the final outcome. As to the fact that the victims' testimony was considered to constitute evidence, the Court maintained that the testimony constituted sufficient evidence and that its content was sufficiently incriminating to set aside the presumption of innocence in respect of the author. Lastly, with regard to the alleged violation of article 14, paragraph 5, of the Covenant, the Supreme Court stated that the Spanish remedy of criminal cassation met the requirements of that article, which did not require a second hearing as such but merely stipulated that a person who had received a criminal sentence should be allowed to appeal the sentence to a higher court, in accordance with the domestic legislation of the country in question. The Supreme Court notes, however, that in cassation proceedings it cannot reassess evidence that has been evaluated and argued by the trial court. When a violation of presumption of innocence is alleged, the Supreme Court conducts a three-way review¹ of the evidence submitted at trial in order to determine that, as the lower court found, evidence does exist and that it is lawful and sufficient. It is this three-way review that allows the Supreme Court to assert that the remedy of cassation meets the requirements of article 14, paragraph 5, of the Covenant.

¹ According to the decision of the Criminal Chamber of the Supreme Court, this "three-way review" of evidence submitted in first instance involves: (a) ascertaining that there is inculpatory evidence against the accused (existence of evidence); (b) ascertaining that the evidence has been obtained and introduced into the proceedings in accordance with constitutional and procedural requirements (lawfulness of evidence); and (c) ascertaining that the evidence can reasonably be regarded as sufficient to warrant a conviction (sufficiency of evidence).

2.4 The author filed an application for *amparo* with the Constitutional Court on 13 June 2002. The application for *amparo* was denied because it was submitted after the deadline of 20 working days.

The complaint

3.1 The author alleges that his right to have his conviction and sentence reviewed by a higher court was violated. In his view, the Supreme Court denies any violation of article 14, paragraph 5, of the Covenant because it considers that the Spanish cassation procedure meets the requirements of the Covenant. The Court admitted that it could not re-evaluate evidence that had been assessed and argued by the court of first instance. As to the author's challenge regarding the weight given to the alleged victims' testimony, the Court stated that the credibility of testimony given at trial, having been assessed directly by the trial courts, could not be reviewed in the context of an appeal in cassation.

3.2 The author alleges that even though the Constitutional Court found his application for *amparo* time-barred, the remedy was not an effective one, given that the Constitutional Court had stated, in the wake of the Committee's Views in the *Gómez Vázquez* case,² that the Spanish remedy of cassation met the requirements of article 14, paragraph 5, of the Covenant.

State party's observations on the admissibility of the communication

4.1 In a note dated 20 April 2005, the State party submitted its observations on the admissibility of the communication. The State party cites the author's failure to exhaust domestic remedies, his application for *amparo* having been rejected as time-barred. It points out that the State party cannot be made to bear the adverse consequences of the author's failure to meet procedural requirements or responsibilities.

4.2 The State party also argues that the submission of an application for *amparo* to the Constitutional Court is now fully effective in cases such as that covered by the author's communication, since the case arose after the decision in *Gómez Vázquez* and the Constitutional Court is familiar with the arguments in that case. Consequently, it disagrees that there are any grounds for exemption from the obligation to exhaust domestic remedies.

4.3 Moreover, the communication is inadmissible because it is not sufficiently substantiated, given that the author has exercised his right to review of his sentence, since the Provincial High Court's decision was reviewed by the Supreme Court and could have been reviewed by the Constitutional Court. Spain has a fully functioning system of effective review of convictions, as the European Court of Human Rights has recognized.³ In the State party's view, the author's contention that there was no review of his sentence is unfounded because it is inconsistent with the facts and constitutes an abuse of the right to submit communications to the Committee.

4.4 The State party notes that the Committee's task is not to formulate a general opinion of the State party's judicial system but to make observations concerning the specific case covered by the communication. In this connection, it refers to the Supreme Court's decision and the three-way review it conducted to determine that there was evidence and that it was legal and sufficient.

² Communication No. 701/1996, *Gómez Vázquez v. Spain*, Views adopted on 20 July 2000.

³ European Court of Human Rights, judgement of 30 November 2004 in respect of complaints Nos. 74182, 74186 and 74191 of 2001.

Author's comments

5.1 On 7 July 2005, the author replied to the State party's observations. The author argues that the Constitutional Court's ruling that his application for *amparo* was time-barred was inconsistent with its own doctrine, given that criminal convictions must be notified in duplicate, once to the convicted person's counsel and once to the convicted person.⁴ However, the decision was notified not to the author, who was in prison, but to his court-appointed counsel, who did not inform him of it. The author did not learn of the decision until 22 May 2002, through new counsel. Accordingly, the Constitutional Court's interpretation is unduly formalistic and does not respect the right to free and effective legal assistance.

5.2 Furthermore, the remedy of *amparo* was not effective because at the time the author submitted his application there had been no change in the Constitutional Court's doctrine to the effect that the Spanish system of remedies in connection with criminal sentences was consistent with article 14, paragraph 5, of the Covenant. The author maintains that, by definition, the Constitutional Court is limited to stating that the sentence in question does not infringe constitutional rights, but that does not constitute a full review of a conviction, as required under article 14, paragraph 5, of the Covenant.

5.3 Lastly, with regard to the Constitutional Court's alleged familiarity with the Committee's arguments in the *Gómez Vázquez* case, a review of the Court's decisions shows the opposite, as does the fact that the State party's judicial system required adaptation by legislative measures.

Additional comments by the parties

6. On 2 August 2005, the State party submitted its observations on the merits of the communication. The State party reiterates its arguments regarding the failure to exhaust domestic remedies and the unsubstantiated nature of the communication. In addition, it refers to the legal underpinnings of the Supreme Court decision and the Committee's decision in *Parra Corral*,⁵ which it considers applicable to the present case.

7. On 19 October 2005, the author submitted his comments on the State party's observations, in which he reiterates that the Constitutional Court had been unduly rigorous in rejecting his application for *amparo* on the grounds that it was time-barred, thereby contradicting its own doctrine and undermining the effectiveness of the prisoner's free court-appointed counsel. He repeats that the review that the Constitutional Court may carry out does not constitute a full review within the meaning of article 14, paragraph 5, of the Covenant.

Decision by the Committee on the admissibility of the communication

8.1 At its ninety-third session, on 1 July 2008, the Committee considered the admissibility of the communication.

8.2 With regard to the State party's argument that the author had not exhausted domestic remedies, given that the remedy of *amparo* was denied on the grounds that the author's application was time-barred, the Committee considered, on the basis of its case law,⁶ that

⁴ The author refers to Constitutional Court judgement No. 88/1997 of 5 May 1997.

⁵ Communication No. 1356/2005, *Parra Corral v. Spain*, decision adopted on 29 March 2005.

⁶ See, for example, communications No. 511/1992, *Länsman et al. v. Finland*, Views adopted on 14 October 1993, paragraph 6.3; No. 1095/2002, 701/1996, *Gómez Vázquez v. Spain* (note 2 above), paragraph 10.1; No. 986/2001, *Semey v. Spain*, Views adopted on 30 July 2003, paragraph 8.2; No.

the remedy of *amparo* before the Constitutional Court had no chance of succeeding in respect of the alleged violation of article 14, paragraph 5. It concluded that consequently domestic remedies have been exhausted.

8.3 The Committee considered that the author's complaint was sufficiently substantiated insofar as it raised relevant issues with respect to article 14, paragraph 5, and that those issues should be examined on the merits. It therefore declared that the communication was admissible.

State party's observations on the merits and author's comments

9.1 In its observations on the merits, dated 21 January 2009, the State party refers to its observations submitted on 2 August 2005 regarding the clearly unsubstantiated nature of the communication. The State party adds that the Supreme Court's decision gives a complete review of the factual aspects of the conviction and of the incriminating evidence. That decision also states explicitly that the remedy of cassation — if interpreted and applied with sufficient scope — meets the requirements of article 14, paragraph 5, of the Covenant.

9.2 The State party refers to the Committee's case law⁷ in which the remedy of cassation was considered sufficient for the purposes of article 14, paragraph 5, of the Covenant.

10.1 In his reply of 9 March 2009, the author reiterates previously submitted arguments and denies that the Supreme Court conducted a full review of the conviction and incriminating evidence of the case. The author recalls that the Supreme Court itself admits that it is unable to conduct such a review owing to the nature of the remedy of cassation.

10.2 The author adds that the only review available to the Supreme Court is an external review of the logical reasoning, which must abide by the lower court's findings of fact. He argues that a review which is as limited, external and extraordinary as that of the presumption of innocence in the Spanish cassation procedure does not meet the requirements of a full review, under the terms of article 14, paragraph 5, of the Covenant.

Issues and proceedings before the Committee

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 Protocol.

11.2 With respect to article 14, paragraph 5, of the Covenant, the author argues that he was not granted a full review of his conviction, and especially of the incriminating evidence, as required by that provision. In this regard, the Committee notes that the Supreme Court itself has stated that in cassation proceedings "it cannot reassess evidence that has been evaluated and argued by the trial court", despite which the Court considers that it may review decisions of Provincial High Courts "with sufficient scope" to meet the requirements of the provisions of the Covenant.

1101/2002, *Alba Cabriada v. Spain*, Views adopted on 1 November 2004, paragraph 6.5; and No. 1293/2004, *Maximino de Dios Prieto v. Spain*, decision adopted on 25 July 2006, paragraph 6.3.

⁷ Including communications No. 1389/2005, *Bertelli Gálvez v. Spain*, decision adopted on 25 July 2005; No. 1399/2005, *Cuartero Casado v. Spain*, decision adopted on 25 July 2005; No. 1323/2004, *Lozano Araez et al. v. Spain*, decision adopted on 28 October 2005.

11.3 The Committee recalls that, although a retrial or new hearing are not required under article 14, paragraph 5,⁸ the court conducting the review must be able to examine the facts of the case,⁹ including the incriminating evidence. As noted in paragraph 11.2 above, the Supreme Court itself stated that it could not reassess the evidence evaluated by the trial court. The Committee concludes that the review conducted by the Supreme Court was limited to a verification of whether the evidence, as assessed by the first instance judge, was lawful, without assessing the sufficiency of the evidence in relation to the facts that would justify the conviction and sentence imposed. It did not, therefore, constitute a review of the conviction as required by article 14, paragraph 5, of the Covenant.

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, paragraph 5, of the Covenant.

13. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to furnish the author with an effective remedy which allows a review of his conviction by a higher tribunal. The State party also has an obligation to take steps to ensure that similar violations do not occur again in future.

14. In becoming a party to the Optional Protocol, Spain recognized the competence of the Committee to determine whether there has been a violation of the Covenant. Pursuant to article 2 of the Covenant, the State party has undertaken to guarantee to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to furnish them with an effective and applicable remedy should it be proved 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. 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 Communications No. 1110/2002, *Rolando v. Phillipines*, Views adopted on 3 November 2004, para. 4.5; No. 984/2001, *Juma v. Australia*, Views adopted on 28 July 2003, para. 7.5; No. 536/1993, *Perera v. Australia*, Views adopted on 28 March 1995, para. 6.4.

⁹ See Human Rights Committee, general comment No. 32 (2007) on article 14 (Right to equality before courts and tribunals and to a fair trial), *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40 (A/63/40)*, vol. I, annex VI, paragraph 48.

Appendix

Individual opinion of Committee Member Mr. Krister Thelin (dissenting)

The majority has found a violation of article 14, paragraph 5, of the Covenant.

I respectfully disagree.

Article 14, paragraph 5, does not require a retrial or a new hearing, but at a minimum that the court conducting the review itself sufficiently examines the facts presented at the lower court.^a

In this case it is clear from the reading of the Supreme Court's judgment, that it did not merely accept the findings of the Provincial High Court but did, indeed, appraise itself the relevant evidence brought before the lower court.

That being so, no violation of article 14, paragraph 5, of the Covenant has been disclosed.

(Signed) Mr. Krister **Thelin**

[Done in French, English 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 See general comment No. 32 (note 7 above), paragraph 48. See also communication No. 956/2000, *Piscioneri v. Spain*, inadmissibility decision of 7 August 2003.

**O. Communication No. 1366/2005: *Piscioneri v. Spain*
(Views adopted on 22 July 2009, Ninety-sixth session)***

<i>Submitted by:</i>	Mr. Rocco Piscioneri (represented by counsel, Mr. José Luis Mazón Costa)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	9 August 2004 (initial submission)
<i>Decision on admissibility</i>	2 July 2008
<i>Subject matter:</i>	Right to review of conviction by a higher tribunal
<i>Procedural issues:</i>	Exhaustion of domestic remedies – Claim insufficiently substantiated – Claim already examined by the Committee
<i>Substantive issue:</i>	Right to review of conviction and sentence by a higher tribunal
<i>Article of the Covenant:</i>	14, paragraph 5
<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 22 July 2009,

Having concluded its consideration of communication No. 1366/2005, submitted by Mr. Rocco Piscioneri 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 9 August 2004, is Rocco Piscioneri, an Italian national born in 1950. He claims to be the victim of a violation by Spain of article 14, paragraph 5, of the Covenant. The Optional Protocol entered into force for Spain on 25 April 1985. The author is represented by counsel, Mr. José Luis Mazón Costa.

* 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. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

1.2 On 13 May 2005, the Special Rapporteur on New Communications and Interim Measures, acting on behalf of the Committee, agreed to the State party's request to separate the consideration of the admissibility and merits of the communication.

Factual background

2.1 On 11 January 1999, the Provincial High Court in Barcelona sentenced the author to a prison term of 8 years and 10 months for trafficking in hashish and for forgery. The author submitted an appeal in cassation to the Supreme Court,¹ a remedy that does not allow reconsideration of the evidence on which a conviction is based. On 9 October 2000, when the Court had not yet ruled on the application, the author requested the Supreme Court to suspend the proceedings.² On 11 October 2000, the Second Division of the Supreme Court rejected the author's request, whereupon the author instituted *amparo* proceedings, which were dismissed by the Constitutional Court on 11 December 2000. On 8 June 2001, the Supreme Court upheld the Provincial High Court sentence. The ruling on the cassation appeal partially recognized the ground for cassation relating to the applicability of aggravating circumstances under article 370 of the Criminal Code and reduced the sentence imposed on the author by six months. On 16 July 2001, the author again applied for *amparo*; his application was denied in a decision dated 28 October 2002. In both cases the author cited the Committee's Views in *Gómez Vázquez*³ but the courts did not take them into account.

2.2 The author submitted a communication under the Optional Protocol on 11 May 2000⁴ claiming, inter alia, a violation of article 14, paragraph 5, of the Covenant. The author maintained that, on that occasion, his complaint was not based on the Supreme Court's failure to review his conviction but on its refusal to entertain a request by the defence for suspension of the cassation proceedings until such time as the State party had brought its legislation into line with the *Gómez Vázquez* ruling. In its decision of 7 August 2003,⁵ the Committee ruled, with respect to article 14, paragraph 5, of the Covenant, that "the mere suspension of an on-going proceeding cannot be considered, in the Committee's opinion, to be within the scope of the right protected in paragraph 5 of article 14 of the Covenant, which only refers to the right to a revision by a higher tribunal. Consequently, this part of the complaint must be declared inadmissible *ratione materiae* under article 3 of the Optional Protocol".⁶

The complaint

3. The author claims a violation of article 14, paragraph 5, of the Covenant inasmuch as he was denied a proper review of his conviction by the Supreme Court, since the remedy of cassation did not allow for a reconsideration of the evidence adduced against him.

¹ The author submitted an appeal in cassation on six grounds, including the violation of his right to the presumption of innocence and the improper application of article 370 of the Spanish Criminal Code (aggravating circumstances).

² The author contends that he did so because he had learned that in the *Gómez Vázquez* case, the Committee had ruled that the remedy of judicial review or cassation (*casación*) is not an effective remedy.

³ Communication No. 701/1996, *Gómez Vázquez v. Spain*, Views of 20 July 2000.

⁴ The initial communication was supplemented on 5 January 2001.

⁵ Communication No. 956/2000, *Piscioneri v. Spain*, inadmissibility decision of 7 August 2003.

⁶ *Ibid.*, para. 6.7.

State party's observations on admissibility

4.1 On 27 April 2005, the State party submitted comments on the admissibility of the communication. It argued that, in his appeal in cassation, the author did not raise the issues which he then put before the Committee and that his communication should consequently be declared inadmissible for failure to exhaust domestic remedies.

4.2 As to the alleged violation of article 14, paragraph 5, of the Covenant, the State party argues that the author has been able to exercise the right to have his sentence and conviction reviewed, since the trial court sentence was appealed in the Supreme Court and the Supreme Court's ruling was subsequently considered by the Constitutional Court. It points out that the European Court of Human Rights has accepted that the State party has a fully functioning system for the effective review of convictions.⁷

4.3 The State party further argues that, in this case, it is sufficient to read the judgement in cassation to see that the Supreme Court conducted a full review of the sentence handed down at first instance. Given this thorough reconsideration of the conviction and the sentence, it contends that there has clearly been no violation of article 14, paragraph 5, of the Covenant and that the communication is therefore manifestly unfounded. The State party asks for the communication to be ruled inadmissible as constituting an abuse of the purpose of the Covenant, under article 3 of the Optional Protocol.

Author's comments

5.1 The author replied to the State party's submission on 11 July 2005. He states that he explicitly cited the *Gómez Vázquez* ruling in his appeals but that the Supreme Court and the Constitutional Court ignored it. He therefore requested suspension of the cassation proceedings until such time as the State party had adapted its legislation, but his request was denied. He also contends that, as the Committee found in *Pérez Escobar*,⁸ the remedy of *amparo* is futile for the purposes of article 14, paragraph 5, of the Covenant.

5.2 Moreover, the author states that his trial was based on facts, not legal issues, and yet the police statements on which the sentence was based could not be reviewed by the Supreme Court. As to the State party's reference to the case law of the European Court of Human Rights, the author argues that the European Court has no competence to rule on the compatibility of Spanish criminal cassation law with the right to a second hearing in criminal cases, since the State party has not ratified Protocol No. 7 to the European Convention on Human Rights.

Decision of admissibility

6.1 The Committee considered the admissibility of the communication on 2 July 2008 during its ninety-third session.

6.2 The Committee noted that the author had previously submitted a communication which it had considered on 7 August 2003. However, in the decision it reached in 2003 with respect to the claim under article 14, paragraph 5, of the Covenant, the Committee limited its consideration to the refusal by the Constitutional Court to review the Supreme Court decision to not suspend cassation proceedings; it did not consider the merits of the claim. The Committee observed that the claim put forward in the present communication is

⁷ European Court of Human Rights, judgement of 30 November 2004 in respect of complaints Nos. 74182, 74186 and 74191 of 2001.

⁸ Communication No. 1156/2003, *Pérez Escobar v. Spain*, Views of 28 March 2006.

that the appeal in cassation was not an effective remedy for the review of the conviction as required by article 14, paragraph 5, of the Covenant.

6.3 With regard to the State party's argument that the author has not exhausted domestic remedies because he did not raise the issues in his appeal in cassation that he put before the Committee in his communication, the Committee noted that the author had invoked article 14, paragraph 5, of the Covenant in his application to the Supreme Court dated 9 October 2000 which he subsequently appealed in *amparo* to the Constitutional Court and in his appeal in *amparo* against the cassation ruling.⁹ It further noted that both applications were rejected. The Committee therefore concluded that domestic remedies had been exhausted.

6.4 The Committee considered that the author's complaint had been sufficiently substantiated insofar as the issues which it set out in relation to article 14, paragraph 5, and that those issues should be considered on the merits. It consequently declared the communication admissible.

State party's observations on the merits and author's comments

7. On 21 January 2009, the State party presented its observations on the merits of the communication. It referred to the jurisprudence of its Constitutional Court, according to which the appeal in cassation in criminal cases may meet the requirements of the Covenant, provided that the powers of review provided for by this remedy are interpreted broadly. In this regard, the State party invoked the Committee's jurisprudence,¹⁰ according to which the appeal in cassation was deemed to satisfy the requirements of article 14, paragraph 5, of the Covenant. The State party asserted that the cassation judgement discussed at length the facts and evidence upon which the conviction was based and that they were sufficient to override the presumption of innocence.

8. The author's response of 24 March 2009 reiterates his earlier claims that he did not obtain a full review of his sentence. He states that, as recognized by the Supreme Court, the assessment of the direct evidence is the exclusive responsibility of the court of first instance.

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

9.2 The Committee takes note of the author's arguments in support of his assertion that the appeal in cassation does not constitute a full review as required by article 14, paragraph 5, of the Covenant. It also notes the State party's claims that the Court fully reviewed the Provincial Court ruling. The Committee observes that the Supreme Court's ruling of 8 June 2001 indicates that the Court reviewed each of the author's grounds of appeal, and reviewed the Provincial Court's assessment of the sufficiency of the evidence. The Committee further observes that the Supreme Court partially accepted the ground of appeal relating to the improper application of aggravating circumstances and consequently reduced

⁹ See para. 2.1 above.

¹⁰ See, inter alia, communications No. 1389/2005, *Bertelli Gálvez v. Spain*, decision of 25 July 2005; No. 1399/2005, *Cuartero Casado v. Spain*, decision of 25 July 2005; No. 1323/2004, *Lozano Araez et al. v. Spain*, decision of 28 October 2005.

the sentence initially imposed on the author. In addition, the Committee notes that, in this case, the Constitutional Court dismissed the *amparo* application on reasoned grounds and once again reviewed the Provincial Court's assessment of the sufficiency of the evidence. Consequently, the Committee concludes that the author has not been denied the right to have his conviction and sentence reviewed by a higher court in accordance with article 14, paragraph 5, 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 disclose a violation of article 14, paragraph 5, 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.]

**P. Communication No. 1378/2005, *Kasimov v. Uzbekistan*
(Views adopted on 30 July 2009, Ninety-sixth session)***

<i>Submitted by:</i>	Mr. Mansur Kasimov (not represented by counsel)
<i>Alleged victim:</i>	Mr. Yuldash Kasimov, the author's brother
<i>State party:</i>	Uzbekistan
<i>Date of communication:</i>	12 April 2005 (initial submission)
<i>Decision on admissibility:</i>	6 March 2006
<i>Subject matter:</i>	Death sentence after unfair trial; use of torture during preliminary investigation
<i>Procedural issues:</i>	None
<i>Substantive issues:</i>	Right to be represented by counsel of own choice; death sentence imposed after an unfair trial
<i>Articles of the Covenant:</i>	6, paragraphs 1, 4 and 6; 7; 9, paragraphs 1–4; 10; 14, paragraphs 1–4; 16
<i>Article of the Optional Protocol:</i>	2
<i>The Human Rights Committee</i> , established under article 28 of the International Covenant on Civil and Political Rights, <i>Meeting on 30 July 2009,</i> <i>Having concluded</i> its consideration of communication No. 1378/2005, submitted to the Human Rights Committee on behalf of Mr. Yuldash Kasimov under the Optional Protocol to the International Covenant on Civil and Political Rights, <i>Having taken into account</i> all written information made available to it by the author of the communication, and the State party, <i>Adopts</i> the following:	

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

1.1 The author of the communication is Mr. Mansur Kasimov, an Uzbek national. He submits the communication on behalf of his brother, Yuldash Kasimov, also an Uzbek national, born in 1985, who, at the time of submission of the communication, was

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Mohammed Ayat, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Mr. Lazhari Bouzid, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

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

imprisoned in Uzbekistan and was awaiting execution of a death sentence handed down by the Tashkent City Court on 3 March 2005. The author claims that the State party violated his brother's rights under article 6, paragraphs 1, 4, and 6; article 7; article 9, paragraphs 1–4; article 10; article 14, paragraphs 1–4; and article 16, of the Covenant.

1.2 On 13 April 2005, pursuant to rule 92 of its rules of procedure, the Human Rights Committee, acting through its Special Rapporteur on New Communications and Interim Measures, requested the State party not to carry out Mr. Kasimov's execution while his case is examined by the Committee. On 13 June 2005, the State party informed the Committee that it had acceded to its request to suspend the execution, pending the Committee's final decision. On 8 July 2005, the Special Rapporteur on New Communications and Interim Measures decided to have the admissibility of the communication examined separately from the merits. On 12 June 2006, the State party informed the Committee that following a decision of the Supreme Court of Uzbekistan taken on 22 November 2005, Mr. Kasimov's death sentence was commuted to a 20 years' prison term.

1.3 The Optional Protocol entered into force for the State party on 28 December 1995.

The facts as presented by the author

2.1 On the morning of 26 June 2004, the author discovered the bodies of his parents in their home, and called the police. Later that day, his brother, Mr. Yuldash Kasimov, was arrested, and was charged with the murders on 29 June 2004.

2.2 According to the author, following his arrest, his brother was subjected to torture and severely beaten during interrogation; his girlfriend was also beaten in his presence. The author adds that he too was arrested and severely beaten by investigators for a period of three days. The objective of the torture and beatings was to force one of the brothers to confess to their parents' murder. The author states that his brother, who was 19 years old at the time, did not withstand the violence and psychological pressure applied by the police, and "confessed" to the murder.

2.3 According to the author, during the first two weeks of the investigation, a lawyer whom he had hired to represent his brother was not granted access to him. After his brother was finally allowed to meet with this lawyer, he immediately wrote to the Prosecutor's Office, retracting his confession.

2.4 The author claims that the investigation and trial of his brother were marred by numerous irregularities: many defence witnesses were not called nor examined, without any reason being given by the judge; and the judge threatened certain defence witnesses with reprisals (form of reprisal is not specified).

2.5 The author's brother retracted his "confession" in Court, and a video recording of the interrogation was examined during the trial. According to the author, it was obvious from this video that his brother had been beaten as bruises on his body were visible, and it appeared that his brother had difficulties speaking and moving. However, the Court apparently ignored these visible bruises.

2.6 Further, no examination was conducted to establish whether there was any evidence of gunpowder residue on his brother's hands or clothes, which would have been present if he had fired the shots from the handgun which killed his parents. Such residue cannot be washed off and remains identifiable for several weeks.

2.7 On 3 March 2005, the Tashkent City Court found Mr. Kasimov guilty of his parents' murder and sentenced him to death. The Court allegedly based its conviction solely on Mr. Kasimov's confession, which was obtained under torture and in the absence of a defence

lawyer. According to the author, no information existed in the criminal case file about the name of the investigator who recorded Mr. Kasimov's confession, nor the names of any other persons in whose presence the confession was made.

2.8 The author appealed to the appellate body of the Tashkent City Court, which on 12 April 2005 upheld the conviction and sentence. According to the author, this judgment is final and executory. Further complaints to the Ombudsman, and the President's office, including a request for clemency, were unsuccessful.

2.9 The author affirms that his brother is innocent and notes that his father, a senior Interior Ministry Official, had several enemies since he had been an honest and incorruptible individual. According to the author, his father had received death threats prior to his assassination. The author adds that the police search of the parents' apartment revealed no fewer than 23 fingerprints, which did not match those of any family members. However, this was not investigated.

The complaint

3. The author claims that his brother was wrongly convicted after an unfair trial, which relied on a forced confession extracted under duress. He claims that the State party violated his brother's rights under article 6, paragraphs 1, 4, and 6; article 7; article 9, paragraphs 1–4; article 10; article 14, paragraphs 1–4; and article 16, of the Covenant.

State party's observations on admissibility and merits

4.1 In its submission dated 13 June 2005, the State party challenged the admissibility of the communication. On the facts of the case, it noted that Mr. Kasimov was convicted of the murder of his parents and various other offences under the Uzbek Criminal Code.

4.2 The State party invokes a large body of evidence which in its view confirms Mr. Kasimov's guilt. Mr. Kasimov voluntarily presented himself to the authorities and gave a detailed confession of the murders. He told the police that, approximately one week before his parents' murder, he had formed the idea to kill them in order to avoid being held accountable for having stolen a large amount of money from his father. At approximately 4.30 a.m. on 26 June 2004, he went to the bedroom where his parents were sleeping and shot them with his father's pistol and silencer. He then drove to a friend's summer house, near the Chirchik River in Kibrai district, where he threw the pistol into the river. The pistol was later retrieved from the river bed by the police, and ballistic tests proved that it was the murder weapon.

4.3 The State party contends that the criminal investigation and trial of Mr. Kasimov took place without any violations of the Uzbek criminal procedure law or the provisions of the Covenant. It denies the allegations that Mr. Kasimov: was beaten in order to obtain a confession; that he was denied access to lawyer for two weeks; and that the court placed pressure on the defence witnesses and made threats of reprisals. According to the State party, these allegations are groundless and are refuted by the evidence in the criminal case file:

- A video recording was made of evidence being taken from Mr. Kasimov, in the presence of a lawyer. This was displayed and shown in Court. Mr. Kasimov appeared relaxed, freely providing a detailed and comprehensive account of how he had stolen the money from his father, how he had murdered his parents, and where he had disposed of the gun.
- Two senior officers from the Mirzo-Ulugbekski district internal affairs department testified that no "unauthorized investigative methods" had been used against Mr.

Kasimov. According to a forensic medical examination carried out on Mr. Kasimov on 22 September 2004, his body showed no signs of injuries. A forensic expert confirmed this in court. In addition, after Mr. Kasimov's allegation that unauthorized investigation methods had been used against him during the pretrial investigation, an internal inquiry was conducted that failed to substantiate his complaint.

- Mr. Kasimov was interrogated as a witness and then as a suspect on 27 June 2004, and again on 29 June 2004, on each occasion in the presence of a lawyer. He did not complain of any mistreatment at those times.

4.4 According to the State party, Mr. Kasimov's actions were correctly qualified by the court, and the punishment he was given was commensurate with his crime. Allegations that unauthorized methods were used against him during the pretrial investigation were found to be groundless. From the very moment of being taken into custody, during all interrogations and investigative stages, and also at his trial, he was represented by lawyers.

Author's comments on State party's submission

5.1 In his comments on the State party submission, dated 18 October 2005, the author reiterated that his brother's confession was extracted under torture, and that the confession was dictated to his brother by investigators; details of these violations were included in the complaint to the procurator's office. He noted that the trial court conducted only a formal review of the case file, did not address the procedural mistakes made in the investigation, and generally sides with the prosecution. The appeal court reviewed the case only superficially. The author reiterated that his parents were murdered by unidentified criminals.

5.2 The author reiterated that for a period of 10 days, Mr. Kasimov was not allowed to meet with the lawyer whom the author had hired. He provides further details of Mr. Kasimov's torture, and states that at one point, a police truncheon was covered with vaseline and inserted into his brother's anus. His brother was then forced to sign a statement, after which the police conspired to recover a pistol from the Chirchik River, falsely claiming it to be the murder weapon.

5.3 The author claimed that the Court violated his brother's right to the presumption of innocence, and did not express doubt about the evidence in his brother's favour, as required under Uzbek law.

5.4 Finally, the author noted that the Court did not take into account the fact that Mr. Kasimov was only 19 years old, and that he had no previous criminal record. Article 97 of the Criminal Code provides that the sanction for murder is 15 to 20 years imprisonment, with capital punishment to be used only as an "exceptional measure of punishment".

Issues and proceedings before the Committee

Consideration of admissibility

6.1 The Committee examined the admissibility of the communication during its eighty-sixth session, on 6 March 2006. It established, first, that the same matter has not been submitted for examination under another procedure of international investigation or settlement and noted that the State party has not presented any objection in relation to the issue of exhaustion of domestic remedies. It concluded that the conditions set forth in paragraphs 2 (a) and (b) of article 5 of the Optional Protocol have thus been satisfied.

6.2 The Committee noted the author's allegations of violations of article 14, paragraph 4, and of article 16. In the absence of any detailed information in substantiation of these allegations, it considered that the author has failed sufficiently to substantiate these claims, for purposes of admissibility, and this part of the communication was declared inadmissible under article 2 of the Optional Protocol.

6.3 On the claims under articles 7, 10 and 14, paragraph (3) (g), the Committee noted that the author had provided detailed information about his brother's alleged torture and forced confession at the hands of investigation authorities. It noted that the State party denied that Mr. Kasimov was subjected to torture and affirmed that two officers testified that no torture took place. The Committee noted, however, that no information about their knowledge of the matter or their evidence was provided. On the State party's affirmation that a forensic examination of Mr. Kasimov showed no signs of injuries, the Committee noted that, however, the examination in question occurred on 22 September 2005, i.e. nearly three months after Mr. Kasimov's arrest. It also noted that no specific details were provided about its results nor the "internal inquiry" conducted into Mr. Kasimov's complaints of torture. Accordingly, the Committee considered that the author's allegations under articles 7, 10, and 14, paragraph 3(g), were sufficiently substantiated, and declared them admissible.

6.4 On the author's claim that his brother was convicted solely on the basis of his allegedly forced confession, without proper legal representation, and that his brother's lawyer had no access to him during the first two weeks of the investigation (see para. 2.3), the Committee noted that the State party had referred to other evidence adduced in Court, and reiterated that Mr. Kasimov's complaints (to the Court) about torture were found to be groundless; it also contended that at all times he had access to a lawyer, without however refuting the allegation that he had no access to *his privately hired* lawyer. The Committee noted the author's claim that neither the name of the investigator who recorded his brother's confession nor the names of the other persons present when the confession was made are included in the case file. The Committee noted that the State party had not commented on these allegations, let alone refuted them. Accordingly, it concluded that they were sufficiently substantiated, and declared them admissible as raising issues under articles 9 and 14, paragraphs 1, 2, and 3 (b), of the Covenant.

6.5 The Committee has further noted the author's claim that several defence witnesses were not examined, and that some were threatened with "reprisals" by the court. In this regard, the Committee noted that the author has not clarified how and why these testimonies would be or would have been of relevance to the case. However, given that the State party had simply rejected this allegation as groundless, without providing more specific information, the Committee considered this allegation to be sufficiently substantiated, for purposes of admissibility, in relation to article 14, paragraph 3 (e), and declared it admissible.

6.6 Consistent with its jurisprudence, the Committee considered that, since the author's claim under article 14 that his brother was sentenced to death after an unfair trial was declared admissible, so was his claim under article 6.

6.7 The Committee requested the State party to submit its comments on the merits of the case within six months. It also invited the State party to provide it with information on the reasons that led the court to refuse the examination of defence witnesses; to detail the results of the internal inquiry into Mr. Kasimov's allegation of torture, in particular in how the inquiry was conducted and with what results; and to comment on the author's allegation that his brother could not access his privately hired lawyer during the first two weeks of the investigation. The author was requested (a) to provide detailed information and evidence about defence witnesses having been refused examination by the court, and (b) to explain when he hired the private lawyer and when this private lawyer was allowed to see his client.

State party's observations on the merits

7.1 The State party presented its merits observations on 12 June 2006. It recalls that Mr. Kasimov was convicted, on 3 March 2005 by the Tashkent City Court, for the murder of his parents and other crimes, and was sentenced to death. On 22 November 2005, the Supreme Court commuted his sentence to 20 years' imprisonment.

7.2 The State party recalls the facts of the case: from February to June 2004, Mr. Kasimov had stolen money belonging to his father totalling the equivalent of 20 000 US dollars. He spent the money with his girlfriend, S.A.

7.3 At around 4.30 a.m. on 26 June 2004, the author's brother entered the bedroom of his parents who were sleeping and shot his father in the head once, and his mother in the head twice, with a pistol belonging to his father. His parents died from their injuries.

7.4 After collecting the bullet cases from the crime scene, he arrived by car to the house of one T.M., at the settlement "Pobeda", where he threw the pistol, a silencer, and the bullet cases into the Chirchik River.

7.5 According to the State party, Mr. Kasimov's guilt is confirmed not only by his confessions made in the presence of a lawyer at the preliminary investigation, but also by other evidence, including:

(a) Depositions of his girlfriend according to which he was offering her expensive gifts and was inviting her to expensive restaurants, etc.;

(b) Depositions of the girlfriend's mother according to which Mr. Kasimov lent 7900 US dollars to her husband; concurrent testimonies by witnesses R.A., S.S., and T.M.;

(c) Testimony of one V.M, according to whom Mr. Kasimov paid him 1000 US dollars services as a driver;

(d) The deposition of one N.T. that in May and June 2004, Mr. Kasimov rented his apartment for 500 US dollars a month;

(e) Testimony of one A.A., a manager of a restaurant, who confirmed that Mr. Kasimov has rented the whole restaurant on 25 June 2004, paying 1000 US dollars for that;

(f) The testimony of Mr. T.T., who was present when the police found the pistol in the Chirchik river; it was Mr. Kasimov who pointed out the exact location of the pistol;

(g) The testimony of one S.S., who confirmed that on 26 June 2004, at 5.05 a.m., Mr. Kasimov had asked him to drive him to a place near the lake "Rakhat".

7.6 The State party also refers to the conclusions of a number of medical-forensic and ballistic experts.

7.7 The State party further contends that the examination of the author's case in light of the Committee's admissibility decision, permitted it to establish that no violation of Mr. Kasimov's rights under the Covenant occurred in his case.

7.8 The Supreme Court of Uzbekistan examined the case and, on 22 November 2005, taking into account Mr. Kasimov's age and the fact that he had no prior convictions, commuted his death sentence to a 20 year prison term. His penalty was further reduced by one-quarter, as two different general amnesty acts applied to his case.

7.9 According to the State party, neither during the preliminary investigation nor in the court was it established that the author's brother, his girlfriend, or other witnesses in the case, had been subjected to unlawful methods of investigation. During the preliminary investigation, Mr. Kasimov's allegation of the use of unlawful methods of investigation or physical and psychological pressure were examined, including through interrogations and

visual confrontations, and were not confirmed. As a result, on 25 September 2004, the criminal case against the officials of the Mirzo-Ulugbekski district department of Internal Affairs was shelved.

7.10 In court, the investigators in charge of Mr. Kasimov's case — M.K. and U.N. — denied using unlawful methods of investigation in the investigation of the case. According to the conclusions of a medical-forensic examination, Mr. Kasimov's body disclosed no injuries. Also, the medical expert who conducted the examination confirmed in court that the alleged victim's body did not reveal any injury.

7.11 The State party recalls that the video record of the verification of the confessions of Mr. Kasimov at the crime scene was also examined by the court. The record was made in the presence of a lawyer. From it, it was clear that the alleged victim provided without any form of coercion, voluntary and detailed explanations on the theft of the money, the pistol, and the circumstances of the murder of his parents. He pointed out a cache where the pistol and the money were kept, as well as the exact location where the pistol and the silencer were discarded after the murder. He pointed out exactly how and from where he fired the shots, and ammunition was seized in his parents' home.

7.12 According to the State party, from the moment of Mr. Kasimov's arrest, all interrogations or investigation acts, as well as all court's sessions, were conducted in the presence of the Tashkent bar lawyers R.A., G.G., a lawyer of the Chilanzar district bar, E.A., four other lawyers from law firms, and V.I. from the Judicial Consultation in relation to minors, V.I.

7.13 The examination of the first instance trial transcript shows that Mr. Kasimov's lawyers twice requested that additional witnesses be interrogated in court – the experts P.K. and U. I.; the experts, S., F., and S.; two police officers from the Mirzo-Ulugbekski district department of the Internal Affairs, N. and K.; the investigators from the Tashkent Prosecutor's Office N. and B.; the experts N., T., and the witness T.T. All these defence requests were granted, and thus all depositions made on Mr. Kasimov's behalf were examined by the court. The State party concludes that no violations of the Criminal Procedure legislation occurred in the present case, and thus Mr. Kasimov's conviction met all procedural standards.

8. The author did not comment on the State party's submissions, despite three reminders (sent in 2006, 2008, and 2009).

Consideration of the merits

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

9.2 The author has claimed that his brother's rights under articles 9, and 14, paragraphs 1, 2, and 3 (e) were violated. The State party contends that no violation of Mr. Kasimov's procedural rights occurred, that the courts correctly assessed his case, and that his guilt was established on the basis not only of his video-recorded confessions, but also on the basis of additional and extensive corroborating evidence. The Committee also notes that the State party has contended that Mr. Kasimov was represented by a lawyer from the moment of his arrest, and that this was not contested by the author. It further notes that the State party provided it with a list of the requests filed by Mr. Kasimov's lawyers to have additional experts and witnesses interrogated, and its contention that *all* these requests were granted. In the absence of any comments from the author and any other pertinent information on file in this respect, the Committee decides that the facts before it do not reveal any violation of Mr. Kasimov's rights under articles 9 and 14, paragraphs 1, 2, and 3 (e), of the Covenant.

9.3 The author also claims that his brother was beaten and tortured by investigators after his arrest, and was forced to confess his guilt. The State party has rejected this claim by contending that the court interrogated two investigators, and that they denied using unlawful methods of investigation against the alleged victim. It also contends that a criminal case was opened as a result of Mr. Kasimov's torture claims, but that it was subsequently closed. The Committee also notes that the State party has referred to a forensic-medical examination that was carried out on 22 September 2004, according to which Mr. Kasimov's body displayed no signs of injuries.

9.4 The Committee notes that the State party's reply does not provide detailed answers to the questions that were put to it in the Committee's admissibility decision of 6 March 2006. Thus, the State party has failed to explain how the internal inquiry into the complaints of torture (paragraphs 4.4 and 5.2) was conducted, beyond reference to "interrogations and visual confrontations". On this basis, an apparent criminal case against local officials of the Department of Internal Affairs was shelved. No other evidence of a serious criminal inquiry was offered. The only other evidence of any inquiry into the allegations that was offered by the State party seems to have consisted of questioning by the court of the investigators involved and a forensic medical report. The investigators' predictable denials were believed, a circumstance that does not amount to convincing treatment of the allegations. The fact that a forensic medical report issued some three months after the ill-treatment complained of "disclosed no injuries" (paragraphs 4.3 and 7.10) can similarly not be taken as convincing refutation of the allegations.

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.¹ It considers that in the circumstances of this case, the State party has not demonstrated that its authorities adequately addressed the torture allegations advanced by the author, in the context of any internal inquiry, any criminal proceedings against those responsible for the alleged ill-treatment, or by way of judicial inquiry into the reliability of the evidence against the author's brother. Accordingly, due weight must be given to the author's allegations. The Committee concludes, in the absence of any more detailed information from the State party, that the facts before it disclose a violation of the rights of Mr. Kasimov under articles 7 and 14, paragraph 3 (g), of the Covenant. In the light of this conclusion, it is unnecessary to examine separately the author's claims under article 10 of the Covenant.

9.6 The author has also claimed that his brother's defense rights were violated, as the latter was unable to meet with his privately hired lawyer during the first two weeks after arrest. It was exactly during this time period that Kasimov was charged with the murders of his parents. The Committee further notes that, although the State party contends that all interrogations and investigation acts, as well as all court sessions, were carried out in the presence of lawyers, it does not deny that, at the early stages of Mr. Kasimov's detention, he could not communicate with lawyers of his own choosing. In the circumstances of the present case, the Committee concludes that in preventing the brother of the author to access the counsel of his choice for 10 days, and by obtaining his confessions during that period, the State party's authorities did violate Mr. Kasimov's rights under article 14, paragraph 3 (b) of the Covenant.²

9.7 The author claims a violation of article 6 of the Covenant, as Mr. Kasimov's death sentence was imposed after an unfair trial that did not meet the requirements of article 14. The Committee recalls that the imposition of a sentence of death upon conclusion of a trial

¹ General comment No. 20 (1992) on article 7, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, para. 14.

² See, for example, communication No. 537/1993, *Kelly v. Jamaica*, Views adopted on 29 July 1997.

in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant.³ In the present case, however, Mr. Kasimov's death sentence was commuted by the Supreme Court of Uzbekistan, on 22 November 2005. In these circumstances, the Committee considers it unnecessary to examine separately the author's claim under article 6.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 7 and article 14, paragraphs 3 (b) and (g), of the International Covenant on Civil and Political Rights.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author's brother with an effective remedy, including the payment of adequate compensation, initiation and pursuit of effective investigation and criminal proceedings to establish responsibility for Mr. Yuldash Kasimov's ill-treatment, and, unless he is released, a retrial with the guarantees enshrined in the Covenant. The State party is also under an obligation to prevent similar violations in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not, and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its 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.

[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 See, inter alia, communication No. 1096/2002, *Safarmo Kurbanova v. Tajikistan*, Views adopted on 6 November 2003, paragraph 7.7.

Appendix

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

1. In general I concur with the deliberations and conclusions of the Human Rights Committee in communication No. 1378/2005, *Kasimov v. Uzbekistan*. I regret, however, that I cannot agree with the Committee's findings in the final part of paragraph 9.7, where it states that it considers it unnecessary to examine separately the author's claim of a violation of article 6 in view of the commutation by the Supreme Court of Uzbekistan, on 22 November 2005, of the death sentence imposed on Mr. Kasimov.

2. The Committee recalls in paragraph 9.7 that "the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant". That being so, it is difficult to see why the Committee did not find a violation of article 6 in this case when it found violations of articles 7 and 14 of the Covenant during Mr. Kasimov's trial.

3. Uzbekistan has made significant advances in its domestic legislation in terms of respect for and guarantees of the right to life, as shown by the fact that on 23 December 2008 the State ratified the second Optional Protocol to the International Covenant on Civil and Political Rights, thereby demonstrating its commitment to the abolition of capital punishment. Moreover, in the *Kasimov* case, the Committee had requested interim measures, to which the State replied on 13 June 2005 informing the Committee that it had acceded to its request to suspend the execution pending the Committee's final decision. This demonstrates the State's fulfilment in good faith of the international obligation undertaken on ratification of the International Covenant on Civil and Political Rights to take the necessary measures to give full effect to the Committee's decisions.

4. The above does not excuse the Committee from giving an opinion on the facts of a specific case, as considered under this individual communication. In my view it is inappropriate — most pertinently for the purposes of proper reparation — for a body such as the Committee to fail to give an explicit opinion on a violation of a human right recognized in one or more articles of the International Covenant on Civil and Political Rights.

5. In its general comment No. 6 (1982) on article 6, the Human Rights Committee states that "the expression 'most serious crimes' must be read restrictively to mean that the death penalty should be a quite exceptional measure. It also follows from the express terms of article 6 that it can only be imposed in accordance with the law in force at the time of the commission of the crime and not contrary to the Covenant. The procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence ..."^a

6. A violation of article 6, paragraph 2, exists regardless of whether the death penalty was actually carried out. As the Committee itself has stated before, "the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have

^a *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40), annex VI, para. 7.*

not been respected constitutes a violation of article 6 of the Covenant”.^b That finding was based on earlier decisions in which the Committee stated that a preliminary hearing that failed to observe the guarantees of article 14 violated article 6, paragraph 2, of the Covenant.^c

7. In the interpretation of human rights law, and in the name of progress, an international body may amend a view it previously held and replace it with an interpretation that provides greater protection for the rights contained in an international instrument: this constitutes appropriate and necessary development of international human rights law.

8. The reverse procedure is not acceptable, however: it is not appropriate to interpret human rights provisions more restrictively than before. The victim of a violation of the Covenant deserves at least the same protection as that provided in cases considered previously by the same body.

9. Consequently, and without wishing to minimize the steps taken by Uzbekistan in respect of the abolition of the death penalty, I am of the opinion that, in the Kasimov case, the Committee should also have found a violation of the right contained in article 6, paragraph 2, of the International Covenant on Civil and Political Rights.

(Signed) Mr. Fabián Omar **Salvioli**

[Done in Spanish, English and French, 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. 1096/2002, *Kurbanova v. Tajikistan*, Views adopted on 6 November 2003, para. 7.7.

^c Communications No. 719/1996, *Conroy Levy v. Jamaica*, Views adopted on 3 November 1998, para. 7.3, and No. 730/1996, *Clarence Marshall v. Jamaica*, Views adopted on 3 November 1998, para. 6.6.

**Q. Communication No. 1382/2005, *Salikh v. Uzbekistan*
(Views adopted on 30 March 2009, Ninety-fifth session)***

Submitted by: Mr. Mukhammed Salikh (Salai Madaminov)
(represented by counsel, Ms. Salima Kadyrova)

Alleged victim: The author

State party: Uzbekistan

Date of communication: 23 March 2004 (initial submission)

Subject matter: Unsuccessful attempt by an Uzbek citizen to have access to his criminal case file and a sentence to appeal an unlawful conviction

Procedural issue: Domestic remedies that do not offer reasonable prospect of success

Substantive issues: Right to fair trial; right to understand the nature and cause of the charge; minimum procedural guarantees of defence in criminal trial; right to have one's sentence and conviction reviewed by a higher tribunal according to law

Article of the Covenant: 14, paragraphs 3 (a), (b), (d) and (e)

Article of the Optional Protocol: 5, paragraph 2 (b)

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

Meeting on 30 March 2009,

Having concluded its consideration of communication No. 1382/2005, submitted to the Human Rights Committee on behalf by Mr. Mukhammed Salikh 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. Prafullachandra Natwarlal Bhagwati, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Lazhari Bouzid, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli and Mr. Krister Thelin.

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

1.1 The author of the communication is Mukhammed Salikh (Salai Madaminov),¹ an Uzbek national born in 1949, leader of the opposition “Erk” party of Uzbekistan, who was granted refugee status in Norway. The communication was submitted on his behalf by Salima Kadyrova, an Uzbek lawyer. While she does not invoke a violation of any specific provisions of the International Covenant on Civil and Political Rights, the facts of the communication appear to raise issues under article 14 thereof. The Optional Protocol entered into force for the State party on 28 December 1995.

1.2 On 9 August 2005, the Special Rapporteur on New Communications and Interim Measures decided, on behalf of the Committee, that the admissibility of this communication should be examined separately from the merits.

The facts as presented by the author

2.1 On 17 November 2000, the Supreme Court sentenced the author *in absentia* to 15 ½ years’ imprisonment, on charges related to the terrorist bombings in Tashkent on 16 February 1999. The charges, trial and sentence allegedly were all politically motivated and linked to his participation in the first presidential elections in Uzbekistan in December 1991, when he was competing with the current incumbent, President Islam Karimov. Neither the author himself nor his family were notified of the criminal proceedings against him. The charges were based on the testimony of several other accused who later claimed, during their respective trials, to have been subjected to torture. The author lists the names of four persons who were forced to testify against him during the preliminary investigation and in court: Zayniddin Askarov, Mamadali Makhmudov, Mukhammad Begzhanov and Rashid Begzhanov. He submits a copy of Askarov’s statement delivered on 26 November 2003 during a press conference organized by the National Security Service at Tashkent prison. Allegedly, Askarov used a temporary absence of the National Security Service officer from the press conference room to confess that he gave false testimony against the author, on a promise from the Minister of Internal Affairs that six imprisoned mullahs would be spared the death penalty. Reportedly, these mullahs were nonetheless executed. Askarov offered public apologies to the author for wrongly accusing him of having links with, and sponsoring, the Islamic Movement of Uzbekistan (IMU).

2.2 In August 2003, the author contacted Salima Kadyrova, a member of the Bar in Samarkand, and on 19 August 2003, authorized her to act on his behalf for an appeal against his conviction. She submits that to this day, no one has accepted to defend the author in Uzbekistan, out of fear of being persecuted by the authorities. Kadyrova obtained a writ and on an unspecified date filed an application with the Chairperson of the Supreme Court, for access to the author’s criminal case file and a copy of his judgment and sentence. She was told that consideration of her application would take a week. She returned a week later and was told that she had to provide a written request from her client for access to the files. On an unspecified date, she reapplied to the Supreme Court, this time with a power of attorney dated 19 August 2003, signed by the author under his penname and certified by a Notary Public in Norway, where the author had by then been granted asylum. By letter from the Supreme Court of 26 September 2003, Ms. Kadyrova was informed that the power of attorney did not fulfil the requirements of article 1, part 5, of the Law “On Notaries” of 26 December 1996, to the effect that notary actions abroad should be performed by consular officers of the Republic of Uzbekistan. Counsel submits that the law does not

¹ Mukhammed Salikh is a pen-name of the author, used interchangeably with the name Salai Madaminov, under which the author was registered at birth.

require the power of attorney to be certified by a notary and refers to articles 4 and 7 of the Law “On the guarantees of attorney’s activity and social protection” of 25 December 1998. That law specifies that it is prohibited to request any authorization, except for a writ confirming an attorney’s power to act in a case and an attorney’s identity card, and to establish other obstacles to an attorney’s activity.

2.3 On 7 October 2003, counsel received a second power of attorney from the author, again signed by him under his penname and certified by a Notary Public from Oslo.² On an unspecified date, she reapplied to the court for access to the author’s file and a copy of judgment and sentence. On this occasion, she was told that consideration of her application would be postponed for an “indefinite period”. Not having received an answer after several months, she again applied formally to the Chairperson of the Supreme Court on 2 December 2003; again, she received no reply. On an unspecified date, she wrote to the Chairperson of the Parliament. On 17 December 2003, she was informed that her letter had been forwarded to the Supreme Court. On 19 March 2004, and without having a copy either of his indictment or of his judgment, the author applied to the Chairperson of the Supreme Court requesting to initiate a supervisory review of his unlawful conviction by the Supreme Court.

2.4 Counsel states that the author currently does not have any documents or information about the details of the case against him, nor his conviction *in absentia*. The authorities’ refusal to let her access the author’s files violates his right, guaranteed under article 30 of the Uzbek Constitution, to have access to documents affecting a citizen’s rights and freedoms. She invokes provisions of the Criminal Procedure Code that were violated by the State party in her client’s case, including the right to defence, the right to appeal the unlawful actions of an investigator, but does not provide any further substantiation of these claims. Her client continues to live in exile and cannot return to Uzbekistan because of this unlawful conviction.

The complaint

3. Counsel does not invoke a violation of any specific provisions of the International Covenant on Civil and Political Rights by the State party. However, the facts as submitted appear to raise issues under article 14 of the Covenant.

State party’s observations on admissibility and merits

4.1 On 10 June 2005, the State party challenged the admissibility of the communication on the basis of article 5, paragraph 2, of the Optional Protocol. It submits that Madaminov’s sentence was not appealed on cassation by any of the parties listed in article 498 of the Criminal Procedure Code as authorized to file such appeal: the convicted person, his lawyer, legal representative, the victims and their representatives.

4.2 The State party argues that counsel never proved Madaminov’s authorization to act on his behalf, as required under article 50 of the Criminal Procedure Code. On 22 September 2003, she submitted a request to access Madaminov’s case file but did not attach to this request any authorization signed by Madaminov, who by then lived abroad. On an unspecified date, she was informed of the necessity to present written authorization from her client. On 26 September 2003, she submitted another request for access to the case file and attached a photocopy of the power of attorney, written on behalf of one Mukhammed

² The difference between the first and the second letters is in the duration of their validity – two and three years respectively.

Salikh and referring to a passport allegedly issued to him by the Oslo police on 24 August 1999. According to the file, the name of the person convicted is Salai Madaminov, an Uzbek citizen. No document in the case file suggests that Salai Madaminov has changed his first or second names, renounced Uzbek citizenship and acquired the Norwegian. Counsel did not submit Mukhammed Salikh's ID nor any document proving that the person on whose behalf the power of attorney was issued and Salai Madaminov are indeed the same person. On an unspecified date, she was informed in writing of the requirements of article 1 of the Law "On Notaries", according to which notary actions abroad should be performed by consular officers of the Republic of Uzbekistan. According to article 91 of this Law, documents prepared abroad with the participation of government officials of other countries are accepted by the notary only after their legalization by the competent office in the Ministry of Foreign Affairs of the Republic of Uzbekistan.

4.3 The author's case could be considered by the Presidium or Plenum of the Supreme Court, provided that counsel or any other person authorized by law to request a supervisory review of this criminal case present documents that comply with the legal requirements. Complaint could also be considered by the Ombudsman, who, under article 10 of the Law "On the Authorized Person of the *Oliy Mazhlis* (Parliament) of the Republic of Uzbekistan on Human Rights", may conduct her own investigations.

4.4 The State party contends that counsel's claims of a violation of the Criminal Procedural Code in her client's case are unfounded, since she has never been able to access his case file.

4.5 The State party notes that on 12 February 1993, criminal proceedings against Salai Madaminov were instituted. He signed an undertaking not to leave his place of residence without the investigator's permission. Nonetheless, so as to elude criminal liability, he left Uzbekistan illegally on 13 April 1993 and, went into hiding in Turkey. While living abroad, he was involved in activities designed to overthrow the constitutional order of Uzbekistan. On 16 February 1999, 16 people died and 128 were wounded in Tashkent as a result of terrorist bombings.

4.6 Investigation into the bombings produced evidence of Madaminov's intent forcibly to take over the government, and that he had contacted the leaders of the terrorist organization IMU, one Yuldashev and one Khodzhev. In October 1998, Yuldashev sent two IMU members to Turkey, where Madaminov was then living, who offered Salikh the post of President of a future Islamic State of Uzbekistan if he facilitated raising of funds for the purchase of arms and military equipment; Madaminov accepted. Information about Madaminov's meetings and negotiations with IMU leaders was corroborated by investigation files and testimonies of persons sentenced for their participation in the terrorist bombings.

4.7 The criminal case against Madaminov was opened on the basis of investigation files. Since Madaminov failed to appear in court, he was tried in accordance with article 410 of the Criminal Procedure Code³ with the participation of an attorney, one Kuchkarov, who

³ Article 410 of the Criminal Procedure Code reads: "Examination of a criminal case by the court of first instance takes place in defendant's presence, the defendant's appearance in court is compulsory. If the defendant fails to appear in court, examination of a criminal case should be postponed, except for the cases envisaged in part three of the present article. The court has a right to enforce the presence of the defendant who failed to appear in court, as well as a right to impose or change the defendant's restraint measure.

Examination of a case in the absence of a defendant is allowed only if the defendant is outside of the territory of Uzbekistan and fails to appear in court, and his absence does not prevent the court from

was defending his rights in court. Therefore, the State party submits, the requirements under the Criminal Procedure Code were fully met. Representatives of international human rights organizations, the OSCE, foreign embassies and mass media also attended the trial as observers. On 17 November 2000, the Judicial Chamber of the Supreme Court sentenced Madaminov, among other defendants, to 15 ½ years imprisonment on a total of 13 charges, including premeditated murder and terrorism.

Author's comments on State party's observations

5.1 On 9 February 2006, the author refuted the State party's challenge of the identity of Salai Madaminov and Mukhammed Salikh, and provided copy of a diplomatic passport of the (former) Union of Soviet Socialist Republics (USSR), issued by the Ministry of Foreign Affairs of the Uzbek Soviet Socialist Republic on 26 April 1990. There, he is identified as "Madaminov Salai (Moukhammad Salikh)". He provided copy of the court judgment concerning Rashid Begzhanov, Mamadali Makhmudov, Mukhammad Begzhanov, given by the Tashkent Regional Court on 18 August 1999. In this judgment, the author is referred to as "Madaminov Salai (Moukhammad Salikh)". He added that since 1971 he has published more than 20 books in Uzbekistan under his pen-name, Mukhammed Salikh.⁴ He further confirmed the power of authority that he gave to Salima Kadyrova in 2003 to act on his behalf. The author reiterated that the criminal case against him was fabricated and referred to evidence he presented in his initial submission.

5.2 By letter of 17 February 2006, counsel challenged the State party's claim about non-exhaustion of available domestic remedies. She stated that the subject matter of the complaint to the Committee, on behalf of her client, was exactly that she was prevented by the State party from submitting an appeal for supervisory review of the author's conviction by not granting her access to the author's case file and a copy of his sentence. She denied that she had not proven the author's authorization for her to act on his behalf, as required by article 50 of the Criminal Procedure Code. The State party itself mentioned that she applied for access to the author's case file twice, whereas in fact she submitted six requests without ever receiving a positive reply from the Supreme Court. She also referred to article 135 of the Civil Code, according to which a power of attorney should be either in a simple written form or it should be certified by a notary. She referred again to article 7 of the Law "On the guarantees of attorney's activity and social protection" that required only that a writ confirming an attorney's permit to participate to a case and an attorney's identity card were required for an attorney's participation in a case.

5.3 Counsel invoked article 22 of the Uzbek Constitution, which guarantees legal protection by the Republic of Uzbekistan of all its citizens on the territory of Uzbekistan and abroad. She submitted that there is no information that Salikh ever renounced his Uzbek citizenship and, therefore, he should be able to exercise his right to avail himself of the services of an attorney. She denied that the author's criminal case could have been considered by the Presidium or Plenum of the Supreme Court and argued that, in order for her to submit an appeal for supervisory review, she should be granted access to the criminal case file. She repeated that that she was deliberately prevented from accessing her client's file.

establishing truth on the case; or when the defendant was removed from the court room on the basis of article 272 of the present Code.

⁴ The author submitted copies of cover pages of two books published by the state publishing houses of the Uzbek Soviet Socialist Republic where his name appears as "Mukhammed Salikh (Madaminov Salai)".

5.4 Regarding the State party's claim that individual human rights complaints can be also considered by the Ombudsman, counsel referred to article 9 of the Law invoked by the State party that prohibits Ombudsman to consider the issues falling in the court's jurisdiction.

5.5 As to the State party's challenge of the identity of Salai Madaminov and Mukhammed Salikh, counsel recalled that the sentence of the Tashkent Regional Court of 18 August 1999 and the decision of the Supreme Court of 25 October 1999 on case No. 03–1035k–99 mention her client as "Madaminov Salai (Moukhammed Salikh)". To be able to list both names, the investigator was required to verify the person's identity, under article 98 of the Uzbek Criminal Procedure Code.

5.6 As to the legality of the author's conviction *in absentia*, counsel referred to part 1 of article 410 of the Criminal Procedure Code, which states that "the defendant's appearance in court is compulsory". The State party's reference to the exception from this rule (part 3 of article 410), allowing consideration of the case if the defendant is not present on the territory of Uzbekistan, is subject to the procedural guarantees of article 420 of the Criminal Procedure Code. In the absence of one of the defendants, the court should have suspended consideration of the case with regard to the missing defendant.

Decision on admissibility

6.1 During its eighty-eighth session, on 9 October 2006, the Committee considered the admissibility of the communication. It noted the State party's argument that, on one hand, Mukhammed Salikh, the author of the present communication, and, on the other hand, Salai Madaminov, a person whose conviction by a court of the State party was challenged before the Committee, are not identical. The Committee observed, however, that the author has produced copies of an ID issued by the State party's predecessor (the former USSR), and of judgments issued by the State party's own courts, where both names — Mukhammed Salikh and Salai Madaminov — were simultaneously used to identify the author. Given this situation, the Committee considered that the identity of the author should not be questionable to the State party, and concluded that it was not precluded from examining the communication on this ground.

6.2 Furthermore, the Committee noted that the State party had challenged the admissibility of the communication for non-exhaustion of domestic remedies, as the author's conviction had not been appealed to a higher tribunal and to the Ombudsman. Counsel in turn argued that she could not access her client's files and appeal his conviction with any reasonable prospect of success, as the State party deliberately prevented her from accessing her client's file, without which she would be unable to submit an appeal for supervisory review. Contrary to the applicable law, she was requested to present a power of attorney from the author authorizing her to act on his behalf that had to be certified by consular staff of the Republic of Uzbekistan. As this requirement was not provided for by law, the Committee did not consider it to be a bar to admissibility.

6.3 The Committee recalled its jurisprudence that article 5, paragraph 2(b), did not oblige complainants to exhaust domestic remedies that offer no reasonable prospect of success.⁵ It reaffirmed that applications to an Ombudsman institution did not constitute an "effective remedy" for the purposes of article 5, paragraph 2(b), of the Optional Protocol.⁶ The Committee noted that the facts of the communication appeared to raise issues under

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

⁶ Communication No. 334/1988, *Michael Bailey v. Jamaica*, Views adopted on 31 March 1993.

article 14 of the Covenant, and considered that the author had exhausted domestic remedies, for the purposes of article 5, paragraph 2(b) of the Optional Protocol. Accordingly, the Committee declared the communication admissible.

State party's observations on the merits

7.1 On 27 December 2006, the State party claimed that the decision on admissibility adopted by the Committee in the present communication was unfounded. It reiterated that Madaminov was tried in accordance with article 410, part 3, of the Criminal Procedure Code (participation of a defendant in court proceedings), because he had failed to appear in court. An attorney defending his rights participated in the pretrial investigation and in court; therefore, Madaminov's right to defence was not violated. The State party recapitulated its earlier arguments, summarised in paragraph 4.2 above and added that under article 66 of the Law "On Notaries", a notary attests to the authenticity of a copy of a document's duplicate, provided that the duplicate itself was either duly attested by a notary or issued by the same entity that produced the original document. In the latter case, a duplicate should be issued on that entity's official letterhead, stamped and duly contain a reference mark, indicating that the original document was being kept by the entity in question itself. The State party drew the Committee's attention to the fact that a writ obtained by Madaminov's counsel stated that it was issued to allow her to get access to the criminal case file of Mukhammed Salikh.

7.2 The State party further submitted that Madaminov's counsel did not comply with the requirements of the Law "On Notaries", even though under article 3 of the Law "On Legal Profession (*advocatura*)" of 27 December 1996, a lawyer called to the bar undertakes strictly to comply with the Constitution and the laws of Uzbekistan. Moreover, under article 7 of the same Law, attorneys are obliged to comply with the requirements of the law in force in Uzbekistan in the exercise of their professional duties.

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

8.1 On 9 January 2007, the author commented on the State party's observations. He stated that the State party's reliance on article 410, part 3, of the Criminal Procedure Code in justification for having conducted his trial *in absentia* is misguided, because part 1 of the same article makes the defendant's appearance in the court of first instance compulsory. On the State party's argument that "an attorney defending Madaminov's rights participated in the pretrial investigation and in court", the author claimed that an attorney who was merely present at, rather than "participated in", the court proceedings, without either a writ or a power of attorney from his part, could not have properly defended his interests in court. The author submitted that an attorney could not be present at the court proceedings in the absence of his/her client.

8.2 With regard to the State party's claims that counsel failed to provide a document that would prove that she had been authorised by Madaminov to act on his behalf in the supervisory review instance and that a writ referred to the name of "Mukhammed Salikh", the author reiterated counsel's argument that she did comply with the requirements of article 50 of the Criminal Procedure Code by presenting a writ, confirming that she had been authorised to act on his behalf. The author added that the Committee has already established at the admissibility stage that his identity should not have been questionable in any way to the State party. He affirmed that he had never renounced his Uzbek citizenship, had never been a citizen of Norway and had never submitted an application to obtain one. A travel document issued by the Norwegian police on 24 August 1999 did not endow him with the citizenship of Norway and, therefore, he should be entitled to benefit from all the rights guaranteed to a citizen of Uzbekistan by the Constitution and other laws.

8.3 Finally, the author argued that the State party's reference to the Law "On Notaries" was irrelevant to his case, because neither the issuance of a writ, nor the requests to the Supreme Court and the Parliament to grant access to his criminal case file, needed any attestation by a notary.

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 27 December 2006, which challenge the admissibility of the communication. It considers that the arguments raised by the State party are not of such nature as to require the Committee to review its admissibility decision, owing in particular to the lack of new relevant information, such as a copy of the judgment and sentence of the Supreme Court of 17 November 2000 concerning the author, as well as a copy of the trial transcript. The Committee therefore sees no reason to review its admissibility decision.

9.3 The Committee proceeds to consideration of the case on the merits. It notes that although neither the author nor his counsel have invoked violations of any specific provisions of the Covenant by the State party, their allegations and the facts as submitted to the Committee appear to raise issues under article 14, paragraph 3 (a), (b), (d) and (e), of the Covenant.

9.4 In the first place, the Committee must examine whether the proceedings on the basis of which the author of the communication was sentenced to 15 ½ years' imprisonment disclose any breach of rights protected under the Covenant. Under article 14, paragraph 3, everyone is entitled to be tried in his presence and to defend himself in person or through legal assistance. This provision and other requirements of due process enshrined in article 14 cannot be construed as invariably rendering proceedings *in absentia* impermissible, irrespective of the reasons for the accused person's absence.⁷ Indeed, proceedings *in absentia* may in some circumstances (for instance, when the accused person, although informed of the proceedings sufficiently in advance, declines to exercise his right to be present) be permissible in the interest of the proper administration of justice. Nevertheless, the effective exercise of the rights under article 14 presupposes that the necessary steps should be taken to inform the accused of the charges against him and notify him of the proceedings (article 14, paragraph 3 (a), of the Covenant).⁸ Judgment *in absentia* requires that, notwithstanding the absence of the accused, all due notifications has been made to inform him or the family of the date and place of his trial and to request his attendance. Otherwise, the accused, in particular, is not given adequate time and facilities for the preparation of his defence (article 14, paragraph 3 (b)), cannot defend himself through legal assistance of his own choosing (article 14, paragraph 3 (d)) nor does he have the opportunity to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf (article 14, paragraph 3 (e)).⁹

9.5 The Committee acknowledges that there must be certain limits to the efforts that can reasonably be expected of the competent authorities with a view to establishing contact

⁷ Communication No. 16/1977, *Mbenge v. Zaire*, Views adopted on 25 March 1983, para. 14.1.

⁸ Human Rights Committee, general comment No. 32 (2007) on article 14 (Right to equality before courts and tribunals and to a fair trial), *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40 (A/62/40)*, vol. I, annex VI, para. 31.

⁹ *Mbenge v. Zaire* (note 7 above), para. 14.1.

with the accused. With regard to the present communication, however, those limits need not be spelled out, for the following reasons. The State party has not challenged the author's contention that neither he nor his family were notified of the criminal proceedings against the author; and that an attorney, one Kuchkarov, who, as argued by the State party, defended his rights in court, was not, in fact, the attorney of his own choosing. In addition, no indication has been given by the State party about any steps taken by its authorities to transmit to the author the summonses for his appearance in court. In this regard, the Committee regrets that the State party has not complied with its request to make available to it a copy of the judgment in the author's case, as well as a copy of the trial transcript – both are documents that could have shed light upon the issue at stake. These factors, taken together, lead the Committee to conclude that the State party failed to make sufficient efforts with a view to informing the author about the impending court proceedings, thus preventing him from preparing his defence or otherwise participating in the proceedings. In the view of the Committee, therefore, the State party has violated the author's rights under article 14, paragraph 3 (a), 3 (b), 3 (d) and 3 (e), of the Covenant.

9.6 Under these circumstances, the Committee considers that it is not necessary to examine issues relating to the supervisory review process.

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 violations of the author's rights under articles 14, paragraph 3 (a), 3 (b), 3 (d) and 3 (e), of the Covenant.

11. In accordance with article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including adequate compensation. The State party is also under an obligation to prevent similar violations in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its 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.]

**R. Communication No. 1388/2005, *De León Castro v. Spain*
(Views adopted on 19 March 2009, Ninety-fifth session)***

<i>Submitted by:</i>	Luis de León Castro (represented by counsel Fátima de León)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	23 August 2004 (initial submission)
<i>Decision on admissibility</i>	9 March 2007
<i>Subject matter:</i>	Arbitrary detention owing to the denial of parole; lack of full review of the lower court's judgement on appeal in cassation
<i>Procedural issue:</i>	Exhaustion of domestic remedies; insufficient substantiation of the alleged violations
<i>Substantive issues:</i>	Arbitrary detention; right to have sentence and conviction reviewed by a higher court in accordance with the law
<i>Articles of the Covenant:</i>	9, paragraph 1; 14, paragraph 5
<i>Articles of the Optional Protocol:</i>	2; 5, paragraph 2 (b)

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

Meeting on 19 March 2009,

Having concluded its consideration of communication No. 1388/2005, submitted on behalf of José Luis de León Castro 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 23 August 2004, is José Luis de León Castro, a Spanish citizen born on 25 February 1929. The author claims to be the victim of

* The following members of the Committee participated in the examination of this communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Lazhari Bouzid, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

The text of an individual opinion of Committee member Ms. Ruth Wedgwood is appended to the present document.

violations by Spain of articles 9, paragraph 1, and 14, paragraph 5, of the Covenant. The Optional Protocol entered into force for Spain on 25 April 1985. The author is represented by counsel.

1.2 On 13 July 2005 the Special Rapporteur on New Communications and Interim Measures decided that the admissibility of the communication should be considered separately from the merits.

Factual background

2.1 The author served as a lawyer for a housing association in a lawsuit against various construction companies and architects and an insurance company concerning defects in the construction of a building. In 1996 a court upheld the association's claim and ordered the defendants to pay 2,000 million pesetas in compensation. The insurance company paid its share, which amounted to 86 million pesetas. The association had reached an agreement with the author and the court attorney handling the case that they should be paid in accordance with the guidelines established by the Madrid Bar Association and with the schedule of attorneys' fees. Payment would be made when the association had sufficient funds.

2.2 In April 1997 the attorney collected his fee of 6 million pesetas, remitted 50 million pesetas to the author and then wrote out a cheque to the association for the remaining amount of 30 million pesetas.

2.3 Following a disagreement over the amount of the fee paid to the author, on 20 January 1998 the housing association brought criminal proceedings against him for alleged misappropriation of funds. The prosecutor's office classified the offence as either misappropriation of funds or fraud. On 8 February 2001 the Madrid Provincial Court sentenced the author to three years' imprisonment for fraud. The author states that the court invented the story that he had deceived the attorney into giving him the 50 million pesetas and that, in determining that the maximum amount the lawyer could charge was 22 or 23 million pesetas, it failed to take into account the fees he could charge for an appeal. The author maintains, in addition, that the essential element of the offence of fraud, namely deception, was introduced by the judges at the sentencing stage, and it was therefore impossible for him to mount a defence against this new accusation during the trial.

2.4 On 21 April 2001, the author submitted an appeal in cassation to the Supreme Court. In a ruling dated 20 January 2003, the Supreme Court found that the author's guilt had been established on the basis of lawfully obtained evidence which had been assessed by the court and that the assessment of evidence was a matter for the sentencing court, not the Supreme Court. The author claims that this judgement, too, distorted the facts proved at trial by finding that the author had concealed from the attorney the terms on which his fee had been set so that the attorney would pay him the 50 million pesetas. Moreover, the Supreme Court's assertions could not be reviewed by a higher court.¹

¹ With regard to the assessment of evidence, the Supreme Court's judgement in cassation stated the following: "There is an abundance of evidence — both direct and circumstantial — that weakens the presumption of innocence. This evidence includes the following: (a) the statement made by the accused acknowledging that he received 50 million pesetas and that he did not transfer any of the money to the housing association, an acknowledgement to which he adds that he was perfectly entitled to receive this amount of money; (b) the fact that he was not entitled to obtain the full amount is proven by a number of documents contained in the file, including one sent by the present appellant to the housing association on 10 April 1992, in which a contract for the provision of services was considered to exist between the two parties and in which it was stated that, if the case was taken to

2.5 On 20 February 2003, the author submitted an application for *amparo* to the Constitutional Court, claiming, inter alia, that his right to be informed of the charges against him and his right to presumption of innocence had been violated. On 26 January 2004, the Constitutional Court found that there was sufficient evidence against the author and rejected the application. The author states that the Constitutional Court does not permit any challenges to the evidence considered in the sentences that are handed down.

2.6 On 11 February 2003, the author filed a petition for a pardon with the Ministry of Justice. On 12 February 2003, after the Supreme Court had rejected his appeal in cassation, he applied to the Madrid Provincial Court for a suspension of his sentence. On 7 April 2004, the Provincial Court rejected that request. The author went to prison on 25 April 2003. He applied for reconsideration, citing his age (74) and asserting that there was no danger that he would escape, that he had no previous convictions and that his family would be left destitute if he were to go to prison. His request for reconsideration was rejected on 3 June 2003. The author pointed out that on 11 April 2004 a local newspaper had reported that the Provincial Court had suspended the sentences of two bankers of advanced years pending a decision on their petition for a pardon. On 21 July 2003, the author applied to the Constitutional Court for a suspension of his sentence; this appeal was not examined until January 2004, when the application was rejected.

2.7 Before going to prison, the author applied to the Prisons Department for conditional release. On 17 June 2003 he was interviewed in prison by the Assessment Board. On 6 August 2003 the Prisons Department informed him that he had been placed under the ordinary (grade 2) prison regime, after determining that he was not eligible for the semi-open regime. The Department decided that this regime should apply to the author with effect from 31 July 2003. The author explains that the reason for selecting that date was that Act No. 7/2003 of 30 June 2003 on reform measures for the full execution of sentences had entered into force in early July. This law made access to the restricted-release regime and to parole conditional upon prior payment of the civil liabilities arising from the offence. This law required that declarations of insolvency be taken into account, however, and the author had submitted such a declaration on 18 November 1999; it did not restrict the applicable rules in respect of people in their 70s.

2.8 On 7 August 2003, the author appealed his prison regime assignment before the Prison Supervision Court, requesting that he be granted parole and, subsidiarily, that he be placed under a grade 3 regime. In a decision communicated on 9 December 2003, the Prison Supervision Court accepted the author's application and placed him under a restricted-release regime (grade 3 restricted: weekend leave). It also stated that he would be eligible for parole once he had paid the compensation corresponding to the civil liabilities

court (as it was) and an amount of 650 million pesetas was obtained, lawyers' fees (for the lawyer and attorney) would be set at 8 million pesetas, plus 6 per cent value added tax (VAT); there was also a document dated 24 July 1992 sent to the housing association by the accused, in his capacity as its lawyer, stating that the fee would be brought into line with the guidelines established by the Bar Association; from the attached copy of these guidelines it could be deduced that the fee would normally be between 15 and 16 million pesetas, or between 22 and 23 million pesetas in an especially complicated case; another series of documents drafted and consequently acknowledged by the accused, such as those of 31 October and 16 December 1996, are similar in content; (c) there is also the witness statement given by Mr. Vélez, in which he said, in his capacity as the court attorney, that he had given the 50 million pesetas in question to the accused because the latter, in addition to informing him of the relationship of trust he enjoyed with the housing association, had concealed from the attorney the terms on which his fee had been set. Therefore, lawfully obtained evidence was assessed by the trial court based on logic, coherence and the lessons of experience, with its authority to undertake such an assessment being established by article 741 of the Criminal Procedure Act, which is based on no less an important principle than that of immediacy."

arising from the offence. On 19 December 2003, the Assessment Board granted him leave on alternate weekends but denied him parole, which he had requested on the grounds of his advanced age.

2.9 On 15 January 2004 the author again applied to the Prison Supervision Court for parole, arguing that he was over 70 years old and that he understood from the Supervision Court decision placing him under the restricted-release regime that the requirement to discharge his civil liabilities would be deemed fulfilled once he had signed an express undertaking to pay the corresponding compensation if he received any income; in that regard, he stated that he was awaiting a ruling in a case from which he expected to receive 90 million pesetas. This request was turned down on 13 May 2004 on the basis of a prison report dated 1 April 2004. On 1 April 2004, the author had applied to the Provincial Court for the suspension of his sentence; this was denied on 21 April 2004 because the sentence was longer than two years. On 26 April 2004, the Prisons Department granted the author daily leave between 5.30 p.m. and 9.45 p.m. as well as weekend leave. On 2 June 2004, the author submitted a complaint to the General Council of the Judiciary concerning the delay in processing his requests for conditional release in the Prison Supervision Court and the Provincial Court. This complaint was dismissed on 30 June 2004. On 6 May 2005, the Madrid Provincial Court upheld the author's appeal against the decisions of Prison Supervision Court No. 3, according to which the author was to remain under the semi-open (grade 3 restricted) regime, and approved his application for the full open regime. The prison administration did not implement this decision immediately; in response to this situation, the author submitted several written requests and an application for *amparo*. The Constitutional Court rejected this application on 18 January 2006.

2.10 A further parole application submitted to Madrid Prison Supervision Court No. 2 was rejected on 5 December 2005. The author appealed this decision before the Madrid Provincial Court, which dismissed his appeal on 3 February 2006.² On 16 March 2006, the author submitted an application for *amparo* to the Constitutional Court against the decision of the Madrid Provincial Court.

2.11 The author considers that he has exhausted domestic remedies. He says that, although in the application for *amparo* before the Constitutional Court he did not adduce a violation of the right to a second hearing, this remedy was in any case ineffective because of the Constitutional Court's refusal to apply the Committee's jurisprudence relating to article 14, paragraph 5, of the Covenant. The author asserts that he has exhausted all available domestic remedies before the prison authorities and the Prison Supervision Court in his attempts to obtain conditional release.

The complaint

3.1 The author claims to be a victim of arbitrary detention in violation of article 9, paragraph 1, of the Covenant. He states that a law limiting his eligibility for prison privileges was applied retroactively. The purpose of Act No. 7/2003 of 31 July 2003³ is to

² The decision states the following: "Apart from the fact that the Assessment Board's recommendation on the proposal for parole was unfavourable ... we do not see that the prisoner's response to the prison regime has been sufficiently positive to allow him to be granted as important a privilege as the one requested, especially given that he has not accepted criminal responsibility. On the other hand, age is not currently a serious impediment to the prisoner's serving his sentence, since José Luis de León Castro is, fortunately, in good health and benefits from a grade 3 prison regime that gives him a considerable margin of freedom, his presence being required at the open prison centre for only six hours a day."

³ The correct date of Act No. 7/2003 is 30 June 2003; it entered into force on 2 July 2003.

regulate access to prison privileges by persons convicted of terrorism or of fraud or misappropriation involving large sums of money that adversely affect large numbers of people. In such cases, the civil liabilities arising from the offence must be discharged before parole is granted. The author argues that his case does not meet any of those criteria. Under the guidelines drawn up by the Prisons Department for the application of this law, prison authorities must take the existence or absence of a prior declaration of insolvency into account. The author maintains that he has a declaration of insolvency dated 18 November 1999, while the events in question occurred on 15 April 1997.

3.2 The author says that in order to be granted parole he is required to settle the civil liabilities arising from the offence. He considers this to be unfair, unlawful and discriminatory because he is not financially solvent, having been unable to practise as a lawyer for three years as a result of his conviction. He adds that nobody is willing to offer him an employment contract because he is 75 years old.

3.3 He claims that the Prison Supervision Court handed down erroneous rulings in order to delay the processing of his parole applications and thereby allow the full term of his sentence to elapse. He cites the Prison Supervision Court ruling of 10 June 2004, in which the Court quashed the order issued by the Prisons Department placing him under the restricted-release (grade 3 restricted) regime and decided that he should remain under the ordinary (grade 2) prison regime. The author requested that the error be corrected, but this was not done until 6 July 2004. On the same day, he was informed of a ruling by the Prison Supervision Court dated 26 July 2004 (sic) that refused him parole on health grounds because he was subject to the ordinary (grade 2) regime. The author maintains that he had not applied for parole on health grounds, but on the grounds of age, and that he was not subject to the grade 2 regime. He further states that he asked for these rulings to be rectified.

3.4 The author also alleges a violation of article 14, paragraph 5, of the Covenant on the grounds that he was not granted a full review of the sentence handed down by the Madrid Provincial Court. He cites the Human Rights Committee's concluding observations of 3 April 1996 on the fourth periodic report of Spain and the Committee's Views on communications No. 701/1996, *Gomez Vásquez v. Spain*; No. 986/2001, *Semey v. Spain*; No. 1007/2001, *Sineiro Fernández v. Spain*; and No. 1101/2002, *Alba Cabriada v. Spain*. He argues that the review carried out by the high court was confined to legal aspects and did not include an examination of the facts of the case because he had been unable to obtain a review of the evidence by the Supreme Court. The reason for this, he claims, is that the Supreme Court ruled that the credibility of statements cannot be the subject of review, since nothing that depends on the immediacy of the proceedings can be subject to appeal.

State party's observations on admissibility

4.1 By note verbale dated 11 July 2005, the State party submitted its observations on the admissibility of the communication. It maintains that the communication is inadmissible under articles 2, 3 and 5, paragraph 2 (b), of the Optional Protocol because domestic remedies have not been exhausted and because the communication is clearly without merit.

4.2 According to the State party, the author challenged various decisions of the prison authorities in the Prison Supervision Court but did not at any time challenge the various rulings of the Court itself, despite the fact that the Court's rulings indicated that they were subject to the remedy of reconsideration. In addition, the only application for *amparo* submitted by the author was related to the trial in which he was convicted rather than to prison-related matters, and no reference was made to the right to review of conviction and sentence by a higher court.

4.3 The State party adds that the author was deprived of his liberty for reasons defined by law and pursuant to legally established procedures in accordance with article 9, paragraph 1, of the Covenant. The State party argues that allegations in respect of the right of pardon or clemency and suspension of sentence fall outside the scope of article 9, paragraph 1, of the Covenant.

4.4 As to the alleged violation of article 14, paragraph 5, the State party repeats that the matter was never raised in the domestic courts, not even in the application for *amparo* submitted to the Constitutional Court. The State party denies that the application for *amparo* was futile. It argues that the only exception to the exhaustion of domestic remedies rule is unreasonably prolonged proceedings. The remedies must exist and be available, but they cannot be considered ineffective simply because the author's claims were not upheld. It adds that any over-interpretation of the Protocol could open the way for dispensing with domestic remedies whenever the relevant jurisprudence has been established by the domestic courts, which would clearly run counter to the letter and spirit of article 5, paragraph 2 (b).

4.5 The State party refers to Constitutional Court jurisprudence, which establishes that, to ensure that the remedy of cassation meets the standards of the Covenant, a broad interpretation of the scope of review by the court of cassation must be applied (Constitutional Court judgements of 3 April 2002, 28 April 2003 and 2 June 2003, *inter alia*). The State party argues that, because this claim was not brought before the Constitutional Court, it is now impossible to know whether that Court would have found the Supreme Court's review of the conviction and sentence sufficiently comprehensive or not.

4.6 The State party further considers that the judgement handed down in cassation shows that the second chamber of the Supreme Court did carry out a full review of the sentence issued by the Provincial Court. Quoting the third and seventh grounds of the judgement, it concludes that the author alleges a lack of review because he disagrees with the assessment of the facts and evidence. The State party refers to the decision of the Constitutional Court, which states that "the appellant's claim that there was insufficient evidence against him cannot be upheld ... on the contrary, from the record it can only be concluded that there was an abundance of evidence, both direct and circumstantial ...". The State party asserts that the Constitutional Court also reviewed the evidence and the assessment of it made in the course of the appeal in cassation.

Author's comments on the State party's observations

5.1 In his comments of 20 September 2005, the author states that the prison administration did not place him under the open prison regime or process his application for parole, despite the Madrid Provincial Court decision of 6 May 2005 granting the application of the full open regime and its decision of 25 May 2005 ordering the prison administration to process his parole application. The author states that he repeatedly requested that, in view of his age and his health, these court rulings be applied, but that the judicial decisions adopted in that regard were arbitrary and constituted a denial of justice.

5.2 The author disputes the State party's assertion that he did not appeal the various rulings of the prison authorities; in this connection, he refers to the complaint he lodged with the General Council of the Judiciary concerning the delay in proceedings and to article 5, paragraph 2 (b), of the Optional Protocol. He adds that as a result of the constant delays in the appeal proceedings, he brought two criminal actions for obstruction of justice. He maintains that the unreasonable prolongation of proceedings in these appeals and in the issuance of rulings is the reason why he did not submit an application for *amparo*.

5.3 As to the State party's claim that the communication is clearly without merit because it falls outside the scope of article 9, paragraph 1, the author refers to the jurisprudence of the Committee in communication No. 44/1979, *Alba Pietraroia v. Uruguay* and to its Views on communication No. 305/1988, *Van Alphen v. The Netherlands*. He also refers to the views of the Working Group on Arbitrary Detention and argues that there cannot possibly be any legal grounds for keeping a 77-year-old man in prison when he has served three quarters of his sentence, is subject to the grade 3 open prison regime and has shown good behaviour. He also refers to the 3 December 2003 decision of Madrid Prison Supervision Court No. 1, which found that the likelihood that he would reoffend tended to be low and noted his good behaviour and normal personality. He argues that this situation constituted a violation of article 9, paragraph 1, of the Covenant. The author again asserts that Act No. 7/2003, which was published on 31 July 2003 and entered into force on 1 August 2003, contains an unconstitutional transitional provision for retroactive application.

5.4 As to the State party's claim that domestic remedies have not been exhausted, the author repeats that the Constitutional Court systematically rejects any application for *amparo* that is based on the lack of a second hearing, for the Court takes the view that the scope of the remedy of cassation is consistent with the right to a second hearing established in article 14, paragraph 5, of the Covenant.

5.5 The author also refutes the State party's claim that the Supreme Court examined factual issues in this case. The remedy of cassation in criminal matters in Spain is subject to strict limitations in respect of the re-examination of evidence, and no facts declared proven in the judgement may be reviewed. The author refers to the replies of the Spanish State in communications Nos. 1101/2002 and 1104/2002 (para. 3.4 above), in which he says the State party recognizes that judicial review, or appeal in cassation, is a legal remedy intended essentially to standardize the interpretation of the law. For the author, the adoption of Act No. 19/2003, establishing a genuine second judicial instance in criminal cases, is confirmation of the fact that the Spanish system of cassation does not comply with the requirements of the Covenant.

5.6 The author contends that the main issue in the criminal trial was the existence or absence of deception and that the resolution of that issue would require an evaluation and review of the facts declared proven in the Provincial Court sentence. The high court, in the third legal ground of its judgement as quoted by the State party, considers the question of whether or not there was a violation of the right to presumption of innocence by assessing whether or not there was an absence of evidence, but it does not enter into an assessment of the evidence as such. According to the author, in its judgement the high court acknowledged that the weighing of evidence is conducted by the trial court, whose competence to do so is established by article 741 of the Criminal Procedure Act based on the principle of immediacy. The high court confined itself to determining whether the reasoning set forth in the lower court's sentence was inconsistent with the content of specific documents. Such a review could never entail a full re-examination of the evidence (and therefore of the verdict reached), much less of the facts declared proven in the trial court's sentence.

5.7 The author also contests the State party's contention that the Constitutional Court reviewed the prosecution evidence and its evaluation in cassation. He observes that the Constitutional Court confined itself to establishing that there was no lack of evidence, without evaluating the evidence as such.

The Committee's decision on admissibility

6.1 On 9 March 2007, at its eighty-ninth session, the Committee decided that the communication was admissible in respect of the complaints related to articles 9, paragraph 1, and 14, paragraph 5, of the Covenant.

6.2 With regard to the author's complaint of violations of article 9, paragraph 1, the Committee found that the complaint had been sufficiently substantiated for the purposes of its admissibility and that the author had exhausted the remedies available to him.

6.3 As to the complaint under article 14, paragraph 5, the Committee took note of the State party's argument that domestic remedies had not been exhausted because the alleged violations referred to the Committee had never been brought before the Constitutional Court. The Committee recalled its jurisprudence, which indicates that it is necessary to exhaust only those remedies that can reasonably be expected to prosper.⁴ An application for *amparo* had no prospect of prospering in relation to the alleged violation of article 14, paragraph 5, of the Covenant, and the Committee therefore considered that domestic remedies had been exhausted.

6.4 As to the alleged failure to substantiate the communication in respect of the complaint under article 14, paragraph 5, the Committee found that the author had sufficiently substantiated this part of the communication for the purposes of its admissibility and concluded that the communication was admissible in respect of the alleged lack of a full review in cassation of the sentence handed down by the Provincial Court.

State party's observations on the merits

7.1 On 18 October 2007 the State party submitted its observations on the merits of the communication. With regard to the alleged violation of article 9, paragraph 1, of the Covenant, the State party claims that the author's complaint refers to the application of prison privileges, the granting or denial of which does not call into question the fact that he was obliged to serve the three-year prison sentence that had been lawfully imposed upon him.

7.2 The author began by requesting a suspension of his sentence, which is ruled out under the Criminal Code for sentences of more than two years. He began to serve his prison sentence on 28 April 2003, and the Prison Supervision Court placed him under the semi-open (grade 3) regime on 3 December 2003. This was done despite the fact that the author had not yet served a quarter of his sentence or discharged his civil liabilities, both of which are prerequisites for the granting of this privilege; the requirements were waived because the author had served almost a quarter of the sentence and had undertaken to discharge the civil liabilities in question.

7.3 While under the semi-open regime, the author applied for parole. The request was rejected by decision of 5 May 2004 on the grounds of a failure to meet the requirements for parole, namely the discharge of civil liabilities and completion of three quarters of the sentence. Although under the law the requirement that the author serve three quarters of the sentence could have been waived owing to his age, it would have been inappropriate to

⁴ See, for example, communications No. 701/1996, *Cesario Gómez Vázquez v. Spain*, Views of 20 July 2000, paragraph 10.1; No. 986/2001, *Joseph Semey v. Spain*, Views of 30 July 2003, paragraph 8.2; No. 1101/2002, *Alba Cabriada v. Spain*, Views of 1 November 2004, paragraph 6.5; No. 1293/2004, *Maximino de Dios Prieto v. Spain*, decision of 25 July 2006, paragraph 6.3; and No. 1305/2004, *Villamón Ventura v. Spain*, decision of 31 October 2006, paragraph 6.3.

grant parole because of the author's failure to even partially discharge his civil liabilities. No appeal of this decision was lodged. On several subsequent occasions, applications by the author for parole were again rejected by the courts on the grounds that he showed no remorse or any intention of discharging his civil liabilities and that the illness he invoked was not of a serious nature. At no point did he submit an application for *amparo* against these decisions. Nor did he inform the Committee of the legal provisions he considered to have been violated or the specific circumstances on which such an allegation would be based. The author has deliberately omitted any reference to the judicial decisions dismissing his applications from the information provided to the Committee. In support of his argument that the necessary remedies were not available, he mentions only the decision of the Provincial Court ordering that an application be processed. However, once that application had been processed, it was rejected by reasoned decision on repeated occasions.

7.4 With regard to the alleged violation of article 14, paragraph 5, the author confines himself to making general comments, without specifying which evidence he disputes or which particular pieces of evidence or facts he was unable to have reviewed. In addition, the ruling on the appeal in cassation shows that the Court carried out a thorough review of the prosecution evidence, leading to the conclusion that "lawfully obtained evidence was assessed by the trial court based on logic, coherence and the lessons of experience, competence for this assessment being established by article 741 of the Criminal Procedure Act". The Court also examined various documents contained in the case files that the author had referred to when claiming that the evidence had been erroneously assessed by the Provincial Court.

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

8.1 On 12 December 2007, the author submitted comments on the State party's observations. He reiterates that it was arbitrary to hold him in prison from the age of 74 years and 2 months to the age of 77 years and 5 months. Contrary to the State party's claims, the author did challenge his conviction, since he submitted an appeal in cassation and an application for *amparo*.

8.2 With regard to the suspension of sentence, he states that, under article 80 of the Criminal Code, any sentence may be suspended without it being necessary to meet any requirement whatsoever in the case of a serious illness with incurable symptoms. The Views and the relevant jurisprudence equate old age (70 and over) with serious illness. In addition, article 92 of the Criminal Code provides that anyone who is 70 years old or reaches the age of 70 while serving his or her sentence may be granted parole. Thus, parole is in no way made conditional upon the length of the prison sentence.

8.3 Contrary to the State party's claims, it is not true that the author was placed under the semi-open (grade 3 restricted) regime. He entered prison on 25 April 2003 and, despite many favourable reports (from the psychologist, instructor, etc.), the prison placed him under the strict (grade 2) prison regime on 19 June 2003. On 6 August 2003, the Prisons Department confirmed that he had been placed under that regime, but with effect from 31 July 2003 rather than from the date of the prison's decision on the placement, as provided for by law. This was done so that Act No. 7/2003 of 30 June 2003, which made parole conditional upon payment of the compensation corresponding to the civil liabilities arising from the offence, would be applicable to him.

8.4 While serving his sentence, the prison regime under which the author was placed was as follows:

- From 25 April to 23 December 2003, he remained in prison, with no entitlement to leave

- On 3 December 2003, he was placed under the grade 3 restricted regime, under which, from 23 December 2003 on, he was granted leave on alternate weekends (from Saturday afternoon to Sunday afternoon)
- Starting on 23 January 2004, he was granted leave on weekends from 4 p.m. on Friday to 10 p.m. on Sunday
- On 2 March 2004, he was granted 22 days of leave every six months
- Starting on 20 May 2004, he was granted daily leave from 5.30 p.m. to 9.45 p.m., Monday through Friday, and weekend leave from 9 a.m. on Saturday to 9 a.m. on Monday
- From 1 December 2005, he was required to be in prison only from 3 p.m. to 9 p.m., Monday through Friday (he no longer spent the night in prison)
- By its decision of 10 March 2006, the Madrid Provincial Court, taking into account the fact that the author had almost completed his sentence and the author's age, health and the level of risk he posed, ordered that the periods he was required to be in prison would be from 4 p.m. to 6 p.m. on Monday, Wednesday and Friday
- On 20 August 2006, he obtained his unconditional release from prison

8.5 The author contests the State party's claim that he was granted prison privileges despite the fact that he had not yet served a quarter of his sentence or discharged his civil liabilities. Neither of these requirements was present in the Criminal Code or the prison legislation in force at the time he began his prison sentence or at the time that he should have been eligible for parole. Act No. 7/2003 introduced the additional requirement of discharging one's civil liabilities, taking into account the prisoner's personal and financial circumstances, and the additional criterion regarding particularly serious crimes likely to endanger a great number of people. In criminal law, however, new requirements are not retroactive. In addition, no account was taken of the fact that the author had declared he was insolvent during the pretrial phase, or that he would be unable to exercise his profession owing to his disqualification for the duration of his sentence. Nor was he allowed time to work unless he could produce an employment contract. In other words, the administrative authorities themselves denied him the possibility of discharging his civil liabilities.

8.6 The author contests the State party's claim that he did not appeal against the decision of 5 May 2004 refusing him parole. He appealed that decision before Prison Supervision Court No. 3 and the Provincial Court.

8.7 Article 4.4 of the Criminal Code provides that the judge or court may suspend a sentence pending a ruling on a request for pardon, if serving the sentence would render the pardon devoid of effect. At around the same time (11 April 2003), the same court suspended the prison sentences (of three years and four months) of two bankers because the nature and duration of the sentences would have rendered the pardon devoid of effect. Yet the author's sentence was not suspended, despite the fact that he had filed a petition for a pardon.

8.8 With regard to the State party's claim that the author's illness was not serious and that he was in good health, these considerations are not mentioned in the decision of 7 December 2005 refusing him parole. In addition, the courts referred to his "good health" despite the fact that prison doctors had not made such a diagnosis and that there had been no prior medical examination. On 18 May 2006, during medical examinations carried out because the author was suffering from thrombophlebitis, he was found to have lung cancer. The author did not inform the prison or the courts of this, but instead waited until he had completed his sentence before undergoing an operation on 1 September 2006.

8.9 The author reiterates that he was the victim of a violation of article 14, paragraph 5, of the Covenant, since there was no review of his sentence or conviction. In addition, a fine that had been levied on him was replaced by an additional four months in prison; this was unlawful, given his declaration of insolvency.

Consideration of the merits

9.1 The Committee has examined the merits of the present communication in the light of all the information provided by the parties.

9.2 The author alleges a violation of article 14, paragraph 5, of the Covenant because the Supreme Court did not carry out a full review of the sentence handed down by the Provincial Court. The Committee observes, however, that it is clear from the judgement handed down by the Supreme Court on 20 January 2003 that the Court had reviewed in detail the Provincial Court's assessment of the evidence. Consequently, the Committee cannot conclude that the author has been denied the right to have his conviction and sentence reviewed by a higher court in accordance with article 14, paragraph 5, of the Covenant.

9.3 With regard to the author's allegations that the retroactive application of Act No. 7/2003 of 31 July 2003 limited his access to prison privileges, including parole, and that the processing of his applications for parole was delayed in order to oblige him to serve his entire prison sentence, the Committee must decide whether these claims constitute a violation of article 9, paragraph 1, of the Covenant. The Committee observes that the various complaints made by the author to the prison and judicial authorities were dealt with by those authorities and that, as a result, the author obtained progressively increasing prison privileges. His complaints were addressed in accordance with the legislation in force, and the resulting judicial decisions made available to the Committee by the author were reasoned. The Committee cannot conclude, in view of the documents in the case file, that the denial of parole to the author made his imprisonment for the entire duration of his sentence arbitrary within the meaning of article 9, 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 articles 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.]

Appendix

Individual opinion (dissenting) of Committee member Ms. Ruth Wedgwood

In this case, the author (who is a lawyer) was sentenced to jail in Spain in 2001, following his conviction for fraud in the receipt of legal fees. This is indeed a serious offence that strikes at the heart of the integrity of a legal system. His conviction for fraud was affirmed by the Supreme Court of Spain in January 2003, after his appeal in cassation, and he began serving a three-year prison term in April 2003.

The author has claimed that the State party violated article 9 of the Covenant by retrospectively applying to him the restrictive provisions of a new parole statute passed after the date of his initial conviction and appeal. The parole statute, Act No. 7/2003, which came into force on 1 August 2003, provides that parole cannot be granted to a convicted defendant unless he has satisfied the civil liabilities arising from an offence. The State party admits that parole was denied to the author on several occasions because he had not yet discharged his civil liabilities.^a

Even within the terms of the new statute, no refusal of parole was supposed to be based on unpaid civil liabilities unless account was taken of a prisoner's declaration of financial insolvency. In addition, any prisoner who was aged 70 or older was not to be subject to the new parole restriction at all. See Views of the Committee, paragraph 2.7. The author apparently should have fallen within the second category, since he was sentenced to jail just before his 72nd birthday.^b In addition, he states that he made a declaration of financial insolvency.^c

On this rather puzzling factual record, the Committee concludes that "the various complaints made by the author to the prison and judicial authorities were dealt with by those authorities" and that the Committee "cannot conclude ... that the denial of parole to the author made his imprisonment for the entire duration of his sentence arbitrary within the meaning of article 9, paragraph 1" of the Covenant.^d

But criminal penalties cannot be increased retrospectively to the detriment of a defendant, after the offence has been committed. This is the plain command of article 15, paragraph 1 of the Covenant. The State has claimed that parole amounts to a discretionary exercise of pardon or clemency that falls outside the Covenant.^e But even assuming that discretionary pardon and clemency are outside the realm of the law, the parole scheme here was regulated by statute, not by the pure clemency of a governor or head of state or the purely discretionary decision of a parole board. Indeed, the very purpose of the new statute that was applied retrospectively to the author was to prevent any discretionary exercise of clemency or parole unless and until the defendant's unpaid civil liabilities had been discharged. Nor does the gradual modification of the custodial regime imposed on the author suffice to cure the problem of *ex post facto* application of a harsher release statute.

^a See the Views of the Committee (above), paragraph 7.3.

^b *Ibid.*, paras 1.1 and 2.3.

^c *Ibid.*, para. 3.1.

^d *Ibid.*, para. 9.3.

^e *Ibid.*, para. 4.3.

And while the State argues that the author did not exhaust all available domestic remedies, the Committee has found to the contrary.^f

The counsel for the author did not specifically invoke article 15, paragraph 1, of the Covenant. But a penalty imposed in violation of that article is also “arbitrary” within the meaning of article 9. The measure of arbitrariness under article 9 is not bounded by the positive law of a State party, much less by a retrospective and onerous change in the laws governing the availability of parole. In addition, the Committee’s disposition of this Communication should not be misread as showing any indifference to the more difficult issue of article 11 of the Covenant, which specifically forbids imprisonment “on the ground of inability to fulfil a contractual obligation”. Though the Committee has little jurisprudence on the issue, the measures used in criminal cases to coerce the payment of restitution may, at some future date, be worthy of examination in light of the language of that provision, at least in a case where the matter has been properly elucidated. Indeed, the State party’s own statute, which instructed parole authorities to take account of a *bona fide* declaration of insolvency, may have proceeded from the same concern.

(Signed) Ruth Wedgwood

[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 Ibid., para. 6.1.

**S. Communication No. 1397/2005, *Engo v. Cameroon*
(Views adopted on 22 July 2009, Ninety-sixth session)***

<i>Submitted by:</i>	Pierre Désiré Engo (represented by counsel, Charles Taku)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Cameroon
<i>Date of communication:</i>	30 March 2005 (initial submission)
<i>Subject matter:</i>	Prolonged detention of applicant without trial
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Arbitrary detention; failure to respect the right to be tried within a reasonable time; conditions of detention
<i>Articles of the Covenant:</i>	9; 10, paragraph 1; 14, paragraphs 2 and 3 (a–d)
<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 22 July 2009,

Having concluded its consideration of communication No. 1397/2005, submitted by Pierre Désiré Engo 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 30 March 2005, is Pierre Désiré Engo, a Cameroonian national who is currently being held in the Centre Province Prison in Yaoundé. He claims to be a victim of violations by Cameroon of article 9, article 10 and article 14, paragraphs 2 and 3 (a), (b), (c) and (d), of the International Covenant on Civil and Political Rights. He is represented by counsel, Charles Taku. The Optional Protocol entered into force for Cameroon on 27 September 1984.

* 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. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Hellen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sánchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

Account of events

2.1 The author was managing director of Cameroon's national social security fund, the Caisse Nationale de Prévoyance Sociale (CNPS), until 3 September 1999, when he was arrested. Since that date, he has been held in the Centre Province Prison in Yaoundé.

2.2 CNPS and the company Six International founded Prévoyance Immobilière de Gestion de Travaux (PIGT) to manage property owned by the Fonds National d'Assurance (National Insurance Fund). On 1 July 1998, Mr. Atangana Bengono, who at the time was manager of PIGT, resigned following allegations of embezzlement. CNPS then decided to suspend all banking operations by PIGT in order to forestall any other act of corruption, such as those alleged to have occurred at PIGT. The author claims to have been the target in a number of trials relating to these matters.

2.3 On 11 December 1998, in the first proceedings, Mr. Atangana Bengono lodged a complaint against the author for attempted misappropriation of public funds, misappropriation of public funds, withholding evidence, forgery and falsification of records and brought criminal indemnification proceedings in respect of those charges (*Public Prosecutor and Mr. Atangana Bengono and CNPS v. Mr. Engo et al.*). On 23 December 1998, the author himself lodged a complaint and a claim for criminal indemnification against Mr. Atangana Bengono and others for attempted misappropriation of public funds, withholding and fabricating evidence and forgery and falsification of private business and banking documents. The examining magistrate opened a judicial inquiry on 19 February 1999, at which CNPS lodged a complaint against the author for misappropriation of public funds and registered a claim for criminal indemnification. The examining magistrate decided to try the cases separately. In the first trial, on 26 August 1999, following a preliminary examination, the author was charged and released without bail. On 3 September 1999, during the examination of the merits, the examining magistrate, according to the author, found that the same complaint entailed two further offences (trading in influence and abuse of functions). The author was charged and placed under a detention warrant. After examination of the expert reports, the results of an international request for judicial assistance, documents requisitioned from banks and witness statements, the judicial inquiry established that there was sufficient evidence to try the author for misappropriation of public funds, favouritism, trading in influence and corruption. The judicial inquiry was closed and the author committed for trial to Mfoundi Regional Court. The trial was adjourned several times: the approach adopted by the President of the Court was to suspend the session at intervals until the conclusion of the case in order to avoid the normal practice of adjournments, which were considered too time consuming. On 23 June 2006, the Mfoundi Regional Court found the author guilty of complicity in the misappropriation of public funds, favouritism and corruption and sentenced him to 15 years in prison. The court also denied Mr. Atangana Bengono's application for criminal indemnification as unfounded.

2.4 The second trial (*Public Prosecutor and Ayissi Ngono v. Messrs. Engo and Atangana Bengono*) was based on a petition by Mr. Ayissi Ngono concerning the issue of an uncovered cheque on 29 December 1998. At the author's request, Mr. Ayissi Ngono and Mr. Atangana Bengono were summoned to appear before the same court to answer charges of extorting a signature, attempted fraud and blackmail. The two proceedings were combined on 18 May 1999. On 18 January 2000, the Yaoundé Court of First Instance sentenced the author to six months' imprisonment for issuing an uncovered cheque, and to payment of 10 million CFA francs in damages to Mr. Ayissi Ngono. It also issued a detention warrant against the author during the course of the hearing. All the parties appealed against this decision, the author on 23 February 2000. According to the author, no appeal hearing was ever held, for reasons unknown. On 24 August 2000, the author requested to be released from prison, since he had served his term, but no action was taken.

According to the State party, the record of the trial is currently being passed to the Centre Province Court of Appeal.

2.5 The third trial (*Public Prosecutor and CNPS v. Engo, Dippah et al.*) arose out of a complaint lodged on 27 December 1999 by CNPS against a Mr. Dippah and others for forgery, falsification of records and misappropriation of public funds. On 23 May 2000, the government procurator opened a judicial inquiry into forgery, falsification of records and misappropriation of public funds with reference to the author and Mr. Dippah, among others. They were held in custody, while the other accused were left at liberty. The author received a committal order on 11 April 2002. On 22 November 2002, the Mfoundi Regional Court handed down a ruling finding the author guilty of involvement in misappropriation and sentencing him to 10 years' imprisonment and payment of damages. The author lodged an appeal on 22 November 2002. On 27 April 2004, the Centre Province Court of Appeal upheld the judgement against the author. The author lodged an appeal in cassation the same day, and the file was passed to the Supreme Court on 19 January 2005. On 22 June 2006, the Supreme Court dismissed the appeal in cassation. The author indicates that his counsel were not called to attend the Supreme Court hearing.

2.6 The fourth trial arose from a writ of summons issued by Mr. Atangana Bengono against the author on 15 and 18 October 2001 to answer charges of making tendentious comments, disseminating false information and defamation. In support of his case, Mr. Atangana Bengono stated that, on 11 December 1998, he had lodged a complaint and a claim for criminal indemnification against the author for attempted misappropriation of public funds. The newspaper *La Nouvelle Presse* was reporting on the trial while the case was still under investigation. On 10 April 2003, the court ruled that the prosecution had lapsed as the plaintiff had withdrawn his charges on 29 April 2002, and ordered him to pay costs. The government procurator's office appealed against that ruling on 17 April 2003. The file of the trial is being passed to the Centre Province Court of Appeal.

2.7 The fifth trial arose from the international request for judicial assistance issued by the examining magistrate in the case *Public Prosecutor and Mr. Atangana Bengono and CNPS v. Mr. Engo et al.* (see paragraph 2.3), with a view to determining the source and the amount of the money held in the author's accounts in Paris. It related to a transfer of 250 million French francs and, in view of the size of the sum involved, the prosecutor's office took over the case and opened a new judicial inquiry. On 15 February 2005, the prosecutor issued a new detention warrant against the author, and charged him with misappropriation of public funds. An international request for judicial assistance was issued on 7 March 2005.

The complaint

3.1 The author claims that his right to liberty and security of person (article 9 of the Covenant) has been violated. He contends that he was arrested without a warrant and was arbitrarily detained in poor conditions, in violation of article 10, paragraph 1, of the Covenant, and without being informed of the charges against him in the various cases. In that regard, following his imprisonment in 1999, the author's state of health deteriorated. He developed glaucoma. Despite his need for medical treatment and his repeated requests to the prosecutor and other authorities to that effect, he was prevented from contacting his doctors during the first two years of his detention. It was not until the Red Cross intervened that he was examined by his doctors. Because he was denied medical treatment, his eyesight has deteriorated. The author wrote a number of letters to the authorities in order to draw attention to his medical problems and detention conditions.

3.2 The author also maintains that his right to a fair hearing (article 14, paragraphs 2 and 3 (a-d)) has been violated by the State party. He also contends that the rights of the defence

and other requirements of the right to a fair trial were violated in his case, chiefly as a result of his excessively long detention, the harassment to which his lawyers were subjected, the refusal to let him see the forensic reports, the seizure and confiscation of documents intended to be used in his defence and the fact that the State did nothing to put a stop to the media campaign portraying him as guilty before he had been tried.

3.3 The author indicates that, in January 2000, his lawyer and the lawyer's assistant were followed and stopped by four armed men, who threatened them and stole all the documents pertaining to Mr. Engo's case. The day after this incident, the offices of the author's second Cameroonian lawyer were searched and ransacked.

3.4 On 24 March 2001, the author consulted two lawyers from the Paris Bar. He informed them that, among other things, he had discovered that the government procurator was investigating his Paris and Brussels bank accounts with the help of the French judicial authorities, even though he had never been formally notified that such action was being taken. On 4 May 2001, the complainant, Mr. Atangana Bengono, wrote to the Embassy of Cameroon in Paris to ensure that the lawyers' visa requests were denied. The lawyers were thus prevented from defending the author. In June 2001, the author requested the government procurator and the court to allow his lawyers to visit him. No action was taken on this request. In May 2002, the Embassy of Cameroon in Paris denied a visa to another lawyer who had been contacted by the author. Also in May 2002, after the Cameroonian authorities had refused to grant a visa to one of the author's Paris-based lawyers so that he could represent him in Yaoundé, all the author's Cameroonian lawyers refused to represent him in court as long as their Parisian colleagues were not authorized to travel to Cameroon.

3.5 On 3 March 2003, the deputy government procurator wrote a letter blocking a bank account held by the author. This undermined the author's ability to pay lawyers' expenses and fees and impaired his right to a defence. On 22 October 2003 and 12 April 2004, without a warrant, the government procurator searched the author's cell and his home, and confiscated documents that were to be used for his defence.

3.6 The author has also been the target of other public accusations in the press. On 29 August 2003, the newspaper *La Nouvelle Expression* published an article accusing the author of arms dealing. According to the author, the investigation into this charge is apparently still under way, although the State party indicates that no judicial proceedings are under way against the author for arms dealing. Moreover, the State media are continuing their propaganda campaign against the author, despite numerous requests to the prosecutor, the Minister of Justice and the managing director of Cameroon Radio Television to put a stop to it. The author, who has long remained faithful to the Government of Cameroon, attributes his imprisonment to the fact that he was held in increasing esteem by the population. He states that, in 1994, he had founded a non-governmental organization to help the poorest people in Cameroon and that, in 1999, he had announced that his foundation would shortly be opening offices throughout the country. During the same period, Transparency International criticized the Government for its failure to combat corruption. The author considers that he is being used as a scapegoat in the Government's campaign against corruption.

3.7 With regard to the exhaustion of domestic remedies, he made an application for release pending trial on 27 October 1999 to the Minister of Justice, who did not reply. On 10 January 2000, the author lodged a complaint with the Minister of Justice concerning the violation of his rights by the Yaoundé government prosecutor. No action was taken by the Minister. On 7 June 2000, the author's lawyers issued an application addressed to the government prosecutor to set aside the detention warrant, which they considered violated the principles of the law with regard to jurisdiction, inasmuch as the examining magistrate cannot include new facts in his inquiry himself or act on his own motion.

3.8 On 3 September 2001, the author lodged another complaint before the government prosecutor concerning the unreasonable delay in the proceedings and the length of his time in custody, basing his argument on article 9, paragraph 3, of the Covenant. He requested a speedy trial or release pending trial. A further application for his release was made to the government prosecutor attached to the Yaoundé courts, indicating that the author had been in pretrial detention since 3 September 1999, i.e., for over two years at the time the application was made.¹ The author claims that all domestic remedies have been exhausted.

State party's observations on admissibility and the merits

4.1 On 17 November 2005, the State party challenged the admissibility of the communication, primarily on the grounds that all the proceedings initiated against the author are still under way in the domestic courts. The delays noted were rather the fault of his lawyers, who, with their numerous pleas and release applications, had acted as a brake on the proceedings and caused considerable delays. In the alternative, the State party contends that the communication is unfounded and contains no evidence of a violation of the Covenant.

4.2 With regard to the author's arrest and detention, the State party claims that, since the author was placed under a detention warrant and taken to the Centre Province Prison in Yaoundé following his indictment on the basis of a judicial inquiry properly opened against him, his imprisonment cannot be termed "arbitrary".

4.3 The State party maintains that, as the acts of misappropriation of public funds with which the author is charged constitute an offence under the Cameroon Criminal Code, he cannot claim release as a matter of right under the Code of Criminal Investigation, in view of the nature and gravity of the offences in question. His applications for release were rejected in accordance with the procedures and timescales laid down by law. Moreover, the State party maintains that the author failed to refer the matter to the Regional Court, as prescribed by Ordinance No. 72/4 of 26 August 1972 in cases where the examining magistrate denies an application for release on bail.

4.4 The State party rejects the author's argument that legal proceedings were brought against him for offences for which the decision on whether to prosecute lay with the government prosecutor, noting that article 63 of the Code of Criminal Investigation provides that "any person who considers him or herself harmed by a crime or offence may lodge a complaint in that regard and register a claim for criminal indemnification with an examining magistrate". The complaint lodged by Mr. Atangana Bengono thus constitutes a legal remedy in exercise of the public right of action. Moreover, the case before the examining magistrate was an action in rem and was not concerned with the characterization of the offences listed in the complaint. Furthermore, whereas the absence of a legitimate interest makes a civil action before a trial court inadmissible, the same does not apply to criminal proceedings, which are automatically set in motion once a deposit is paid by the complainant.

4.5 As for the "invalidity of the procedure whereby the examining magistrate allegedly acted on his own motion in taking up the case", the State party states that, pursuant to the provisions of articles 128 and 133 of the Criminal Investigation Code, the examining magistrate is not bound by the classification at law by which the complainant believes he can characterize the alleged acts as criminal. Moreover, under article 134 of the Code, the examining magistrate conducts the judicial inquiry against the persons named in the complaint and any others identified at a later stage. The author was thus properly indicted.

¹ There is a copy of the application in the file, but it gives no date and no details of the outcome.

As for the author's allegations that the *non bis in idem* principle was violated, he cannot claim that the actions brought against him related to the same acts. He was originally tried on the charge of issuing an uncovered cheque and subsequently prosecuted on various counts of misappropriation of public funds, attempted forgery and falsification of records. These acts, which are offences under articles 253, 184 and other articles of the Criminal Code, are completely different from one another. The judicial inquiry opened in relation to specific acts uncovered new facts, such as the transfer of 25 billion CFA francs, and the government prosecutor therefore acted correctly in opening a separate judicial inquiry.

4.6 With regard to the question of the violation of the rights of the defence, the State party contends that the forensic reports and all the other documents on which the examining magistrate relied were sent to the author, and that his comments were recorded before the termination of the proceedings. Regarding the alleged seizure of materials in the case file, the State party claims that the materials in question were contentious accounting records. The seizures had been carried out with full respect for the law, both at the author's home and in his prison cell. With regard to the obstacles, threats and attacks to which the author's lawyers were subjected, the State party argues that the matter was not referred to any court of law and that, furthermore, one of the author's lawyers was granted an entry visa for Cameroon on two occasions (22 July and 6 September 2002) in order to assist his client at the hearings of 2 August and 10 September 2002.

4.7 With regard to the conditions in which the author is detained, the State party maintains that the author is an ordinary prisoner and has been treated in a humane manner, like all Cameroonian prisoners. The State party is striving, so far as it can and taking into account its level of development, to uphold minimum standards for prisoners. It adds that the author's allegations that he needed regular medical treatment are unfounded, given that he has always chosen to disregard the advice of the prison doctor. Concerning the alleged obstacles to his medical care, the State party adds that he has received, and continues to receive, treatment from the doctors of his choice.

Author's comments on admissibility and the merits

5.1 In his comments of 22 January, 17 March and 30 June 2006 on the question of the exhaustion of domestic remedies, the author contends that the State party did not clearly indicate what domestic remedies were available to him. The State party does not challenge the authenticity of the documents provided by the author to substantiate his claims. Nor does the State party provide any documentary evidence in support of its statements or details of the cases and trials it claims to have initiated, in the form of case numbers or copies of judgements. This will prevent the Committee from ruling on the effectiveness and reasonableness of these remedies.

5.2 The author claims that, at his second trial, he did not have access to effective remedies within a reasonable time (see paragraph 2.4 above).² The State party did not reply to the author's allegations that he had had no access to remedies as a result of a denial of justice. Moreover, the State party does not explain the delays in the proceedings. To support his claims, the author indicates, *inter alia*, that the appeal against his six-month prison sentence for issuing uncovered cheques, filed in May 2000, is still pending before the Court

² Counsel draws attention to communications No. 113/1981, *C.F. et al. v. Canada*, declared inadmissible on 12 April 1985, and No. 164/1984, *G.F. Croes v. Netherlands*, declared inadmissible on 7 November 1988 ["In the absence of any clear indication from the State party concerning other effective domestic remedies which the author should have pursued, the Committee concluded that it was not precluded by article 5, paragraph 2 (b), of the Optional Protocol from considering this case" (para. 6.3)]. He also draws attention to the case law of the European Court of Human Rights.

of Appeal, even though he completed his sentence on 16 November 2000. He also considers that he has exhausted domestic remedies with regard to release on bail, and that the remedies mentioned by the State party had no prospect of success and were not available.³ Moreover, the sheer number of arrest and detention warrants issued during the proceedings described in paragraphs 2.3 and 2.7 above made access to remedies difficult. He was held in detention in connection with another pending case, in violation of the presumption of innocence and the rights of the defence, and thus of articles 9, 10 and 14 of the Covenant.

5.3 The author reiterates that his arrest and detention were arbitrary and that he was arrested without a warrant. He points out that the State party does not contest these facts; nor does it contest the material included in the case file as proof of his deteriorating health, which requires specialist medical care not available in prison. He again invokes articles 9 and 14 of the Covenant and contends that his detention on various grounds prevents him from preparing his defence. In that connection, he points out that his bank accounts have been blocked, which prevents him from choosing his lawyers, that his lawyers are not informed of adjournment dates of cases in progress and that his French lawyers withdrew in protest on 29 March 2006.

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, in compliance with the provisions of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 The State party argues that the author has not exhausted domestic remedies. In his turn, the author asserts that he has no effective domestic remedies available to him and that in any case the remedies and appeals still under way have been unreasonably prolonged. In the Committee's view the issue of delays in the exhaustion of domestic remedies is closely bound up with the claim of unreasonable delays in consideration of the merits of the case and ought consequently to be taken up in the context of the merits.

6.4 The Committee finds that the author has substantiated his claims under articles 9, 10 and 14 sufficiently for the purposes of admissibility and therefore declares them admissible.

Consideration of the merits

7.1 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.

³ He draws attention also to communications No. 210/1986, *Pratt v. Jamaica* and No. 225/1987, *Morgan v. Jamaica*, Views adopted on 6 April 1989; to communications No. 220/1987, *Kalvez v. France*, declared inadmissible on 8 November 1989; and No. 229/1987, *Reynolds v. Jamaica*, Views adopted on 8 April 1991, with reference to the fact that it is not necessary to exhaust domestic resources if they have no objective prospect of success.

7.2 With regard to the complaints of violations of article 9, the Committee notes that the author was placed under a detention warrant on 3 September 1999, following a complaint accompanied by the lodging of an application for criminal indemnification, the initiation of a judicial inquiry and questioning. The Committee considers that he was therefore deprived of his liberty on grounds and in accordance with the procedure set out in the law, and that no violation of article 9 occurred in respect of the allegations of arbitrary detention. In respect of the allegations of arbitrary detention during the first trial, the author has been in detention since 3 September 1999, and an initial judgement was handed down on him by the Mfoundi Regional Court on 23 June 2006 (in the case *Public Prosecutor and CNPS, Atangana Bengono v. Engo et al.*), that is, almost seven years after he was imprisoned. The Committee considers that this in itself constitutes a violation of article 9, paragraph 3, of the Covenant.

7.3 Concerning the author's allegations that he was not promptly informed of the charges against him in each of the trials, the Committee notes that the State party has not replied specifically on this point, but that it merely states that the author was placed under a detention warrant and taken to prison after being indicted, on the basis of a judicial inquiry properly opened against him, and that his imprisonment cannot therefore be termed arbitrary. In the absence of detailed information from the State party establishing that the author was informed promptly of the grounds for his arrest in each of the cases, the Committee must give full weight to the author's claim that he was not promptly informed of all the charges against him. In this respect, the Committee finds a violation of article 9, paragraph 2, of the Covenant.

7.4 In respect of the author's allegations that existing remedies for challenging his detention are neither effective nor available, the Committee points out that the author and his counsel requested his release from prison, and subsequently his release pending trial, on several occasions. According to the State party, his requests for release were rejected in accordance with the procedures and timescales laid down by law, and the author has not exhausted all available remedies, as he did not apply to the Regional Court for his release pending trial. Yet the Committee notes that, for example, the application of 3 September 2001 for release pending trial was addressed to the government prosecutor attached to the Yaoundé courts. The Committee also notes that the author indicates that the prosecutor refused on four occasions to release him pending trial. In this case, the Committee considers that the author had the right to seek remedies in order that the State party should rule on the lawfulness of his detention, as provided in article 9, paragraph 4, of the Covenant, and that the material in the files does not reveal a violation of article 9, paragraph 4, of the Covenant.

7.5 The author also maintains that the conditions of his detention have been inhumane, particularly owing to the fact that the authorities have denied him access to appropriate medical care, leading to the severe deterioration of his eyesight. The State party argues that the author receives appropriate medical care, which is provided by the prison doctor. However, the State party fails to address the author's claims relating to his need to have access to more specialized medical care, nor does it deny that the CNPS ophthalmologist, who is the author's attending physician, reports a severe deterioration of the author's eyesight. In the present case, the State party has not demonstrated that it has provided the medical care appropriate to the author's condition, despite the author's requests. In the Committee's view, this constitutes a violation of the provisions of article 10, paragraph 1, of the Covenant.

7.6 With regard to the allegations of violations of article 14, notably article 14, paragraph 2, the Committee notes first that the author claims that his right to the presumption of innocence has been violated. To support his claim, he cites the information about him published in the State media. The author wrote letters to the competent

authorities requesting them to put a stop to the publication of such information; however, these letters met with no response. The State party does not contest these facts. The Committee recalls that the accused's right to be presumed innocent until proved guilty by a competent court is guaranteed by the Covenant. The fact that, in the context of this case, the State media repeatedly portrayed the author as guilty before trial and published articles to that effect, is in itself a violation of article 14, paragraph 2, of the Covenant.

7.7 The Committee notes that the author claims to have waited several months to be informed of the charges against him and to be given access to the case file. The State party failed to reply specifically to this point and merely states that the author had access to all the material in the case, without adducing any evidence. In this respect, the Committee finds a violation of article 14, paragraph 3 (a).

7.8 With regard to the obstruction of the author's preparation of his defence, the Committee notes that the State party replies that a lawyer from Paris received two visas in order to assist his client at two hearings in 2002. The State party does not, however, respond to the allegations that two of the lawyers from the Paris Bar appointed by the author were prevented from travelling to Cameroon to assist their client in May 2001 and May 2002, which prompted the Cameroonian lawyers to refuse to represent him in court. Neither does the State party challenge the authenticity of the letter dated 4 May 2001 in which one of the author's accusers requests the Ambassador of Cameroon in Paris to stop the lawyers coming. Persons charged with a criminal offence have the right to communicate with counsel of their own choosing; this is one guarantee of a fair hearing provided for in article 14, paragraph 3 (b) and (d), of the Covenant. The State party does not contest the author's right to be represented by French lawyers or that those lawyers were authorized to represent him in the State party's courts. The fact that the author encountered considerable obstacles in his efforts to communicate with these lawyers therefore constitutes a violation of the procedural guarantees provided for in article 14, paragraph 3 (b) and (d).

7.9 The Committee also notes that only one final judgement has been handed down in respect of the author, who has been in custody since 1999, in one of the cases against him (see paragraph 2.5 above), namely the ruling by the Supreme Court on 22 June 2006, and that one judgement was passed by the Regional Court on 23 June 2006, against which he seems not to have appealed (see paragraph 2.3 above). Article 14, paragraph 3 (c), of the Covenant guarantees individuals the right to be tried without undue delay. The State party justifies the delay in the various proceedings against the author by citing the complexity of the cases and, in particular, the numerous appeals filed by the author. The Committee points out that article 14, paragraph 5, of the Covenant guarantees the right to appeal, and that the exercise of this right cannot be used as justification for unreasonable delays in the conduct of the proceedings, since the rule set out in article 14, paragraph 3 (c), also applies to these appeal proceedings.⁴ Consequently, the Committee considers that, in the circumstances of this case, the fact that a period of eight years elapsed between the author's arrest and the delivery of a final judgement by either the court of appeal or the court of cassation, and that a number of appeal proceedings have been in progress since 2000, constitutes a violation of article 14, paragraph 3 (c), of the Covenant.⁵

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 a violation of article 9, paragraphs 2 and 3, article 10, paragraph 1, and article 14, paragraphs 2 and 3 (a), (b), (c) and (d), of the Covenant.

⁴ Communication No. 27/1978, *Pinkney v. Canada*, Views adopted on 29 October 1981, para. 22.

⁵ Communication No. 1421/2005, *Francisco Juan Larrañaga v. the Philippines*, Views adopted on 24 July 2006, para. 7.2.

9. Pursuant to article 2, paragraph 3 (a), of the Covenant, the State party has an obligation to provide the author with an effective remedy leading to his immediate release and the provision of adequate ophthalmological treatment. 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 and 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 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.]

**T. Communication No. 1406/2005, *Weerawansa v. Sri Lanka*
(Views adopted on 17 March 2009, Ninety-fifth session)***

<i>Submitted by:</i>	Mr. Anura Weerawansa (represented by his brother, Mr. Ron. Pat. Sarath Weerawansa)
<i>Alleged victim:</i>	Mr. Anura Weerawansa
<i>State party:</i>	Sri Lanka
<i>Date of communication:</i>	10 March 2005 (initial submission)
<i>Subject matter:</i>	Imposition of the death penalty following alleged unfair trial
<i>Procedural issues:</i>	Inadmissibility for non-substantiation – evaluation of facts and evidence, incompatibility
<i>Substantive issues:</i>	Mandatory death penalty; notion of “most serious crime”; least possible suffering with regard to the method of execution (hanging); conditions of detention; unfair trial
<i>Articles of the Covenant:</i>	6; 7; 10, paragraph 1; and 14
<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 17 March 2009,

Having concluded its consideration of communication No. 1406/2005, submitted to the Human Rights Committee by Mr. Anura Weerawansa 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. Anura Weerawansa, a Sri Lankan citizen, currently under sentence of death in a prison in Sri Lanka.¹ He claims to be a victim of

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Lazhari Bouzid, Ms. Zonke Zanele Majodina, Motoc, Mr. Michael O’Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

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

violations by the State party of his right to life under article 6 of the International Covenant on Civil and Political Rights. The communication also appears to raise issues under article 7; article 10, paragraph 1; and article 14 of the Covenant. He is represented by his brother, Mr. Ron. Pat. Sarath Weerawansa.

Factual background

2.1 On 8 March 2002, the author was arrested and his statement was recorded, which he alleges was given under duress. On 4 April 2002, he was charged with the crime of conspiracy to commit the murder of Sujith Prasanna Perera, a customs officer, during the period between 21 and 24 March 2001, and for abetting the second and third accused to commit the murder of the officer on 24 March 2001. He was not allowed any contact with family members while held in custody. He was represented by a lawyer of his own choice from the stage of the preliminary hearing until the appeal.

2.2 The author's trial began on 8 May 2002, and judgement was delivered on 1 October 2002, in which the author was convicted as charged and sentenced to death by hanging. On 24 November 2004, the Supreme Court, composed of five judges, dismissed his appeal and affirmed the author's conviction and sentence. It is not clear whether the author requested a Presidential pardon.

2.3 The author explains that, prior to his conviction, as a customs officer, he had to prosecute cases against government officials, as a result of which he was on an earlier occasion victim of a conspiracy and accused of involvement with the LTTE (Liberation Tigers of Tamil Eelam¹) and detained for 8 months in 1996. He was subsequently compensated for unlawful arrest and detention. He claims that his conviction in the current case was also the result of a conspiracy, as he had initiated actions to apprehend a number of "key figures" involved in money laundering.

2.4 According to the author, the judiciary was biased, not impartial and under the influence of the President. The judges of both the first and second instance courts unjustly accepted the evidence of an individual, on which his conviction was largely based, who it was acknowledged was supposed to have been an accomplice to the crime but who had been pardoned. The author claims that after giving evidence at his trial, this witness was immediately re-employed by the customs department, thereby demonstrating the link between him and the authorities. The author provides a detailed report of his own analysis of the evidence at trial, which he claims further demonstrates his claim that he received an unfair trial including: the suppression of witness statements relating to the identity of the motorcycle used during the commission of the crime; contradictions in witness evidence; amendment of the indictment during the trial; failure to summon certain witnesses; failure to make available to the defence certain eye-witness statements; the detention of witnesses for up to 72 hours under the Prevention of Terrorism Act rather than the normal 24 hour period under the Criminal Procedure Act for the purpose, it is implied, of fabricating evidence.

2.5 According to the author, his conditions of detention are inhuman and are contributing to his "mental breakdown". He is incarcerated in a filthy cell, measuring eight by six feet, where he is kept twenty-three and a half hours a day with "scanty food". Since the registration of his case before the Committee, the author claims that his brother has received threats from the police and unidentified forces are trying to prevent him from pursuing the present communication.

¹ According to the State party, Sri Lanka has had a moratorium on the death penalty for nearly 30 years. No date for the commencement of the moratorium is provided.

The complaint

3.1 The author claims that he was denied a fair trial for the reasons set out in paragraph 2.4 above. He claims that although he was legally represented he suspects that his counsel was under pressure from the executive to “double-cross” him, and he complains that he was not allowed a jury trial.

3.2 The author claims that the offences of which he was convicted were not the “most serious crimes” under article 6, paragraph 2, and that capital punishment by hanging is contrary to the Covenant, as it has been proven that it will take 20 minutes for the person to die. The author claims that the death penalty was reintroduced after the assassination of a Colombo High Court judge, but does not provide the date or further information in this regard. According to newspaper clippings provided by the author, no death sentences had been commuted to life imprisonment since March 1999, which had been the practice since 1977. He also claims that in recent media reports the executive and administrative authorities have referred to plans to execute the author, thus aggravating the deterioration of his mental health.

3.3 The author claims that his conditions of detention also amount to a violation of the Covenant, although he does not specifically invoke article 10.

The State party’s submission on admissibility and merits and the author’s comment thereon

4.1 On 9 December 2005, the State party contests the admissibility and merits of the communication on the ground of non-substantiation. On the facts, it submits that the author was indicted by the Attorney General on a charge of conspiracy to murder and for aiding and abetting the commission of the murder along with two other accused. Both the author and the deceased were customs officers attached to the Sri Lanka Customs. On 24 March 2001, the deceased died due to close range firearm injuries received on his head and chest. Due to the serious nature of the offence, it was decided to conduct the trial of all the accused before a Bench consisting of three judges of the High Court. All three accused chose their own lawyer to defend them. The prosecution decided to grant pardon to an accomplice, in order to strengthen its case against the accused. The evidence of the accomplice was corroborated by other witnesses on material points. All three accused chose to testify.

4.2 On the basis of an evaluation of all of the evidence, the Court convicted all three accused of the respective charges in their indictment. According to the State party, its law provides that the offence of murder carries a mandatory sentence of death. Conspiracy to murder and abatement of the offence of murder also carry a mandatory death sentence and it was on this basis that the author was sentenced to death upon conviction. On 11 October 2004, the Supreme Court, consisting of five judges, considered the appeal of the three accused. On 24 November 2004, it dismissed the appeals and affirmed the convictions and sentences. The judgement was unanimous. The author was represented by senior counsel in his appeal, all of the arguments made by the accused were considered and reasons were provided by the court for the dismissal of the appeal.

4.3 The State party denies that the author did not have a fair trial due to the President’s alleged control over the judiciary and argues that the earlier judgement in the author’s favour, in which he was awarded financial compensation following a successful fundamental rights claim, belies his claim that the President controls the judiciary. The State party considers that murder is a “most serious” crime within the terms of the Covenant and is one of the few crimes where the law provides for a mandatory death sentence. In any event, there has been a moratorium on the execution of the death sentence for nearly thirty years.

4.4 The State party submits that at no stage did the author complain about his counsel, neither during the trial, nor during the appeal or thereafter. He chose his own lawyers and if he was dissatisfied with them, he could have retained others. He could also have complained of any improper conduct to the Supreme Court, which has control over disciplinary matters concerning lawyers, or to the Bar Association which is the professional body for lawyers. The State party denies that the author was not allowed to communicate with his family members and claims that he received the same treatment as any other detained person. As to the author's conviction, the State party submits that as demonstrated in the Supreme Court judgement, the evidence of the witness who was granted a conditional pardon was corroborated on the material facts by independent evidence. The State party dismisses as unsubstantiated the claim that the trial and appeal courts were prejudiced and refers to the decisions themselves as evidence that they were unbiased.

4.5 As to the arguments relating to the death penalty, including the method of execution, the State party reiterates that the death penalty is mandatory for murder. However, it argues that there is a statutory right of appeal. Thus, the notes made by the trial judge and the comments of the Attorney General are considered prior to the President considering whether the death sentence should be carried out or whether it should be replaced by an alternative sentence. The State party refers to its moratorium on the death penalty, but argues that in any event the imposition of the death sentence for a serious offence, after a trial by a competent court, by a State party that has not abolished the death penalty, is not a violation of any Covenant rights.

4.6 Finally, the State party reiterates that by ratifying the Optional Protocol, it never intended to recognise the competence of the Committee to consider communications involving decisions handed down by a competent court in Sri Lanka. The government has no control over judicial decisions and a decision of a competent court may only be reviewed by a Superior Court. Any interference by the Government of Sri Lanka with regard to any decision of a competent court would be construed as an interference of the independence of the judiciary, which is guaranteed under the Sri Lankan Constitution.

5. The author provided several responses, dated 18 January, 6 October 2006, and 17 May 2008, and 28 July 2008, to the State party's submission. In these, he reiterates claims previously made on the evaluation of the facts and evidence by the trial court and also provides translations of the trial proceedings, which he claims proves the conspiracy of the executive, administrative and judicial branches of the State party. In particular, he highlights inconsistencies in the main prosecutions' witness evidence which he claims should not have been accepted by the court, including contradictory evidence on the witness's whereabouts prior to murder, and failure to establish that a motor bike had been used for the purposes of the crime.

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 State party maintains that it never intended by its ratification of the Optional Protocol to recognize the competence of the Committee to consider decisions of its courts. The Committee recalls its general comment No. 31 (2004) on the nature of the general legal

obligation imposed on States parties to the Covenant.² In particular, paragraph 4, which codifies the Committee's consistent practice, includes the following: "The obligations of the Covenant in general and article 2 in particular are binding on every State party as a whole. All branches of government (executive, legislative and judicial)...are in a position to engage the responsibility of the State party. The executive branch that usually represents the State party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State party from responsibility for the action and consequent incompatibility." Accordingly, the Committee cannot refrain from proceeding with the issues of admissibility and merits.

6.3 The Committee notes that a number of the author's allegations relate to the evaluation of facts and evidence by the State party's courts, which appear to raise issues under article 14 of the Covenant. The Committee refers to its jurisprudence³ and reiterates that it is generally for the appellate courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that it was clearly arbitrary or amounted to a denial of justice. The material before the Committee does not reveal that the conduct of the trial suffered from any such defects. Accordingly, the author has not substantiated this part of the communication for purposes of admissible and these claims are thus considered inadmissible pursuant to article 2 of the Optional Protocol.

6.4 As to the claim that the author did not have the option to be tried by a jury, which it would appear raises issues under article 14 of the Covenant, the Committee recalls its jurisprudence that "the Covenant does not confer the right to trial by jury in either civil or criminal proceedings, rather the touchstone is that all judicial proceedings, with or without a jury, comport with the guarantees of fair trial."⁴ This claim is therefore inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

6.5 The Committee considers that the author has failed to substantiate his claim that his lawyers "double-crossed" him, which appears to raise issues under article 14. As argued by the State party and uncontested by the author, the author was represented throughout the proceedings by lawyers he chose himself. He never filed any formal complaint against them during the proceedings themselves and, apart from making a vague claim that they "double-crossed" him, he has not provided any further arguments or substantiation of this claim for the purposes of admissibility. For these reasons, the Committee considers that this claim is inadmissible under article 2 of the Optional Protocol.

6.6 The Committee finds that the other claims relating to: the mandatory nature of the death penalty; the question of whether the crime for which he was convicted was a "most serious crime"; the author's conditions of detention; and his possible mode of any execution are admissible.

Consideration of the merits

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

² Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40 (A/59/40), vol. I, annex III.

³ Communication No. 541/1993, *Errol Simms v. Jamaica*, Decision adopted on 3 April 2005, para. 6.2.

⁴ For example, communications No., 818/1998, *Kavanagh v. Ireland* (No. 1), Views adopted on 4 April 2001, and No. 1239/2004, *Wilson v. Australia*, Decision adopted on 1 April 2004.

7.2 The Committee notes that the author was convicted of conspiracy to commit murder and of abetting murder, on the basis of which he received a mandatory death sentence. The State party does not contest that the death sentence is mandatory for the offence of which he was convicted, but argues that it has applied a moratorium on the death penalty for nearly thirty years. The Committee recalls its jurisprudence that the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of article 6, paragraph 1, of the Covenant, in circumstances where the death penalty is imposed without any possibility of taking into account the defendant's personal circumstances or the circumstances of the particular offence.⁵ Thus, while observing the fact that the State party has imposed a moratorium on executions, the Committee finds that the imposition of the death penalty itself, in the circumstances, violated the author's right under article 6, paragraph 1, of the Covenant.

7.3 In the light of the finding that the death penalty imposed on the author is in violation of article 6 in respect of his right to life, the Committee considers that it is not necessary to address the issue of the method of execution, that may be imposed on the author if the State party were to recommence executions, under article 7 of the Covenant.

7.4 The Committee notes that the State party has not contested the information provided by the author on his deplorable conditions of detention, such as that he is incarcerated in a small and filthy cell, in which he is kept for twenty-three and a half hours a day with inadequate food. Nor has the State party contested the claim that these conditions have an effect on the author's physical and mental health. The Committee considers, as it has repeatedly found in respect of similar substantiated claims,⁶ 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. In the light of this finding in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary to separately consider any possible claims arising under article 7 in this regard.⁷ For these reasons, the Committee finds that the State party has violated article 10, 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 reveal violations by the State party of article 6, paragraph 1; and article 10, paragraph 1, of the Covenant.

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 and appropriate remedy, including commutation of his death sentence and 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. The State party is 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, that State

⁵ Communications No. 806/1998, *Thompson v. St. Vincent and The Grenadines*, Views adopted on 18 October 2000; No. 845/1998, *Kennedy v. Trinidad and Tobago*, Views adopted on 26 March 2002; and No. 1077/2002, *Carpo v. The Philippines*, Views adopted on 28 March 2003.

⁶ For example communication 908/2000, *Xavier Evans v. Trinidad and Tobago*, Views adopted on 21 March 2003.

⁷ Communication No. 818/1998, *Sextus v. Trinidad and Tobago*, Views adopted on 16 July 2001, para. 7.4.

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.

[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. Fabian Omar Salvioli (partially dissenting)

1. I fully concur with the decision by the Human Rights Committee finding violations of article 6, paragraph 1, and article 10, paragraph 1, of the International Covenant on Civil and Political Rights in the case of *Anura Weerawansa v. Sri Lanka*, communication No. 1406/2005. The Committee has correctly determined that the established facts reveal violations both of the right of all persons to life and of the right of any person deprived of his or her liberty to humane treatment and due respect.

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, and article 7 of the Covenant.

A. Competence of the Committee to find violations of articles not referred to in the complaint

3. The Committee should not, in the absence of a specific allegation by the author of a communication that one or more articles has been violated, restrict its own competence to find other possible violations of the Covenant that are supported by the established facts. Under the Committee's rules of procedure,^a a requested State can submit statements relating to both the admissibility and the merits of the complaint set forth in the communication; if the adversarial principle in the procedure established by the Optional Protocol for dealing with individual communications is to be fully respected, neither party should be left without a proper defence.

4. The principle of *iura novit curia*, universally and uncontroversially followed in general international jurisprudence,^b especially where human rights are concerned,^c gives the Human Rights Committee scope not to restrict itself to the legal claims made in a complaint when the facts disclosed and established in adversarial proceedings clearly reveal the violation of a provision not cited by the complainant. Should this be the case, the Committee ought to document the violation in proper legal form.

5. Likewise, to ensure that all the purposes of the Covenant are complied with, the Committee's protective powers authorize it to rule that the State party found to be at fault must put a stop to all the effects of the violation, guarantee that such a thing will not recur, and make reparation for the damage caused in the particular incident concerned.

^a Rule 97.2

^b Permanent Court of International Justice: "Lotus", Judgment No. 9, 1927, P.C.I.J., Series A No. 10.

^c European Court of Human Rights, Handyside Case, Judgment of 7 December 1976, Series A No. 24, para. 41; Inter-American Court of Human Rights, *Godínez-Cruz v. Honduras*; Series C N, para. 172; Judgment of 20 January 1989.

B. Violation of article 2, paragraph 2, of the Covenant

6. A State may incur international responsibility, inter alia, through the action or omission of any of its authorities, including, naturally, the legislature, or any other body having legislative authority under the constitution.

7. Article 2, paragraph 2, of the Covenant states: “where not already provided for by existing legislative or other measures, each State party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.” While the obligation laid down in article 2, paragraph 2, is a general one, failure to comply with it may render the State internationally responsible. The provision is a self-executing rule. The Committee has rightly pointed out that: “...the obligations of the Covenant in general and article 2 in particular are binding on every State party as a whole. All branches of Government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local) are in a position to engage the responsibility of the State party.”^d

8. The Committee has also pointed out that “... article 2 is couched in terms of the obligations of State parties towards individuals as the right-holders under the Covenant ...”.^e The obligations set forth in article 2, paragraph 2, supplement those set forth in paragraphs 1 and 3 of the same article which, to my mind, are independent provisions of equal rank, in no way subordinate one to another. The *travaux préparatoires* for the Covenant do not admit of any other conclusion, and in keeping with the *pro persona* postulate, precedence in human rights matters must be given to the broadest interpretation when the issue is one of safeguarding rights, to the narrowest when the issue is that of determining the scope of restrictions, and in any event to an interpretation that makes sense of the rule or provision concerned.

9. Just as States Parties to the Covenant cannot order action which violates established rights and freedoms, failure to bring their domestic legislation into line with the provisions of the Covenant constitutes, in my estimation, a violation in and of itself of the obligations set out in article 2, paragraph 2, of the Covenant.

10. To maintain that a violation of article 2 of the Covenant cannot be found in the context of an individual complaint is an unacceptable restriction and curtailment of the Committee’s own powers of protection under the International Covenant on Civil and Political Rights and the first Optional Protocol thereto.

11. In the present case, furthermore, we have an instance of the actual application, to the detriment of Mr. Anura Weerawansa, of legislation requiring the death penalty for individuals found guilty of the offences of murder, conspiracy to murder or aiding and abetting a murder; this is not only in breach of article 6 of the Covenant, as the Committee has found, but also a violation of article 2, paragraph 2. The legislation itself, irrespective of its application, breaches article 2, paragraph 2, of the Covenant inasmuch as Sri Lanka has not taken the requisite action under its domestic law to give effect to the right covered by article 6 of the Covenant.

^d 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 (A/59/40)*, vol. I, annex III, para. 4.

^e *Ibid.*, para. 2.

C. The mandatory death penalty and its incompatibility with the Covenant

12. The rule making the death penalty mandatory is fundamentally incompatible with the International Covenant as a whole, and some parts of it in particular. When a State party has a rule making the death penalty mandatory and the penalty is applied, at trial, to one or more individuals, there is to my mind not only a violation of article 6 of the Covenant but also a violation of article 7, which prohibits cruel, inhuman or degrading treatment or punishment.

13. The thrust of article 6 of the Covenant is the abolition of capital punishment, as the wording of paragraph 6 makes clear. Against this background, the article imposes certain restrictions on countries which have not yet resolved to abolish the death penalty: they must comply with strictly observed and scrutinized procedural standards; they must restrict the application of the death penalty to the most serious crimes, and they must take account of some of the personal circumstances of the individual on trial, which may definitely lead to the sentence or execution of the sentence being set aside. The penal legislation applied to Mr. Anura Weerawansa. requires the death penalty to be applied automatically and generically for the offences of murder, conspiracy to murder and aiding and abetting a murder, disregarding the fact that those offences may indicate different levels of seriousness; it thus prevents the judge or court from taking the circumstances into account in establishing the level of guilt and tailoring the penalty to the individual, since it constrains them to impose the same punishment indiscriminately on what may be very different forms of behaviour. This, by virtue of article 6 of the Covenant, is unacceptable when a human life is at stake and amounts, in the terms of article 6, paragraph 1, to arbitrariness. The penal legislation whose compatibility with the Covenant is under discussion prevents account being taken of personal circumstances or the particular circumstances of the crime, automatically imposing the application of the death penalty across the board on anyone found guilty.

14. Besides this, an individual brought to trial knowing that, if found guilty, the only outcome is that he or she will be sentenced to death experiences suffering which amounts to cruel treatment and is, accordingly, incompatible with article 7 of the Covenant.

D. Consequences of finding a violation of article 2, paragraph 2

15. Far from being a purely academic exercise, 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.

16. The Committee has also pointed out that “article 2 defines the scope of the legal obligations undertaken by States parties to the Covenant. A general obligation is imposed on States parties to respect the Covenant rights and to ensure them to all individuals in their territory and subject to their jurisdiction ...”^f Paragraph 2 of that article assumes all the more importance when one considers that the Committee has stated in a general comment that any reservation to it would be utterly incompatible with the aims and objectives of the Covenant.^g

^f Ibid., para. 3.

^g “Equally, a reservation to the obligation to respect and ensure the rights, and to do so on a non-discriminatory basis (art. 2, para. 1) would not be acceptable. Nor may a State reserve an entitlement

17. In its general comment No. 31, the Human Rights Committee argues that “where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant’s substantive guarantees”.^h Correctly interpreted, this implies that a change in domestic practice can be considered only when a rule allows for different possibilities, one or more of which are incompatible with the Covenant while others are not, and the incompatible options are applied in one or more specific instances: then the State can change its practice and apply a different option, one that is compatible with the Covenant. When, on the other hand, a rule offers only one possibility, as in the present case of legislation that establishes a mandatory death penalty, the only course is to rescind the rule itself. And it must be remembered, “the requirement under article 2, paragraph 2, to take steps to give effect to the Covenant rights is unqualified and of immediate effect”.ⁱ

18. I thus consider that the Committee ought to have concluded:

(a) That the Sri Lankan legislation discussed in this case that makes the death penalty mandatory for the offences of murder, conspiracy to murder and aiding and abetting a murder is itself incompatible with the International Covenant on Civil and Political Rights;

(b) That the facts of the case reveal a violation of article 2, paragraph 2, of the Covenant and that, the rule requiring the death penalty having been applied to the victim, the violation was committed in relation to articles 6 and 7 of the Covenant, to Mr. Anura Weerawansa’s detriment;

(c) That the State must, as a guarantee of non-recurrence, rescind the provision in criminal law stipulating the death penalty for the offences of murder, conspiracy to murder and aiding and abetting a murder that was applied to Mr. Anura Weerawansa, as being incompatible with the International Covenant on Civil and Political Rights.

(Signed) Fabián Salvioli

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

not to take the necessary steps at the domestic level to give effect to the rights of the Covenant (art. 2, para. 2) ...” Human Rights Committee, general comment No. 24 (1994) on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to the declarations under article 41 of the Covenant, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40)*, annex V, para. 9.

^h General comment No. 31 (note d above), para. 13.

ⁱ *Ibid.*, para. 14.

**U. Communication No. 1407/2005, *Asensi v. Paraguay*
(Views adopted on 27 March 2009, Ninety-fifth session)***

<i>Submitted by:</i>	Juan Asensi Martínez (represented by counsel, Adolfo Alonso Carvajal)
<i>Alleged victim:</i>	The author and his minor children, Liz-Valeria and Lorena-Fabiana Asensi Mendoza
<i>State party:</i>	Paraguay
<i>Date of communication:</i>	26 April 2005 (initial submission)
<i>Subject matter:</i>	Removal of author's minor daughters abroad without author's consent
<i>Procedural issues:</i>	Failure to substantiate claim
<i>Substantive issues:</i>	Family's right to State protection; every child's right to such measures of protection as are required by their status as minor
<i>Articles of the Covenant:</i>	23, paragraph 1; 24, paragraph 1
<i>Articles 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 March 2009,

Having concluded its consideration of communication No. 1407/2005, submitted to the Human Rights Committee by the authors 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 30 April 2005, is Juan Asensi Martínez, a Spanish national. He claims to be the victim, together with his minor daughters Liz-Valeria and Lorena-Fabiana Asensi Mendoza,¹ of a violation by Paraguay of articles 23, paragraph 1, 24, paragraph 1, and 26 of the Covenant. The Optional Protocol entered into force for the State party on 11 April 1995. The author is represented by counsel.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Lazhari Bouzid, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

¹ In view of the girls' ages and the difficulties in communication between the author and his ex-wife, the Committee agrees to consider them as part of the present communication.

Facts as submitted by the author

2.1 The author, an industrial engineer, married Dionisia Mendoza Rabuguetti, a Paraguayan national, in Paraguay on 16 August 1997. The couple had two children, Liz-Valeria and Lorena-Fabiana, who were born in Asunción on 12 April 1997 and 5 April 1999 respectively. By reason of the author's work, the family, which included a child of Ms. Mendoza from a previous relationship, moved to Barcelona on 13 September 1999. The author's wife took the children to Paraguay on holiday from June to November 2000. On 14 January 2001, taking advantage of a business trip by the author, she left their home in Barcelona for good and moved to Paraguay with the three children. The move was made without the author's consent and he filed a complaint in that regard alleging an offence of abduction of minors under article 225 of the Spanish Criminal Code.

2.2 The author states that since their return to Paraguay the children have been living with their mother and her boyfriend, an administrator at the Itaguá national hospital, in run-down accommodation in a marginal and dangerous district of the city of Ita. This way of life was very different from the one they had enjoyed when they were living with the author.² Relatives and neighbours reported that they were not being fed properly and looked neglected and ill – most notably, they were not being treated for a chronic bronchial condition³ – and were not in school. They frequently witnessed violent scenes between the mother and her boyfriend. The mother was engaging in prostitution in her own home and there were fears that the older girl had been subjected to sexual abuse. The mother allows the girls no contact with the author or her own family. According to the case file, the maternal grandmother approached the court in 2002 to alert the authorities to the unsafe situation the girls found themselves in and to ask that, if they could not be handed over to their father, she at least could be granted care and custody.

2.3 In 2001 and 2002 the author made several trips to Paraguay to see his daughters, even leaving his job in Spain. He was able to see them a number of times and give them things they needed, either in secret or with a social worker, by court order. On 10 February 2002, when the author was visiting the girls and in front of other family members, Ms. Mendoza threatened to kill him and attacked him with an iron chair and a kitchen knife, causing injuries that required hospital treatment.⁴ The author took criminal proceedings with the Asunción Public Prosecutor's Office.⁵ As a result Ms. Mendoza was placed under house arrest but she failed to comply with this order. At the same time, the Ita justice of the peace dismissed a complaint of domestic violence brought by Ms. Mendoza against the author, for failure to substantiate her accusations.

2.4 On 27 March 2002, the author obtained court authorization for the girls to spend some days with him. Ms. Mendoza refused to hand them over, however. The author also asked the Spanish Embassy in Asunción to mediate his contacts with Ms. Mendoza. The Embassy made various fruitless attempts to do so and then alerted the Child Protection Department of the Paraguayan Ministry of Justice and Labour.

² The author submits a number of documents attesting to the unsafe conditions in which the children were living.

³ The author's communication includes a doctor's certificate from 12 January 2002 addressed to the juvenile court and stating that the children were suffering from "obstructive bronchitis syndrome". Subsequent certificates show that they recovered once the author had managed to get them treated.

⁴ The case file contains a copy of the medical certificate.

⁵ According to the author, there were other complaints against Ms. Mendoza, brought by members of her own family, notably criminal proceedings for bodily harm brought by her sister in June 2002; a complaint for theft brought by her uncle; and a complaint for uttering death threats, lodged with the police by her brother in April 2002. The case file contains copies of the relevant documents.

2.5 The author states that he has attempted various judicial remedies in Paraguay and in Spain to get his daughters back.⁶ On 11 April 2001, for example, he applied to the Juvenile Protection and Correctional Court (First Roster) for international return. In its ruling of 26 June 2001, the Court pointed out the importance of settling claims of this kind as quickly as possible in order to avoid “one of the serious consequences that can arise in cases such as this, namely the uprooting of the children and the negative influence of the person holding them, who naturally tends to try to turn them against the absent parent”. Among other things, the Court found that, according to the case file, the children’s effective place of residence was their father’s home in Spain and that the proceedings taken by Ms. Mendoza in the Paraguayan courts were evidence of her intention to remove them from the guardianship and parental authority of their father. In accordance with domestic law and the 1980 Hague Convention on the Civil Aspects of International Child Abduction,⁷ the Court pronounced the children’s removal to Paraguay wrongful and ordered that they should be returned to the author immediately. It also pointed out that, under the Convention, the question of custody should be settled by the courts in the children’s effective place of residence, that is to say their place of residence in Spain.

2.6 On 20 August 2001 the Asunción Juvenile Appeal Court quashed the lower court’s sentence. The author challenged the Appeal Court’s decision on constitutional grounds but the Supreme Court rejected his application in a ruling of 15 March 2005.

2.7 While he was awaiting a final decision on the issue of return, a process that took several years, the author submitted an application for access arrangements.⁸ He also lodged a complaint with the Ita Juvenile Court in 2002, over the neglect of the children and the situation of risk they were in, and sought temporary custody pending the Supreme Court’s decision on his constitutional challenge. The author claims that no action was ever taken on this request.

2.8 In parallel with this the author applied in Spain for legal separation, on 19 March 2002, with Court No. 4 in Martorell. In a sentence dated 29 November 2002 the Court pronounced the separation and awarded the author care and custody of the children and Ms. Mendoza visiting rights. Parental authority was to be shared.⁹

2.9 Applying Spanish law on the abduction of minors and the Hague Convention, Trial and Investigating Court No. 2 in Villafranca del Penedés, Spain, sentenced Ms. Mendoza on 2 November 2005 to pretrial detention for evading Spanish justice and absconding. The Court also ordered the girls to be returned to the author and requested extradition proceedings to be taken against Ms. Mendoza for the offence of abduction of minors. On 30 November 2005 the Court asked the Ministry of Justice to request the Paraguayan central

⁶ As regards the proceedings in Spain, the author submits documents showing that he received assistance from the Ministry of Justice, through the Department of International Legal Cooperation, Spain’s central authority for the application of the Hague Convention. The Spanish authority contacted the Paraguayan central authority.

⁷ Under article 3 of the Convention, “the removal or the retention of a child is to be considered wrongful where

(a) It is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) At the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention”.

⁸ From the file it appears that this request was not dealt with separately but simply added to the file on the application for return.

⁹ Ms. Mendoza did not contest the application and was therefore declared to be in default; the proceedings continued with no further reference to her.

authority responsible for applying the Hague Convention to execute the order for the return of the children to their father.

Complaint

3.1 In the author's view, the events described violate his rights and those of his daughters under articles 23, paragraph 1, and 24, paragraph 1, of the Covenant. He claims that the mother is not providing adequate protection to the children and that he himself is unable to protect them, owing to the lack of action on the part of the State party's authorities, a failing reflected most clearly in the poorly substantiated Supreme Court sentence and the unreasonably long time taken by the Paraguayan courts to reach their verdicts. He says that, notwithstanding the mother's criminal history, the girls' unsafe situation and the delays in settling his appeals – nearly four years in the case of the constitutional challenge – the courts took no steps to protect his daughters.

3.2 The author states that the mother's Paraguayan nationality was a key factor in the domestic court's decision to deny the girls' return. In that regard he invokes article 26, alleging that he received unfair and discriminatory treatment from the State party's courts on the grounds of his nationality.

State party's observations on admissibility and the merits

4.1 On 4 May 2006 the State party submitted comments on the admissibility and merits of the communication. It stated that the case had been adjudicated in three courts and that domestic remedies had therefore been exhausted.

4.2 In its ruling of 15 March 2005, the Supreme Court pointed out that the author and his wife had lived together since 1996 in Paraguay, where they got married and where their two daughters were born. The children can be presumed to have lived in Spain only for some nine months between September 1999 and June 2000, which cannot give rise to any claim that Spain is the family's habitual place of residence.

4.3 One key point considered by the Supreme Court has to do with article 13 of the Hague Convention, which provides that the requested State is not bound to order the return of the child if there are substantiated grounds for opposing it. The Court found that the children's mother opposed their return on the grounds that there was a serious danger of them being exposed to physical or mental risk, which could place them in an intolerable situation. The Paraguayan Court also found, under article 3 of the Convention on the Rights of the Child, that there was every justification for keeping the girls on Paraguayan territory and that, considering their age, moving to Spain would have been an upheaval that would not be in their best interests.

4.4 In the State party's view the author did not demonstrate in the course of the proceedings what physical or psychological risk the children would run if they remained with their mother. Moreover, under both Paraguayan and Spanish law parental authority is equally shared by both parents. There is thus nothing to stop the author availing himself of a visiting and access arrangement.

4.5 Under the regime established in the Hague Convention, the court competent to rule on return is the court in the place where the requested child is. In this case the children were in Paraguay from the time proceedings were initiated up to the time the Supreme Court handed down its ruling. The State party argues that the Supreme Court settled the case on the basis of the Hague Convention. Technically and legally speaking, the rights protected by the Covenant are also protected by the Convention, and in a more precise, systematic and methodical fashion. The Supreme Court ruling represents a strict application both of the Convention and of the Covenant in respect of the issues addressed in article 23.

4.6 The State party also argues that the author was not denied the right of access to the courts and that his arguments were properly addressed. He cannot therefore claim a denial of justice or discrimination in the handling of his request.

4.7 The State party provided the Committee with copies of the domestic court rulings. The Appeal Court sentence questions whether the author has any right to custody of his daughters and whether the marital home was in Spain, given that Spain had denied Ms. Mendoza permanent residence. The Court argued that, if the marital home was not legally in Spain then clearly the daughters could not have legal residence in Spain, and the mother could not be required to reside in Spain or stopped from leaving Spain with her children under her own parental authority. The Court took the view that, given their young age, it was in the children's best interests to remain in Paraguay and for the issue of custody to be resolved there; conversely, their best interests would not be served by the upheaval of travelling to Spain and settling there.

4.8 The Supreme Court ruling on the author's constitutional challenge to the Appeal Court sentence points out that the couple lived in Paraguay from 1996 – they married in Paraguay and their daughters were born in Paraguay – until they decided to move to Spain in September 1999. Ms. Mendoza returned to Paraguay with their daughters in mid-June 2000, with the author's consent, but the author took them back to Spain on 8 October 2000, without warning and without the mother's consent. Ms. Mendoza therefore filed a request to trace the children on 9 October 2000 and then went to Spain to take them back to Paraguay, the children's habitual residence. The girls had lived uninterruptedly in Spain for only around nine months, from September 1999 to June 2000. The Supreme Court found that the Appeal Court had based its judgement on the Hague Convention and the Convention on the Rights of the Child, which provide that actions concerning children shall be determined in accordance with the child's best interests. The Appeal Court had also found that return was not appropriate in view of the children's ages (one was 4 and the other was 2), since the move to Spain would put them at unacceptable mental risk. The Supreme Court found that the Appeal Court judgement had taken due account of the Constitution and was based on the children's best interests.

Author's comments on the State party's submission

5.1 On 19 November 2007 the author replied to the State party's comments. He pointed out that he has legal custody of his daughters by virtue of the judgements of Court No. 4 in Martorell and of the Barcelona Provincial Court. The proceedings in those courts had been conducted with all judicial safeguards and the author had even offered to pay Ms. Mendoza's fare to Spain to attend the hearing. He goes on to state that the Spanish courts issued a warrant for Ms. Mendoza's arrest and sought the cooperation of the State party's authorities in ensuring that she returned the children, based on the court decision awarding the author custody.¹⁰ He recalls that Ms. Mendoza had attempted to kill him and he therefore fears for his life if he goes to Paraguay; and she is preventing him from staying in touch with his daughters.

5.2 The author notes that the State party's observations fail to mention the children's living conditions in Paraguay, which should be viewed in the context of the poverty to be found there. The Supreme Court accepted Ms. Mendoza's contentions without really looking into the situation. It failed to take into account the fact that Ms. Mendoza left Spain to be with someone she was having a relationship with and lived with until 2004; the

¹⁰ In a decision dated 20 May 2008 a lower court in the State party rejected the request for return submitted by the Martorell court, on the basis of the Supreme Court judgement of 15 March 2005.

criminal complaints brought against Ms. Mendoza by members of her family; the request by the children's maternal grandmother to be granted care and custody given the risks involved in remaining with their mother; Ms. Mendoza's alleged prostitution; and her disregard for judicial instructions such as the court requests, obtained on application by the author, for the children to undergo a psychological examination or to be allowed to spend some days with the author in 2002. It also failed to take into account that the girls were living off the material support provided by the author and the Spanish Consulate.

5.3 The author claims that the Supreme Court judgement was reached by three judges, one of whom was in favour of a finding of unconstitutionality in respect of the Appeal Court ruling. In that judge's view, the Appeal Court had exceeded its competence, which was limited to determining the children's habitual residence and not whether the father had the right of custody.

5.4 The Supreme Court judgement contains errors of fact in respect of the children's place of residence. The author argues that the family was officially resident in Spain¹¹ between 19 September 1999 and 14 January 2001, notwithstanding Ms. Mendoza's trip to Paraguay during that time, i.e., between June and October 2000. During this period the mother, the mother's older son and the daughters were registered in Spain and the children were enrolled in school. They were all covered by social security. The author recalls that the daughters were removed from Spain without a passport and with the direct intervention of the Paraguayan Consulate in Barcelona, which issued the mother with a safe conduct without the author's knowledge. Lastly he argues that the Supreme Court's assessment of the child's best interests is not compatible with the Covenant. He also notes the failure on the part of the State party's judicial authorities to deal with the issue as a matter of urgency.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

6.3 The author claims that he received discriminatory treatment from the State party's authorities, in violation of article 26 of the Covenant, because he was not a Paraguayan national, and that the fact that the children's mother was Paraguayan was a key factor in the domestic courts' decision to deny their return. In the Committee's view, however, the author fails to present sufficient evidence in support of his claims. Consequently it considers that this part of the communication has not been sufficiently substantiated and is inadmissible under article 2 of the Optional Protocol.

¹¹ The author submitted documentary evidence of the family's official residence in Spain, including documentary evidence of the granting of a visa to Ms. Mendoza and her older son on grounds of family reunification and certificates from the children's school and from the hospital they attended. A letter from the Director-General of Legislative Policy and International Legal Cooperation of the Spanish Ministry of Justice to the Deputy Minister of Justice of Paraguay states that Spain was the country of habitual residence.

6.4 As to the author's claims under articles 23 and 24 of the Covenant, the Committee takes note of the State party's argument that domestic remedies have been exhausted and finds these claims sufficiently substantiated for the purposes of admissibility. Finding no impediment to admissibility, the Committee declares the communication admissible insofar as it appears to raise issues under articles 23 and 24, paragraph 1, of the Covenant.

Consideration on the merits

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

7.2 The Committee must determine whether, in the course of the author's efforts to maintain contact with his minor daughters and exercise his right of custody, a right granted by the Spanish courts, the State party violated the right of the author and his daughters, as a family, to the protection of the State under article 23, paragraph 1, of the Covenant. The Committee notes that the author and his ex-wife were married in August 1997 and that his daughters were born in 1997 and 1999 respectively. The family first lived in Paraguay and in September 1999 moved to Spain, where the author was working. Starting in January 2001, when his ex-wife left Spain for good with their daughters, the author made numerous attempts to keep in contact with the children, obtain their return and meet their material and emotional needs. On the legal front, his efforts took the form of administrative and judicial action of various kinds, both in Spain, the last place the family lived, and in the State party. The remedies invoked in the Spanish courts gave rise to a separation order in November 2002 granting the author care and custody of the girls. In addition, the Spanish authorities made approaches to the State party with a view to protecting the author's rights under the Hague Convention on the Civil Aspects of International Child Abduction, to which both States are party.

7.3 With regard to the measures taken in the State party, the Committee notes that the author applied to the courts in proceedings of two kinds: (a) to obtain the return of the children and (b) to obtain effective access to his children and assert his right of custody. The former gave rise to judgements in three courts, of which the Appeal Court and Supreme Court rulings found against the return of the children. Both the Appeal Court and the Supreme Court state that they have taken account of the children's best interests and that taking them to Spain would in their view have put them at psychological risk given their young age. Yet the judgements do not explain what either court understands by "best interests" and "psychological risk" or what evidence was considered in reaching the conclusion that there was in fact such a risk. There is also nothing to show that the author's complaints concerning the children's unsafe living conditions in Paraguay were duly examined. The Committee also notes that the lower court judgement emphasized the need for speedy settlement of the issue of return, despite which the Supreme Court took nearly four years to hand down its ruling, too long for a case such as this.

7.4 As to the remedies invoked by the author in the State party with a view to making contact with his daughters and obtaining custody, the Committee notes that the author applied to the courts on these matters. The file shows, for example, that in March 2002 the author obtained court authorization for the girls to spend a few days with him but that the authorization could not be implemented because the mother refused to comply. The authorities did nothing to ensure that the author's ex-wife complied with the court order. The Committee also notes that, while his constitutional challenge was still pending, the author complained to the court about the neglect of the children and the situation of risk they were in, and sought temporary custody, yet he never received a reply to his application. The Committee also notes the statements by the Appeal Court and the State party to the effect that the issues relating to custody of the children should be settled in

Paraguay and that denial of return did not stop the author availing himself of a visiting and access arrangement. Despite these statements, however, there has been no decision by the State party authorities on custody rights or visiting arrangements for the author.

7.5 In light of the foregoing, the Committee finds that the State party has not taken the necessary steps to guarantee the family's right to protection under article 23 of the Covenant, in respect of the author and his daughters, or the daughters' right, as minors, to protection under article 24, 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 articles 23 and 24, 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 the facilitation of contact between the author and his daughters. 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 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 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.]

**V. Communication No. 1418/2005, *Iskiyaev v. Uzbekistan*
(Views adopted on 20 March 2009, Ninety-fifth session)***

<i>Submitted by:</i>	Yuri Iskiyaev (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Uzbekistan
<i>Date of communication:</i>	12 November 2004 (initial submission)
<i>Decision on admissibility:</i>	6 July 2006
<i>Subject matter:</i>	Detention of an individual on charges of extortion
<i>Procedural issues:</i>	Exhaustion of domestic remedies, lack of substantiation of claims
<i>Substantive issues:</i>	Torture, cruel, inhuman and degrading treatment; violations during detention; unfair trial
<i>Articles of the Covenant:</i>	7; 9, paragraph 1; 10; 14, paragraphs 1, 3 (e), and 5
<i>Articles of the Optional Protocol:</i>	2; 5, paragraph 2 (b)

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

Meeting on 20 March 2009,

Having concluded its consideration of communication No. 1418/2005, submitted to the Human Rights Committee on behalf of Mr. Yuri Iskiyaev 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,

Adopted the following:

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

The author of the communication is Mr. Yuri Iskiyaev, a Tajik national, born in 1956. He claims to be a victim of a violation by Uzbekistan of his rights under article 7; article 9, paragraph 1; article 10, paragraphs 1 and 2; and article 14, paragraphs 1, 3(e) and 5 of the Covenant.¹ He is unrepresented.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Lazhari Bouzid, Ms. Zonke Zanele Majodina, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

¹ The Optional Protocol entered into force for the State party on 28 December 1995.

1.2 On 16 January 2006, the Special Rapporteur on New Communications and Interim Measures decided to have the admissibility of the communication examined separately from the merits.

The facts as presented by the author

2.10 In 1996, the author left Tajikistan and settled in Samarkand, Uzbekistan, where he leased a bar and restaurant. A number of officers from the Uzbek Ministry of Internal affairs, including the Chief of the Anti-Corruption unit and the Chief of the Investigation Department, frequented the bar and restaurant, but never paid their bills. According to the author, they tried to extort money from him, and threatened him with imprisonment.

2.11 In August 1997, the author saw one of the waitresses who worked at his restaurant, Ms. Boichenko, being beaten by one Mr. Gaziev. The author intervened. Following the incident, Mr. Gaziev agreed to pay Ms. Boichenko \$US 60 as a compensation for dental expenses arising from the beatings. It was arranged that a relative of Mr. Gaziev would give the money to the author, who would pass it on to Ms. Boichenko. However, on 3 September 1997, when the amount was supposed to be paid, the author was arrested by the police and placed in detention, where he was beaten and subjected to degrading treatment, including being forced to touch the genitals of one of the investigators. The author was then charged with extortion, for allegedly having blackmailed Mr. Gaziev under threat of pressing criminal charges against him in relation to his assault on Ms. Boichenko.

2.12 The author states that he was detained without an arrest warrant for four days, in contravention of the Criminal Procedure Code, which requires production of a warrant within 72 hours. During his detention, he was repeatedly and severely beaten. On 7 September 1997, unable to withstand the beatings, he attempted to commit suicide and had to be taken to hospital. A medical report, dated 7 September 1997, confirming the author's allegations, was submitted to the Committee. The report states that his condition was critical. He lost his consciousness and had a cut wound on his upper arm. On 13 September 1997, he was brought back to the detention centre, where he remained for over a month and was again subjected to beatings in order to make him confess to the charge of extortion. The author identified by name some of the individuals, who allegedly participated in his beatings. At one point, he was placed in solitary confinement, where conditions were very poor; the cell was not heated and he was deprived of warm clothes. He claims that he was systematically beaten in front of other prisoners "because he was a Jew".² He also claims that he was detained for more than a month with inmates categorized as particularly dangerous despite the fact that his court trial was still pending and he was not yet convicted.

2.13 The author's trial in the District Court of Samarkand took place on 3 December 1997 and it was very short. During the proceedings, the Court refused the author's requests to call Ms Boichenko as a witness in his defence.³ At the conclusion of the author's trial, the District Court of Samarkand convicted him of extortion and sentenced him to 6 years imprisonment.

2.14 The author claims that he was tried by a district court, whereas the State party's law requires that foreign nationals have to be tried by a regional court at first instance. In this

² In a subsequent communication, the author provides a handwritten note from an inmate who corroborates this statement.

³ It transpires from the Court's decision that Ms Boichenko's statement was read out in Court. According to a subsequent supervisory review decision of the Samarkand Regional Court defence counsel consented to the statement of Ms. Boichenko being read out in Court.

regard, he points out that the Court did not enquire about his nationality in spite of his requests.

2.15 On 9 March 1998, the author's appeal in cassation was rejected by the Regional Court of Samarkand. The author states that the appeal judgment was procedurally defective, as the signatures of all relevant judges and the date did not appear on the judgment.

2.16 On 1 November 2000, the author was pardoned pursuant to a Presidential Decree of 28 August 2000, and released.

The complaint

3. The author claims that his torture and degrading treatment whilst in detention constitute a violation of his rights under article 7 of the Covenant (torture and degrading treatment in detention), and that the poor conditions of detention violated his rights under article 10, paragraphs 1 (poor conditions in detention) and 2 (a) (detention with particularly dangerous convicts while waiting for his trial). He claims that his unlawful detention violated his rights under article 9, paragraph 1 (procedural violations during detention); and that his trial entailed violations of his rights under article 14, paragraphs 1 (incompetent court), 3 (e) (violation of a right to obtain the attendance of a witness), and 5 (violation in administration of an appeal judgement) of the Covenant.

State party's observations

4.1 In its submission dated 29 November 2005, the State party challenged the admissibility of the communication. It states that the author had not exhausted domestic remedies, as he had not sought a supervisory review of his conviction. In particular, the State party submitted that the author did not appeal to the Samarkand Regional Court or the Supreme Court of Uzbekistan. It also affirmed that the Institution of Ombudsman, as pursuant to article 1, of the Law on the Ombudsman, constitutes a "complement to the existing forms and means" of human rights protection. According to article 10 of the mentioned Law, the Ombudsman is empowered to examine individual complaints and to conduct its proper inquiries. The State party further contended that the author's assertions about violations of his rights are without foundation.

4.2 The State party noted that it has sent the author's complaint to the Samarkand Regional Court for supervisory review.

Author's comments on the State party's observations

5.1 In his comments on the State party submission dated 19 January 2006 and 31 March 2006, the author provided further details of the poor conditions of the two correctional facilities in cities Kattakurgan and Navoi, in which he was imprisoned. In particular, he describes the unsanitary conditions and states that tuberculosis was rife. He complained about it to the administration of the prison. However, the chief of the administration threatened him that if he complained again, he would be made "rotten". As he complained "to other instances" against the administration's immobility, he was beaten on a daily basis and placed in an isolation cell for "15 to 20" days. He provided copies of cover letters signed by penitentiary administration to accompany his complaints allegedly on poor

conditions in correctional facilities to several different authorities. He also asserts his innocence of the charge of extortion.⁴

5.2 The author forwarded to the Committee copy of the decision issued by the Samarkand Regional Court, dated 2 December 2005. The Court rejects the author's contentions.⁵ It concludes that: the author's guilt was established by the evidence; no procedural violations occurred in relation to his detention; whilst the signatures of the relevant judges and the date were indeed absent from the appeal decision, this did not invalidate the decision; the Court properly evaluated the written statement of Ms. Boichenko during the trial, and defence counsel had consented to her statement being read out in Court. Finally, the Court states that the authors' claims about having been tortured had not been confirmed and qualified the author's claims as a defence strategy aimed at avoiding criminal liability. In this regard, the Court notes that the author can take his complaint to the Chief Administrator of State Punishments⁶ or to the Chief Prosecutor.

Consideration of admissibility

6.1 On 6 July 2006, during its eighty-seventh session, the Committee considered the admissibility of the communication. On the State party's contention that the author had not sought supervisory review of his conviction and appeal, and had not appealed to the Ombudsman, the Committee noted, that the author's case was examined, on 2 December 2005, by the Deputy President of the Samarkand Regional Court, which concluded that there were no grounds to present a supervisory (protest) motion.⁷ It also noted the author's claim that he had attempted to complain, with several authorities, about the poor conditions in detention, and that this was not refuted by the State party. In the absence of any other information from the State party, in particular a detailed description about the availability and the effectiveness, in practice, of the remedies it invoked, the Committee considered that it was not precluded by article 5 paragraph 2 (b) of the Optional Protocol to examine the communication.

6.2 On the alleged violation of article 9, the Committee noted that on 2 December 2005, the Samarkand Regional Court rejected this allegation, concluding that no procedural violations occurred in relation to the author's detention; it established that the author had been arrested on 4 September 1997 on charges of extortion, and was placed in custody on 6 September 1997. The author has not contested this. In the circumstances, the Committee concluded that he had failed sufficiently to substantiate this claim, for purposes of admissibility. Accordingly, this part of the communication was declared inadmissible under article 2 of the Optional Protocol.

6.3 The Committee concluded that the communication was admissible as far as the author's claims under articles 7, 10, and 14 had been sufficiently substantiated.

⁴ The author does not respond to the State party's submissions. However, he notes briefly that he had appealed to the General Procurator's Office, the President and the Ombudsman, although he does not explain the subject matter of his appeals, nor the results.

⁵ The decision states it has reviewed the author's complaint to the Human Rights Committee, and the decisions of the trial and appeal courts.

⁶ The so called 'GUIN' within the Ministry of Internal Affairs.

⁷ Supervisory review ('nadzor') is a discretionary review process common in former Soviet Republics, which the Committee has previously considered not to constitute an effective remedy for the purposes of exhaustion of domestic remedies: see, for example, communication No 836/1998, *Gelazauskas v Lithuania*, Views adopted 17 March 2003.

State party's additional observations

7.1 On 12 October 2006, the State party presented its observations on the merits of the communication in the form of an opinion issued by the Supreme Court. The Supreme Court confirms the findings of the Samarkand Regional Court of 2 December 2005 and finds no procedural violations during investigation and court proceedings. It submits that no unlawful methods were used against the author during the preliminary investigation as the claims were not confirmed. It also contends that all interrogations, investigation and court proceedings were conducted with the participation of a defence counsel. During the court trial the author had not complained about any violation of his rights during the preliminary investigation, in particular, use of proscribed methods of investigation and beatings by the police officials. It further states that the author and his counsel had agreed to have Ms. Boichenko's statement read out in court.

7.2 To the question of author's nationality it submits that the author testified that he was a stateless person.

7.3 Addressing the matter of missing signatures of cassation court judges the Supreme Court explains that the decision of the cassation court is signed by all judges, who participated during the examination of the case. The defendant and other participants in the process usually receive a legalised copy of the decision, which may not contain the signatures of all three judges. It concludes that the author's actions were classified correctly and the punishment was proportionate to the crime.

Author's additional comments

8.1 On 26 April 2007, the author disagrees with the conclusions by the Supreme Court and notes that his defence counsel, Ms. Rustamova, did not attend his trial despite his requests,⁸ and thus she could not confirm the author's citizenship. The court appointed Ms. Bagirova as a defence counsel, but the author refused her services as he had already hired Ms. Rustamova. Furthermore, Ms. Bagirova tried to convince him to confess guilty in all charges brought against him. The author submits that he requested the court and the preliminary investigators to provide documents confirming his identity, but this request was ignored. He also claims that he filed an objection to the judge, however the judge ignored his request. The author notes that Ms. Boichenko was present in the office of one of the investigators, where he was severely beaten, before being transferred to jail. She could have confirmed this, if she had been allowed to be present at his trial.

8.2 The author submits that two of the witnesses at the trial, were assistants to the judge, while other two witnesses were related to each other (mother and daughter). The rest of the witnesses were invited by Mr. Gaziev and thus gave testimonies in Mr. Gaziev's favour. The author claims that these persons had witnessed the beatings of Ms. Boichenko by Mr. Gaziev, but were not related to his own case.

Consideration of merits

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

9.2 The Committee notes the author's claims that he was subjected to torture and degrading treatment while in detention to force him to confess guilt in extortion. It notes

⁸ The author does not explain why his defence counsel, Ms. Rustamova did not attend his trial.

that the author has provided detailed information on the methods of torture as well as a medical report to corroborate his claims. He has also identified by name some of the individuals, who allegedly participated in his beatings. The Committee further notes that in its reply to the author's allegations, based on the present communication, the Samarkand Regional Court qualified the author's claims as a defence strategy aimed at avoiding criminal liability. The Committee notes, however, the medical report and the fact that the author had to be hospitalized while in detention. These facts should have been sufficient for the domestic authorities to initiate an investigation. The State party did not comment on the medical report. In these circumstances due weight must be given to the author's allegations, and the Committee considers that the facts presented by the author disclose a violation of his rights under article 7 of the Covenant.

9.3 The Committee notes the author's submissions with details of the poor conditions of the two correctional facilities in which he was imprisoned. In particular, the author describes the unsanitary conditions, and states that tuberculosis was rife. He provided copies of cover letters signed by penitentiary administration to accompany his complaints allegedly on poor conditions in correctional facilities to several different authorities. He claims that none of them, in fact, reached their addressees. Allegedly, he was called by the chief of the administration and threatened if he complained again. The State party has not commented on these allegations. Taking into consideration the detailed description of the conditions in prisons and the measures taken by the author, the Committee concludes that the facts before it amount to a violation by the State party of the alleged victims' rights under article 10, paragraph 1 of the Covenant.

9.4 The Committee notes the author's allegations that during his pre-trial detention he had spent more than a month in a cell with inmates categorized as particularly dangerous, despite the fact that his court trial was still pending and he was not yet convicted. The Committee further notes that in its reply to the author's allegations, the State party submitted that no procedural violations occurred in relation to his detention. It also stated that the author never raised the alleged violations during pre-trial detention at the court proceedings. The author has not commented on this specific matter in his further submissions. In the absence of any further information the Committee cannot conclude at the existence of a violation of article 10, paragraph 2 (a), of the Covenant.

9.5 On the alleged violation of article 14, paragraph 1, the Committee notes that the State party has rejected this allegation, concluding that no procedural violation occurred during the author's trial; according to the Criminal Procedure Code of Uzbekistan, the Samarkand City Court had a jurisdiction to examine the author's case. The author has not contested this claim in his further observations. In the absence of any further information, the Committee considers that there is no basis for finding of a violation of article 14, paragraph 1.

9.6 With respect to a claim of a violation of article 14, paragraph 3 (e), the Committee notes the State party's contention that the author and his counsel had consented to have Ms. Boichenko's statement read out in her absence. This argument has not been refuted by the author in his further comments, although in his previous submissions he had claimed that he was deprived of a right to obtain the attendance and examination of Ms. Boichenko as a witness. In the absence of any further information, the Committee cannot conclude at the existence of a violation of article 14, paragraph 3 (e).

9.7 The author has also claimed that the appeal judgement was procedurally defective as the signatures of relevant judges and the date did not appear on the judgement in violation of article 14, paragraph 5. The State party notes that the convicted and other parties to the process receive only copies of the decision, which may not contain the signatures of all three judges. The original is signed by all judges, who participated at examination of a case. The State party acknowledges the absence of the date on the judgement, however it argues

that this cannot serve as a basis for its cancellation. The author did not contest this claim in his further observations. In the absence of any further relevant information in this respect, the Committee considers that the facts as presented do not amount to a violation of the author's rights under article 14, paragraph 5 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 7 and article 10 paragraph 1 of the International Covenant on Civil and Political Rights.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including initiation and pursuit of criminal proceedings to establish responsibility for the author's ill-treatment, and payment of appropriate compensation to the author. The Committee reiterates that the State party should review its legislation and practice to ensure that all persons enjoy both equality before the law and equal protection of the law.

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

[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. 1432/2005, *Gunaratna v. Sri Lanka*
(Views adopted on 17 March 2009, Ninety-fifth session)***

<i>Submitted by:</i>	Mr. Dalkadura Arachchige Nimal Silva Gunaratna (represented by the Asian Legal Resource Centre)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Sri Lanka
<i>Date of communication:</i>	1 August 2005 (initial communication)
<i>Subject matter:</i>	Ill-treatment of author by police officers while in detention
<i>Procedural issue:</i>	Effectiveness of remedies
<i>Substantive issues:</i>	Prohibition of torture and cruel, inhuman and degrading treatment; right to security of the person; right to an effective remedy; equality of arms
<i>Articles of the Covenant:</i>	7; 9; 14, paragraph 1; 2, paragraph 3
<i>Article of the Optional Protocol:</i>	5, paragraph 2

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

Meeting on 17 March 2009,

Having concluded its consideration of communication No. 1432/2005, submitted to the Human Rights Committee on behalf of Mr. Dalkadura Arachchige Nimal Silva Gunaratna 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 1 August 2005, is Mr. Dalkadura Arachchige Nimal Silva Gunaratna, a Sri Lankan national born on 15 January 1961. He claims to be a victim of violations by Sri Lanka of articles 7; 9; 14, paragraph 1; and article 2, paragraph 3, of the Covenant. He is represented by counsel, the Asian Legal Resource Centre. The Covenant and the Optional Protocol entered into force for the State party on 11 September 1980 and 3 January 1998, respectively.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Lazhari Bouzid, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

1.2 On 2 November 2005, and in the light of the information before it, the Committee, acting through its Special Rapporteur on New Communications and Interim Measures requested the State party, under rule 92 of its rules of procedure, to afford the author and his family protection against further intimidations and threats. The State party was also requested to provide the Committee, at its earliest convenience, with its comments on the author's allegations that he and his family have been denied such protection.

The facts as presented by the author

2.1 On 19 June 2000, the author and his wife were at their home. At approximately 4.30 p.m., ten police officers led by the Assistant Superintendent of the Panadura police surrounded the author's house, illegally arrested him, tied his hands behind his back with rope, and took him into custody to Panadura police station. After his arrest, the author was allegedly brutally tortured by the police officers at the police station.

2.2 On 5 July 2000, the author was taken to Panadura hospital by two Panadura police officers. Hospital authorities recommended that the author be admitted but the officers refused to do so. The author was taken to Panadura hospital a second time, where hospital authorities advised that he be taken to Colombo Eye Hospital. On 10 July 2000, the author was admitted to Colombo Eye Hospital. He remained there for one month and seven days and underwent eye surgery. After he was discharged, the author was taken to Panadura police station where he was further assaulted, handcuffed and tied to a bed.

2.3 The author suffered serious physical and psychological injuries, and permanently lost the sight of one of his eyes, as a result of the torture.¹ The author refers to the detailed medical report of 10 November 2000 in this regard,² which details the history of the injuries suffered by the author, and lists the twenty injuries found on his body during the examination. The report concludes that one injury and one scar are the result of blunt trauma such as a blow with a hard blunt object. Further, the medical report concludes that these two injuries are of a nature which fall within section 3(11)(e) of the Penal Code, due to the permanent impairment of the author's vision and secondary glaucoma. The author adds that the loss of the sight in one eye will have a severe impact on the quality of his life. As a result of his unlawful arrest and assault, the author cannot pursue his livelihood and is unable to support his wife and three children.

2.4 The author states that after he was tortured, he endured multiple threats to his life, warning him to withdraw the complaints he had lodged. On 6 March 2005, shots were fired at his house by police officers. When the author came out of the house, he witnessed three police officers in uniform and two other persons in plain clothes running into a vehicle. The author notified higher police officials but no action was taken. The author and his family have received several threatening phone calls from unknown persons since he reported the

¹ The author provides a medical report from the Judicial Medical Officer of Colombo dated 10 November 2000, relating to his fundamental rights application to the Supreme Court, which states that some injuries are "due to blunt trauma like a blow with a hard blunt object", that some scars "are consistent with scars of healed contusions/contused abrasions and could have been caused by long blunt objects like batons rubber hoses etc."; and that other scars "could have been caused by the application of ligatures/handcuffs" at the wrist and the ankle. All scars were less than six months old and "are consistent with the manner of assault during the period as mentioned by the examinee".

² The medical report states that while in custody the author was handcuffed and assaulted with hosepipes; laid face down on an iron bed, handcuffed and tied by the ankles to the bed, and assaulted with a club and a hose pipe; kept in a dark room for eight days; that during one assault he received an injury to his right eye and bled from his eye; that he was suspended from the roof and beaten, and thereafter fainted; that his head was immersed under water.

incident, and he has been pressured to settle the case. In spite of making several complaints to the relevant authorities about these threats to his life, no action was taken to protect the author, and the perpetrators continue in their positions and are free to continue threatening the author. One of the perpetrators is an Assistant Superintendent of Police, Mr. Ranmal Kodithuwakku, who is a high ranking police officer. The author notes that he is the son of the former Inspector General of Police, and he believes that the high social status and influence of this particular police officer is one of the reasons for the delay in obtaining justice in this case. The Asian Human Rights Commission³ and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment have issued urgent appeals⁴ calling for immediate intervention in the case.

2.5 The author made a detailed statement to the Sri Lankan Human Rights Commission on 27 July 2000, while he was at Colombo Eye Hospital. He then submitted a fundamental rights case to the Supreme Court of Sri Lanka on 18 September 2000 (case number 565/2000).⁵ Once the complaint was filed, its hearing was postponed several times. The author was pressured by the perpetrators to settle the case but refused to do so. Complaints about these threats were made to higher police authorities but no action was taken. At the time of the original communication, this case had not yet been decided, despite the fact that its final hearing had already taken place, and no steps by the domestic mechanisms available in Sri Lanka were successful in bringing the perpetrators to justice.⁶

2.6 The author emphasizes that even though an investigation into his case was ordered and completed, none of the perpetrators have been indicted, and no action has been taken by the authorities under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994, nor have the authorities initiated any proceedings against the perpetrators. The author emphasizes that he has not yet been provided with any protection, nor has his case been decided.

3.1 On 14 December 2006, counsel informed the Committee that the Supreme Court judgment on the author's fundamental rights case was handed down on 16 November 2006, six years after the application was filed. The author maintains that the delay of six years amounts to an unreasonably prolonged delay within the meaning of article 5, paragraph 2(b), of the Optional Protocol. The written submissions to the Supreme Court by the author were made on 14 October and 2 November 2004, and usually the delivery of the judgment takes place within a short time thereafter, and in fundamental rights cases usually within

³ Urgent appeals issued by the Asian Human Rights Commission dated 11 March and 8 April 2005, suggesting action be taken to urge the Sri Lankan authorities to provide immediate protection to the author and his family, and conduct a proper investigation.

⁴ See the addenda to the reports of the Special Rapporteur, "summary of information, including individual cases, transmitted to governments and replies received": E/CN.4/2004/56/Add.1, paragraph 1558; E/CN.4/2003/68/Add.1, paragraphs 1523-1524 [which refers to the author's arrest on a separate occasion, on 22 May 2000, when he was kept in custody for one week and beaten], and 1573-1574.

⁵ Based on articles 11 [freedom from torture], 12(1) [right to equality before the law], 13(1), and 13(2) [freedom from arbitrary arrest, detention and punishment], and 14(1) (g) [freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise] of the Constitution.

⁶ The author refers to communication No. 1250/2004, *Sundara Arachchige Lalith Rajapakse v. Sri Lanka*, Views adopted on 14 July 2006, where the Committee observed that a delay of three years by the State party to expedite the proceedings as against the perpetrators amount to an unreasonably prolonged delay within the meaning of article 5, paragraph 2(b), of the Optional Protocol. The author also refers to communication No. 617/1995, *Anthony Finn v. Jamaica*, Views adopted on 31 July 1998.

one or two months. In the meantime the author was encouraged and pressed by the court and the main respondent to settle the case.

3.2 The judgment of the Supreme Court found that several police officers had violated the author's rights as guaranteed by the Constitution, regarding illegal arrest (section 13(1)), illegal detention (section 13(2)) and torture (section 13(5)). Thus, on the merits of his case, the author argues that his position was vindicated by the Supreme Court and that the State party cannot contest the merits.⁷

The complaint

4.1 The author alleges a violation of article 7 of the Covenant, since he was tortured from 19 June 2000 for 21 days. As a result, he permanently lost vision in one eye and was hospitalised for one month and seven days. He was rendered unable to support his family and continues to remain unable due to the injuries sustained by him. He lives under fear and intimidation from his assailants, and domestic mechanisms have failed to provide him redress.

4.2 The author claims a violation of article 9 of the Covenant, since he was illegally arrested and detained in custody without being informed of the reason for his arrest. He was not brought before a local magistrate, even though the Criminal Procedure Code provides that an arrested person must be produced before a court of law within 24 hours of arrest. He was deprived of his right to apply for bail; detained for 21 days; and tortured by police officers throughout this period. He is under continuous threat from the assailants, who have evaded any punishment. No domestic procedures can provide the author protection, even though he has made numerous requests to higher police authorities and human rights bodies for protection. By failing to take adequate measures to ensure that the author was protected from threats by those who tortured him or other persons acting on their behalf, the State party breached article 9 of the Covenant.

4.3 The author further alleges a violation of article 2, paragraph 3, of the Covenant. He recalls that despite initiation of a fundamental rights action in the Supreme Court, and making of numerous complaints to the relevant police and human rights authorities regarding the threats to his life, none of the domestic bodies have provided an effective remedy to the author. The case was brought before the Supreme Court on 18 September 2000 and was heard, but no judgment had been rendered when the original communication was submitted to the Committee. The author submits that it cannot be argued that the investigation remains pending, as it was completed. He recalls the Committee's jurisprudence that a State party is under an obligation to provide an effective and enforceable remedy for violations of the Covenant,⁸ that lack of remedies is in itself a

⁷ The judgment concludes that the author was arrested on 19 June 2000; and that the detention of the author from 19 June 2000 until 8 July 2000, the date on which the detention order was obtained, was unlawful and therefore in breach of article 13, paragraphs 1 and 2, of the Constitution. The Supreme Court also deemed that the medical evidence was "conclusive evidence of the injuries suffered by the complainant", that the author "had been subjected to torture whilst in police custody" and hence there had been a violation of article 11 of the Constitution. The Supreme Court deemed that the infringement of the rights guaranteed under article 14(1)(g) of the Constitution could not be sustained.

⁸ The author refers to communications No. 238/1987, *Floresmilo Bolaños v. Ecuador*, Views adopted on 26 July 1989; No. 336/1988, *Fillastre v. Bolivia*, Views adopted on 5 November 1991; No. 90/1981, *Luyeye Magana ex-Philibert v. Zaire*, Views adopted on 21 July 1983; No. 563/1993, *Bautista de Arellana v. Colombia*, Views adopted on 27 October 1995; No. 840/1998, *Mansaraj et al. v. Sierra Leone*, Views adopted on 16 July 2001; and No. 768/1997, *Mukunto v. Zambia*, Views adopted on 23 July 1999.

violation of the Covenant,⁹ that the State is under an obligation to provide a remedy for the offence of torture;¹⁰ and that complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective, and that the notion of an effective remedy must include as full a rehabilitation as may be possible. In this case, the State party failed to comply with its obligation under article 2, paragraph 3, of the Covenant.

4.4 The author adds that the judgment of the Supreme Court cannot be considered an adequate remedy pursuant to article 2, paragraph 3, of the Covenant, as it exonerated the chief perpetrator of the violations. The sole ground for this decision are notes produced by the Assistant Superintendent that on the day of the arrest he was engaged in other duties, which is in complete contradiction with available evidence. The result of this judgment is that the responsibility for the violations was put on minor officers, exonerating the chief perpetrator who was the commanding officer of the arrest, detention and torture operation. The Assistant Superintendent is also the Officer-in-Charge of the Quick Response Unit, which according to the Supreme Court judgment carried out the arrest, detention and torture, and he should have been held liable because of his command responsibility. As such, the author argues that the principle of equality before the law and before courts has not been applied, as the Assistant Superintendent was treated as being above the law, and that this in itself constitutes a violation of article 14, paragraph 1, of the Covenant. He also argues that article 14, paragraph 1, read together with article 2, paragraph 3, was breached as he was denied an adequate remedy.

4.5 The author was also denied an adequate remedy in light of the inadequate compensation awarded in this case by the Supreme Court. The Supreme Court awarded Rs. 5,000 (approximately US\$ 50) to be paid by the fourth respondent for the eye injury, and requested the Inspector General of Police to pay Rs. 50,000 (approximately US\$ 500) by way of compensation. The author argues that the Supreme Court failed to give due weight to the extent of the injuries sustained by him and the length of his illegal detention. He recalls that in other cases, the Supreme Court has awarded higher compensation for serious injuries.¹¹ Thus, while the compensation awarded does not amount to an adequate remedy for violations of rights protected under articles 7 and 9 of the Covenant, the award also violates the principle of equality before courts and tribunals under article 14, paragraph 1, of the Covenant.

4.6 The author further claims that his right to an adequate remedy for violations of articles 7 and 9 of the Covenant have been breached, as no one has been prosecuted, despite the fact that the medical report indicated that one injury amounted to an offence under section 3(11)(b) of the Penal Code. He refers to letters written on his behalf by the Asian Human Rights Commission to the Attorney-General of Sri Lanka and the Inspector General of Police, drawing to their attention the failure to take criminal and disciplinary actions against the persons responsible for the violations. The State party has therefore failed to provide adequate remedy to the author. As other similar crimes have been prosecuted before Sri Lankan courts, some of which occurred after 2000, there have been violations of articles 7 and 9, read with article 2, paragraph 3, and of article 14, paragraph 1, read with article 2, paragraph 3.

⁹ Communication No. 90/1981, *Luyeye Magana ex-Philibert v. Zaire*, Views adopted on 21 July 1983, para. 8.

¹⁰ General comment No. 20 (1992) on article 7, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, para. 14; communication No. 322/1988, *Hugo Rodríguez v. Uruguay*, Views adopted on 19 July 1994, para. 12.3.

¹¹ In a case where the torture victim suffered renal failure (Gerard Mervyn Perera, SCFR 328/2002), the Supreme Court awarded Rs. 800,000 (approximately US\$ 8,000) as compensation, and the same sum again for medical costs. The total award was Rs. 1,600,000 (approximately US\$ 16,000).

4.7 The author states that his complaint has not been submitted to another procedure of international investigation or settlement.

4.8 On exhaustion of domestic remedies, the author recalls that he has attempted to obtain redress through a fundamental rights application, in order to obtain compensation and redress. He has not obtained any result after five years and has been subjected to threats and other acts of intimidation because he has initiated these procedures. He therefore considers that the proceedings in Sri Lanka are unreasonably prolonged and the remedies are not effective. Further, regarding the effectiveness of the remedies, the author submits that at the time of his original communication to the Committee, no judgment had been delivered regarding his allegations of torture, although the case had been heard by the Supreme Court. The alleged perpetrators were neither suspended from their duties¹² nor taken into custody, which allowed them to put pressure upon and threaten the complainant. The author refers to the jurisprudence of the Committee Against Torture that allegations of torture should be investigated promptly, without much delay,¹³ that no formal complaint need be lodged; and that it is sufficient that the victims bring the facts to the attention of the authorities.

State party's observations

5. On 16 March 2007, the State party informed the Committee that subsequent to the Supreme Court judgment, the Attorney-General has decided to indict all the police officers against whom the Supreme Court issued adverse findings. Indictments under the Convention Against Torture Act are currently being prepared and will be dispatched to the relevant High Courts in due course.

Author's comments on the State party's submissions

6.1 On 20 July 2007, the author questions how the developments mentioned by the State party are meant to affect the admissibility and the merits of the communication. He recalls that the judgment of the Supreme Court was issued more than six years after the case was filed, which in itself constitutes a violation of the obligation to provide a remedy without undue delay. Further, criminal proceedings are still pending, more than seven years after the acts of torture occurred. Thus, the obligation to carry out a prompt and impartial investigation has not been met and remedies are "unreasonably prolonged" within the meaning of article 5, paragraph 2(b), of the Optional Protocol.¹⁴

6.2 The author notes that the State party does not address the facts and the substance of his claims. It does not provide any explanation for the substantial delays of over six years in both fundamental rights and criminal proceedings relating to the present case. Referring to

¹² The author refers to the recommendations of the Special Rapporteur on the question of torture that "When a detainee or relative or lawyer lodges a torture complaint, an inquiry should always take place and, unless the allegation is manifestly ill-founded, the public officials involved should be suspended from their duties pending the outcome of the investigation and any subsequent legal or disciplinary proceedings." (E/CN.4/2003/68, para. 26 (k)).

¹³ The author refers to communications No. 59/1996, *Encarnación Blanco Abad v. Spain*, Views adopted on 14 May 1998, paragraphs 8.2 and 8.6; No. 60/1996, *Khaled M'Barek v. Tunisia*, Views adopted on 10 November 1999, paragraphs 11.5-11.7, where the Committee Against Torture deemed that a delay of three weeks and more than two months in initiating procedures into allegations of torture was excessive, as was an unwarranted delay of ten months in ordering an inquiry into allegations of torture.

¹⁴ See communication No. 1250/2004, *Rajapakse v. Sri Lanka*, Views adopted on 14 July 2006.

the Committee's jurisprudence,¹⁵ the author requests that the Committee give due weight to the allegations substantiated in the initial complaint in the absence of comments by the State party.

6.3 Regarding the State party's decision to indict the police officers named in the Supreme Court judgment, the author notes that the State party has not provided a time table for the indictments, or provided any information on arrests. Furthermore, the State party has not provided any indication as to whether the said police officers have been or will be the subject of any administrative sanctions, and whether they remain in post. The mere mention that the Attorney-General has decided to indict, without any clarifying details of the official investigation, provides little assurance as to the seriousness of the investigation and the likelihood that it will result in indictments capable of being fully prosecuted under the law. Further, the Attorney-General's decision fails to take into consideration the fact that the most responsible person (the Assistant Superintendent) is not affected by the Supreme Court judgment, and therefore even if indictments were to follow, they would relate to the 'foot soldiers' as opposed to the person chiefly responsible, who remains shielded from responsibility.

6.4 As to the allegation of violation of article 7 of the Covenant, read with article 2, paragraph 3, the author recalls that no action has been taken against the chief perpetrator regarding the violations of his rights, and therefore submits that the Supreme Court judgment has no basis in law or fact and itself constitutes a denial of his right to an adequate remedy for violation of his rights.

6.5 As to the compensation granted by the Supreme Court, the author argues that the compensation was grossly inadequate, compared to sums awarded in other cases, and in light of the injuries suffered by the author it cannot constitute an adequate remedy in terms of article 2, paragraph 3, of the Covenant. The author further notes that the Supreme Court did not order any compensation to be paid by the State: only two respondents were ordered to pay compensation. This failure ignores the State's responsibility for violation of rights by State officers. It is for the State to ensure that its officers do not commit torture, illegal arrest and detention and other acts of abuse of rights. The State party, having failed in their duty to protect the rights of the author, is responsible for payment of compensation to him.

6.6 As to the effectiveness of remedies, the author recalls the delays in the fundamental rights case, and argues that it is not apparent that the case, which was supported by affidavits and strong medical evidence, was of such a complex nature that more than six years were required for its determination. In light of the Committee's jurisprudence,¹⁶ and considering that the State party has not provided any explanation for the repeated

¹⁵ Communications No. 1152/2003, *Ndong Bee v. Equatorial Guinea*, and No. 1190/2003, *Mico Abogo v. Equatorial Guinea*, Views adopted on 31 October 2005; No. 641/1995, *Gedumbe v. Democratic Republic of the Congo*, Views adopted on 9 July 2002; No. 532/1993, *Maurice Thomas v. Jamaica*, Views adopted on 3 November 1997; No. 1108/2002, *Karimov v. Tajikistan*, Views adopted on 26 March 2007; No. 1071/2002, *Valeryi Segeevich Agabekov v. Uzbekistan*, Views adopted on 16 March 2007; No. 1353/2005, *Njaru v. Cameroon*, Views adopted on 19 March 2007; and No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006.

¹⁶ Communications No. 1250/2004, *Rajapakse v. Sri Lanka*, Views adopted on 14 July 2006; No. 1320/2004, *Pimentel et al. v. Philippines*, Views adopted on 19 March 2007. Counsel also refers to general comment No. 31 (*Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40 (A/59/40)*, vol. I, annex III), to jurisprudence of the Committee Against Torture (communication No. 171/2000, *Dimitrov v. Serbia and Montenegro*, Views adopted on 3 May 2005), and to jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights on unreasonable delay and the right to an effective remedy.

postponements and the delay in proceedings, a delay of almost six years must be considered unreasonable and in violation of the right to an effective remedy in cases of torture.

6.7 As to the obligation to undertake a prompt, effective, and impartial investigation, the author recalls that the investigations in the present case were marked by serious delays throughout, and that indictments have not been filed. The State party has not provided any explanation why it has taken such a long time to commence and complete investigations and to file indictments. The State party has thus violated article 2, paragraph 3, read in conjunction with article 7 of the Covenant, to carry out prompt and effective investigations.¹⁷

6.8 As to the protection of victims and witnesses as an integral element of the right to an effective remedy, the author deems that it raises an issue under article 9 and article 2, paragraph 3, in conjunction with article 7 of the Covenant.¹⁸ The author highlights that it is not clear what measures the State party took to ensure the protection of the author in line with the Committee's request under rule 92 of its rules of procedure. Intimidations and threats to the security of victims and witnesses discourage complainants and adversely impact on the exercise of remedies and the conduct of investigations. The lack of any victim or witness programme in Sri Lanka, and a series of cases where victims and witnesses in torture cases were threatened or even killed are evidence of a systemic failure that has resulted in impunity.

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 and procedures, decide whether or not it is admissible under the Optional Protocol of the Covenant.

¹⁷ Counsel refers to general comments No. 20 (note 10 above) and No. 31 (note 16 above); to the Committee's concluding observations on the Democratic People's Republic of Korea (CCPR/CO/72/PRK, para. 15), and jurisprudence of the Committee on the obligation of State parties to "investigate, as expeditiously and thoroughly as possible, incidents of alleged ill-treatment of inmates" (communication No. 373/1989, *Stephens v. Jamaica*, Views adopted on 18 October 1995, para. 9.2). See also communications No. 587/1994, *Reynolds v. Jamaica*, Views adopted on 3 April 1997; No. 599/1994, *Spence v. Jamaica*, Views adopted on 18 July 1996; and No. 1416/2005, *Alzery v. Sweden*, Views adopted on 25 October 2006. Counsel also refers to reports of the Special Rapporteur on the question of torture (E/CN.4/2004/56, para. 39; E/CN.4/2003/68, para. 26(i)), to the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, the Standard Minimum Rules for the Treatment of Prisoners, the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, and to jurisprudence of the Committee against Torture (communication No. 59/1996, *Encarnacion Blanco Abad v. Spain*, Views adopted on 14 May 1998).

¹⁸ Counsel also refers to: general comment No. 31 (note 16 above); article 13 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; Principle 33 (4) of the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment; and Principle 12(b) of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; as well as jurisprudence of the European Court of Human Rights.

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 As to the alleged violation of article 14, paragraph 1, the Committee notes the author's argument that the principle of equality before the law and before courts was breached as the Assistant Superintendent was treated as being above the law by the Supreme Court, and that the amount of compensation awarded by the Supreme Court also violated the principle of equality before courts and tribunals. The Committee recalls that article 14 guarantees procedural equality and fairness only and cannot be interpreted as ensuring the absence of error on the part of the competent tribunal.¹⁹ 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.²⁰ In the absence of any clear evidence of arbitrariness or misconduct, or lack of impartiality on the part of the Supreme Court, the Committee is not in a position to question the Supreme Court's evaluation of the evidence and consequently finds that this part of the communication is inadmissible under article 2 of the Optional Protocol.

7.4 The Committee also notes that the author's claim relating to the quantum of compensation is also alleged to violate articles 7 and 9 in conjunction with 2 of the Covenant. The Committee adopts the same reasoning as in paragraph 7.3 above to conclude that in the absence of any clear evidence of arbitrariness or impartiality on the part of the Supreme Court in arriving at the quantum of compensation awarded, the Committee is not in a position to question the amount and thus finds that this part of the communication is inadmissible under article 2 of the Optional Protocol.

7.5 As to the alleged violations of articles 7 and 9, read in conjunction with article 2, paragraph 3, the Committee notes that these issues were the subject of a fundamental rights complaint before the Supreme Court, which handed down its judgment in November 2006, six years after the complaint was lodged. It also notes that the State party has informed the Committee that subsequent to the Supreme Court judgment, the Attorney-General has decided to indict all the police officers against whom there were adverse findings by the Supreme Court, but that as of the date of this decision, though eight years have lapsed since these events, no such indictments have been made. The Committee notes that the State party has not provided any reasons why the fundamental rights case could not have been disposed of more expeditiously, or why the indictments against the police officers have not been lodged for almost eight years, nor has it claimed the existence of any elements of the case which might have complicated the investigation or the judicial determination of the case for such a long period. The Committee therefore finds that the delay in the determination of the fundamental rights complaint and in the filing of the indictments amounts to an unreasonably prolonged delay within the meaning of article 5, paragraph

¹⁹ Communications No. 273/1988, *B.d.B. v. The Netherlands*, Inadmissibility decision adopted on 30 March 1989, paragraph 6.3; No. 1097/2002, *Martínez Mercader et al. v. Spain*, Inadmissibility decision adopted on 21 July 2005, paragraph 6.3.

²⁰ See Human Rights Committee, general comment No. 32 (2007), on article 14, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40 (A/62/40)*, Vol. I, annex VI, paragraph 26. See also communications No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, Inadmissibility decision adopted on 2 November 2004, paragraph 7.3; No. 886/1999, *Bondarenko v. Belarus*, Views adopted on 3 April 2003, paragraph 9.3; No. 1138/2002, *Arenz et al. v. Germany*, Inadmissibility decision adopted on 24 March 2004, paragraph 8.6.

2(b), of the Optional Protocol. It is also clear from the aforesaid facts that the author has exhausted the domestic remedies available to him.

7.6 As the State party has not contested the admissibility of any of the other claims advanced by the author, the Committee, on the basis of the information available to it, concludes that the claims based on articles 7 and 9; and article 2, paragraph 3, are sufficiently substantiated, for purposes of admissibility, and are thus admissible.

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

8.2 As to the claims of violations of articles 7 and 9 of the Covenant with regard to the author's alleged torture and the circumstances of his arrest, the Committee notes that the author has provided detailed information and evidence to corroborate his claims on the basis of which the State party's Supreme Court found violations of his rights under sections 11 and 13, paragraphs 1 and 2 of the Constitution. It also notes that the State party has not contested the authors' claims but merely informed the Committee that in 2007, the Attorney General had "decided" to issue indictments in this case and that they were being prepared at the time. The Committee reiterates its jurisprudence that the Covenant does not provide a right for individuals to require that the State party criminally prosecute another person. It considers, nonetheless, that the State party is under a duty to investigate thoroughly alleged violations of human rights, and to prosecute and punish those held responsible for such violations.²¹

8.3 The Committee notes that the author's fundamental rights application before the Supreme Court was disposed of only after a long delay of six years. Moreover, despite the fact that it has now been eight years since the author's arrest, the information provided by the State party with respect to the prosecution of those responsible has been minimal and despite requests it has not indicated whether indictments have actually been issued and when the cases would be likely to be heard. Under article 2, paragraph 3, the State party is under an obligation to ensure that remedies are effective. Expedition and effectiveness are particularly important in the adjudication of cases involving torture. The Committee is of the view that the State party cannot avoid its responsibility under the Covenant by putting forward the argument that the domestic authorities have already dealt or are still dealing with the matter, when it is clear that the remedies provided by the State party have been unduly prolonged without any valid reason or justification, indicating failure to implement these remedies. For these reasons, the Committee finds that the State party violated article 2, paragraph 3, read together with articles 7 and 9 of the Covenant. As far as the claims of separate violations of articles 7 and 9 are concerned, the Committee notes that the State party's Supreme Court has already found in favour of the author in this regard.

8.4 With regard to the claim that the State party violated the author's rights by failing to investigate the complaints filed by him with the police, the Committee notes that the State party has not addressed this allegation, nor has it provided any specific arguments or materials to refute the author's detailed account of the complaints filed by him. It recalls its jurisprudence that article 9, paragraph 1, of the Covenant protects the right to security of the

²¹ See communication No. 1250/2004, *Rajapakse v. Sri Lanka*, Views adopted on 14 July 2006, paragraph 9.3.

person also outside the context of formal deprivation of liberty.²² Article 9, on its proper interpretation, does not allow the State party to ignore threats to the personal security of non-detained persons subject to its jurisdiction. In the present case, the author has alleged having been threatened and pressurised to withdraw his complaints. In the circumstances, the Committee concludes that the failure of the State party to investigate these threats to the life of the author and to provide any protection, violated his right to security of person under article 9, paragraph 1 of the Covenant.²³

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 by the State party of article 2, paragraph 3, read together with articles 7 and 9, of the Covenant, as well as a separate violation of article 9, paragraph 1, of the Covenant with respect to the threats made against the author.

10. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy. The State party is under an obligation to take effective measures to ensure that the author and his family are protected from threats and intimidation, that the proceedings against the perpetrators of the violations are pursued without undue delay, and that the author is granted effective reparation, including adequate compensation. The State party is also under an obligation to take measures 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, that State party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the 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.]

²² Communications No. 821/1998, *Chongwe v. Zambia*, Views adopted on 25 October 2000; No. 195/1985, *Delgado Paez v. Colombia*, Views adopted on 12 July 1990; No. 711/1996, *Dias v. Angola*, Views adopted on 18 April 2000; No. 916/2000, *Jayawardena v. Sri Lanka*, Views adopted on 22 July 2002.

²³ See communications No. 916/2000, *Jayalath Jayawardena v. Sri Lanka*, Views adopted on 22 July 2002, paragraph 7.3; No. 1353/2005, *Njaru v. Cameroon*, Views adopted on 19 March 2007, paragraph 6.3.

**X. Communication No. 1447/2006, *Amirov v. Russian Federation*
(Views adopted on 2 April 2009, Ninety-fifth session)***

<i>Submitted by:</i>	Mr. Abubakar Amirov (represented by counsel, Mr. Boris Wijkström, World Organization Against Torture, and Ms. Doina Straisteanu, Stichting Russian Justice Initiative)
<i>Alleged victim:</i>	The author and his wife Mrs. Aïzan Amirova
<i>State party:</i>	Russian Federation
<i>Date of communication:</i>	9 January 2006 (initial submission)
<i>Subject matter:</i>	Deprivation of life of a Russian national of Chechen origin in the course of a military operation; failure to conduct an adequate investigation and to initiate proceedings against the perpetrators; denial of justice
<i>Substantive issues:</i>	Right to life; torture, cruel, inhuman or degrading treatment or punishment; denial of justice; effective remedy
<i>Procedural issues:</i>	Non-substantiation of claims; exhaustion of domestic remedies
<i>Articles of the Covenant:</i>	2, paragraph 1; 6; 7; 9; and 26; and 2, paragraph 3, read in conjunction with 6, 7, 9 and 26.
<i>Articles of the Optional Protocol:</i>	2; 5, paragraph 2 (b)

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

Meeting on 2 April 2009,

Having concluded its consideration of communication No. 1447/2006, submitted to the Human Rights Committee by Mr. Abubakar Amirov in his own name and on behalf of Mrs. Aïzan Amirova 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. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Lazhari Bouzid, Ms. Iulia Antoanella Motoc, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

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

1.1 The author of the communication, Mr. Abubakar Amirov, a Russian national of Chechen origin born in 1953, is the husband of Mrs. Aïzan Amirova (deceased), also a Russian national of Chechen origin born in 1965. Mrs. Amirova's body was found on 7 May 2000 in Grozny. The author acts on his own behalf and on behalf of his wife, and claims a violation by the Russian Federation of his wife's rights and of his own rights under article 2, paragraph 1; article 6; article 7; article 9; and article 26; as well as under article 2, paragraph 3, read in conjunction with article 6; article 7; article 9; and article 26, of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 1 January 1992. The author is represented by Mr. Boris Wijkström and Ms. Doina Straisteanu.

1.2 On 16 August 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 1 February 2007, 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 The author and Mrs. Amirova were married in 1989 and lived in Grozny until 1999 when the Russian Federation's second military operation in the Chechen Republic began. Shortly after, author and family moved to the village of Zakan-Yurt for safety reasons. In mid-November 1999, the author returned to Grozny to collect family belongings. He returned to Zakan-Yurt on or around 18 November 1999, but did not find his family and was unable to determine their whereabouts.

2.2 Not knowing about the whereabouts of wife and children, the author travelled to the village of Achkhoy-Martan, where he had relatives. He remained in Achkhoy-Martan because it was impossible for him to continue searching for his family due to heavy fighting in the area from November 1999 to early February 2000.¹

2.3 On an unspecified date, he found his children at their place of temporary residence in Nagornoe village, but his wife was not with them. He learned that at some point in early January 2000 his wife, who was eight months pregnant at the time, had left for Grozny in order to retrieve some belongings that had been left in their apartment and to attempt to look for him. On 11 January 2000, she registered with the local police for permission to cross checkpoint No. 53 in Grozny.

2.4 After Grozny was occupied by Russian federal forces in early February 2000, the author returned Grozny. On an unspecified date, not having heard of his wife's whereabouts since her departure for Grozny, he informed the authorities of her disappearance. The search for his wife officially started on 28 March 2000.

¹ The author provides copies of 35 reports on the 1999 – 2003 military operation of the Russian federal forces in the Chechen Republic published by Amnesty International, Chechnya Justice Project of the Stichting Russian Justice Initiative, Parliamentary Assembly of the Council of Europe, Human Rights Watch, "Memorial" Human Rights Centre, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, United Nations High Commissioner for Human Rights, Working Group on Enforced or Involuntary Disappearances, Commission on Human Rights and World Organization Against Torture. <http://www2.ohchr.org/english/issues/disappear/index.htm>

2.5 On 7 May 2000, the body of a woman was found by residents of Grozny in the basement of a storehouse in Grozny. According to the testimony of one of the residents, the body had started to decompose and the basement looked as if there had been some sort of explosion in it. Investigators of the Staropromyslovsky Temporary Department of Internal Affairs of Grozny and agents of the Ministry of Emergency Situations were called to the crime scene.

2.6 The same day, the author was informed by his family that an unidentified body had been found in Grozny which could be that of his wife. The author immediately visited the office of the Ministry of Emergency Situations in Grozny, where he asked for a car to be taken where the body had been found. At the crime scene, he identified the body and informed the agents of the Ministry of Emergency Situations that it was indeed his wife. He asked for an autopsy to be performed. The agents of the Ministry of Emergency Situations allegedly replied that he should be grateful to have found her remains. At the author's insistence, however, agents of the Ministry of Emergency Situations issued a statement attesting to the state of his wife's body. According to this statement, the body presented three perforations on the chest (two) and on the neck (one). There was a cut on the left side of the abdomen measuring 20–25 centimetres, made by a sharp object. There was no underwear on the body, pullover and dress were unbuttoned and some buttons were missing.

2.7 On 7 May 2000, investigators of the Staropromyslovsky Temporary Department of Internal Affairs of Grozny filed two reports on the discovery of Mrs. Amirova's body, as well as a record on the examination of the crime scene. The author claims that the investigators did not take photographs of the body, did not remove clothing or otherwise examined the body for further clues about the circumstances of her death, and did not bring the body to a hospital or morgue for an autopsy.

2.8 On 8 May 2000, the author took his wife's body to the village of Dolinskoe and buried her the same day.

2.9 On an unspecified date, the Head of the Staropromyslovsky Temporary Department of Internal Affairs of Grozny closed the official inquiry into the case of Mrs. Amirova's disappearance, as her remains had been identified on 7 May 2000.

2.10 On 19 May 2000, an investigator of the Grozny Prosecutor's Office initiated a criminal investigation into the circumstances of Mrs. Amirova's death. The prosecutor explained that "[a]s a result of the initial examinations, the investigator has come to the conclusion that the elements of a crime are present in this case and therefore, in application of articles 108, 109, 112, 115, 126 of the Code of Criminal Procedure of the Russian Federation a preliminary inquiry should be opened in this case". The same day, the investigator requested the Head of the Staropromyslovsky Temporary Department of Internal Affairs of Grozny to carry out a number of investigative actions. The same day, the same investigator requested the Head of the Territorial Department of the Ministry of Emergency Situations of the Chechen Republic to indicate the location of Mrs. Amirova's grave, to proceed to exhume her body and carry out a forensic medical examination. The author submits that, in the end, forensic medical examination of his wife's body was not performed, because, according to the authorities, they did not know where to find his wife's body.

2.11 At the end of May 2000, a number of witnesses' statements were taken by the investigators. The author submits that these statements, many of which were from Mrs. Amirova's relatives, appear to be formulaic in nature, and contain no information of interest to the criminal investigation. Thus, witnesses were not questioned about the state of her body when it was found, nor asked other relevant questions which could have shed light on the circumstances of her death. The author argues that the investigation failed to identify

other persons who remained in Staropromyslovsky District during the period from December 1999 to February 2000, and who could have possibly testified about the activities of Russian federal forces in the area. Although the author had alleged that his wife had been raped and killed by the Russian federal forces, and although it was known that these forces took control of Staropromyslovsky District at the time of her death, no efforts were made to establish the identity of the Russian military unit operating in the area in order to question its commanding officers.

2.12 On 1 June 2000, the Deputy Minister of the Ministry of Emergency Situations replied to the investigator's request of 19 May 2000, stating that Mrs. Amirova's burial was not listed in the Ministry's register. The author argues that the investigator did not ask the Ministry of Emergency Situations for information on how to reach Mrs. Amirova's immediate family in order to find her grave, nor did the Ministry offer to provide this information.

2.13 On 19 June 2000, investigator closed the criminal case for lack of "evidence of a crime", since "the body of the victim was not observed to bear signs of a violent death" and Mrs. Amirova "was not a victim of a crime but rather died from pregnancy complications, since in January 2000 she was 8 months pregnant." The author submits that the investigator did not specify what evidence was collected during the investigation, or how such evidence justified his decision. The unfounded nature of the investigator's conclusion on the cause of his wife's death is evident from the fact that no autopsy was ever performed, absent which it was not possible to establish that Mrs. Amirova had indeed died from pregnancy complications.

2.14 On 21 June 2000, the author petitioned the Special Representative of the President of the Russian Federation for the Promotion of Human and Civil Rights and Freedoms in the Chechen Republic, and requested his assistance in reopening the investigation. The author stated in his petition that his wife was last seen on 12 January 2000 at the "Tashkala" bus stop, when she and the other two women were "taken captive by military officers". On 7 July 2000, the appeal was forwarded to the Office of the Military Prosecutor of the Northern Caucasus Military District.

2.15 On 17 August 2000, a senior prosecutor of the Grozny Prosecutor's Office refused to reopen the investigation, claiming that the author himself had obstructed the inquiry by burying his wife before an autopsy could be performed, and by acting against the exhumation of Mrs. Amirova's body. The author claims that in fact he requested an autopsy to be performed when he identified his wife's body, but his request was denied. For this reason, he had insisted that the agents of the Ministry of Emergency Situations issue a statement attesting to the state of Mrs. Amirova's body when it was found. Another reason advanced by the prosecutor in justification for his refusal to reopen the investigation was that at the time of Mrs. Amirova's death there were no Russian troops in the Staropromyslovsky district of Grozny.

2.16 In August 2000, two months after the investigation had been closed the first time, the author was accorded the status of "victim" under Russian criminal procedure.² This meant that he did not have the right to present his testimony, demonstrate evidence, have access to the investigation materials, or complain or appeal actions taken by the prosecutors until after the initial investigation had already been suspended.

2.17 On 31 August 2001, Mrs. Amirova's death certificate was issued by the Civilian Registry Office of the Staropromyslovsky District. The certificate stated that she died from a gunshot wound to the chest on 12 January 2000.

² Article 53 of the Criminal Procedure Code.

2.18 On 5 November 2000, the author requested the Prosecutor of the Chechen Republic to inform him of the results of the investigation. The same day, he requested the Central Office of the Military Prosecutor of the Russian Federation to resume the investigation, claiming specifically that his pregnant wife was raped and then atrociously killed by the Russian federal servicemen. On 30 January 2001, the author requested the Prosecutor of Grozny to inform him of the decision in his wife's case. All these requests were re-transmitted to the prosecutorial authorities in Grozny.

2.19 On 24 March 2001, the Grozny Deputy Prosecutor concluded that the decision of 19 June 2000 to close the investigation into Mrs. Amirova's death had violated the Criminal Procedure Code. Specifically, he established the person in charge of the case at the time had failed to "undertake any appropriate investigation" of the case prior to its closure, and that his conclusion about the non-violent nature of Mrs. Amirova's death was "not based on the evidence of the criminal case". The Deputy Prosecutor also noted that despite the need to perform a forensic medical examination to establish the cause of death of the author's wife, such an examination was never performed. Given the author's testimony about the traces of gunshot wounds on Mrs. Amirova's body, the investigator should have interrogated witnesses. On 28 March 2001, the investigation was assigned to an investigator of the Grozny Prosecutor's Office. On 4 April 2001, the Military Prosecutor informed the author that the criminal investigation of his wife's case had been officially resumed.

2.20 On 14 April 2001, the author requested the Prosecutor of Grozny to provide him with a copy of criminal case file contents. On 24 April 2001, the investigator decided to suspend the preliminary investigation, as it was impossible to identify the perpetrator/s, despite the investigative and operational measures undertaken.

2.21 On 28 August 2001, the author again requested the Prosecutor of Grozny to resume the investigation. On 12 September 2001, the investigation was resumed for the third time by the same Grozny Deputy Prosecutor who had reopened it on 24 March 2001. Once again, he established that the preliminary investigation had been prematurely suspended and specifically requested the identification and interrogation of the individuals "who were present at the post-mortem examination of Mrs. Amirova's body" and of "the agents of the Ministry of Emergency Situations who carried out the burial of her body". This time, the author himself took steps to identify witnesses for the prosecution and wrote to the Prosecutor of Grozny on 6, 11, 14, 17 September and 11 October 2001, urging him to interrogate these witnesses. On 14 September 2001, he requested the Prosecutor of Grozny to conduct a thorough search of the crime scene to collect evidence.

2.22 The author submits that a certain number of witnesses were indeed questioned and their testimonies added to the case record to no avail. On 12 October 2001, the Prosecutor of Grozny suspended the investigation, stating that it was impossible to identify the perpetrator, despite the measures taken. This decision did not explain what measures had been taken and/or why they were unsuccessful. It mentioned that Mrs. Amirova's body bore "marks of violent death" on it when discovered. The same day, the author was informed in writing that the case was "temporarily suspended".

2.23 The author continued to try to ascertain the outcome of the investigation in 2002 and 2003. His last effort in this regard took place in 2004 when he went to the Grozny Prosecutor's Office, where he was told that the Prosecutor's Office "was tired of hearing [his] complaints" and that he should "wait until the war in Chechnya comes to an end" and then they would help him find those responsible for the crime. About a week after his inquiry he was beaten up by persons in military uniform who came to his home and whom he believes were sent by the State party's authorities to intimidate him into silence. As a result of this attack, the author has changed his place of residence and has ceased his efforts to enquire about the investigation out of fear for his life and that of his children.

2.24 In 2001, Human Rights Watch submitted an application to the European Court of Human Rights on the author's behalf. One year after the application was made, the Court requested additional information on the application from the author. As the author had changed his place of residence, he was unaware of the Court's request and did not reply on time. In the absence of a reply from the author, his dossier was closed.

2.25 After the last suspension of the investigation in Mrs. Amirova's criminal case on 12 October 2001, it appears that some additional investigative actions were made, including a forensic analysis on 23 October 2001 of a piece of an explosive device found in the basement where the body of the author's wife had been discovered. Since the beginning of 2003 the author has not received more information about the status of the investigation and believes that the State party's authorities were never serious about pursuing the criminal investigation.

2.26 On the issue of exhaustion of domestic remedies, the author submits that he took all possible steps to ensure that a proper investigation was conducted into the cause and circumstances of his wife's death and that there are no available remedies for the victims of human rights violations of Chechen origin in the Chechen Republic. He argues that the lack of accountability for perpetrators of the most serious human rights violations in the Chechen Republic is extensively documented.³

2.27 The author submits that the State party's law enforcement authorities have engaged in the systematic practice of failing to follow-up allegations of crimes committed in the Chechen Republic with serious investigations. Prosecutions of military and police authorities are extremely rare and convictions merely anecdotic. According to NGO reports, "[a]lthough in many instances, local prosecutors do launch criminal investigations into civilians' complaints of serious abuses, they routinely suspend these investigations shortly afterwards claiming that it is impossible to establish the identity of the perpetrator."⁴ The author refers to the Committee's jurisprudence, according to which there is a duty to exhaust domestic remedies only to the extent that they are available, effective⁵ and not unreasonably prolonged.⁶ The author argues that the recitation of facts above and submitted supporting documents⁷ clearly demonstrate that remedies are neither available nor effective in his case. The fact that five years have elapsed between Mrs. Amirova's death and the submission of the present communication to the Committee, during which no effective investigation has been conducted, demonstrates that remedies in the Russian Federation are unreasonably prolonged.

2.28 The author argues that a submission of civil claim for damages is *ab initio* ineffective, because under the State party's law, the civil court has no power to identify those responsible for a crime or to hold them accountable. A civil remedy faces serious obstacles if those responsible for the crime have not already been identified in criminal proceedings. He concludes that an application to a civil court is neither an alternative nor is it an effective remedy in his case.

2.29 The author claims that the Russian federal forces were the "material authors" of the human rights violations in his case and their actions are attributable directly to the State

³ See note 1 above. The Parliamentary Assembly of the Council of Europe has stated that "the prosecuting bodies are either unwilling or unable to find and bring to justice the guilty parties." Parliamentary Assembly of the Council of Europe, resolution 1315, 2003, paragraph 5.

⁴ Chechnya Justice Project, Annual Report 2003, Moscow, Nazran, Utrech, 2004, p. 10.

⁵ Communications Nos. 210/1986 & 225/1987, *Pratt & Morgan v. Jamaica*, Views adopted on 6 April 1989.

⁶ Communication No. 336/1988, *Fillastre & Bizoarn v. Bolivia*, Views adopted on 5 November 1991.

⁷ Note 1 above.

party. He invokes the decision of the Inter-American Court of Human Rights in *Velásquez Rodríguez*,⁸ in which the Court concluded that the responsibility of a State for a given crime will be proven whenever (1) it can be shown that there was an official practice of a certain kind of violation of human rights in the country, carried out by the Government or at least tolerated by it, and (2) the abuse committed against a specific victim can be linked to that practice.⁹ He argues that these two elements are met in his case: the Russian federal forces engaged in, or at a very minimum, tolerated, a consistent practice of massive and systematic human rights violations during the military operation in the Chechen Republic;¹⁰ and the circumstances surrounding Mrs. Amirova's death are consistent with these well-documented practices.¹¹

2.30 Lastly, the author submits that the State party's obligations under article 2 of the Covenant are both negative and positive in nature. States parties must not only refrain from committing violations, they must also take actions to prevent their occurrence. The positive duties of prevention apply regardless of whether the source of the violation is an agent of the State or a private individual. The more serious the violation, e.g. one relating to the right to life and the right to be free from torture and ill-treatment, the more compelling the duty of due diligence¹² owed by the State party to prevent their occurrence and investigate and punish the perpetrators. The author contends that the State party's responsibility is engaged regardless of the identity of the perpetrator.

The complaint

3.1 The author submits that the State party violated his and his wife's rights under article 2, paragraph 1; article 6; article 7; article 9; and article 26; as well as article 2, paragraph 3, read in conjunction with article 6; article 7; article 9; and article 26 of the Covenant.

3.2 The author refers to the Committee's jurisprudence, according to which in cases involving the arbitrary deprivation of life, the obligation to provide effective remedies entails: (a) investigating the acts constituting the violation, (b) bringing to justice any person found to be responsible for the death of the victim, (c) paying compensation to the surviving families, and (d) ensuring that similar violations do not occur again.¹³ He argues that the first element of the remedy, i.e. the investigation, is critical to ensuring the subsequent ones and notes that the investigative obligation is one of process, not outcome. The State party is not obliged to prosecute and convict someone in every single criminal case. However, the State party is obligated to initiate an investigation *that is capable of*

⁸ *Velásquez Rodríguez v. Honduras*, Judgment of July 29, 1988, Series C No. 4, paragraph 124.

⁹ *Ibid.*, paragraph 126.

¹⁰ The author refers to the Human Rights Watch report entitled "Civilian Killings in Staropromyslovsky District of Grozny", documenting that the district of Grozny where Mrs. Amirova was killed, was an area that came under a particularly intensive attack by the Russian federal forces, who systematically killed unarmed civilians, mostly women and elderly people.

¹¹ The author refers specifically to the same geographic location, same moment in time, same pattern of killing and same method of cover-up.

¹² Human Rights Committee, General comment No. 31 (2004) on the nature of the general legal obligation imposed on State parties to the Covenant, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40 (A/59/40)*, vol. I, annex III, para. 8.

¹³ Communications Nos. 146/1983 & 148-154/1983, *Baboeram-Adhin et al. v. Suriname*, Views adopted on 4 April 1985, paras. 15 and 16; communication No. 778/1997, *José Antonio Coronel et al. v. Colombia*, Views adopted on 24 October 2002, para. 10.

leading to the prosecution and punishment¹⁴ of the guilty parties.¹⁵ As a direct result of the failure of the State party's authorities to initiate a good faith investigation into the killing of his wife, no suspect(s) were ever identified, questioned, or charged, and no one was prosecuted, tried, let alone convicted for her torture and death, and the author has received no compensation for his loss. This demonstrates a breach of the right to a remedy guaranteed by article 2, paragraph 3, read in conjunction with article 6; article 7; article 9; and article 26.

3.3 As to the claim under article 6 of the Covenant, the author refers to the Committee's general comment on this article, in which the Committee explained that "[...] States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities."¹⁶ He claims that the fact that Mrs. Amirova was arbitrarily deprived of her life is conclusively established by the numerous documents, including the statement issued by the Ministry of Emergency Situations attesting to the state of Mrs. Amirova's body when it was found and her death certificate which attributes her death to a "gunshot wound to the chest". This description is consistent his account of the facts as described in the multiple letters he wrote the authorities, and by the State party's authorities' numerous references in their decisions to Mrs. Amirova's "murder", "violent death", etc. The circumstances of her death prove that she was killed by state agents. The author, therefore, submits that his wife's killing by the Russian federal forces and the subsequent failure of the State party's authorities to take appropriate measures to investigate her murder constitute a violation of the negative obligations under article 6 to prevent arbitrary deprivation of life at the hands of state security forces, and a violation of the positive duty to take measures to prevent, investigate, punish and redress such violations.

3.4 The author adds that his wife was first severely tortured and ill-treated before she was killed. He argues that the infliction of a knife wound of 20 to 25 centimetres in length in the abdomen of Mrs. Amirova, is an act which also clearly rises to the threshold of torture. Considering that she was 8 months pregnant at the time, it is reasonable to conclude that the infliction of such an injury was deliberately intended to provoke, and must in fact have provoked, an extreme suffering both physical and psychological in the moments preceding her death. The fact that she was not wearing any underwear when she died indicates that she was most likely subjected to sexual violence, possibly rape, before her death. The author claims, that the rape or the threat of rape of a person in the custody of State agents amounts to a violation of article 7. In her case, the violation was particularly egregious considering the advanced state of her pregnancy.

3.5 The author also claims that his wife was the victim of a violation of her right to security. The Committee has held that right to security of a person must be protected even outside the detention context and that any person subject to the State party's jurisdiction is entitled to benefit from this right.¹⁷ The failure of the State party to adopt adequate measures to ensure the individual's security constitutes a breach of article 9 because States have not only negative obligations to refrain from violating this right but also positive

¹⁴ The italicized language reflects that standard of the ECHR, see *Khashiyev and Akayeva v. Russia* judgment of 24 February 2005, paragraph 153.

¹⁵ Human Rights Committee, general comment No. 20 (1992) on article 7, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, para. 14.

¹⁶ General comment No. 6 (1982), *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40)*, annex VI, para. 3.

¹⁷ Communication No. 195/1985, *Delgado Páez v. Colombia*, Views adopted on 12 July 1990.

duties to ensure an individual's liberty and security. The author invokes the Committee's jurisprudence.¹⁸

3.6 The author adds that in the case of civilian victims of human rights abuses of Chechen origin at the hands of the Russian federal forces, the State party failed to respect the equal protection and non-discrimination principles by systematically denying the protections and remedies afforded by its domestic law to them on the ground of their national origin. The author contends, in particular, that the facts of the case clearly reveal that he was a victim of this kind of discrimination in his attempts to secure a remedy for the murder of his wife. He argues, therefore, that his case reveals a joint violation by the State party of its obligations under article 2, paragraph 1, and article 26, of the Covenant.

State party's observations on admissibility and merits

4.1 On 16 August 2006, the State party challenged the admissibility of the communication, arguing that the author did not exhaust domestic remedies, as according to the Supreme Court of the Chechen Republic in the period between 2002 and 2006, he did not appeal to a court any decisions of the investigation authorities related to the suspension of the investigation in the criminal case concerning the discovery of his wife's body.

4.2 On the merits, the State party reiterates that on 19 May 2000, an investigator of the Grozny Prosecutor's Office initiated a criminal case concerning the discovery on 7 May 2000 of Mrs. Amirova's body. The case was opened under article 105 of the Criminal Code (murder). The State party submits that the author's allegation about its failure to conduct the investigation in good faith is contrary to the facts and to case file materials. It describes in detail the authorities' efforts to examine the crime scene on 7 May 2000, and notes that it was impossible to identify the age of the victim and the time of her death, due to the decomposition of her body. No signs of violent death were discovered and no photographs of the crime scene were taken. The State party claims that it was impossible to conduct a forensic medical examination of Mrs. Amirova's body at a later stage, as requested by the investigator, since under local custom, her body was buried by her relatives the day it was discovered. The investigator questioned all the witnesses mentioned in the author's letters to the authorities but it was the author himself who refused to allow the exhumation of his wife's body and to communicate the location of her grave. The State party submits that the author, in numerous complaints to various bodies, requested the questioning of various individuals capable of corroborating his claim that his wife's body bore knife and gunshot wounds. But at no stage did he communicate the location of her grave or request the exhumation of her body and a forensic medical examination. The State party argues that only these examinations could have shed light on the real cause of Mrs. Amirova's death. The author's own testimony and that of agents of the Ministry of Emergency Situation are insufficient to conclude that the wounds were inflicted when Mrs. Amirova was still alive, as none of them has specialized knowledge on the matter. Moreover, their testimony contradicts that of other witnesses also present at the crime scene.

4.3 For the State party, the author's allegations that his wife's death is imputable to the Russian federal forces are inconsistent and unfounded for the following reasons. Firstly, the causes of Mrs. Amirova's death have not been established; secondly, there is no reliable information in the case file that would suggest that her death was caused by federal servicemen; thirdly, there was no mention of the signs of violent death during the author's initial testimony of 31 May 2000. In fact, the first ever reference by the author to the fact

¹⁸ Communication No. 859/1999, *Luis Asdrúbal Jiménez Vaca v. Colombia*, Views adopted on 25 March 2002, para. 7.1.

that the Russian federal servicemen have raped and then atrociously killed his pregnant wife appears in the letter to the Prosecutor of the Chechen Republic dated 5 November 2000.

4.4 The State party notes that on 1 May 2006, the decision of the Prosecutor of Grozny of 12 October 2001 to suspend the investigation into the circumstances of Mrs. Amirova's death was revoked as being premature upon instruction of the Office of the General Prosecutor to examine the new arguments raised by the author in his communication to the Committee. The State party specifically refers to the author's agreement to allow an exhumation and a forensic medical examination of his wife's body, as well as a necessity to investigate the author's allegations of him being beaten up by persons in military uniform in 2004, as a result of which he changed his place of residence. The same day, the resumed investigation was handed over to the investigator of the Prosecutor's Office of the Staropromyslovsky District, which sought to establish the author's whereabouts, as for the last two years he has not been living at the address indicated in the communication.

4.5 The State party considers that the absence of positive results in the investigation does not mean that the investigation was not conducted in good faith. The investigation was influenced by other objective factors, such as the situation in which the inquiry was carried out, the influence of ethnographic factors, local customs, and the realistic possibility of participation by specialists in certain investigatory and forensic procedures. The opening of a criminal case under article 105 of the Criminal Code does not necessarily mean that the investigation established the circumstances of the victim's death and confirmed that it was a violent one.

Author's comments on the State party's observations

5.1 On 14 December 2006, the author refutes the State party's arguments and draws the Committee's attention to the fact that the State party has presented no evidence in support of its assertions, while he does refer to specific documentation that corroborates his allegations.

5.2 The State party argued that it could not proceed with the forensic examination of Amirova's body due to the author's refusal to communicate the location of his wife's place of burial. The author challenges this statement and recalls that on 7 May 2000 when he recognized the body of his wife, he informed the agents of the Ministry of Emergency Situations and asked that an autopsy be performed. Only the next day, on 8 May 2000, the author took his wife's body to Dolinskoe and buried her. The place of burial was no secret, as well as the address of his place of residence where prosecutors could have contacted him about the exhumation. The State party's claim that the author refused to communicate the place of his wife's burial is untrue. He was not asked by any representative of the law enforcement agencies to indicate the place of burial and to agree with the exhumation. Normally this would be in a form of written protocol signed by investigator and the author. No such document was attached to the State party's observations in support of its claim. The State party's argument that the author did not inform law enforcement agencies about his wife's place of burial in his many complaints is inconsistent. The author requested an investigation into the cause of his wife's death but how that investigation should have been performed was within the State party's own remit.

5.3 The State party denies the Russian federal forces' involvement in his wife's death. The author submits, however, that this statement alone does not suffice to overturn his well founded suspicions and evidence which directly point to the Russian federal forces' responsibility for his wife's death.

5.4 The author regrets that the decision of the Prosecutor of Grozny of 1 May 2006 to resume the investigation into the circumstances of his wife's death was taken because of his

communication to the Committee. All his attempts over five years to revoke the suspension of the investigations had been fruitless. The author therefore does not consider this resumption of the investigation to have been done in good faith. In the author's opinion, the objective factors invoked by the State party could in no way excuse the State party from the obligation of conducting an effective investigation. There was no state of emergency declared on the territory of the Chechen Republic and no derogations were adopted from the legislation in force.

5.5 The author argues that the fact that "the body of the victim was not observed to bear traces of a violent death" is due to the unprofessional work of the Staropromyslovsky Temporary Department of Internal Affairs of Grozny. Now the State party interprets this omission in its favour declaring that "there is no violent death" which in itself contradicts the case facts. The author refutes the State party's argument that "under local custom the body had been buried by relatives the day it was discovered". He submits that investigators of the Staropromyslovsky Temporary Department of Internal Affairs left the crime scene saying nothing about the autopsy to him even after he requested one. The author took his wife's body on 8 May 2000, i.e. one day after the discovery of the body. The author also submits that the State party failed to explain numerous omissions in the preliminary investigation that were indicated in his initial submission.

5.6 As to the State party's claim that the communication is inadmissible for failure to exhaust domestic remedies, the author argues that appeal of the prosecutor's decision to close the case is an ineffective remedy, incapable to repair the omissions of the investigation. He submits that this remedy is provided in article 125 of the Criminal Procedure Code. A complaint against the inquirer, investigator, or the prosecutor's omissions or actions can be filed with the appropriate court by the applicant, his defence lawyer, his legal or another representative. The court is obliged to hear the case within five days from receiving the complaint and the judge shall pass a decision to confirm or dismiss the complaint. A copy of the decision shall be sent to the applicant and the prosecutor.

5.7 The author submits, based on the experience of Stichting Russian Justice Initiative, that this remedy is not effective in the Chechen Republic. The Stichting Russian Justice Initiative and its numerous applicants whom it represents have lodged complaints under article 125 of the Criminal Procedure Code against prosecuting and investigating bodies with various courts in the Chechen Republic in more than 30 separate cases. However, the complaints have not yielded any results, as in most cases, the complaints went unanswered. The author considers that there is no requirement that he pursue this domestic remedy since it has proved to be illusory, inadequate and ineffective and since, inter alia, the incident complained of was carried out by and under the responsibility of State agents.

5.8 The author explains that the ongoing investigation is a *pro forma* exercise and submits that while this domestic remedy exists on paper, it is ineffective. He argues that there is a well-founded fear against pursuing such remedies in so far as there is: (a) a lack of genuine investigations by public prosecutors and other competent authorities; (b) positive discouragement of those attempting to pursue remedies; (c) an official attitude of legal unaccountability towards the Russian federal forces, and (d) a lack of prosecutions against members of the Russian federal forces for alleged extra-judicial killings.

Supplementary State party's submissions on the author's comments

6.1 On 25 May 2007, the State party submits that on 1 June 2006, the Prosecutor's Office of the Staropromyslovsky District decided to suspend the investigation into the circumstances of Mrs. Amirova's death on the basis of article 208, paragraph 1, part 1, of the Criminal Procedure Code, as it was impossible to identify the perpetrator/s.

6.2 On the facts, the State party adds that subsequently to the discovery of Mrs. Amirova's body, a number of supplementary examinations of the crime scene were carried out. These examinations, however, did not produce any positive results. The State party reiterates that, according to the criminal case file, the author has never petitioned for the forensic medical examination of his wife's body. On the contrary, the case file contains the protocol of the author's examination of 14 April 2001, in which he refuses to allow an exhumation of Mrs. Amirova's body and to communicate the location of her grave. The State party claims that the author has refused to sign this protocol.

6.3 The State party further submits that in the absence of the forensic medical examination, it was impossible to objectively ascertain whether Mrs. Amirova's body bore gunshot wounds. At the same time, the author's testimony corroborated by that of the agent of the Ministry of Emergency Situations, give reasons to believe that Mrs. Amirova's death was violent. Therefore, the criminal case was initiated under article 105, part 1 (murder), of the Criminal Code and the investigation is not yet completed. The preliminary investigation, however, did not establish any objective evidence of the involvement of federal servicemen in this crime.

6.4 The State party adds that, given the author's agreement to allow an exhumation and to communicate the location of his wife's place of burial, on 29 March 2007, the Prosecutor's Office of the Chechen Republic revoked the decision of the Prosecutor's Office of the Staropromyslovsky District of 1 June 2006 to suspend the investigation into the circumstances of Mrs. Amirova's death. In accordance with article 37 of the Criminal Procedure Code, the Prosecutor's Office of the Chechen Republic ordered a number of investigative actions, such as supplementary interrogation of the author and of the agent of the Ministry of Emergency Situations, interrogation of investigators of the Department of Internal Affairs who examined the crime scene on 7 May 2000, and the medical forensic examination of Mrs. Amirova's body.

6.5 The State party refutes the claim that the referral of the case to courts of the Chechen Republic is an ineffective remedy. It argues that all the complaints filed with the courts of the Chechen Republic under article 125 of the Criminal Procedure Code have been examined. For example, out of the 39 complaints examined in 2006, 17 were granted. The State party submits that under article 127 of the Criminal Procedure Code, decisions of the court of first instance can be appealed on cassation (chapters 42–45 of the Criminal Procedure Code) and through the supervisory review procedure (chapters 48–49 of the Criminal Procedure Code). During 2004–2006, decisions of the district courts were appealed to the Supreme Court of the Chechen Republic.

Author's comments on the State party's supplementary submissions

7. On 20 December 2007, with reference to the State party's submissions of 27 May 2007, the author notes that the State party has simply repeated the arguments it had made in its prior submission of 17 August 2006 and once again has not backed up its claims with any concrete evidence. As the State party raises the same issues, the author refers the Committee to his prior comments of 14 December 2006.

Further submissions from the State party and the author

8.1 On 19 March 2008, the State party submits that on 2 April 2007 the resumed investigation was handed over to an investigator of the Prosecutor's Office of the Staropromyslovsky District. On 13 April 2007, this investigator requested the Head of the Department of Internal Affairs of the Staropromyslovsky District, to reinvigorate the efforts to identify the perpetrator/s of the crime, witnesses and eyewitnesses, as well as to secure appearance in the prosecutor's office for interrogation of the two agents of the Ministry of

Emergency Situations and of the three officers of the Staropromyslovsky Temporary Department of Internal Affairs of Grozny who were present at or examined the crime scene on 7 May 2000.

8.2 On 26 April 2007, the Head of the Department of Internal Affairs of the Staropromyslovsky District replied that reinvigorated efforts to identify the perpetrator/s of the crime, witnesses and eyewitnesses did not produce any positive results so far; it was impossible to secure appearance of the three officers of the Staropromyslovsky Temporary Department of Internal Affairs of Grozny, because these officers have left the Chechen Republic at the end of their assignment and their current whereabouts were unknown; efforts to establish the whereabouts and to secure the appearance of the two agents of the Ministry of Emergency Situations did not produce any positive results so far. At the time of supplementary interrogation of 25 April 2007, the author stated that the protocol of his examination of 14 April 2001 was contrary to the facts. The State party argues that during supplementary interrogation of 25 April 2007 the author did not deny that he had refused to sign the protocol of 14 April 2001, which proves that he indeed was examined by the prosecutor and refused to allow an exhumation of Mrs. Amirova's body and to communicate the location of her place of burial.

8.3 The State party adds that although the author himself does not presently object against the exhumation of his wife's body, he must be aware that Mrs. Amirova's relatives do object against it, as being contrary to the Muslim customs. The State party specifically refers to the protocol of interrogation of Mrs. Amirova's sister of 27 April 2007. On 2 May 2007, the investigator of the Prosecutor's Office of the Staropromyslovsky District decided to suspend the investigation into the circumstances of Mrs. Amirova's death on the basis of article 208, paragraph 1, part 1, of the Criminal Procedure Code, as it was impossible to identify the perpetrator/s. The author and Mrs. Amirova's sister were informed of the decision in writing.

9. On 24 July 2008, with reference to the State party's submissions of 19 March 2008, the author notes that the State party has simply repeated the arguments it had made in its prior submissions and has not yet provided any concrete evidence to the case. Because the State party raises the same issues, the author refers the Committee to his prior comments of 14 December 2006.

Issues and proceedings before the Committee

Consideration of admissibility

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

10.2 The Committee notes that the same matter is not being examined under any other international procedure, in line with the requirements of article 5, paragraph 2(a), of the Optional Protocol.

10.3 Regarding the exhaustion of domestic remedies, 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 to the presumed victim.

10.4 The State party has argued that the communication is inadmissible for failure to exhaust domestic remedies. In support of its argument, the State party has noted that the

author has failed to appeal to a court any decisions of the investigation authorities related to the suspension of the investigation in the criminal case concerning the discovery of Mrs. Amirova's body. The author claims, however, that the referral to the courts of the Chechen Republic is an ineffective remedy, incapable to repair the omissions of the investigation. Furthermore, he argues, there is a well-founded fear against pursuing such remedies in so far as there is: (a) a lack of genuine investigations by public prosecutors and other competent authorities; (b) positive discouragement of those attempting to pursue remedies; (c) an official attitude of legal unaccountability towards the Russian federal forces, and (d) a lack of prosecutions against members of the Russian federal forces for alleged extra-judicial killings. In addition, the author refers to the experience of Stichting Russian Justice Initiative that has lodged complaints under article 125 of the Criminal Procedure Code on behalf of other persons whom it represented; in most cases these complaints went unanswered. The Committee notes that the State party challenges the author's claim about the ineffectiveness of the judicial remedies in the Chechen Republic, without, however, providing any evidence that any investigation initiated pursuant to a court decision had led to the effective prosecution and punishment of the perpetrator/s. In the circumstances, the Committee considers that the question of exhaustion of domestic remedies in the present communication is so closely linked to the merits of the case that it is inappropriate to determine it at the present stage of the proceedings and that it should be joined to the merits.

10.5 In relation to the alleged violation of article 2, paragraph 1, and article 26 of the Covenant, in that the State party has failed to respect the equal protection and non-discrimination principles by systematically denying the protections and remedies to, generally, civilian victims of human rights abuses of the Chechen origin and, specifically, to the author, on the ground of their national origin, the Committee considers that these claims have been insufficiently substantiated, for purposes of admissibility. They are thus inadmissible under article 2 of the Optional Protocol.

10.6 Concerning the author's claim of a violation of article 9, in that the State party failed to adopt adequate measures to ensure Mrs. Amirova's liberty and security even outside the detention context, the Committee considers that this claim has not been sufficiently substantiated, for purposes of admissibility, and is inadmissible under article 2 of the Optional Protocol.

10.7 The Committee considers that the author's claims under article 6 and article 7, as well as under article 2, paragraph 3, read in conjunction with article 6 and article 7, of the Covenant, have been sufficiently substantiated, for purposes of admissibility, and declares them admissible.

Consideration of the merits

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

11.2 With regard to the author's claim that article 6 was violated, the Committee recalls paragraph 1 of its general comment No. 6 (1982) on article 6, which states that the right enshrined in this article is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation.¹⁹ The Committee recalls its jurisprudence that criminal investigation and consequential prosecution are necessary

¹⁹ General comment No. 6 (note 16 above), para. 1.

remedies for violations of human rights such as those protected by article 6.²⁰ It further recalls its general comment No. 31, that where investigations reveal violations of certain Covenant rights States parties must ensure that those responsible are brought to justice.²¹

11.3 The Committee notes that in its submissions of 25 May 2007 and 19 March 2008, the State party concedes that the author's testimony corroborated by that of the agent of the Ministry of Emergency Situations give reasons to believe that Mrs. Amirova's death was violent. The Committee also notes that Mrs. Amirova's death certificate of 31 August 2001 issued by the Civilian Registry Office of the Staropromyslovsky District states that she died from a gunshot wound to the chest on 12 January 2000. The Committee further notes the author's claim, attested by the death certificate, that her death occurred at the same time and in the same place as the second military operation in the Chechen Republic conducted by the Russian federal forces and that in his communication to the Committee and numerous letters to the State party's authorities, the author attributed his wife's arbitrary deprivation of life to the State party's federal forces. As regards the subsequent investigation, it was suspended on 2 May 2007 for the fifth time since 2000, for failure to identify the perpetrator/s. However, the investigation has not been completed, thereby preventing the author from pursuing his claim for compensation. The Committee notes that the author and the State party accuse each other of either failing or obstructing to carry out the exhumation and forensic medical examination of Mrs. Amirova's body. The Committee also notes that, as transpires from the facts presented by the author and uncontested by the State party, the author did ask for an autopsy to be performed the same day when his wife's body was discovered but his request was denied.

11.4 The Committee considers that the death by firearms warranted at the very minimum an effective investigation of the potential involvement of the State party's federal forces in Mrs. Amirova's death, besides an uncorroborated statement that there was no objective evidence of the involvement of federal servicemen in this crime. The Committee notes the failure of the State party even to secure the testimony of the agents of the Ministry of Emergency Situations and of the Staropromyslovsky Temporary Department of Internal Affairs of Grozny who were present at the crime scene on 7 May 2000. The Committee also notes the uncontested evidence submitted by the author of a pattern of alleged violations by the State party of the sort asserted in the present case, as well as a pattern of perfunctory and unproductive investigations whose genuineness is doubtful. The facts of the present case exemplify this pattern. The Committee further observes that although over nine years have elapsed since Mrs. Amirova's death, the author still does not know the exact circumstances surrounding his wife's death and the State party's authorities have not indicted, prosecuted or brought to justice anyone. The criminal case remains suspended without any indication from the State party when it will be completed. The Committee also notes that a civil claim for compensation, even if could provide adequate reparation, faces serious obstacles if those responsible for the crime have not already been identified in criminal proceedings. The State party must accordingly be held to be in breach of its obligation, under article 6, read in conjunction with article 2, paragraph 3, properly to investigate the death of the author's wife and take appropriate action against those found responsible.

11.5 As to the author's attribution of his wife's arbitrary deprivation of life to the State party's federal forces, the Committee recalls its jurisprudence²² that the burden of proof

²⁰ Communication No. 1436/2005, *Sathasivam v. Sri Lanka*, Views adopted on 8 July 2008, para. 6.4.

See also general comment No. 31 (note 12 above), paragraphs 15 and 18.

²¹ General comment No. 31 (note 12 above), para. 18.

²² Communications No. 30/1978, *Bleier v. Uruguay*, Views adopted on 24 March 1980, para. 13.3, No. 84/1981, *Dermit Berbato et al. v. Uruguay*, Views adopted on 21 October 1982, para. 9.6.

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. 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. In addition, the deprivation of life by the authorities of the State is a matter of utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.²³ The Committee takes into account the evidence provided by the author pointing to the State party's direct responsibility for Mrs. Amirova's death, but considers that, the evidence does not reach the threshold that would allow a finding that there has been a direct violation of article 6, with regard to Mrs. Amirova.

11.6 The author claimed that his wife was severely tortured, ill-treated and most likely subjected to sexual violence before she was killed. These allegations were presented both to the State party's authorities, i.e. the Central Office of the Military Prosecutor of the Russian Federation, and in the context of the present communication. 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.²⁴ In the present case, the State party refuted the author's allegation by stating that there was no objective evidence of the involvement of federal servicemen in this crime. In the absence of any information by the State party, specifically in relation to any inquiry made by the authorities both in the context of the criminal investigation or in the context of the present communication to address the allegations advanced by the author in a substantiated way, due weight must be given to the author's allegations. In these circumstances, the Committee considers that 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. For the same reasons mentioned in the previous paragraph in respect of article 6, the Committee considers that the evidence does not reach the threshold that would allow a finding of a direct violation of article 7 of the Covenant.

11.7 As to the author's claim also to be a victim of violations of the Covenant, the Committee recalls its jurisprudence according to which the close family of victims of enforced disappearance may also be victims of a violation of the prohibition of ill-treatment under article 7. This is because of the unique nature of the anxiety, anguish and uncertainty for those to the direct victim. That is the inexorable consequence of an enforced disappearance. Without wishing to spell out all the circumstances of indirect victimization, the Committee considers that the failure of a State party responsibly to discharge its obligations to investigate and clarify the circumstances of the harm suffered by the direct victim will be usually be a factor. Additional factors may be necessary. In the present case, the Committee notes the horrific conditions in which the author came to find his wife's mutilated remains, as attested at the time by public officials (see paragraph 2.6 above), followed by the dilatory, sporadic measures undertaken to investigate the circumstances that have lead to the above findings of violations of articles 6 and 7, read together with article 2, paragraph 3. The Committee considers that, taken together, the circumstances require the Committee to conclude that the author's own rights under article 7 have also been violated.

²³ General comment No. 6 (note 16 above), para. 3.

²⁴ General comment No. 20 (note 15 above), para. 14.

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation in respect of Mrs. Amirova by the Russian Federation of article 6 and article 7, read in conjunction with article 2, paragraph 3, of the Covenant, and a violation in respect of the author of article 7.

13. Under 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 in the circumstances of his wife's death, prosecution of those responsible, and adequate 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 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.]

**Y. Communication No. 1457/2006, *Poma v. Peru*
(Views adopted on 27 March 2009, Ninety-fifth session)***

<i>Submitted by:</i>	Ángela Poma Poma (represented by counsel, Tomás Alarcón)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Peru
<i>Date of communication:</i>	28 December 2004 (initial submission)
<i>Subject matter:</i>	Withdrawal of water from indigenous land
<i>Procedural issue:</i>	Examination under another procedure of international investigation or settlement; insufficient substantiation of the complaint
<i>Substantive issues:</i>	Right to an effective remedy, right to equality before the courts, right to privacy and family life, right of minorities to enjoy their own culture
<i>Articles of the Covenant:</i>	1, paragraph 2; 2, paragraph 3; 17; and 27
<i>Articles of the Optional Protocol:</i>	2 and 5, paragraph 2 (a)

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

Meeting on 27 March 2009,

Having concluded its consideration of communication No. 1457/2006, submitted on behalf of Ángela Poma Poma 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 28 December 2004, is Ángela Poma Poma, a Peruvian citizen born in 1950. She claims to be a victim of a violation by Peru of article 1, paragraph 2; article 2, paragraph 3 (a); article 14, paragraph 1; and article 17 of the Covenant. The Optional Protocol entered into force for the State party on 3 January 1981. The author is represented by counsel, Tomás Alarcón.

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

In accordance with rule 90 of the Committee's rules of procedure, Mr. José Luis Pérez Sanchez-Cerro did not take part in the adoption of this decision.

Factual background

2.1 The author and her children are the owners of the “Parco-Viluyo” alpaca farm, situated in the district of Palca, in the province and region of Tacna. They raise alpacas, llamas and other smaller animals, and this activity is their only means of subsistence. The farm is situated on the Andean altiplano at 4,000 metres above sea level, where there are only grasslands for grazing and underground springs that bring water to the highland wetlands. The farm covers over 350 hectares of pasture land, and part of it is a wetland area that runs along the former course of the river Uchusuma, which supports more than eight families.

2.2 In the 1950s, the Government of Peru diverted the course of the river Uchusuma, a measure which deprived the wetlands situated on the author’s farm of the surface water that sustained the pastures where her animals grazed. Nevertheless, the wetlands continued to receive groundwater that came from the Patajpujo area, which is upstream of the farm. However, in the 1970s the Government drilled wells (known as the Ayro wells) to draw groundwater in Patajpujo, which considerably reduced the water supply to the pastures and to areas where water was drawn for human and animal consumption. The author claims that this caused the gradual drying out of the wetlands where llama-raising is practised in accordance with the traditional customs of the affected families, who are descendants of the Aymara people, and which has been part of their way of life for thousands of years.

2.3 In the 1980s, the State party continued its project to divert water from the Andes to the Pacific coast in order to provide water for the city of Tacna. In the early 1990s, the Government approved a new project entitled the Special Tacna Project (*Proyecto Especial Tacna* (PET)), under the supervision of the National Institute for Development (INADE). This project involved the construction of 12 new wells in the Ayro region, and a plan to build a further 50 wells subsequently. The author observes that this measure accelerated the drainage and degradation of 10,000 hectares of the Aymaras’ pastures and caused the death of large quantities of livestock. The work was carried out despite the fact that no decision had been taken to approve an environmental impact assessment, which is required under article 5 of the Code on the Environment and Natural Resources. In addition, the wells were not registered in the Water Resources Register kept by the National Institute of Natural Resources (INRENA).

2.4 In 1994 various members of the Aymara community held demonstrations in the Ayro region, which were broken up by the police and armed forces. The author contends that the leader of the community, Juan Cruz Quispe, who prevented the construction of the 50 wells planned under PET, was murdered in the Palca district and that his death was never investigated.

2.5 According to the author, following a series of protests by the indigenous community, including a collective complaint addressed to the Government on 14 December 1997, 6 of the 12 wells built in Ayro were closed down, including well No. 6, which was believed to be especially harmful to the interests of the indigenous community. This well was transferred to the *Empresa Prestadora de Servicios de Saneamiento* de Tacna, or EPS Tacna, part of the municipal administration.

2.6 The case file contains a copy of a letter from INADE dated 31 May 1999 addressed to INRENA, which is part of the Ministry of Agriculture, as a result of an enquiry from a member of Congress. It indicates that EPS Tacna, in agreement with the former ONERN (now INRENA), had carried out an environmental impact study which had concluded that the foreseeable overall environmental impact was moderate, and that the quantity of underground water resources to be withdrawn would be less than the calculated renewable reserves as established in hydrogeological studies.

2.7 Also in the file is a copy of a letter from INRENA dated April 2000, pointing out that INRENA had not received any environmental impact study from PET and that consequently no authorization had been given for the drilling of the wells.

2.8 The author also sent the Committee a copy of a report prepared by the Ombudsman in 2000 recommending that the Executive Director of PET should submit the environmental impact study and the reports on PET activities to INRENA so that it could issue the necessary evaluation.

2.9 In 2002, the company reopened well No. 6 in order to obtain more water, whereupon the author filed a criminal complaint with Tacna Prosecutor's Office No. 1 against the manager of EPS Tacna for an environmental offence, unlawful appropriation and damages; the complaint was dismissed by the prosecutor. On 17 September 2003, the author appealed to the Senior Prosecutor, who ordered that the wells should be inspected by the prosecutor and the police. After the inspection, Tacna Prosecutor's Office No. 1 concluded that there was evidence of an offence and instituted criminal charges in Tacna Criminal Court No. 1 against the manager of EPS Tacna for the environmental offence of damage to the natural, rural or urban landscape, as provided for in the Criminal Code.

2.10 Approximately one year after the complaint had been filed, the judge of Criminal Court No. 1 recused himself from the case because he was married to the company's legal adviser, and the case was referred to Tacna Criminal Court No. 2. On 13 July 2004, the court declared that the trial would not open because of failure to fulfil a procedural requirement – the submission of a report from the competent State authority, INRENA. This legal requirement provides that before the opening of a trial the competent authority must submit a report on the allegation of an environmental offence. The author maintains that although the prosecutor insisted that the preliminary investigation should go ahead, claiming that the case file contained a report from INRENA, the judge shelved the case.

2.11 On 10 January 2005 the prosecutor filed additional charges with Criminal Court No. 2, for the offence of unlawful appropriation of water under article 203 of the Criminal Code. The prosecutor claimed that the surface waters and groundwater of the Ayro area had been used peacefully in accordance with customs and usages and that by taking the water without consultation or authorization by the relevant agency, PET had diverted the waters from their normal course, adversely affecting the author. That charge was dismissed. The prosecutor lodged an application for reconsideration and an appeal against that decision, which were dismissed. He subsequently instituted complaint proceedings, which were declared to be without merit on 24 June 2005, since the prosecutor had not appealed against the decision of 13 July 2004 and the addition of charges was improper.

2.12 The author also submitted a complaint to the National Development Institute (INADE), which replied that officials of the PET project were under investigation for irregularities, after it had been observed that they had been negotiating to share the underground water along the Tacna coast with Chile. The author thus realized that surplus quantities of water were to be found underground along the Tacna coast and that it was unnecessary for the Ayro wells to continue operating. On 11 November 2004, INADE informed her that it was not possible to launch an investigation. This left the author without any means of throwing light on the facts. Three years previously the facts had also been drawn to the attention of CONAPA, the Peruvian Government agency responsible for indigenous affairs, which did nothing.

2.13 The author submits that she has exhausted all available domestic remedies without her case being brought to trial. She adds that the Code of Constitutional Procedure allows for *amparo* and habeas corpus proceedings against judges only for denial of justice, which is not applicable in the present case.

The complaint

3.1 The author alleges that the State party violated article 1, paragraph 2, because the diversion of groundwater from her land has destroyed the ecosystem of the altiplano and caused the degradation of the land and the drying out of the wetlands. As a result, thousands of head of livestock have died and the community's only means of survival – grazing and raising llamas and alpacas – has collapsed, leaving them in poverty. The community has therefore been deprived of its livelihood.

3.2 The author also claims that she was deprived of the right to an effective remedy, in violation of article 2, paragraph 3 (a), of the Covenant. By requiring the submission of an official report before the judge can open proceedings, the State becomes both judge and party and expresses a view on whether or not an offence has been committed before the court itself does so. She also complains that the Criminal Code contains no provision for the offence of dispossession of waters used by indigenous people for their traditional activities, and states that she has exhausted domestic remedies.

3.3 The author alleges that the facts described constitute interference in the life and activities of her family, in violation of article 17 of the Covenant. The lack of water has seriously affected their only means of subsistence, that is, alpaca- and llama-grazing and raising. The State party cannot oblige them to change their way of family life or to engage in an activity that is not their own, or interfere with their desire to continue to live on their traditional lands. Their private and family life consists of their customs, social relations, the Aymara language and methods of grazing and caring for animals. This has all been affected by the diversion of water.

3.4 She maintains that the political and judicial authorities did not take into account the arguments put forward by the community and its representatives because they are indigenous people, thereby violating their right to equality before the courts under article 14, paragraph 1.

State party's observations on admissibility and on the merits

4.1 On 26 May 2006, the State party challenged the admissibility and merits of the complaint. It maintains that the author's daughter referred a case to the Commission on Human Rights under the 1503 procedure, containing the same allegations, and that the complaint should therefore be declared inadmissible under article 5, paragraph 2 (a), of the Optional Protocol.

4.2 With regard to the merits, the State party observes that the withdrawal of water by EPS Tacna is not subject to approval of an environmental impact study, but is carried out in accordance with a scale of priorities established in the General Water Act. This Act lays down an order of preference in water use, setting drinking water supply to the public as a priority use. In addition, most of the wells were sunk before the entry into force of the Code on the Environment and Natural Resources, Legislative Decree No. 613, promulgated in September 1990, which established the requirement for an environmental impact assessment before any work may commence.

4.3 As a result of the recommendations made by the Ombudsman, PET entrusted INRENA with the task of carrying out an environmental impact assessment, and the recommendations and technical measures it contains have been applied by PET since 1997. Moreover, it was updated in December 2000 and passed to INRENA for evaluation. Meanwhile, a report from the Tacna Regional Agricultural Department dated 12 July 2001 confirmed that although the drawing of groundwater by EPS Tacna was illegal, the way it was done did not affect the natural reserves, and that the water resources in question were an essential source for meeting the domestic and agricultural water requirements of the

Tacna valley, so that the drawing of water should continue. By a letter dated 20 February 2006, the Office of the Ombudsman informed the author of the steps taken and the measures adopted by PET to comply with the environmental impact assessment. By a further letter dated 20 March 2006, the Office of the Ombudsman informed the author that the case was closed.

4.4 The State party points out that the wells are being operated by PET in accordance with the Constitution and legislation in force in Peru, and with the Covenant. It stresses that the Office of the Ombudsman pointed out, after the construction of the wells, that the State had passed legislation on the need to carry out environmental impact assessments, and therefore considered that it had concluded its work without finding any infringement of fundamental rights by the State. In cases where the State had considered that harm had been caused as a result of the activities carried out by PET, the reports and complaints had been dealt with.

4.5 The State party adds that the alleged damage caused to the ecosystem has not been technically or legally substantiated, and that the violation of the rights of the author, her family and other members of the Ancomarca community has not been established.

4.6 In relation to the alleged violation of article 2 of the Covenant, the State party considers that the author's complaint was dismissed because it was not technically substantiated. The State party considers that the imposition of the above-mentioned technical requirement is not a violation of the author's right to an effective remedy but is a procedural requirement that is related to the nature of the offence and is provided for by law. The requirement is based on the need for technical information which will enable the Public Prosecutor to make a proper assessment of the situation.

Author's comments

5.1 In her comments of 12 July 2006 the author reiterates that, despite the charges brought by the Public Prosecutor's Office, the Tacna Criminal Court ordered that the trial should not be opened on the basis of a procedural requirement, holding that it cannot initiate criminal proceedings in cases of environmental offences which have not been previously categorized as such by the competent authority, namely INRENA. INRENA is an administrative State body, and in this case is playing the dual role of "judge and party". She points out that the investigating judge ensured impunity by not allowing the case against the manager of the company to proceed, so that the author was left without any possibility of judicial remedy. She adds that the reason for this refusal was that the State itself and the public agencies of the regional and municipal authorities were chiefly responsible for the environmental offences.

5.2 The author submits that legislation relating to the environment is the only means the indigenous communities have to safeguard their land and natural resources. She maintains that the State party has violated International Labour Organization (ILO) Convention No. 169, given that there is no national law to protect the Peruvian indigenous communities who are adversely affected by development projects.

5.3 The author forwarded to the Committee a report prepared privately at the request of the community in 2006 by a Swiss geologist, entitled "Environmental impact of the Vilavilani project – some geological and hydrological aspects". The report states, *inter alia*, that the diversion of water considerably intensifies the processes of erosion and transport of sediments, affecting not only the infrastructure for withdrawal, irrigation and drinking water, but also exacerbating the serious problems of desertification and morphodynamic stability facing the area, producing a major negative impact on the ecosystem of the entire region.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 As far as the examination of the matter by another procedure of international investigation or settlement is concerned, the Committee takes note of the State party's claim that the case was referred to the Commission on Human Rights under the procedure established by Economic and Social Council resolution 1503 (XLVIII) of 27 May 1970. However, the Committee points out that this does not constitute a procedure of international investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol,¹ since the 1503 procedure is very different in nature from the one provided for under the Optional Protocol and does not allow for an examination of the individual case resulting in a decision on the merits.

6.3 The Committee takes note of the author's complaint that the diversion of water caused the drying out and degradation of her community's land, some of which belonged to her, and the death of livestock, which violated her right not to be deprived of her livelihood under article 1, paragraph 2, and her right to privacy and family life under article 17 of the Covenant. The Committee recalls its jurisprudence whereby the Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated, but that these rights do not include those set out in article 1 of the Covenant.² Concerning the author's reference to article 17, the Committee considers that the facts as presented by the author raise issues that are related to article 27.³ In this regard it points out that the State party's observations are general in nature and do not refer to the violation of a specific article of the Covenant.

6.4 As for the author's complaint that she was deprived of her right to an effective remedy, the Committee notes that this has been sufficiently substantiated for the purposes of admissibility insofar as it raises issues under article 2, paragraph 3 (a) taken together with article 27, of the Covenant. In contrast, the allegation of a violation of article 14, paragraph 1, in that the authorities did not take into account the complaints because they were made by members of an indigenous community, has not been sufficiently substantiated for the purposes of admissibility, and must be declared inadmissible under article 2 of the Optional Protocol.

6.5 Therefore, the Committee declares the communication admissible in respect of the complaints under article 27, taken alone and read in conjunction with article 2, paragraph 3 (a), of the Covenant.

¹ See the decisions adopted by the Committee on communications No. 1/1976, *A. et al. v. Uruguay*, adopted on 26 January 1978, and No. 910/2000, *Randolph v. Togo*, adopted on 27 October 2003, paragraph 8.4.

² See, among others, the Committee's Views in communications No. 167/1984, *Lubicon Lake Band v. Canada*, 26 March 1990, paragraph 32.1; No. 547/1993, *Mahuika et al. v. New Zealand*, 27 October 2000, paragraph 9.2; and No. 932/2000, *Gillot v. France*, adopted on 15 July 2002, paragraph 13.4.

³ See communication No. 167/1984 (note 2 above), paragraph 32.2.

Consideration of the merits

7.1 The Committee has considered this communication in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol. The issue it must clarify is whether the water diversion operations which caused degradation of the author's land violated her rights under article 27 of the Covenant.

7.2 The Committee recalls its general comment No. 23 (1994), according to which article 27 establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, the other rights which all persons are entitled to enjoy under the Covenant.⁴ Certain of the aspects of the rights of individuals protected under that article – for example, to enjoy a particular culture – may consist in a way of life which is closely associated with territory and use of its resources. This might particularly apply in the case of the members of indigenous communities which constitute a minority. This general comment also points out, with regard to the exercise of the cultural rights protected under article 27, that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them. The protection of these rights is directed to ensure the survival and continued development of cultural identity, thus enriching the fabric of society as a whole.

7.3 In previous cases, the Committee has recognized that the rights protected by article 27 include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong.⁵ In the present case, it is undisputed that the author is a member of an ethnic minority and that raising llamas is an essential element of the culture of the Aymara community, since it is a form of subsistence and an ancestral tradition handed down from parent to child. The author herself is engaged in this activity.

7.4 The Committee recognizes that a State may legitimately take steps to promote its economic development. Nevertheless, it recalls that economic development may not undermine the rights protected by article 27. Thus the leeway the State has in this area should be commensurate with the obligations it must assume under article 27. The Committee also points out that measures whose impact amounts to a denial of the right of a community to enjoy its own culture are incompatible with article 27, whereas measures with only a limited impact on the way of life and livelihood of persons belonging to that community would not necessarily amount to a denial of the rights under article 27.⁶

7.5 In the present case, the question is whether the consequences of the water diversion authorized by the State party as far as llama-raising is concerned are such as to have a substantive negative impact on the author's enjoyment of her right to enjoy the cultural life of the community to which she belongs. In this connection the Committee takes note of the author's allegations that thousands of head of livestock died because of the degradation of 10,000 hectares of Aymara pasture land – degradation caused as a direct result of the implementation of the Special Tacna Project during the 1990s – and that it has ruined her way of life and the economy of the community, forcing its members to abandon their land

⁴ *Official records of the General Assembly, Forty-ninth Session, Supplement No. 40 (A/49/40), vol. I, annex VI.*

⁵ *Lubicon Lake Band v. Canada* (note 2 above), para. 32.2.

⁶ Communications No. 511/1992 and No 1023/2001, *Länsman v. Finland*, Views adopted on 26 October 1994 and 15 April 2005, respectively.

and their traditional economic activity. The Committee observes that those statements have not been challenged by the State party, which has done no more than justify the alleged legality of the construction of the Special Tacna Project wells.

7.6 In the Committee's view, the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community depends on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy. The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community. In addition, the measures must respect the principle of proportionality so as not to endanger the very survival of the community and its members.

7.7 In the present case, the Committee observes that neither the author nor the community to which she belongs was consulted at any time by the State party concerning the construction of the wells. Moreover, the State did not require studies to be undertaken by a competent independent body in order to determine the impact that the construction of the wells would have on traditional economic activity, nor did it take measures to minimize the negative consequences and repair the harm done. The Committee also observes that the author has been unable to continue benefiting from her traditional economic activity owing to the drying out of the land and loss of her livestock. The Committee therefore considers that the State's action has substantively compromised the way of life and culture of the author, as a member of her community. The Committee concludes that the activities carried out by the State party violate the right of the author to enjoy her own culture together with the other members of her group, in accordance with article 27 of the Covenant.

7.8 With regard to the author's allegations relating to article 2, paragraph 3 (a), the Committee takes note of the case referred by the author to the Tacna Prosecutor No. 1 and the Senior Prosecutor. It observes that, although the author filed a complaint against the EPS Tacna company, the competent criminal court did not allow the case to open because of a procedural error, namely the alleged lack of a report that the authorities themselves were supposed to submit. In the particular circumstances, the Committee considers that the State party has denied the author the right to an effective remedy for the violation of her rights recognized in the Covenant, as provided for in article 2, paragraph 3 (a), read in conjunction with article 27.

7.9 In light of the above findings, the Committee does not consider it necessary to deal with the author's complaint of a violation of article 17.

8. In light of the above, the 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 27 and article 2, paragraph 3 (a), read in conjunction with article 27.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to provide the author an effective remedy and reparation measures that are commensurate with the harm sustained. The State party has an obligation to take the necessary measures to ensure that similar violations do not occur in future.

10. By becoming a party to the Optional Protocol, Peru recognized the competence of the Committee to determine whether there has been a violation of the Covenant. 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 furnish them with an effective and applicable remedy should it be proved 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 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.]

**Z. Communication No. 1460/2006 *Yklymova v. Turkmenistan*
(Views adopted on 20 July 2009, Ninety-sixth session)***

<i>Submitted by:</i>	Ms. Maral Yklymova (represented by counsel, Mr. Kenneth Lewis)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Turkmenistan
<i>Date of communication:</i>	27 July 2005 (initial submission)
<i>Subject matter:</i>	Arbitrary arrest and detention, including house arrest
<i>Procedural issues:</i>	Exhaustion of domestic remedies, admissibility <i>ratione materiae</i>
<i>Substantive issues:</i>	Arbitrary arrest and detention, right to liberty and security of person, right to be informed of reasons for arrest and of charges against her, right to be brought promptly before a judge and to have lawfulness of detention considered by a judge, liberty of movement, freedom from arbitrary or unlawful interference
<i>Articles of the Covenant:</i>	9, paragraphs 1–4; 12; 17; and 14, paragraph 3 (a) and (c)
<i>Article of the Optional Protocol:</i>	5, paragraph 2 (b)
<i>The Human Rights Committee</i> , established under article 28 of the International Covenant on Civil and Political Rights,	
<i>Meeting on 20 July 2009,</i>	
<i>Having concluded</i> its consideration of communication No. 1460/2006, submitted to the Human Rights Committee on behalf of Ms. Maral Yklymova under the Optional Protocol to the International Covenant on Civil and Political Rights,	
<i>Having taken into account</i> all written information made available to it by the author of the communication, and the State party,	
<i>Adopts</i> 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. 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. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli and Mr. Krister Thelin.

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

1. The author of the communication is Maral Yklymova, a Turkmen national, currently residing in Sweden. At the time of the submission of her communication to the Committee, she was under house arrest in Turkmenistan. She claims to be a victim of violations by Turkmenistan of article 9, article 12, article 14, and article 17, of the International Covenant on Civil and Political Rights. She is represented by counsel, Mr. Kenneth Lewis.

The facts as presented by the author

2.1 The author is the daughter of Mr. Saparmurad Yklymov, a former deputy agricultural minister of Turkmenistan. In 1997, her parents were granted refugee status in Sweden, and became Swedish citizens in 2003. In 2001, while studying in the United Kingdom, the author filed several applications for a British residency permit, which were denied and she therefore had to return to the State party upon graduation.

2.2 On 25 November 2002, there was a murder attempt against the former Turkmen President Saparmurat Niyazov. In December 2002, Mr. Saparmurad Yklymov, along with three other former ministers, was convicted and sentenced *in absentia* to life imprisonment for “conspiracy to overthrow the President”.

2.3 On 25 November 2002, the author was arrested by the National Security Committee (the KNB) without a warrant and without being informed of any judicial charges against her.¹ She was released on 30 December 2002 without charges. Within the next few months, her apartment, ID card and passport were confiscated. She did not receive a formal acknowledgement of her arrest or the confiscation of her property. As it is obligatory to have an ID card to stay in Ashgabat for more than three days, the author was prevented from staying in her home town. She did remain in the town for another few months but in her aunts’ house. However, during the summer of 2003, following the confiscation of her apartment, she was forced to leave and went to Mary, where she lived with and was supported by her grandmother until she left Turkmenistan in July 2007.

2.4 Despite the fact that no charges were brought against her, the author was under constant surveillance in her grandmother’s home. Armed officials guarded the house every day and she was required to report to her local police station on a regular basis. A group of between 10 and 12 armed officials searched the house nearly every day without any explanation or any document providing a legal basis for such searches. Her telephone line was tapped and when her parents telephoned her, the police answered the phone. Her parents did manage to speak to her on a few occasions during which she made it clear that she was under pressure not to accept any international phone calls.

2.5 Initially, she was allowed to leave the house to run errands, albeit under surveillance, but from September 2004, no one was allowed to enter or leave the premises. Seven officials remained inside and outside the building at all times and there was a food delivery twice a day. On 10 September 2004, the author’s family learnt that the KNB had cut off her telephone line. From that moment, she remained in an uncertain legal situation which resembled house arrest. She was under constant surveillance by armed officers but without any legal basis for such restrictions. In January 2003, the President demanded the extradition of Mr. Saparmurad Yklymov from Sweden.

¹ The Special Rapporteur of the Organization for Security and Co-operation in Europe (OSCE) characterized this arrest as arbitrary in his report on Turkmenistan of 13 March 2003.

2.6 On 20 May 2003, the author was granted a permanent residence permit in Sweden. Citizens are not allowed to leave the country without an exit visa and since 2000 they have been required to obtain special permission from the police even to travel to Turkmen areas in neighbouring Uzbekistan. After September 2004, the procedures for obtaining this permission were tightened even further.² The author had no possibility of receiving an exit visa. If she attempted to leave the country without this document it may have resulted in further retaliation against both her and her relatives. In any event, considering her constant surveillance and the fact that her physical appearance was well known to the authorities, such an escape would have been impossible. She did try to leave the State party in the summer of 2003, but was refused permission.

The complaint

3.1 On the issue of exhaustion of domestic remedies, the author argues that, as no formal judicial decisions had been taken in her case, it was impossible to make any application for redress. During the spring of 2003, the author and her aunt tried to contact the United Nations representative in Ashgabat, as a result of which they were summoned to the prosecutor's office, where they were informed that any further attempt to contact the United Nations would lead to imprisonment on the ground of "disturbing public peace".

3.2 The author claims a violation of article 9, paragraph 1, on account of the arbitrary deprivation of her liberty between 25 November and 30 December 2002. She claims a violation of article 9, paragraph 2, as she was not informed of the reasons for her arrest and of article 9, paragraph 4, regarding the lawfulness of her detention. From September 2004, she describes her situation as an arbitrary arrest, as she was not informed of the reason for her house arrest, and was not entitled to take proceedings to decide upon the lawfulness of her deprivation of liberty, thus violating article 9, paragraphs 1, 2, and 4.

3.3 The author claims that the obligation to report to her local police station violated her rights under article 12, paragraph 1, and as there was no criminal charge against her, there should be no exception to the right to liberty of movement set out in paragraph 3 of the same provision. She also claims a violation of article 12, paragraph 1, for having been forced to move from Ashgabat to Mary and from being prohibited from returning to her home village.³

3.4 The author also claims a violation of article 14, paragraphs 3 (a) and (c), as although her treatment appeared to imply that there were criminal charges against her, she was not informed of them nor tried without undue delay. Finally, the author claims a violation of article 17, with respect to the searches of her home without legal grounds, the deprivation of her telephone contacts, the confiscation of her apartment, passport, and ID.⁴

State party's submission on admissibility and the author's comments thereon

4. On 14 April 2008, the State party submitted that the author had not been charged with any crime and denied that she had been persecuted by the authorities. It states that in

² Article 214 of the Criminal Code states that the (attempt) of illegal crossing of Turkmenistan's border (without the correct documents or authorization) is punishable with penal labour or imprisonment up to two years.

³ In this regard, she refers to the jurisprudence of the Committee in the case of communications No. 505/1992, *Ackla v. Togo*, Views adopted on 25 March 1996 and No. 157/1983, *Mpaka Nsusu v. Zaire*, Views adopted on 26 March 1983.

⁴ The author refers to communication No. 74/1980, *Estrella v. Uruguay*, Views adopted on 29 March 1983.

July 2007, the author voluntarily moved to Sweden with her grandmother Nurbibi Barabinskaya to join their relatives there.

5.1 On 28 August 2008, the author confirmed that she had been released from detention in July 2007, but only after four years of house arrest and after the death of President Niyazov on 21 December 2006. She fled to Turkey with her grandmother and from there to Sweden. She maintains her original claims and notes that the State party does not directly deny the fact that she was deprived of her liberty for a number of years. She considers the State party's explanations as vague: it has failed to rebut the facts presented by her. The author submits that by 2008 she was forced to leave the country, as she did not exist on the national register, had lost her job and all her assets, and her friends were afraid to be seen with her.

5.2 On 26 January 2009, the author provided a detailed list of events which occurred during the period in question in Turkmenistan, as well as a list of all the foreign diplomats who were aware of her case and with whom she was in contact during her house arrest. She provides details of the dates and times upon which she met with the diplomats concerned and submits that she received warnings to have no further contact with foreign diplomats. In the list of events provided, she states that she sent a letter of complaint to the general prosecutor's office and to the Ministry of Internal Affairs (it is not clear what her complaints related to).

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.

6.2 The Committee notes the author's argument on non-exhaustion of domestic remedies to the effect that, as there were no formal judicial decisions taken against her it would have been judicially impossible to make any claim before the judicial authorities. The Committee notes that the State party has neither contested this claim, nor provided any information on available judicial remedies which would have been or remain at the author's disposal. It also notes the efforts made by the author (para. 5.2) to bring an end to her house arrest. Thus, the Committee considers that there is no reason to find the communication inadmissible for lack of exhaustion of domestic remedies and considers this communication in conformity with article 5, paragraph 2 (b), of the Optional Protocol.

6.3 As to the claims under article 9, paragraph 3, and article 14, paragraph 3 (a) and (b), the Committee notes that both the State party and author acknowledge that no charges were in fact made against her. For this reason, the Committee considers that these claims are inadmissible *ratione materiae*, under article 3 of the Optional Protocol.

6.4 As no other issues arise with respect to the admissibility of the communication, the Committee considers the claims under article 9, paragraphs 1, 2, and 4, article 12, paragraph 1, and article 17, to be admissible.

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 recalls that under article 9, paragraph 1, of the Covenant everyone has the right to liberty and security of person, and no one shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law. The Committee further recalls that house arrest may also give rise to a finding of a violation of article 9.⁵ The Committee notes that, apart from a mere denial that the author was ever charged or persecuted by Turkmen authorities, the State party does not dispute the author's claim that she was arrested and detained from 25 November 2002 to 30 December 2002, and was placed under house arrest from the summer of 2003 to July 2007, i.e. for nearly four years, without any legal basis. For this reason, the Committee considers that the author was deprived of her liberty during these two periods and that her detentions were arbitrary, which constitute a violation of article 9, paragraph 1, of the Covenant.

7.3 The Committee notes the claim that on neither occasion was the author informed of the reasons for her arrest or of the charges against her. The State party does not dispute this claim. For this reason, the Committee concludes that the author's rights under article 9, paragraph 2, of the Covenant were violated.

7.4 The Committee notes the author's allegations that she had no opportunity to challenge the lawfulness of either of her periods of detention. The State party did not respond to those allegations. The Committee recalls that under 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. Accordingly, and in the absence of any satisfactory explanations by the State party, the Committee concludes that the author's rights under article 9, paragraph 4, of the Covenant were violated.

7.5 As to the author's claims with respect to her freedom of movement, the Committee recalls that article 12 of the Covenant establishes the right to liberty of movement and freedom to choose residence for everyone lawfully within the territory of the State. In the absence of any pertinent explanation from the State party, other than a blanket denial that its authorities had targeted the author, justifying the restrictions to which the author was subjected, pursuant to paragraph 3 of article 12, the Committee is of the opinion that the restrictions on the author's freedom of movement and residence were in violation of article 12, paragraph 1, of the Covenant.

7.6 Finally, the Committee considers that the searches of the author's home without legal grounds, the deprivation of her telephone contacts, and the confiscation of her apartment, passport and ID (see paragraph 3.4 above), in the absence of any pertinent explanation from the State party, amount to an arbitrary interference with her privacy, family, and home within the terms of article 17 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 violations by Turkmenistan of article 9, paragraphs 1, 2, and 4, article 12, paragraph 1, and article 17 of the International Covenant on Civil and Political Rights.

9. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee concludes that the author is entitled to an effective remedy, including adequate compensation. In addition, the State party is required to take steps to prevent further occurrences of such violations in the future.

⁵ Communications No. 132/1982, *Monja Jaona v. Madagascar*, Views adopted on 1 April 1985; No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 15 March 2005; and No. 1172/2003, *Abbassi Madani v. Algeria*, Views adopted on 28 March 2007.

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 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 its Views. The Committee 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.]

**AA. Communication No. 1469/2006, *Sharma v. Nepal*
(Views adopted on 28 October 2008, Ninety-fourth session)***

<i>Submitted by:</i>	Yasoda Sharma (represented by Advocacy Forum-Nepal)
<i>Alleged victims:</i>	The author and her husband Surya Prasad Sharma
<i>State party:</i>	Nepal
<i>Date of communication:</i>	26 April 2006 (initial submission)
<i>Subject matter:</i>	Disappearance, detention incommunicado
<i>Procedural issue:</i>	Non-exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to life; prohibition of torture and cruel, inhuman or degrading treatment or punishment; right to liberty and security of the person; respect for the inherent dignity of the human person
<i>Articles of the Covenant:</i>	2, paragraph 3, in connection with articles 6, 7, 9 and 10
<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 October 2008,

Having concluded its consideration of communication No. 1469/2006, submitted to the Human Rights Committee by Yasoda Sharma 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 submitted on 26 April 2006 is Mrs. Yasoda Sharma, a Nepalese national born on 3 May 1967, on behalf of herself and her missing husband, Surya Prasad Sharma, born on 27 September 1963. She claims that Nepal has violated article 2, paragraph 3 in connection with articles 6, 7, 9 and 10, by not conducting a thorough investigation of her husband's disappearance. She is represented by counsel,

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

Advocacy Forum – Nepal. Nepal has been a State party to the Covenant and its Optional Protocol since 14 May 1991.

1.2 On 12 February 2008, the State party requested that the admissibility of the communication be examined separately from the merits of the communication. On 29 February 2008, the Special Rapporteur on New Communications and Interim Measures, on behalf of the Committee, determined that the admissibility and the merits of this case should be considered together.

Facts as presented by the author

2.1 On 12 January 2002, the author's husband returned home after living in hiding for five years as a supporter of the Communist Party of Nepal (Maoist). An application was prepared with the support of some mainstream political leaders for him to surrender, and it was suggested that he submit this application to the Office of the Chief District Officer in Baglung on 14 January 2002. On that day at 5 a.m., a group of 10 to 15 uniformed army personnel came to the author's residence in Srinigar Tole, Baglung district. They woke up the author and her husband. The captain in charge (whose name is unknown) and another soldier entered the house and removed the author's husband from his bed. He was then taken into custody and informed that he would be taken to the army barracks to be interrogated. The soldiers then searched the house for ammunition and Maoist-related documents. They found nothing. When the soldiers left with the author's husband, the author followed them to the Kalidal Gulm army barracks, where she saw her husband being led inside. She was not permitted to enter the barracks, but was informed that her husband would be released after the interrogation.

2.2 On 15 January 2002, the author went to the army barracks with food and warm clothes for her husband. She was not permitted to visit him. Army personnel also informed her that her husband was safe. On 20 January 2002, she was again prevented from visiting her husband at the barracks. On the same day, a soldier visited her at home, stating that her husband had sent him to collect tobacco for him. The soldier did not disclose his identity. However, he was able to ask for Mr. Sharma's preferred tobacco by its exact name. He told her that her husband had been beaten and that she should not tell anyone that he had come to visit her on her husband's behalf. On 22 January 2002, the author heard rumours that her husband had been severely tortured in the barracks.

2.3 On 23 January 2002, the author and her mother-in-law asked again to visit her husband. The soldier at the gate went inside the barrack, came back and told them that Mr. Sharma had escaped on 21 January 2002 while being taken to Amalachour village to reveal the whereabouts of a Maoist hide-out. He repeated what Major Chandra Bahadur Pun had told him, i.e. that Mr. Sharma had drowned in the Kaligandaki River during his escape.

2.4 On 2 February 2002, the author came to the barracks to meet with Major Chandra Bahadur Pun. She enquired about the charge under which her husband was held and his state of health. The Major reiterated that Mr. Sharma had patrolled with troops in order to identify other Maoist 'terrorists' during which time he escaped. The author enquired about his body, in the eventuality that he had been killed by the armed forces. The Major denied that any murder had occurred, refused to disclose any further information and asked her to leave.

2.5 On 3 February 2002, the author contacted the Chief District Officer (CDO) and asked under which law her husband was detained. The CDO claimed that, because of the state of emergency, he could not provide detailed information about her husband's situation. On 4 February 2002, the author approached the District Police Office of Baglung for information on her husband, but was told that they had no time to hear her case. She persistently tried to collect news from the relevant authorities.

2.6 On 12 February 2002, Amnesty International released an urgent-action appeal for Mr. Sharma. On 9 September 2002, the author appealed to the National Human Rights Commission (NHRC). On 20 January 2006, the Commission informed the author that it had communicated with the relevant authorities, but failed to obtain any further information about Mr. Sharma. The author also contacted several other human rights organizations at various dates, but none were able to assist her.

2.7 On 4 February 2003, the author filed in the Supreme Court a writ of habeas corpus against the Home Ministry, the Defence Ministry, the Police Headquarters, the Army Headquarters, the District Administration Office (CDO) of Baglung, the District Police Office of Baglung and the Khadgadal Barracks of Baglung. On 5 February 2003, the Supreme Court ordered the respondents to show cause and provide reasons for the alleged victim's detention. It received responses from all the respondents between February and April 2003. All, with the notable exception of the CDO, denied the arrest and detention of Mr. Sharma. They stated that they had not made any order for his arrest, had not arrested him and were not illegally detaining him. Furthermore, they demanded that the writ of habeas corpus be quashed. As for the CDO, it responded that its records showed that Mr. Sharma had been arrested by the security forces, had escaped while patrolling and jumped into the river from which he did not emerge. The Supreme Court asked for further details from the CDO. In its reply dated 2 April 2003, the CDO stated that on 21 January 2002, troops from the Kalidal barracks were patrolling with Mr. Sharma around 4 p.m. along Dovan Way when they were ambushed by Maoists. At this point, Mr. Sharma tried to escape, jumped into the river and did not reappear. He was assumed drowned. The CDO stated that this incident was verbally reported to the author.

2.8 The Supreme Court asked for further details to be provided by the Office of the Attorney General which upheld the CDO's description of events regarding Mr. Sharma. It also reported that "the Kalidal Gulm barrack had moved to some other place and the Khadgadal Gulm barrack had come to Baglung. Thus, the latter had neither arrested, nor received any information on Surya's case by the prior barracks." On 12 November 2003, the Supreme Court ordered again the CDO to provide some clarification on the law under which the arrest of Mr. Sharma took place. The CDO replied that he had been arrested by the security forces, in particular those stationed at Kalidal Gulm barrack, under no order or act by the CDO, but for the purposes of their own investigation. The CDO stated that a person could be arrested for interrogation and kept in detention and that Mr. Sharma had died during that time.

2.9 On 12 September 2004, the Malego Commission on the investigation of missing persons (set up in 2004 to publicly declare the location of missing persons) published a list of missing persons which included Mr. Sharma's name and quoted the CDO's response. In a letter dated 2 February 2005, the Home Ministry supported the CDO's response and reaffirmed that Mr. Sharma was not in army custody or placed under their control.

2.10 On 16 February 2005, the Supreme Court quashed the writ of habeas corpus. The author waited for seven months for the grounds under which the writ was quashed to be revealed. On 23 September 2005, she was provided with the decision which stated that since Mr. Sharma had drowned in the river, he was not in the custody or control of the state and that there was thus no need to issue the writ. The Supreme Court took no action to compel the respondents to produce Mr. Sharma's body, regardless of the cause of death, as is required by a writ of habeas corpus.

The complaint

3.1 The author claims that she was not given an effective remedy in violation of article 2, paragraph 3. There was no thorough investigation into the disappearance of her husband.

While her husband was arrested during a declared state of emergency, the author recalls that article 4 does not permit derogations to articles 6, 7, 8, 11, 15, 16 and 18 of the Covenant, and that, in any case, her husband's enforced disappearance was not required by the emergency situation. She argues that the failure to maintain current and accurate records of detainees increases the likelihood of detainees being subjected to torture and other abuses. The Supreme Court did not order an investigation, nor did it bring the perpetrators to justice. The author also argues that the 1996 Torture Compensation Act is of limited assistance since details of the torture inflicted on the victim must be provided and such information is not usually available. She recalls that the Committee has previously held that the failure to provide effective remedies was in itself a violation of the Covenant.¹

3.2 The author claims that the State's failure to investigate her husband's disappearance breaches its obligation under article 6. She recalls that States have a responsibility under article 6 to take measures to prevent disappearances and to effectively investigate them.² By taking the author's husband on patrol in a Maoist-controlled area, the army was directly putting at risk his personal safety. It also took no reasonable steps to protect him during the alleged drowning. As of today, there is no independent report as to what has happened to the author's husband while he was in the custody of the army. The author notes that two contradictory responses were given to the Supreme Court. Most authorities claimed that the husband was never arrested or detained by them, while the CDO held that he drowned in a river while trying to escape.

3.3 The author claims that the enforced disappearance of her husband and the ill-treatment he was subjected to constitute violations of article 7. Her husband was never detained in officially recognized places of detention. The family never knew his exact whereabouts. His name, place(s) of detention and the names of the persons responsible for his detention were never recorded in registers readily available and accessible to his relatives.³ While the CDO maintains that he was held for a short period of time, without charge, for the purposes of an interrogation, he should have been traceable at all times. The author argues that her husband's arrest and incommunicado detention constitutes a breach of article 7.⁴ Moreover, she argues that the anguish caused to herself by her husband's disappearance is also a violation of article 7.⁵

3.4 The author claims that her husband's rights under article 9 were violated because he was arrested without a warrant and not informed of the grounds of arrest. He was never charged. Moreover, he was held incommunicado between 14 January 2002 and 21 January 2002 when he allegedly died. He did not have the opportunity to consult a lawyer and could not challenge the lawfulness of his detention.

3.5 The author claims that her husband's rights under article 10 were violated because he was a victim of an enforced disappearance.

¹ See communication No. 90/1981, *Luyeye Magana ex-Philibert v. Zaire*, Views adopted on 21 July 1983, paragraph 8.

² See communications No. 449/1991, *Rafael Mojica v. Dominican Republic*, Views adopted on 15 July 1994, paragraph 5.5; and No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 16 April 1996, paragraph 8.3.

³ See Human Rights Committee, general comment No. 20 (1992) on article 7, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, para. 11.

⁴ See communications No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003, paragraph 9.5; and No. 440/1990, *El-Megreisi v. Libyan Arab Jamahiriya*, Views adopted on 23 March 1994, para. 5.4.

⁵ See communication No. 107/1981, *Quinteros Almeida v. Uruguay*, Views adopted on 21 July 1983, para. 14.

3.6 With regard to the issue of exhaustion of domestic remedies, the author notes that she has attempted to obtain redress through a habeas corpus writ in order to find out the reasons for her husband's detention and his whereabouts. This was unsuccessful. Under the Judicial Administration Act of 1991, the Supreme Court may review a case decided by itself on two grounds, namely where a new fact arises after the decision and this fact is of vital importance to decide the case, or where the decision is inconsistent with the Supreme Court's previous jurisprudence. However, in the present case, the author cannot seek review on either ground since no new fact has arisen and there are many previous decisions quashing writs of habeas corpus where the respondents deny arrest and detention. The author has also approached the National Human Rights Commission and the Malego Commission, but without success. She considers that she has exhausted all domestic remedies.

3.7 The author requests that the Committee recommend to the State party that it must ensure that her husband's disappearance be thoroughly investigated by an impartial body in order to determine his situation and that this information be communicated to the family. On the basis of that information, the author should be released. If it is established that he has been killed, those responsible for his death should be identified, prosecuted and punished for obstructing the course of justice and causing the death of the author's husband. The State party should ensure that the family receives full and adequate reparation.

State party's observations on admissibility

4.1 By note verbale of 12 February 2008, the State party recalls that the author's husband was arrested by the security forces for an interrogation on his involvement in terrorist activities. While he was accompanying security forces to identify and show the hideouts of the rebels in the Amalachour area in Baglung district on 21 January 2002, they were ambushed and attacked by the rebels. Taking advantage of the situation, the author's husband jumped into the Kaligandaki river and drowned on his escape. He did not emerge from the river and was assumed drowned.

4.2 The State party challenges the admissibility of the communication on two grounds. Firstly, the State party argues that the author has not exhausted domestic remedies. It contends that there are established civil as well as criminal procedures available to the author. The author did not initiate criminal proceedings through the filing of a First Information Report (FIR), which is the starting-point for any legal action. This would have triggered an investigation of the case under the supervision of the Office of the District Attorney. The author could then have gone to the District Court, and then to the Appellate Court. Decisions by the Appellate Court can be appealed to the Supreme Court.

4.3 The State party notes that instead of following the ordinary course of action, the author filed in the Supreme Court a writ of habeas corpus. The State party argues that this is not the normal legal course of justice, but a complement to it. Writ jurisdiction is invoked only when facts and merits are established beyond doubt, but no other legal remedies are available. The author has created a false impression that she has exhausted domestic remedies because she resorted directly to the Supreme Court through her habeas corpus writ petition. In any case, the author failed to seek judicial review by the Supreme Court which has the power to review its own decisions. She passed her own subjective pre-conceived judgment that it was unlikely that the judges would change the decisions made in her case. The State party emphasizes that the exercise of writ jurisdiction by the Supreme Court does not bar in any way the right of an individual to seek a remedy under the ordinary legal procedures. Legal remedies are available and effective.

4.4 While acknowledging that at the time of the arrest of the author's husband, the country was under a declared state of emergency, the State party argues that this situation

did not deprive persons from seeking normal legal remedies. It further notes that the Comprehensive Peace Accord signed on 21 November 2006 provides for the establishment of a Truth and Reconciliation Commission whose mandate will be to look into all cases of disappeared persons.

4.5 Finally, the State party argues that counsel does not appear to be authorized to represent the author before the Committee.

4.6 On 11 March 2008 and 5 June 2008, the State party was requested to submit information on the merits of the communication. The Committee notes that this information has not been received. It regrets the State party's failure to provide any information with regard to the 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.

Author's comments on the State party's submissions

5.1 On 10 June 2008, the author argues that contrary to the State party's claims, domestic remedies have been exhausted in this case. Firstly, she recalls that there is no specific crime of enforced disappearance and that there is thus no domestic remedy to exhaust. There is no specific prohibition on enforced disappearances under the Interim Constitution. An order by the Supreme Court in 2007 to criminalise enforced disappearances has yet to be acted upon by the government. Under the domestic legal system, it is necessary to file a FIR) with the police for an investigation into an alleged crime to be investigated. Nonetheless, the State party had ample knowledge of the alleged crime through various official and unofficial sources and therefore had a duty to investigate. Indeed, the State party itself acknowledges that "it appears that the case does not seem to be one that can be remedied through a writ petition but might require detailed investigation." The State party failed to mention that a FIR can only be submitted for one of the crimes listed in Schedule 1 of the State Cases Act of 1992. Enforced disappearance is not one of the crimes listed. It is therefore impossible for the author to submit a FIR for the disappearance of her husband. It is also impossible for the author to submit a FIR for the torture of her husband, as torture is not a crime listed in schedule 1 of the State Cases Act. Although the Torture Compensation Act of 1996 allows a family member to make a complaint on behalf of the victim in a "disappearance case", it is impossible meet the burden of proof required by the Act, because a copy of a physical or mental check-up report must be made available to the concerned District Court. While the State party notes that there are civil procedures available to the author, it fails to list the specific remedies available. It is therefore impossible for the author under domestic law to seek redress for the disappearance of her husband as the existing legal system lacks the necessary mechanisms to allow her to submit a complaint to the competent authorities.

5.2 In some cases of disappearances, where it is known that the disappeared person died in custody, relatives have attempted to file FIRs under the State Cases Act for alleged homicide. However, in many cases, the fact that the person died cannot be proved in the absence of a body: filing a FIR for homicide or unlawful death is thus unlikely to lead to a successful investigation and prosecution. In any case, the filing of a FIR has led in some cases (not only disappearance cases) to threats to the plaintiffs and their families to force

them to withdraw the FIR.⁶ Moreover, FIRs have been refused by the police for various reasons. On occasion, the police have claimed that the case was a political issue on which it could not take action or that the complaint is against army personnel senior to the police officer and who is still working in the district. If the FIR is refused by the police, it is possible to appeal to CDO (Chief District Officer) and then appeal to the appellate court. However, these appeals are ineffective since there have been several cases where despite an order from the CDO to register the FIR, the DPO (district police office) has continued to refuse to take action.

5.3 While the State party claims that the domestic judicial system was functioning properly, the author recalls that even if she had been able to submit a FIR for the “disappearance” of her husband in January 2002, any progress in the police investigation would have stopped by November 2003 when the government established a unified command structure, whereby the police and the paramilitary Armed Police Force were brought under the command of the Royal Nepalese Army. This meant that submitting a FIR to the police about actions taken by the army would not have been investigated independently and impartially. Very few people dared to approach the police during that period and, if they did, the response was that the police had no power to investigate actions taken by the army. The author also recalls that there was a state of emergency between November 2001 and November 2002. It is therefore clear that the disappearance of her husband took place at a time when access to justice was limited both by restrictions on the legal system itself due to the state of emergency and fear for personal safety due to the conflict situation. Just after the arrest of her husband, the author’s telephone connection was cut off for a year as a punitive measure, leaving her with no means to contact people if she was in need of help or felt threatened.

5.4 As to the possibility of filing a FIR for unlawful death/killing, the author emphasizes that the fact that her husband died during an attempt to escape the custody of the security forces has not been established. She is therefore not obliged to file a FIR for unlawful death. In any case, the State party had full knowledge of the disappearance and alleged death of her husband through both news articles documenting his disappearance at the time and the filing of the habeas corpus petition. Under Sections 7 and 9 of the State Cases Act and Rules 4 (5) and (6) of the State Cases Regulations, the DPO has the responsibility to initiate an investigation into all suspicious acts that come to its attention. The State party therefore had the responsibility to fully investigate the circumstances of the alleged death of the author’s husband, even in the absence of a FIR.

5.5 The author recalls that although she filed a writ of habeas corpus in the Supreme Court, the investigation into the whereabouts of her husband ordered by the Supreme Court was biased and ineffective. She argues that she could not appeal to the Supreme Court as suggested by the State party, since there had been no court decision in this case for the reasons developed above. As there is no crime of “disappearance” in domestic law, she was unable to submit a complaint for the “disappearance” of her husband. She has not appealed against the Supreme Court’s decision to dismiss the writ petition as there was no substantive reason to believe that the appeal would have been considered in a more independent manner. For a review of the Supreme Court’s ruling to take place, the petitioner must show that there are new facts or evidence. This was not the case here. Furthermore, the ruling would have been reviewed by the same judge who dismissed the habeas corpus petition. This drastically restricts the chances that the case would have been

⁶ See Report of the Working Group on Enforced and Involuntary Disappearances, (E/CN.4/2005/65/Add.12), paragraph 26.

reviewed effectively. These problems with the procedure are reflected in the fact that it is very rare in Nepal for petitioners to ask for review of dismissed habeas corpus decisions.

5.6 The author recalls that she has approached the National Human Rights Commission (NHRC). Her complaint was registered on 13 September 2002. On 15 May 2008, she was informed that the investigation is “in its last stages”. In any case, the powers of the NHRC are limited. After the completion of an investigation, it can issue recommendations on compensation and further investigations to bring perpetrators to justice. However, it does not have the power to issue binding decisions. Many of its recommendations remain ignored. As for the Malego Committee, the author argues that the investigation by the Committee was less than satisfactory. The Committee simply quoted the response by the CDO, which states that the author’s husband drowned while trying to escape from the armed forces. As to the State party’s mention of the future Truth and Reconciliation Commission, the author finds this information irrelevant to the admissibility of the present case since this Commission still needs to be established and is not an existing remedy.

5.7 Finally, on the issue of authorization from the author to file to the complaint, the author points out that she signed the original copy of the communication submitted to 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, 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 the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 With respect to the requirement of exhaustion of domestic remedies, the Committee notes the State party’s argument that the author has not filed a First Information Report (FIR) with the police. Nevertheless, the Committee also notes the author’s argument according to which the filing of FIRs with the police rarely leads to any investigation being made into the disappearance of the person concerned. It also notes that the author has made many enquiries, including with the Chief District Officer (CDO) and the District Police Office of Baglung (see paragraph 2.5 above). On 4 February 2003, she also filed in the Supreme Court a writ of habeas corpus which was quashed two years later, even though the circumstances of the disappearance of the author’s husband remained unclear. The Committee also notes that six years after the author’s complaint was registered with the National Human Rights Commission, the investigation is still on-going. In the circumstances, the Committee considers that the author has met the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

6.4 With regard to the issue of authorization, the Committee notes that the author signed the original complaint submitted by counsel to the Committee. It therefore concludes that counsel was duly authorized by the author to submit her complaint to the Committee.

6.5 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; 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 provided under article 5, paragraph 1, of the Optional Protocol.

7.2 As to the alleged detention incommunicado of the author's husband, the Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20 on article 7, which recommends that States parties should make provision against detention incommunicado.⁷ It notes that the author claims that her husband was detained incommunicado from 12 January 2002 until the time of his alleged death on 21 January 2002. The Committee notes that the author saw her husband being taken to the army barracks. In these circumstances and in the absence of any explanations from the State party in this respect, due weight must be given to the author's allegations. The Committee concludes that to keep the author's husband in captivity and to prevent him from communicating with his family and the outside world constitutes a violation of article 7 of the Covenant.⁸

7.3 With regard to the alleged violation of article 9, the information before the Committee shows that the author's husband was arrested by uniformed army personnel without a warrant and held incommunicado without ever being informed of the reasons for his arrest or the charges against him. The Committee recalls that the author's husband was never brought before a judge and could not challenge the legality of his detention. In the absence of any pertinent explanations from the State party, the Committee finds a violation of article 9.⁹

7.4 As to the alleged disappearance of the author's husband, the Committee recalls the definition of enforced disappearance in article 7, paragraph 2(i), of the Rome Statute of the International Criminal Court: "Enforced disappearance of persons means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time." Any act leading to such disappearance constitutes a violation of many of the rights enshrined in the Covenant, including the right to liberty and security of person (art. 9), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art. 7) and the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (art. 10). It also violates or constitutes a grave threat to the right to life (art. 6).¹⁰ In the present case, in view of her husband's disappearance since 12 January 2002, the author invokes article 2, paragraph 3, article 6, article 7, article 9 and article 10.

7.5 The Committee notes that the State party has provided no response to the author's allegations regarding the forced disappearance of her husband. It reaffirms that the burden of proof cannot rest on the author of the communication alone, especially considering that the author and the State party do not always have equal access to the evidence and

⁷ General comment No. 20 (note 3 above), para. 11.

⁸ See communications No. 540/1993, *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, paragraph 9.4.

⁹ See communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, paragraph 8.5.

¹⁰ See communication No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003, paragraph 9.3.

frequently the State party alone has the relevant information.¹¹ 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 allegations are corroborated by credible evidence submitted by the author and where further clarification depends on information exclusively in the hands of the State party, the Committee may consider an author's allegations substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party.

7.6 In the present case, the author has informed the Committee that her husband disappeared on 14 January 2002 at the Kalidal Gulm army barracks where he was last seen by the author herself. He may have been seen at the army barracks on 20 January 2002 by a soldier. While the author was told on 23 January 2002 that her husband drowned in a river while escaping and was presumed dead, she still does not know the exact circumstances of his death and what has happened to him in the period preceding it. In the absence of any comments by the State party on the author's husband's disappearance, the Committee considers that this disappearance constitutes a violation of article 7.

7.7 With regard to the alleged violation of article 10, the Committee notes the author's argument that her husband's rights under this provision were violated because he was a victim of an enforced disappearance. It recalls that all persons deprived of their liberty have the right to be treated with humanity and with respect for the inherent dignity of the human person. In the present case, the author's husband disappeared and possibly died while he was in the custody of the State party. In the absence of any comments by the State party on the author's husband's disappearance, the Committee considers that this disappearance constitutes a violation of article 10.

7.8 As to the possible violation of article 6 of the Covenant, the Committee notes that both the author and the State party seem to agree that the author's husband is dead. Nonetheless, while invoking article 6, the author also asks for the release of her husband, indicating that she has not abandoned hope for his reappearance. The Committee considers that, in such circumstances, it is not for it to appear to speculate on the circumstances of the death of the author's husband, particularly in the light of the fact that there has been no official inquiry into the event. Insofar as the State party's obligations under paragraph 9 below would be the same with or without such a finding, the Committee considers it inappropriate in the present case to make a finding in respect of article 6.

7.9 With regard to author herself, the Committee notes the anguish and stress that the disappearance of the author's husband since 12 January 2002 caused to the author. It therefore is of the opinion that the facts before it reveal a violation of article 7 of the Covenant with regard to the author herself.¹²

7.10 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 attaches importance to the 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

¹¹ See communications No. 139/1983, *Conteris v. Uruguay*, Views adopted on 17 July 1985, paragraph 7.2; and No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, paragraph 8.3.

¹² See communications No. 107/1981, *Quinteros v. Uruguay*, Views adopted on 21 July 1983, paragraph 14; and No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 31 July 2003, paragraph 9.5.

could in and of itself give rise to a separate breach of the Covenant.¹³ In the present case, the information before it indicates that the author did not have access to such effective remedies, and the Committee concludes that the facts before it reveal a violation of article 2, paragraph 3, read together with article 7 and article 9 and article 10 with regard to the author's husband; and a violation of article 2, paragraph 3, read together with article 7 with regard to the author herself.¹⁴

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 article 7, article 9, article 10 and article 2, paragraph 3, read together with article 7, article 9 and article 10 with regard to the author's husband; and of article 7, alone and read together with article 2, paragraph 3, with regard to the author's herself.

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 and fate of the author's husband, his immediate release if he is still alive, adequate information resulting from its investigation, and adequate compensation for the author and her family for the violations suffered by the author's husband and by themselves. While the Covenant does not give individuals the right to demand of a State the criminal prosecution of another person,¹⁵ the Committee nevertheless considers the State party duty-bound not only to conduct thorough investigations into alleged violations of human rights, particularly enforced disappearances and acts of torture, but also to prosecute, try and punish those held responsible for such violations.¹⁶ 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, that State party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the 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.]

¹³ *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40 (A/59/40)*, vol. I, annex III, para. 15.

¹⁴ See communication No. 1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007, paragraph 7.10.

¹⁵ See communications No. 213/1986, *H.C.M.A. v. The Netherlands*, Views adopted on 30 March 1989, paragraph 11.6; and No. 612/1995, *Vicente et al. v. Colombia*, Views adopted on 29 July 1997, paragraph 8.8.

¹⁶ See communications No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, paragraph 11; and No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, paragraph 10.

**BB. Communication No. 1472/2006, *Sayadi et al. v. Belgium*
(Views adopted on 22 October 2008, Ninety-fourth session)***

Submitted by: Nabil Sayadi and Patricia Vinck (represented by counsel, Georges-Henri Beauthier)

Alleged victims: The authors

State party: Belgium

Date of communication: 14 March 2006 (initial submission)

Decision on admissibility: 30 March 2007

Subject matter: Application to have names removed from the Consolidated List of Individuals and Entities Belonging to or Associated with the Taliban and Al-Qaida Organization as Established and Maintained by the 1267 Committee

Procedural issues: Individuals subject to the jurisdiction of the State party; non-exhaustion of domestic remedies; same matter currently being examined under another procedure of international investigation or settlement

Substantive issues: Lack of an effective remedy; right to liberty of movement; right to leave a country, including one's own; right to a fair trial; principle of equality of arms; presumption of innocence; reasonable time frame for proceedings; right to enforcement of remedies; principle of legality of penalties; protection from arbitrary or unlawful interference with one's privacy; right to freedom of thought, conscience and religion; right to freedom of association; principle of non-discrimination

Articles of the Covenant: 2, paragraph 3; 12; 14, paragraphs 1, 2 and 3; 15; 17; 18; 22; 26; and 27

Articles of the Optional Protocol: 1 and 5, paragraph 2 (a) and (b)

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

* The following members of the Committee participated in the consideration of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Ms. Helen Keller, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer. The texts of individual opinions signed by Committee members Mr. Ivan Shearer, Mr. Yuji Iwasawa, and Sir Nigel Rodley are appended to the present Views (appendix B).

Meeting on 22 October 2008,

Having concluded its consideration of communication No. 1472/2006, submitted to the Human Rights Committee on behalf of Nabil Sayadi and Patricia Vinck, 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 and the State party,

Adopts the following:

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

1. The authors of the communication dated 14 March 2006 are Mr. Nabil Sayadi and Ms. Patricia Vinck. Mr. Sayadi was born on 1 January 1966 in Lebanon and Ms. Vinck, his wife, was born on 4 January 1965 in Belgium. They hold Belgian nationality. They claim to be the victims of violations by Belgium of article 2, paragraph 3, article 14, paragraphs 1, 2 and 3, and articles 12, 15, 17, 18, 22, 26 and 27 of the International Covenant on Civil and Political Rights. They are represented by counsel, Mr. Georges-Henri Beauthier. The Covenant and the Optional Protocol thereto entered into force for the State party on 21 April 1983 and 17 May 1994 respectively. The Committee's Special Rapporteur on New Communications and Interim Measures decided that the question of the communication's admissibility should be considered separately from the merits.

Factual background

2.1 On the basis of Security Council resolutions 1267 (1999),¹ 1333 (2000), 1390 (2002) and 1455 (2003) and European Union Council Regulation No. 881/2002,² a criminal investigation of the authors was initiated on 3 September 2002 at the request of the Belgian Public Prosecutor's Office.

2.2 On 19 November 2002, the State party informed the Sanctions Committee that the authors were, respectively, the director and secretary of *Fondation Secours International*, reportedly the European branch of the Global Relief Foundation, an American association that has been on the sanctions list since 22 October 2002.

2.3 The authors' names were placed on the lists appended to the Security Council resolution (23 January 2003), the European Union Council Regulation (27 January 2003)³ and a Belgian ministerial order (31 January 2003),⁴ but the authors were not given access to the "relevant information" justifying their listing. Enforcement of the provisions of

¹ On the creation of the United Nations Sanctions Committee, one of whose tasks is "to update regularly the list referred to in paragraph 2 of resolution 1390 (2002), including through the designation of individuals, groups, undertakings and entities that are subject to the measures referred to above, on the basis of relevant information provided by Member States and regional organizations".

² Council Regulation (EC) No. 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, *Official Journal*, L139/9, 29 May 2002.

³ Commission Regulation (EC) No. 145/2003 of 27 January 2003 amending Regulation (EC) No. 881/2002 for the ninth time.

⁴ Ministerial order of 31 January 2003 amending the ministerial order of 15 June 2000 implementing the Royal Decree of 17 February 2000 concerning the restrictive measures directed against the Taliban in Afghanistan.

international and Community law is provided for in Belgian legislation by the laws of 11 May 1985 and 3 May 2003, the Royal Decree of 17 February 2000⁵ and various ministerial implementing orders. While the authors, who have four children, have not been convicted or prosecuted and have a clean judicial record, the freezing of all their financial assets following their listing prevents them from working, travelling, moving funds and defraying family expenses.

2.4 The authors submitted several requests in 2003 to Belgian ministers and the Prime Minister, the European authorities, the United Nations and the Belgian civil authorities. The ministers invoked the Belgian State's international obligations, the European Commission said it had no authority to remove the names of the plaintiffs from a list drawn up by the Sanctions Committee,⁶ and the Prime Minister simply referred to the fact that an investigation was under way to examine new evidence.

2.5 As far as judicial procedures are concerned, the authors found themselves in a situation where the law was not being applied, as neither had been charged with an offence. On 11 February 2005, they obtained from the Brussels Court of First Instance an order requiring the Belgian State to initiate the procedure to have their names removed from the Consolidated List. While there was "relevant information" to hand – namely the absence of any indictment of the authors in February 2004 – the Belgian State did not initiate the de-listing procedure. The Court ordered the Belgian State to "urgently initiate a de-listing procedure with the United Nations Sanctions Committee and to provide the petitioners with proof thereof, under penalty of a daily fine of €250 for delay in performance". Pursuant to this order, on 25 February 2005 the State party requested the Sanctions Committee to delist the authors. At the time of the communication, no decision on the matter had been taken by the Sanctions Committee.

2.6 The Judge's Chambers of the Brussels Court of First Instance also confirmed the plaintiffs' innocence, dismissing the case on 19 December 2005 after more than three years of criminal investigation. Neither of these two decisions has been appealed and they are now final.

The complaint

3.1 The authors allege violations of article 2, paragraph 3, article 4, paragraph 1, article 14, paragraphs 1, 2 and 3, and articles 12, 15, 17, 18, 22, 26 and 27 of the Covenant.

3.2 Counsel for the authors considers that all possible domestic remedies have been exhausted. The petitioners instituted civil proceedings, which ended on 11 February 2005 with the final ruling against the Belgian State, and the charges were dismissed by a summary judgement on 19 December 2005. The authors' counsel sent numerous letters to the counsel for the Belgian State to ask what follow-up had been given to the de-listing request submitted to the Sanctions Committee. Counsel states that Belgian ministers and European Community and international political bodies were apprised of the State party's failure to act on the authors' request for de-listing.

3.3 With regard to the allegation of a violation of article 14, paragraph 1, the authors were placed on the list and their assets frozen in the absence of any court ruling on the matter. In counsel's view there is no doubt that the "administrative and temporary" nature

⁵ Royal Decree of 17 February 2000 concerning the restrictive measures directed against the Taliban in Afghanistan.

⁶ The letter of 28 October 2003 indicates that, while the Commission is empowered to amend the list attached to the Regulation, it cannot do so unless the Sanctions Committee alters its decision of 22 January 2003.

of these measures, as they were presented by the Belgian State, cannot hide the fact that they are tantamount to criminal sanctions and cannot justify the lack of judicial intervention and the prolonged imposition of sanctions.

3.4 Respect for the presumption of innocence, the right to an effective remedy, and the right to a procedure with all due structural and functional guarantees have been violated. The presumption of innocence had been flouted by the Belgian State's proposal to place the authors' names on the Consolidated List without "relevant information", in breach of article 14, paragraph 2, of the Covenant. While States may make this type of proposal on the basis of "relevant information", and even though the concept is not precisely defined, with regard to the restriction of the freedoms of the individuals concerned, such relevant information must be supported by a detailed statement of reasons. The only justification adduced by the Belgian State is the existence of grounds for believing that "the plaintiffs have links to the parent association, the Global Relief Foundation, and, hence, to the Al-Qaida terrorist group". What is more, the proposal for the listing on 19 November 2002 came only a few days after the opening of the investigation on 3 September 2002 and would therefore appear to have been premature and unjustified.

3.5 With respect to article 15 of the Covenant, counsel argues that the authors' listing breaches the principle of the legality of penalties. For the Belgian State, the listing is the consequence of an offence committed by the authors, but the definition of that offence and its essential elements were not known. Counsel further argues that, while States alone are competent to activate the de-listing procedure on the basis of "relevant information", the Belgian State consistently refused to do so until the investigation was over. In so doing, it gave precedence to proof of the plaintiffs' lack of culpability over the presumption of innocence. Counsel maintains that, although the Belgian civil courts duly found in favour of the authors in February 2005, the principle of the presumption of innocence was patently violated.

3.6 With regard to the allegation of a violation of article 2, paragraph 3, counsel argues that the authors have no effective remedy in the criminal courts that would enable them to instigate the closure of the investigation that has been under way for over three years. Article 136 of the Criminal Investigation Code provides that "if the investigation is not closed after one year, the indictments chamber may hear a petition addressed to the clerk of the court of appeal by the accused or the complainant". According to counsel, however, the European Court of Human Rights deemed that this article "raises certain issues of Belgian domestic law that have yet to be resolved and that the Belgian Government has not provided an example of a domestic court finding under that provision in favour of a person who, invoking a petition based on article 136, paragraph 2, had not been charged".⁷ That remedy cannot, therefore, be considered to be effective.

3.7 Counsel argues that the information and sanctions procedure reveals a lack of functional guarantees, such as the principle of equality of arms, in breach of article 14, paragraph 3. The authors are at a disadvantage in presenting their case, owing to the violation of their right to information and the lack of transparency in their regard. The Belgian State is not complying with the humanitarian clause contained in paragraph 1 of Security Council resolution 1452 (2002), which provides that the freezing of assets shall not apply to funds and other financial assets necessary for basic expenses. Whereas resolution 1452 (2002) leaves it to States to determine the nature of such funds and assets, it does not require the interested parties to file a petition in order to benefit from the humanitarian clause. It is for the Belgian State to alert the authors to this clause, in

⁷ *Stratégies et Communications et Dumoulin v. Belgique*, No. 37370/97 (sect. 3) (fr) – (15.7.02), paras. 53-56.

accordance with the Act of 29 July 1991 on the formal justification of administrative acts and the Act of 11 April 1994 on public access to the administration and remedies. It was not until 11 February 2003 that the authors became aware of that clause. The Belgian State invokes the fact that the Community Regulation had not yet entered into force for Belgium on the date of the authors' request to benefit from the clause. Counsel for the authors points out that the petition existed and continued to exist after its entry into force. The Brussels Court of First Instance has not ruled on that point.

3.8 With regard to the lack of structural guarantees, in violation of article 14, paragraph 3, of the Covenant, in counsel's view the application of sanctions was marked by the lack of a reasonable time frame for the proceedings and, more particularly, for the investigation. The latter lasted three years and three months, which also implies a breach of article 2, paragraph 3 (c), of the Covenant, on the right to enforcement of remedies. The virtual absence of any effort by the Belgian State to secure de-listing by the Sanctions Committee is characteristic of a situation marked by the implicit acceptance of sanctions and their intolerable consequences for the authors. Although the Belgian State had undertaken to renew its de-listing petition in the event the case was dismissed by the Belgian courts, it never did so.

3.9 Counsel further maintains that the question of the responsibility of certain States represented on the Sanctions Committee is raised directly in the case of those which, in the absence of any "relevant information", blocked the de-listing of the plaintiffs, in violation of the ruling delivered by the Belgian courts on 11 February 2005 and of the right to enforcement of remedies enshrined in article 2 of the Covenant.

3.10 With regard to the allegation of a violation of article 12 of the Covenant, the authors cannot travel freely or leave Belgium. Mr. Sayadi has been unable to take up an offer of employment with the Red Crescent in Qatar.

3.11 With regard to the allegation of a violation of article 17, counsel points out that the authors' full details have been made widely available through their listing by the Sanctions Committee. They are also regularly obliged to seek publication of rights of reply in order to correct newspaper articles. Mr. Sayadi's reputation has been tarnished and disparaged and he has been dismissed from the firm where he had worked since July 2002. He had to apply to the Malines labour tribunal in order to obtain unemployment benefits, which he had been denied.

3.12 With regard to the allegation of a violation of article 18, read together with article 22, paragraph 1, and article 27, of the Covenant, counsel argues that the Belgian State is holding up the establishment of Muslim associations whose aim is to fund humanitarian projects in various parts of the world. The authors are prevented from practising their religion and from developing and financing projects designed to improve the living conditions of other practitioners of the Muslim faith.

3.13 Counsel affirms that the conditions set forth in article 4, paragraph 1, of the Covenant have not been met. The "public emergency" supposedly posed by terrorism and its financing results in the adoption of measures and the implementation of procedures that generate discrimination based on the practice of the Muslim faith, in violation of article 26 of the Covenant. The only allowable restrictions on rights protected by the Covenant are those that are necessary in a democratic society. And yet, the contrary is being done with regard to one part of the population, calling into question the basic principles of a democratic society. The power to judge individuals belongs to the judiciary, and the fact that the Belgian Government has frozen the bank accounts of the authors' association and the authors themselves attests to legislative encroachment on the judicial sphere. The principle of equality has also been violated in that, in the name of combating terrorism, the mere listing of individuals is sufficient to justify the institution of special procedures

against them in the courts and the imposition of sanctions without trial, effective remedy or rights of defence.

State party's observations

4.1 On 6 July 2006, the State party invoked the Security Council resolution calling on all States to "cooperate fully with the [Sanctions] Committee ... in the fulfilment of its tasks, including supplying such information as may be required by the Committee in pursuance of this resolution".⁸ On 20 December 2002, the Security Council adopted resolution 1455 (2003) containing the humanitarian clause. The guidelines of the Committee for the conduct of its work contain the procedure for requesting Sanctions Committee de-listing.⁹ In particular, requests must be based on "relevant information" to be provided by the person wishing to submit a request for a review of his or her case. As far as the State party is concerned, all the Security Council resolutions have been transposed to the European regulations, since, following a transfer of competence from the member States to the European Community, the implementation of the economic measures determined by the United Nations falls within the Community's sphere of competence.

4.2 Regarding the facts, the State party states that the *Fondation Secours Mondial* is the European branch of the Global Relief Foundation, an Islamic charitable organization active in the United States and suspected of involvement in the financing of Al-Qaida. The criminal investigation initiated on 3 September 2002 examined the authors' involvement in the *Fondation Secours Mondial*, as well as Mr. Sayadi's numerous alleged contacts, including those of a financial nature, with a number of leaders linked to the Al-Qaida network. On 22 October 2002 the Global Relief Foundation was placed on the Sanctions Committee list. This listing mentions, inter alia, its links with its European branches, including the *Fondation Secours Mondial*. On 22 January 2003, after studying the information in its possession, and following an initiative by the State party, the Sanctions Committee decided to list the authors. On 28 January 2003, the European Commission published an updated Consolidated List containing the authors' names. On 31 January 2003, the Minister of Finance issued a ministerial order, published on 19 February 2003, updating that list, with the authors' names included. On 27 February 2003, the authors requested the Ministers of Finance, Justice and Foreign Affairs to take the steps needed for their de-listing, but furnished no relevant information. The authors received a reply from each of the Ministers: on 26 March 2003, the Minister of Justice affirmed that the assets freeze was no more than a temporary administrative measure totally unconnected to any criminal conviction or judicial confiscation. It could not, therefore, be maintained that the authors had been convicted "without any kind of trial". The Minister of Justice informed them that their listing was justified by their membership of the Global Relief Foundation; the same information was transmitted to them on 8 April 2003 by the Minister for Foreign Affairs. On 30 December 2003, the Prime Minister replied that he had requested the Minister of Justice to make enquiries of the Federal Prosecutor's Office on the progress of the investigation and that the Office considered that the investigation could not yet be closed as there was new information to be examined.

4.3 On 3 February 2004, the authors brought an action against the Belgian State in the Brussels Court of First Instance, the aim being to secure an order for it to file a de-listing request with the Sanctions Committee, on the grounds that they had not been charged after an investigation lasting a year and a half. The State party claimed that the relevant

⁸ Security Council resolution 1267 (1999), para. 9.

⁹ Guidelines of the Committee for the conduct of its work, adopted on 7 November 2002 and amended on 10 April 2003.

information on the basis of which it could profitably submit a de-listing request would be the closure of the investigation without an indictment. The Court, however, ruled on 11 February 2005 that after two and a half years of investigation it was reasonable to demand that a de-listing request be submitted to the Committee. The State party immediately complied with the judgement. The de-listing request was distributed by the secretariat of the Sanctions Committee to all Committee members on 4 March 2005. The no-objection procedure (implying de-listing in the absence of objections within 48 hours (counted in working days)) was, however, blocked when members of the Sanctions Committee expressed reservations about the Belgian State's petition within the established time limit. On 10 January 2006, the State party submitted to the Sanctions Committee, for the necessary follow-up, the order dismissing the case in the criminal proceedings delivered by the Judge's Chambers of the Brussels Court of First Instance.

4.4 The State party asked the Public Prosecutor's Office for permission to peruse the criminal file on the authors, in order to look for any relevant information it could submit to the Sanctions Committee. On 4 April 2006, the State party reiterated its de-listing request on the basis of the decision of the Judge's Chambers and the lack of any evidence in the criminal file to justify maintaining the authors' names on the list. The State party went beyond not only what had been required by the ruling of the Brussels Court of First Instance, but also the commitment expressed in an official letter dated 22 September 2005 to the authors' counsel. Examination of the de-listing request is currently still pending before the Sanctions Committee.

4.5 With regard to admissibility, the State party points out that the matter raised by the authors is already being examined under another procedure of international investigation or settlement, the United Nations Sanctions Committee.¹⁰ This Committee meets the conditions for definition as "another procedure of international investigation or settlement" within the meaning of article 5, paragraph 2, of the Optional Protocol. As a result, the Human Rights Committee must decline jurisdiction with regard to the authors' communication.

4.6 With regard to the merits of the case and the alleged violations of the presumption of innocence, the right of access to justice and a fair trial, the State party contends, firstly, that, in accordance with the Security Council resolutions, it was obliged to furnish information on the authors. The State party notes that the Sanctions Committee has confirmed that when a charitable organization is listed, the main persons connected to such bodies must also be listed. Secondly, the measure in dispute could violate the presumption of innocence and the principle of legality of penalties only if it took the form of a criminal sanction. The grounds for inclusion on the list, namely the existence of "ties" to Al-Qaida, is not in itself a criminal offence. The authors are wrong to claim that because the judicial investigation had been initiated a few months earlier, the State party's action was premature and unjustified. Thirdly, the authors are wrong to maintain that the State party breached the presumption of innocence. While the State party did claim that the de-listing request should be filed after the criminal investigation had been closed – which in its view constituted "relevant information" to be submitted to the Committee – the Court of First Instance ruled that it should be filed without awaiting the closure of the investigation and the State party has complied with this ruling.

4.7 As for the alleged lack of effective remedies in the criminal courts to have the investigation closed, the State party asserts that the authors did have a remedy in this

¹⁰ The State party refers to a note from the Sanctions Committee dated 25 May 2006 stating that the matter is still pending.

particular case, since they took the Government to court and obtained an order requiring it to submit a de-listing request to the Sanctions Committee.

4.8 As for the allegation that the information and sanctions procedure followed by the Belgian State attests to the absence of functional guarantees, the State party notes that article 14, paragraph 3, of the Covenant provides for anyone charged with a criminal offence to be informed of the charge against him, and that it therefore does not apply to measures that are neither charges nor criminal sanctions. The authors were informed of the facts on which their listing was based.

4.9 As for the alleged violations in relation to the humanitarian clause in resolution 1452 (2002), the exemption for humanitarian reasons is provided for in Regulation (EC) No. 561/2003 amending Regulation No. 881/2002, which, pursuant to the Treaty establishing the European Community, is binding and directly applicable in all member States. It does not need to be incorporated into Belgian law and no notification is required. The Regulation contains all the information concerning the procedure to be followed in order to benefit from this exemption. Resolution 1452 (2002) provides that the State must determine the funds needed for basic expenses. The State is unable to make such a determination unless the individuals provide it with information on, for example, the amount of their rent or mortgage, or their medical expenses. Regulation (EC) No. 561/2003 provides that any person wishing to benefit from the humanitarian clause must address a request to the relevant competent authority of the member State, as listed in annex II of the regulation. The authors were informed of this regulation once it had been published in the *Official Journal*. In fact, while the absence of notification of an administrative act may hinder the imposition of obligations on the person it is addressed to – who, in any event, is aware of it invoking a right does not require notification of the act on which it is based.¹¹ Hence, the absence of notification does not prevent the humanitarian clause from being invoked. That being said, in the case in point the authors were well aware of this possibility, thanks to, among other things, the reply to the parliamentary question posed to the Minister of Justice and the letter of 30 December 2003 from the Prime Minister asking them to provide a list of expenses for the purposes of the humanitarian clause procedure, since without it the procedure would be suspended. The authors, however, have still not submitted a valid application to the Ministry, nor have they produced any documentary evidence. The fact that they do not benefit from the clause is a problem entirely of their own making. For this reason the Committee should declare the communication inadmissible under article 5, paragraph 2 (b), of the Optional Protocol. Domestic remedies refer not only to legal remedies, but also to administrative remedies.¹² The fact that the humanitarian clause was not invoked means that (administrative) domestic remedies were not exhausted.¹³

4.10 Regarding the alleged lack of structural guarantees, including the failure to observe a reasonable time limit, the State party points out that the authors give no reasons for claiming this limit was breached with respect to the investigation. The reasonableness of a time limit depends on the circumstances and complexity of a given case. In this case, the three and a half years of investigation are justified by the complexity of the dossier and the fact that letters rogatory had to be executed abroad. As for the alleged violations of the right

¹¹ The State party refers to the case law of the Council of State of Belgium.

¹² The State party refers to communication No. 1184/2003, *Brough v. Australia*, Views adopted on 17 March 2006, paragraph 8.6: “The Committee recalls that the requirement, in article 5, paragraph 2 (b), of the Optional Protocol, to exhaust ‘all available domestic remedies’ not only refers to judicial but also to administrative remedies, unless the use of such remedies would be manifestly futile or cannot reasonably be expected from the complainant.”

¹³ The State party refers to communication No. 1159/2003, *Sankara v. Burkina Faso*, Views adopted on 28 March 2006, paragraph 6.4.

to enforcement of a remedy, the ruling of the Brussels Court of First Instance against the Belgian State was promptly implemented by the State party. It also points out that it went beyond what the ruling demanded by transmitting the dismissal ruling to the Sanctions Committee.

4.11 On 9 November 2006, the State party added that the authors were not subject to its jurisdiction within the meaning of article 1 of the Optional Protocol. The rules on communications preclude the authors from disputing United Nations rules concerning the fight against terrorism before the Committee. The same rules prevent the authors from challenging measures taken by the State party to implement its obligations under the Charter of the United Nations. The State party understands this communication to be aimed solely at preventing the Belgian State from exercising any discretion it may have in the implementation of United Nations rules.

4.12 As for the alleged substantive violations of the Covenant, the State party claims that its role was limited to relaying information about the authors to the Sanctions Committee, as required under United Nations rules. The Sanctions Committee then examined this information and placed the authors on the Consolidated List. The State party has taken all appropriate measures within its power to have the authors' names de-listed, consistent with respect for the authors' fundamental rights as well as United Nations rules. Moreover, the measures to combat the financing of terrorism were adopted by the Security Council under Chapter VII of the Charter of the United Nations. The existence of a threat to international peace and security is an exceptional circumstance justifying restrictions on the enjoyment of the individual rights established in international human rights instruments. Article 103 of the Charter provides that "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail". Moreover, the measures adopted to combat the financing of terrorism are not definitive. For example, it is possible to submit a request for an exemption from the assets freeze and the travel ban to the Sanctions Committee. Contrary to the authors' implication, the measures taken by the United Nations are in no way directed against Islam as a religion.

Authors' comments on the State party's observations

5.1 On 20 December 2006, the authors' counsel, in response to the State party's claim that the communication was inadmissible under article 5, paragraph 2 (a), of the Optional Protocol, submitted that the three requirements set out in that article were not met. Firstly, the Sanctions Committee does not constitute a procedure of international investigation or settlement as construed by the Committee.¹⁴ The word *enquête* (investigation) means "an impartial procedure to establish the facts" or "aiming to clarify the facts". The English word "investigation" is derived from the verb "to investigate", which implies an effort to establish the truth. Thus the phrase "procedure of international investigation" refers to an international body that sets out to establish the facts.¹⁵ Since the Sanctions Committee's listing and de-listing procedures do not provide for any investigation on the part of that Committee, the Sanctions Committee cannot be considered a "procedure of international investigation". The role of the Sanctions Committee is limited to listing names submitted

¹⁴ Communications No. 118/1982, *J.B. et al. v. Canada*, decision on inadmissibility adopted on 18 July 1986, para. 6.3; No. 829/1998, *Judge v. Canada*, Views adopted on 5 August 2003, para. 10.4; and No. 172/1984, *Broeks v. the Netherlands*, Views adopted on 9 April 1987, para. 12.3.

¹⁵ Communication No. 154/1983, *Baboeram et al. v. Suriname*, Views adopted on 4 April 1985, para. 9.1.

by States, without further investigation, and de-listing names at the request of a State, if none of the Committee members object.

5.2 Secondly, the Sanctions Committee is not an international settlement procedure. The ordinary meaning of the word “settlement” (*règlement*) is “a procedure which puts an end to a disagreement or dispute”. In the present case, de-listing the authors would put an end to the State party’s ongoing violation of the Covenant, but would not constitute the *restitutio in integrum* to which the authors are entitled¹⁶ after four years of sanctions, which should include a finding that the Covenant was violated.

5.3 Thirdly, the Committee understands “the same matter” to mean “the same claim”.¹⁷ The Sanctions Committee was set up by the Security Council to help combat terrorism. In the present case, the Sanctions Committee was asked to lift sanctions, whereas the Human Rights Committee is requested to make a finding that the State party has violated rights protected by the Covenant. The matter before the Human Rights Committee is therefore not the same as the matter before the Sanctions Committee, as required by article 5, paragraph 2 (a), of the Optional Protocol.

5.4 Fourthly, the de-listing request is no longer being examined by the Sanctions Committee, as the Human Rights Committee would require.¹⁸ The Sanctions Committee did not agree to the State party’s de-listing requests of 4 March 2005 and 4 April 2006. Further, the note from the Sanctions Committee stating that the matter remains pending is dated 25 May 2006 – over seven months ago. The de-listing procedure was unsuccessful, and the State party is wrong to infer from the Sanctions Committee’s lack of response that it is currently considering the authors’ request.

5.5 Regarding the State party’s argument that the authors failed to exhaust domestic remedies because they did not have recourse to the humanitarian clause, counsel submits that a request to invoke this clause is not a domestic remedy within the meaning of the Covenant. A domestic remedy must potentially remedy the situation or, more specifically, it must have some prospect of success.¹⁹ A request by the authors to benefit from this clause could not bring about a complete lifting of sanctions and thus end the violations of the Covenant. The clause therefore is not a domestic remedy within the meaning of article 5, paragraph 2 (b), of the Protocol.

5.6 As to the merits, the State party must take responsibility for the implementation of Security Council resolution 1267 (1999) and related resolutions. It is not correct to say that the State party is bound to implement sanctions imposed by the Security Council. Article 103 of the Charter does not apply because the Security Council was acting *ultra vires* in adopting the resolutions that imposed the sanctions. Thus, the resolutions are not “obligations” within the meaning of Article 103. In imposing sanctions on individuals as part of its efforts to combat terrorism, the Security Council has exceeded its powers under the Charter. While the resolutions setting out the sanctions regime were adopted under Chapter VII, that does not mean that they are binding on Members of the United Nations, since a body must adopt decisions that are within its powers. The oversight of Member States and legal precedent are now the only constraints on the Security Council preventing

¹⁶ General Assembly resolution 56/83, annex, “Responsibility of States for internationally wrongful acts”, art. 34 (“Forms of reparation”).

¹⁷ Communication No. 75/1980, *Fanali v. Italy*, Views adopted on 31 March 1983, para. 7.2.

¹⁸ Communication No. 577/1994, *Polay Campos v. Peru*, Views adopted on 6 November 1997, para. 6.1.

¹⁹ Communications Nos. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989, para. 12.3. General Assembly resolution 56/83 (note 16 above), art. 44 (b) (“Admissibility of claims”).

it from imposing its will through a contrived finding of a threat to international peace and security. The Security Council must act in accordance with the purposes and principles of the United Nations, with the customary interpretation of the Charter and with international legal precedent. The authors in this case are not a threat to international peace and security as defined in Article 39 of the Charter of the United Nations. Recourse to Chapter VII is admissible where a situation has massive cross-border repercussions. In the alternative, recourse to Chapter VII has always been contested by certain States, indicating a lack of *opinio juris*. Given the lack of *opinio juris*, resolution 1267 (1999) and related resolutions are *contra legem*: the fight against an “invisible” enemy does not dispense with the obligation to respect the Charter as currently interpreted.

5.7 The imposition of sanctions on private individuals is not consistent with the purposes and principles of the United Nations. International case law establishes that Article 39 of the Charter may be used only within the limits of the purposes and principles of the United Nations.²⁰ Those purposes and principles include the maintenance of international peace and security “in conformity with the principles of justice and international law”. The order in the present case to freeze the assets of charitable organizations and the individuals who direct them on the sole ground that they are suspected of financing international terrorism violates the principles of justice established in the Covenant, and is thus a violation of international law, and ultimately of the Charter. In these circumstances, the State party is not bound to enforce the sanctions. A decision taken *ultra vires* is not binding, and the State party must give precedence to the peremptory norms of international law (*jus cogens*) over any other obligation.²¹ The Committee stated in general comment No. 29 (2001) on derogation during a state of emergency that “States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of ... peremptory norms of international law”.²² Therefore the State party is not obliged to enforce sanctions which conflict with *jus cogens* and the peremptory norms of international law established in the Covenant.

5.8 Further, the enforcement of sanctions imposed by the Security Council and relayed by the European Union does not exempt the State party from its international responsibility under the Covenant. This interpretation is confirmed by the case law of the European Court of Human Rights, which has held that: “The Convention does not exclude the transfer of competences to international organizations provided that Convention rights continue to be ‘secured’. Member States’ responsibility therefore continues even after such a transfer.”²³ The State party must therefore respect its obligations under the Covenant regardless of the fact that it is a member of the European Union and the United Nations; Article 103 of the Charter does not override the illegality of violations of the Covenant. Article 103 does not exempt a State that gives Charter obligations precedence over other international obligations from its international responsibilities, and it is not a ground for precluding the wrongfulness of an act in the form of a violation of an obligation not contained in the Charter. According to the established interpretation of the law on international responsibility, only by invoking article 4 of the Covenant can a State party avoid all

²⁰ Case No. IT-94-I-AR72, *Dusko Tadic*, 2 October 1995, *Tadic* (1995) I ICTY JR 293, para. 29.

²¹ General Assembly resolution 56/83 (note 16 above), art. 26 (“Compliance with peremptory norms”). Article 53 of the Vienna Convention on the Law of Treaties of 23 May 1969, *United Nations Treaty Series*, vol. 1155, I-18232, p. 362 (by extension to a unilateral act of an international organization).

²² *Official records of the General Assembly, Fifty-sixth Session, Supplement No. 40 (A/56/40)*, vol. I, annex VI, para. 11.

²³ *Matthews v. United Kingdom* [GC], No. 24833/94, CEDH 1999-I - (18.2.99), para. 32.

responsibility.²⁴ The Committee has stressed that for article 4 to apply, the State party must have officially proclaimed a state of emergency.²⁵

5.9 On the merits of the case, counsel recalls that whether or not a measure is “criminal” in nature is not bound by the classification in domestic law. On the basis of international case law, the authors consider that the sanctions imposed on them are indeed criminal in nature. The European Court of Human Rights has found that the criminal nature of a sanction depends on whether or not it is associated with criminal proceedings, and whether the sanction is sufficiently severe to have a punitive and deterrent character.²⁶ In the present case, the State party, in addition to enforcing sanctions against the authors, has launched a criminal investigation. Further, the Monitoring Group established pursuant to Security Council resolution 1363 (2001) is of the view that “individuals designated on the list must be terrorists or suspected terrorists and must be apprehended. They should then be sent to their country of origin or to the country where they have been indicted”.²⁷ The wording of the French text – “*extradés*” (extradited) and “*lancé un mandat d’arrêt*” (indicted) – implies that the context is criminal law. An asset freeze and a travel ban may also amount to criminal sanctions within the meaning of the Covenant. The “ordinary meaning” of the word “sanction” also evokes a criminal context, as it is derived from the Latin word *sanctio*, which means “penalty” or “punishment”.

5.10 There are two types of violations of the Covenant. Violations of *jus cogens* relate to article 14, paragraph 2, and article 15 of the Covenant.²⁸ Regarding article 14, paragraph 2, criminal sanctions have been imposed on the authors without their having been proved guilty according to law, and without any trial. The authors continue to be subject to sanctions despite the fact that the Judge’s Chambers of the Brussels Court of First Instance ordered that their case should be dismissed. Counsel recalls that the Monitoring Group,²⁹ the Sanctions Committee’s Analytical Support and Sanctions Monitoring Team³⁰ and the Legal Counsel of the United Nations³¹ have repeatedly deplored States’ “reluctance” to strictly implement the relevant resolutions, in the absence of any judicial review to test whether the sanctions are well founded. Regarding article 15 of the Covenant, the authors have been “held guilty” without trial for a criminal offence which the State party has expressly recognized does not exist, as is apparent from the closure of the investigation. Lastly, as to the violations of articles 12, 17, 27, and 18 taken together with 22, counsel refers to the original communication.

State party’s reply

6.1 On 17 January 2007, the State party submitted that the authors are not entitled to challenge United Nations regulations on the fight against terrorism before the Committee. Article 1 of the Optional Protocol precludes the authors from disputing measures taken by the State party to implement its Charter obligations. In the circumstances, the authors are not subject to the jurisdiction of the State party and the Committee is not entitled to consider their complaints. The authors do not dispute that the action of a State falls beyond

²⁴ General Assembly resolution 56/83 (note 16 above), art. 55 (“*Lex specialis*”): the traditional grounds that preclude the wrongfulness of an act are invalid if *lex specialis* applies.

²⁵ General comment No. 29 (note 22 above), para. 2.

²⁶ *Malige v. France*, Rec. 1998-VII, fasc. 93 (23.9.98), p. 2934.

²⁷ S/2002/1338, para. 53.

²⁸ Counsel is referring to general comment No. 29.

²⁹ S/2003/1070, para. 28; S/2002/1338, para. 17.

³⁰ S/2004/679, para. 34.

³¹ Letter from Denmark dated 7 June 2006 (S/2006/367), p. 4 (question); S/PV.5474 (response by the Legal Counsel), p. 5.

the State's jurisdiction if it is dictated by an international obligation. The authors' argument wrongly implies that the Committee can pass judgement on the validity of Security Council resolutions. It also suggests that States Members of the United Nations are in a position to scrutinize the legitimacy of Security Council resolutions in terms of the Charter and to consider them alongside provisions of the Covenant. Even if Member States did have such discretion, at most it would imply marginal oversight restricted to manifest abuses by the Security Council. The Security Council emphasized only recently "the obligations placed upon all Member States to implement, in full, the mandatory measures adopted by the Security Council".³² In this case, the authors have not identified any manifest violation of the Charter. Regarding the alleged action ultra vires on the part of the Security Council, the Security Council did not act ultra vires and it is well established that terrorism constitutes a threat to international peace and security.

6.2 As for the alleged non-conformity of Security Council resolutions with the purposes and principles of the United Nations, the maintenance of international peace and security and respect for the principles of justice and international law are both objectives of the Security Council. It is up to the Security Council to find an appropriate balance between the two objectives, and in this case, the actions of the Security Council were not manifestly inappropriate. The principle of *jus cogens* would be violated only if the assets freeze and travel ban constituted criminal sanctions, which they do not. In *Malige v. France*, the European Court of Human Rights requires more than an association with criminal proceedings for it to be established that a sanction is "criminal". In this case, the assets freeze is not a penalty imposed in connection with a criminal procedure or conviction. The basis for the listing is not in itself a criminal offence in Belgian or international law: "the measures referred to ... are preventative in nature and are not reliant upon criminal standards set out under national law".³³ The decision of the judicial authorities to initiate an investigation of the authors for conspiracy and money-laundering was not dependent on the authors' inclusion on the list. Persons placed on the list may invoke the humanitarian clause and be granted an exemption from the travel ban.³⁴ These measures cannot be described as criminal in nature, such as to engage the presumption of innocence and principle of legality of penalties. In the circumstances, the State party had no option but to implement the Security Council resolutions, and the authors are not subject to the jurisdiction of the State party within the meaning of article 1 of the Optional Protocol.

6.3 As to the argument that the implementation of sanctions does not exempt the State party from its responsibilities under the Covenant, the determination of the European Court in *Matthews v. United Kingdom* is irrelevant, since it concerns the transfer of competences to an international organization subsequent to ratification of the European Convention on Human Rights. In ratifying the Charter, the State party transferred powers to the Security Council, and it has subsequently ratified the Covenant. At the time when the State party ratified the Covenant, the powers it had transferred to the Security Council were no longer within its competence, and so the State party cannot be held responsible under the Covenant for how those powers are exercised. As for Article 103 of the Charter, it establishes an order of precedence and absolves the State of responsibility for failure to fulfil a lower-ranking obligation. Article 103 is not merely an exemption clause which would permit a State not to comply with an obligation in conflict with a Charter obligation: it requires the State to comply with the Charter. Thus the State cannot be held responsible for failure to respect a lower-ranking obligation that runs counter to the Charter.

³² Security Council resolution 1730 (2006).

³³ Security Council resolution 1735 (2006).

³⁴ Security Council resolution 1390 (2002).

6.4 As for the lack of the notification required under article 4 of the Covenant, no such notification is required since the Covenant itself provides for restrictions on liberty of movement, respect for privacy and the right of access to a court. Standard practice is that States parties to the Covenant give notification only of measures taken on an individual basis, not of measures taken to implement United Nations sanctions. Thus, the authors' complaint could only relate to the manner in which the State party exercised any discretion it might have in implementing United Nations rules. The State party has taken all measures open to it and has therefore respected the Covenant within the limits of its jurisdiction. Inclusion on the list is a preventive rather than a punitive measure, as is apparent from the fact that the persons affected can obtain authorization from the Sanctions Committee for an exemption from the assets freeze and travel ban.

6.5 Regarding the authors' request that the State party offset the sanctions imposed on the authors at the domestic and Community levels, following the transfer of competence to the European Community in this matter, the implementation of economic measures adopted by the United Nations is a matter for the European Community. The European regulations incorporating the provisions of Security Council resolutions are binding and directly applicable in the State party, and take precedence over conflicting domestic legal provisions. As a result, even if the State party removed the authors from the Belgian list, that would have no impact on their personal situation since they would remain on the Community list, which takes precedence over Belgian legislation. It would be beyond the jurisdiction of a Belgian judge to disapply Community law on the basis of the Covenant. A Belgian judge would not be competent to determine this matter, which falls within the exclusive competence of the Court of Justice of the European Communities, and could only refer the point for a preliminary ruling.³⁵ The Court of First Instance of the European Communities has already found on several occasions that sanctions adopted by the Security Council in its efforts to combat the financing of terrorism are consistent with respect for human rights.³⁶ Even if the State party stopped implementing Security Council resolutions, the authors' names would remain on the Consolidated List, and other Member States would be bound to uphold the travel ban, unless the Sanctions Committee authorized an exemption to it.

Decision of the Committee concerning admissibility

7.1 On 30 March 2007, at its eighty-ninth session, the Committee considered the admissibility of the communication.

7.2 It considered that article 1 of the Optional Protocol recognizes the competence of the Committee to receive and rule on communications from individuals who claim to be victims of a violation of any of the rights set forth in the Covenant, and who are subject to the jurisdiction of a State party. The State party contended that the authors were not subject to its jurisdiction within the meaning of article 1 of the Optional Protocol. According to the State party, the rules on communications precluded the authors from disputing United Nations rules concerning the fight against terrorism before the Committee. The same rules were said to prevent the authors from challenging measures taken by the State party to implement its obligations under the Charter of the United Nations. While the Committee could not consider alleged violations of other instruments such as the Charter of the United Nations, or allegations that challenged United Nations rules concerning the fight against

³⁵ Articles 220, 230 and 234 of the Treaty establishing the European Community (as amended).

³⁶ Case T-315/01, *Yassin Abdullah Kadi v. Council and Commission*, Judgement of the Court of 21 September 2005; Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*, Judgement of the Court of 21 September 2005.

terrorism, the Committee was competent to admit a communication alleging that a State party had violated rights set forth in the Covenant, regardless of the source of the obligations implemented by the State party. The Committee concluded that the provisions of article 1 of the Optional Protocol did not preclude the consideration of the communication.

7.3 The Committee recalled that it was not competent to consider a communication if the same matter was already being examined under another procedure of international investigation or settlement. The State party contended that the same matter was pending before the Sanctions Committee of the United Nations, which constituted “another procedure of international investigation or settlement”. Without having to consider the question of the nature of the Sanctions Committee, the Committee limited itself to considering the words “the same matter”, and referred to its jurisprudence according to which the words “the same matter” must be understood as referring to one and the same claim concerning the same individual, as submitted by that individual, or by some other person empowered to act on his behalf, to the other international body.³⁷ In the case at issue, the petition for de-listing currently examined by the Sanctions Committee had not been submitted by the authors but by the State party under the guidelines of the Sanctions Committee.³⁸ The Committee therefore concluded that the same matter was not being examined under another procedure of international investigation or settlement and that, consequently, it was not prohibited from examining the communication in accordance with the provisions of article 5, paragraph 2 (a).

7.4 On the matter of exhaustion of domestic remedies, the State party claimed that the authors’ failure to invoke the humanitarian clause constituted a failure to exhaust (administrative) domestic remedies since the clause provided them with an effective domestic remedy. The Committee noted that the humanitarian clause in resolution 1452 (2002) and incorporated into Regulation (EC) No. 561/2003 amending Regulation No. 881/2002, authorized the State party not to apply the assets freeze to any funds it might determine to be necessary for the basic expenses of listed persons. The Committee noted that, even if the authors had applied for a release of funds under the humanitarian clause, they could have withdrawn an amount sufficient to cover their basic expenses but would still have had no effective remedy in respect of the alleged violations, i.e., a hearing of their allegations of violations of their rights under the Covenant. The Committee therefore found that application of the humanitarian clause did not constitute an effective remedy and that the authors had been under no obligation to avail themselves of it before applying to the Committee.

7.5 As to the authors’ claims under article 2, paragraph 3, article 12, article 14, paragraphs 1, 2 and 3, and articles 15 and 17 of the Covenant, the Committee found that the facts submitted by the authors were closely bound up with the substance of the case and should thus be considered on the merits. As to the claims under articles 18, 22, 26 and 27 of the Covenant, the Committee found that the authors had not sufficiently substantiated their complaints for the purposes of admissibility. The Committee therefore concluded that the

³⁷ Communications No. 75/1980, *Fanali v. Italy*, Views adopted on 31 March 1983; No. 777/1997, *Sánchez López v. Spain*, decision adopted on 25 November 1999.

³⁸ See in this regard the conclusions of the Analytical Support and Sanctions Monitoring Team: “although the guidelines [of the Sanctions Committee] allow parties to petition for de-listing, in accordance with United Nations practice they can only do so through their Government of residence and/or citizenship. If that Government is not sympathetic, the petition might not be presented to the Committee, regardless of the merits” (Second report of the Analytical Support and Sanctions Monitoring Team established pursuant to Security Council resolution 1526 (2004) concerning Al-Qaida and the Taliban and associated individuals and entities, S/2005/83, para. 56).

communication was admissible under article 2, paragraph 3, article 12, article 14, paragraphs 1, 2 and 3, and articles 15 and 17 of the Covenant.*

State party's observations on the merits

8.1 On 21 December 2007, the State party reiterated its previous observations that it has done nothing contrary to the requirements of the Covenant. If the Committee were to conclude that the State party had conducted itself in a manner that was intrinsically incompatible with the requirements of the Covenant taken in isolation, *quod non*, Articles 25 and 103 of the Charter of the United Nations would preclude a determination that such conduct was unlawful, in other words, they would rule out any finding that the Covenant had been violated. Pursuant to Article 25 of the Charter of the United Nations, the State party must accept and carry out the decisions of the Security Council, a body that determines the existence of a threat to international peace and security justifying the application of Chapter VII and that decides on an appropriate response. Article 103 of the Charter is not merely an exemption clause authorizing non-fulfilment of an obligation that is in conflict with a Charter obligation; it requires compliance with the Charter, and therefore with the decisions of the Security Council, in the event of conflict between the latter and another international obligation. It therefore absolves States of responsibility for failure to fulfil a lower-ranking obligation. Hence, the Collective Measures Commission to strengthen the United Nations system of collective security³⁹ maintained that "it was of importance" that States should not be subjected to legal liabilities under treaties or other international agreements as a consequence of carrying out United Nations collective measures",⁴⁰ and the General Assembly took note of this position.⁴¹ Since under Article 103 of the Charter, Charter obligations prevail over any others, a State Member of the United Nations carrying out its obligations under the Charter cannot incur liability under the Covenant.

8.2 In the present case, the Security Council adopted resolution 1267 (1999) et seq., introducing sanctions to counter terrorism financing. The State party was obliged to furnish information about the authors so that the Sanctions Committee could draw up a list of persons and entities that it identified as being linked to the Al-Qaida network or the Taliban.⁴² For the State party this necessarily entailed an obligation towards the Sanctions Committee to act on the basis of information that the authors were the director and secretary of *Fondation Secours International*, an entity that has been on the United Nations list since 22 October 2002. This obligation was subsequently elucidated by the Sanctions Committee, which confirmed that when a charitable organization is listed, the main persons

* The following members of the Committee participated in the consideration of the admissibility of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanut, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood. The texts of individual opinions signed by Committee members Sir Nigel Rodley, Mr. Ivan Shearer, Ms. Iulia Antoanella Motoc, Mr. Walter Kälin, Mr. Yuji Iwasawa and Ms. Ruth Wedgwood are appended to the present Views (appendix A).

³⁹ Established by the General Assembly by resolution 377 (V).

⁴⁰ United Nations archive, V, 318, quoted in Simma, *Charta der Vereinten Nationen, Kommentar*, 1991, p. 1069.

⁴¹ General Assembly resolution 503A (VI).

⁴² The State party quotes Security Council resolution 1267 (1999): States Members of the United Nations must: "cooperate fully with the Committee [...] including [by] supplying such information as may be required by the Committee in pursuance of this resolution" (para. 9).

connected to such bodies must also be listed.⁴³ As a State Member of the United Nations, the State party may at most exercise marginal oversight of Security Council resolutions and identify only manifest abuses, which have not been observed in the present case.

8.3 The State party recalls that it did everything in its power to have the authors delisted and to end a situation that the authors consider to be contrary to the Covenant. In particular, it initiated a de-listing procedure, which it then carried out and initiated a second time. It cannot be held responsible for the fact that, in spite of its efforts, the members of the Security Council refuse to delist the authors. In these circumstances, it cannot be deemed to have violated the Covenant.

Authors' comments on the State party's observations on the merits

9.1 On 21 January 2008, the authors reiterated their previous comments and stated that they would shortly have been on the list for five years, the State party having initially asserted that relevant evidence had been found against them. The State party had subsequently been forced to admit that no such evidence had been found, following not only a criminal court decision but also a civil judgement which was not appealed by the State party. The latter maintains that there is nothing it can do, even though other nations, before rashly transmitting information, carry out an investigation and, if necessary, refuse to have the names of persons subject to their jurisdiction placed on an international list.⁴⁴

9.2 Counsel points out that in the United States no member of the Global Relief Foundation is on the United Nations list, apart from the authors.⁴⁵ France, Kosovo, Bosnia and Herzegovina and Pakistan, where offices of this organization were operating, felt no need to make any declaration of any kind. The founder of the Global Relief Foundation was imprisoned in the United States for 19 months and subsequently extradited to Lebanon without standing trial. He is now free and is able to travel unhindered anywhere in the world. The authors, who have neither the role nor the responsibilities of the founder of the Global Relief Foundation, see their lives and those of their children as being frozen by this list: they cannot leave their country or hold a bank account but they have to pay charges on their blocked accounts.⁴⁶ Lastly, since 7 December 2005, the authors have been asking the Federal Prosecutor's Office, to no avail, for the return of the property and effects that were seized from them during searches. The different authorities attribute responsibility to one another for returning these items, even though the authors are no longer the subject of a criminal investigation.

Consideration of the merits

10.1 The Human Rights Committee considered the communication in the light of all the information supplied to it by the parties, as it is required to do under article 5, paragraph 1, of the Optional Protocol.

10.2 The Committee recalls that, at the time of its decision on admissibility, it was of the view that the provisions of article 1 of the Optional Protocol did not preclude the consideration of the communication. In this regard, the Committee notes that the State

⁴³ Initial report of the Follow-Up Group, 16 June 2003, p. 17, No. 61.

⁴⁴ Counsel provides a report by the National Commission on Terrorist Attacks Upon the United States (*Staff Monograph on Terror Financing*, Chapter 5, "Al-Barakaat case study") and an article from the *Wall Street Journal Europe* ("Asset-Freeze List Sparks Rift Between U.S., European Allies") of 21 March 2002, which, according to counsel, demonstrate "this elementary prudence".

⁴⁵ Counsel provides a letter dated 9 July 2003 from a United States lawyer.

⁴⁶ Counsel provides bank account statements.

party, in its various observations, has maintained that it is bound to comply with the decisions of the Security Council of the United Nations; and that all the Security Council resolutions have been transposed to the European regulations, since, following a transfer of competence from the member States to the European Community, the implementation of the economic measures determined by the United Nations falls within the Community's sphere of competence. The State party states that the European regulations incorporating the provisions of the Security Council resolutions are binding and directly applicable in the State party, and take precedence over conflicting domestic legal provisions. The Committee also recalls that the authors, in their comments on the merits, reiterate their previous observations and indicate that they have been on the sanctions list for over five years. The Committee notes that most of the facts concern parts of the communication that were already the subject of a thorough study when the question of admissibility was considered. Consequently, the Committee is of the view that there is no need to reconsider the Committee's competence to consider the present communication and that the other arguments must be analysed in the context of the consideration on the merits.

10.3 Although the parties have not invoked article 46 of the Covenant, in view of the particular circumstances of the case the Committee decided to consider the relevance of article 46. The Committee recalls that article 46 states that nothing in the Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations. However, it considers that there is nothing in this case that involves interpreting a provision of the Covenant as impairing the provisions of the Charter of the United Nations. The case concerns the compatibility with the Covenant of national measures taken by the State party in implementation of a Security Council resolution. Consequently, the Committee finds that article 46 is not relevant in this case.

10.4 The facts set before the Committee indicate that the State party froze the assets of the authors after their names were placed on the Consolidated List, which was subsequently appended to a European Community regulation and a ministerial order issued in the State party. The placement of the authors' names on the Consolidated List prevents them from travelling freely. The authors allege violations of their right to an effective remedy, their right to travel freely, their right not to be subject to unlawful attacks on their honour and reputation, the principle of legality of penalties, respect for the presumption of innocence and their right to proceedings that afford procedural and structural guarantees.

10.5 With regard to the violation of article 12 of the Covenant, the authors indicate that they can no longer travel or leave Belgium, and that Mr. Sayadi was unable to accept an offer of employment in another country. The State party does not challenge this allegation, and the Committee observes from the outset that, in the present case, there has been a restriction of the authors' right to travel freely. While noting its general comment No. 27 (1999) on article 12, and that liberty of movement is an indispensable condition for the free development of the individual,⁴⁷ the Committee nevertheless recalls that the rights covered by article 12 are not absolute. Paragraph 3 of article 12 provides for exceptional cases in which the exercise of the rights covered by article 12 may be restricted. In accordance with the provisions of that paragraph, the State party may restrict the exercise of those rights only if the restrictions 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 Covenant. In its general comment No. 27, the Committee notes that "it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them" and that "restrictive measures must

⁴⁷ *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40 (A/55/40)*, vol. I, annex VI, sect. A, para. 1.

conform to the principle of proportionality; they must be appropriate to achieve their protective function”.⁴⁸

10.6 In the present case, the Committee recalls that the travel ban for persons on the sanctions list, particularly the authors, is provided by Security Council resolutions to which the State party considers itself bound under the Charter of the United Nations. Nevertheless, the Committee considers that, whatever the argument, it is competent to consider the compatibility with the Covenant of the national measures taken to implement a resolution of the United Nations Security Council. It is the duty of the Committee, as guarantor of the rights protected by the Covenant, to consider to what extent the obligations imposed on the State party by the Security Council resolutions may justify the infringement of the right to liberty of movement, which is protected by article 12 of the Covenant.

10.7 The Committee notes that the obligation to comply with the Security Council decisions adopted under Chapter VII of the Charter may constitute a “restriction” covered by article 12, paragraph 3, which is necessary to protect national security or public order. It recalls, however, that the travel ban results from the fact that the State party first transmitted the authors’ names to the Sanctions Committee. The proposal for the listing, made by the State party on 19 November 2002, came only a few weeks after the opening of the investigation on 3 September 2002. According to the authors, this listing appears to have been premature and unjustified. On this point, the Committee notes the State party’s argument that the authors’ association is the European branch of the Global Relief Foundation, which was placed on the sanctions list on 22 October 2002, and the listing mentions the links of the Foundation with its European branches, including the authors’ association. The State party has furthermore argued that, when a charitable organization is mentioned in the list, the main persons connected with that body must also be listed, and this has been confirmed by the Sanctions Committee. The Committee finds that the State party’s arguments are not determinative, particularly in view of the fact that other States have not transmitted the names of other employees of the same charitable organization to the Sanctions Committee (see paragraph 9.2 above). It also notes that the authors’ names were transmitted to the Sanctions Committee even before the authors could be heard. In the present case, the Committee finds that, even though the State party is not competent to remove the authors’ names from the United Nations and European lists, it is responsible for the presence of the authors’ names on those lists and for the resulting travel ban.

10.8 The Committee notes that a criminal investigation that had been initiated against the authors at the request of the Public Prosecutor’s Office was dismissed in 2005, and that the authors thus do not pose any threat to national security or public order. Moreover, on two occasions the State party itself requested the removal of the authors’ names from the sanctions list, considering that the authors should no longer be subject, *inter alia*, to restrictions of the right to leave the country. The dismissal of the case and the Belgian authorities’ requests for the removal of the authors’ names from the sanctions list show that such restrictions are not covered by article 12, paragraph 3. The Committee considers that the facts, taken together, do not disclose that the restrictions of the authors’ rights to leave the country were necessary to protect national security or public order. The Committee concludes that there has been a violation of article 12 of the Covenant.

10.9 With regard to the allegation of a violation of article 14, paragraph 1, the authors contend that they were placed on the sanctions list and their assets frozen without their being given access to “relevant information” justifying the listing, and in the absence of any court ruling on the matter. The authors also draw attention to the prolonged imposition of those sanctions and maintain that they did not have access to an effective remedy, in

⁴⁸ *Ibid.*, para. 14.

violation of article 2, paragraph 3, of the Covenant. The Committee notes, in this connection, the assertion of the State party that the authors did have a remedy, since they took the State party to the Brussels Court of First Instance and obtained an order requiring it to submit a de-listing request to the Sanctions Committee. Based solely on consideration of the actions of the State party, the Committee therefore finds that the authors did have an effective remedy, within the limits of the jurisdiction of the State party, which guaranteed effective follow-up by submitting two requests for de-listing. The Committee is of the view that the facts before it do not disclose any violation of article 2, paragraph 3, or of article 14, paragraph 1, of the Covenant.

10.10 With regard to the allegation of a violation of article 14, paragraph 3, of the Covenant, and to the authors' arguments that the application of sanctions was marked by the lack of a reasonable time frame for the proceedings and, more particularly, for the investigation into allegations of criminal association and money-laundering, the Committee notes that the criminal investigation was initiated on 3 September 2002 and that the dismissal order was issued by the Brussels Court of First Instance on 19 December 2005. The State party points out that the authors give no reasons for claiming a violation of the reasonable time limit for the investigation. It contends that the three and a half years of investigation were justified by the complexity of the dossier and the fact that several investigative measures had been carried out abroad. The Committee recalls that what constitutes an excessive and a reasonable length of time is a matter that must be assessed on a case-by-case basis, taking account, *inter alia*, of the complexity of each case. In the present case, the Committee finds that the facts before it do not disclose any violation of article 14, paragraph 3, of the Covenant with respect to the duration of the investigation.

10.11 With regard to the allegation of a violation of article 14, paragraphs 2 and 3, and article 15, in respect of the sanctions procedure, the Committee recalls that, in its decision on admissibility, it found that the facts submitted by the authors were closely bound up with the substance of the case and should thus be considered on the merits. In this connection, it takes note of the arguments of the authors, who consider that the sanctions imposed on them are criminal in nature and that the State party launched a criminal investigation in addition to enforcing the sanctions (see paragraph 5.9). The Committee also takes note of the State party's arguments that the sanctions cannot be characterized as "criminal", since the assets freeze was not a penalty imposed in connection with a criminal procedure or conviction (see paragraph 6.2). Moreover, the State party maintains that placement on the list was a preventive rather than a punitive measure, as was apparent from the fact that the persons affected could obtain authorization for an exemption from the freeze on their assets and from the travel ban (see paragraph 6.4). The Committee recalls that its interpretation of the Covenant is based on the principle that the terms and concepts in the Covenant are independent of any national system or legislation and that it must regard them as having an autonomous meaning in terms of the Covenant.⁴⁹ Although the sanctions regime has serious consequences for the individuals concerned, which could indicate that it is punitive in nature, the Committee considers that this regime does not concern a "criminal charge" in the meaning of article 14, paragraph 1. The Committee therefore finds that the facts do not disclose a violation of article 14, paragraph 3, article 14, paragraph 2, or article 15 of the Covenant.

10.12 With regard to the allegation of a violation of article 17 of the Covenant, the Committee takes note of the authors' arguments that their full contact details have been made available to everyone through their inclusion on the Consolidated List. It recalls that

⁴⁹ See, for example, communication No. 50/1979, *Van Duzen v. Canada*, Views adopted on 7 April 1982, paragraph 10.2.

article 17 recognizes the right of everyone to protection against arbitrary or unlawful interference with his privacy, family, home or correspondence, and against unlawful attacks on his honour and reputation. The obligations imposed by this article require the State party to adopt legal or other measures to give effect to the prohibition on such interference or attacks on the protection of this right. In the present case, the Committee finds that the sanctions list is available to everyone on the Internet under the title *The Consolidated List established and maintained by the 1267 Committee with respect to Al-Qaida, Usama Bin Laden, and the Taliban and other individuals, groups, undertakings and entities associated with them*. It also finds that the authors' names were included in the ministerial order of 31 January 2003 amending the ministerial order of 15 June 2000 implementing the Royal Decree of 17 February 2000, concerning restrictive measures against the Taliban of Afghanistan, as published in the State party's *Official Gazette*. It considers that the dissemination of personal information about the authors constitutes an attack on their honour and reputation, in view of the negative association that some persons could make between the authors' names and the title of the sanctions list. Moreover, many press articles that cast doubt on the authors' reputation have been published, and the authors are obliged, on a regular basis, to demand the publication of a right of reply.

10.13 The Committee takes note of the authors' argument that the State party should be held responsible for the presence of their names on the Consolidated List, which has led to interference in their private life and to unlawful attacks on their honour and reputation. It recalls that it was the State party that communicated all the personal information concerning the authors to the Sanctions Committee in the first place. The State party argues that it was obliged to transmit the authors' names to the Sanctions Committee (see paragraph 10.7 above). However, the Committee notes that it did so on 19 November 2002, without waiting for the outcome of the criminal investigation initiated at the request of the Public Prosecutor's Office. Moreover, it notes that the names are still on the lists in spite of the dismissal of the criminal investigation in 2005. Despite the State party's requests for removal, the authors' names and contact data are still accessible to the public on United Nations, European and State party lists. The Committee therefore finds that, in the present case, even though the State party is not competent to remove the authors' names from the United Nations and European lists, it is responsible for the presence of the authors' names on those lists. The Committee concludes that the facts, taken together, disclose that, as a result of the actions of the State party, there has been an unlawful attack on the authors' honour and reputation. Consequently, the Committee concludes that there has been a violation of article 17 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, finds that the facts before it disclose a violation of article 12 and article 17.

12. Pursuant to article 2, paragraph 3 (a), of the Covenant, the State party is bound to provide the authors with an effective remedy. Although the State party is itself not competent to remove the authors' names from the Consolidated List, the Committee is nevertheless of the view that the State party has the duty to do all it can to have their names removed from the List as soon as possible, to provide the authors with some form of compensation and to make public the requests for removal. The State party is also obliged to ensure that similar violations do not occur 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 and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation is found to have occurred, the Committee wishes to

receive from the State party, within 180 days, information about the measures taken to give effect to the present Views. The State party is also invited to publish the present Views.

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

Appendix A

Individual opinions on the Committee's decision on admissibility

Individual opinion (partly dissenting) by Committee members Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Iulia Antoanella Motoc

Having separated admissibility from the merits, the Committee might have been expected to give some reasons for declaring this communication admissible. Instead, in respect of articles 2, paragraph 3; 12; 14, paragraphs 1, 2 and 3; 15; and 17, it contents itself with the unsupported assertion that "the facts submitted by the authors are closely bound up with the substance of the case and should thus be considered on the merits".

Although it failed to make the argument explicitly, it is evident that the State party has done what it could to secure the authors' de-listing. In so doing it has provided the only remedy within its power. Accordingly, unless the Committee believes that the State party's mere compliance with the Security Council listing procedure (in the absence of bad faith by the State party or of manifest abuse or overstepping of the Security Council's powers) is capable of itself of violating the Covenant, it is not clear how the authors can still be considered victims, under article 1 of the Optional Protocol, of violations of the State party's obligations under the Covenant.

We acknowledge, of course, that the authors may have been unjustly harmed by operation of the extravagant powers the Security Council has arrogated to itself, including the obstacles it has created to the correction of error. It is more than a little disturbing that the executive branches of 15 Member States appear to claim a power, with none of the consultation or checks and balances that would be applicable at the national level, to simply discard centuries of States' constitutional traditions of providing bulwarks against exorbitant and oppressive executive action. However, the Security Council cannot be impleaded under the Covenant, much less the Optional Protocol.

Even if the authors were capable of being considered as victims of breaches of the State party's obligations under the Covenant, we are bemused by the Committee's novel assumption that there could be any merit to the authors' claims under article 2, paragraph 3, on its own. Nor do we understand on what basis it believes that articles 14 and 15 could be relevant to actions that the State party quite rightly maintains are administrative, not criminal.

(Signed) Sir Nigel **Rodley**

(Signed) Mr. Ivan **Shearer**

(Signed) Ms. 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.]

**Individual opinion (partly dissenting) of Committee members
Mr. Walter Kälin and Mr. Yuji Iwasawa**

We agree with the Committee that the authors' claims under article 2, paragraph 3, article 12, article 14, paragraph 1, and article 17 of the Covenant and the facts submitted by them are closely bound up with the substance of the case and therefore, without prejudice to the outcome of the case, should more appropriately be considered on the merits of the case.

At the same time, we maintain that the claims of violations of article 14, paragraphs 2 and 3, and article 15 should have been declared inadmissible *rationae materiae*. While it is true that freezing of the authors' financial assets is part of the fight against terrorism, this measure clearly does not serve the purpose of sanctioning the authors for their allegedly illegal behaviour but rather aims at preventing them from continuing their alleged support of terrorist activities, and thus is of administrative character.

(Signed) Mr. Walter **Kälin**

(Signed) Mr. 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 (dissenting) of Ms. Ruth Wedgwood

Under the Optional Protocol, this Committee has a limited purview. We can “consider” an individual communication invoking the norms of the International Covenant on Civil and Political Rights, only where the matter concerns “a violation by [a] State party” that has joined the Optional Protocol.^a

The matter under consideration here does not meet that test. The complaint of Belgian citizens Nabil Sayadi and Patricia Vinck is inadmissible because it pleads no cognizable violation by the State party.

The authors are complaining about the actions and decisions of the United Nations Security Council, not the acts of Belgium. Security Council resolutions have established administrative measures to prevent the financing and facilitation of international terrorism. These sanctions extend to “any individuals, groups, undertakings or entities associated with Al-Qaida, Usama bin Laden or the Taliban”, including those “who have participated in financing, planning, facilitating, recruiting for, preparing, perpetrating, or otherwise supporting terrorist activities or acts”.^b

The Security Council acted under Chapter VII of the United Nations Charter to impose this mandatory regime of economic sanctions. The financial controls are designed to thwart acts of catastrophic terrorism by private actors, including violence against civilians. The Council has acted to meet a “threat to the peace” and “to maintain or restore international peace and security”.^c

Article 48 (2) of the United Nations Charter provides that Security Council decisions “shall be carried out by the Members of the United Nations *directly* and through their action in the appropriate international agencies of which they are members” (emphasis added).^d Article 25 likewise provides that “The Members of the United Nations *agree to accept and carry out the decisions* of the Security Council in accordance with the present Charter” (emphasis added). And ultimately, Article 103 provides that “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”.

The Committee is not entitled to use the hollow form of a pleading against a State to rewrite those provisions. As the Committee acknowledges, it has no appellate jurisdiction to review decisions of the Security Council. Neither can it penalize a State for complying with those decisions. It would be inconsistent with the constitutional structure of the United Nations Charter, and its own responsibilities under the Covenant.

Belgium was required by the Security Council to provide information about the authors. The decision to “list” the authors under the financial sanctions directed against Al-

^a Optional Protocol to the International Covenant on Civil and Political Rights, article 1.

^b See Security Council resolution 1617 (2005), fifth preambular paragraph.

^c See Charter of the United Nations, Article 39.

^d Article 48 reads in full: “(1) The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine. (2) Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.”

Qaida and its affiliates was taken by the Sanctions Committee of the Security Council, not by Belgium.^e

Even apart from its limited remit, the Committee cannot take a blinkered account of what is at stake here. Human rights and the enforcement decisions of the Security Council share a common concern for the lives of innocent people. The Council's authority to address threats to international peace and security is to prevent the scourge of war, and in modern practice, this has included internecine civil conflicts as well. The Security Council has also concluded that international peace requires preventing acts of catastrophic terrorism.

The United Nations Charter recognizes the centrality of human rights, see Articles 55 and 56. And the Security Council must continue to weigh how to employ sanctions effectively and fairly. Economic sanctions have a considerable impact on civilians, even where they are not directed at specific entities or individuals. Indeed, so-called "smart sanctions" are an attempt to limit the impact of sanctions to persons believed to be assisting in the prolongation of a conflict.

But the Security Council also has the competence to prevent the commission of crimes against humanity, whether committed by State or non-State actors, as threats to international peace and security.^f The sanctions of the Security Council were undertaken to protect the foremost human right, namely, the right to life.

The authors of the complaint have not applied for the release of any portion of their assets under the humanitarian exception provided by Security Council resolution 1452 (2002). In addition, Belgium has obtained review of the basis for listing of the authors on two occasions.

The authors invoke three other claims against the State party, and each is equally wide of the mark. The first is article 14, paragraph 3, of the Covenant, which only applies to criminal matters. Belgium's initial criminal investigation examined allegations of "Mr. Sayadi's numerous alleged contacts, including those of a financial nature, with a number of leaders linked to the Al-Qaida network".^g There is no indication that the criminal investigation took excessively long,^h and the criminal matter has been resolved.

Article 14, paragraph 3, does not apply as such to international organizations, but in any event, the sanctions regime imposed by the Security Council is not a criminal proceeding. The financial controls are stated by Security Council resolution 1735 to be "preventive in nature and ... not reliant upon criminal standards set out under national law".ⁱ The type and plenitude of evidence required for a criminal charge and conviction in a State

^e It was also the determination of the Sanctions Committee, not of Belgium individually, that "when a charitable organization is listed" under the sanctions regime, "the main persons connected to such bodies must also be listed". See Views of the Committee above, paragraph 4.6. The authors served respectively as director and secretary of the Fondation Secours International, reported to be the European branch of an organization placed on the sanctions list as of October 2002. The authors assert that the Security Council's "imposition of sanctions on private individuals is not consistent with the purposes and principles of the United Nations". But that is not a question we are competent to entertain, and indeed, the authors' claim runs against the Security Council's established practice.

^f See, e.g., *The Responsibility to Protect*, Report of the International Commission on Intervention and State Sovereignty, December 2001, and Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change, 2004, paragraphs 199–205.

^g See Views of the Human Rights Committee above, para. 4.2.

^h See Views of the Human Rights Committee above, para. 4.10. The Belgian criminal investigation required the gathering of evidence abroad, through the time-consuming process of "letters rogatory".

ⁱ See Security Council resolution 1735 (2006), tenth preambular paragraph.

party may differ from the standards deemed appropriate by the Council for the imposition of precautionary civil sanctions. Some members of this Committee may not agree with the Security Council's choice. But without minimizing the importance of fairness and adequate review, it is not up to this Committee to determine what are the appropriate evidentiary standards for the Security Council's action.^j

Finally, there is no basis for claims under articles 15 and 17 of the Covenant. The authors have not been held guilty of a criminal offence, and the law defining terrorist crimes has not changed since the time of their challenged conduct. Hence, article 15, paragraph 1, does not apply. The exception of article 15, paragraph 2, also is relevant to Al-Qaida's violent acts targeting innocent civilians, or these are "criminal according to the general principles of law recognized by the community of nations". The idea of complicity and assistance to such acts, even by indirect means, is a part of customary law. As for article 17, there has been no "arbitrary" or "unlawful" interference with privacy, nor "unlawful attacks on [the authors'] honour or reputation". The only actions taken by Belgium were in accordance with the binding mandate of the Security Council.

(Signed) Ruth Wedgwood

[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.]

^j Compare High-level Panel, paragraph 182 ("Where sanctions involve lists of individuals or entities, sanctions committees should establish procedures to review the cases of those claiming to have been incorrectly placed or retained on such lists.").

Appendix B

Individual opinions on the Committee's decision on the merits

Individual opinion of Committee member Mr. Ivan Shearer (dissenting)

The Committee has found that the action of the State party in transmitting the names of the authors to the United Nations Sanctions Committee on 19 November 2002 constituted a violation of articles 12 and 17 of the Covenant inasmuch as that transmittal led to the placing of the authors on the Consolidated List with adverse consequences for their freedom of movement, their honour and reputation, and to interference in their private life. The Committee has found that the State party acted prematurely, and therefore wrongfully, in transmitting the authors' names to the Sanctions Committee before the conclusion of the criminal investigation into the authors' activities initiated by the State party's Public Prosecutor.

In my opinion, the Committee should have rejected this communication as unsubstantiated.

The State party was under an obligation to carry out the decisions of the United Nations Security Council by reason of article 25 of the Charter of the United Nations. Obligations under the Charter have priority over all other obligations by reason of Article 103 of the Charter. The Committee's reasoning, especially in paragraph 10.6 of its Views, appears to regard the Covenant as on a par with the Charter of the United Nations, and as not subordinate to it. Human rights law must be accommodated within, and harmonized with, the law of the Charter as well as the corpus of customary and general international law.^a

It may be that, with regard to the particular issue raised in the present communication of the implementation of Security Council resolution 1267 (1999) by the State party, there can be said to exist a certain margin of appreciation vested in States when giving effect to binding decisions of the Security Council. This discretion was recognized by the European Court of Justice in the joined cases of *Kadi and the Al Barakaat International Foundation v. Council of the European Union and the Commission of the European Communities* in its judgement dated 3 September 2008, and handed down after the pleadings in the present communication had closed.^b The Court nullified the European regulation under which the plaintiffs in that case had been sanctioned by reason of the failure to provide in the regulation a mechanism whereby those to be sanctioned would be informed of the evidence against them and allowed to be heard in answer. But the situation

^a For a relevant analogy, see Human Rights Committee, general comment No. 31 on the nature of the general legal obligation imposed on States parties to the Covenant (*Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40 (A/59/40)*, vol. I, annex III), paragraph 11, which, referring to human rights in times of armed conflict, stated that "While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive."

^b Cases C-402/05 and C-415/05 P, Judgement of the Court (Grand Chamber), paragraph 298.

of the State party in the present case is different. It was not Belgium that ordered the authors' listing; it merely provided information regarding the names of those associated with a certain organization. Only after the authors' names appeared as a consequence on the Consolidated List were the authors subject to the measures directed by the implementing Belgian ministerial orders and European orders.

The chronology of events, set out in paragraphs 2.1–2.3 of the Committee's Views, demonstrates, in my opinion, that the State party acted in good faith in responding to the demands of the United Nations Security Council under the terms of a binding resolution. It is not reasonable to assert that, even on the assumption of the possession of a degree of discretion as to the manner in which such obligations should be carried out, the State party should have awaited the outcome of its criminal investigation, launched on 3 September 2002 (and thus more than two months prior to the transmittal of their names to the Sanctions Committee), and not concluded until 19 December 2005. Regard must be had to the presumed imminence and seriousness of the danger posed by individuals and associations listed by the Sanctions Committee.

Indeed the European Court of Justice itself, in the case cited above, recognized that an immediate nullification of the impugned regulation implementing sanctions could lead to irreversible prejudice to the effectiveness of those measures found to be justified. Thus the Court suspended the execution of the order of nullification for a period of three months.^c

Furthermore, the State party has tried to secure the authors' delisting but to no avail. There is no other avenue open to it to correct the mistake that was made. Nor can there be a remedy where the State party acted in good faith to discharge its obligations under a superior law. There can be no violation of the Covenant in these circumstances.

(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.]

^c Judgement, paras. 373–376.

Individual opinion of Committee member Mr. Yuji Iwasawa (concurring)

Article 103 of the Charter of the United Nations provides that “in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”.

The State party argued that the rules on communications prevent the authors from challenging measures taken by the State party to implement its obligations under the Charter, and that Article 103 of the Charter absolves States of responsibility for failure to fulfil a low-ranking obligation.

The majority’s Views dismiss the State party’s arguments, stating merely that “the Committee considers that, *whatever the argument*, it is competent to consider the compatibility with the Covenant of the national measures taken to implement a resolution of the United Nations Security Council” (para. 10.6, emphasis added). I do not believe that the Committee should sidestep the issue raised by Article 103 of the Charter in this manner, and I therefore offer this concurring opinion.

The International Court of Justice stressed in the *Lockerbie* case that “Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter” and that “in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under *any other international agreement ...*” (Case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, Libyan Arab Jamahiriya v. United Kingdom, Provisional Measures, Order of 14 April 1992, 1992 ICJ 3, 15*, para. 39, *Libyan Arab Jamahiriya v. United States, 1992 ICJ 114, 126*, para. 42, emphasis added).

I take note that, besides Article 103, the Charter contains Article 24 which provides that in discharging its duties for the maintenance of international peace and security, “the Security Council shall act in accordance with the Purposes and Principles of the United Nations”. Article 1, paragraph 3, stipulates that one of the Purposes of the United Nations is to promote and encourage “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”, and Article 55 (c) provides that “the United Nations shall promote ... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”. And, under Article 25 of the Charter, the Members agreed to accept and carry out the decisions of the Security Council “in accordance with the present Charter”.

Against this background, in the present case, the Committee examined the actions of the State party in light of the obligations it had undertaken under the Covenant. The State parties to the Covenant are obliged to comply with the obligations under it to the maximum extent possible, even when they implement a resolution of the United Nations Security Council.

The Charter of the United Nations is a “relevant rule of international law” to be taken into account in interpreting the Covenant in accordance with article 31 (3) (c) of the Vienna Convention on the Law of Treaties. The Committee properly notes that “the obligation to comply with the Security Council decisions adopted under Chapter VII of the Charter may constitute a ‘restriction’ covered by article 12, paragraph 3, which is necessary to protect national security or public order” (para. 10.7).

In this case, the authors argued that the State party's proposal for the listing was premature and unjustified. The State party transmitted the authors' names to the Sanctions Committee on 19 November 2002, only some weeks after the opening of the investigation on 3 September 2002. The State party argued that the authors' association is the European branch of an organization which was placed on the sanctions list, and that when a charitable organization is mentioned in the list, the main persons connected with that body must also be listed. The Committee finds that "the State party's arguments are not determinative, particularly in view of the fact that other States have not transmitted the names of other employees of the same charitable organization to the Sanctions Committee" (para. 10.7), and concludes that "the facts, taken together, do not disclose that the restrictions of the authors' rights to leave the country were necessary to protect national security or public order" (para. 10.8).

In a similar vein, with regard to article 17 of the Covenant, the Committee finds that the State party is responsible for the presence of the authors' names on the list, and concludes that "as a result of the actions of the State party, there has been an unlawful attack on the authors' honour and reputation" (para. 10.13).

The State party could have acted otherwise while in compliance with the resolutions of the Security Council of the United Nations.

For the reasons stated above, I am of the view that Article 103 of the Charter of the United Nations does not prevent the Committee from reaching the conclusions drawn in the Views.

(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 Sir Nigel Rodley (concurring)

While I dissented on admissibility (together with Mr. Shearer and Ms. Motoc), I have joined the Committee in its finding on the merits of violations of articles 12 and 17, on the basis of the information submitted at the merits stage on behalf of the authors and uncontested by the State party. That information (para. 9.2) gave plausible grounds for concluding that the course of action adopted by the State party was not compelled by Security Council resolutions, notably resolution 1267 (1999).

The approach of the Committee is restricted to an analysis of the issues from the sole perspective of the Covenant. It does not directly address the possibility of conflict with the Security Council resolutions in question. If such a conflict exists, it is left to others to decide what may be the legal consequences.

My earlier dissent presumed that there was indeed a conflict between the State party's obligations under the Covenant and its "prima facie" obligation under Article 25 of the Charter of the United Nations to carry out the pertinent Security Council decisions (see *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, *Provisional Measures, Order of 14 April 1992, ICJ Reports 1992*, p. 3, para. 39; *Libyan Arab Jamahiriya v. United States of America*, *ICJ Reports 1992*, p. 114, para. 42; emphasis added). It also presumed that Charter Article 103 decided the conflict in favour of the obligations arising from the Security Council decisions. There was also an implicit presumption that the Committee was not well placed to assess the legal validity of the decisions, that is, whether the prima facie obligation to carry out the decisions was a definitive obligation. On further reflection, I have come to the view that the Committee could itself take at least a prima facie view as to the existence or otherwise of a conflict.

This then begs the question of what criteria should be applied in interpreting the resolutions for the purposes of establishing whether there is indeed a conflict. Article 24 of the Charter obliges the Security Council to act "in accordance with the purposes and principles of the United Nations". Article 1, paragraph 3, of the Charter establishes that one of the purposes of the United Nations is "promoting and encouraging respect for human rights and for fundamental freedoms". A strict interpretation of this language could suggest that the Security Council cannot act in a way that requires disrespect for those rights and freedoms.

I would not go that far. However, the Charter wording strongly suggests that the first interpretation criterion is that there should be a presumption that the Security Council did not intend that actions taken pursuant to its resolutions should violate human rights.

A second criterion would be a presumption that, in any event, there was no intention that a peremptory norm of international (human rights) law (*jus cogens*) should be violated. This has been recognized by both the European Court of Human Rights (*Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway* (2007)) and even the Court of First Instance of the European Communities (*Kadi and Al Barakat Foundation v. Council of the European Union* (2005)).

A third criterion would be that rights that are non-derogable in times of grave public emergency under international human rights treaties would be presumed not to be intended to be violated. Not all such rights are necessarily rules of *jus cogens*.

A fourth criterion would be that, even in respect of rights that may be derogated from during a public emergency, any departures would be conditioned by the principles of necessity and proportionality. In other words the steps required would have to be the

absolute minimum necessary by way of impinging on human rights norms (see Human Rights Committee general comment No. 29 (2001)). On the other hand, there is no firm basis for the claim sometimes made that, where the human rights rule in question is one of treaty obligation, there is a need for the pertinent procedural rules established by the relevant treaty to be followed. For instance, a treaty may require formal notification, perhaps via a declaration, in the case of derogation. I can see no reason why the operation of Security Council decisions adopted to address the threat to international peace and security should be hampered by such procedural provisions of an international agreement. It follows that the absence of compliance with such procedural rules by a State party to an international human rights agreement cannot be taken as evidence that derogation has not happened or cannot be effected.

Finally, State practice in relation to the Security Council decisions has to be a relevant interpretative factor. It is perhaps this criterion that has effectively been decisive for the Committee in the present case, insofar as the author argued and provided evidence that other States in the same position as the State party did not act in the same way as the State party.

While it is not an issue for the Committee, I would venture to suggest that these criteria would also be helpful to those called upon to assess the legal validity of a Security Council resolution.

Without aiming to apply the above criteria in a detailed way to the facts at hand, it could be that the Security Council, in its first response to the need to combat the uniquely virulent terrorism of Al-Qaida that culminated in the atrocities of 11 September 2001, might take measures involving derogation from rights susceptible of derogation (freedom of movement; privacy; property too, albeit not a right protected by the Covenant). Certainly, the listing procedure could be and was understood to contain such elements. Necessity and proportionality, however, do not vouchsafe permanent answers. On the contrary, the answers vary according to the conditions being faced. It is not easy to see why nearly a decade after the first resolution 1267 (1999) and seven years after 9/11 the Council could not have evolved procedures more consistent with the human rights values of transparency, accountability and impartial, independent assessment of facts. It may be hoped that it will not too much longer delay adjusting the procedures in line with these values. This would avoid putting States, including States party to the Covenant or other international human rights treaties, when determining the legislative or executive action to be taken, in the unenviable position of having to engage in difficult exercises in interpretation of or even challenges to the validity of provisions of Security Council resolutions.

(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.]

**CC. Communication No. 1473/2006, *Morales Tornel v. Spain*
(Views adopted on 20 March 2009, Ninety-fifth session)***

<i>Submitted by:</i>	Isabel Morales Tornel, Francisco Morales Tornel and Rosario Tornel Roca (represented by counsel, José Luis Mazón Costa)
<i>Alleged victims:</i>	The authors and Diego Morales Tornel
<i>State party:</i>	Spain
<i>Date of communication:</i>	17 April 2006 (initial submission)
<i>Subject matter:</i>	Death of a person serving a prison sentence as a result of AIDS
<i>Procedural issues:</i>	Failure to substantiate; lack of victim status
<i>Substantive issues:</i>	Right to life; right not to be subjected to arbitrary interference with family life
<i>Articles of the Covenant:</i>	6, paragraph 1; 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 20 March 2009,

Having concluded its consideration of communication No. 1473/2006, submitted on behalf of the authors 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 Isabel Morales Tornel, Francisco Morales Tornel and Rosario Tornel Roca, siblings and mother respectively of the deceased Diego Morales Tornel. They claim that the latter was the victim of a violation by Spain of article 6, paragraph 1; article 7; article 14, paragraph 1; and article 17 of the Covenant. The authors are represented by counsel. The Optional Protocol entered into force for the State party on 25 April 1985.

* 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. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

Factual background

2.1 Diego Morales Tornel, born in 1957, was sentenced to 28 years in prison for miscellaneous property crimes. He was held in pretrial detention from September 1981 until December 1982. On 20 June 1984 he was transferred to Murcia Prison to serve his sentence and stayed there until 12 October 1985. He was subsequently incarcerated alternately in Murcia Prison and prisons in Puerto de Santa María and Gijón, and was eventually moved to El Dueso Prison (Santander).

2.2 A medical report dated 28 November 1990 issued at the time of his arrival at Gijón Prison noted that he had been diagnosed as HIV-positive on 4 April 1989. He was treated with intravenous Retrovir (AZT) in that prison from 11 July to 19 August 1991, and underwent medical check-ups to assess his tolerance of the drug, which proved negative. In October 1991 he applied to the Directorate General of Penal Institutions for a transfer to Murcia Prison or a nearby facility so that he could be closer to his family, but his application was rejected on 25 November 1991.

2.3 According to the authors, there is no evidence in the records of the other prisons in which he was incarcerated, including El Dueso Prison to which he was transferred on 7 December 1991, of any medical examination on arrival. On 11 March 1993 the medical service of the latter facility treated him for various ailments and ordered his admission to hospital the following day. He remained in hospital until 10 April 1993. During his stay, he was diagnosed with and treated for AIDS, pulmonary tuberculosis, probable pneumonia and an intestinal infection. The authors claim that during the period from December 1991 to March 1993 he received no medical care and underwent no AIDS tests or check-ups.

2.4 On his return, the prison doctor requested the Director, on 29 April 1993, that Mr. Morales Tornel be given access to prison benefits for persons suffering from a serious and incurable disease. She noted in the medical report that the prisoner had been diagnosed with AIDS, that his condition had seriously deteriorated and that he was incurably ill.

2.5 On 4 May 1993 he was again hospitalized, suffering from dyspnoea, asthenia and general discomfort. He was discharged on 10 May 1993 after receiving two transfusions of concentrated red blood corpuscles, and was transferred to the prison infirmary. The hospital had given him two medical appointments for 28 May and 11 June 1993 but he was not escorted to the second appointment. From August 1993 he received antiretroviral treatment with Didanosina.

2.6 On 11 May 1993, the El Dueso Prison Treatment Board applied to the Directorate General of Penal Institutions for conditional release of the prisoner on health grounds. Commenting on his conduct in prison, the Board stated that after an initial period of maladjustment, Mr. Morales Tornel had gradually adapted to the regime of the prisons through which he had passed. His conduct in El Dueso could be characterized as normal. The Directorate General of Penal Institutions did not respond to the request.

2.7 On 10 May 1993, the El Dueso Prison Treatment Team issued a social report in which it noted that Mr. Morales Tornel was on good terms with his family, although their visits were rare on account of the geographical distance and his father's poor state of health due to cancer. The social officer had informed the prisoner's mother of his state of health and his admission to hospital. When the question of conditional release had been raised, his mother had no objection to taking him into the family home.

2.8 On 13 October 1993, the El Dueso Prison Treatment Board reiterated its request for conditional release, invoking the risk of death. The Directorate General of Penal Institutions turned down the request on 25 October 1993. It stated in the decision that a fresh application should promptly be filed by fax in the event of a significant worsening in the prisoner's condition.

2.9 In mid-October Mr. Morales Tornel abandoned his medical treatment for TB, claiming that it upset his stomach, causing him to vomit. On 26 October 1993 he was examined in his cell by the prison medical officer who, while noting his poor condition, did not have him transferred to the infirmary. On 11 December 1993 he was again visited in his cell by the prison doctor. He had then been suffering severe loss of liquid for 15 days, which resulted in cachectic syndrome, characterized by a gradual pathological loss of weight. He was admitted to hospital again on 13 December 1993.

2.10 The authors found out about the latest admission to hospital when they phoned Mr. Morales Tornel in prison to inform him of his father's death on 14 December 1993. They then spoke to the social officer, who advised them to refrain from informing him of the event until his physical and emotional condition had improved. Having been put in contact with the hospital, his mother decided to visit him, but Mr. Morales Tornel died on 1 January 1994 before the trip could be arranged.

2.11 The authors allege that the Directorate General had not been informed promptly, as it had requested, of the worsening of the prisoner's state of health. Moreover, notwithstanding the rapid deterioration in his state of health, he had received virtually no medical care in the prison before being admitted to hospital, the doctor having merely noted that he had stopped taking the TB medication.

2.12 On 28 December 1994 the authors filed a petition with the Ministry of Justice and the Interior concerning the inadequate functioning of penal institutions, invoking the pecuniary responsibility of the State. Specifically, they complained of the refusal to transfer the prisoner to Murcia Prison so that he could be visited by his family; the lack of adequate medical care; the denial of conditional release on account of illness; failure to inform the Directorate General of the deterioration in his state of health; and failure to inform his family of his terminal condition in December 1993. The authors requested compensation on all those grounds. The petition was, however, rejected.

2.13 The authors filed an administrative appeal with the National High Court. In that administrative appeal, they claimed that it was not known when Mr. Morales Tornel had been declared HIV-positive, since, despite their request, the administrative file does not contain medical records for the period from 1984 to 1990. Thus, he could have even contracted the infection while serving his prison sentence. While in the Gijón Prison from 11 July to 19 August 1991, he was treated with retroviral medication, but the treatment had to be suspended because he could not tolerate it. On transferring to the El Dueso Prison in December of that year, he was again administered the same treatment. In the light of his previous negative reaction to it, Mr. Morales Tornel abandoned it voluntarily. From December 1991 to March 1993, he was not administered any type of medication and did not undergo any AIDS tests or check-ups. By March 1993, not only had he developed AIDS but he had also contracted pulmonary tuberculosis, pneumonia and an intestinal infection while in prison.

2.14 The appeal was dismissed on 27 October 1999. The Court's judgement acknowledges that Mr. Morales Tornel had been diagnosed as a terminal AIDS patient on 12 March 1993, that no effective treatment was available at that time, and that the antiretroviral treatment would not improve the final prognosis. The judgement also notes that the isolation of the patient in such circumstances could not have improved his quality of life and life expectancy. It also notes that it could be concluded from the evidence, and, in particular, from the results of the expert medical opinion, that the medical treatment received by Mr. Morales Tornel during his imprisonment at El Dueso Prison was the correct treatment for his illness and in line with the procedures normally recommended and applied at the time.

2.15 According to the authors, the judgement disregards the fact that Mr. Morales Tornel had been declared HIV-positive on 4 April 1989, as noted in his administrative file. With regard to the denial of conditional release, the authors show that the grounds invoked by the Court are unrelated to that decision, since it had nothing to do, in their view, with release on account of a risk to the prisoner's life.¹

2.16 The authors filed an appeal in cassation with the Supreme Court against the National High Court judgement. The application was dismissed on 29 April 2004. On 8 March 2005 they filed an application for *amparo* with the Constitutional Court, alleging violations of Mr. Morales Tornel's right to life and the right to family life as well as their own right to family life and right not to be subjected to inhuman treatment. The application was dismissed on 23 March 2006. With regard to the violation of the right to life and the right not to be subjected to inhuman treatment invoked by the authors, the Court affirmed that they were not holders of such rights inasmuch as it was their deceased relative who had suffered the alleged shortening of his life and inhuman treatment. An application for *amparo* could only serve to protect the rights of those directly affected, in other words the holders of the subjective right that had allegedly been violated. In view of its basically subjective character, an application for *amparo* could not give rise to rulings concerning the fundamental rights of third parties. With regard to the right to family life, the Court held that the right in question did not include mere expectations of enjoyment of a particular kind of life, either within the family or as an individual, that one of the parties to the dispute considered to be desirable.

The complaint

3.1 The authors claim that the refusal to grant Mr. Morales Tornel conditional release seven months before his death constitutes a violation of article 6, paragraph 1, of the Covenant. Furthermore, although Mr. Morales Tornel was hospitalized after the decision by the Directorate General of Penal Institutions of 25 October 1993, the circumstances of his custody were not reviewed as requested in the Directorate General's decision. That was equivalent to disregard of the sick prisoner's right to life.

3.2 The authors further allege that a large number of prisoners with AIDS have died in Spanish prisons. These prisoners are not only deprived of the necessary medical care but are also particularly at risk of contracting infectious diseases, which constitute an additional health hazard. In the case of Mr. Morales Tornel, the antiretroviral treatment only began in 1992, although he had been diagnosed as HIV-positive in April 1989.²

3.3 The authors claim to be victims of inhuman treatment in violation of article 7 of the Covenant. This is due to the fact that the prison failed to inform them that Mr. Morales

¹ The judgement states: "release (...) clearly cannot cure a disease that has been diagnosed as incurable but may be justified solely on the ground that it promotes a relative improvement and slower progression of the disease with fewer acute episodes, since the change of environment has a positive impact on a human being's psychosomatic well-being, whereas remaining in prison has a correspondingly negative impact. This is so, we wish to stress, provided that the other legal and regulatory preconditions for conditional release (...) have been met. In short, only a serious and incurable illness, the progression of which would be unfavourably affected by remaining in prison, entailing a deterioration in the patient's health and thus shortening his or her life, even where there is no imminent risk of death, can justify the release of the prisoner concerned, provided that the other conditions laid down in the Criminal Code have also been met." The conditions in question include a record of good conduct and an individually established favourable prospect of social reintegration.

² The application to the National Court notes that he was treated with Retrovir from 11 July until 19 August 1991 but proved allergic to the drug.

Tornel was permanently confined to his cell, that he was too weak to call them, and that he was at an advanced stage of AIDS with imminent risk of death. The prison health service was aware of the seriousness of his condition but his family was not.

3.4 The authors assert that Mr. Morales Tornel was denied the right of contact with his family because of the distance of the prison from his family's place of residence. His request to be transferred to a prison close to Murcia was rejected in 1991. Moreover, the family was not informed of the seriousness of his condition. They learned of his final admission to hospital only when they attempted to inform him of his father's death. Those facts constitute a violation of the right to family life of both Mr. Morales Tornel and of the authors under article 17 of the Covenant.

3.5 Lastly, the authors claim that the Constitutional Court denied them the right to justice in violation of article 14, paragraph 1, of the Covenant, by maintaining that they were not holders of the rights they invoked.

State party's observations on admissibility and on the merits

4.1 In its observations of 10 July 2006, the State party notes that the complaint regarding failure to inform the family of the state of health of Mr. Morales Tornel was not raised at the domestic level. The complaint is in any case unwarranted. In fact, the file before the Committee contains a report by the El Dueso Prison Treatment Team, dated 10 May 1993, which states that the prisoner's mother had been kept informed by telephone of her son's condition and hospitalization. The application filed with the National Court explicitly acknowledges that Mr. Morales Tornel's mother was informed of his admission to hospital and that she decided to visit her son.

4.2 The complaint filed by the authors in the domestic courts concerned pecuniary responsibility for compensation for the alleged moral and psychological damage suffered as a result of the abnormal functioning of the prison administration. No allegation of criminal failure to render assistance to the prisoner was made and no specific complaint of that nature was filed. No recourse was had either to the special procedure for judicial protection of fundamental rights. The Supreme Court judgement, which the authors did not provide to the Committee, states in response to the authors' allegations concerning lack of medical care that those allegations are contrary to the established facts: "There are medical visit sheets in the record attesting to the fact that the appellant underwent medical examinations on a number of occasions before the illness was diagnosed; for example, on 11 September 1990 an inflammation of the ear was diagnosed; he was examined on 12 November 1990; treatment was provided on 19 December 1990, 2 July 1991, 10 July 1991, 19 September 1991 and 10 December 1991, and an examination was conducted on 14 January 1992. In general, the lack of a record of any other medical examinations and treatment of the prisoner does not in itself imply that they did not take place. It is due to the fact that the administrative complaint was initially filed on the basis of the appellant's death from AIDS, so that the administrative file and the decision on the administrative complaint contain no record of previous medical care."

4.3 There is no record either of any appeal against the decision refusing conditional release, although the General Prison Act authorizes the Prison Oversight Judge to deal with complaints from prisoners concerning the prison regime and treatment whenever their fundamental rights or prison rights and benefits are affected. That accounts for the Constitutional Court's finding that the application for *amparo* related solely to issues pertaining to the claim for compensation. It can be held, under those circumstances, that the complainants acted exclusively in defence of their own rights in the domestic courts and that they lack the status of victims of the alleged violations for the purposes of the Optional Protocol. They cannot claim either to have exhausted domestic remedies, since no domestic

complaint or application was filed by the prisoner regarding many of the alleged facts that occurred long before the prisoner's death, when he was still fit and entitled to do so.

4.4 The State party argues that the rights invoked are not covered by the Covenant, which contains no right to serve a sentence in a penal institution of the prisoner's own choosing or a right to conditional release.

4.5 The State party draws attention to the domestic courts' thorough examination of the facts, especially the medical care received by the prisoner, which cannot be challenged as unreasonable or arbitrary. Thus, the Supreme Court held in its judgement that the medical care provided to the prisoner during his stay at El Dueso Prison was the correct treatment for his illness. The medical care received was in line with the procedures normally recommended and applied at the time, and there was no causal relationship either between the patient's death and the medical treatment, or between the medical treatment and the deterioration in his condition or the increase in his physical and psychological suffering.

4.6 With regard to the violation of article 14, paragraph 1, alleged by the authors, the State party affirms that there is nothing in the Covenant that would support a right of access to a constitutional court in defence of the rights of third parties. Their right of access to justice was in no way impeded by the mere fact the Constitutional Court refused on solid grounds to attribute to the right in question the scope asserted by the authors.

4.7 In the light of the foregoing, the State party requests the Committee to declare the communication inadmissible on the ground that the authors lack the status of victims; that domestic remedies have not been exhausted; that the claims have not been adequately substantiated under article 2 of the Optional Protocol; and that the communication is clearly an abuse of the provisions of the Covenant, in accordance with article 3 of the Protocol. The State party further requests the Committee to declare that it has in no way violated the Covenant.

4.8 On 6 September 2006 the State party replied on the merits, making the same observations as on the question of admissibility.

Authors' comments on the State party's observations

5.1 On 22 January 2007 the authors submitted comments on the State party's observations. With regard to their status as victims, they claim that no doubt was cast on their status either by the Ministry of Justice, the National Court or the Supreme Court. The Constitutional Court was alone in holding that only the deceased had standing to defend his right to life. With regard to the exhaustion of domestic remedies, the authors point out that they pursued their case as far as the Constitutional Court, invoking the same complaints as had been raised before the Ministry of Justice and the Interior.³

5.2 The authors reiterate their initial complaints, claiming that the State party has distorted their petitions, for instance regarding the failure to communicate information concerning the patient to his family when his condition seriously deteriorated in December 1993.

³ See paragraphs 2.12 to 2.16 above.

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 As it is required to do pursuant to article 5, paragraph 2 (a), of the Optional Protocol, the Committee ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee takes note of the State party's argument that the communication should be considered inadmissible on the ground that the authors lack the status of victim of the alleged violations, since their legal action at the domestic level was taken exclusively in defence of their own rights and not in defence of the rights of the deceased. The Committee notes, however, that some of the complaints raised by the authors with the Committee refer to violations of their own rights under the Covenant.

6.4 The authors claim that their deceased relative's right under article 6, paragraph 1, of the Covenant was violated because of the refusal to grant him conditional release when he had only a few months to live, and because he did not receive the medical care that his condition required. The Committee recalls its jurisprudence, as well as rule 96 (b) of its rules of procedure, in support of the finding that the authors are entitled to submit a communication alleging that the rights of a deceased relative were violated. The fact that the alleged victim is deceased therefore cannot constitute an impediment to the admissibility of the communication. Furthermore, the Committee considers that the claims regarding the violations of article 6, paragraph 1, of the Covenant have been adequately substantiated for the purposes of admissibility and that the authors exhausted the domestic remedies. This part of the communication is therefore declared admissible.

6.5 The authors claim that Mr. Morales Tornel's right to family life under article 17 of the Covenant was violated because he was kept in prisons that were a long way away from his family's place of residence and because his family was not informed of the seriousness of his condition. The Committee notes that Mr. Morales Tornel applied to the Directorate General of Penal Institutions for a transfer in October 1991 but there is nothing in the file to show that he attempted to obtain a transfer by other means when this request was turned down. Nor is there any evidence in the file that he attempted to inform his family of the seriousness of his condition in the months prior to his death. Consequently the Committee finds this part of the communication inadmissible under article 2 of the Optional Protocol, as insufficiently substantiated.

6.6 The authors also claim that their right not to receive inhuman treatment, under article 7 of the Covenant, was violated because they were not informed by the prison of the seriousness of their deceased relative's condition. They further claim that this same fact constitutes a violation of the right to family life under article 17 of the Covenant. The Committee notes that these complaints were filed in the form of administrative litigation and *amparo* proceedings before the Constitutional Court. Thus, the available domestic remedies were exhausted.

6.7 Having made these findings, the Committee considers it unnecessary to rule on admissibility in respect of the authors' allegations pertaining to a possible violation of article 14, paragraph 1, of the Covenant, because of the refusal of the Constitutional Court to find that the authors were victims.

6.8 As there are no other impediments to admissibility, the Committee decides that the communication is admissible to the extent that it raises issues pertaining to article 6,

paragraph 1, with regard to Mr. Morales Tornel; and articles 7 and 17 of the Covenant with regard to the authors.

Consideration of the merits

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

7.2 The authors claim that the rights of their deceased relative were violated under article 6, paragraph 1, of the Covenant because of the refusal to grant him conditional release when he had only a few months to live, and because he did not receive the medical care that his condition required. The Committee notes that Mr. Morales Tornel had been diagnosed as incurably ill when the application was filed and that, given the characteristics of his disease, there are no grounds for establishing a causal relationship between his death and his continuing incarceration. With regard to the claim that he did not receive the medical care in prison that his condition required, the Committee notes the lack of sufficient information in the file to enable it to find that the medical treatment was inadequate and that the evaluation of facts and evidence by the domestic courts in that regard suffered from arbitrariness. The Committee therefore does not have sufficient evidence to affirm that Mr. Morales Tornel's rights were violated with respect to article 6 of the Covenant.

7.3 The Committee must also decide whether the fact that the prison administration failed to inform the authors of the seriousness of Mr. Morales Tornel's condition during the final months of his life constitutes a violation of the right of the authors not to be subjected to arbitrary interference with their family. The Committee recalls its jurisprudence to the effect that arbitrariness within the meaning of article 17 is not 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.⁴

7.4 The Committee notes that in April 1993 Mr. Morales Tornel was diagnosed as an incurably ill patient whose health was seriously deteriorating. In May 1993 the prison in which he was incarcerated conveyed this information to his family, which stated its willingness to take care of the patient if he were granted conditional release. Although his condition continued to deteriorate, the prison, according to the information in the file, did not resume contact with the family. Nor did it inform the Directorate General of Penal Institutions of this deterioration, despite the fact that, in turning down the request for conditional release, on 25 October of that year, the Directorate General had stated that a fresh application should promptly be filed in the event of a significant worsening in the prisoner's condition. The prison also failed to inform the family of his final admission to hospital, on 13 December 1993, when the patient was already terminally ill. The family only discovered that he was in hospital when they themselves tried to contact Mr. Morales Tornel. Under the circumstances, the Committee considers that the passive attitude of the prison deprived the authors of information which undoubtedly had a significant impact on their family life, and which may be characterized as arbitrary interference with the family and as a violation of article 17, paragraph 1, of the Covenant. At the same time, the State party has not demonstrated that such interference was reasonable or compatible with the purposes, aims and objectives of the Covenant.

⁴ See communication No. 558/1993, *Canepa v. Canada*, Views of 3 April 1997, paragraph 11.4.

7.5 Having made this finding, the Committee considers it unnecessary to rule on the possible existence of a violation of article 7 on the basis of the same allegations.

8. In the light of the foregoing, 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 a violation of article 17, paragraph 1, of the Covenant.

9. Pursuant to article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including appropriate compensation for the violation that occurred. The State party is also under an obligation to ensure that similar violations do not occur 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 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 these 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.]

**DD. Communication No. 1479/2006, *Persan v. Czech Republic*
(Views adopted on 24 March 2009, Ninety-fifth session)***

<i>Submitted by:</i>	Mr. Jaroslav Persan (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Czech Republic
<i>Date of communication:</i>	17 April 2006 (initial submission)
<i>Subject matter:</i>	Discrimination on the basis of citizenship with respect to property restitution
<i>Procedural issues:</i>	Abuse of right of submission; exhaustion of domestic remedies
<i>Substantive issues:</i>	Equality before the law; equal protection of the law
<i>Article of the Covenant:</i>	26
<i>Articles of the Optional Protocol:</i>	3; 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 2009,

Having concluded its consideration of communication No. 1479/2006, submitted to the Human Rights Committee by Jaroslav Persan 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 Jaroslav Persan, a citizen of the United States of America and the Czech Republic, born on 23 April 1928, currently residing in Texas, United States. 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. The Optional Protocol entered into force for the State party on 22 February 1993. The author is not represented.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Lazhari Bouzid, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli and Mr. Krister Thelin.

An individual opinion signed by Committee members Mr. Abdelfattah Amor, Mr. Ahmad Amin Fathalla and Mr. Lazhari Bouzid has been appended to the present Views.

Facts as presented by the author

2.1 The author used to live in the Czech Republic. His possessions included a private house and the surrounding land in the Rímov community, district of České Budějovice. The original property belonged to Vojtěch Persan since 1933. Upon his death, the author inherited half of that property. He purchased the other half in 1974.

2.2 The author left the Czech Republic with the intention to emigrate on 14 August 1981. On 3 May 1982, the District Criminal Court found him guilty of leaving the country and sentenced him to the punishment of property confiscation (1T 97/82–38). As part of the decision, the author's property was seized by the Government. The property was subsequently sold to another private person (reg. 212/86).

2.3 The author obtained United States citizenship on 1 May 1989. According to the Naturalization Treaty between Czechoslovakia and the United States of America of 16 July 1928, he automatically lost his Czech citizenship when acquiring American citizenship.

2.4 On 17 December 1990, the decision of the District Criminal Court was overturned by resolution of the District Court of České Budějovice under law 119/90 on judicial rehabilitation. On 13 October 1999, the District Office in České Budějovice issued a certificate of citizenship of the Czech Republic to the author.

2.5 On 15 July 1996, the author applied to the District Land Office in České Budějovice for restitution of his property under law 30/1996. On 28 May 1999, the District Land Office rejected the application on the ground that the author was not a Czech citizen on 31 January 1996, as required under Law 30/1996.

2.6 The author appealed to the Regional Court in České Budějovice on 19 July 1999. The Regional Court confirmed the decision of the District Land Office on 22 November 1999. It argued that the author was not a Czech citizen when Law 30/1996 entered into force, nor when he filed the restitution claim and did not become a citizen before the deadline for filing a claim. The fact that the author acquired Czech citizenship on 13 October 1999 was deemed irrelevant. The author did not attempt other judicial remedies in the Czech Republic, as he anticipated that they would be futile.

2.7 The author applied to the European Court of Human Rights on 5 August 2000, but his case was declared inadmissible on 21 February 2001 because it was not submitted within the statutory six-month time-limit.

The complaint

3. The author claims a violation of article 26 of the Covenant by the Czech Republic.

The State party's observations on admissibility and merits

4.1 In its submission of 8 January 2007, the State party addresses both admissibility and merits of the communication. As to admissibility, the State party notes that the decision of the European Court of Human Rights in the author's case was rendered on 21 February 2001. Thus, over five years elapsed before the author turned to the Committee on 17 April 2006. In the absence of any explanation by the author of the reason for the delay and in reference to the Committee's decision in *Gobin v. Mauritius*,¹ the State party invites the

¹ Communication No. 787/1997, inadmissibility decision adopted on 16 July 2001.

Committee to consider the communication inadmissible as an abuse of the right to submit a communication, under article 3 of the Optional Protocol.

4.2 In addition, the State party notes that the author failed to initiate an action under section 8(1) of law 229/1991 against those natural persons to whom part of the property was transferred in 1986, requesting the determination that the ownership title to the properties had passed to him. The State party argues that the author has failed to exhaust domestic remedies in respect of this part of his claim.

4.3 On the merits of the case, the State party refers to its observations submitted to the Committee in similar cases,² in which it outlined the political circumstances and legal conditions for the restitution laws. The purpose of these laws was only to eliminate some of the injustices committed by the communist regime, as it was not feasible to eliminate all injustices committed during that time. The State party refers to the decisions by the Constitutional Court, which repeatedly considered the question of whether the precondition of citizenship complied with the Constitution and the fundamental rights and freedoms and found no reason for abolishing it.

4.4 The State party adopted the restitution laws, including Law No. 229/1991, as part of two-fold efforts: first, in an effort to mitigate, to a certain degree, at least some of the injustices committed earlier; second, in an effort to carry out speedily a comprehensive economic reform with a view to introducing a market economy. The restitution laws were part of the objective to transform society and to carry out economic reform including the restitution of private property. The condition of citizenship was included to ensure that private owners would take due care of the property.

4.5 The State party highlights that persons requesting property restitution could apply to Czech national authorities for citizenship also in 1990 and 1991, and that they stood a realistic chance of acquiring the citizenship, thereby meeting the precondition set forth by the restitutions laws. By failing to submit an application for Czech citizenship in this period, the author deprived himself of the opportunity to meet the nationality requirement in good time.

4.6 The State party notes that, in its judgment of 22 November 1999, the Regional Court held that if the properties had passed to natural persons the author should have sought the determination of the ownership title by an action brought against these natural persons rather than the Land Office. The State party notes that the author has not brought such an action. Had he initiated such an action, he would also have had to prove, in addition to citizenship, that these persons had acquired the properties on the basis of illegal preferential treatment or for a price lower than the price corresponding to the pricing regulations then in force.

4.7 With respect to the author's allegation that no domestic remedies were available to him, the State party argues that, in relation to the property that was transferred to private individuals, he could have requested a determination of ownership under section 8, subsection 1, of law 229/1991. The decision taken as a result of that action is subject to appeal. In respect of the part of the property that remained in the hands of the State, the author had available a remedy against the Land's Office decision under Section 2501 of the Rules of Civil Procedure before the Regional Court.

² See, for example, communication No. 586/1994, *Adam v. Czech Republic*, Views adopted on 23 July 1996.

The author's comments on the State party's observations

5.1 In his comments, dated 8 March 2007, on the State party's submission, the author states that he could not have re-acquired Czech citizenship by law 88/1990, as indicated by the State party. As regard the portion of property that passed to private hands, the author contends that he was never notified of the disposition of his property and that he did not know to whom it had been sold. In any case, the author claims that he was not an "entitled person" under the restitution laws as he did not meet the nationality requirement.

5.2 The author rejects the State party's argument that his communication is inadmissible as an abuse of the right of submission. He explains that the delay in submitting the communication was caused by lack of information and contends that the State party does not publish the Committee's decisions. As regards exhaustion of domestic remedies, the author reiterates that no domestic remedies were available to him.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The Committee notes that a similar claim filed by the authors was declared inadmissible by the European Court of Human Rights on 21 February 2001. However, article 5, paragraph 2 (a), of the Optional Protocol does not constitute an obstacle to the admissibility of the instant communication, since the matter is no longer pending before another procedure of international investigation or settlement, and the Czech Republic has not entered a reservation to article 5, paragraph 2 (a), of the Optional Protocol.³

6.3 The Committee notes the State party's argument that the communication should be considered inadmissible as constituting an abuse of the right to submit communications under article 3 of the Optional Protocol, in view of the delay in submitting the communication to the Committee.⁴ The State party asserts that the author waited over five years after the inadmissibility decision of the European Court of Human Rights (over 6 years after exhaustion of domestic remedies) before submitting their complaint to the Committee. The author argues that the delay was caused by the lack of information available. The Committee reiterates that the Optional Protocol does not establish any deadline for the submission of communications, and that the period of time elapsing before doing so, other than in exceptional cases, does not in itself constitute an abuse of the right to submit a communication. In the instant case, the Committee does not consider a delay of seven years since the exhaustion of domestic remedies or over five years since the decision of another procedure of international investigation or settlement as an abuse of the right of submission.⁵

³ See communication 1463/2006, *Gratzinger v. Czech Republic*, Views adopted on 25 October 2007, paragraph 6.2.

⁴ See paragraph 4.1.

⁵ Communication No. 1484/2006, *Lnenicka v. Czech Republic*, Views adopted on 25 March 2008, para. 6.3; Communication No. 1485/2006, *Vlcek v. Czech Republic*, Views adopted on 10 July 2008, para. 6.3; communication No. 1488/2006, *Süsser v. Czech Republic*, Views adopted on 25 March 2008, para. 6.3; communication No. 1305/2004, *Villamon Ventura v. Spain*, Views adopted on 31 October 2006, para. 6.4.

6.4 With respect to the requirement of exhaustion of domestic remedies, the Committee notes that the State party has challenged the admissibility of the part of the communication relating to the property that was transferred by the State to private individuals. The Committee recalls that only such remedies have to be exhausted which are both available and effective. The Committee notes that although the author failed to file an action against those private individuals, the State party itself acknowledged that the requirement of nationality was also applicable to this claim.⁶ Thus, the Committee considers that such an action would not have offered the author a reasonable chance of obtaining effective redress and therefore would not have constituted an effective remedy for the purpose of article 5, paragraph 2 (b), of the Optional Protocol. In the absence of any further objections to the admissibility of the communication, the Committee declares the communication admissible in so far as it may 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 is whether the denial of the author's request for restitution of his property on the ground that he did not fulfil the citizenship requirement contained in Act 229/1991, as amended, constitutes a violation of the Covenant.

7.3 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 26.⁷

7.4 The Committee recalls its Views in the cases of *Simunek, Adam, Blazek, Marik, Kriz, Gratzinger* and *Zdenek and Ondracka*⁸ where it held that article 26 had been violated, and that it would be incompatible with the Covenant to require the author to obtain Czech citizenship as a prerequisite for the restitution of his property or, alternatively, for the payment of appropriate compensation. Bearing in mind that the author's original entitlement to his properties had not been predicated on citizenship, it found that the citizenship requirement was unreasonable. In the case *Des Fours Walderode*,⁹ 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.

⁶ See paragraph 4.6.

⁷ See inter alia communication No. 182/1984, *Zwaan-de Vries v. The Netherlands*, Views adopted on 9 April 1987, paragraph 13.

⁸ Communication No. 516/1992, *Simunek v. Czech Republic*, Views adopted on 19 July 1995, para. 11.6; *Adam v. Czech Republic* (note 2 above), para. 12.6; communication No. 857/1999, *Blazek v. Czech Republic*, Views adopted on 12 July 2001, para. 5.8; communication No. 945/2000, *Marik v. Czech Republic*, Views adopted on 26 July 2005, para. 6.4; communication No. 1054/2002, *Kriz v. Czech Republic*, Views adopted on 1 November 2005, para. 7.3; *Gratzinger v. Czech Republic* (note 3 above), Views adopted on 25 October 2007, para. 7.5; and communication No. 1533/2006, *Zdenek and Ondracka v. Czech Republic*, Views adopted on 2 November 2007, para. 7.3.

⁹ Communication No. 747/1997, *Des Fours Walderode v. Czech Republic*, Views adopted on 30 October 2001, paras. 8.3–8.4.

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 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 provide the author with an effective remedy, including compensation if the property in question cannot be returned. The Committee reiterates that the State party should review its legislation and practice 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 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.]

Appendix

Individual opinion by Committee member Mr. Abdelfattah Amor (dissenting)

In this communication, the Committee does not consider the delay of more than seven years since the exhaustion of domestic remedies and over five years since the decision of a procedure of international investigation or settlement as an abuse of the right of submission. It therefore concludes that the communication is admissible.

We do not share the Committee's opinion in that regard and would like to:

1. *Refer* to my dissenting opinion on communication No. 1533/2006, *Zdenek and Ondracka v. Czech Republic*;
2. *Point out* that the author provided an explanation for the delay in submitting his communication only in response to the State party's assertion that the communication constituted an abuse of rights;
3. *Specify* that the only explanation given by the author to justify the delay was that he had not been aware of the Committee's decisions since the State party did not publish them, which is neither a reasonable nor a convincing explanation for the delay, leaving the way wide open for all kinds of evasions and seriously jeopardizing legal certainty;
4. *Stress* that the Committee has not taken it upon itself to analyse and establish whether the delay was justified, thereby giving the impression that it was distancing itself from what its jurisprudence consistently required or did not consider it important in this particular case to establish whether the delay was justified or not;
5. *Note with regret* the inconsistencies in the Committee's jurisprudence regarding the deadline for the submission of communications, which undermined the authority of the Committee's Views and called into question its credibility.

(Signed) Mr. Abdelfattah **Amor**

[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 members Mr. Ahmad Amin
Fathalla and Mr. Bouzid Lazhari**

We associate ourselves with the opinion of Mr. Abdelfattah Amor's in this case.

(Signed) Mr. Ahmad Amin **Fathalla**

(Signed) Mr. Bouzid **Lazhari**

[Done in French, English 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.]

EE. Communication No. 1483/2006, *Basongo Kibaya v. Democratic Republic of Congo* (Views adopted on 30 July 2009, Ninety-sixth session)*

<i>Submitted by:</i>	Mr. Philémon Basongo Bondonga (represented by counsel, Mr. Dieudonné Diku)
<i>Alleged victim:</i>	Mr. Baudouin Basongo Kibaya
<i>State party:</i>	Democratic Republic of the Congo
<i>Date of communication:</i>	10 March 2004 (initial submission)
<i>Subject matter:</i>	Torture by members of the Armed Forces
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issue:</i>	Prohibition of torture and cruel, inhuman or degrading punishment or treatment
<i>Articles of the Covenant:</i>	7 and 2, paragraph 3 (c)
<i>Articles of the Optional Protocol:</i>	2; 4, paragraph 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 30 July 2009,

Having concluded its consideration of communication No. 1483/2006, submitted to the Human Rights Committee by Mr. Philémon Basongo Bondonga 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 10 March 2004, is Mr. Philémon Basongo Bondonga, a citizen of the Democratic Republic of the Congo, born in Kinshasa on 25 May 1984. He has submitted the communication on behalf of his father, Mr. Baudouin Basongo Kibaya, a citizen of the Democratic Republic of the Congo, born in Kisangani on 15 May 1954, who died on 7 March 2004 of causes unrelated to the events described below. The author claims that his father was a victim of violations by the Democratic Republic of the Congo of article 7 and article 2, paragraph 3 (c), of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the Democratic Republic of the Congo on 1 November 1976.

* The following members of the Committee participated in the consideration of this communication: Mr. Mohammed Ayat, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Ms. Christine Chanet, 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. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

The facts as submitted by the author

2.1 On 23 April 2001, Lieutenant Basongo Kibaya was forced to hand over his service weapon to Albert Kifwa Mukuna, Commander of the Lukunga District, headquartered in the Lufungula camp. He immediately reported the matter to his superior officers in order to avoid being punished for losing his weapon. After he had done so, Commander Albert Kifwa Mukuna ordered his arrest on 30 April 2001. At approximately 11 p.m. on that same day, the Commander went with his two bodyguards, Joel Betikumesu and John Askari, to Baudouin Basongo Kabaya's cell and ordered that Mr. Basongo be given 400 lashes on the buttocks. As a result of this torture, Mr. Baudouin Basongo Kibaya became sexually impotent.

2.2 On 4 May 2001, Mr. Baudouin Basongo Kibaya lodged a complaint with the Office of the Prosecutor-General of the Military Court against Commander Albert Kifwa Mukuna for arbitrary arrest and physical torture. In October 2002, following several months of investigations, the Military Prosecutor's Office scheduled the case for a hearing by the military court. On 29 January 2003, the military court sentenced Commander Albert Kifwa Mukuna to a term of imprisonment of 12 months and ordered him to pay damages of 250,000 Congolese francs (the equivalent of US\$ 400). His two bodyguards were each sentenced to six months of imprisonment.

2.3 The public prosecution service responsible for enforcing sentences left Albert Kifwa Mukuna and his two bodyguards at liberty, despite the fact that the men had been convicted.

Complaint

3.1 The author maintains that there was a violation of article 7 and of article 2, paragraph 3 (c), of the International Covenant on Civil and Political Rights.

3.2 The author considers the sentence which the military court handed down to the torturers to be unusually lenient and claims that he was unable to make use of effective remedies. He further maintains that the sentence was not enforced, even though the enforcement of sentences is one of the functions of the public prosecution service.

3.3 As far as the exhaustion of domestic remedies is concerned, the author argues that it was not possible to file an ordinary appeal against the military court's judgement, as the court heard and decided the case at first and last instance. He refers to Act No. 023/2002 of 18 November 2002 concerning the Military Code of Justice, article 378 of which stipulates that "military court decisions which acquire the force of *res judicata* are not governed by the present Act". Moreover, this court was abolished in March 2003 and it pronounced only the operative part of its judgements, without issuing an executory copy or any copy thereof. The author furthermore states that, under Congolese law, the grounds for filing an appeal are incompetence and a breach of law, *inter alia*; neither of these two conditions obtains in the particular case before the Committee.

Lack of cooperation by the State party

4. In notes verbales dated 18 July 2006, 8 June 2007, 29 July 2008 and 18 February 2009, the State party was requested to convey information to the Committee on the admissibility and merits of the communication. The Committee notes that it did not receive the requested information. It regrets that the State party did not supply any relevant information on the admissibility or the merits of the author's allegations. It recalls that, under the Optional Protocol, the State concerned is required to submit to the Committee written explanations or statements clarifying the matter and indicating what remedies, if any, may have been taken. In the absence of a reply of any kind from the State party, the

Committee must give due weight to the author's allegations insofar as they 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 decide, in accordance with rule 93 of its rules of procedure, whether or not the communication 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 Having taken note of the author's arguments concerning the exhaustion of domestic remedies and taking into account the lack of cooperation by the State party, the Committee concludes that there is nothing in article 5, paragraph 2 (b), of the Optional Protocol to prevent it from considering the communication. The Committee further concludes that the facts presented by the author have been sufficiently substantiated for the purposes of article 7 and article 2, paragraph 3 (c), of the Covenant. Accordingly, it decides that the communication is admissible and proceeds to consider it on the merits.

Consideration on the merits

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

6.2 With regard to the allegation of a violation of article 7 and of article 2, paragraph 3 (c), of the Covenant, the Committee notes the author's allegation that his father was detained and whipped by Commander Kifwa Mukuna's bodyguards, on the Commander's orders, for reporting the forcible removal of his weapon. The Committee also notes the author's allegation that the public prosecution service failed to enforce the relatively light sentence handed down by the military court, since the convicted persons never served their prison terms. In the absence of any relevant information from the State party which might contradict the author's allegations, the Committee considers that the facts laid before it reveal a violation of article 7, together with article 2, 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 information before it reveals a violation of article 7, together with article 2, 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 appropriate compensation. The State party is under an obligation to enforce the ruling of the military court of 29 January 2003. It is also under an obligation to ensure that similar violations do not occur in future.

9. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in 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 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.]

**FF. Communication No. 1493/2006, *Williams Lecraft v. Spain*
(Views adopted on 27 July 2009, Ninety-sixth session)***

<i>Submitted by:</i>	Ms. Rosalind Williams Lecraft (represented by Open Society Justice Initiative, Women's Link Worldwide and SOS Racismo-Madrid)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	11 September 2006 (initial submission)
<i>Subject matter:</i>	Discrimination resulting from an identity check
<i>Procedural issues:</i>	Abuse of the right to submit communications; insufficient substantiation of allegations
<i>Substantive issue:</i>	Racial discrimination
<i>Articles of the Covenant:</i>	2, paragraph 3; 12, paragraph 1; 26
<i>Articles of the Optional Protocol:</i>	2 and 3

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

Meeting on 27 July 2009,

Having concluded its consideration of communication No. 1493/2006, submitted to the Human Rights Committee by Ms. Rosalind Williams Lecraft 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 11 September 2006, is Rosalind Williams Lecraft, a Spanish citizen born in 1943, who claims to be the victim of a violation by Spain of article 12, paragraph 1, and article 26, read in conjunction with article 2 of the Covenant. She is represented by counsel. The Optional Protocol entered into force for Spain on 25 April 1985.

* The following members of the Committee participated in the consideration of the present communication: Mr. Abdelfattah Amor, Mr. Mohammed Ayat, Mr. Prafullachandra Natwarlal Bhagwati, 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. Michael O'Flaherty, Mr. José Luis Pérez Sánchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

The text of the dissenting opinion of Committee members Mr. Krister Thelin and Mr. Lazhari Bouzid is appended to the present document.

The facts as submitted by the author

2.1 The author, who is originally from the United States of America, acquired Spanish nationality in 1969. On 6 December 1992, she arrived at Valladolid railway station from Madrid with her husband and son. Shortly after she got off the train an officer from the National Police approached her and asked to see her National Identity Card. The police officer did not ask anyone else who was on the platform at that time, including her husband and son, for their identity cards. The author asked the police officer to explain the reasons for the identity check; the officer replied that he was obliged to check the identity of people like her, since many of them were illegal immigrants. He added that the National Police were under orders from the Ministry of the Interior to carry out identity checks of “coloured people” in particular. The author’s husband observed that that was racial discrimination, which the police officer denied, asserting that he had to carry out identity checks owing to the high number of illegal immigrants living in Spain. The author and her husband asked the police officer to produce his own National Identity Card and police badge, whereupon he replied that if they did not change their attitude he would arrest them. He escorted them to an office in the railway station where he recorded their personal details, and at the same time showed them his identity badge.

2.2 The following day the author went to the San Pablo district police station to file a complaint of racial discrimination. The complaint was dismissed by Valladolid investigating court No. 5 on the ground that there was no evidence that any crime had been committed. The author did not appeal against this decision; instead, on 15 February 1993, she filed a complaint with the Ministry of the Interior challenging its alleged order to the National Police to conduct identity checks on coloured people. She also claimed that the General State Administration should be held materially responsible for the police officer’s unlawful action. She asserted that the practice of carrying out identity checks based on racial criteria was contrary to the Spanish Constitution and the European Convention for the Protection of Human Rights and Fundamental Freedoms, and that the identity check carried out on her had caused her and her family moral and psychological injury. She therefore requested compensation of approximately 5 million pesetas. To support her request the author submitted a medical certificate dated 15 March 1993 stating that she was suffering from “social phobia” and “agoraphobic trauma” caused by “an identity check by the police in a railway station, based on racial discrimination”.

2.3 In a decision of 7 February 1994, the Ministry declared the first part of the author’s complaint inadmissible; it held that there was no order obliging members of the State Security Corps and Forces to identify people by their race. If such an order existed it would be unconstitutional *ipso jure*. The Ministry also declined to consider the lawfulness of the identity check carried out on the author, since her complaint related solely to a general order and not to what had happened to her. An appeal against the decision was lodged with the administrative division of the National High Court (*Audiencia Nacional*), which dismissed it in a ruling of 15 March 1996.

2.4 The claim about the General State Administration’s material responsibility was also dismissed by the Ministry of the Interior, which held that the police officer in question had been acting within his authority to control illegal immigration and responding to the author’s foreign appearance, in the assessment of which police officers could take into account the racial characteristics of the current Spanish population. The author lodged an appeal against this decision with the National High Court.

2.5 On 29 November 1996, the National High Court dismissed the appeal. Among other things, it considered that the police officer’s behaviour arose out of legislation on foreigners according to which police officers were under orders to identify foreigners at Valladolid railway station. Since the author was black, the request for identification was not disproportionate. In addition, article 20 of the Public Security Organization Act authorized

the authorities to carry out such procedures “whenever ascertaining the identity of those concerned is necessary for the purpose of maintaining security”; and it had not been shown that the police officer’s conduct had been inconsiderate or humiliating.

2.6 The author filed an application for *amparo* with the Constitutional Court, which was dismissed in a judgement of 29 January 2001. The Court considered that the request for identification was not a clear case of discrimination, since the administrative proceedings had determined that there was no specific order or instruction to identify individuals of a particular race. As to the matter of whether there had been any covert racial discrimination, the Court found no evidence that the National Police officer’s conduct was dictated by racial prejudice or any particular intolerance of members of a specific ethnic group.¹

2.7 After the Constitutional Court had handed down its judgement, the author considered approaching an international body. She did not do so, however, because of her emotional state as a result of nine years of litigation and financial problems. At that time, Spanish law did not provide for free legal assistance for the type of remedies she was seeking; she therefore bore all the costs herself. After the Constitutional Court judgement was issued, she could not afford to seek further remedies.

The complaint

3.1 The author alleges that she was the victim of direct racial discrimination. The reason she had to undergo the identity check was that she belonged to a racial group not normally associated with Spanish nationality. She herself was a Spanish citizen but was treated less favourably than other Spanish citizens (including her husband, of Caucasian origin, who was with her) would have been in a comparable situation.

3.2 Although Spanish legislation allowing the police to carry out identity checks for the purposes of immigration control appears to be neutral, the way it is applied has a disproportionate impact on people who are coloured or have “specific ethnic physical characteristics” deemed “indicative” of non-Spanish nationality. In view of the way it was applied by the police officer in question and by the Spanish courts, Spanish legislation on immigration control places such persons at a disadvantage.

3.3 The Spanish courts justified the action of the police officer in question by arguing that it was for a legitimate purpose: to control immigration by identifying foreigners without identity papers. By implication they regarded the procedure as appropriate and necessary to achieve that purpose, because, in the opinion of the courts, black people were

¹ The judgement states that, as was clear from the previous judicial proceeding, “the police took the criterion of race merely as indicating a greater probability that the person concerned was not Spanish. None of the circumstances surrounding the incident suggest that the National Police officer’s conduct was dictated by racial prejudice or any particular intolerance of members of a specific ethnic group (...). The action taken by the police occurred in a place of transit, a railway station, where, on the one hand, it is not unreasonable to suppose that there might be a greater probability than elsewhere that people who are selectively requested for identification may be foreign; and, on the other hand, the inconvenience that any request for identification may cause is minor and a reasonably acceptable part of daily life. (...) Nor has it been proved that the police officers carried out the procedure in an inconsiderate, offensive way or gratuitously hindered the complainant’s freedom of movement (...), since they took only as long as was necessary to carry out the identity check. Lastly, it may be excluded that the police officers acted in an angry or strident fashion which attracted attention to Ms. Williams Lecraft and the persons accompanying her, making them feel ashamed or uncomfortable in front of the other people in the railway station (...). What might have been discriminatory was the use of a criterion (in this case a racial one) which bore no relation to the identification of the persons for whom the legislation stipulated the administrative measure, in this case foreign citizens”.

more likely to be foreigners than people with other racial characteristics. This line of argument, however, cannot be considered valid.

3.4 Skin colour cannot be considered a reliable criterion by which to guess at a person's nationality. Increasing numbers of Spaniards are black or belong to other ethnic minorities and are consequently prone to humiliation by special police attention. On the other hand, large numbers of foreigners are white and look no different from native Spaniards. A policy which targets a specific race runs the risk of diverting police attention from foreigners without identity papers who are of other origins, and may therefore be counterproductive. From a legal standpoint, the aim — immigration control — cannot justify a policy directed specifically towards black people. Such a policy foments racial prejudice within society and serves, albeit unintentionally, to legitimize the use of racial differences for inappropriate ends.

3.5 The author requests the Committee to find a violation of article 2, article 12, paragraph 1, and article 26 of the Covenant and to instruct the State party to grant her compensation of 30,000 euros for moral and psychological injury and a further 30,000 euros to offset the costs she incurred in the proceedings before the domestic courts.

State party's observations on admissibility and on the merits

4.1 In its observations of 4 April 2007, the State party argues that, while it is true that the Optional Protocol does not formally establish a deadline for the submission of communications, it does exclude communications which, for reasons including time factors, may entail an abuse of the right of submission. This is the case with the present communication: almost six years have elapsed since the final judgement was issued by the domestic courts. The author's argument that there was no free legal assistance available at the time is not correct: the State party refers to the Civil Procedure Act, article 57 of the Bar Statute of 1982, the Judiciary Organization Acts of 1985 and 1996 and article 119 of the Constitution. The State party concludes that the communication should be declared inadmissible under article 3 of the Optional Protocol.

4.2 The State party also argues that the facts disclose no violation of the Covenant. Controlling illegal immigration is perfectly lawful and there is nothing in the Covenant to prevent police officers from carrying out identity checks for that purpose. This is provided for under Spanish legislation: specifically, at the time the incident took place, by article 72.1 of the enabling regulations for Organization Act No. 7/1985 on the Rights and Freedoms of Foreigners in Spain, which required foreigners to carry their passports or documents with which they entered Spain and, where appropriate, their residency permits, and to show them to the authorities upon request. The Public Security (Organization) Act and the Decree on the National Identity Document also empower the authorities to carry out identity checks and require everyone, including Spanish citizens, to show identity documents.

4.3 There are relatively few blacks in the Spanish population at present, and they were even fewer in number in 1992. On the other hand, one of the major sources of illegal immigration into Spain is sub-Saharan Africa. The difficult conditions in which these people often arrive in Spain — they are frequently the victims of criminal organizations — constantly attract media attention. If one accepts the legitimacy of the control of illegal immigration by the State, then one must surely also accept that police checks carried out for that purpose, with due respect and a necessary sense of proportion, may take into consideration certain physical or ethnic characteristics as being a reasonable indication of a person's non-Spanish origin. Furthermore, in this case the existence of an order or specific instruction to identify individuals of a given race was ruled out. The author has not been

subjected to a further identity check for 15 years and it would therefore not make sense to claim a motive of discrimination.

4.4 The author's identity check was conducted in a respectful manner and at a time and place where it is normal for people to be carrying identity papers. The police action took only as long as was necessary to carry out the identity check and ended when the author was found to be Spanish. All things considered, the check on the author's identity was carried out with the necessary legal authorization, based on a reasonable and proportionate criterion and in a respectful manner; thus there was no violation of article 26 of the Covenant.

Author's comments on the State party's submission

5.1 On 17 December 2007, the author reiterated that the time which elapsed between the exhaustion of domestic remedies and her submission of the communication to the Committee was due to financial difficulties. The 1996 Act to which the State party refers does not provide for the possibility of free legal assistance in respect of regional or international bodies. The European Court of Human Rights does provide this type of assistance, at its discretion, but never at the start of proceedings. Furthermore, when the Constitutional Court handed down its judgement the author did not know of any non-governmental organizations in Spain with the necessary experience and interest to bring her case before a regional or international body. As soon as she obtained free legal assistance from the organizations that are representing her before the Committee, she decided to present her case.

5.2 The author agrees with the State party's assertion that the control of illegal immigration is a legitimate objective, and that police identity checks are an acceptable method of achieving that objective. However, she does not agree that in order to do so police officers should use only racial, ethnic and physical characteristics as indicators of people's non-Spanish origins. In its reply the State party admits that it considers skin colour as an indicator not only of non-Spanish nationality, but even of illegal presence in Spain. The author reiterates her statement that skin colour may not be considered indicative of nationality. Selecting a group of people for immigration control based on the criterion of skin colour is direct discrimination, because it is tantamount to using stereotypes in the immigration control programme. Moreover, using skin colour as a basis for asserting that this group may be victims of trafficking constitutes differential treatment. A study conducted by the Spanish police in 2004 concluded that only 7 per cent of trafficking victims came from Africa. The State party has not succeeded in showing that its policy of using race and skin colour as indicators of illegal status is reasonable or proportionate to the objectives it seeks to achieve.

5.3 The author also states that the absence of intent to discriminate and the courteous conduct on the part of the police officer who requested her identity document are irrelevant. What is important is that his act was discriminatory. The fact that it was not repeated is not relevant either. Neither the Covenant nor the Committee's jurisprudence requires an act to be repeated in order to determine the existence of racial discrimination.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

6.3 The Committee takes note of the State party's argument that the communication should be considered inadmissible under article 3 of the Optional Protocol as constituting an abuse of the right of submission, in view of the excessive delay in submitting the communication to the Committee – almost six years after the date of the *amparo* judgement by the Constitutional Court. The Committee reiterates that the Optional Protocol does not establish any deadline for submitting communications, and that the period of time that elapses before doing so, other than in exceptional cases, does not in itself constitute an abuse of the right to submit a communication. In the present case, the Committee takes note of the author's difficulties in securing free legal assistance and does not consider that the delay in question constitutes such an abuse.²

6.4 The author claims that the facts as submitted constitute a violation of article 12, paragraph 1, of the Covenant. The Committee considers that this allegation has not been substantiated for purposes of admissibility and finds it inadmissible under article 2 of the Optional Protocol.

6.5 Since there are no further obstacles to the admissibility of the communication, the Committee decides that the communication is admissible insofar as it appears to raise issues under article 2, paragraph 1, and 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 for in article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee must decide whether being subjected to an identity check by the police means that the author suffered racial discrimination. The Committee considers that identity checks carried out for public security or crime prevention purposes in general, or to control illegal immigration, serve a legitimate purpose. However, when the authorities carry out such checks, the physical or ethnic characteristics of the persons subjected thereto should not by themselves be deemed indicative of their possible illegal presence in the country. Nor should they be carried out in such a way as to target only persons with specific physical or ethnic characteristics. To act otherwise would not only negatively affect the dignity of the persons concerned, but would also contribute to the spread of xenophobic attitudes in the public at large and would run counter to an effective policy aimed at combating racial discrimination.

7.3 A State's international responsibility for violating the International Covenant on Civil and Political Rights is to be judged objectively and may arise from actions or omissions by any of its organs of authority. In the present case, although there does not appear to have been any written order in Spain expressly requiring identity checks to be carried out by police officers based on the criterion of skin colour, it appears that the police officer considered himself to be acting in accordance with that criterion, a criterion considered justified by the courts which heard the case. The responsibility of the State party is evidently engaged. It is therefore for the Committee to decide whether that action is contrary to one or more of the provisions of the Covenant.

² Communications No. 1305/2004, *Villamón v. Spain*, Views adopted on 31 October 2006, para. 6.4; No. 1101/2002, *Alba Cabriada v. Spain*, Views adopted on 1 November 2004, para. 6.3; and No. 1533/2006, *Zdenek and Ondracka v. Czech Republic*, Views adopted on 31 October 2007, para. 7.3.

7.4 In the present case, it can be inferred from the file that the identity check in question was of a general nature. The author alleges that no one else in her immediate vicinity had their identity checked and that the police officer who stopped and questioned her referred to her physical features in order to explain why she, and no one else in the vicinity, was being asked to show her identity papers. These claims were not refuted by the administrative and judicial bodies before which the author submitted her case, or in the proceedings before the Committee. In the circumstances, the Committee can only conclude that the author was singled out for the identity check in question solely on the ground of her racial characteristics and that these characteristics were the decisive factor in her being suspected of unlawful conduct. Furthermore, the Committee recalls its jurisprudence that 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. In the case under consideration, the Committee is of the view that the criteria of reasonableness and objectivity were not met. Moreover, the author has been offered no satisfaction, for example, by way of apology as a remedy.

8. In the light of the foregoing, 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 26, read in conjunction with article 2, paragraph 3, 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 a public apology. The State party is also under an obligation to take all necessary steps to ensure that its officials do not repeat the kind of acts observed in this case.

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

Appendix

Dissenting opinion of Committee members Mr. Krister Thelin and Mr. Lazhari Bouzid

The majority has found the communication admissible and has considered it on its merits.

I respectfully disagree.

Delay in submitting a communication does not in itself constitute an abuse of the right of submission under article 3 of the Optional Protocol. However, from the jurisprudence of the Committee, as it could be understood, it follows that undue delay, absent exceptional circumstances, should lead to inadmissibility of a communication. In a number of cases the Committee has found a period of over five years to constitute undue delay (refer to relevant Czech cases, including *Kudrna*,^a and dissenting opinion in *Slezák*).^b

In the present case, the author has let almost six years elapse before submitting her complaint. Her claim, that she had difficulties in securing free legal assistance, does not, in light of all the facts in the case, constitute a circumstance, which could justify this undue delay. The late communication should therefore be considered an abuse of the right of submission and, consequently, inadmissible under article 3 of the Optional Protocol.

(Signed) Mr. Krister **Thelin**

(Signed) Mr. Lazhari **Bouzid**

[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 Communications No. 1582/2007, *Kudrna v. Czech Republic*, inadmissibility decision of 21 July 2009 (below), No. 1452/2006, *Chytil v. Czech Republic*, inadmissibility decision of 24 July 2007; No. 1484/2006, *Lnenicka v. Czech Republic*, Views adopted on 25 March 2008; and No. 1485/2006, *Vlcek v. Czech Republic*, Views adopted on 10 July 2008.

^b See communication No. 1574/2007 (below), Views adopted on 20 July 2009.

**GG. Communication No. 1495/2006, *Madoui v. Algeria*
(Views adopted on 28 October 2008, Ninety-fourth session)***

<i>Submitted by:</i>	Zohra Madoui (represented by counsel, Nassera Dutour)
<i>Alleged victim:</i>	The author and her son Menouar Madoui
<i>State party:</i>	Algeria
<i>Date of communication:</i>	19 July 2006 (initial submission)
<i>Subject matter:</i>	Enforced disappearance
<i>Procedural issue:</i>	None
<i>Substantive issues:</i>	Prohibition of torture and cruel, inhuman or degrading treatment or punishment; right to liberty and security of person; arbitrary arrest and detention; right to recognition as a person before the law; right to effective remedy
<i>Article of the Covenant:</i>	7; 9; 10; 16; and 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 28 October 2008,

Having concluded its consideration of communication No. 1495/2006, submitted by Zohra Madoui on her own behalf and on behalf of her son Menouar Madoui 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 19 July 2006, is Zohra Madoui, an Algerian citizen born in Algeria on 28 November 1944. She claims that her son, Menouar Madoui, born in Algeria on 9 February 1970, is a victim of violations by Algeria of article 7; article 9; article 16; and article 2, paragraph 3, of the Covenant. She also claims that she herself has been a victim of violations by Algeria of article 7 and article 2, paragraph 3, of the Covenant. The Covenant and the Optional Protocol entered into force for Algeria on 12 December 1989. The author is represented by counsel, Nassera Dutour.

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

Facts as presented by the author

2.1 In early March 1997, Menouar Madoui, the author's son, and his friend Hassen Tabeth, were arrested by gendarmes and detained for failure to produce their identity documents during a check. Menouar Madoui was held for 13 days at the gendarmerie in Larbâa. When the author visited him in detention, she noticed that her son was soaking wet. He told her that he had been tortured with electric shocks.

2.2 On 7 May 1997, the city of Larbâa was cordoned off by the combined forces of the police, army and gendarmerie, who carried out a sweep of the city, searching most of the houses and making many arrests. Menouar Madoui was at the market that day and, when the combined forces stormed the market, he took refuge in a friend's shop. When things calmed down he went to prayers at the main mosque in Larbâa, near the town hall, but by nightfall he had not returned home to his mother.

2.3 The next morning the author went to look for her son. At the mosque, a man told her he had witnessed some arrests the day before. Four young men had been arrested by plain-clothes police outside the mosque, handcuffed and put in an unmarked car. The author went to the gendarmerie where her son had been held a few months earlier. The gendarmes told her they had not arrested him. She then went to the barracks nearby, but the military referred her to the municipal police (*garde communale*), who in turn directed her to the police station. She went to the police station and then made the rounds of all the barracks in the town, at one of which a soldier told her that she should look in the maquis instead. As a last resort, in the late afternoon, the author went to the operational command headquarters (*poste de commandement opérationnel* – PCO) on the road to El Fâas, where a member of the legitimate defence group (GLD) said that her son had been brought in the night before and was being held there. She asked if she could bring him some food but he said she could only bring clothes.

2.4 After that the author went to the PCO every day to try to see her son. Every day the officers on duty gave her a different answer. Some admitted that her son was being held there, others said not. Meanwhile the author continued to go round all the police stations in the area, as well as prisons, barracks, the hospital and the morgue, to glean information about her son. She was sent back and forth from one to the other. By some she was told that her son had been transferred to the prison in Blida or Tizi-Ouzou, by others that he had been admitted to the psychiatric hospital in Blida, or even that he had been released.

2.5 On 21 May 1997 the author explained her position to the public prosecutor in Larbâa, who wrote to the chief of police of Larbâa and instructed the author to deliver the letter personally so that the police chief could launch an investigation into her son's disappearance. The author duly presented the chief of police with the letter and a file; she never received any report of an investigation. On 2 January 2000, a statement from the Larbâa police informed the author that the inquiry into her son's whereabouts ordered by the Larbâa public prosecutor had been closed.

2.6 Forty days after her son's disappearance, the author still had no news and returned to the PCO. A policeman told her that her son was still there, but would probably be released the following day. She therefore waited outside the PCO the next day for him to be released. A senior officer noticed her and went over to ask what she was doing there. When she explained that she was waiting for her son to be released he told her to leave at once and threatened her. When she refused he became aggressive and, pinning her to the wall, slapped and punched her repeatedly. Shocked, the author fled; thereafter, her enquiries were less energetic.

2.7 In February 1998 the author went to the court in Blida, where she was seen by the Government prosecutor, who wrote to the prosecutor with the court in Larbâa, who in turn wrote to the PCO commanding officer. As a result the author obtained a meeting with the

PCO commanding officer, who again told her that her son's case was the responsibility of the Larbâa police. Two weeks later the anti-terrorist squad came to the author's home with a summons for questioning at the PCO. The author found an excuse not to go with them and said she would go later. She first told her relatives and then went to the PCO in the afternoon, where she was questioned again about her son's disappearance. Nothing ever came of that interview. The author subsequently received another two summonses from the Larbâa police station (9 January 2000 and 16 June 2001), one from the Larbâa gendarmerie (5 December 2005) and another from the gendarmerie at El Biar (21 December 2005).

2.8 In May 1998 Hassen Tabet, who had been arrested with the author's son in March 1997 (see paragraph 2.1 above), went to see the author on his release from prison. He told her that a fellow-prisoner at Blida prison had told him he had been arrested along with her son and that her son had been taken to the prison in Boufarik. The author went to Boufarik but a warder told her that her son was not there. On 11 May 1998 the author lodged a complaint with the Government prosecutor at the Bab Essabt court. She has never had a response.

2.9 In June 1998 another person confirmed that the author's son was indeed being held at Boufarik prison. The person said that he had been arrested on 8 May 1997, the day after the author's son, and that they had shared a cell in Boufarik prison. However, he said they were not held in an ordinary prison but shut underground in the dark. He said that, at the time of his release, the author's son had still been alive.

2.10 In 1999 Menouar Madoui's brother-in-law heard from someone who had just been let out after five years of incommunicado detention that he had shared a cell (cell No. 6) with the author's son in Serkadji prison. The author went to Serkadji and was told she had to apply to the Supreme Court for a visiting permit if she wanted to see her son. As the author is illiterate, she consulted her friends, who suggested she apply to the Algiers Court for a permit. The Algiers Court informed her that issuing visiting permits was not one of its tasks and she must approach the court in Larbâa. The officials at the court in Larbâa advised her not to pursue the matter further. Frightened, the author abandoned her quest for a visiting permit.

2.11 On 30 March 2004 the author filed a complaint with the Larbâa public prosecutor, with a copy to the Government prosecutor in Blida, challenging the transfer of her son's case to the district of Baraki when he had been arrested in Larbâa. On 7 January 2006 she received a summons from the Larbâa court. She went to the court on 6 February 2006 and was asked to produce the witnesses who claimed to have seen her son. However, since their safety could not be guaranteed, the witnesses refused to appear for fear of reprisals.

Complaint

3.1 In respect of article 7, the author recalls that, when first arrested in March 1997, her son said he had been tortured with electric shocks. She argues that her son's forced disappearance is in itself a violation of article 7. She recalls that the Committee has accepted that being the victim of enforced disappearance may constitute inhuman or degrading treatment.¹

¹ See communications No. 449/1991, *Mojica v. Dominican Republic*, Views adopted on 15 July 1994, paragraph 5.7; No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996, paragraph 8.5; No. 542/1993, *Tshishimbi v. Zaire*, Views adopted on 25 March 1996, paragraph 5.5; No. 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006, paragraph 9.8; and No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, paragraph 9.6.

3.2 As to the author herself, she claims that her son's disappearance has been a painful and agonizing ordeal. She had found him in a serious condition once before, after his first arrest. This time, following his disappearance, she has no idea what has become of him. This is compounded by the fact that the various authorities she approached starting the day after he went missing continually sent her back and forth from one to the other. They all gave different answers, some simply confusing her but, at their worst, raising her hopes of finding her son. Those hopes were always dashed. The author recalls that the Committee has accepted that the disappearance of a loved one could constitute a violation of article 7 for the family.²

3.3 With regard to article 9, the author recalls that her son's detention was not entered in the registers of police custody and there is no official record of his whereabouts or his fate. The fact that his detention is not acknowledged and that the Government authorities persistently refuse to reveal what has happened to him means that he has been arbitrarily deprived of his liberty and security of person in violation of article 9. The author cites the Committee's case law whereby any unacknowledged detention of a person constitutes a complete negation of the right to liberty and security of person guaranteed under article 9.³

3.4 As to article 16, the author believes that her son's forced disappearance is inherently a denial of the right to recognition everywhere as a person before the law. She cites the 18 December 1992 Declaration on the Protection of All Persons from Enforced Disappearance.⁴

3.5 As regards article 2, paragraph 3, the author recalls that the State party has an obligation to provide an effective remedy for the violations she and her son have suffered.⁵ She claims that, as the victim of enforced disappearance, her son has been denied the right to an effective remedy for his arbitrary detention and the various violations he has suffered. She has tried to find her son by all legal means and has exercised all available remedies to that end without result. The State has therefore violated its obligations to conduct a thorough and diligent investigation into his disappearance, to inform the author of the outcome of that investigation, to institute criminal proceedings against those held to be responsible for his disappearance, to try them and to punish them.

3.6 Regarding the exhaustion of domestic remedies, the author argues that, according to the Committee's case law, only effective and available remedies within the meaning of article 2, paragraph 3, need to be exhausted.⁶ Since this case concerns a serious violation of her son's fundamental rights, she recalls the Committee's case law whereby only remedies

² See communication No. 107/1981, *Quinteros v. Uruguay*, Views adopted on 21 July 1983, paragraph 14; and concluding observations on the second periodic report of Algeria (CCPR/C/79/Add.95), paragraph 10.

³ See communications No. 8/1977, *Weismann and Perdomo v. Uruguay*, Views adopted on 3 April 1980, paragraph 16; No. 139/1983, *Conteris v. Uruguay*, Views adopted on 17 July 1985, paragraph 10; No. 181/1984, *Arévalo v. Colombia*, Views adopted on 3 November 1989, paragraph 11; No. 563/1993, *Bautista v. Colombia*, Views adopted on 27 October 1995, paragraph 8.5; No. 612/1995, *Vicente et al. v. Colombia*, Views adopted on 29 July 1997, paragraph 8.6; *Bousroual v. Algeria* (note 1 above), paragraph 9.5; and, *Boucherf v. Algeria* (note 1 above), paragraph 9.5.

⁴ See also concluding observations on the second periodic report of Algeria (note 2 above), paragraph 10.

⁵ See *Boucherf v. Algeria* (note 1 above), paragraph 11.

⁶ See, for example, communication No. 147/1983, *Arzuada Gilboa v. Uruguay*, Views adopted on 1 November 1985, paragraph 7.2.

of a judicial nature need to be exhausted.⁷ In this case the author has attempted remedies of every kind, administrative and judicial, without result. In the case of administrative remedies, she repeatedly sought information concerning her son's fate, approaching various authorities who continually sent her from pillar to post and gave her no clear information. On 6 July 1998 she approached the Ombudsman. On 4 August 1998 she approached the National Human Rights Observatory, which merely told her that her son had no criminal record. On 29 March 2004 she wrote a letter addressed to the President of the Republic, the Prime Minister, the Minister of Justice and the President of the National Advisory Commission for the Promotion and Protection of Human Rights. She received no reply. As for judicial remedies, she filed several complaints with a number of courts, none of which led to any serious investigation into her son's disappearance. Furthermore, with the adoption by referendum of the Charter for Peace and Reconciliation on 29 September 1995, and the entry into force of a presidential order implementing the Charter on 28 February 2006, the author believes there are no more effective remedies available to her.

3.7 The author mentions that her son's case was submitted to the Working Group on Enforced or Involuntary Disappearances. However, she notes that the Committee holds that extra-conventional procedures and mechanisms established by the former Commission on Human Rights do not constitute procedures of international investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.⁸

3.8. The author asks the Committee to request the State party to order independent investigations with a view to locating her son and to bring the perpetrators of the enforced disappearance before the competent civil authorities for prosecution in accordance with article 2, paragraph 3, of the Covenant. She also requests appropriate reparation for herself and her family, such reparation to include adequate compensation and a full and complete rehabilitation of her son including, for example, medical care and psychological support.

State party's observations on admissibility and merits

4. On 28 July 2008, the State party indicated that it has made every effort to locate the author's son. Enquiries have been made with the civil and military authorities cited by the author, and they have categorically denied that her son was ever arrested. Investigations have also been made in all the places mentioned by the author and her son has never been detained in any of them. An examination of the register at Boufarik prison, referred to by the author, shows that her son has not been held there. There are signed statements from several witnesses, including his brother-in-law, Ramdane Mohammed, to the effect that the author's son is mentally ill and frequently runs away from home.⁹

Author's comments on the State party's observations

5.1 In comments dated 8 September 2008, the author argued that the State party was merely recapitulating the domestic judicial procedure. At no time does it produce concrete evidence to either deny or accept responsibility for the forced disappearance of the author's son. According to the Committee's case law, the State party must furnish evidence if it

⁷ See *Bautista v. Colombia* (note 3 above), paragraph 5.1; *Vicente et al. v. Colombia* (note 3 above), paragraph 5.2; and communication 778/1997, *Navarro et al. v. Colombia*, Views adopted on 24 October 2002, paragraph 6.2.

⁸ See *Celis Laureano v. Peru* (note 1 above), paragraph 7.1.

⁹ The State party has not provided these statements.

seeks to refute claims made by the author of a communication: it is no use the State party merely denying them, whether explicitly or implicitly.¹⁰

5.2 On the merits, the author recalls that, even though several witnesses saw her son being arrested and a policeman twice told her that her son was being held at the PCO on the road to El Fâas, the authorities deny having arrested him. Furthermore, he had also been arrested in March 1997, two months before the second arrest in May 1997, and on that occasion had been detained for 13 days in the Larbaâ gendarmerie, where he had been tortured. The author notes that the Algerian authorities never mention the case of Hassan Tabeth, who had been arrested along with her son and who told her when he came out of prison that a fellow-prisoner, Nourredine, had told him he had been in prison with her son at Boufarik.

5.3 Regarding the State party's claim that her son is mentally disabled, the author says that, in her description of the facts of the case, she certainly mentions having visited a psychiatric hospital in the course of her enquiries (see paragraph 2.4 above), but that is an instinctive reflex common to all families of missing persons after they have searched for a few days. The families are aware that torture is routine and assume that treatment of that kind could cause their relatives to lose their mind and be put in a psychiatric hospital. She says there has never been any question of mental disability in her son. Moreover, his brother-in-law, Mohammed Ramdane, has never been summoned by the authorities and has never signed any statement alleging that Menouar Madoui suffers from mental disability. She does, however, remember that, in the course of her enquiries, she one day explained to the gendarmes that her son Menouar was the household's sole breadwinner and that it was imperative that they should find him; she had then told them that her other son, Mohammed Madoui, born on 15 January 1965, was mentally disabled and unable to work. The gendarmes had asked her to provide documents to show her son was disabled, which she did, believing the gendarmes would act on them. This clearly shows that the authorities have never conducted any proper investigation.

Issues and proceedings before the Committee

Admissibility considerations

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

6.2 As required 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. The Committee notes that the case was submitted to the Working Group on Enforced or Involuntary Disappearances.¹¹ However, it recalls that extra-conventional procedures or mechanisms established by the Commission on Human Rights 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 procedures of international investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.¹² The Committee recalls that the study of human rights problems of a

¹⁰ See *Quinteros v. Uruguay* (note 2 above), paragraph 11.

¹¹ The Working Group on Enforced or Involuntary Disappearances transmitted the case to the Algerian Government on 27 June 2005. As yet no reply has been received from the Government.

¹² See *Celis Laureano v. Peru* (note 1 above), paragraph 7.1.

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 Protocol. Accordingly, the Committee considers the fact that Menouar Madoui's case was registered before the Working Group on Enforced or Involuntary Disappearances does not make it inadmissible under this provision.¹³ As the Committee finds no other reason to consider the communication inadmissible, it proceeds with its consideration of the claims on the merits, under article 7; article 9; article 16; and article 2, paragraph 3, as presented by the author.

Consideration of the merits

7.1 The Committee has considered the present communication in the light of all the written information communicated to it by the parties, in accordance with article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee recalls the definition of enforced disappearance in article 7, paragraph 2 (i), of the Rome Statute of the International Criminal Court: "Enforced disappearance of persons means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time." Any act leading to such disappearance constitutes a violation of many of the rights enshrined in the Covenant, including the right to liberty and security of person (art. 9), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art. 7) and the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (art. 10). It also violates or constitutes a grave threat to the right to life (art. 6).¹⁴ In the present case, in view of her son's disappearance on 7 May 1997, the author invokes articles 7, 9 and 16.

7.3 The Committee notes that the State party has not provided satisfactory answers to the author's allegations concerning the forced disappearance of her son. It recalls that the burden of proof does not 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.¹⁵ 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 allegations are corroborated by credible evidence submitted by the author and where further clarification depends on information exclusively in the hands of the State party, the Committee may consider an author's allegations substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party.

7.4 In the present case, the Committee notes that the author's son disappeared on 7 May 1997 and that his family does not know what has happened to him. However, the author received certain information from various sources indicating that her son had been arrested by the authorities on that day and subsequently held in various places. Several soldiers told her that her son had been detained at the operational command headquarters on the road to

¹³ Ibid.

¹⁴ See communication No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 31 July 2003, paragraph 9.3.

¹⁵ See *Conteris v. Uruguay* (note 3 above), paragraph 7.2; and communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, paragraph 8.3.

El Fâas (see paragraphs 2.3, 2.4 and 2.6 above). Moreover, she also learned from at least two persons — including Hassen Tabeth, a friend of her son who had been arrested with him — that her son had been held in the prison in Boufarik (see paragraphs 2.8 and 2.9 above). She also learned from another person that her son had been held in Serkadji prison (see paragraph 2.10 above). The Committee notes that the State party has merely replied that the author's son had not been arrested or detained by the authorities. The State party added that the author's son suffers from psychiatric problems and simply ran away from the family home. The Committee nevertheless observes that the State party has provided no evidence to substantiate its statements. In the absence of a satisfactory explanation by the State party regarding the disappearance of the author's son, the Committee considers that this disappearance constitutes a violation of article 7.

7.5 The Committee also notes the anguish and distress that the disappearance of the author's son on 7 May 1997 has caused the mother. It therefore is of the opinion that the facts before it disclose a violation of article 7 of the Covenant with regard to the mother.¹⁶

7.6 As to the alleged violation of article 9, the information before the Committee shows that the author's son disappeared on 7 May 1997 in Larbâa. The Committee notes that this information has not been contested by the State party. According to the author, her son was arrested by agents of the State party on that day, which was confirmed by Hassen Tabeth, a friend of her son who had been arrested with him (see paragraph 2.8 above). Moreover, several persons had confirmed to her that, following his arrest, her son had been held in various places (see paragraph 7.4 above). The Committee notes that the State party merely replies that the author's son was not arrested or detained by the authorities. Nevertheless, the Committee observes that the State party has provided no evidence to substantiate its statements. In the absence of adequate explanations by the State party concerning the author's allegations that her son's arrest and subsequent incommunicado detention were arbitrary and illegal, the Committee finds a violation of article 9.¹⁷

7.7 As to the alleged violation of article 16 of the Covenant, the question arises as to whether and under what circumstances a forced disappearance may amount to denying the victim recognition as a person before the law. The Committee points out that intentionally removing a person from the protection of the law for a prolonged period of time may constitute a refusal to recognize that person before the law if the victim was in the hands of the State authorities when last seen and, at the same time, if the efforts of their relatives to obtain access to potentially effective remedies, including judicial remedies (Covenant, art. 2, para. 3) have been systematically impeded. In such situations, disappeared persons are in practice deprived of their capacity to exercise entitlements under law, including all their other rights under the Covenant, and of access to any possible remedy as a direct consequence of the actions of the State, which must be interpreted as a refusal to recognize such victims as persons before the law. The Committee notes that, under article 1, paragraph 2, of the Declaration on the Protection of All Persons from Enforced Disappearance,¹⁸ enforced disappearance constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law. It also recalls that article 7, paragraph 2 (i), of the Rome Statute of the International Criminal Court recognizes that the "intention of removing [persons] from the protection of the law for a prolonged period of time" is an essential element in the definition of enforced disappearance. Lastly, article 2 of the International Convention for the Protection of All

¹⁶ See *Quinteros v. Uruguay* (note 2 above), paragraph 14; and *Sarma v. Sri Lanka* (note 14 above), paragraph 9.5.

¹⁷ See *Medjnoune v. Algeria* (note 15 above), paragraph 8.5.

¹⁸ See General Assembly resolution 47/133 of 18 December 1992.

Persons from Enforced Disappearance mentions that enforced disappearance places the person concerned outside the protection of the law.¹⁹

7.8 In the present case, the author says that her son was arrested along with three other people by plainclothes police on 7 May 1997. He was then allegedly taken to the operational command headquarters (PCO) and thence to the prison in Boufarik. There has been no news of him since that date. The Committee notes that the State party has failed to provide any satisfactory explanation concerning the author's claim to have had no news of her son since 7 May 1997, and it appears not to have conducted a thorough investigation into the fate of the son or provided the author with any effective remedy. The Committee is of the view that if a person is arrested by the authorities and there is subsequently no news of that person's fate, the authorities' failure to provide information effectively places the disappeared person outside the protection of the law. Consequently, the Committee concludes that the facts before it in the present communication reveal a violation of article 16 of the Covenant.²⁰

7.9 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 attaches importance 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.²¹ In the present case, the information before it indicates that the author did not have access to such effective remedies, and the Committee concludes that the facts before it reveal a violation of article 2, paragraph 3, of the Covenant in conjunction with articles 7, 9 and 16, in respect of the author's son, and a violation of article 2, paragraph 3, of the Covenant in conjunction with article 7, in respect of the author herself.

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 of article 7, article 9 and article 16 and of article 2, paragraph 3, in conjunction with articles 7, 9 and 16 of the Covenant in respect of the author's son; and of article 7 and of article 2, paragraph 3, in conjunction with article 7 of the Covenant in respect of the author herself.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with reparation in the form of compensation. While the Covenant does not give individuals the right to demand of a State the criminal prosecution of another person,²² the Committee nevertheless considers the State party duty-bound not only to conduct thorough investigations into alleged violations of human rights, particularly enforced disappearances and acts of torture, but also to prosecute, try and punish the culprits.²³ The State party is therefore also under an obligation to prosecute, try

¹⁹ See communication No. 1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007, para. 7.8.

²⁰ *Ibid.*, para. 7.9.

²¹ *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40 (A/59/40)*, vol. I, annex III, para. 15.

²² See communication No. 213/1986, *H.C.M.A. v. The Netherlands*, Views adopted on 30 March 1989, paragraph 11.6; and *Vicente et al. v. Colombia* (note 3 above), paragraph 8.8.

²³ See *Boucherf v. Algeria* (note 1 above), paragraph 11; and *Medjnoune v. Algeria* (note 15 above), paragraph 10.

and punish those held responsible for these violations. The State party is, further, required to take measures 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 and to provide an effective and enforceable remedy where a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to its 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.]

**HH. Communication No. 1508/2006, *Amundson v. Czech Republic*
(Views adopted on 17 March 2009, Ninety-fifth session)***

<i>Submitted by:</i>	Ms. Olga Amundson (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	The Czech Republic
<i>Date of communication:</i>	13 March 2006 (initial submission)
<i>Subject matter:</i>	Discrimination on the basis of citizenship with respect to restitution of property
<i>Procedural issue:</i>	Abuse of the right of submission
<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 17 March 2009,

Having concluded its consideration of communication No. 1508/2006, submitted to the Human Rights Committee by Ms. Olga Amundson 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, originally dated 13 March 2006 and supplemented by a further submission on 24 April 2007, is Ms. Olga Amundson, an American and Czech citizen, born in 1947 in the former Czechoslovakia and currently residing in the United States of America. She claims to be a victim of a violation by the Czech Republic of her rights under article 26 of the International Covenant on Civil and Political Rights.¹ She is unrepresented.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Lazhari Bouzid, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

¹ The Optional Protocol to the International Covenant on Civil and Political Rights entered into force for Czech Republic on 22 February 1993.

Facts as presented by the author

2.1 The author was born in the former Czechoslovakia and lived there until December 1972 when she left for the United States to visit her relatives. In 1973, she married a United States citizen and in 1977 acquired United States citizenship and lost her Czechoslovak citizenship by virtue of the 1928 Naturalization Treaty between the United States and Czechoslovakia. Also in 1973, the Czech authorities refused to allow the author to stay in the United States and in 1979 she was sentenced *in absentia* to 14 months imprisonment for illegally leaving the country. In 1990, in accordance with Act No. 119/1990 on Judicial Rehabilitation, the author's conviction was retroactively annulled.

2.2 In 1970, the author and her brother inherited a 39-unit apartment building in Prague – 4 Nusle cp. 1330. In 1973, the property was confiscated by the State and is currently held by the city of Prague and administered by the municipal office of Prague 4.

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

2.4 On 27 May 1991, on the basis of Act No. 87/1991, the author claimed the recovery of her property, which was refused by the property administration, Housing Association – Prague 4, on the ground that she did not meet the citizenship requirements. In April 1995, the author was granted Czech citizenship and re-applied for the restitution of her property, which was rejected because the author did not have Czech citizenship during the first restitution period in 1991. On 22 October 1998, the Prague 4 District Court upheld this decision. On 18 October 1999, the author's appeal to the Prague Municipal Court was rejected on the same grounds. On 27 July 1999, the Czech Supreme Court made the same finding. On 18 October 1999, the Constitutional Court rejected the author's appeal for not satisfying the Czechoslovak citizenship requirement. On 1 October 2002, the European Court for Human Rights dismissed the author's complaint.²

2.5 On 15 December 2005, the Prague 4 District Court rejected a new lawsuit by the author based on the Civil Code in which she requested determination of the ownership of the building cp. 1330 in Prague 4 – Nusle, ruling that given the absence of the author's Czech citizenship in 1991, she was not entitled to determination of ownership under the Civil Code or any other law. On 14 February 2007, the Supreme Court rejected an extraordinary appeal by the author stating that if the author was not entitled to property restitution under the relevant laws, she was neither entitled to claim ownership according to the Civil Code. The author claims that there are other properties owned by her family, however she claims that any attempt to request for their restitution would be futile without having had Czech citizenship in 1991.

² The application number was 60537/00.

The complaint

3. The author claims that Act No. 87/1991 on Extra-judicial Rehabilitation is discriminatory and violates article 26 of the Covenant.

The State party's submission on admissibility and merits

4.1 On 30 April 2007, the State party commented on the admissibility and merits of the communication. It challenged 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 communication no. 787/1997 *Gobin v. Mauritius*,³ in which the Committee declared inadmissible a communication which had been submitted five years after the alleged violation of the Covenant. In the present case, the State party argues that the author petitioned the Committee on 13 March 2006, six years and five months after the Constitutional Court ruling of 18 October 1999, without offering any explanation for this time lapse.

4.2 The State party recalls that the author only obtained Czech citizenship on 28 April 1995. It argues that the author was not subjected to differential treatment, but that she was treated in the same way as all other persons who failed to meet the citizenship requirement by 1 October 1991, as provided for in the Act No. 87/1991. According to the State party, this is the established interpretation of this Act, followed also by the Supreme Court.

4.3 The State party further refers to its earlier submissions in similar cases,⁴ and indicates that its restitution laws, including Act No. 87/1991, were part of a two-fold effort: to mitigate the consequences of injustices committed during the Communist rule, on the one hand, and to carry out comprehensive economic reform with the objective of introducing a well-functioning market economy, on the other. Since it was not possible to redress all injustices committed during the Communist regime, restrictive preconditions were put in place, including the citizenship requirement, its main objective being to ensure due care for property as part of the process of privatisation. According to the State party, the citizenship requirement has always been considered by both the Parliament and the Constitutional Court to be in conformity with the Czech Republic's constitutional order and in compliance with fundamental rights and freedoms.

4.4 The State party underlines that Act No. 87/1991, in addition to the citizenship requirement, set out other conditions that had to be met by claimants for them to be successful with their restitution claims. In particular, one of the conditions laid down in the section 5, subsection 2, of this Act was that the person entitled had to call upon the liable person to return the property within six months of the entry into force of the Act, i.e. until 1 October 1991, otherwise the claim would expire. The State party argues that the author did not prove that she met this condition.

4.5 Finally, the State party claims that the author did not substantiate her assertion of a violation of article 26 of the Covenant.

³ Communication No. 787/1997, *Gobin v. Mauritius*, inadmissibility decision adopted on 16 July 2001, para. 6.3.

⁴ See, for example, State party observations on communications No. 586/1994, *J.F. Adam v. the Czech Republic*, Views adopted on 23 July 1996; and No. 1000/2001, *George Mráz v. the Czech Republic*.

The author's comments to the State party's observations

5. On 25 November 2007 and on 20 December 2007, the author commented on the State party's submission. Regarding the argument that the submission of her communication amounts to an abuse of the right of submission, the author asserts that she made a claim before the European Court of Human Rights, which was rejected in October 2002 for being manifestly ill-founded. She argues that as the State party does not publish or translate the Committee's decisions,⁵ any delay by the author is justified by the State party's intentional efforts to conceal the Committee's work. The author quotes from the communication No. 586/1994, *J.F. Adams v. the Czech Republic*⁶ and states that the case does not contain any precedent that could be unfavourable to her case. She argues that she did indeed meet the requirement set forth in Act No. 87/1991 when she requested the surrendering of her property from the Housing Association – Prague 4 on 27 May 1991.

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 declared inadmissible as an abuse of the right of submission of a communication because of the long delay between the last decision in the case and the author's submission to the Committee. The Committee notes that the Optional Protocol does not establish time limits within which a communication should be submitted. It is thus only in exceptional circumstances that the delay in submitting a communication would lead to inadmissibility of the communication.⁷ In the circumstances of the present case, in view of the fact that following the exhaustion of domestic remedies the author filed a complaint with the European Court of Human Rights, which was rejected in October 2002 (three and a half years prior to the submission of the communication to the Committee), as well as in view of the civil law suit the author undertook in May 2005 before the Prague 4 District Court, the Committee considers that the delay is not such as to render the communication inadmissible as an abuse under article 3 of the Optional Protocol. It therefore decides that the communication is admissible in as far as it appears to raise issues under article 26 of the Covenant.

⁵ See for example communications No. 516/1992, *Simunek et al. v. the Czech Republic* Views adopted 19 July 1997 and No. 1054/2002, *Kriz v. the Czech Republic*, Views adopted on 1 November 2005.

⁶ *J.F. Adam v. the Czech Republic* (note 4 above), Views adopted on 23 July 1996.

⁷ See, for example, communications No. 1223/2003, *Tsarjov v. Estonia*, Views adopted on 26 October 2007, paragraph 6.3; No. 1434/2005, *Fillacier v. France*, inadmissibility decision adopted on 28 April 2006, paragraph 4.3; and, *Gobin v. Mauritius* (note 3 above), paragraph 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 is whether the application to the author of Act No. 87/1991 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 26.⁸

7.3 The Committee recalls its Views in the cases of *Simunek, Adam, Blazek, Marik, Kriz, Gratzinger* and *Zdenek and Ondracka*⁹ where it held that article 26 had been violated, and that it would be incompatible with the Covenant to require the authors to obtain Czech citizenship as a prerequisite for the restitution of their property or, alternatively, for the payment of appropriate compensation. Bearing in mind that the authors' original entitlement to their properties had not been predicated on citizenship, it found that the citizenship requirement was unreasonable. In the case *Des Fours Walderode*,¹⁰ 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.

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

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation if 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.

⁸ See communication No. 182/1984, *Zwaan-de Vries v. The Netherlands*, Views adopted on 9 April 1987, paragraph 13.

⁹ *Simunek v. Czech Republic* (note 5 above), para. 11.6; *J.F. Adam v. Czech Republic* (note 4 above), para. 12.6; communication No. 857/1999, *Blazek v. Czech Republic*, Views adopted on 12 July 2001, para. 5.8; communication No. 945/2000, *Marik v. Czech Republic*, Views adopted on 26 July 2005, para. 6.4; *Kriz v. Czech Republic* (note 5 above), para. 7.3; communication 1463/2006, *Gratzinger v. Czech Republic*, Views adopted on 25 October 2007, para. 7.5; and communication No. 1533/2006, *Zdenek and Ondracka v. Czech Republic*, Views adopted on 2 November 2007, para. 7.3.

¹⁰ Communication No. 747/1997, *Des Fours Walderode v. Czech Republic*, Views adopted on 30 October 2001, paras. 8.3–8.4.

[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 No. 1510/2006, *Vojnović v. Croatia* (Views adopted on 30 March 2009, Ninety-fifth session)*

<i>Submitted by:</i>	Mr. Dušan Vojnović (not represented by counsel)
<i>Alleged victims:</i>	The author, his wife Dragica Vojnović and his son Milan Vojnović
<i>State party:</i>	Croatia
<i>Date of communication:</i>	23 January 2006 (initial submission)
<i>Subject matter:</i>	Proceedings in relation with the termination of specially protected tenancy
<i>Procedural issues:</i>	Same matter having been examined under another procedure of international investigation or settlement; exhaustion of domestic remedies; inadmissibility <i>ratione personae</i> ; inadmissibility <i>ratione temporis</i> .
<i>Substantive issues:</i>	Fair trial; trial in reasonable time; interference with the home; discrimination on the grounds of national origin
<i>Articles of the Covenant:</i>	2, paragraphs 1 and 3 (b); 7; 9; 12; 14, paragraph 1; 17; 18 and 26.
<i>Articles of the Optional Protocol:</i>	1; 2; 3; 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 30 March 2009,

Having concluded its consideration of communication No. 1510/2006, submitted to the Human Rights Committee on behalf of Mr. Dušan Vojnović, Ms. Dragica Vojnović and Mr. Milan Vojnović 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 Dušan Vojnović, born in 1935, a Croatian citizen of Serb national origin. He claims that together with his wife Dragica Vojnović

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Lazhari Bouzid, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli and Mr. Krister Thelin.

(born in 1946) and his son Milan Vojnović (born in 1968), he is a victim of violations by Croatia of article 2, paragraphs 1 and 3 (b); article 7; article 9; article 12; article 14, paragraph 1; article 17; article 18 and article 26, of the International Covenant on Civil and Political Rights.¹ The author is not represented by counsel.

Facts as presented by the author

2.1 From 1986 to 1992, the author and his family lived in a state-owned apartment in Zagreb (32/IV Lastovska Street). Under domestic legislation, they held tenancy rights which in most aspects amounted to ownership,² except that the State could terminate that right in certain circumstances. Article 99 of the Housing Relations Act³ reads as follows:

“1. A specially protected tenancy may be terminated if the tenant [...] ceases to occupy the flat for an uninterrupted period exceeding six months.

2. A specially protected tenancy shall not be terminated under the provisions of paragraph 1 of this section in respect of a person who does not use the flat on account of undergoing medical treatment, performance of military service or other justified reasons.”

2.2 In June 1991, the author and his son moved to Serbia, while his wife remained in the apartment until 2 October 1992. The author claims that his family was forced to leave the apartment in Zagreb because they had received death threats from unknown people and feared for their lives as Croatian Serbs. The author claims that he did not inform the authorities of the threats, as other inhabitants of the apartment building in the same situation had experienced forced evictions following their reports to the police.

2.3 On 15 November 1995, the Zagreb Municipal Court, applying article 99 of the Housing Relations Act, decided that the author and his wife who were represented by an appointed trustee (*guardian at litem*) were deprived of their tenants' rights since they had not used the apartment for longer than six months without “justified reasons”. The author claims that 44 days before this decision, the apartment had been taken over by another person, allegedly for free. The author claims to have been unaware of the 15 November 1995 Zagreb Municipal Court decision until November 1998. Despite the authorities' knowledge of his temporary address in Belgrade, they did not convoke him to participate in the proceedings.

2.4 On 9 October 1998, the repatriation section of the United Nations High Commissioner for Refugees (UNHCR) Belgrade certified that the Croatian Government had confirmed that the author and his family were able to return to Croatia however indicating that “their possessions were in use”. In November 1998, the author and his family submitted a request to buy the apartment in Zagreb, which was refused.

2.5 On 13 November 2000, the Municipal Court of Zagreb allowed a review of the court proceedings – which had been requested by the author on 7 December 1998 – and revoked its previous decision of 15 November 1995. The Zagreb Municipal Court conducted proceedings, which according to the author were carried out in a discriminatory manner, in particular as two key witnesses — neighbours who were acquainted with the circumstances

¹ The Optional Protocol to the International Covenant on Civil and Political Rights (Optional Protocol) entered into force for Croatia on 12 January 1996.

² The tenant was entitled to use the apartment during his lifetime.

³ The law was in force until 1996. However, in 1991, Croatia initiated a process of privatization and adopted the Specially Protected Tenancies Act (Sale to Occupier) which allowed tenants of publicly owned apartments to purchase under favourable conditions the apartment they lived in.

that led to the author's and his family's departure — were summoned but not heard, as a confrontation between the author's wife and the witness Veselinka Zelenika who currently occupies the apartment was rejected, and as information regarding similar situations of other Serbs in the same apartment building was not taken into consideration as it was judged not being part of the debate. On 12 April 2002, the Zagreb Municipal Court decided that the author's tenancy rights were terminated. The case was then referred to the Zagreb County Court, sitting as a Court of Appeal, which dismissed it on 25 November 2003. On 17 July 2003, the author filed a complaint with the Constitutional Court, alleging a violation of his constitutional right to proceedings in a reasonable period of time. The Constitutional Court dismissed the complaint on 9 November 2005 arguing that the proceedings started on the date of the rehearing (13 November 2000) and therefore the lawsuit lasted 2 years, 3 months and 27 days. The case was then brought to the European Court of Human Rights which, on 18 November 2005, declared it inadmissible *ratione temporis*, since the alleged facts occurred prior to the entry into force of the European Convention on Human Rights for Croatia.

2.6 On 4 June 2004, the Zagreb Municipal Court rejected a review request on procedural grounds ruling that the value of the disputed object was inferior to the legal limit above which that Court had jurisdiction to consider the case. The author objects to the assessment of the value of the apartment, which was determined on the basis of the yearly legal rent at the time of the complaint. The dismissal was confirmed on 16 November 2004 by the Zagreb County Court. On 17 February 2004, the author lodged a constitutional complaint.⁴

2.7 The author further claims that in 1991, before leaving Croatia, his son Milan Vojnović was victim of repeated inspections, arrests and serious body injuries by members of the Croatian Police "Zbor Narodne Garde". In August 1991, the author's son was dismissed from his job at the "Zagrebačka banka" for alleged uncertified absence, which the author contests. In February 2004, the Zagreb Municipal Court ruled that the incidents of 1991 perpetrated by members of the Ministry of Interior against the author's son Milan Vojnović amounted to inhuman and humiliating treatment and that his dismissal was unjustified. The court awarded compensation.

2.8 Finally, the author claims that the dismissal of his wife, Dragica Vojnović, from her job at the "Auto-Market-Zagreb" on 30 September 1992 after 25 years of service was discriminatory highlighting that ethnic Croat employees received severance allowance, while she did not.

The complaint

3. The author invokes a violation of article 2, paragraph 1 and 3 (b); article 7; article 9; article 12; article 14, paragraph 1; article 17; article 18 and article 26, of the Covenant.

State party's observations on admissibility and merits

4.1 By submissions of 16 January 2007 and 12 March 2007, the State party challenged the admissibility of the communication on the grounds that the same matter has been brought before another international body, that domestic remedies have not been exhausted and that the complaints by the author on behalf of his son Milan Vojnović are inadmissible *ratione temporis* and *ratione personae*.

4.2 The State party maintains that the communication should be declared inadmissible on the grounds of its declaration with regard to article 5, paragraph 2 (a), of the Optional

⁴ See paragraph 4.7 below.

Protocol stating that the Committee shall not have competence to consider a communication from an individual if the same matter is being examined or has already been examined under another international procedure.⁵ The State party argues that on 27 January 2004, the author filed to the European Court of Human Rights (ECHR) an identical application based on the same facts. It is not clear which articles of the European Convention on Human Rights were invoked in the author's application, however it appears that the author in essence complains about the outcome of the domestic proceedings conducted for the termination of his tenancy rights on a flat in Zagreb, as well as the dismissal of his son Milan Vojnović from work in 1991. On 18 November 2005, the ECHR declared the application inadmissible *ratione temporis*.

4.3 The State party asserts that the author has failed to exhaust all domestic remedies. Only civil proceedings regarding the termination of the specially protected tenancy were conducted and the author's constitutional complaint under article 62 of the Constitutional Act lodged on 17 February 2004 for violations of his rights protected in articles 14 and 17, of the Covenant remains pending.

4.4 The State party further argues that the duration of the proceedings, which as determined by the Constitutional Court in its 9 November 2005 decision lasted 2 years, 3 months and 27 days, cannot be considered as unreasonably long according to article 5, paragraph 2 (b), of the Optional Protocol. The State party highlights the special role of the Constitutional Court, which allows it to take into consideration other aspects than only the chronological order of the case.

4.5 The State party contests the alleged violation of article 9, of the Covenant as it has not deprived the author of his liberty. It holds that this part of the communication should be dismissed. The State party further argues that the author failed to invoke violations of the rights protected in article 12, paragraph 4; article 18, paragraph 1, and article 26, of the Covenant before domestic courts and that the communication should be declared inadmissible in these respects.

4.6 With regard to the complaints lodged on behalf of the author's son Milan Vojnović, the State party argues that they are inadmissible *ratione temporis* as the events took place in August 1991 and thus before the State party's ratification of the Optional Protocol. The State party also argues that the complaints should be held inadmissible *ratione personae* given that the author does not provide any authorization to file a communication on behalf of his son and does not substantiate why his son would have been prevented from filing his own communication.

4.7 By submission of 18 May 2007, the State party filed observations on the merits. It informed the Committee that the author's constitutional complaint had been dismissed on the merits on 7 February 2007. In relation to the alleged violation of the right to equality before the law, the Constitutional Court held that the competent court's views were not the result of arbitrary interpretation or self-willed application of the relevant substantive law. With regard to the alleged violation of the right to a fair trial, the Constitutional Court ruled that there have not been any procedural violations in the court proceedings given that they were conducted by the competent judicial authority, that the participants were able to take active part in the proceedings and could propose evidence and remedies and thus the guarantees of fair trial were not violated. The Constitutional Court ruled further that in a case pertaining to the termination of specially protected tenancy, a violation of the right to

⁵ "With regard to article 5, paragraph 2 (a) of the Protocol, the Republic of Croatia specifies that the Human Rights Committee shall not have competence to consider a communication from an individual if the same matter is being examined or has already been examined under another procedure of international investigation or settlement."

prohibition of torture, inhuman and degrading treatment was not relevant and that the alleged violation of the right to prohibition of discrimination was not sufficiently substantiated. It further ruled that in relation to the alleged violation of the right to home, the evidence before the courts proved that the author and alleged victims had left their residence voluntarily; as it appears that the author's wife handed over the keys to of the flat in October 1992 and signed the minutes of handover as per regular procedure. Finally, it held that the right to domestic remedy was not violated given that the author took an active part in the proceedings on the termination of the specially protected tenancy and made use of available domestic remedies.

4.8 Regarding the alleged violation of article 2, paragraphs 1 and 3 (b), of the Covenant, the State party maintains that the author did indeed have remedies available, which he also used, including some of them successfully. The State party argues that in the proceedings, the author was treated without discrimination.

4.9 The State party maintains that the author's rights to equality before courts and fair trial in the proceedings for termination of specially protected tenancy were not violated (article 14, paragraph 1, of the Covenant). It states that in the first court proceedings in 1995, the author was represented by an appointed trustee who protected his interests, and that subsequently, on 13 November 2000, the author succeeded with his request for review of the 1995 lawsuit on the grounds that the court had unjustifiably determined that the author's whereabouts were unknown. In the review proceedings, the author and his wife were represented by an attorney of their choice, and they were allowed to present relevant facts and evidence, including by oral testimony.

4.10 Regarding article 17, of the Covenant, the State party argues that the termination of the specially protected tenancy was based on valid domestic law (article 99 of the Housing Relations Act), that it pursued a legitimate aim – offer apartments for use under favourable conditions to meet the housing needs of the user and his family –, and that the termination for unjustified absence served to combat the shortage of housing space. The State party argues further that the principle of proportionality was respected and refers to the fact that in the domestic court proceedings the author did not succeed proving the existence of duress which had allegedly led to the family's departure from the flat. It also underlines that the author and his wife did not request any protection from, or report the alleged threats to the competent authorities. Additionally, the domestic courts assessed that the author and his wife had left the flat in a planned manner, given that the author moved out in June 1991, while his wife remained in the apartment until October 1992. Even if the author had left the flat due to threats that remained unreported for justified reasons, he neglected, until 1995, to make use of available remedies to protect his specially protected tenancy.⁶ In relation to the legitimacy of the institute of termination of specially protected tenancy, the State party argues that according to case law of international judicial bodies, a wide margin of appreciation should be given to States when regulating sensitive social issues.⁷

4.11 Finally, the State party argues that independent of the fact that the author's specially protected tenancy had been terminated, he had the possibility to participate in a program for housing accommodation which was provided for persons who had left Croatia and wanted to return. It was not clear from the author's communication, whether he submitted an application under that programme.

⁶ See judgement of the Supreme Court of the Republic of Croatia, Rev-155/94.

⁷ See for example European Court of Human Rights judgements *James and Others v. The United Kingdom* of 21 February 1986, Series A No. 98, p. 32, § 46; *Mellacher and Others v. Austria* of 19 December 1986, Series A No. 169, p. 25, § 45.

Author's comments on the State party's observations

5.1 On 10 September 2007 and 18 December 2008, the author submitted comments on the State party's observations. In response to the State party's assertion that he did not undertake any steps to prevent the termination of his tenancy, the author clarifies that, due to the armed conflict in the State party, he was not able to enter Croatia without a passport, which was only issued in 1997 during the United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTAES) mandate.⁸ From 1991 to 1997, the authorities did not issue new identification documents and the old documents were not valid for return, thus his and his family's right to enter their own country was violated (article 12, paragraph 4, of the Covenant). Upon arrival in Belgrade, the author sought protection from the Government of the Socialist Federal Republic of Yugoslavia in relation with the threats received prior to his departure from the flat, however his request remained unanswered. On 16 March 1995, the office of the Government of Croatia in Belgrade provided the author with a negative reply to his request for assistance with regard to the apartment in Zagreb.

5.2 The author refutes the State party's claims that he and his family left the apartment voluntarily and in a planned manner pointing out that it would not be logical to leave an apartment in which the author had lived for 36 years and for which he was the holder of tenancy rights.

5.3 The author underlines that he and his family are part of a pattern of discrimination against the Serb national minority. It was discriminatory and degrading to assign an appointed trustee in the first proceedings before the Zagreb Municipal Court (decision of 15 November 1995), as he was neither juvenile, nor deprived of his legal capacities as per the Civil Procedure Code. The designation of an appointed trustee despite the authorities' knowledge of his temporary address in Belgrade deprived him of his right to equality before a court.

5.4 With regard to the violations of articles 2 and 14, of the Covenant, the author notes that in the review proceedings before the Zagreb Municipal Court, the witnesses proposed by himself and his wife to illustrate the situation in which they had to flee the apartment, were summoned but not heard, and that the information he provided on the number of persons with Serb nationality living in the same apartment building, who had to flee in the same circumstances was not taken into consideration.

5.5 The author furthermore claims that in his complaint regarding his right to proceedings within reasonable time, the Constitutional Court did not assess the time lapse correctly, as 13 years, 1 month and 7 days had passed between the author's forced departure and its decision. Counting from the 15 November 1995 Zagreb Municipal Court decision to the Constitutional Court decision, 9 years, 11 months and 24 elapsed. Starting from the date of his application for review of the 1995 proceedings until the Constitutional Court decision, 6 years, 11 months and 2 days had passed.

5.6 On 17 November 2008, the author's request for housing accommodation under the Program of Housing Accommodation for former holders of specially protected tenancy⁹

⁸ Acting under Chapter VII of the Charter of the United Nations, the Security Council adopted resolution 1037 (1996), creating the United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTAES), in force from January 1996 to January 1998.

⁹ The right to housing under the Housing Program outside of the Area of Special State Concern is conferred upon persons or members of a family who are not owners or co-owners of a house or apartment on the territory of the Republic of Croatia or on the territory of other States created after the dissolve of the former Socialist Federative Republic of Yugoslavia (SFRY), or that they did not

was rejected on the grounds that the author sold property in Glina town at the address of 6 Prečac and that he was currently co-owner of a property at the address of 5 Balinac in the county of Glina. The author specifies that for the property in Glina town, the State Agency only reimbursed him of a third of the total price and that the owner of the property on 5 Balinac was his son Milan Vojnović. The author reiterates his claim to be victim of discrimination as a member of the Serb national minority.

5.7 Regarding the decision by the Constitutional Court of 7 February 2007, the author claims to have never been notified of this decision.

5.8 Regarding the complaint lodged with the European Court of Human Rights, the author specifies that he claimed violations of articles 6 (1); 8 (1); 13; 14 and 17, of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). The author claims, without further substantiation, that the proceedings before the European Court of Human Rights (ECHR) were different.

Additional comments by the State party on the author's submission

6. On 17 March 2008, the State party presented further observations. It confirmed that the author indeed lodged a request for housing under the Housing Program and that the competent Ministry had replied on 21 February 2007 requesting further information, which the author provided in October 2007. The State party submits that the author's request is pending before the competent domestic authorities.

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 In accordance with article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that a complaint filed by the author (complaint No. 11791/04) was found inadmissible by ECHR on 23 November 2005 because the facts related to the period prior to the entry into force for the State party of the European Convention on Human Rights. The Committee recalls that on acceding to the Optional Protocol, the State party entered a reservation to article 5, paragraph 2 (a), of that Protocol specifying that the Committee "shall not have competence to consider a communication from an individual if the same matter is being examined or has already been considered under another procedure of international investigation or settlement". The Committee notes, however, that ECHR did not "examine" the case in the sense of article 5, paragraph 2 (a), of the Optional Protocol, inasmuch as its decision pertained only to an issue of procedure.¹⁰ There is thus no impediment arising out of article 5, paragraph 2 (a), of the Optional Protocol regarding the admissibility.

sell or offer or otherwise alienate their house or apartment after 8 October 1991, or that they did not acquire the legal status of protected tenant (Official Gazette 63/03).

¹⁰ See communications No. 1389/2005, *Bertelli Gálvez v. Spain*, inadmissibility decision adopted on 25 July 2005, paragraph 4.3; and No. 1446/2006, *Wdowiak v. Poland*, inadmissibility decision adopted on 31 October 2006, paragraph 6.2.

7.3 The Committee takes note of the State party's contention that domestic remedies have not been exhausted, as a constitutional complaint was pending. The Committee notes that on the date of submission of the communication – 23 January 2006 – a constitutional complaint was pending before the Constitutional Court. However, in its submission on the merits, the State party informed the Committee that the author's application was rejected on 7 February 2007. The Committee recalls its jurisprudence that, save in exceptional circumstances, the date used for determining whether remedies may be deemed exhausted is the date of the Committee's consideration of the communication.¹¹

7.4 As to the State party's argument that the author does not have any authorization to represent his son Milan Vojnović and that his son could have submitted the communication himself, the Committee finds that the author does not have standing to act on his adult son's behalf¹² and declares this part of the communication inadmissible under article 1, of the Optional Protocol.

7.5 With respect to the alleged violation of article 2, paragraph 3; article 7; and article 9, of the Covenant and with respect to the claims the author presented concerning the dismissal of his wife Dragica Vojnović, the Committee considers that the author failed to sufficiently substantiate these claims for purposes of admissibility, and that these parts of the communication are therefore inadmissible under article 2, of the Optional Protocol.

7.6 As to the author's claim under article 14, paragraph 1, of the Covenant relating to the court proceedings in 1995 including the appointment of a trustee to represent him before the Zagreb Municipal Court, the Committee notes that the facts took place before the entry into force of the Optional Protocol for the State party. Accordingly, it considers this claim incompatible *ratione temporis* with the provisions of the Covenant and declares it inadmissible under article 3, of the Optional Protocol.

7.7 With respect to the alleged violations of articles 12 and 18, of the Covenant, the Committee notes the State party's argument that the author did not raise these claims before the domestic courts. The Committee recalls its jurisprudence, according to which the requirement of exhaustion of domestic remedies, which allows the State party to remedy an alleged violation before the same issue is raised before the Committee, oblige the author to raise the substance of the issues submitted to the Committee before domestic courts. Noting that the author has failed to raise issues related to articles 12 and 18, of the Covenant before domestic courts, the Committee concludes that this part of the communication is inadmissible pursuant to article 2, and article 5, paragraph 2 (b), of the Optional Protocol.

7.8 With regard to the author claim that the determination of the value of the apartment undertaken to establish the Zagreb Municipal Court's jurisdiction in the author's review request (rejected on 4 June 2004), relied on outdated figures, the Committee recalls that its jurisdiction is limited to the examination of arbitrariness, manifest error or denial of justice¹³ in the proceedings before the domestic courts and concludes that the author has

¹¹ Communication No. 1228/2003, *Lemercier and another v. France*, inadmissibility decision adopted on 27 March 2006, para. 6.4.

¹² See communications No. 946/2000, *L.P. v. Czech Republic*, Views adopted on 25 July 2002, paragraph 6.5; and No. 397/1990, *P.S. v. Denmark*, inadmissibility decision adopted on 22 July 1992, paragraph 5.2.

¹³ See Human Rights Committee, general comment No. 32 (2007) on article 14, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40 (A/62/40, Vol. I)*, annex VI, paragraph 26; and communications No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, inadmissibility decision adopted on 2 November 2004, paragraph 7.3; No. 886/1999, *Bondarenko v. Belarus*, Views adopted on 3 April 2003, paragraph 9.3; No. 1138/2002, *Arenz et al. v. Germany*, inadmissibility decision adopted on 24 March 2004, paragraph 8.6.

failed to sufficiently substantiate that the evaluation of the value of the apartment based on the yearly rent at the time the review complaint was lodged, 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. This part of the communication is therefore inadmissible, under article 2, of the Optional Protocol, for lack of substantiation.

7.9 The Committee further notes the State party's argument that the author failed to claim a violation of article 26, of the Covenant before domestic courts. However, it considers that the author raised the issue of discrimination in his individual constitutional complaint before the Constitutional Court, and so may be considered to have exhausted domestic remedies for purposes of article 5, paragraph 2 (b), of the Optional Protocol.

7.10 For the above reasons, the Committee concludes that the communication is admissible, in as far as it raises issues under article 2, paragraph 1; article 14, paragraph 1; article 17 and article 26, 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 in article 5, paragraph 1, of the Optional Protocol.

8.2 With regard to the alleged violation of article 14, paragraph 1, of the Covenant, the Committee takes note of the author's claims that his rights to a fair trial in the review proceedings before the Zagreb Municipal Court were violated as two key witnesses – neighbours who were acquainted with the circumstances that led to the author's departure – were summoned but not heard; that a confrontation between the author's wife and the witness Veselinka Zelenika, who currently occupies the apartment, was rejected; and that information regarding similar situations of other Serbs in the same apartment building was not taken into consideration. The Committee further notes the State party's arguments stating that in the said proceedings, the author was represented by an attorney of his choice; that he and his wife were able to participate in the proceedings and give oral testimony; and that witness statements were examined.

8.3 The Committee recalls that the concept of a "suit at law" under article 14, paragraph 1, of the Covenant is 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.¹⁴ In the present case, the proceedings relate to the determination of rights and obligations pertaining to specially protected tenancy in the area of civil law and they therefore fall under the concept of a suit at law. With regard to the alleged violation of the right to a fair trial, the Committee notes that it is a fundamental duty of the domestic courts to ensure equality between the parties, including the ability to contest all the arguments and evidence adduced by the other party.¹⁵ In its 12 April 2002 decision, the Zagreb Municipal Court evaluated that the case was sufficiently debated following the hearing of the author and his wife and three witnesses, including the current owner of the apartment. The Committee observes that, in addition to refusing to hear witnesses summoned to testify on the author's departure, as noted in paragraph 8.2 above, the Court also rejected the reception of additional information on other persons of Serb nationality who abandoned their apartments in similar circumstances, stating that this information was

¹⁴ See general comment No. 32 (note 13 above), paragraph 16.

¹⁵ See general comment No. 32 (note 13 above), paragraph 13; and communications No. 846/1999, *Jansen-Gielen v. The Netherlands*, Views adopted on 3 April 2001, paragraph 8.2; No. 779/1997, *Äärelä and Näkkäljärvi v. Finland*, Views adopted on 24 October 2001, paragraph 7.4.

not part of the debate. The Committee recalls that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice. However, given the circumstances in the State party when the facts occurred, as noted by the author, and the conditions in which the family had to leave the apartment and relocate to Belgrade, the Committee considers that the decision of the Court not to hear witnesses proposed by the author was arbitrary and violated the principles of fair trial and equality before courts contained in article 14, paragraph 1, in conjunction with article 2, paragraph 1, of the Covenant.

8.4 The Committee notes the author's claim that the proceedings to determine the termination of his specially protected tenancy were not conducted in reasonable time. The Committee observes that the State party has not provided any explanation justifying the overall length of the proceedings of almost seven years, starting from the date of the author's application for review on 7 December 1998, to the decision by the Constitutional Court on 9 November 2005. The Committee recalls that the right to a fair hearing under article 14, paragraph 1, of the Covenant entails a number of requirements, including the condition that the procedure before the national tribunals must be conducted expeditiously.¹⁶ This guarantee relates to all stages of the proceedings, including the time until the final appeal decision. Whether a delay is unreasonable must be assessed in the light of the circumstances of each case, taking into account, inter alia, the complexity of the case, the conduct of the parties, the manner in which the case was dealt with by the administrative and judicial authorities, and any detrimental effects that the delay may have had on the legal position of the complainant. The Committee thus finds that in light of the author's diligent conduct and of the negative effects the delay has on the author's and his family's return to Croatia, as well as in absence of an explanation by the State party justifying the delay, the overall length in the proceedings for the determination of the author's specially protected tenancy was unreasonable and in breach of article 14, paragraph 1 in conjunction with article 2, paragraph 1, of the Covenant.

8.5 The Committee must determine whether the termination of the author's specially protected tenancy constituted a violation of article 17, of the Covenant. It recalls that, under article 17, of the Covenant, it is necessary for any interference with the home not only to be lawful, but also not to be arbitrary. The Committee considers, in accordance with its general comment No. 16 (1988), that the concept of arbitrariness in article 17, of the Covenant 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.¹⁷

8.6 The Committee observes that the termination of the author's specially protected tenancy was in accordance with Croatian law, article 99 of the Housing Relations Act. The issue for the Committee to decide is therefore whether the termination was arbitrary. The Committee notes the author's claims that he and his family left the apartment due to threats they had received because they belong to the Serb national minority; that for fear of reprisals they did not seek any protection from the authorities in Croatia but upon arrival in Belgrade, the author informed the Government of the Socialist Federal Republic of Yugoslavia of the threats and requested protection; that this request remained unanswered; and that on 16 March 1995 he received a negative reply from the representative of the Government of the State party in Belgrade regarding his request for assistance with respect to his apartment. The author further claims that as he did not have valid identification

¹⁶ See general comment No. 32 (note 13 above), para. 27.

¹⁷ *Official Records of the General Assembly, Forty-third Session, Supplement No. 40 (A/43/40)*, annex VI, para. 4.

documents from 1991 to 1997, he was not able to travel to Zagreb to take the necessary measures to protect his tenancy rights and that despite the authorities' knowledge of the author's temporary address in Belgrade, they did not convoke him to participate in the first court proceedings before the Zagreb Municipal Court. The Committee also notes the State party's arguments that the termination of the author's specially protected tenancy relied on a legal basis (the Housing Relations Act) and pursued a legitimate aim – liberating housing space to provide accommodation for other citizens in need. It also respected the principle of proportionality, given that in domestic proceedings the author did not succeed in proving that his and his family's departure from the flat was due to threats received and that even if such threats had occurred and that they were not reported for justified reasons; the author should have taken steps to ensure the protection of his tenancy as according to domestic case law.

8.7 Taking note of the fact that the author and his family belong to the Serb minority, and that the threats, intimidation and unjustified dismissal experienced by the author's son in 1991 were confirmed by a domestic court, the Committee concludes that it appears that the departure of the author and his family from the State party was caused by duress and related to discrimination. The Committee notes that despite the author's inability to travel to Croatia for lack of personal identification documents, he informed the State party of the reasons of his departure from the apartment in question. Furthermore, as ascertained by the Zagreb Municipal Court, the author was unjustifiably not convoked to participate in the 1995 court proceedings before the latter. The Committee therefore concludes that the deprivation of the author's tenancy rights was arbitrary and amounts to a violation of article 17 in conjunction with article 2, paragraph 1, of the Covenant.

8.8 Having reached the conclusion that there was a violation of the above mentioned articles, the Committee does not need to consider the question of a separate violation of article 26 of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 14, paragraph 1 in conjunction with article 2, paragraph 1; and article 17 also in conjunction with article 2, 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 adequate compensation.

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

[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.]

**JJ. Communication No. 1512/2006 *Dean v. New Zealand*
(Views adopted on 17 March 2009, Ninety-fifth session)***

<i>Submitted by:</i>	Mr. Allan Kendrick Dean (represented by counsel, Mr. Tony Ellis)
<i>Alleged victim:</i>	The author
<i>State party:</i>	New Zealand
<i>Date of communication:</i>	8 September 2006 (initial submission)
<i>Subject matter:</i>	Sentence of preventive detention; retrospectivity of sentencing regime; rehabilitation of prisoner in preventive detention
<i>Procedural issue:</i>	Non-exhaustion of domestic remedies
<i>Substantive issues:</i>	Arbitrary detention; Access to courts to challenge lawfulness of detention; Right to rehabilitative treatment during detention; Right to benefit from lighter penalty
<i>Articles of the Covenant:</i>	9, 10, 14 and 15
<i>Articles of the Optional Protocol:</i>	2, 5 (2) (b)

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

Meeting on 17 March 2009,

Having concluded its consideration of communication No. 1512/2006, submitted to the Human Rights Committee on behalf of Mr. Allan Kendrick Dean 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,

Adopted the following:

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

1. The author of the communication, dated 8 September 2006, is Allan Kendrick Dean, a New Zealand citizen currently in preventive detention (that is, indefinite detention until release by the Parole Board) in New Zealand. He claims to be a victim of violations by New Zealand of articles 2, paragraph 3 (a) and (b); 7; 9, paragraphs 1 and 4; 10, paragraphs

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Lazhari Bouzid, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood. An individual opinion signed by Committee member Mr. Krister Thelin is appended to the present Views.

1 and 3; 14, paragraphs 1, 2, 3 and 5; 15, paragraph 1; and 26 of the Covenant. He is represented by counsel, Mr. Tony Ellis.

The facts as presented by the author

2.1 On 24 June 1995, the author entered a cinema and sat down next to a 13-year old boy. He put his hand across the boy's lap and rested it on his crotch on top of his pants. The boy then moved away to another seat.

2.2 Prior to this incident, the author had received 13 convictions for various incidences of indecency offences spanning nearly 40 years. He had been warned on two occasions that he might face a sentence of preventive detention if he came before the Court again on similar charges.

2.3 The author was charged with an offence of "indecency with a boy between 12 and 16 years old". He pleaded guilty on this account during summary proceedings in the District Court, in whose jurisdiction he faced a maximum sentence of three years' imprisonment. However, the District Court, in accordance with section 75 of the Criminal Justice Act 1985 (since repealed), declined the jurisdiction as to sentence upon the ground that it had reason to believe that the author was liable to preventive detention. The author's case was then transferred to the High Court for sentence. On 3 November 1995, he was sentenced to preventive detention, with eligibility for parole on 22 June 2005, in accordance with the law applicable at the time which fixed a minimum ten year non-parole period.

2.4 The author's appeal was initially dismissed, without reasons, on 23 November 1995. He had not been granted legal aid for his appeal. Following judgements by the Privy Council¹ and the Court of Appeal² that the appeal procedure, which had also been followed in the author's case, was flawed, the author applied for a rehearing of his appeal. He was granted legal aid. The Court of Appeal dismissed the appeal on 17 December 2004. The author's application for leave to appeal to the Supreme Court was rejected on 11 April 2005.

The complaint

3.1 The author complains that the sentence of preventive detention was manifestly excessive given the gravity of the offence and, thus, failed to respect his right to be treated with dignity in breach of article 7, or alternatively article 10, paragraph 1. The author submits that the concept of proportionality in punishment lies at the heart of the prohibition of cruel, inhuman and degrading punishment.³ The author submits that the uncertainty inherent to preventive detention has serious adverse psychological effects which render the sentence cruel and inhumane.

3.2 The author further claims that the disproportionateness of his sentence constitutes a violation of article 14, paragraph 1, of the Covenant. He submits that article 14, paragraph 1, applies to the entire criminal proceeding, including sentencing,⁴ and that a manifestly excessive sentence is not a fair sentence.

¹ *Taito v. R.*, 19 March 2002.

² *R v. Smith*, 19 December 2002.

³ In support of his argument, the author refers to the Privy Council judgement in *Forrester Browne (Junior) and Trono Davis v. The Queen* [2006] UKPC 10.

⁴ In this context, the author refers to the judgement of the European Court of Human Rights *Easterbrook v. United Kingdom* [2003] ECHR 278.

3.3 He further complains that his right to a fair trial was breached when he was transferred from the District Court to the High Court for sentencing, since the nature of the charge fundamentally changed when the sentence he faced increased from a maximum of three years' imprisonment to preventive detention. In this connection, the author submits that the nature of the charge includes also the maximum penalty that may be imposed, since this would influence the decision whether to plead guilty or not. In the instant case, the author pleaded guilty to a charge of indecency within the summary jurisdiction of the District Court. When the District Court then transferred his sentencing to the High Court, the author was not given an opportunity to reconsider his guilty plea and to decide whether to proceed to a trial. He claims that this constitutes a violation of article 14, paragraphs 1 and 3(a), as he was convicted in the summary jurisdiction without a jury trial, and then transferred to the indictable jurisdiction to face the most serious penalty permissible under the law without the necessary due process protections.

3.4 The author also claims that the delay in the hearing of his appeal, which was dismissed nine years after his appeal had been initially filed, constitutes a breach of article 14, paragraphs 3(c) and 5.⁵ He claims that the appropriate remedy for the delay should have been a reduction in sentence from preventive detention to a finite term. The Court, however, refused to enter into this question, which was raised by counsel for the author at his appeal, according to the author because it considered that the author would be entitled to apply for parole six months later. The author claims that the consideration of his entitlement for parole was irrelevant to the question of whether he had suffered a breach and whether he was entitled to a remedy, and thus violated his right to a fair trial under article 14, paragraph 1.

3.5 He further claims that the appeal hearing violated article 14, paragraphs 1 and 3(d), because the Court of Appeal embarked on an inquisitorial fact finding investigation into the author's past offending and recovered the file related to a judgement of 24 July 1970. The author complains that this breached the principle of adversarial proceedings and that he was only given an opportunity to review the file after the Court had already formed its opinion. He moreover claims that the Court only produced part of the file and that the full file was only produced after his counsel so requested and that the appeal judgement in the case had gone missing.

3.6 The author further claims that his counsel's submissions were unreasonably dismissed by the Court of Appeal, in violation of article 14, paragraph 1. He claims a further violation of article 14, paragraph 1, because of the failure of the Court of Appeal to request an updated psychiatric report. The author submits that when he was sentenced in 1995, the Court had before it one psychological report of 1993 and one psychiatric report of 1995, which contained only two pages and was based on only one meeting with the author. He further submits that the psychiatrist who produced that report was being investigated for malpractice in his native state. The author submits that given the time elapse the Court of Appeal was duty bound to call for an up to date report in order to determine the appeal.

3.7 The author claims that he has been discriminated against by the judiciary on the basis of his sexual orientation, as he has been treated more harshly than non-homosexuals in respect of sentencing. In this context, he refers to the sentencing notes made by the judge who sentenced him to eight years' imprisonment in 1970, which show a clearly homophobic attitude. He also refers to section 140A (repealed) of the Crimes Act 1961, under which he was sentenced, which only criminalized indecent assaults by a man on any

⁵ In support of his claim, the author refers to the Committee's jurisprudence in communications No. 818/1998, *Sextus v. Trinidad and Tobago*, Views adopted on 16 July 2001 and No. 588/1994, *Errol Johnson v. Jamaica*, Views adopted on 22 March 1996.

boy between 12 and 16 years' old. The section was only replaced with a gender neutral provision in 2003.

3.8 The author claims a violation of article 15, paragraph 2, as he has been denied access to a more lenient penalty than that afforded to people who were sentenced after the enacting of the Sentencing Act 2002. He submits that all offenders sentenced to preventive detention prior to the Act, received automatic 10 year non-parole periods, whereas those sentenced after received 5 year non-parole periods. In this context, the author submits that the determination of parole eligibility amounts to the imposition of a sentence.⁶ The author also claims that the difference in treatment between offenders based solely on the sentencing date constitutes discrimination, in violation of article 26.

3.9 The author claims that New Zealand's preventive detention regime violates article 9, paragraph 1, of the Covenant, since it lacks safeguards to prevent arbitrary detention; article 14, paragraph 1, because the trial Court can only impose part of the sentence whereas the rest of the sentence is in the hands of an administrative body; article 14, paragraph 2, since it violates the presumption of innocence, and article 15, paragraph 1, as it imposes a discretionary sentence on the basis of evidence of future dangerousness and does not sanction past acts. He also claims a violation of article 9, paragraph 4, since his continued detention is not subject to regular review by a court, as the Parole Board lacks independence from the executive and does not provide the guarantees of judicial procedure. The author makes reference to the Committee's Views in *Rameka et al. v. New Zealand*,⁷ and notes that nine members in one way or another dissented from the majority opinion that preventive detention may be imposed if proper safeguards are in place to ensure compliance with the Covenant. The author refers to the views expressed by the dissenting opinions of six Committee members and states that the Committee's own jurisprudence shows that the Committee is not bound by precedent.

3.10 The author refers to the Committee's observation in *Rameka et al. v. New Zealand* that the authors had not advanced any reasons why the Parole Board should be regarded as insufficiently independent and impartial for purposes of article 9, paragraph 4, of the Covenant.⁸ In this connection, the author submits that the members of the Parole Board are political appointees, and that the majority are lay persons. Moreover, the Department of Corrections exerts undue influence over the Parole Board members, as it organises and provides their formal training. The author further states that the parole hearings are not public, and that the Parole Board is not an adversarial proceeding, and does not respect the right to legal representation.

3.11 The author claims that he is a victim of a violation of article 10, paragraph 3, since he has been unreasonably denied treatment to aid in his rehabilitation and release. He states that at his first parole hearing on 22 June 2005, the Parole Board concluded that he had done insufficient courses to address his offending, and that to release him would pose an undue risk to the community. The Board recommended that he be transferred to Auckland Prison to undergo relapse prevention treatment and to aid him in formulating a release plan. The author's transfer however did not materialize and after the Parole Board hearing on 23 June 2006, the Parole Board again recommended that he be transferred to Auckland Prison as soon as possible in order to develop a release plan. The Parole Board indicated that if a suitable release plan were to be in place at the time of the next hearing in November 2006, it would order his release. The author claims that the Department's policy that persons

⁶ The author refers to the submissions made by counsel in communication No. 1492/2006, *Ronald van der Plaats v. New Zealand*, decision adopted on 7 April 2006.

⁷ Communication No. 1090/2002, Views adopted on 6 November 2003.

⁸ *Ibid.*, para. 7.4.

servicing preventive detention are not scheduled for specific treatment until after they reach their parole eligibility date violates his right to rehabilitation.

3.12 The author claims that because of the Department's policy he has been arbitrarily detained beyond his parole eligibility date, in breach of article 9, paragraph 1, and that there is no possibility of review of his continued detention by a genuine independent and impartial tribunal. In this context, the author states that the Department of Corrections has no obligation to follow the recommendations of the Parole Board.

3.13 The author also claims that his right to equal treatment before the law is breached, on the grounds that the policy of the Department of Corrections discriminates against preventive detainees, who are not scheduled for treatment until after their parole eligibility date, in favour of offenders who are serving finite sentences, who are offered treatment when they have served 66 per cent of their sentence. He states that a lack of resources cannot serve as a justification for a violation of a Covenant right.

3.14 The author states that following the dismissal of his application for leave to appeal by the Supreme Court on 11 April 2005, he has exhausted all available domestic remedies.

The State party's submission on admissibility and merits

4.1 By submission dated 5 June 2007, the State party challenges the admissibility and the merits of the communication.

4.2 With regard to the author's allegation that the offence for which he was convicted was discriminatory against homosexual males and that his sentence was higher because of his homosexuality, the State party submits that the author has failed to exhaust domestic remedies in this regard, as he has failed to raise this matter on appeal. The State party moreover rejects the allegation on its merits and submits that the failure in 1995 to have a specific offence of indecency by a woman against a boy does not amount to discrimination against the author. In this connection, the State party explains that, while in 1995 there was no specific offence in respect of indecency by a woman against a boy, in those circumstances the offender was charged with a more general offence such as assault. The State party further submits that the author has failed to substantiate his claim that the sentence imposed upon him was higher because he was a homosexual male. It explains that the sexual activity of the author is criminalized, not because it is homosexual or heterosexual, but because it is committed against children. The State party notes that the sentencing notes referred to by the author relate to his conviction in 1970, prior to the entry into force of the Covenant and the Optional Protocol.

4.3 In relation to the nature of the sentence of preventive detention, the State party notes that the author essentially seeks to review the Committee's Views in *Rameka v. New Zealand*. The State party invites the Committee to follow its jurisprudence established in the *Rameka* case, especially because the author was sentenced under exactly the same regime as the authors in that case. If the Committee would be minded to depart from its Views in the *Rameka* case, the State party would wish to make full submissions. The State party also submits that the author has failed to exhaust domestic remedies in respect of some of his allegations. His allegations relating to the independence and impartiality of the Parole Board were not raised as part of the author's appeal and author's counsel expressly informed the Court of Appeal that he was not litigating these allegations. Further, the author has not sought judicial review in respect of the decisions of the Parole Board in his case, nor has he issued proceedings for breach of the New Zealand Bill of Rights Act. As to the merits, the State party argues that the criminal limb of article 14 does not apply to the Parole Board as the Board is not involved in the determination of a criminal charge. Nor is the proceeding before the Parole Board a 'suit of law' within the meaning of article 14, paragraph 1, of the Covenant. Whereas it is for the courts to determine guilt and to impose a

sentence commensurate with the seriousness of the offense, the role of the Parole Board is merely to administer the sentence imposed by the court, as the focus of parole is not punishment, but safety for the community. In any event, the State party argues that when looked at globally, including the establishment of the Parole Board by Statute as an independent statutory authority, the statutory protections against bias and the availability of judicial review by the courts, the requirements of article 14 are met.

4.4 With regard to the author's allegations concerning the availability of rehabilitation programmes, the State party submits that the author has failed to exhaust domestic remedies since at no time has he sought review of the decisions of the Department of Corrections in this regard. During the appeal, counsel for the author expressly advised the Court that he was not litigating these allegations. On the merits, the State party argues that its penitentiary system meets the requirements of article 10, paragraph 3, as it provides a range of targeted rehabilitation programmes during imprisonment, prior to release and upon parole. The State party submits that article 10, paragraph 3, does not provide an absolute right of individuals to receive one-to-one psychological treatment or to participate in a particular rehabilitation programme. The State party provides details of the rehabilitation assistance received by the author during his numerous terms of imprisonment, including specialized rehabilitation programmes for child sex offenders and one to one psychological counselling. Notwithstanding, the author has continued to re-offend, including whilst on parole. The State party rejects the author's allegation that his release has been delayed because he has not been provided with rehabilitation during his current sentence and submits that the author has followed a number of rehabilitation programmes as well as one to one psychological counselling. In addition, in 2000 he was offered the opportunity to attend the Te Piriti programme, a pre-release programme for sexual offenders against children. According to the State party the author refused to participate in the programme because of the involvement of female psychologists and because the programme does not address his homosexual orientation. According to the State party, the relapse prevention treatment provided in Auckland prison, mentioned by the Parole Board in 2005, is the Te Piriti programme which the author refuses to attend. The State party adds that the author was transferred to Auckland prison in July 2006, and that he re-appeared before the Parole Board in November 2006. The Board considered that the author had not yet produced a comprehensive release plan showing the supervision and support for his release and decided to adjourn the matter until March 2007. At counsel's request, the hearing has been adjourned until June 2007.

4.5 With regard to the transfer of the proceedings from the District Court to the High Court, the State party submits that the author has failed to exhaust domestic remedies as he never sought to vacate his guilty plea or to appeal his conviction. The State party further submits that the author has failed to substantiate his allegation that he was unaware that he was facing a sentence of preventive detention. On the contrary, he had previously received a number of warnings that preventive detention might be imposed if he continued offending against children. The State party further notes that the author was represented by counsel throughout the sentencing process.

4.6 With regard to the author's allegations concerning his appeal against sentence, the State party submits that the length of time taken in rehearing the author's appeal does not amount to a breach of article 14, and that even if it did, a reduction in sentence would not be an appropriate remedy as there was no harm to the author arising from the delay, and the rehearing of his appeal constituted a remedy for the flawed procedure followed in the determination of the author's first appeal. The State party submits that the initial appeal was heard and determined within reasonable time, on 21 March 1996. The author did not challenge the procedure by which his appeal was determined. After other appellants had challenged the procedure and as a result of consequent legislative amendments, the author was provided with an opportunity for a rehearing. He filed an application for a rehearing on

21 May 2003. The rehearing took place on 10 November and 15 December 2004. As admitted by the author, 12 months of that delay was due to unavailability of counsel. The State party therefore submits that the delay of seven years and three months in the determination of the author's appeal cannot be solely attributed to the State party.

4.7 As to the conduct of the Court of Appeal in obtaining a court file relating to one of the author's previous offences, the State party asserts that this did not amount to a breach of article 14, as the Court obtained the file in relation to counsel's submission that the author was merely a 'nuisance' offender. Once the Court had obtained the file, which related to the author's 1970 conviction and sentence of eight years' imprisonment for sexual assault on boys under 16, it gave the author and the Crown another opportunity to be heard. As to the allegations concerning the decision of the Court of Appeal to reject the author's appeal, the State party submits that the author essentially seeks review of the Court's decision, and that this part of the communication is therefore inadmissible since the Committee's role is not to re-evaluate findings of fact or to review the application of domestic legislation. As to the court's reliance on a two year old psychological report, the State party notes that the author did not challenge the reliance on these documents in his appeal and that this part of the communication is thus inadmissible for failure to exhaust domestic remedies. The State party moreover explains that it would have been open to the author to produce his own psychological or psychiatric evidence to the Court.

4.8 With regard to the author's claim that the sentence of preventive detention imposed upon him was manifestly excessive and disproportionate, the State party refers to the Committee's Views in *Rameka v. New Zealand* and submits that the author essentially seeks a review of the substantive decisions of the domestic courts as to whether the sentence should have been imposed. His argument that the sentence was excessive was rejected by the Court of Appeal and the Supreme Court declined leave to appeal. In determining whether the sentence of preventive detention was appropriate the Court of Appeal took account of, inter alia, the author's long history of sexual offending, the three prior warnings as to the likelihood of a sentence of preventive detention being imposed if the author reoffended, the seriousness of the 1970 offending which demonstrated that the author, if given the opportunity, was more than a 'proper', the author's poor response to rehabilitation efforts and his failure to comply with his special conditions of parole on his last release which required him to undertake psychological counselling. The State party argues that the Committee is essentially asked to be a further level of appellate review of sentence and that the communication should thus be inadmissible. As to the merits, the State party argues that the imposition of the sentence in the author's particular circumstances did not amount to a breach of article 7 or article 10, paragraph 1.

4.9 With regard to the non-retrospectivity of the Sentencing Act 2002, which came into force seven years after the author was convicted and sentenced, the State party submits that the author has failed to exhaust domestic remedies as he did not raise these issues upon appeal. On the merits, the State party submits that article 15, paragraph 1, does not extend to penalties enacted after a person has been convicted and sentenced, and that it does not require States parties to bring persons who have already been sentenced back before the Courts for re-sentencing. In this connection, the State party explains that the Sentencing Act 2002 does not provide for a 5 year non-parole period as alleged by the author but requires the sentencing court to impose a minimum term of imprisonment of at least five years. The State party submits that the author has failed to establish that he would have received a 'lighter penalty' had he been sentenced under the Sentencing Act, as it is not possible to speculate what minimum term of imprisonment would have been imposed by the Court. The State party further submits that the date of sentencing is not an 'other status' for the purposes of article 26.

Author's comments on the State party's submission

5.1 The author challenges the State party's submission that parts of his communication are inadmissible for failure to exhaust domestic remedies. He claims that no effective remedies are available in New Zealand for violations of Covenant rights, since the Covenant has not been incorporated into domestic legislation and section 4 of the New Zealand Bill of Rights prevents the Courts from undertaking any inquiry into the question whether any legislation violates the rights contained in the Bill of Rights.⁹ The author refers to a decision of the Court of Appeal,¹⁰ rejecting a challenge to the regime of preventive detention on the basis that it violated sections 9, 22, 23 and 25 of the Bill of Rights and articles 7, 9, 10, 14 and 15 of the Covenant, reasoning that it was prevented by section 4 of the Bill of Rights to undertake an inquiry into the desirability or otherwise of the preventive detention regime. The Supreme Court declined leave to appeal, stating that the suggestion that the sentence of preventive detention is unlawful in itself cannot withstand section 4 of the New Zealand Bill of Rights Act.

5.2 The author moreover notes that as far as article 10, paragraph 3, is concerned, no equivalent provision exists in the New Zealand Bill of Rights, and domestic remedies are thus not available. The author states that, since the submission of his original communication, he has in vain requested the Department of Corrections to help him construct a release proposal which would allow him to be released. He also had to seek the services of a private psychologist as the Department had refused to engage one. In the absence of a sufficient release plan, the Parole Board declined to release the author.

5.3 The author withdraws the part of his communication relating to the independence of the Parole Board, in light of the fact that the issue has not yet been fully challenged in the domestic courts.

5.4 With regard to his claim that the nature of the preventive detention regime violates articles 7, 9, 10, 14 and 15 of the Covenant, the author acknowledges that this is the same claim as raised in *Rameka v. New Zealand*, but states that he is relying on the individual opinions appended to the Committee's Views and asks the Committee to revisit its decision. The author states that he raised the excessiveness of the sentence on appeal, and that in any event no effective remedy is available as the regime cannot be challenged before the courts because of section 4 of the Bill of Rights. Relying on the Committee's earlier jurisprudence,¹¹ the author therefore argues that this part of the communication is not inadmissible for failure to exhaust domestic remedies.

5.5 In regard to his claim that the offence for which he was convicted was discriminatory against homosexual males and that his sentence was higher because of his homosexuality, the author states that he could not have raised the 1970 comments on appeal as he became only aware of it during the hearing of the appeal, after he obtained a copy of

⁹ Section 4 of the New Zealand Bill of Rights reads:

"No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights), --

(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective, or

(b) Decline to apply any provision of the enactment – by reason only that the provision is inconsistent with any provision of the Bill of Rights.

¹⁰ *Exley*, CA279/06 [2007] NZCA 393.

¹¹ Communications No. 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989, para. 12.5; No. 511/1992, *Lansman et al. v. Finland*, Views adopted on 26 October 1994, para. 6.2; No. 550/1993, *Faurisson v. France*, Views adopted on 8 November 1996, para. 6.1.

the file that had been obtained by the Court of Appeal. The author disputes the State party's claim that he has failed to substantiate his claim that the sentence imposed upon him was higher because he was a homosexual male and refers to expert reports which found that sentences of preventive detention are imposed almost four times more frequently for homosexual offending than for heterosexual offending.

5.6 The author reiterates his claim that the transfer of his case from the District Court to the High Court breached his rights under article 14 of the Covenant and states that it was the Court's duty to inform him of his increased jeopardy and advise him of the possibility of changing his plea.

5.7 The author reiterates that he is the victim of undue appellate delay. He explains that he did not seek special leave to petition the Privy Council as no legal aid was available and special leave was only granted in exceptional circumstances.

5.8 As to the procedure before the Court of Appeal, the author reiterates his claim that the Court did not have the power to search the 1970 file and that they nevertheless did was detrimental to his right to fair hearing. With regard to the State party's suggestion that he could have presented his own psychological report to the Court of Appeal, the author submits that it was incumbent on the Court to decline to act on an outdated 10-year old report and that he should not have been sentenced to preventive detention on the basis of this report. The author moreover points out that since 2002 two reports are required before preventive detention can be imposed, and that, since his appeal was heard after 2002, these standards should have been applied. In the absence of such second report, the author claims that his sentence of preventive detention is arbitrary.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 With regard to the author's claims under article 14, paragraphs 1 and 3 (a) of the Covenant, relating to the transfer of the proceedings in his case from the District Court to the High Court, the Committee notes that the author did not seek to vacate his plea, nor did he appeal his conviction. The Committee therefore considers that this part of the communication is inadmissible for failure to exhaust domestic remedies, under article 5, paragraph 2(b), of the Optional Protocol.

6.3 As to the author's claim that he was discriminated against on the basis of his homosexuality, under article 26 of the Covenant, the Committee notes that he was convicted for the crime of indecency with a minor and that he has failed to substantiate for purposes of admissibility, that he is a victim of discrimination on the basis of his sexual orientation. The Committee therefore considers that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.4 The Committee note the author's claims that the appeal hearing violated his rights under article 14, because the Court produced the file related to the author's 1970 conviction and failed to order an updated psychiatric report. It observes that the author was represented by counsel throughout the proceedings, that the file relating to his past convictions was provided in response to an argument made by his own counsel and that the author could have provided his own psychiatric report and made no objection during the proceedings to reliance upon the report in question. For these reasons, the Committee finds that the author

has not substantiated his claims and that therefore this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.5 As to the author's claim under article 26 of the Covenant, the Committee finds that he has failed to demonstrate that the Department of Corrections discriminated against him in the provision of rehabilitation treatment. Thus, the Committee concludes that this part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.6 The Committee notes that the author has withdrawn his claims in relation to the question of independence of the Parole Board.

6.7 The Committee notes the author's claim that he is a victim of a violation of articles 15 and 26 because the Sentencing Act 2002 has not been applied to him. He argues that the minimum non-parole period for preventive detention is 5 years, whereas when he was sentenced, the minimum non-parole period was 10 years.¹² The Committee notes its jurisprudence on changes in sentencing and parole regimes that "it is not the Committee's function to make a hypothetical assessment of what would have happened if the new Act had been applicable to him", and that it cannot be assumed what a sentencing judge applying new sentencing legislation would in fact have concluded by way of sentence.¹³ The Committee's jurisprudence has also noted the relevance of a prediction as to the author's own future behaviour to the duration of imprisonment.¹⁴

6.8 The Committee notes that, even assuming for the purposes of argument that article 15, paragraph 1, of the Covenant applies to the period after conviction and sentence and that changes in parole entitlements within a preventative detention regime amount to a penalty within the meaning of the same provision, the author has not shown that sentencing under the new regime would have led to him serving a shorter time in prison. The contention that the author would have been released earlier under the new regime speculates on a number of hypothetical actions of the sentencing judge, acting under a new sentencing regime, and of the author himself. The Committee therefore concludes, consistent with its earlier jurisprudence,¹⁵ that the author has not shown that he is a victim of the alleged violation of articles 15, paragraph 1, and article 26, and this part of the communication is inadmissible under article 1 of the Optional Protocol.

6.9 The Committee has noted the submissions made by the State party and the author on the availability of domestic remedies. It considers that there is no obstacle to the admissibility of the remaining issues raised by the author in his communication and will proceed to examine these issues on the merits.

6.10 The Committee concludes that the claims based on violations of article 9, paragraph 1 (arbitrary detention); article 9, paragraph 4 (review of detention); article 10, paragraph 3 (rehabilitation); article 14, paragraphs 3 (c) and 5 (relating to the issue of delay); article 7; article 10, paragraph 1; and article 14 (relating to the alleged excessive nature of the sentence) of the Covenant have been sufficiently substantiated and should be considered on the merits.

¹² Section 80 (repealed) of the Criminal Justice Act 1985.

¹³ Communication No. 55/1979, *MacIsaac v. Canada*, Views adopted on 14 October 1982, paras. 11 and 12.

¹⁴ Communication No. 50/1979, *Van Duzen v. Canada*, Views adopted on 7 April 1982, paragraph 10.3.

¹⁵ *Ronald van der Plaat v. New Zealand* (note 6 above).

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 author has claimed that he is a victim of undue delay in the hearing of his appeal. The Committee notes that initially the author's appeal was heard in 1996, but that in 2002 a Privy Council and Court of Appeal judgement considered flawed the procedure applied in the hearing of the appeal. Subsequently the author was given an opportunity to apply for a rehearing of his appeal, which he did on 21 May 2003. The Court of Appeal rejected his appeal on 17 December 2004. 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) and 5.

7.3 As regards the author's claim that the imposition of the sentence of preventive detention was manifestly excessive in his case, the Committee notes that the author has a long history of sexual assault and indecency offences, that he had been warned on several occasions that in case of re-offending he might be sentenced to preventive detention, and that he committed the offense for which he was convicted to preventive detention within three months of his release from prison after having been convicted for a similar offense. The Committee considers that in the circumstances of the present case, the sentence of preventive detention was not so excessive as to amount to a violation of either article 7, 10, paragraph 1, or 14 of the Covenant.

7.4 The Committee recalls that the sentence of preventive detention does not per se amount to a violation of the Covenant, if such detention is justified by compelling reasons that are reviewable by a judicial authority.¹⁶ As to the claim under article 9, paragraph 4, the Committee observes that the maximum finite sentence for the author's offense was seven years' imprisonment at the time he was convicted.¹⁷ Accordingly, the author had served three years of detention for preventive purposes, at the time of his first Parole hearing in 2005. The Committee refers to its finding in *Rameka*¹⁸ and finds that the author's inability to challenge the existence of substantive justification for his continued detention for preventive reasons during that time was in violation of his right under article 9, paragraph 4, of the Covenant to approach a court for a determination of the lawfulness of his detention period.

7.5 The Committee notes that the author remains in detention following completion of the minimum 10-year period of preventive detention, due to the absence of a sufficient release plan showing the supervision and support necessary for his re-integration in society. It notes that the author himself is responsible for the production of such a plan and chose not to attend certain rehabilitation programmes which would have been an important preliminary step in this process. While recognising that it is the duty of the State party in cases of preventive detention to provide the necessary assistance that would allow detainees to be released as soon as possible without being a danger to the community, it would appear that in the present case the author has contributed himself to the delay in putting the plan together thereby holding up the consideration of his release. The Committee concludes therefore that the author has failed to demonstrate violations of article 9, paragraph 1, and article 10, paragraph 3 of the Covenant.

¹⁶ See the Committee's Views in *Rameka et al. v. New Zealand* (note 7 above), para. 7.3.

¹⁷ Section 140A (repealed) of the Crimes Act 1961.

¹⁸ See the Committee's Views in *Rameka et al. v. New Zealand* (note 7 above), para. 7.2.

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 facts before it disclose a violation of articles 9, paragraph 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 with an effective remedy. 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 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.

[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. Krister Thelin (dissenting)

1. The majority has found a violation of the author's right under article 9, paragraph 4, of the Covenant. I respectfully disagree.
2. In line with the Committee's finding in *Rameka et al. v. New Zealand*,^a the majority correctly underscores, that a sentence of preventive detention under the State party's criminal legal system does not as such amount to a violation of the Covenant. Furthermore, the lawfulness of the author's sentence was reviewed upon appeal.
3. The fact that the author, having been sentenced by a court in a lawful manner, did not have recourse to additional judicial review of his continued detention for a number of years does not, in my view, constitute a violation of article 9, paragraph 4.
4. This provision should not be interpreted so as to give a right to judicial review of a sentence on an unlimited number of occasions (cf. dissenting opinion of Mr. Ivan Shearer et al. in *Rameka et al. v. New Zealand*). No distinction should in this respect be made between a finite sentence of imprisonment, where questions of parole may later arise, or, as in the present case, when the sentence is of preventive detention with a fixed minimum period before the sentence may be reviewed.
5. For these reasons the Committee should have found a non-violation also of article 9, paragraph 4, of the Covenant.

(Signed) Mr. 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. 1090/2002, Views adopted on 6 November 2003.

**KK. Communication No. 1514/2006, *Casanovas v. France*
(Views adopted on 28 October 2008, Ninety-fourth session)***

<i>Submitted by:</i>	Robert Casanovas (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	France
<i>Date of communication:</i>	28 September 2006 (initial submission)
<i>Decision on admissibility:</i>	3 July 2007
<i>Subject matter:</i>	Obligation to pay a deposit in order to be able to challenge speeding fines
<i>Procedural issues:</i>	Failure to exhaust domestic remedies; failure to substantiate the allegations of a violation
<i>Substantive issues:</i>	Effective remedy; judicial remedy; presumption of innocence; fair hearing by a competent, independent and impartial tribunal
<i>Articles of the Covenant:</i>	2, paragraph 3 (a) and (b); 14, paragraphs 1 and 2
<i>Articles of the Optional Protocol:</i>	5, paragraph 2 (b); 2

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

Meeting on 28 October 2008,

Having concluded its consideration of communication No. 1514/2006, submitted by Robert Casanovas (not represented by counsel) 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. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Ms. Helen Keller, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Ms. Christine Chanet did not participate in the adoption of the Views.

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

1.1 The author of the communication is Mr. Robert Casanovas, a French national. He claims to be a victim of violations by France of articles 2 and 14 of the International Covenant on Civil and Political Rights. He is not represented by counsel. The Covenant and the Optional Protocol thereto entered into force for the State party on 4 February 1980 and 17 February 1984 respectively.

1.2 On 4 March 2007, the Committee's Special Rapporteur on New Communications and Interim Measures decided to consider the admissibility and the merits of the communication separately.

Factual background

2.1 Between 5 and 15 July 2006, the author received three notices of driving offences from the road traffic offences computer centre. The first, dated 5 July 2006, informed him that, at 9.40 p.m. on 20 April 2006, his vehicle had passed an automatic radar control unit and a speeding offence had been noted for a recorded speed of 130 km per hour in an area where the speed limit was 110 km per hour. The second notice, dated 8 July 2006, informed him that, at 9.39 p.m. on 20 April 2006, his vehicle had passed an automatic radar control unit and a speeding offence had been noted for a recorded speed of 119 km per hour in an area where the speed limit was 110 km per hour. The third notice, dated 15 July 2006, informed him that, at 9.44 a.m. on 11 July 2006, his vehicle had passed an automatic radar control unit and a speeding offence had been noted for a recorded speed of 92 km per hour in an area where the speed limit was 90 km per hour.

2.2 The three notices informed the author that he could either pay a fixed penalty of €68 for the first two offences and of €135 for the third, and lose 4 of his 12 driving licence points, or challenge the notices by submitting a reasoned complaint to an officer of the public prosecutor's department; however, the admissibility of the complaint was subject to the prior deposit of the amount of the fines demanded, failing which his case would not be considered.

2.3 On 7, 13 and 20 July 2006, the author informed the public prosecutor's department by registered letter that he had not been driving the vehicle on the days or at the times when the offences had been noted and did not know who had been. In substantive terms, the author claimed that the strict regulations for signposting the two radar units had been violated, thereby nullifying the offences recorded by those units. The author further argued in his three letters that the radar had been set up by prefectural order following an irregular procedure, which renders the notice of the offence null and void. If the public prosecutor's department considered that it was not obliged to accept his complaints, the author asked to appear before the competent community court to obtain a judgement on the merits. On 4 July 2006 and 13 and 20 September 2006, an officer of the public prosecutor's department informed the author that his applications for exemption had been dismissed on the grounds that he had not deposited the sums required under articles 529-10¹ and 530-1² of the Code

¹ Article 529-10 of the Code of Criminal Procedure: "When a fixed penalty notice concerning one of the offences mentioned in article L.121-3 of the Traffic Code has been sent to the vehicle licence holder or to the persons specified in article L.121-2, paragraphs 2 and 3, of the Traffic Code, any application for exemption under article 529-2 or claim under article 530 shall be admissible only when sent by recorded delivery registered letter enclosing either:

1. One of the following documents:

of Criminal Procedure. The public prosecutor's department informed him that he could apply again, subject to prior payment of a deposit within 45 days, which the author refuses to do.

The complaint

3.1 In the author's view, his three claims were dismissed by the officer of the public prosecutor's department without any consideration of the merits whatsoever, solely on the grounds that the applicant had not first paid the deposit. Such a dismissal is a violation of article 2, paragraphs 3 (a) and (b), and article 14, paragraphs 1 and 2, of the Covenant.

3.2 On the question of admissibility under article 2 of the Covenant, the author considers that he has no genuinely effective remedy to oblige the French authorities to assess his three claims on the merits. The officer of the public prosecutor's department refused the application under articles 529–10 and 530–1 of the Code of Criminal Procedure, which constitutes binding domestic legal provisions. These provisions are binding on the officer but are a manifest violation of the Covenant. The author maintains that the ordinary and the administrative courts in France are loath to refuse to apply a law that violates an international treaty. Indeed, they decline to exercise any proper oversight of the constitutionality of laws, leaving that up to the Constitutional Council, which cannot consider cases brought by a private individual. Since his three applications have been dismissed by the officer of the public prosecutor's department, the author has exhausted all domestic remedies and has no judicial means of compelling the State party to assess the applications on the merits. Inasmuch as the author refuses to first pay a deposit, the proceedings are now closed. The fine is definitive and the points have been docked from his driving licence. The author cannot have the case tried in the courts, as referral to the

(a) An official acknowledgement of the reporting of the theft or destruction of the vehicle or of the theft of the licence plate (an offence under article 317–4–1 of the Traffic Code), or a copy of the certificate of destruction issued in accordance with the provisions of the Traffic Code; or

(b) A letter signed by the author of the application or claim giving the name, address and driving licence number of the person alleged to have been driving the vehicle when the offence was recorded; or

2. A document acknowledging deposit of a sum equal to the amount of the fixed penalty provided for by article 529–2, paragraph 1, or the amount of the augmented fixed penalty provided for by article 530, paragraph 2; such deposit shall not be deemed tantamount to payment of the fixed penalty and shall not entail any loss of driving licence points under article L.223–1, paragraph 4, of the Traffic Code.

“An officer of the public prosecutor's department shall ascertain whether the application or claim meets the conditions of admissibility under the present article.”

² Article 530–1 of the Code of Criminal Procedure: “In respect of an application made pursuant to article 529–2, paragraph 1, a protest filed pursuant to article 529–5, paragraph 1, or a claim made under article 530, paragraph 2, the public prosecutor may decide either not to prosecute, or to proceed in accordance with articles 524 to 528–2 or articles 531 et seq. or to inform the applicant that their claim is inadmissible since it is not substantiated or fails to attach the original notice.

“In the event of a conviction, the fine imposed may not be less than the amount of the fixed penalty or indemnity in cases under article 529–2, paragraph 1, and article 529–5, paragraph 1, or less than the amount of the augmented fixed penalty in cases under article 529–2, paragraph 2, and article 529–5, paragraph 2.

“In cases under article 529–10, where proceedings are discontinued or after an acquittal, and where the required deposit has been made, the amount of the deposit shall be refunded, on request, to the person to whom the fixed penalty notice was addressed or against whom proceedings were instituted. In the event of a conviction, the fine imposed may not be less than the amount provided for under the preceding paragraph plus 10 per cent.”

ordinary courts is the sole competence of the officer of the public prosecutor's department, who has exclusive powers of prosecution.

3.3 As to article 2, paragraph 3 (a), of the Covenant, the author claims a violation because he does not have a genuinely effective remedy. Prosecuted for three criminal offences punishable by fines or administrative penalties (loss of driving licence points), his applications were definitively dismissed by a police officer representing the public prosecutor's department. The offer of a fresh assessment of his claims provided he pays a deposit cannot be considered a proper remedy. The officer is not a judge, who is by law independent and impartial, but a representative of the public prosecutor whose job it is to impose penalties. The officer did not assess the merits of the claims or in any real sense determine the rights of the person claiming the remedy, as article 2 requires, but simply dismissed the arguments out of hand because no deposit had been paid.

3.4 As to the violation of article 14, the author's case was not given a fair and public hearing by a competent, independent and impartial tribunal, since the representative of the public prosecutor had without justification blocked the author's application by rejecting it out of hand, thereby preventing the trial courts from making a determination. This dismissal violates article 14, paragraph 2, which establishes that everyone charged with a criminal offence shall be presumed innocent. To compel a person facing prosecution to pay a deposit in the amount of the fine incurred, on pain of refusal to consider the arguments in their defence, violates the principle of innocence. The author indicates that the State party will argue that it is only a deposit, and that it will be reimbursed if the claim is upheld or the court decides to acquit; however, criminal proceedings for a minor offence take several years under the French justice system.

State party's observations on the admissibility of the communication

4.1 On 23 January 2007, the State party argued that the author has not exhausted all domestic remedies and that his allegations that his rights have been violated are insufficiently substantiated. The author maintains that article 529–10 of the Code of Criminal Procedure offers no effective remedy to challenge the three fines. This article in fact provides that, to contest a traffic-related charge before the public prosecutor, the vehicle licence holder, who is financially liable for the fines incurred, must either present an official acknowledgement of the reporting of the theft of the vehicle or a certificate of destruction or a letter stating who was driving the vehicle, or deposit the amount of the fines. In the present case, the author refused to deposit the sum of €271, which led the public prosecutor's department to find his claim inadmissible under article 529–10 of the Code of Criminal Procedure. He persisted in his refusal even when reminded by the public prosecutor's department that he could deposit the sum of €271 within 45 days. In this way he lost the opportunity he had been offered to challenge the justification for the fines imposed.

4.2 Under article 530–1 of the Code of Criminal Procedure, the public prosecutor's department could have referred the author's case to the police court, which, under articles 524 to 528 of the Code of Criminal Procedure, could have acquitted or convicted or sent the case to the public prosecutor's department for prosecution under the regular procedure. The Court of Cassation, in considering the compatibility of the remedy provided by article 530–1 of the Code of Criminal Procedure with article 6 of the European Convention on Human Rights, has ruled that it satisfies the requirements of that article, "since applicants have the opportunity to assert their rights before a police court in adversarial proceedings which may result in acquittal and discharge, and thus the nullification of the enforceable instrument" (Cass. civ. 16 May 2002).

4.3 The author does not show that he is in any financial difficulties, and so has barred the way to the remedies available by refusing to deposit the sum of €271. This deposit cannot be considered an obstacle to access to a court and a fair trial as protected under article 2, paragraphs 3 (a) and (b), and article 14, paragraphs 1 and 2, of the Covenant. It is rather intended as a means of dealing with the great number of challenges to traffic fines in such a way as to combine promptness with procedural guarantees.

4.4 The State party draws the Committee's attention to the specific nature of the fixed penalty procedure for offences under article L.121-3 of the Traffic Code.³ These offences are the ones that occur most frequently and they are being punished as part of a road accident reduction policy that has borne fruit. This procedure is applicable only to fines in categories 1 to 4, i.e. up to a maximum of €750 in 2007. This exceptional procedure does not violate the overall principles of criminal law. Although vehicle licence holders are financially liable for the fines, they are not criminally responsible for offences committed with the vehicle. Thus, in the present case, the author does not risk a loss of points or an entry on his criminal record. Under no circumstances will the author be deemed to have committed a criminal offence. Consequently, there are no grounds for his complaint of a violation of the presumption of innocence under article 14, paragraph 2.

4.5 In the light of the above, the State party considers that the author has not exhausted all domestic remedies and that his allegations of violations are not sufficiently substantiated.

Author's comments on the State party's observations

5.1 On 22 March 2007, the author indicated that he had tried to challenge the grounds for the fines imposed but that his challenge had been dismissed with no consideration of the merits, and not by a judge but by a mere police officer representing the public prosecutor, on the sole grounds that no prior deposit had been paid. Such a deposit should be unacceptable in a democratic society and constitutes a blatant violation of the principle of presumption of innocence. It represents a real obstacle to access to a court and a fair trial since the State party authorities refuse to conduct even a summary consideration of the challenge without the deposit. All citizens have the right to individual consideration of their situation and the State party's argument that the great number of challenges warrants the provision of fewer procedural guarantees is unacceptable. The State party's argument that the applicant was not in financial difficulty is inadmissible and his financial situation has no bearing on his refusal to pay a deposit. It is a matter of principle.

³ Article L.121-3 of the Traffic Code: "As an exception to article L.121-1, the vehicle licence holder is financially liable for fines incurred for violations in respect of maximum authorized speeds, compliance with safe distances between vehicles, the use of lanes and carriageways reserved for certain types of vehicle, and signs requiring vehicles to stop, unless they can demonstrate theft or force majeure of any other kind or they provide all the evidence needed to show that they did not in fact commit the offence.

"Persons found financially liable under the present article are not criminally liable for the offence. When the police or community court applies this article, including by a summary order, that decision is not entered on the criminal record, cannot be taken into account in further offences and does not entail the loss of driving licence points. The rules of judicial constraint are not applicable to payment of the fine.

"Paragraphs 2 and 3 of article L.121-2 are applicable in the same circumstances.

"Note: Act No. 2005-47 of 26 January 2005, article 11: "These provisions shall enter into force on the first day of the third month after publication. Nevertheless, cases duly brought before the police or community courts by that date shall remain within the jurisdiction of those courts."

5.2 In the author's view the State party makes an error of law when it asserts that this procedure, which is an exception to the general law, does not violate the main principles of criminal law. Under article 529-2 of the Code of Criminal Procedure,⁴ "if no payment is made and no application is filed within 45 days, the fixed fine shall be automatically increased and recovered by the Treasury through an order executed by the public prosecutor". This means that, if the claim is dismissed by the public prosecutor's department because no deposit has been paid, French law considers that no valid claim exists and the public prosecutor's department can issue an enforcement order on behalf of the Treasury, without any consideration of the facts by an independent or impartial judge. The public prosecutor is therefore entitled to issue the enforcement order to recover the fines. The proceedings are closed and final, refusal to consider the claim being a necessary step in a procedure that precludes any consideration of the merits by a court. Domestic remedies are therefore exhausted.

Decision of the Committee on admissibility

6.1 On 3 July 2007, at its ninetieth session, the Committee considered the admissibility of the communication.

6.2 On the question of the exhaustion of domestic remedies, the author believed that he had had no effective remedy to oblige the French authorities to assess his three claims on the merits. The Committee took note of the State party's argument that the author had not shown that he was in any financial difficulties, and had barred the way to the remedies available by refusing to deposit the sum of €271, thereby rejecting the opportunity offered to him to challenge the fines. The Committee also took note of the author's arguments, and noted that the officer of the public prosecutor's department had declared his claim inadmissible under article 529-10 of the Code of Criminal Procedure for failure to pay a deposit. Under the circumstances, the Committee considered that the question of the exhaustion of domestic remedies was closely bound up with the issue of the author's refusal to pay a deposit and his allegations of violations of the Covenant deriving from the obligation to pay such a deposit. The Committee considered that those arguments should be taken up when the merits of the communication were examined.

7. The Human Rights Committee therefore decided that the communication was admissible insofar as it raised issues under articles 2 and 14 of the Covenant.

State party's observations on the merits

8.1 On 21 January 2008, the State party explained the role of the officer of the public prosecutor's department. It noted that according to article 529-10 of the Code of Criminal Procedure he "ascertains whether the application or claim meets the conditions of admissibility stipulated in the present article". Hence, the officer's sole function is to ascertain that the material conditions of admissibility, which include payment of the deposit, have been met. Article 529-10 assigns him a related task: if the claim contains all

⁴ Article 529-2 of the Code of Criminal Procedure: "The offender must pay the amount of the fixed fine within the time limit stated in the previous article, unless within the same time limit they file an application for exemption with the office named in the notice. In cases under article 529-10, such application must be accompanied by one of the documents required under that article. The application shall be transmitted to the public prosecutor.

"If no payment is made and no application is filed within 45 days, the fixed fine shall be automatically increased and recovered by the Treasury through an order executed by the public prosecutor."

the necessary documents and information, the officer will transmit it to the court for consideration on the merits; if the claim is incomplete, he will declare it inadmissible. He is not authorized, therefore, to consider the claim on the merits. If an officer of the public prosecutor's department rejects a claim submitted under article 529–10 on the ground that it is unfounded, i.e. by assessing it on its merits, he oversteps his remit of simple material verification. It was on that basis that the European Court of Human Rights found an officer of the public prosecutor's department to have committed an error of law by rejecting an appeal from the perpetrator of an offence as "inadmissible because legally unfounded", thereby exceeding his legal authority. The Court found that there had been a violation of article 6, paragraph 1, of the European Convention on Human Rights.⁵ For these reasons, the State party does not accept the author's allegation that the officer "without justification blocked the author's application" in that he simply "dismissed the arguments". The officer of the public prosecutor's department merely declared the application to be inadmissible under article 529–10, because the deposit had not been paid.

8.2 The State party argues that the requirement to pay a deposit as a condition of admissibility does not undermine the right of access to a court. It recalls that this right is not an absolute right, and that it is subject to certain restrictions, including with regard to the conditions of admissibility of an appeal. These restrictions must not undermine the very substance of this right, however. They must pursue a legitimate aim and maintain a reasonable relationship of proportionality between the aim pursued and the means employed. As part of the restrictions on access to a court, a State party may impose financial conditions, which may include payment of a deposit. These financial restrictions do not impede access to a court, since the legal aid system enables the State, where necessary, to defray the costs of a procedure that is beyond the means of the party concerned.

8.3 The State party recalls that this is a deposit of an amount equivalent to the fine established under articles 529–10 and 530–1 of the Code of Criminal Procedure. Hence, the requirement to pay a deposit is consistent with the principles of legality, legitimacy and proportionality. This requirement is legal, as it is provided for by law. It does not exclude fixed traffic fines. The Court of Cassation considered the requirement to pay a deposit part of the formal conditions of admissibility.⁶ The requirement is legitimate because the purpose of the deposit is to deal with the great number of challenges to fixed traffic fines with a view to the proper administration of justice and the dismissal of applications that are manifestly dilatory. It furthermore finds the requirement to be proportionate to the aim pursued, for the following reasons.

8.4 First, the State party recalls that the author refused "on principle" to deposit the amount required under articles 529–10 and 530–1 of the Code of Criminal Procedure. The author held to his position notwithstanding the fact that payment of the deposit is a condition of admissibility characterized by complete legal predictability. To uphold the author's claim would amount to allowing every person involved in a proceeding to challenge the applicable rules on admissibility by adapting them to individual circumstances, thereby countermining the imperative of ensuring the certainty of the law in a democratic society. The State party furthermore recalls that the deposit is a security which is not paid to the office that recovers the fine and may be returned to the party concerned if the court does not find the initial offence to have been proven. The European Court of Human Rights, for example, only considered the amount of the deposit an obstacle to the

⁵ See European Court of Human Rights, *Peltier v. France*, judgment of 21 May 2002, para. 37, and *Besseau v. France*, judgment of 7 March 2006, paragraph 25.

⁶ The State party cites two judgements of the Criminal Division of the Court of Cassation: the *Varela* judgement of 21 January 1997 and the *X. Jerome v. Voix du Nord* judgement of the same date.

right of access to a court where the amount was so disproportionate as to constitute a genuine brake barring access to a court. In the present case, the State party notes that the amount of the deposit was small, did not in any case exceed the amount of the fixed fine and, furthermore, that the author could have applied for legal aid if he had considered the sum to be disproportionate to his means. It therefore concludes that the requirement to pay a deposit did not place a disproportionate burden on the author, considering the aim of this measure, and thus does not disclose a violation of article 2 of the Covenant.

8.5 Second, the State party argues that a detailed examination of the three claims shows that their main purpose is to challenge the prefectural order on the installation of the radar control unit which recorded the speeding offences. It points out that the prefectural order is an administrative decision and the author could therefore have applied to an administrative court for an annulment on grounds of *ultra vires*, something which he failed to do.

8.6 Third, the State party emphasizes that the author does not contest the offence itself, namely, that his vehicle was speeding; he merely asserts that he was not driving when the offences occurred and does not know who was. It recalls that the owner is legally responsible for his vehicle and furthermore that he is deemed to be the driver, unless he can prove that the vehicle was destroyed, stolen or driven by a third party. The owner cannot therefore exonerate himself of responsibility by stating that he does not know who was driving the vehicle at the time of the offence. In any case, the State party notes that in the three applications for exemption transmitted to the payment centre the author had ticked the box marked "I had lent (or rented) my vehicle to the following person, who was or may have been driving it when the offence was noted" and had added the handwritten comment "see enclosed letter". No letter was in fact included in his applications for exemption. Had the author identified the driver as he was required to do under the regulations, he would have provided evidence allowing him to be exonerated of responsibility.

8.7 As to the claim that the requirement to pay a deposit is incompatible with the presumption of innocence, the State party considers that this claim is bound up with the claim concerning the right of access to a court and should not be considered separately. If the Committee considers the claim separately, however, the State party recalls that payment of the deposit does not amount to a presumption of guilt, since a police court hearing a claim could acquit, discharge or convict the claimant. Therefore, the deposit cannot be likened to a fine. Furthermore, article 529–10 of the Code of Criminal Procedure clearly states that "payment of this deposit cannot be compared to payment of the fixed fine and does not give rise to the docking of points from the driving licence". The deposit is merely a security. Indeed, the European Court of Human Rights concluded that the deposit could not be regarded as "a finding of guilt without guilt first having been proved and, in particular, without the party concerned having had the opportunity to avail himself of due process".⁷ The State party concludes that the author's right to the presumption of innocence has not been infringed.

Author's comments on the State party's observations

9.1 On 18 February 2008, the author stated that he concurred with the State party's analysis of the role of the officer of the public prosecutor's department and that it is French law which is contrary to the Covenant. He recalls that under article 55 of the French Constitution international treaties have a higher authority than laws. The officer of the public prosecutor's department, subject to oversight by the ordinary courts, ought not to have applied French law as it is incompatible with the provisions of the Covenant.

⁷ See European Court of Human Rights, *Leutscher v. the Netherlands*, judgment of 26 March 1996.

9.2 As to the requirement to pay a deposit as a condition of the admissibility of the applicant's claim, the author notes that the *Varela* case invoked by the State party concerns a person who intended to sue for damages but had not paid the security ordered by the investigating judge. The author is not the party bringing proceedings here but the party facing them. He maintains that to be faced with criminal proceedings and, in addition, to have to pay a sum of money in order to be able to present a defence is a breach of due process and of the principle of presumption of innocence.

9.3 As to the possibility of applying for an annulment of the prefectural order concerning the installation of the radar unit that recorded the speeding offence, the author maintains that he did not need to file an application to set aside the order on grounds of ultra vires as the criminal courts have full jurisdiction and can determine whether a regulation which is the subject of a legal challenge before them is unlawful. In any event, the author could not have filed an application to set aside the order on grounds of ultra vires, because such an application would have had to be filed not more than two months from the date of publication of the contested prefectural order. Any administrative appeal was thus destined to fail. The author could only have argued before the criminal court that the prefectural order on which the prosecution was based was illegal; this he was unable to do because his claim did not reach the court after the procedure had been blocked by the officer of the public prosecutor's department.

9.4 As to the responsibility of the vehicle owner, the author maintains that there is nothing contradictory about his stating that he had lent the vehicle to another person without disclosing the identity of that person. He argues that it is not part of his ethical code to report the person to whom he may have lent his vehicle and that, in any case, he does not know who was driving the vehicle at the time in question, since over 30 persons regularly visit his home and have access to his vehicle. He refuses to report a member of his family. In his view, French law wrongly presumes that the vehicle owner is responsible, which is contrary to the Covenant.

Additional observations of the parties on the merits

10.1 On 12 May 2008, the author recalled that the State party had declared that the author did not risk losing points or being given a police record. The author had, however, received a letter dated 7 March 2008 from the Ministry of the Interior indicating that he had committed a criminal offence under the Traffic Code entailing the loss of a point on his driving licence and the inclusion of his name on the register of the national driving licence authority. He concluded that any driver who challenges the offence that he is accused of committing without first paying the deposit will have his application dismissed, while the criminal offence will be definitively recorded without any consideration of the merits, a point will be docked from his driving licence and the driver's name will be included in the register of the national driving licence authority.

10.2 On 16 May 2008, the State party informed the Committee of a recent decision of the European Court of Human Rights dismissing as manifestly unfounded an application invoking the same complaint as that in the present communication.⁸ In that decision, the Court found the purpose of the deposit to be legitimate, namely, that of "preventing dilatory and groundless appeals and avoiding an excessive burden being placed on the role of the police court with regard to road traffic, an issue which affects the entire population and is the subject of frequent challenges".

⁸ See European Court of Human Rights, *Thomas v. France*, decision of 29 April 2008.

10.3 On 13 June 2008, the author recalled that the Committee is in no way bound by the decisions of the European Court of Human Rights. In any event, the decision invoked by the State party concerns article 6, paragraphs 1 and 2, of the European Convention on Human Rights, the content of which differs from that of article 2, paragraph 3, and article 14, paragraphs 1 and 2, of the Covenant. Moreover, article 2, paragraph 3, guarantees the right to an effective remedy, a concept not found in article 6 of the European Convention on Human Rights.

10.4 The author recalls a ruling of the Constitutional Council that, under the French Constitution and European Convention on Human Rights, the licence holder of a vehicle which commits an offence recorded by an automatic radar unit may be simply presumed guilty and required to pay a court fine only if the licence holder can “effectively” present the arguments in his defence “at all stages of the procedure”.⁹ Since, however, the defence arguments were not considered owing to non-payment of the deposit, the author clearly did not have access to an “effective” remedy at all stages of the procedure. Even if the European Court of Human Rights takes the view that the deposit may be considered a legitimate means of ensuring the proper administration of justice and preventing dilatory and groundless appeals, the deposit should not preclude consideration of the defence arguments on the merits. The author suggests that the national legislation, while retaining the requirement of a prior deposit, could still make provision in the event of non-payment for the defence arguments to be considered on the merits by an independent and impartial tribunal. Where the arguments proved groundless, the penalty could be increased, for example. In that way, dilatory and groundless appeals could be punished in a manner that would serve as a deterrent.

Consideration of the merits

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

11.2 With regard to the claim of a violation of article 2, paragraph 3 (a) and (b), the Committee recalls that article 2 of the Covenant can be invoked by individuals only in conjunction with other articles of the Covenant. It notes that article 2, paragraph 3 (a), stipulates that each State party undertakes “to ensure that any person whose rights or freedoms as recognized [in the Covenant] are violated shall have an effective remedy”, while article 2, paragraph 3 (b), provides that each State party undertakes “to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State”. In the present case, however, the Committee considers that the allegations of the author in respect of article 2, paragraphs 3 (a) and (b), are closely bound up with his allegation that he did not have access to a court within the meaning of article 14, paragraph 1, and should not be considered separately.

11.3 As to the author’s claim of a violation of article 14, paragraph 1, the Committee takes note of the author’s allegation that his right to have his case heard by a court that would weigh the merits of the criminal charges against him was violated by the obligation to pay the deposit. It recalls that the author was not required to pay the fines as such in order to have access to a court but to deposit an amount equivalent to the fines.¹⁰ According

⁹ See Constitutional Council, Decision No. 99–411 of 16 June 1999.

¹⁰ In this regard, the exemption application form used in the author’s case clearly states, “Payment of this deposit shall not be deemed tantamount to payment of the fixed penalty and shall not entail any loss of driving licence points.”

to the State party, this system was put in place to improve efficiency in an area which engenders a very large number of cases. The Committee notes that the right of access to a court is not absolute and is subject to certain restrictions. These restrictions must not, however, limit access to the courts to such an extent that the very substance of the right of access to justice is undermined. In the present case, the Committee observes that the system put in place by the State party is used only for relatively small fines and that the amount of the deposit did not exceed that of the fixed fine under article 529–10 of the Code of Criminal Procedure. It notes that the author does not invoke any financial difficulties preventing him from paying the deposit within the set time limit. The Committee considers such a system as having a legitimate aim, in particular that of ensuring the proper administration of justice, and as being unlikely to undermine the substance of the author's right of access to the police court. As to the author's argument that his application was dismissed by an officer of the public prosecutor's department, rather than by a judge, the Committee notes that the decision in question was an administrative not a judicial one, requiring the officer only to determine whether the conditions of admissibility had been met. The Committee further notes that, under French law, the officer of the public prosecutor's department had the right to take the decision to dismiss the application for failure to pay the deposit. If the author had paid the deposit, he would have had access to the police court, which would have provided him with an effective remedy. Under these circumstances, the Committee finds that, in the present case, the obligation to pay a deposit does not impair either the author's right of access to a court or his right to an effective remedy. The Committee therefore concludes that the facts before it do not disclose a violation of article 14, paragraph 1, or article 2, paragraphs 3 (a) and (b), of the Covenant.

11.4 As to the claim of a violation of article 14, paragraph 2, the Committee takes note of the author's argument that the obligation to pay a deposit infringes the presumption of innocence. It also notes, however, that, under article 529–10 of the Code of Criminal Procedure, payment of the deposit does not amount to payment of the fixed fine. It therefore considers that payment of the deposit cannot be likened to a finding of guilt; had payment been made, the police court could have acquitted, discharged or convicted the author. Under these circumstances, the Committee concludes that the facts before it do not disclose a violation of article 14, paragraph 2, 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 disclose a violation of article 2, paragraphs 3 (a) and (b), or article 14, paragraphs 1 and 2, of the Covenant.

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

**LL. Communication No. 1539/2006, *Munaf v. Romania*
(Views adopted on 30 July 2009, Ninety-sixth session)***

Submitted by: Mohammad Munaf (represented by counsel,
Ms. Amy L. Magid)

Alleged victim: The author

State party: Romania

Date of communication: 13 December 2006 (initial submission)

Date of admissibility decision: 2 April 2008

Subject matter: Removal of the author from the Embassy of
the State party in Iraq by MNF-I, subsequent
trial, conviction, possible death sentence in
Iraq

Procedural issues: Insufficient power of attorney; alleged victim
not within the jurisdiction of the State party;
absence of “victim” status; failure to
substantiate claims; failure to exhaust
domestic remedies; abuse of the right of
submission

Substantive issues: Right to life; Notion of “most serious crime”;
inhuman treatment, arbitrary detention; unfair
trial

Articles of the Covenant: 6; 7; 9; 10, paragraphs 1 and 2; and 14,
paragraphs 2 and 3 (b), (d), and (e)

Articles of the Optional Protocol: 1; 2; and 5 (b)

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

Meeting on 30 July 2009,

Having concluded its consideration of communication No. 1539/2006, submitted to
the Human Rights Committee on behalf of Mr. Mohammad Munaf 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. Mohammed Ayat, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari
Bouzaïd, Ms. Christine Chanet, 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. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

Pursuant to rule 90 of the Committee’s rules of procedure, Committee member Ms. Iulia Antoanella
Motoc did not participate in adoption of the Committee’s views.

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

1.1 The author is Mr. Mohammad Munaf, an Iraqi-American dual national and a Sunni Muslim, who is currently detained at ‘Camp Cropper’, Baghdad, under the “physical custody” of the Multinational Force – Iraq (MNF-I) and/or United States. military officers, and is awaiting a review of his case by the lower court.¹ He claims to be a victim of violations by Romania of article 6; article 7; article 9; article 10, paragraphs 1 and 2; and article 14, paragraphs 2 and 3 (b), (d), and (e), of the International Covenant on Civil and Political Rights.² The author is represented by counsel of Robins, Kaplan, Miller and Ciresi, Minneapolis, United States.

1.2 On 21 December 2006, pursuant to rule 92 of the Committee’s rules of procedure (Interim measures), the Committee’s Special Rapporteur on New Communications and Interim Measures requested the State party to ensure, to the extent possible, and through whatever channels it deemed appropriate, to adopt all necessary measures to ensure that the life, safety and personal integrity of the author and his family were protected, so as to avoid irreparable damage to them, while this case was under consideration by the Committee, and to inform the Committee on the measures taken by the State party in compliance with this decision.

1.3 On 7 February 2007, in response to the Special Rapporteur’s request, the State party submitted, inter alia, that it opposes the death penalty, that it requested the extradition of the author to the State party to answer criminal charges but that through no fault of its own, the author was not extradited (see paragraph 4.6 below). It also submitted that since the Committee’s request under rule 92, the following démarches have been made by the Romanian Embassy in Baghdad to the Iraqi Ministry of Foreign Affairs and the Command of the MNF-I: the Embassy stated that Romania was committed to the abolition of the death penalty and had ratified all relevant treaties in this regard; that no action should be taken to endanger the life and personal integrity of the author; and that the death penalty should not be imposed upon him. To the Command of the MNF-I it also stated that, “Romania considered it appropriate that Mr. Munaf remains in the custody of the Multi-National Force.” It also submitted that, according to its own information, there is no indication that the author’s family is under any threat in Romania and they have not requested themselves any protection from the State party’s authorities.

The facts as submitted by the author

2.1 In March 2005, the author and his family (Romanian wife and children) were living in Romania. On 15 March 2005, the author travelled to Iraq with three Romanian journalists, as their translator and guide. On or about 28 March 2005, the travellers were kidnapped by unknown armed forces. An Iraqi group identifying itself as the “Muadh Ibn Jabal Brigade” publicly claimed responsibility for the kidnapping. The hostages were held captive for 55 days. On or about 22 May 2005, they were all released without harm and taken to the Romanian Embassy in Baghdad, Iraq. The Romanian Embassy immediately handed the author over to “United States military officers”, in whose custody he has remained ever since.

¹ At the time of the submission of this communication to the Committee he author had been sentenced to death by the Central Criminal Court of Iraq (“CCCI”). However, prior to the consideration of admissibility on 2 April 2008, this sentence was quashed upon appeal before the Iraqi Court of Cassation with a direction for further investigation.

² The Covenant and Optional Protocol entered into force for Romania on 23 March 1976 and 20 October 1993, respectively.

2.2 United States military personnel transported the author to ‘Camp Cropper’, a detention facility located at the Baghdad International Airport. According to the author, while in detention at ‘Camp Cropper’, he was threatened with torture and subjected to “abuse and mistreatment” by both American and Romanian officials who attempted to coerce statements from him. For more than seven months, he was held in complete isolation in a small box-like cell. His family has been threatened by United States and Romanian officials. The officials told the author that if he did not confess to a role in the kidnapping of the Romanian journalists, he, his sister (who lives in Iraq), and his wife (whose current residence is unclear) would be sexually assaulted. The author submits that other prisoners in ‘Camp Cropper’ have also been beaten and tortured. He has been subjected to painful and humiliating searches of his person, and he spends 23 hours a day in solitary confinement in a cell measuring approximately two square metres. For one hour each day, he is released into a “cage” with men accused of murder, who threaten him with violence. All his possessions have been removed from him except his copy of the Koran and he is forced to wear a yellow suit reserved for condemned prisoners.

2.3 On 12 October 2006, after approximately 16 months of detention and alleged mistreatment at Camp Cropper, the author was presented, along with five other defendants, to the Central Criminal Court of Iraq (“CCCI”) to face charges for alleged involvement in the kidnapping. He was represented by a privately engaged lawyer. The author alleges that during these proceedings he was not presumed innocent; that he was not permitted to contact his American counsel (although he was represented by local counsel); that he was not given adequate time and facilities for the preparation of his defence; that he was not permitted to cross-examine witnesses against him or to call witnesses on his own behalf.

2.4 Prior to the proceedings, a judge of the CCCI had told the author’s lawyer privately that the charges against him would be dropped, as the Romanian Embassy had not come forward to support the prosecution, a necessary prerequisite for the pursuit of such a charge. According to the author, because he was charged with the kidnapping of Romanian citizens, under Iraqi law, the CCCI could not prosecute him without a formal complaint from the Romanian government. During proceedings before the CCCI, a United States Lieutenant made a formal complaint against the author. He claimed that Romania had authorized him to make the complaint on its behalf and to request that the author be sentenced to death. He claimed that the authorisation was documented in a signed letter. This letter was not produced in Court and neither the author nor his counsel has ever seen it. In addition, a United States General stated in open court that all the defendants were guilty and should be sentenced to death. According to the author, at this point, the judge requested everyone, except his judicial assistants and the United States Lieutenant and General, to leave the court room. Thus, both he and his counsel were excluded from the courtroom for part of the proceedings. After 15 minutes, counsel and the defendants were readmitted whereupon the defendants were convicted of kidnapping and sentenced to death by hanging.

2.5 On 15 October 2006, a few family members visited the author in detention, during which he informed them that he was being subjected to ill-treatment subsequent to his death sentence. An American soldier supervised the visit, after which he informed the family that no future visits or telephone calls would be allowed. For over one month following this visit, the author was held in detention incommunicado.

2.6 According to the author, the State party, although it asserted that it did not authorize any United States officer to speak on its behalf during the CCCI proceedings, took no official action to clarify this issue with the Iraqi authorities. On 2 November 2006, a press release was merely issued by the Romanian Ministry of Justice, stating that it had never authorized any American official to represent the Romania government during the proceedings before the CCCI. According to the author, despite the State party’s knowledge of his conviction and sentence, it failed to take any other action to intervene on his behalf.

On 23 November 2006, the State party successfully obtained a video-conference with the author to obtain his testimony in relation to criminal proceedings in Romania, in which he was named as a defendant for his alleged role in the kidnapping. According to the author, despite such successful negotiations with his custodians, the State party made no effort to secure his release or to protect him from torture, trial without due process or imminent death.

2.7 At the time of submission of his communication, the author's appeal of his conviction was still pending before the Iraqi Court of Cassation. The author feared that if his appeal was unsuccessful he would be placed under the control of the Government of Iraq, and would be subjected to much worse treatment than that experienced to date, which would amount to torture. According to the author, the Human Rights Office of the United Nations Assistance Mission in Iraq has consistently documented the widespread use of torture there. Human Rights Watch has also reported that most allegations of ill-treatment of detainees implicate the Iraqi Ministry of the Interior. Sunni Muslims such as the author experience particularly harsh treatment. The author fears that, if his appeal fails, he will ultimately be executed by hanging.

The complaint

3.1 The author claims violations of the Covenant based on the State party's failure to act with respect to the author.³ He claims a violation of article 6, as the State party made no inquiry and sought no assurances before allowing United States officers to remove him from the safety of the Romanian Embassy. It made no inquiry and sought no assurances with respect to the conditions of confinement and treatment in Camp Cropper and made no inquiry and took no action to protect the author from the CCCI proceedings, which lacked due process safeguards. The State party was aware of evidence implicating the United States forces in the abuse and torture of detainees when it authorized his transfer to United States custody. Even upon learning that a United States officer had appeared at the proceedings, falsely claiming to be appearing on behalf of the State party and filing a complaint, in which he demanded that the author be sentenced to death, the State party made no inquiry and took no action to clarify its position. His sentence was imposed unlawfully following a prosecution that proceeded on the basis of a United States officer's false authority, but the State party neither undertook appropriate inquiries and nor took action to protect his life. The author was sentenced to death for a crime that did not involve loss of life and cannot be considered a "most serious crime" within the terms of article 6, paragraph 2. By failing to act, the State party established the crucial link in the causal chain that would make his execution possible. It thus violated and continues to violate his right to life under article 6.

3.2 The author claims violations of articles 7 and 10, paragraph 1, as the State party's decision to transfer him to the custody of United States officers without seeking assurances, as well as its subsequent failure to take any action to protect him, led to him being subjected to cruel, inhuman and degrading treatment (see paragraph 2.2 above). Since his conviction, the author has had the additional burden of the knowledge that he has been sentenced to death, and the fact that he is forced to wear a yellow suit reminds him of his status as a condemned prisoner. He claims that he has already suffered irreparable psychological harm, and, if he loses his appeal, he will be subjected to further harm by Shiite-led Iraqi security forces and ultimately hung, which would in itself constitute a violation of article 7 of the Covenant, due to the prolonged suffering and agony this method

³ He refers to the Committee's jurisprudence in communication No. 829/1998, *Judge v. Canada*, Views adopted on 5 August 2003.

of execution may cause. Even when a hanging is carried out in the most humane way possible, instantaneous death rarely occurs. In Iraq where hangings are carried out in secret and the executioners learn by trial and error, the author submits that the victims may remain conscious as they slowly suffocate to death. He also claims a violation of article 10, paragraph 2, as he was not separated from convicted prisoners prior to his conviction.

3.3 The author claims a violation of article 9 of the Covenant, as the State party arbitrarily handed the author over to United States authorities violating his right to liberty and personal security. He also claims violations of article 14, arising from the Iraqi judicial proceedings, which he claims remain ongoing while his appeal is pending, as the State party could take steps to correct the miscarriage of justice that occurred during the proceedings of 12 October 2006. He claims that his following rights were violated: article 14, paragraph 2, as he was not presumed innocent; article 14, paragraph 3 (b), as he was not permitted to speak with his American counsel and although he was represented by counsel, he was not given adequate time and facilities for the preparation of his defence; article 14, paragraph 3 (e), as he was not permitted to cross examine witnesses against him or to present any witnesses on his own behalf; and article 14, paragraph 3 (d), as both he and his counsel were excluded from the courtroom for part of the proceedings. If the State party had informed the CCCI that it did not support the prosecution of the author, the proceedings and thus the violations implicit therein could have been avoided.

3.4 As to exhaustion of domestic remedies, because the author was immediately transferred to the physical custody of United States military officers, there existed and continues to exist no domestic remedies for him to challenge the State party's decision to allow his removal and transfer from the Embassy, as well as its failure to intervene in the Iraqi criminal proceedings on his behalf. Even if judicial remedies were available, he has had no access to them by virtue of his incarceration. He requested the State party's intervention, in particular by sending several letters to the Romanian Embassy in Washington, but it failed to respond. He also informed the State party of his intention to file a complaint before the Committee, in the event that the State party refused to take any action on his behalf. The United States Government asserts that he is in the legal custody of the MNF-I, of which Romania is a member. As a result, the United States courts have thus far declined to assert habeas corpus jurisdiction over any United States custodians.

State party's submission on admissibility

4.1 On 5 March 2007, the State party contested the admissibility of the communication on the grounds that there was insufficient power of attorney; that the author was not within the jurisdiction of the State party (extra-territoriality); that he was not a "victim" within the terms of the Optional Protocol; that he had failed to substantiate his claims; that he had failed to exhaust domestic remedies; and that he had abused the right of submission.

4.2 On the facts, with respect to the events that took place in Iraq, the State party submits that on 22 May 2005, the four hostages were released as a result of an operation involving a military effort under the command of the MNF-I – the only foreign military authority allowed on the territory of Iraq, according to the relevant United Nations Security Council resolutions. The hostages were immediately brought by the MNF-I to the premises of the Romanian Embassy in Baghdad. The Romanian authorities, "took the three Romanian citizens into custody", while the author (American-Iraqi national) remained "under the authority and protection of MNF-I". On the same day, the author was debriefed by the MNF-I. On 23 May 2005, the MNF-I detained him on suspicion of having represented a threat to the security in Iraq. Since then he has been detained by MNF-I

troops at 'Camp Cropper' detention facility. The State party claims that there is no Romanian presence in this facility unit. It is exclusively run by the U.S. military.⁴

4.3 On 17 May 2005, the Romanian judicial authorities initiated criminal proceedings against the author on charges of violations of Romanian criminal law on issues of terrorism, relating to the kidnapping.⁵ The proceedings were based on the principle of "territoriality", as some of the alleged preparatory and executive acts were allegedly carried out on Romanian soil, and the principle of "personality", considering that the victims were Romanian citizens. The author was charged with acts of terrorism and with being an accomplice in the kidnapping allegedly organised by one O.H.

4.4 Romanian prosecutors participated in some of the investigations carried out in Baghdad, with the approval of the Iraqi judicial authorities. They interrogated and took statements from the author on the following days: 30–31 May 2005; 26–27 July 2005; 14–15 September 2005; and 18 November 2006. They noticed that the author was well-treated and that he benefited from decent food and proper conditions of personal hygiene. They did not notice any signs of ill-treatment or physical or psychological coercion. The author did not raise any claim against the MNF-I authorities, nor did he draw their attention to acts of torture or ill-treatment to which he, now, claims he was subjected to during detention. The statements were either taken in the presence of the author's Iraqi or Romanian lawyer (who travelled to Baghdad for some of the interrogations). There was also a United States representative from 'Camp Cropper' present during all the interrogations who attested to the respect of the author's civil and political rights. All the interrogations were audio/video recorded. None of his lawyers contested the statements, nor did they claim that they were given under coercion.

4.5 The Romanian prosecutors' mandate was only to hear the author's statements relevant to the cases brought before the Romanian judicial authorities. They were not empowered to seize the Iraqi judicial authorities with a case against the author. The State party confirms that a statement was made on behalf of the Ministry of Justice on 2 November 2006, in which it was stated that it had "not authorized any American official to represent Romania during the Iraqi legal proceedings concerning Mr. Mohammad Munaf". In addition, the Romanian representatives from the Embassy in Iraq had no knowledge either of the trial, or of the alleged authorisation allegedly given by the Romanian authorities to the United States military officer. The Romanian Ambassador to Iraq denied any knowledge of the trial, stating that he had contacted United States and Iraqi authorities to ask for information but was unsuccessful. The spokesperson of the Romanian Ministry of Foreign Affairs also issued a statement to the same effect.

4.6 The State party also refers to its efforts to have the author transferred into its custody by way of extradition. On 24 September 2005, the Romanian Ministry of Justice received, from the Court of Appeal of Bucharest, a request for extradition of the author, addressed to the competent United States authorities pursuant to a bilateral convention on extradition. On 25 September 2005, the request was transmitted to the United States Embassy in Bucharest. The United States authorities did not accede to the request, as they considered that the conditions set forth in the bilateral treaty had not been met: specifically, the accused was neither on United States territory nor on a territory occupied or controlled by the United States. His extradition was also considered impossible, as there was no bilateral

⁴ The State party has provided a copy of a letter, dated 7 February 2007, from the Romanian Ministry of Defense to the Secretary of State to the effect that the Romanian Ministry of Defense never had personnel or troops in the detention centre at Camp Cropper.

⁵ A crime relating to the constitution of and participation in terrorist groups, financing of terrorist acts and complicity in terrorist activities.

extradition agreement between Romania and Iraq and, in any event, it's the Constitution of Iraq prohibits the extradition of its own nationals.

4.7 On 19 December 2005, 20 March 2006, 26 April 2006, 26 July 2006, 16 October 2006, 7 November 2006, the Court of Appeal of Bucharest issued requests to the Iraqi judicial authorities for the hearing of the author by videoconference, relating to the proceedings in Romania. No conclusive answer was received by the Iraqi authorities except that, since the author was in the custody of the MNF-I forces, its authorities were not in a position to reply to the State party's requests. Similarly, when approached by the Romanian authorities on several occasions (December 2005, 21 March 2006, 4 May 2006, and 24 May 2006), the United States authorities considered that such requests should be directed to the Iraqi authorities. Following repeated requests to the Iraqi authorities, a video conference was allowed to take place on 23 November 2006 at the Court of Appeal of Bucharest with the help of the MNF-I and of the United States Embassy in Baghdad.

4.8 On 20 February 2007, the Court of Appeal of Bucharest decided that the author should be heard on 27 March 2007 through a rogatory commission. The Romanian Ministry of Justice requested the assistance of the Iraqi authorities for this purpose and requested a copy of the author's file before the CCCI. However, the Iraqi Ministry of Justice stated that there was no legal bases to proceed with the request, and that the video conference of 23 November 2006 had been a favour granted ex gratia to Romania.

4.9 On the admissibility of the current communication, the State party submits that no power of attorney has been provided by the author himself. The authorization of counsel to act on his behalf was provided by his sister, who provides no proof that she was authorized to act on his behalf. As to the argument that, as the author is being held incommunicado, he is prevented from giving express authorization to counsel, the State party argues that the author has periodic contacts with his family, as well as his Iraqi and Romanian lawyers, whom he could have authorized to act on his behalf. Thus, from the State party's point of view, the communication is inadmissible as a threshold matter under article 1 of the Optional Protocol for want of sufficient authorisation.⁶

4.10 The State party further argues that the communication is inadmissible under article 1 of the Optional Protocol and article 2, paragraph 1, of the Covenant, as the author was not within its territory and was not subject to its jurisdiction.⁷ It submits that the author has not been subject to its jurisdiction since 15 March 2005, when he left the State party to go to Iraq together with the three Romania journalists. Romania was never an occupying power in Iraq, a circumstance which could have raised the issue of Romanian extra-territorial jurisdiction on Iraqi territory and over its citizens. Since his release from kidnapping he has been in the custody of the MNF-I international force acting in the territory of Iraq with the consent and at the request of the Iraqi authorities, while he was tried by the CCCI – a national court of Iraq that operates under Iraqi law. Under the pertinent Security Council resolutions, the MNF-I and the Government of Iraq further agreed that the former would maintain physical custody of pretrial detainees waiting for criminal prosecution in Iraqi

⁶ It refers to the Committees' Views in communication No. 740/1997, *Yutronic v. Chile*, adopted on 23 July 1998.

⁷ To support its argument, the State party refers to the jurisprudence of the European Court of Human Rights: *Iiaşcu and others v. Moldova and Russia*; *Issa and others v. Turkey*; and *Bankovic and others*. It refers to European Commission of Human Rights in *Cyprus v. Turkey*, 1994 and *Loizidou v. Turkey*, Judgement on Preliminary Objections, 1995. It also refers to the Committee's Views in communications No. 52/1979, *Lopez v. Uruguay*, and No. 56/1979, *Celiberti v. Uruguay*, and its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40 (A/59/40)*, vol. I, annex III.

courts under Iraqi law, in light of the fact that many Iraqi prison facilities had been damaged or destroyed during the war. The author has never been under the authority and effective control of the State party, since his arrival in Iraq, as the only foreign authority over the Iraqi territory belongs to MNF-I, acting under a United Nations mandate. The fact that the State party failed in its efforts to bring the author under its jurisdiction to face charges in Romania or even to obtain a copy of the author's criminal file in Iraq (para. 4.6 above), demonstrates the lack of authority or control over the author by the State party, from which the lack of jurisdiction over him follows.

4.11 The author himself admitted in his communication that he is not under the State party's jurisdiction, but instead in the "physical custody" of "United States military officers", as part of the MNF-I. This is further demonstrated by the author's appeal solely to the United States courts to seek to prevent his delivery by the United States authorities at Camp Cropper to the Iraqi authorities. In this regard, it refers to the decisions of the United States courts, which asserted that he was "in the custody of a multinational entity", and thus neither under the jurisdiction of the United States nor the State party.

4.12 The State party denies that the Romanian Embassy "allowed" United States military officers to take custody of the author. The hostages' release was secured by the MNF-I and not by United States military officers. His presence in the Romanian Embassy has no legal significance; he remained in the custody of the MNF-I and was never transferred *de jure* or *de facto* into the State party's jurisdiction. The Romanian authorities had no reason to request the custody of the author, as at the moment of departure from the Embassy he was only to be submitted to a debriefing procedure by the MNF-I. As there was no information at that time to indicate the future initiation of criminal proceedings against him in Iraq, the State party's authorities could not have known at that time whether there were substantial grounds to believe that he was at risk of torture, ill-treatment or a death sentence, as set out in the Committee's general comment No. 31.⁷ There was no reason for the State party's authorities to request that he be delivered into their custody to face charges against him in Romania for his involvement in the kidnapping. Only the next day was he arrested on charges of participation in the kidnapping of the three Romanian journalists. According to the State party, the author had "requested to go to the United States Embassy", from which one could infer that it was his will to leave the Romanian Embassy.

4.13 As to the author's reliance on article 22 of the Vienna Convention on Diplomatic Relations to establish a causal link to the State party's responsibility for the author, the State party submits that this article concerns the inviolability of Embassy premises only and does not apply to Embassy personnel, which fall under different articles of the Vienna Convention. The author's presence for a short time in the Embassy is not equivalent under the Vienna Convention or any other provisions of international law to the Embassy taking him into custody. Embassy personnel gave their consent to the representatives of MNF-I to enter Embassy premises so that the Romanian authorities could take the three Romanian citizens into their custody. The author was never taken into custody. The press statement, issued on 22 May 2005, by the President of Romania, in which he stated that, "the three Romanian citizens and their guide had been delivered to the authority of the Romanian Embassy", should be understood as a simple message of reassurance to the Romanian people and the term "authority" should not be considered in its legal sense or equated with "custody". This is supported by another line in the same press statement which stated "the Romanian authorities have taken over *the custody of the Romanian citizens* and are guaranteeing their security until their return home." (emphasis added). The State party refers to a decision of the European Court of Human Rights to demonstrate that the author has failed to invoke any principle of international law, according to which he could be considered to fall under Romanian jurisdiction on the sole basis that Romania formed part of a multi-national coalition, when security in the zone in which the alleged actions took

place was assigned to the United States and the overall command of the coalition was vested in the United States.⁸

4.14 The State party submits that the author is not a victim within the meaning of article 1 of the Optional Protocol, as his allegations are derived from assumptions about possible future events, which had not even begun at the time the author left the Embassy. The State party reiterates that at the time the author left the Embassy, the author was not subject to any criminal procedure in Iraq and there was no arrest warrant issued against him by the MNF-I. As a general rule, a State party is not required to guarantee the rights of persons within another jurisdiction and violations of the Covenant may occur where an individual in similar circumstances is handed over *only* if at that moment the State could establish a risk of a violation – a necessary and foreseeable consequence.⁹ In this case, the facts at the origin of the communication — the criminal procedure in Iraq, the preventive detention in the custody of MNF-I and the death sentence — started after the alleged handing over, independently of the alleged actions of the State party.

4.15 The State party submits that the communication is inadmissible for lack of substantiation, as the author fails to demonstrate either how his alleged handing over to the MNF-I determined the subsequent course of events and or where the causal link lay between this handing over and his future situation. It has not been demonstrated how his current detention is arbitrary, and he has provided no evidence to support his claim that he has been tortured and/or ill-treated in detention. Indeed, claims of ill-treatment have been contradicted by the findings of the Romanian prosecutors who met him in Baghdad. The State party submits that the author has failed to show how its alleged actions affected his right to a fair trial. He has benefited from legal representation and has exercised the right to review. The State party submits that, contrary to what the author alleges, it would appear from paragraph 3 of the Iraqi law on criminal proceedings that the victims' attitude or the attitude of the victim's State party exercises no influence on the initiation, development or cessation of criminal proceedings, and that the author was sentenced to death having taken into consideration the seriousness of his actions and irrespective of any authorisation from the victims or their State of origin.

4.16 On the issue of exhaustion of domestic remedies, it is submitted that despite several meetings with Romanian prosecutors, the author never mentioned that he had been ill-treated by Romanian members of the multinational force. On the contrary, he expressly declared that he had no claim against the State party's authorities. He was assisted by a lawyer chosen by his family, and at no time did this lawyer draw the attention of the Romanian prosecutors, or any other Romanian authorities, to possible signs of violence. The State party's judicial authorities can examine and prosecute criminal charges against the Romanian members of the multinational forces, *ex officio* or upon request. In addition, the author failed to offer the State party the possibility of redressing the alleged violation of his right to a fair trial with respect to the question of the United States Lieutenant's claim to authorisation, as he did not request the Iraqi courts to question the Romanian authorities about the existence and the limits of this authorisation. The State party was not officially notified about this authorisation nor requested to intervene. The lawyers of the author's sister requested, through the State party's Washington Embassy, the State party's intervention in the criminal proceedings in Iraq, but this request did not come from an official authority in Iraq. The Embassy did reply however that the authorisation referred to did not exist and that this response could be used in the criminal proceedings, in order to determine an official request coming from the Iraqi courts. There was no legal way for the

⁸ *Issa and others v. Turkey*, Application No. 31821/96.

⁹ Communication No. 692/1996, *A.R.J. v. Australia*, Views adopted on 28 July 1997.

State party to have access to the procedure or to the author's file in Iraq, and the only other option was to publicly present its position, which it did through the media.

4.17 Finally, the State party submits that the communication is inadmissible for an abuse of the right of submission, as it was lodged before the Committee almost one and a half years after the author was sentenced to death by the Iraqi judicial authorities, although he was aware of the risk of such a sentence from the beginning of the trial. It also submits that the communication was filed because counsel's demand to the Romanian Embassy in Washington to make a formal statement to the Iraqi courts that Romania opposed the imposition of the death penalty, was not acceded to.

Author's comments

5.1 On 21 May 2007, counsel for the author commented on the State party's submission. On the validity of the power of attorney, counsel submits that at all times relevant to the drafting and submission of the complaint, the author was detained at 'Camp Cropper' and was denied access to U.S. counsel, and access to his family and his Iraqi counsel was limited. As a result, he has been unable to submit a complaint on his own behalf or to directly appoint current counsel to submit a complaint on his behalf. It is for this reason that the author's sister filed a power of attorney to act on his behalf.

5.2 On the issue of territoriality, the author refers to article 2 of the Covenant which imposes a duty on States parties to protect, "all persons in their territory", as well as, "all persons under their control". Thus, the State party's distinction between "authority" and "custody" is meaningless as the State party has a duty to protect the author the moment he entered the inviolable territory of the Embassy, irrespective of its *choice* not to exercise or maintain custody of him. The inaccuracy of this distinction is further elucidated in the State party's attempt to equate authority with jurisdiction: "Romania had no authority or control over the author – in other words, no jurisdiction over him."

5.3 As to the claim that the State party did not know that the author would be detained in Iraq, the author submits that the State party's own troops were members of MNF-I and participated in "the planning and initiation" of the operation that led to his release. The Romanian authorities also benefited from the help of the Iraqi Minister of Interior and of the troops under MNF-I command. The State party conducted its own investigation of the author which culminated in the initiation of criminal proceedings against him in Romania on 17 May 2005, five days before the release operation even took place. For all these reasons, the State party could not have been "surprised" that only one day after he was delivered to and relinquished from the authority of the Romanian Embassy he was confined at Camp Cropper. Referral to the CCCI for prosecution was the next logical step, and the ultimate transfer to Iraqi custody, which has not yet taken place, was also readily foreseeable.

5.4 The author reiterates that the State party made no inquiry and sought no assurances before allowing United States officers to remove him from the Embassy. As to the argument that the Embassy never authorised the United States Lieutenant to act on its behalf, the author submits that the State party has never appeared before the CCCI to correct this untruth. Nor has it made any statement to the Iraqi Court of Cassation, which will hear his appeal, in this regard. The State party has failed to take such action even though it may be all that is necessary to prevent the author's execution. As a State party to the Second Optional Protocol, the author submits that it must be required to take such minimal steps to protect those removed from its territory.

5.5 On the issue of exhaustion of domestic remedies, as the author was removed from the reach of the Romanian judicial system, there were no domestic means for him to challenge the State party's failure to prevent his removal. His ongoing detention continues

to prevent him from pursuing such a course. Through his counsel, the author requested executive intervention by the State party, but the Government failed to respond. As to the timing of the submission of his communication to the Committee, the author submits that since his detention on 23 May 2005, he has had very limited access to anyone outside of that facility. The facts stated in the communication were not fully available to the author's family or his United States counsel until shortly before the complaint was submitted. Once these facts came to light, additional time was required to pursue the availability of domestic remedies in the form of requests for executive intervention by Romania. As to the claim that counsel's attempts to obtain executive intervention of the State party on behalf of the author before submitting the communication to the Committee indicates that the ultimate filing of the complaint was an abuse of the right of submission, the author submits that all of the correspondence between his counsel and the Embassy in Washington was included in the complaint and he was entirely forthcoming. Counsel requested executive intervention to discharge his ethical obligation to preserve his client's life and integrity. The communication was delayed on two occasions to allow the State party to take action to assist the author. Further delays were thought to be impossible for the preservation of the author's life and integrity.

Supplementary submission on admissibility

6.1 On 18 January 2008, the State party provided the Committee with three note verbales. Two of them are dated 23 November 2007 and were sent by the Romanian Embassy in Baghdad to the Ministry of Foreign Affairs of the Republic of Iraq and to the Multinational Force Iraq, respectively. Both of these note verbales referred to the recent (no dated provided) decision of the Iraqi Court of Cassation, which apparently confirmed the author's death sentence, reiterated its opposition to the death penalty (see paragraph 1.2 above), and expressed its expectation that the Court of Cassation would have overturned rather than confirmed the death sentence. To the Republic of Iraq, the State party additionally requested the Iraqi authorities to review its decision in order to protect the life and integrity of the author and to the Multinational Force the State party considered it appropriate that the author remain in its custody. The third note verbale, dated 30 November 2007, is a response from the headquarters of the multinational force, indicating that the author remains in its custody pursuant to a United States Federal Court order, issued for reasons unrelated to his sentence and that following the "resolution of his case" MNF-I will follow whatever lawful instructions it receives from the CCCI. It states that its role is a limited one and that it does not interfere with an Iraqi judge's decision to impose a sentence under the authority of a properly constituted, sovereign court.

6.2 On 10 March 2008, in light of newspaper reports that the original decision of the Central Criminal Court of Iraq against the author was reversed, the Special Rapporteur requested clarification from the State party on the current status of this case and information on the author's whereabouts. He also requested a translated copy of paragraph 3 of the Iraqi law on criminal proceedings, referred to in the State party's submission of 5 March 2007, which is alleged to invoke that the victims' attitude or the attitude of the victim's State party exercises no influence on the initiation, development or cessation of criminal proceedings. On 19 March 2008, the State party responded that the view expressed in its submission of 5 March 2007 is an inference from the provisions of paragraph 3 (reproduced *ad litteram* in annex 14), according to which a criminal proceeding, "can only be set in motion on the basis of a complaint from the aggrieved party or someone taking his place in law" in relation to a certain number of offences listed exhaustively in subparagraph A. The offences for which the author was sentenced do not appear in that list, which implies that, other than in these cases, the initiation of criminal proceedings is *ex officio*. Thus, the initiation of proceedings is not conditional on the victim's attitude or the attitude of the victims' State, as implied in the complaint submitted on behalf of the author. The

State party also confirmed the media reports that the Iraqi Supreme Court actually annulled the judgement of the lower courts against the author, a decision which the State party took note of with satisfaction. According to the public information available, the Supreme Court considered that the absence and loss of certain evidence prevented the author from benefiting from all the guarantees of a fair trial. In the State party's view, this decision reflects the fairness of the proceedings before the Iraqi authorities and removes the concern that the death penalty will be carried out.

6.3 On 27 March 2008, the State party submitted a copy and translation of a note verbale dated 11 March 2008, from the Iraqi authorities to the State party, which confirmed that the "Federal Cassation Court has decided to cancel the court sentence against the accused person (Mohammed Munaf) and return the case to the specialized court for further investigation procedures with him. This is in order to know his role in the case and register the statement of the kidnapping journalists on their behalf. It is decided to have the mentioned person detained until finalizing the case and issuing the final decision."

Admissibility decision**

7.1 During the ninety-second session (March/April 2008), the Committee considered the admissibility of the communication.

7.2 The Committee noted the State party's argument that the power of attorney provided by the author's sister to counsel authorizing him to act on the author's behalf was inadequate and that counsel had therefore no standing to act on his behalf. It observed that the author had been detained since the submission and registration of the communication and that there is written evidence provided by the author's sister granting counsel authority to act on her brother's behalf. The Committee referred to its prior jurisprudence,¹⁰ as well as to rule 90 (b) of its rules of procedure, in accepting the legitimacy of authorization in such circumstances. It found, therefore, that the author's representative did have sufficient standing to act on his behalf and that the communication was not considered inadmissible for this reason.

7.3 As to the State party's arguments on the issue of exhaustion of domestic remedies, the Committee noted that the author had been detained in Iraq since the submission of his communication, and that he had taken the only action known to his counsel to seek a remedy through a request for executive intervention. The State party had not shown any means through which application to its own courts could have procured relief in respect of his claims. The Committee notes the argument that for the purposes of exhausting domestic remedies relating to the unfair trial claims before the Iraqi courts, the author should have pursued the issue of the State party's authorisation, or lack thereof, in the Iraqi courts. The

** The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

An individual opinion co-signed by Committee members Mr. Ivan Shearer, Sir Nigel Rodley and Mr. Yuji Iwasawa and a separate opinion signed by Committee member Mr. Walter Kälin are appended to the present decision.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Ms. Iulia Antoanella Motoc did not participate in adoption of the Committee's decision.

¹⁰ Communication No. 1033/2001, *Nallaratnam Singarasa v. Sri Lanka*, Views adopted on 21 July 2004.

Committee noted that the requirement of exhaustion of domestic remedies applies in respect of the State party against whom the communication is brought, and thus, even assuming such a claim could have permissibly been advanced before the Iraqi courts, the author need not have pursued such remedies. For these reasons, the Committee considered that it had not been shown that the author had domestic remedies to exhaust, within the meaning of article 5, paragraph 2 (b) of the Optional Protocol.

7.4 As to the argument on abuse of the right of submission, the Committee did not consider that a delay of one and a half years from the material facts of a case, particularly where those include the imposition of the death penalty, amounted to undue delay, nor did it consider that the subsequent submission of a communication to this Committee following several attempts to seek redress through the executive branch of the State party amounted to such abuse. The Committee thus did not consider that the communication was inadmissible for this reason.

7.5 The Committee noted the remaining arguments from the State party: that the author was neither in its territory nor subject to its jurisdiction; that he should not be considered a “victim” for the purposes of article 1 of the Optional Protocol; and that the claims are insufficiently substantiated, as they are based on events none of which had taken place at the time the author was removed from the Embassy and of which the State party could accordingly not have been aware. It also noted the argument that such events were not the necessary and foreseeable consequences of his removal from the Embassy, and that the necessary causal link was thus absent. It recalled its prior jurisprudence¹¹ that a State party may, in principle, be responsible for violations to the rights of an individual by another State if the necessary and foreseeable consequence of the removal of that individual from its jurisdiction is a violation of their rights under the Covenant. It noted in this respect that, relevant to these issues, the State party had already initiated domestic criminal proceedings against the author on the basis of his presumed involvement in the same incident, which is the subject matter of the present communication, and had been involved in the planning and initiation of the mission to secure the hostages’ release. In conclusion, the Committee’s view was that all these issues are intimately connected to the merits of the case and would be best fully resolved at that stage of the communication.

8. Accordingly, on 2 April 2008, the Committee declared the communication admissible and requested the State party to provide written explanations or statements clarifying the matter, and indicating the measures, if any, that may have been taken by the State party. In this respect, the State party was, in particular, requested to provide in detail the extent of its knowledge or reasonable suspicion of the author’s alleged criminal conduct, the extent to which other States or authorities were aware of same, and the State party’s consideration, with any other State or authority, of how the author’s responsibility for such conduct was to be resolved.

State party’s submission on the merits

9.1 By submission of 8 January 2009, the State party stated that, on 24 April 2008, the Court of Appeal of Bucharest sentenced the author to 10 years of imprisonment for crimes committed on the territory of the State party, namely the crime of “constitution of and participation in terrorist groups, financing terrorist acts and complicity in terrorist activities.” The State party’s authorities are looking into the different possibilities to ensure the enforcement of this sentence against the author given his continued detention in Iraq.

¹¹ See *Judge v. Canada* (note 3 above) and *A.R.J. v. Australia* (note 9 above).

9.2 On the Committee's admissibility decision, the State party argues that the Committee deferred its consideration of admissibility, in particular, as it concerns the jurisdictional issue having decided to consider these arguments in the context of the merits. It requests the Committee to revise its decision on admissibility provided for under rule 99, paragraph 4, of the Committee's rules of procedure.

9.3 The State party reiterates its earlier arguments that the author has not been subject to the State party's jurisdiction since he left Romania on 15 March 2005. He has not been under the "power or effective control" of the State party, as required by the Committee's general comment No. 31 on the nature of the general legal obligation imposed on States parties to the Covenant. According to the State party, since the general rule dictates that the jurisdiction is territorial and only, exceptionally, extra-territorial, for the exception to be applicable it must be proven that there is a causal link between the action of the agents of a State and the subsequent alleged acts. Thus, for the responsibility of the State party to be engaged it should be demonstrated that the author was under the power or effective control of the Romanian authorities and that there was a causal link between the Romanian agents and the alleged violations invoked.

9.4 The State party provides detailed information on the nature of the MNF-I, the role of the Romanian troops within this multinational force and the general attribution of responsibility under international law of the MNF-I under international law. It submits, inter alia, that according to the official site of the MNF-I, since 2003, Romania has deployed 5.200 troops in support of the Operation Iraqi Freedom. The troops were assigned to two different multi-national divisions, Centre South and Southeast. It reiterates that Romanian personnel did not have access to the detention centre in Camp Cropper, except for those providing medical treatment. It refers to a reply of the United Nations Secretariat on the issue of attribution of responsibility of peacekeeping forces at the request of the International Law Commission¹² to demonstrate its proposition that even if the MNF-I was to be considered in the same terms as an United Nations peacekeeping mission, it is indisputable that the Romanian troops were never vested with effective command or control so as to be internationally responsible for the acts of MNF-I. It also refers to decisions of the European Court of Human Rights to support the same argument.¹³ Moreover, the State party was not in a position to secure the respect for the rights defined in the Covenant in the territory of Iraq, as the responsibility to secure those rights was vested in Iraq, as a sovereign State. There is no principle under international law that would have placed the author under the jurisdiction of Romania on the sole basis that it contributed troops to a multinational coalition, when security in the zone in which the alleged actions took place was assigned to the United States and the overall command of the coalition was effectively vested in the United States.

9.5 The State party reiterates that the author was not under its jurisdiction following his release by the MNF-I force with the other three hostages on 22 May 2005. From 28 March 2005 until 22 May 2005, he was considered by the Romanian authorities as a victim. Even though, after investigating the circumstances of the author and journalists departure to Iraq, the Romanian authorities had some suspicions that he was involved on the territory of Romania in criminal acts related to terrorism, they had no reason to believe that he was not

¹² The reply is cited by Lord Bingham of Cornhill in [2007] UKL 58 on appeal from [2006] EWCA Civ 327, Opinions of the Lords of Appeal for Judgement in the *Cause R v. Secretary of State for Defence*.

¹³ *Behrami and Behrami v. France* (dec.) [GC], No. 71412/01 and *Saramati v. France, Germany and Norway* (dec.) [GC], No. 78166/01 (joined cases), and Decision of the admissibility of application No. 23276/04 by Saddam Hussein against Albania, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Turkey, Ukraine and the United Kingdom.

a prisoner in the hands of a terrorist group with the Romanian journalists. In addition, the State party's suspicions only related to the acts which occurred on Romanian territory before the departure of the four individuals to Baghdad. What subsequently transpired in Baghdad could not have been considered a direct consequence of those acts, as it was objectively impossible to test the seriousness and authenticity of the terrorists' claims. There was no reason to doubt the seriousness of the terrorists' threats that they would execute all four hostages and until their release the Romanian authorities feared that the author had been executed. The State party submits that the MNF-I is not replacing the Iraqi authorities but helps to maintain peace and security in Iraq. Therefore, it did not have the authority to deliver the author, who was not a Romanian citizen, to the Romanian authorities if they so requested. The final authority in this regard was vested in the Iraqi authorities, in relation to which international law provisions on extradition law apply.

9.6 The State party reiterates that the author was not under its jurisdiction by virtue of his brief presence at the Romanian Embassy. He was not forcibly removed from the embassy and there was no risk at the time of departure that his rights would be violated. His representatives admitted in the writ of certiorari, which they filed before the Supreme Court of the United States that the author himself asked to be taken to the United States embassy. Thus, his departure was an act of free will, at his request and not a measure imposed upon him by the MNF-I forces or by the Romanian authorities. The author did not seek the protection of the Embassy through, for example, a request for asylum. While the State party recognizes that it has an obligation to protect, it refers to the Committee's jurisprudence in cases of extradition, expulsion or refoulement, in which the analysis of the potential risk that a person could suffer in the jurisdiction of return is made on the basis of the elements available to the State party at the time of transfer. However, at the time of the author's request to be taken to the United States embassy, neither the Iraqi authorities nor the MNF-I manifested any intention of arresting and prosecuting the author on any charges. Given the principle of presumption of innocence, it is also speculative to accuse the Romanian authorities of knowing, even before the initiation of any procedure against the author in Iraq that, he was guilty, would be convicted and would subsequently be sentenced to death. Upon his departure from the Embassy, the State party's authorities believed that he would be submitted to a debriefing procedure by the MNF-I and were not aware that he would subsequently be interned in Camp Cropper for "imperative reasons of security". It was only during the debriefing that evidence of the author's involvement in the kidnapping came to light. His detention was reviewed by a MNF-I Tribunal of three-judges, during which the author was present and had an opportunity to make a statement and call available witnesses.

9.7 On the issue of the presence before the CCI of an American officer alleged to have claimed that he represented Romanian authorities, the State party reiterates that at no time did it empower any person to represent it before the Iraqi courts, as it was not a party to those proceedings. This is clear from the Supreme Court's decision overturning the author's conviction, which only refers to the Romanian victims – the three journalists – as former parties to the proceedings and contains no mention of Romania. In addition, no provision in Iraqi criminal law links prosecution and conviction of an individual to the express consent of the victim. As the author's representatives before the United States Supreme Court admitted, "The Government of Romania has repeatedly denied it authorized Lieutenant Pirone to speak on its behalf." The alleged letter which is said to have authorized the officer to act on the State party's behalf, as admitted by the author's representative, is not part of the court record, neither the author nor his counsel has seen it, and they have been unable to enquire into the circumstances under which it was purportedly obtained. No official role was attributed to this officer and his opinion was not decisive for the court findings. In addition, the author has failed to indicate the provisions that link his conviction to the State party's express request.

9.8 The State party underlines that, as it is not involved in the procedures before the MNF-I nor the procedure before the Iraqi courts, it has no knowledge of the information available to other States authorities of the author's alleged criminal conduct and, therefore, finds it impossible to provide more detail than it did on the last two questions addressed to it by the Committee. In spite of repeated efforts, the Romanian authorities have not received the necessary cooperation from the Iraqi authorities in the author's case, a fact which it can only regret.

9.9 On the merits of the claim under article 6, the State party submits that the so-called "removal" was in fact the direct effect of the author's wish to go to the United States Embassy, at a time when neither the Romanian Embassy nor the author could foresee that the MNF-I Tribunal would decide to intern him and refer his case to the CCCI for criminal proceedings. If the author had known of these developments he would surely have asked for, at least, humanitarian protection. Several facts had not emerged at the time of his departure: the MNF-I only considered that he was involved in the kidnapping after his debriefing; the MNF-I's decision was not final, as the Tribunal had to order his arrest and decide if he threatened, by his conduct, national security; and the Tribunal referred the case to the CCCI but his conviction was not the unconditional result of his departure from the Embassy, as he could have been found beyond any suspicion of having committed any crime and released. The State party denies that it failed to protect the author by refusing to act before the Iraqi court and denies the issue of any authorization in favour of an American officer to support his conviction. The State party's position was one of constant and public denial. However, the author did not show why he or his lawyer, as parties to the procedure, could not have requested the Iraqi court to clarify this aspect.

9.10 On the claims under articles 7 and 10, the State party submits that no evidence was produced to substantiate this claim, apart from a secondary source of testimonial evidence which remains uncorroborated and was flagrantly contradicted by the finding of the Romanian prosecutors who met the author several times during his detention in Bagdad and by his wife, who confirmed to the Romanian authorities that her husband was "doing pretty well". In fact, before the United States Supreme Court, the author had requested not to be transferred into Iraqi custody, as in such places of detention there would be a risk of ill-treatment. The author did not make any reference before the United States courts of the ill-treatment he is alleged to have suffered in Camp Cropper.

9.11 As to conditions of detention in Iraqi prisons, the State party notes that the United States Supreme Court found that no real risk of torture is present, based on the State Department's Reports of the human rights situation in Iraq. Although these reports admit that in some detention facilities under Iraqi custody the human rights situation raises concerns, the Iraqi Ministry of Justice meets international standards of treatment of detainees in its penitentiaries, and the author, if transferred, will be placed in one such location. The State party attaches due importance to the findings of the United States Supreme Court, as it is best placed to evaluate the personal risk that an American citizen is subjected to ill-treatment. As to the issue of the manner in which the death penalty is carried out in Iraq, the State party considers that nothing in its conduct led to this situation and emphasizes that the discussion is a speculative one in any event as the Iraqi Supreme Court annulled the death sentence and called for a new investigation and a new trial that could have a different outcome.

9.12 On article 9, the State party refers to its version of the facts and its argument that the author left the Embassy of his own free will accompanied by members of the multinational force to the Embassy of his State of citizenship. It notes that the United States Supreme Court considered that the MNF-1 Tribunal of three judges ensured all necessary guarantees, including the legality and non-arbitrary nature of his arrest and detention. Moreover, this

issue was not brought up by the author before the United States Courts until the appeal stage.

9.13 On article 14, the State party refers to the Law on Criminal Proceedings in Iraq to demonstrate that the procedure meets the general requirements for a fair trial. It refers to its previous remarks on the alleged role of an American officer (paragraph 9.7), as well as the fact that the Iraqi Supreme Court, which reviewed the author's death sentence, afforded the benefit of the doubt to the author. The Iraqi Supreme Court vacated the author's death sentence, as the victims' testimonies and the testimony of one of the accused were missing, and the sentence did not reflect the ultimate character of the crime. No mention was made of the issue of the authorization allegedly delivered to the American officer by Romanian authorities. No evidence was provided by the author on the other allegations, including no copy of his request to cross-examine witnesses, to contact his American counsel or to be granted time and facilities for his defence. Not even a copy of his appeal against his death sentence was provided. For these reasons, the State party considers that the author has failed to substantiate these allegations.

Author's comments on the State party's submission

10.1 On 12 March 2009, the author maintained that he was within the "power or effective control" of the State party during his time in the Romanian Embassy. It was the State party's own choice to treat the author differently from the other three hostages. The State party's argument that the MNF-I did not have "the necessary authority to deliver Mr. Munaf ... to the Romanian authorities if they so requested", has no basis in fact, as the State party never requested to retain custody of him. The argument that the MNF-I had different authority over the author, as he is not a Romanian citizen as compared to the other three hostages is not supported by any United Nations resolution or other decision or document. The author submits that the difference in treatment was due to the State party's deliberate choice not to request or retain his custody. He submits that the fact that he is not a Romanian citizen does not shield the State party from its duty to protect him. He admits that at the time of departure from the Embassy, he had no reason to believe that he was in any danger and had no reason to seek the State party's protection. However, the protection of fundamental rights is an absolute one and it must be acknowledged that the absence of an affirmative request for protection from a violation does not exonerate the State party.

10.2 According to the author, at the time of his removal from the Embassy, the State party had information that should have led it to the conclusion that there was a real risk that his rights under the Covenant would be violated, thereby triggering at least an inquiry into where he would be taken and what might happen to him. The author notes that the State party's argument that it was only suspicious of the author's involvement in criminal activity on the territory of Romania is inconsistent with its earlier admissibility submissions, in which it submitted that it had information about the possibility that the author was involved in the preparation of the kidnapping and the fact that criminal proceedings were instituted against him on 17 May 2005. In addition, the State party provided a memorandum signed by the Romanian Public Prosecutor which describes the investigation into the author after 5 April 2005. According to this memorandum, Romanian investigators traveled to Baghdad with the consent of the Iraqi government to hear the testimony of witnesses indicted for acts of terrorism by the Iraqi authorities, which took place between 19 and 21 May 2005 at the headquarters of the Major Crimes Unit in Baghdad. It is thus clear that the Romanian authorities were aware that the Iraqi authorities were arresting Iraqi citizens specifically. They knew that the Iraqi authorities had the same information that the State party had on the suspicions vis-à-vis Mr. Munaf and should have concluded that the Iraqi authorities would also suspect him. In addition, although the Romanian submissions are not clear on whether MNF-I authorities were present at the witness hearings, the State party could

reasonably have concluded that they were privy to any information Iraq had, and knowledgeable about Iraq's intentions with regard to Mr. Munaf.

10.3 As to the Committee's question to the State party on its consideration with any other State or authority of how responsibility for such criminal conduct was to be resolved, the author notes that the State party explains its actions in that regard only to the extent that it attempted to gain the cooperation of other authorities in its own criminal investigation and proceedings. The State party chose not to inquire and to seek no assurances regarding what would happen to the author after his removal from the Embassy.

10.4 The author refers to his conviction on 24 April 2008 by the Court of Appeal in Bucharest, on the basis of which he makes several new claims. Noting the fact that he has been detained in Iraq since 23 May 2005, he claims a violation of article 14, paragraph 3(b), as he lacked adequate time and facilities for the preparation of his defense, and a violation of article 14, paragraph 3 (d), as his trial was held in his absence.

10.5 The author acknowledges that the Court of Cassation fully supported his allegations regarding the violation of his rights under article 14 during his trial by the CCCI. On 25 January 2005, his sister received a telephone call from the author who reported that his belongings had been taken from him. After this call, the author was held incommunicado for more than four weeks, during which neither his family nor his Iraqi lawyer were permitted to speak to him. He was transferred multiple times during this period but finally returned to Camp Cropper in the last week.

Author's supplementary submission

11. On 20 April 2009, the author's counsel provided an update on the case. She states that she has been unable to contact the author directly but understands from his family that the Iraqi court has requested the assistance of the Romanian authorities in its investigation of the case. According to counsel, the Iraqi investigation judge has requested the testimony of the three Romanian journalists who had been kidnapped. Six months after the initial request, and following multiple letters to the State party's government, the latter responded offering to allow the Iraqi investigation judge to come and take the testimonies in the State party. As Iraqi rules regarding investigation and criminal procedure do not allow testimony to be taken outside Iraq, the Iraqi court requested that the three witnesses be made available to give testimony via satellite transmission from Romania to Iraq. To date the State party's government has failed to respond. Until an answer is provided by the State party, the Iraqi court cannot proceed with its investigation and the proceedings against the author will not progress. Thus, his detention which has already lasted four years will continue.

Supplementary submissions from the State party

12.1 On 15 May 2009, the State party disputed the author's allegations made in his submission of 20 April 2009. It submits that the Romanian authorities have only received two letters from the Iraqi administration to which it duly responded. On 29 October 2008, the Ministry of Foreign Affairs received a request from the Iraqi judicial authorities for further information on the three kidnapped victims. In January 2009, the State party responded that to conform to the requirements of Romanian law such a request should take a certain form and include inter alia certain guarantees, including the assurances of reciprocity. Such requirements are necessary given that there is no international agreement between Romanian and Iraq on issues of international assistance in criminal matters. On 17 April 2009, the State party received a similar request from the Iraqi authorities to which the State party again requested inter alia assurances of reciprocity. The Iraqi authorities had not responded to this note verbale by the date of the submission.

12.2 On 13 May 2009, the Romanian Ministry of Foreign Affairs received another note verbale from the Iraqi Ministry of Foreign Affairs containing information pursuant to which the Central Investigation Court decided on 13 April 2009 to designate the Iraqi consular officer from the Iraqi Embassy in Bucharest to set up a rogatory commission and take the testimony of the three Romanian journalists. This note was sent to the Ministry of Justice who is considering the matter and will inform the Iraqi authorities in due course. The State party reiterates the numerous requests it has made to the Iraqi authorities for its assistance in the hearing of Mr. Munaf, including by rogatory commission, to which the Iraqi authorities responded in the negative. In addition, the State party informed the Iraqi authorities of the conviction of Mr. Munaf in Romania and requested the Iraqi authorities to consider the application of the principle of *non bis in idem* should he be investigated in Iraq for the same crimes that were the object of the criminal proceedings in Romania. To this request the State party has still not received a response. Finally, the State party denies that it informed the Iraqi authorities of the possibility of an Iraqi investigative judge coming to Romania to take the testimony of the three Romanian journalists. Such a possibility is not envisaged under Romanian law.

12.3 On 5 June 2009, the State party responded to the author's comments of 12 March 2009. It reiterates previous arguments made on admissibility. It submits that the author has failed to substantiate the new claims of violations of article 14 by the Court of Appeal in Bucharest of 24 April 2008. The author's lawyers were aware, at least from 30–31 May 2005, that proceedings were initiated against the author in the State party and they could have requested information from the author's sister or his lawyers in Romania for information on his case. In its submission of May 2007, the State party itself referred to these proceedings. Thus, it submits that the author's failure to make these claims only two years after being informed of the facts relating to them is an abuse of the right of submission to the Committee. It also claims that the author has failed to exhaust remedies, as he did not appeal to the Court of Appeal of Bucharest, despite the fact that he was given additional time in light of his conviction *in absentia*. It also submits that the author still has recourse to one of the extraordinary means of appeal in the State party.

12.4 The State party clarifies its earlier argument that the fact that there was no specific request from the author for protection did not imply that he was in any way at fault by not doing so but that, apart from the issue of whether the State party should have presumed a future violation of his rights, there were no other circumstances which would have entailed a responsibility to react on the part of the Romanian authorities. The State party submits that the claim that Romania had information that should have led to the conclusion that there was a real risk of a violation of his rights remains unproven and a mere hypothesis. The State party submits that it never contested that some of the alleged preparatory and executive acts, which led to the kidnapping, were carried out on Romanian soil but merely clarified that the investigations carried out on the part of the Romanian authorities related only to those preparatory and executive acts that were carried out in the State party. The State party's authorities could not have investigated what had happened on Iraqi territory. In any event, the arrests carried out by Iraqi authorities did not necessarily imply the automatic guilt of the author and could equally have ended with a finding of insufficient evidence to pursue the case.

12.5 As to the argument that the State party should have requested the Iraqi authorities or MNF-I on how it intended to proceed with the author, the State party reiterates, that, at the time, it was of the view that MNF-I intended to subject the author to a debriefing procedure which would take place in the United States Embassy. This was confirmed by the United

States Supreme Court in its decision of *Munaf v. Geren*.¹⁴ The State party submits that it made known its position to both MNF-I and to the Iraqi authorities, and on 28 May 2009, it had made a further request to the Iraqi authorities to review its policy on the death penalty with a view to abolition.

Issues and proceedings before the Committee

Consideration of admissibility

13.1 Prior to considering the merits of the case, the Committee notes that the author formulates new claims in his submission of 20 April 2009 after the Committee's decision on admissibility. The Committee observes that these claims relate to the conduct of the criminal proceedings against him before the Court of Appeal on 24 April 2008. It notes that the State party contests these claims, inter alia, for failure to exhaust domestic remedies, as the author did not appeal his conviction despite the extension of the time-limit in this regard. While noting that the author himself was and remains detained in Iraq, no reasons have been provided explaining why he could not have assigned his Romanian lawyer to pursue an appeal on his behalf. The Committee considers that the author has failed to show that he has exhausted domestic remedies with respect to his new claims, and thus finds this part of the communication inadmissible, pursuant to article 5, paragraph 2(b), of the Optional Protocol.

13.2 As to the State party's request in its submission on the merits to review the admissibility of the entire communication, the Committee reiterates its view set out in the admissibility decision that the author's arguments should be analysed in the context of the consideration on the merits of the case.

13.3 The Committee refers to its decision on admissibility, in which it considered that some of the inadmissibility arguments are intimately linked to the merits and should thus be considered at that stage. The Committee made this assessment inter alia, on the basis of the serious allegations made by the author, the contradictions between the State party and author on several questions of fact and the absence of sufficient information about the extent of the State party's knowledge of the author's alleged criminal conduct. The Committee recalls that it addressed further questions to the State party in its admissibility decision, to which both the State party and the author have had further opportunities to respond.

Consideration of the merits

14.1 The Human Rights Committee considered the communication in the light of all the information supplied to it by the parties, as it is required to do under article 5, paragraph 1, of the Optional Protocol.

14.2 The main issue to be considered by the Committee is whether, by allowing the author to leave the premises of the Romanian Embassy in Baghdad, it exercised jurisdiction over him in a way that exposed him to a real risk of becoming a victim of violations of his rights under articles 6, 7, 9, 10, paragraph 1 and 14 of the Covenant, which it could reasonably have anticipated. The Committee recalls its jurisprudence that a State party may be responsible for extra-territorial violations of the Covenant, if it is a link in the causal chain that would make possible violations in another jurisdiction. Thus, the risk of an extra-territorial violation must be a necessary and foreseeable consequence and must be judged

¹⁴ 553 US (2008), at p. 10–11.

on the knowledge the State party had at the time: in this case at the time of the author's departure from the Embassy.¹⁵

14.3 While there is disagreement about some of the facts of the case, the following is agreed by both parties: the author was brought to the embassy, where he remained for a few hours; he specifically requested to go to the United States embassy on account of his dual citizenship; and he was unaware himself at the time that he might subsequently be charged with a criminal offence in Iraq and thus might have needed the protection of the State party. The latter point has been confirmed in the author's comments on the merits (paragraph 10.1).

14.4 Given both the State party's and author's responses to the questions addressed by the Committee in its admissibility decision, it is clear that the State party was involved in the initiation and planning stage of the operation to release the hostages, and that the author had been charged (and ultimately subsequently convicted) of having committed criminal offences in the State party's territory, offences which related to the kidnapping in Iraq itself. The author argues that the Iraqi administration had provided some assistance to the State party with respect to the latter's investigation of the author for crimes committed in Romania. He argues that, as a result of this cooperation, the State party should not have been "surprised" (paragraph 5.3) to learn that the author was charged the day after his departure. However, the Committee does not consider that "surprise" can be equated with knowledge, on the part of the State party, that violations of the Covenant were a necessary and foreseeable consequence of his departure from the Embassy. Nor does it consider that all of this information, even looking at it in its totality, proves or even suggests that the State party would or should have known, at the time of the author's departure, that criminal proceedings would subsequently be initiated against him in Iraq. Nor could it have known that the initiation of such proceedings would have run a real risk of him, being convicted in circumstances contrary to article 14, ill-treated contrary to article 7 and 10, being sentenced to death, contrary to article 6, and ultimately executed, in a manner contrary to article 6, paragraph 2.

14.5 The Committee notes that at the time of his departure from the embassy, the State party was of the view that the author would merely take part in a de-briefing procedure and had no reason to deny his specific request to go to the United States embassy, in particular given his status as a dual national. The Committee considers that the author's claims that the State party knew otherwise were, and in fact remain, speculative. In this regard, the Committee notes that even since the submission of the communication, the author is no longer under a sentence of death in Iraq, his conviction and sentence having been annulled awaiting further investigation. In addition, by annulling his appeal, the author acknowledges that the Court of Cassation addressed his claims under article 14, concerning the criminal proceedings before the Central Criminal Court of Iraq. In the Committee's view, the fact that the proceedings against the author have not yet been completed, and that upon review at least some of his claims have been addressed, lends further support to the State party's argument that it could not have known at the time of the author's departure from the Embassy that he ran a risk of his rights under the Covenant being violated.

14.6 For the abovementioned reasons, the Committee cannot find that the State party exercised jurisdiction over the author in a way that exposed him to a real risk of becoming a victim of any violations under the Covenant.

¹⁵ *A.R.J. v. Australia* (note 9 above), *Judge v. Canada* (note 3 above) and communication No. 1416/2005, *Alzery v. Sweden*, Views adopted on 25 October 2006.

15. 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 articles 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.]

Appendix

Dissenting opinion on the Admissibility Decision of Committee members, Mr. Ivan Shearer, Sir Nigel Rodley and Mr. Yuji Iwasawa

We are unable to subscribe to the decision to declare the present communication admissible. In our view no further facts could emerge at the merits phase of the proceedings that could lead to an ultimate finding of a violation of the author's Covenant rights. It is wrong to place the State party under a further obligation to respond to a clearly misconceived complaint.

We limit ourselves to what we consider to be the complete absence of a territorial or jurisdictional nexus between the author and the State party, as required by article 2 of the Covenant. The establishment of such a nexus is essential before a communication with respect to that State is admissible.

The facts relevant to this aspect of the case do not appear to be in dispute. The author was brought to the Romanian Embassy in Baghdad together with the other freed hostages by officers of the Multinational Force – Iraq (MNF-I). The three freed hostages remained in the embassy in order for arrangements to be made to repatriate them to Romania. Mr. Munaf, who is a dual Iraqi-United States national, left the embassy in the company of MNF-I requesting that he be taken to the United States Embassy. Mr. Munaf did not request the protection of the Romanian embassy by way of asylum or express a desire to remain there. There is no evidence that he left the embassy otherwise than voluntarily. It was only on the following day that Mr. Munaf was detained by the MNF-I on suspicion of having committed an offence.

It can only be concluded, in our view, that the present communication has been artificially constructed as a complaint against Romania, a party to the Optional Protocol, in order indirectly to draw attention to alleged violations of the Covenant by Iraq and the United States. Neither of the latter States are parties to the Optional Protocol and thus the author would be precluded from bringing proceedings against them before the Committee.

(Signed) Mr. Ivan **Shearer**

(Signed) Sir Nigel **Rodley**

(Signed) Mr. 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.]

Dissenting opinion on the Admissibility Decision of Committee member Mr. Walter Kälin

I am not in a position to join the majority declaring the present communication admissible. In my view the facts of the case, albeit disputed to some extent by the parties, are clear enough to allow the conclusion that the communication should have been declared inadmissible.

The State party claims that the author has neither been within its territory nor subject to its jurisdiction since 15 March 2005, when he left the State party to go to Iraq. It also maintains that while the author was brought to the Romanian Embassy he never left the custody of MNF-I and was not handed over to Romania.

Indeed, the key question in the present case is whether Romania exercised any jurisdiction over the author. The point of departure for examining this issue is article 2 of the Covenant, according to which a State party undertakes to, “respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant ...”, as well as article 1 of the Optional Protocol allowing the Committee to “receive and consider communications from individuals *subject to its jurisdiction*” (emphasis added). Accordingly, the Committee has described “individuals subject to its jurisdiction”, as not referring to the place where the violation occurred, but rather to the relationship between the individual and the State, in relation to a violation of any of the rights set forth in the Covenant.^a This position was confirmed and further explained in the Committee’s general comment No. 31, where the Committee clearly set out that “a State party must respect and ensure the rights laid down in the Covenant to anyone within *the power or effective control* of that State party, even if not situated within the territory of the State party” (emphasis added).^b It went on to say that the enjoyment of Covenant rights is not limited to citizens of States parties and the principle also applies to those within “the power or effective control of the forces of a State party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State party assigned to an international peace-keeping or peace-enforcement operation.” Thus, the test is not, as argued by the State party, whether it had “custody of” or “authority over” the author, or whether it relinquished custody of him to MNF-I, but whether it had “power or effective control” over him for the purposes of respecting and ensuring his Covenant rights.

In this regard, I accept the following facts: The release of the author and the Romanian hostages was secured during a raid by military troops under the command of Multi-National Force-Iraq (MNF-I) whose presence in Iraq was authorized by the Security Council.^c As confirmed by the author, the contingent of MNF-I directly involved in securing the hostages’ release did not include Romanian troops. The State party’s involvement, as has not been contested by it, was limited to the “initiation and planning” stage of the operation. The troops carrying out the operation brought the hostages as well as the author to the Romanian Embassy in Baghdad. From there, the author was taken by MNF-I to ‘Camp Cropper’, where he has been detained since. ‘Camp Cropper’ is an MNF-I

^a Communication No. 52/1979, *Lopez v. Uruguay*, Views adopted on 29 July 1981.

^b General comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40 (A/59/40)*, vol. I, annex III, para. 10.

^c Security Council resolution 1511 (2003) and subsequent resolutions extending the mandate of MNF-I.

detention facility, although a facility in which, as demonstrated by the State party, there were no Romanian personnel during the period in question.

Accordingly, the present case raises three issues: First, it has to be considered whether alleged violations suffered by the author in the form of his detention, trial and sentence are imputable to the State party, by virtue of the State party's presence in the MNF-I. Secondly, it is necessary to examine whether by letting the author be taken away from the premises of the Embassy it exercised jurisdiction over the author in a way that exposed the author to a real risk of becoming a victim of violations of his rights under articles 6, 7, 9, 10, para. 1 and 14 of the Covenant which it may have reasonably anticipated. Finally, the question arises whether the State party exercised jurisdiction over the author when, subsequent to his departure from the Embassy, it allegedly declined to intervene on behalf of the author during the proceedings before the Central Criminal Court of Iraq (CCCI), an omission which, according to the author, made the violation of his rights possible.

Regarding the first question, I find that, whatever the circumstances in which a State party could be held to be exercising jurisdiction over an individual in the context of "an international peace-keeping or peace-enforcement operation", as set out in our general comment No. 31, in the current circumstances the State party was not itself represented in the MNF-I contingent that secured the hostages' release. Thus, the part that the State party played in their release, through its involvement in the initiation and planning of the operation, was insufficiently proximate to bring the author within the power or effective control of the State party, prior to his arrival in the Embassy, as defined by the Covenant and Optional Protocol. The same conclusion must be drawn with respect to the author's detention by the MNF-I in 'Camp Cropper', following his removal from the Embassy, in light of the fact that no personnel from the State party was present in this detention facility during the period in question, as well as with respect to the trial before the CCCI. There is no established principle of international law which would mean that the author fell within the jurisdiction of the State party on the sole basis that it formed part of a coalition with the State that took the author into custody and controlled Camp Cropper. Thus, the author cannot be said to have been under the power or effective control of the State party after his removal from the Embassy and his subsequent detention in 'Camp Cropper'. In my view, the communication is thus inadmissible insofar it claims that the treatment of the author while in detention in Camp Cropper, the trial, and the ensuing death sentence are directly attributable to the State party and amount to violations by the State party of the Covenant.

As to the second question and the author's claims that the act of handing him over to MNF-I leading to his being sentenced to death violated his rights under the Covenant, the Committee's jurisprudence is relevant according to which States Parties have an obligation not to remove, by whatever means, individuals from their jurisdiction if it may be reasonably anticipated that they will be exposed to a real risk of being ill-treated.^d The same obligation exists for a State party that has abolished the death penalty regarding a person risking the death penalty in another country.^e Here, the question arises as to whether the author could be said to have been within "the power or effective control" of the State party, by virtue of his presence in its Embassy in Baghdad. I note that, although the precise sequence of events inside the grounds of the Embassy on 22 May 2005 is contested by the parties to the case, the parties agree that (a) the author was within the premises of the Embassy, and (b) that he was detained only subsequent to his departure from the Embassy. As a matter of international law, a State party has full legal jurisdiction over diplomatic

^d Communication No. 692/1996, *A.R.J. v. Australia*, Views adopted on 28 July 1997.

^e See communication No. 829/1998, *Judge v. Canada*, Views adopted on 5 August 2003, para. 10.4.

premises and the acts of all persons therein. This is so regardless of the precise degrees of factual control that were in fact have been exercised over the individual within the premises by Embassy staff and MFN-I forces. Thus, in the course of 22 May 2005 the author can appropriately be regarded as having come, in legal terms, within the jurisdiction of the State party while at its Embassy in Iraq.

However, even if we accept that the State party exercised jurisdiction over the author while in the Embassy premises, the question remains as to whether the author has sufficiently substantiated his claim, for purposes of admissibility, that the State party was in a position to reasonably anticipate impending violations of this rights under articles 6, 7, 9, 10 and 14 of the Covenant arising from his subsequent detention, trial and sentence. In this regard, the State party's explanation that the author requested to be taken to the United States Embassy as well as the fact that author never claimed to have asked Embassy staff to provide him with protection are highly relevant, as are the short period of time and the circumstances of the author's presence on Embassy premises. It is my view that under these circumstances, the author has failed sufficiently to substantiate, for purposes of admissibility, that the State party's authorities were in a position reasonably to anticipate the alleged violations of his rights under the Covenant.

The final question is whether the State party had jurisdiction over the author with regard to its alleged failure to intervene with relevant authorities during and in the aftermath of the trial before the CCCI despite such requests by his counsel. A refusal to act on behalf of a person being abroad may be a relevant exercise of jurisdiction, provided there is a genuine link between the state and the person concerned.^f In the present case, the author has claimed that according to applicable Iraqi law the State party had to authorize the trial of and the imposition of the death penalty on the author because the victims were its own nationals, and thus was supposed to play a direct role in his trial. Such a legal possibility to prevent the imposition of the death penalty in a trial that allegedly violated article 14 would, in my view, be sufficient to create a genuine link between the State party and the author. I note, however, that the only article quoted by the parties to these proceedings that could be relevant is article 3 of the Iraqi Law on Criminal Proceedings requiring a request by the aggrieved party in the case of certain specified crimes. However, kidnapping is not included in the list spelled out in article 3, and the author has not referred to any other specific provision of Iraqi law to support his contention that in the present case the State party's agreement would have been necessary. Therefore, the Committee should have concluded that the author has not sufficiently substantiated, for purposes of admissibility, his claim that the State party has violated its duty under article 6 to protect his life.

(Signed) Mr. Walter Kälin

[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 See communication No. 1107/2002, *Loubna El Ghar v. Libya*, Views adopted on 2 November 2004.

MM. Communication No. 1553/2007, *Korneenko and Milinkevich v. Belarus* (Views adopted on 20 March 2009, Ninety-fifth session)*

<i>Submitted by:</i>	Mr. Viktor Korneenko (not represented by counsel)
<i>Alleged victim:</i>	Messrs Viktor Korneenko and Aleksandar Milinkevich
<i>State party:</i>	Belarus
<i>Date of communication:</i>	21 August 2006 (initial submission)
<i>Subject matter:</i>	Confiscation of electoral campaign material shortly before elections day; right to disseminate information without unjustified restrictions; fair trial; right to be elected; discrimination on political grounds
<i>Procedural issue:</i>	Level of substantiation of claim
<i>Substantive issues:</i>	Freedom of expression; fair trial; independent tribunal; discrimination; right to be elected and to take part in conduct of public affairs
<i>Articles of the Covenant:</i>	14, paragraph 1; 19; 25; 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 20 March 2009,

Having concluded its consideration of communication No. 1553/2007, submitted to the Human Rights Committee on behalf of Messrs Viktor Korneenko and Aleksandar Milinkevich 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. Viktor Korneenko, a Belarusian national born in 1957, and Mr. Aleksandar Milinkevich, also a Belarusian, born in 1947.¹ Mr. Korneenko claims to be a victim of a violation, by Belarus, of his rights under article 19;

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Lazhari Bouzid, Ms. Zonke Zanele Majodina, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

¹ Mr. Korneenko provides an authorization to act on Mr. Milinkevich's behalf.

article 14, paragraph 1; and article 26 of the International Covenant on Civil and Political Rights. Mr. Milinkevich claims a violation of his rights under article 19; article 25; and article 26, of the Covenant. The authors are not represented by counsel.

The facts as submitted by the authors

2.1 Mr. Korneenko was a member of the electoral headquarters of Mr. Milinkevich during the presidential campaign in the spring of 2006,² Mr. Milinkevich was a Presidential candidate. On 6 March 2006, two weeks before the elections, Mr. Milinkevich asked him to transport 28,000 electoral leaflets by car from Minsk to Gomel. Thirteen thousand of the leaflets consisted of a one page photograph of Milinkevich with the inscription “Milinkevich – the new President”, while the remaining 15,000 leaflets consisted of a two-page printout of the candidate’s electoral program. Mr. Korneenko states that he had hard copies of all the required documents for the production and transportation of the electoral materials in question. His car was stopped and searched by the traffic police and the booklets were seized. According to him, the police record relating to the search did not give any reason for the seizure, but only indicated that the car contained electoral material.

2.2 Mr. Korneenko complained to several institutions (exact dates not provided), such as the Central Electoral Commission, the Gomel Regional Electoral Commission, the General Prosecutor’s Office and the Gomel Prosecutor’s Office, requesting to have the leaflets returned. On 11 March 2006, the Central Electoral Commission informed him that it was not competent to comment on police acts and that it had transmitted his case to the General Prosecutor’s Office. On 14 March 2006, he received a similar reply by the Gomel Regional Electoral Commission. Also on 14 March 2006, he was informed by the Gomel Regional Prosecutor’s Office that his complaint was transmitted to the Zhlobinsk District Prosecutor’s Office. On 16 March 2006, the General Prosecutor’s Office informed him that it had transmitted his case to the Grodno Regional Prosecutor’s Office. On the same day, the Zhlobinsk District Prosecutor’s Office informed him that the seizure of the leaflets in question was permitted by law, and was necessary to verify the lawfulness of the printout and the number of copies produced, given that he had failed to present the originals of the documents required to confirm their conformity with the law. Mr. Korneenko claims that he had presented to the police photocopies of the documents in question. According to him, if the police had doubts about the lawfulness of the leaflets, it should only have confiscated a copy of each document for verification but not the entire amount. He adds that the leaflets seized represented one quarter of all of Mr. Milinkevich’s printed electoral material.

2.3 On 21 March 2006, in his absence, the Zhlobinsk District Court of the Gomel Region concluded that, by transporting leaflets containing information suggesting that Mr. Milinkevich was the new President, Mr. Korneenko had violated article 167–3 of the Administrative Offences Code.³ According to the court, Mr. Korneenko’s guilt was established by the seized material, testimonies of several witnesses, the record of the examination of his car, the police report, and other evidence. Mr. Korneenko was fined to 155,000 Belarusian roubles. The Court also ordered the destruction of the leaflets.

² Mr. Korneenko acted as one of the official representatives of Mr. Milinkevich.

³ The judgment states that on 6 March 2006, Mr. Korneenko conducted his car and transported 28 000 printed leaflets which contained an information suggesting that Aleksandar Milinkevich is the new President, what violates the electoral legislation, i.e. he has committed an administrative offence, proscribed by article 167–3 of the Administrative Offences Code. Article 167–3 of the Administrative Offences Code relates to electoral legislation violations. It reads as follows: “ Campaigning during the election day, . . . , and also other violations of the electoral legislation . . . for which no criminal liability is provided, lead to an imposition of a fine equivalent to up to 10 minimal (monthly) salaries . . .

2.4 On 28 April 2006, the Zhlobinsk District Court of the Gomel Region re-examined the case, confirmed the initial decision,⁴ and found that the sanction imposed was proportionate to the offence committed. Subsequently, Mr. Korneenko requested the President of the Gomel Regional Court to have the Zhlobinsk District Court of the Gomel Region's decision reviewed under the supervisory procedure. On 29 May 2006, the President of the Gomel Regional Court rejected his request by affirming that the prior decision was lawful. Mr. Korneenko then applied, also under a supervisory procedure, to the Chairman of the Supreme Court. On 24 July 2006, the Supreme Court confirmed the lawfulness of the previous decision and rejected his request. Mr. Korneenko argues that the courts failed to provide any explanation on the legal basis for the seizure and destruction of the 15,000 leaflets, which did not contain the slogan "Milinkevich – the new President" but that only listed the candidate's electoral program.

2.5 Subsequently, Mr. Korneenko requested the Central Electoral Commission to explain what electoral campaign material should not include.⁵ On 14 April 2006, the Commission replied that the Presidential electoral campaign material should not contain calls for war, for forced change of the constitutional order, for a breach of the State territorial integrity, for calls of nationalistic, racial, religious, or social hostility, and should not contain insults or slander in relation to public officials and presidential candidates.

2.6 According to Mr. Korneenko, article 167–3 of the Administrative Offences Code must be read jointly with article 49, of the Electoral Code, which provides that if a candidate abuses of his rights during an electoral campaign, the Electoral Commission can revoke his registration as a candidate. In Mr. Korneenko's view, no other sanction is provided in the Electoral Code for such abuses, and the courts thus had no right to fine him. He claims that the seizure and the destruction of the official leaflets during an electoral campaign constituted an attempt by State officials, supporting the regime in place, to obstruct the Mr. Milinkevich's campaign.

The complaint

3.1 Mr. Korneenko claims that by fining him because of the content of Mr. Milinkevich's campaign leaflets, the State party has breached his and Mr. Milinkevich's rights under article 14, paragraph 1, of the Covenant. In his opinion, the courts did not act impartially also because he was fined for having carried leaflets whose content allegedly contradicted the electoral legislation, notwithstanding that only 13,000 copies out of 28,000 leaflets contained the slogan in question.

3.2 In this context, Mr. Korneenko also claims that the State party has placed him and Mr. Milinkevich in an unequal position before the law, because of their political opinions, and failed to guarantee their right to equality before the law, in breach of article 26, of the Covenant.

3.3 He further claims a violation of his and Mr. Milinkevich's rights under article 19, paragraph 2, because of the arbitrary seizure of one quarter of Mr. Milinkevich's campaign material, in particular in violation of their right to impart information, and the State party has failed to justify the necessity of the restriction of their rights.

3.4 The author claims that Mr. Milinkevich is a victim of a violation of article 25, because the seizure and destruction of the leaflets by the State party's authorities, who he

⁴ According to Mr. Korneenko, his case was re-examined as he was not present at the trial, on 21 March 2006, and his name was misspelt in the initial decision. He affirms that his lawyer was representing him when the case was examined on 28 April 2006.

⁵ No exact date is provided.

claims are under the control of the State party's President, were aimed at impeding the electoral campaign of the opposition candidate and at denying him his right to be elected and to take part in the conduct of public affairs.

The State party's observations on admissibility and merits

4.1 By Note verbale of 7 June 2007, the State party made its observations on admissibility and merits. It confirms that Mr. Korneenko was registered by the Central Electoral Commission as an official representative of the Presidential candidate Mr. Milinkevich, in the context of the 2006 Presidential elections. On 10 March 2006, Mr. Korneenko appealed to the Central Electoral Commission against the acts of the Zhlobinsk District Department of Internal Affairs which had seized the campaign materials from his car. Another representative of Mr. Milinkevich, Mr. Labkovich, had also complained to the Commission in this regard. In their complaints, Mr. Korneenko and Mr. Labkovich had asked the Electoral Commission to require the Zhlobinsk District Department of Internal Affairs to return the leaflets and to inform the General Prosecutor's Office of the necessity to initiate criminal proceedings against the policeman involved.

4.2 According to the State party, both Messrs Korneenko and Labkovich were informed by the Central Electoral Commission that it was not empowered to assess the lawfulness of the acts of the police. Pursuant to law, their claims were transmitted to the General Prosecutor's Office.

4.3 On 28 April 2006, the Zhlobinsk District Court of the Gomel Region fined Mr. Korneenko under article 167-3 of the Code of Administrative Offences, for having breached the electoral legislation. He was found guilty of having transported, for the purpose of their dissemination, twenty eight thousand leaflets which did not comply with the requirements of article 45 of the Electoral Code. He appealed against this decision, and in July 2006, the Supreme Court of Belarus reviewed the case and confirmed the judgment.

4.4 According to the State party, the first instance court decision to have the seized leaflets destroyed as constituting the object of the offence was grounded.⁶ There was no information that would indicate any violation of Mr. Korneenko's rights, and there was nothing to indicate that he had been discriminated against or that he was found guilty on political grounds. In substantiation, the State party explains that pursuant to article 45, part 8, of the Electoral Code, each Presidential candidate received a payment of 66,700,000 BLR from the State Budget for the preparation of electoral campaign materials. The Central Electoral Commission had thus transferred this sum to the individual in charge of the production of Mr. Milinkevich materials.

4.5 The Belarusian Constitution guarantees the independence of the judges when administering justice, their irrevocability and immunity, and prohibits any interference in the administration of justice. The law of 13 January 1995, "On the courts and the status of judges", as well as the "Judicial System and Status of Judges Code" of 2006, both provide legal guarantees for the administration of independent justice. Pursuant to article 110 of the Constitution, judges are independent and are only subject to the law; any interference in the administration of justice is impermissible and is liable to punishment.⁷

4.6 According to the State party, the presidential elections of 2006 complied with the criteria for the conduct of democratic elections. The elections took place within the

⁶ It appears that the court sanctioned Mr. Korneenko by a fine; the seizure was the consequence of the fact that the leaflets constituted the object of the administrative offence committed.

⁷ The State party further lists a number of specific guarantees on the independence of the judiciary contained in the Judicial System and Status of Judges Code.

determined deadlines, i.e. their periodicity was respected, and they were universal. The right to electoral equality was respected. The ballot was secret; the ballot papers were counted by members of the electoral commissions. All individuals who have presented the required number of supporting signatures were registered as candidates. All candidates received equal access to public mass media, and were permitted to have their campaign materials printed for free in the seven major national newspapers.

Authors' comments on the State party's submissions

5.1 On 20 November 2007, Mr. Korneenko presented its comments on the State party's observations. He notes that the State party justifies the restriction of his right to freedom of expression by invoking the provisions of article 45 of the Electoral Code. According to him, the State party's conclusion is groundless. Under article 33 of the Belarusian Constitution, everyone is guaranteed freedom of thought, belief, and expression. The limitation of these rights is only permissible in instances specified by law, in the interest of national security, public order, the protection of morals and health of the population, or the rights and liberties of others (article 23 of the Constitution). Similarly, the rights guaranteed by article 19 of the Covenant might only be limited if the restrictions in question are provided by law and are necessary for the respect of the rights or reputations of others, or for the protection of national security or of public order, or of public health or morals.

5.2 Mr. Korneenko contends that the State party has affirmed that the 28,000 copies of Mr. Milinkevich's electoral campaign did not comply with the requirements of article 45 of the Electoral Code. It did not, however, clarify what specific offence he had committed. He concludes that the State party has breached articles 23 and 33 of the Belarus Constitution, as well as article 19, paragraph 3, of the Covenant. Even if it is admitted that the campaign leaflets did not correspond to the legal requirements, the State party should have presented its arguments on why the seizure and the subsequent destruction of the materials in question were necessary for the restriction of the authors' right to freedom of expression.

5.3 Mr. Korneenko contests the State party's arguments that there is nothing to show that he was discriminated against on political grounds. He affirms that the destruction of one quarter of the electoral campaign materials, shortly before the Election Day, demonstrates that the authorities have discriminated him and Mr. Milinkevich, as it was not based on reasonable and objective criteria.

5.4 He contends that the impartiality of the courts presumes that judges do not prejudge a case or act in the interests of one of the parties. According to him, the Zhlobinsk District Court of the Gomel Region concluded that his guilt was confirmed by the sentence contained in the campaign leaflets, namely "Milinkevich – the new President". The court however did not provide any explanation as to the rest of the leaflets which did not contain the sentence in question. This, according to Mr. Korneenko, shows that the court addressed his case in a biased manner, as it permitted the destruction of 15,000 copies of campaign material that was prepared in accordance with the law, and thus acted in the interest of the representatives of the regime in place.

State party's further observations

6. On 2 May 2008, the State party added that on 5 April 2006, the Supreme Court of Belarus rejected Mr. Milinkevich's request to open a case in relation to the refusal of the Central Electoral Commission to declare the 2006 Presidential election invalid. Mr. Milinkevich appealed against the Supreme Court's decision, under the supervisory

procedure.⁸ On an unspecified date, his appeal was rejected by a Deputy Chairman of the Supreme Court. The State party notes that pursuant to article 6 of the law “On the Central Electoral Commission”, the Commission’s decisions might be appealed to the Supreme Court of Belarus when this is provided by law. Article 79, part 6, of the Electoral Code provides only an appeal, by a Presidential Candidate, against the decision of the Central Electoral Commission declaring the elections invalid. Therefore, according to the State party, the Supreme Court has lawfully rejected Mr. Milinkevich’s request to open a case, given that the court was incompetent to act.

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 notes, as required by article 5, paragraph 2 (a) and (b), of the Optional Protocol, that the same matter is not being examined under any other international procedure of investigation or settlement, and that it is uncontested that domestic remedies have been exhausted.

7.3 The Committee notes, first, Mr. Korneneko’s claim under article 14 of the Covenant, according to which the courts have acted in a biased manner in his case given that they ordered the destruction of the totality of the seized leaflets. In the absence of any other pertinent information in this respect, the Committee considers however that Mr. Korneenko has failed to sufficiently substantiate his claim for purposes of admissibility. Accordingly, it concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

7.4 The Committee considers that the remaining part of the authors’ claims, raising issues under article 19, and article 25 read together with article 26 of the Covenant have been sufficiently substantiated 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 authors’ claim that by seizing and destroying without justification, shortly before Election Day, one quarter of the campaign materials of Mr. Milinkevich, the State party has violated both Mr. Korneenko and Mr. Milinkevich’s right of freedom of expression pursuant to article 19 of the Covenant. The Committee notes that in reply, the State party has referred to the decisions of its domestic courts which concluded that the seizure was made in accordance with law, and that Mr. Korneenko was fined because he transported, with the intention to disseminate, leaflets whose content was contrary to the requirements of its Electoral Code.

⁸ The supervisory proceedings permit to challenge the legality of court decisions that have entered into force, and may, in some circumstances, lead to the re-examination of a case (mainly on procedural issues).

8.3 The Committee recalls, first, that the right to freedom of expression is not absolute and that its enjoyment may be subject to limitations.⁹ Pursuant to article 19, paragraph 3, however, only such limitations are permissible as are provided for by law and that are necessary (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (*ordre public*), or of public health or morals. The Committee reiterates in this context that the right to freedom of expression is of paramount importance in any democratic society, and that any restrictions on its exercise must meet strict tests of justification.¹⁰ The State party has presented no explanation as to why the restriction of the Mr. Korneenko's and Mr. Milinkevich's right to disseminate information was justified under article 19, paragraph 3, of the Covenant, except its affirmation that the seizure and the destruction of the leaflets was lawful. In the circumstances and in the absence of any further information in this regard, the Committee concludes that both Mr. Korneenko and Mr. Milinkevich's rights under article 19, paragraph 2, of the Covenant, have been violated.

8.4 In addition, Mr. Korneenko has claimed that as a consequence of the destruction of the leaflets, Mr. Milinkevich's rights under article 25 have also been violated. The State party has not refuted this allegation. The Committee recalls that in its general comment No. 25 (1996) on article 25, it has observed that in order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens is essential; it requires the full enjoyment and respect for the rights guaranteed inter alia by article 19 of the Covenant, including the freedom to publish political material, to campaign for election and to advertise political ideas.¹¹ In the absence of any further pertinent information from the State party in this context, the Committee concludes that in the present case, the violation of Mr. Milinkevich's rights under article 19 has resulted also in a violation of his rights under article 25, read together with 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 disclose a violation of Mr. Korneenko's rights under article 19, paragraph 2, of the Covenant, and a violation of Mr. Milinkevich's rights under article 19, paragraph 2, and article 25 read together with 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 both Mr. Korneenko and Milinkevich with an effective remedy, including compensation amounting to a sum not less than the present value of the fine and any legal costs paid by the author in Mr. Korneenko's case.¹² 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

⁹ See inter alia, communications No. 574/1994, *Kim v. the Republic of Korea*, Views of 3 November 1998; No. 927/2000, *Leonid Svetik v. Belarus*, Views adopted on 8 July 2004, paragraph 7.2; and No. 1022/2001, *Vladimir Velichkin v. Belarus*, Views adopted on 20 October 2005, paragraph 7.3.

¹⁰ *Idem*.

¹¹ *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40 (A/51/40)*, Vol. 1, annex V, paragraph 25.

¹² For the remedy proposed see communication No. 780/1997, *Vladimir Laptsevich v. Belarus*, Views adopted on 20 March 2000, paragraph 10.

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.]

NN. Communication No. 1560/2007, *Marcellana and Gumanoy v. Philippines* (Views adopted on 30 October 2008, Ninety-fourth session)*

<i>Submitted by:</i>	Mr. Orly Marcellana and Mr. Daniel Gumanoy (represented by Ms. Marie Hilao-Enriquez [Alliance for the Advancement of People's Rights – Karapatan])
<i>Alleged victims:</i>	Ms. Eden Marcellana and Mr. Eddie Gumanoy
<i>State party:</i>	The Philippines
<i>Date of communication:</i>	9 March 2006
<i>Subject matter:</i>	Human rights defenders summarily executed
<i>Procedural issues:</i>	Another procedure of international investigation or settlement; lack of substantiation; abuse of right of submission; remedies unreasonably prolonged
<i>Substantive issues:</i>	Arbitrary deprivation of life; right to security of the person; adequacy of investigation; effectiveness of remedy
<i>Articles of the Covenant:</i>	2, paragraphs 1 and 3; 6, paragraph 1; 7; 9, paragraph 1; 10, paragraph 1; 17; and 26
<i>Articles of the Optional Protocol:</i>	2; 3; and 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 30 October 2008,

Having concluded its consideration of communication No. 1560/2007, submitted to the Human Rights Committee on behalf of Ms. Eden Marcellana and Mr. Eddie Gumanoy 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 authors of the communication are Mr. Orly Marcellana and Mr. Daniel Gumanoy. They submit the communication on behalf of their relatives, Ms. Eden Marcellana and Mr. Eddie Gumanoy, who were both found dead near each other in Bansud

* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

(Mindoro Oriental, Philippines), on 22 April 2003. They allege violations by the Philippines of the victims' rights under article 2, paragraphs 1 and 3; article 6, paragraph 1; article 7; article 9, paragraph 1; article 10, paragraph 1; article 17; and article 26 of the Covenant. They are represented by Ms. Marie Hilao-Enriquez, from the Alliance for the Advancement of People's Rights – Karapatan.

1.2 The Covenant entered into force for the State party on 23 January 1986 and the Optional Protocol on 22 November 1989.

Factual background

2.1 Ms. Marcellana was the former Secretary General of Karapatan-Southern Tagalog (a human rights organization) and Mr. Eddie Gumanoy was the former chairperson of Kasama Tk (an organization of farmers). From 19 April 2003 to 21 April 2003, they were leading a fact-finding mission in the province of Mindoro Oriental, to enquire about the abduction of three individuals in Gloria town allegedly committed by elements of the 204th infantry brigade, under the command of one Col. Jovito Palparan, and the killing and disappearance of civilians and burning of properties by the military in the town of Pinamalayan.

2.2 The authors claim that Ms. Marcellana was threatened several times by the military for her advocacy work. In addition, while conducting their work, mission members were under the impression that they were under constant surveillance. At some point, when trying to see the detainees inside the 204th infantry brigade, members of the mission were photographed against their will. On 21 April 2003, the victims decided to conclude the mission and leave Pinamalayan for Calapan City.

2.3 On the same day, at around 7.00 pm, the victims (together with other members of the fact finding mission) were travelling on the highway about 5.5 kilometres from the 204th infantry brigade headquarters, when their van was stopped by ten armed men. The assailants specifically asked for Ms. Marcellana, who was forced to reveal her identity. All the belongings of the members of the fact-finding mission, including mobile phones, documents and photos of the mission, were then seized. After the armed men tied them up, they were taken into a vehicle ("jeepney"). The armed men were not all hooded and some of them could be identified as being Aniano "Silver" Flores and Richard "Waway" Falla, former rebels and currently associated with the military.

2.4 At some point, the victims were ordered to step out of the vehicle while the other members of the fact-finding mission stayed inside the vehicle and were later dropped along the roadside in different parts of Bongabong municipality. The dead bodies of Ms. Marcellana and Mr. Eddie Gumanoy were found the following day. Forensic reports and the death certificates indicate that their death was caused by gun-shot wounds.

2.5 The authors filed a complaint for kidnapping and murder before the Department of Justice (DOJ). By resolution of 17 December 2004, the DOJ dismissed the complaint and the charges against one of the alleged perpetrators on the ground of insufficient evidence. The authors filed a Petition for Review on 22 February 2005, which was dismissed on 20 November 2006. On 7 December 2006, the authors filed a Motion for Reconsideration of said resolution, which was dismissed on 17 April 2007. On 24 May 2007, the authors appealed the DOJ's decisions of 20 November 2006 and 17 April 2007 before the Office of the President of the Republic. The appeal requested that the DOJ decision be reversed and that charges be filed against Aniano "Silver" Flores and Richard "Waway" Falla. That appeal is still pending.

2.6 A complaint was also filed with the Commission on Human Rights of the Philippines. This complaint was later withdrawn, due to the authors' assessment that they would not obtain justice from this body. Complaints were also filed with the House of

Representatives of the Philippines, the Senate, and under the Comprehensive Agreement on respect for Human Rights and International Humanitarian Law, but no action was taken. The authors add that, in spite of widespread and public opposition, one of the principal suspected perpetrators, Col. Palparan, was later promoted to Major General by the President.

2.7 The authors recognize that domestic remedies have not been exhausted, but state that in the present case, remedies have been unreasonably prolonged and are ineffective, as they are unlikely to result in substantial justice and effective redress and do not constitute a remedy for the authors.

The complaint

3. The authors claim a violation by the State party of article 2, paragraphs 1 and 3; article 6, paragraph 1; article 7; article 9, paragraph 1; article 10, paragraph 1; article 17; and article 26 of the Covenant.

State party's observations on admissibility and merits

4.1 On 3 September 2007, the State party filed its observations on the admissibility and merits of the communication. On admissibility, the State party claims that the authors have not exhausted all available domestic remedies. It states that, although the DOJ complaint was dismissed in December 2004, it could have been appealed to the Secretary of Justice.¹ Should the Secretary of Justice act on the basis of grave abuse of discretion, this decision could be challenged by way of certiorari under Rule 65 of the 1997 Rules of Civil Procedure. As regards the alleged delay in the proceedings at the DOJ, the State party claims that for it to have operative legal adverse effect the delay must be unreasonable and consequently the DOJ cannot be held responsible for any delay. In addition, the DOJ cannot be blamed for dismissing the criminal complaint filed by the authors, as its resolution was not arbitrary but duly considered the claims presented and ultimately concluded that the evidence for the prosecution failed to establish probable cause against the respondents. In the State party, the determination of probable cause for purpose of filing a criminal action in the courts falls within the discretion of the prosecutor² subject to the supervision and control of the DOJ Secretary. The authors could still file a criminal complaint if they gather sufficient evidence against the respondents. A preliminary investigation – such as the one conducted by the DOJ – does not in itself constitute a trial. The authors could also file administrative charges against the military officials allegedly involved before the Office of the Ombudsman, or initiate civil proceedings, in accordance with article 35 of the Civil Code.

4.2 With respect to the withdrawal of the complaint pending before the Philippine Commission on Human Rights, the State party argues that such action is tantamount to accusing the Commission of bad faith, which is inconsistent with the legal presumption that this body acts in accordance with its mandate. It points out that the authors themselves

¹ Section 4, 2000 NPS Rule on Appeal, Department Circular No. 70.

² “The institution of a criminal action depends upon the sound discretion of the fiscal. He may or may not file the complaint or information, follow or not follow that presented by the offended party, according to whether the evidence in his opinion, is sufficient or not to establish the guilt of the accused beyond reasonable doubt. The reason for placing the criminal prosecution under the direction and control of the fiscal is to prevent malicious or unfounded prosecution by private persons. It cannot be controlled by the complainant”, Supreme Court of the Philippines, *Crespo v. Mogul*, 151 SCRA 465, 467 (1987).

attached to their communication a letter from the Commission inquiring about the probity of the confirmation of Brig. Gen. Palparan, which shows that the Commission has been discharging its mandate properly.

4.3 In the House of Representatives and the Senate, the matter was referred to the pertinent committees. In the Senate, a resolution has been issued urging its Committee on Human Rights to conduct an inquiry into the circumstances surrounding the present case. The House of Representatives and the Senate constitute the legislative branch of the Government and the authors cannot expect any definitive judgment from these bodies.

4.4 In view of the above, the State party argues that the authors have chosen not to pursue available domestic remedies due to impatience and mistrust in the local government. Therefore, it contends that it is premature for the authors to conclude that domestic remedies are ineffective.

4.5 In addition, the State party argues that the communication is inadmissible under article 5, paragraph 2 (a) of the Optional Protocol as the same matter is being examined by the Special Rapporteur on extrajudicial, summary or arbitrary executions, who visited the country from 12–21 February 2007.

4.6 The State party also challenges the admissibility of the communication on grounds of abuse of the right of submission, as the authors refuse to recognize and respect its authority to investigate, prosecute and resolve criminal acts within its territorial jurisdiction. The authors are trying to involve the international community in the handling of a case about the State party's domestic criminal laws, which constitutes an undue interference with the State party's domestic affairs.

4.7 Finally, the State party maintains that the communication does not sufficiently substantiate the alleged violations of the Covenant committed by the State party. The narration of the facts only establishes that Ms. Marcellana and Mr. Gumanoy were kidnapped and murdered, that some armed men were the perpetrators and that three of those men were allegedly identified. However, the required link between those facts and the authorities of the State party has not been established.

4.8 On the merits, the State party states that it actively pursues remedies concerning alleged extra-judicial killings, and refers to Administrative Order No. 157 of 21 August 2006 issued by President Macapagal-Arroyo, which creates an independent commission (the "Melo Commission") to probe the killings of media workers and activists. On 22 February 2007, the Melo Commission released its 86 page preliminary report, which is being studied by various branches of the Government. In addition, the Supreme Court of the Philippines has drafted guidelines for the Special Courts that will handle extrajudicial killing cases. The State party refers to the preliminary report by the Special Rapporteur on extrajudicial, summary or arbitrary executions, which recognizes that efforts have been made by the State party to fight extrajudicial killings.³

4.9 Furthermore, the State party contends that the communication fails to establish how the State party has violated the Covenant. It submits that the killings of Ms. Marcellana and Mr. Gumanoy are not attributable to its armed forces or to the State but to individuals acting in their own interest. Nevertheless, it is doing its best to ensure that the fundamental rights and liberties of its citizens are respected. The State party recalls that if a State fails to investigate, prosecute or redress private, non-state acts in violation of fundamental rights; it is in effect aiding the perpetrators of such violations for which it could be held responsible

³ Preliminary note on the visit of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, to the Philippines (12–21 February, 2007) (A/HRC/4/20/Add.3), para. 4.

under international law. The establishment of the independent Melo Commission to investigate extrajudicial killings shows the State party's resolve to respond to the problem.

4.10 The State party regrets that human rights organizations have not informed the Commission of the numbers of victims of extrajudicial killings and the reasons why they believe that the military is responsible for those killings. It reiterates that these organizations refused to cooperate with the investigation conducted by bodies created by the State party and instead invoked the Committee's authority.

Authors' comments on the State party's observations

5.1 On 16 February 2008, the authors commented on the State party's submission. On the issue of exhaustion of domestic remedies, they reiterate that this requirement does not apply when remedies are unreasonably prolonged or ineffective. More than five years to the day the victims were kidnapped and murdered in April 2003 and two years after the communication was submitted to the Committee, the legal action which the authors have tried to pursue remains pending before the Office of the President of the State party. Despite overwhelming evidence and clear identification by four witnesses, one of the alleged perpetrators was discharged when the Chief State Prosecutor dismissed the case in December 2004.

5.2 Prior to such dismissal, congressional investigations were held before the House of Representatives and the Senate in May 2003. The House's Committee on Civil, Political and Human Rights, in its initial report, called for a further probe and the temporary relief of then Col. Palparan while the investigation was ongoing but the latter remained in active duty. The Senate's Committee on Justice and Human Rights, for its part, after conducting an initial hearing, suspended its inquiry due to the preliminary investigation before the DOJ.

5.3 As regards the hearings before the Commission on Human Rights, the authors were compelled to withdraw from them because the Commission displayed only casual interest in the case and was allegedly only going through the motions, and that the hearings were being used to eventually clear Col. Palparan and remove obstacles to his promotion. Hence, the withdrawal from proceedings before this Commission was a legitimate sign of protest. Moreover, reference by the State party to the letter sent by the Commission to the Senate is misguided, as the Commission only sent this letter after the survivors and the victims' families complained and criticized the Commission for having allowed the promotion of Col. Palparan, despite serious charges of human rights violations filed against him.

5.4 The authors filed a petition for review of the DOJ dismissal on 22 February 2005, which was dismissed on 20 November 2006, almost two years later, without providing reasons. A new motion for reconsideration was denied by the Secretary of Justice in April 2007, again in a perfunctory manner. Given the excessive time that the DOJ took to resolve the case, and given the way the appeals were disposed of, the authors disagree with the State party that the DOJ cannot be held responsible for the delay. In addition, the explanation provided by the State party on the determination of probable cause, the function of a preliminary investigation and the existence of other remedies are irrelevant to the issue of unreasonable delay.

5.5 The authors point to the pattern of consistent human rights violations, including extrajudicial killings, in the State party, which makes domestic remedies ineffective and meaningless. They add that, despite the claims to the opposite by the State party, not a single perpetrator has been convicted.

5.6 With respect to the claim by the State party that the communication is inadmissible as it is being examined by another procedure of international investigation or settlement,

the authors consider it to be inapplicable to the present case. On one hand, the Special Rapporteur on extrajudicial, summary or arbitrary executions has concluded his investigation and therefore the matter is no longer being examined. On the other hand, the visit by a Special Rapporteur to the State party cannot be considered as an international procedure of investigation or settlement for the purposes of article 5, paragraph 2(a) of the Optional Protocol.

5.7 The authors add that their communication does not constitute an abuse of the right of submission. They state that the circumstances that give rise to an abuse of the right of submission, such as deliberate submission of false information or excessive delay in filing a complaint, do not exist in their case. Additionally, the authors are not refusing to recognize the State party's authority, but claim that domestic remedies are ineffective.

5.8 With respect to the alleged lack of sufficient substantiation invoked by the State party, the authors refer to the extensive supporting documentation attached to their initial communication. They assert that the link to the State party's authorities as perpetrator of the crimes was clearly established and validated by the findings and reports of several independent bodies.⁴

5.9 On the merits, the authors recall that the remedies pursued by the State party have not effectively stopped the extrajudicial killings nor have they afforded justice to the victims. With respect to the Melo Commission, they note that its preliminary report was released in February 2007 under much public pressure, but that no final report has been issued since then. The Melo Commission suffered from lack of credibility and had little power to conduct investigations. Furthermore, several months after the release of the preliminary report, the State party is still studying its recommendations. They invoke the final report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, which states that "[t]he many measures that have been promulgated by the Government to respond to the problem of extrajudicial executions are encouraging. However, they have yet to succeed, and the extrajudicial executions continue".⁵

5.10 Finally, the authors allege that it is clear from the presentation of the facts as well as the supporting documents that the perpetrators identified were members of the State party's security forces, i.e. the 204th infantry brigade of the Philippine Army under the command of then Col. Jovito Palparan, Jr and the so-called rebel returnees who are under military control and command. The authors refer to the *Sarma* case,⁶ where the Committee held Sri Lanka responsible for the disappearance perpetrated by a corporal who abducted a victim, despite the State's contention that the corporal acted beyond authority and without knowledge of his superior officers.

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.

⁴ The authors refer to the Permanent People's Tribunal Second Session on the Philippines; the report of the United States Women Lawyers Human Rights delegation, and the report of the National Council of Churches in the Philippines, which they attached to their submissions.

⁵ "Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mission to the Philippines" (A/HRC/8/3/Add.2), pages 46–47.

⁶ Communication No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003.

6.2 The Committee notes the State party's challenge to the admissibility of the communication on the ground of failure to exhaust domestic remedies. The authors have conceded non-exhaustion of domestic remedies but claim that remedies have been ineffective and unreasonably prolonged. The Committee refers to its case law, to the effect 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. The victims' bodies were found in April 2003, and complaints were filed with the legislative bodies and the DOJ soon thereafter.⁷ Proceedings at the DOJ were finally closed in April 2007. To date, an appeal filed in May 2007 before the Office of the President has not been resolved and remains pending. The Committee considers that, in the circumstances of the present case, domestic remedies have been unreasonably prolonged. The Committee accordingly finds that article 5, paragraph 2 (b), does not preclude it from considering the complaint.

6.3 The Committee also notes the State party's contention that the case is inadmissible because the subject matter of the communication is being or was examined by the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, who visited the country in February 2007. However, the Committee observes that fact-finding country visits by a Special Rapporteur do not constitute a "procedure of international investigation or settlement" within the meaning of article 5, paragraph 2(a), of the Optional Protocol. The Committee further recalls that the study of human rights problems in a country by a Special Rapporteur, although it might refer to or draw on information concerning individuals, could not be regarded as being the same matter as the examination of individual cases within the meaning of article 5, paragraph 2 (a), of the Optional Protocol. Accordingly, the Committee considers that the 2007 country visit by the Special Rapporteur on extrajudicial, summary or arbitrary executions, does not render the communication inadmissible under article 5, paragraph 2 (a), of the Optional Protocol.⁸

6.4 The State party argues that, by refusing to recognize the State party's authority to investigate, prosecute and resolve criminal acts within its jurisdiction and by involving the international community in a case concerning the State party's domestic laws, the authors have abused their right of submission. The Committee rejects this view: On the contrary, it is clear that pursuant to article 1 of the Optional Protocol "[a] State party to the Covenant that becomes a party to the [...] Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State party...". In the absence of any valid reason offered as to why the present communication constitutes an abuse of right of submission, the Committee is of the view that the case is not inadmissible on this ground.

6.5 As regards the authors' claims relating to article 2, paragraph 1; article 7; article 10, paragraph 1; article 17; and article 26 of the Covenant, the Committee observes that the authors do not provide any explanation on how the victims' rights under these provisions have been violated. The Committee considers that the authors have not substantiated these claims, for purposes of admissibility. The claims under article 2, paragraph 1; article 7; article 10, paragraph 1; article 17; and article 26, are thus inadmissible under article 2 of the Optional Protocol.

⁷ Complaints with the House of representative and Senate were filed in May 2003. Information in the file suggests that proceedings at the DOJ were under way in May/June 2003. No information was provided as to the date of the complaint with the Human Rights Commission.

⁸ Communications Nos. 146/1983; 148/1983-154/1983, *Baboeram-Adhin et al. v. Suriname*, Views of 4 April 1985, para. 9.1; and No. 540/1993, *Laureano v. Peru*, Views of 25 March 1996, para. 7.1.

6.6 The Committee considers that the facts of the case give rise to issues under article 2, paragraph 3, article 6, paragraph 1; and article 9, paragraph 1, of the Covenant. In the absence of any other obstacles to the admissibility of these claims, the Committee considers them to be sufficiently substantiated, for purposes of admissibility, 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 made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 As to the claim under article 6, paragraph 1, the Committee observes that it is an established fact, as recognized in the decision of the DOJ of 17 December 2004, that Ms. Marcellana and Mr. Gumanoy were kidnapped, robbed and killed by an armed group. In this regard, the Committee recalls its jurisprudence that criminal investigation and consequential prosecution are necessary remedies for violations of human rights such as those protected by article 6.⁹ The Committee further recalls its general comment No. 31 (2004), which lays down that where investigations reveal violations of certain Covenant rights, States parties must ensure that those responsible are brought to justice.

7.3 In the present case, though over five years have elapsed since the killings took place, the State party's authorities have not indicted, prosecuted or brought to justice anyone in connection with these events. The Committee notes that the State party's prosecutorial authorities have, after a preliminary investigation, decided not to initiate criminal proceedings against one of the suspects due to lack of sufficient evidence. The Committee has not been provided with any information, other than about initiatives at the policy level, as to whether any investigations were carried out to ascertain the responsibility of the other members of the armed group identified by the witnesses.

7.4 In view of the above, and in the absence of other pertinent explanations on this matter by the State party, the Committee concludes that the absence of investigations to establish responsibility for the kidnapping and murder of the victims amounted to a denial of justice. The State party must accordingly be held to be in breach of its obligation, under article 6, in conjunction with article 2, paragraph 3, properly to investigate the death of the victims and take appropriate action against those found guilty.

7.5 As to the claim under article 9, the authors argue that Ms. Marcellana was threatened several times because of her human rights work and that the military had previously incited violence against her. In addition, while conducting their fact-finding mission, all members of the team felt under constant surveillance. The State party does not challenge these statements, nor does it provide any other pertinent information on this allegation.

7.6 The Committee recalls its jurisprudence on article 9, paragraph 1, and reiterates that the Covenant protects the right to security of person also outside the context of formal deprivation of liberty.¹⁰ An interpretation of article 9 which would allow a State party to ignore threats to the personal security of non-detained persons subject to its jurisdiction

⁹ Communication No. 1436/2005, *Sathasivam v. Sri Lanka*, Views adopted on 8 July 2008, para. 6.4. See also 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 (A/59/40)*, vol. I, annex III, paragraphs 15, 18.

¹⁰ Communications No. 195/1985, *Delgado Páez v. Colombia*, Views adopted on 12 July 1990, para. 5.5; No. 711/1996, *Dias v. Angola*, Views adopted on 20 March 2000, para. 8.3; and No. 821/1998, *Chongwe v. Zambia*, Views adopted on 25 October 2000, paragraph 5.3.

would render ineffective the guarantees of the Covenant. Moreover, States parties are under an obligation to take reasonable and appropriate measures to protect these persons.

7.7 In the present case, the Committee observes that, given that the victims were human rights workers and that at least one of them had been threatened in the past, there appeared to have been an objective need for them to be afforded protective measures to guarantee their security by the State. However, there is no indication that such protection was provided at any time. On the contrary, the authors claimed that the military was the source of the threats received by Ms. Marcellana, and that the fact-finding team was under constant surveillance during its mission. In these circumstances, the Committee concludes that the State party has failed to take appropriate measures to ensure the victims' right to security of person, protected by article 9, paragraph 1, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal a violations by the Philippines of article 2, paragraph 3; article 6, paragraph 1; and article 9, 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 initiation and pursuit of criminal proceedings to establish responsibility for the kidnapping and death of the victims, and payment of appropriate compensation. The State party should also take measures to ensure that such violations do not recur in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether 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.]

**OO. Communication No. 1570/2007, *Vassilari et al. v. Greece*
(Views adopted on 19 March 2009, Ninety-fifth session)***

<i>Submitted by:</i>	Vassilari, Maria et al. (represented by counsel Mr. Panayote Dimitras)
<i>Alleged victim:</i>	The authors
<i>State party:</i>	Greece
<i>Date of communication:</i>	1 November 2006 (initial submission)
<i>Subject matter:</i>	State party's failure to prosecute signatories of a letter alleged to be discriminatory
<i>Procedural issues:</i>	Claim partly inadmissible for non-substantiation of claim and non-exhaustion of domestic remedies
<i>Substantive issues:</i>	Prohibition on the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence
<i>Articles of the Covenant:</i>	20, paragraph 2; 26; 14, paragraph 1; 18, paragraphs 1 and 2; and 2, paragraphs 1 and 3 (a)
<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 19 March 2009,

Having concluded its consideration of communication No. 1570/2007, submitted to the Human Rights Committee on behalf of Vassilari, Maria 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 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, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Lazhari Bouzid, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

The text of an individual opinion signed by Committee members Mr. Abdelfattah Amor, Mr. Ahmad Amin Fathalla and Mr. Lazhari Bouzid has been appended to the present Views.

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

1.1 The authors of the communication are Ms. Maria Vassilari, born in 1961, Ms. Eleftheria Georgopoulou, born in 1964, Mr. Panayote Dimitras, born in 1953, and Ms. Nafiska Papanikolatos, born in 1955, all Greek citizens. They claim to be victims of violations of article 20, paragraph 2, taken together with article 2, paragraphs 1 and 3(a); article 26; article 14, paragraph 1; and article 18, paragraph 1, read alone and in conjunction with article 2, paragraphs 1 and 3(a), by Greece. The authors are represented by counsel, Mr. Panayote Dimitras from the Greek Helsinki Monitor.

1.2 On 24 September 2007, the Committee, acting through its Special Rapporteur on New Communications and Interim Measures, decided to examine the admissibility of the communication together with the merits.

The facts as presented by the authors

2.1 On 17 November 2001, a letter to the Rector and the Rector's Council of the University of Patras entitled, "Objection against the Gypsies: Residents gathered signature for their removal", was published in the newspaper *Peloponnisos*. The letter was sent by the representatives of local associations of four districts of Patras, and contained 1,200 signatures of non-Roma residents who lived in the vicinity of a Roma settlement situated in the area of Riganokampos. The settlement was built on land owned by the Rector and the Rector's Council of the University of Patras. The signatories of the letter collectively accused the Roma of specific crimes, including physical assault, battery and an arson attack on a car, and demanded that they be "evicted" from the settlement and failing eviction threatened with "militant action".

2.2 On 29 March 2002, the first and second authors, who reside in the settlement, filed a criminal complaint against the local associations under the Anti-Racism Law, and joined the criminal proceedings to be initiated by the Public Prosecutor as civil claimants. They claimed violation of article 2 of the Anti-Racism Law 927/1979, because of the public expression of offensive ideas against the residents of the settlement on account of their racial origin. They also claimed a violation of article 1 of the same law, by the incitement, by means of public written expression, of discrimination, hatred or violence against the residents of the settlement on account of their racial origin.

2.3 A preliminary judicial investigation was opened, and those who had written the letter were charged. On 17 March 2003, the signatories of the letter and the owner and editor of the newspaper were indicted for the public expression of offensive ideas, in violation of article 2 of the Anti-Racism Law but the charge under article 1 of that law was dropped. On 25 June 2003, the trial took place at the Misdemeanors Court of Patras (the Patras Court). The criminal offences of which the Roma community had been accused of by the signatories of the letter were found to be unsubstantiated by the competent police authority. According to the authors, this fact was ignored by the Patras Court.

2.4 During the proceedings, the presiding judge allegedly made comments which compromised her impartiality and indicated a prejudicial attitude against the Roma. In reply to a comment made by defence counsel that Roma commit many crimes, the authors allege that she stated "it is true" and that there were, "many cases pending against Roma in the court of Patras". When the first author indicated that the letter had offended her, the judge responded "you have to admit, you Roma do steal though".

2.5 During the trial, the third and fourth authors were examined as witnesses. In the context of taking the oath, they had to declare that they were not Orthodox Christians but atheists, and that they could not take the Christian oath under article 218 of the Code of Criminal Procedure (CCP), which reads "I swear to God that I will tell in full conscience

the whole truth and only the truth, without adding or hiding anything”. Instead, they made use of article 220 (2) of the CCP, which provides that “(..) if the investigating judge or the court are convinced after a related statement that the witness does not believe in any religion, the oath taken would be the following: I declare on my honour and conscience that I will tell the whole truth and only the truth, without adding or hiding anything”. According to the authors, to make this affirmation under article 220 (2) of the CCP, the witness must declare his/her religion or non-belief in any religion. However in the present case, it was mistakenly recorded in the minutes of the trial that the witnesses had taken the Christian oath rather than the civil oath.

2.6 On 25 June 2003, the defendants were acquitted and the court concluded that there was no violation of article 2 of the Anti-Racism Law, on the basis that “doubts remained regarding the ... *intention* [emphasis added] to offend the complainants by using expressions referred to in the indictment.” The Court found that the impugned letter merely intended to draw the authorities’ attention to the plight of the Roma in general. The Court did not examine whether such remarks were indeed offensive and did not provide any reasoning as to why the defendants could not be said to have intended to offend the complainants.

2.7 To support their complaint, the authors provide copies of reports from various national and international non-governmental organizations (NGO and INGO), which they claim attest to the forced eviction of Roma by the State party.

The complaint

3.1 The first and second authors claim to be the victims of a violation of article 20, paragraph 2, read in conjunction with article 2, paragraphs 1 and 3 (a), of the Covenant, because the Patras Court failed to appreciate the racist nature of the impugned letter and to effectively implement the Anti-Racism Law 927/1979 aimed at prohibiting dissemination of racist speech. The present case allegedly discloses a violation of the State party’s obligation to ensure prohibition of the advocacy of racial hatred that constitutes incitement to discrimination, hatred or violence. In the authors’ view, the requirement of the law in question to prove intent is an impossible burden on the civil claimants, as the burden of proof in such criminal cases to prove such intent, “beyond reasonable doubt”, is almost impossible to prove. This point they argue is reflected in the fact that there has been no convictions to date under this Act. In this regard, the authors state that it is for this reason that national courts of other States, as well as other international human rights bodies, hold that racist remarks can be made even by negligence, in other words, where there is an absence of intent.

3.2 The four authors claim a violation of article 26, read alone and in conjunction with article 2, paragraphs 1 and 3, because the writers of the letter accused an entire group on the basis of their racial origin for the alleged actions of a few individuals of the same racial group. The claim that the law itself is inadequate, as argued above, is also said to violate article 26, as the failure to punish perpetrators deprives potential victims from protection from such attacks. In addition, the failure of the State party’s authorities, in particular the Patras court, to prosecute the signatories of the letter in question, thereby implementing the Anti-Racism Law, is said to constitute a violation of article 26.

3.3 The first and second authors reaffirm that the conduct of the presiding judge during the trial raised doubts about her impartiality and about whether their criminal complaint was examined by an impartial tribunal, as provided for in article 14, paragraph 1. They refer to the jurisprudence of the European Court of Human Rights (ECHR), which has accepted that as long as a plaintiff does not merely seek a criminal conviction, the fact that he/she joins criminal proceedings with the status of a civil claimant comes within the ambit

of article 6 of the European Convention on Human Rights. In the present case, the first two authors were civil claimants and sought nominal compensation from the defendants. They also claim a violation of this article read alone and in conjunction with article 2, paragraphs 1 and 3.

3.4 The third and fourth authors claim a violation of article 18, paragraph 1,¹ read alone and in conjunction with article 2, paragraphs 1 and 3, as the State party failed to respect their right to freedom of religion because they were obliged to disclose their religious beliefs to be able to testify. According to the authors, the State party is aware of this obligation as demonstrated by the amendment to its Code of Civil Procedure in 2001, under which a witness in civil proceedings is now merely asked whether they would like to take the civil or religious oath and thus does not have to disclose his/her religious beliefs. However, the Code of Criminal Procedure has not been similarly amended.

3.5 On the issue of exhaustion of domestic remedies, the authors argue that under article 486 of the CCP, civil claimants in criminal trials may appeal an acquittal only if they are found liable to pay court expenses or compensation. They cannot appeal the court's finding of guilt or innocence. The prosecutors, who could appeal the verdict, chose not to do so. As regards the claims of the third and fourth authors who testified as witnesses, there are no remedies concerning the obligation to publicly disclose religious beliefs, as the procedure followed was the one laid down by law. As their status was that of witnesses, they could not have made an application to have the minutes of the decision amended to reflect their choice of oath. The authors therefore claim to have exhausted domestic remedies. They also indicate that they have not submitted their claims to another international procedure.

The State party's submission on admissibility and merits

4.1 On 3 August 2007, the State party argued that the communication is inadmissible, as the authors failed to exhaust available domestic remedies with respect to two of their complaints. On the alleged violation of article 14, paragraph 1, the State party submits that the official transcripts of the judgement do not contain any of the comments reported by the authors, and notes that the unauthorized and secret recording of court proceedings is illegal under Greek law and thus cannot be considered as a form of proof. In addition, it submits that the first and second authors failed to take an action for "mal-judging", under article 99 of the Greek Constitution and Law No. 693/1977, requesting the competent court to consider whether the judge in question was impartial. A successful outcome would have led to effective redress for the damage caused.

4.2 As to the allegation that the third and fourth authors had no means to have the minutes of the relevant judgement amended, which indicating incorrectly that they had made a Christian oath, the State party refers to article 145 of the Greek Code of Criminal Procedure. Under this article, the presiding judge can, on his/her own motion correct or supplement the minutes. Although the relevant provision does not include witnesses among the persons that can request an amendment, a simple application filed by the authors would have given the judicial authorities the possibility of correcting the error.

4.3 On 4 December 2007, the State party provided its comments on the merits of the case. It submits that the authors exaggerate and provide inaccurate statements, including the inaccurate translation of words from the letter under consideration, and produce evidence that has nothing to do with their case. For the State party the claims are manifestly ill-founded. The words "eviction" and "militant action" do not appear in the original letter.

¹ It would appear that the author's reference to article 18, paragraph 1, should in fact read article 18, paragraph 2.

According to the State party, the correct translation of the former would be “removal” and of the latter “dynamic mobilizations” which implies protests or demonstrations.

4.4 As to the letter itself half of it, as described by the third author in his Court testimony, refers to the poor living conditions of the Roma in the settlement and focuses on the lack of proper hygiene and prevalence of diseases. The authors of the letter then refer to incidents they claim had occurred, including the theft of fruit, swearing, beating etc. and conclude that the Rector should “remove” the Roma from the settlement (not to evict them), otherwise any delay would lead to “dynamic action”. In its evaluation, the court did not consider that the letter “was not insulting” to the authors, but merely found that the legal condition, namely the offence of a “public, via the press, expression of offensive ideas against a group of people, by virtue of their origin”, is *intentionally* committed, was not met beyond reasonable doubt. It so concluded, after hearing all witnesses and evaluating all of the available evidence. While one may agree or disagree with the Court’s evaluation of the evidence, there is no reason to regard its finding as arbitrary. In this regard, the State party refers to the Committee’s jurisprudence that it is not for the Committee to evaluate the facts and evidence and interpretation of law in a case, unless it can be shown that the decision was manifestly arbitrary or amounted to a denial of justice.

4.5 As to the complaints about the presiding judge, the State party argues that the authors never raised any such concerns during the proceedings about the impartiality of the judge. They were represented throughout by a lawyer who could have filed such a complaint, which would have been immediately recorded in the Court’s records. The only claim the authors admitted having raised was one filed with the Minister, but this application was not based on law and had no legal effect. In any event, the State party submits that there is no basis to conclude that the proceedings against the authors were biased.

4.6 The State party affirms that the claim under article 26 is manifestly ill-founded. The authors have not substantiated their claim and have not demonstrated that persons in a similar situation have been treated differently. As to the claim of a violation of article 2, the State party invokes to the Committee’s jurisprudence that this right does not constitute a substantive right guaranteed under the Covenant.

4.7 As to the claim under article 18, the State party refers to articles 218 and 220 of the CPP, under which one can either choose to take either the religious or civil oath. According to the State party, a witness chooses the oath without actually declaring or being asked to declare his/her beliefs. No prior permission or further information is necessary. The State party acknowledges that an administrative error was made in this case, indicating that the third and fourth witnesses had made a religious oath. This unfortunate error occurred because the Court Registrar used a standard template and omitted to cross out the phrase that the witness “testified after swearing on the Holy Gospel”. For the State party, this error does not amount to a violation of the authors’ right to freedom of religion.

4.8 As to the NGO and INGO reports produced by the authors, the State party submits that these reports do not directly refer to the current case and, in its view, are only provided as a substitute to the lack of evidence provided by the authors.

Author’s comments on State party’s submission

5.1 On 30 January 2008, the authors commented on the State party’s submission. On admissibility, they note that the State party does not appear to contest that domestic remedies have been exhausted with respect to the claims under articles 20, 26 and 18. As to the argument that the claim under article 14 is inadmissible for non-exhaustion, of domestic remedies, the authors clarify that even if they had taken an action for “mal-judging”, and were successful, it could not have reversed the judgement itself, which left unpunished the

allegations of violations of articles 20 and 26. Furthermore, article 16.2 of the same law explicitly provides that, "In any case, the force of the judicial decision or any other act that gave rise to the action for mal-judging is not affected." Thus, the suggested remedy would have been ineffective.

5.2 As to the claim that they have not exhausted remedies with respect to their claims under article 18, the authors note that their claim concerns the involuntary disclosure of their religious beliefs, which is not affected by the mistaken reference to the type of oath made in the minutes, nor the possibility of subsequently correcting them through a procedure which would have again led to yet another involuntary disclosure of their religious beliefs. In any event, even if they had attempted to correct the minutes, it would have depended on the judge's goodwill, as it was not the authors' prerogative to have it corrected. As to the State party's remarks on the alleged comments made by the judge in question, the authors admit that the source of the judge's comments was their own notes. They claim that the official transcript of the trial is in many ways deficient and incomprehensible. However, they note that the State party has not offered any evidence suggesting that the relevant comments were not made by the judge in question.

5.3 On the merits, the authors defend their definition of the two terms questioned by the State party, namely "eviction" and "militant". The former, they claim, is not so different from the term "evacuation", which is the translation in the Oxford Greek-English dictionary. The latter refers to the militant action threatened by the signatories of the letter, which could include the use of force. The authors take issue with the State party's assessment of the importance of the NGO and INGO reports provided by them, and with its contention that these reports were only submitted to effectively slander Greece. The authors dispute that the purpose of the impugned letter was to draw the attention of the authorities to the poor living conditions of the Roma, but rather to force the authorities to take action and relocate the Roma, to another place. According to the authors, extensive reference was made to the alleged increase in the crimes committed by Roma, without producing any evidence but by merely holding them collectively responsible for certain offences, that some of them undoubtedly committed, as well as serious offences. They should not have collectively accused the Roma of committing crimes without, at the very least, producing evidence of a relatively higher crime rate among Roma as compared with non-Roma, to make their claims look bona fide rather than racist. In the authors' view, the signatories of the letter used this issue of criminality in an attempt to have the Roma evicted. The Court should have paid more attention to the nuanced anti-Roma speech and should have refrain from making, let alone silently endorsing, anti-Roma statements.

5.4 The authors argue that although "intention" is required in violation of article 1 of the Anti-Racism Law 927/79, it is not for violations of article 2 and that an incorrect notion of intent was applied by the court. As the authors had already made this argument in their initial submission which, they submit, remains answered by the State, they claim that the State party implicitly admits that the arguments are correct.

5.5 As to the possibility of filing a complaint concerning the impartiality of the judge, the authors acknowledge that an application for the disqualification of a judge may be made under article 17.2 of the Code of Criminal Procedure. However, such an application must be made early on in the proceedings and as the grounds for such disqualification only arose during the proceedings, such a request would have been rejected as inadmissible. The authors wrote to the Minister who could have asked the Appeals Prosecutor to file an appeal leading to a second trial where an impartial panel of judges would have evaluated the case anew. This was the only quasi-judicial means open to them to seek redress for the violation of their rights. On article 26, the authors submit that they have provided sufficient evidence to demonstrate prejudice specifically in this case and submit that the burden of proof is now reversed and rests on the State party. They maintain that it is mandatory in

criminal proceedings to declare that one does not adhere to the Christian faith to be allowed to take the civil oath, despite the State party's argument that one has a free choice of oath. The assumption that one will take the Christian oath unless otherwise expressly stated is reflected in the continued use of pre-printed forms, with the oath set out therein.

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.

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 The Committee notes the State party's argument that the authors did not exhaust domestic remedies with respect to the claim of a violation of article 14, paragraph 1, notably by their failure to initiate an action for "maljudging" against the presiding judge. The Committee also notes that, although the authors were represented by counsel, no complaint was raised during the proceedings about the remarks allegedly made by the judge in question. It may further be noted that the State party contests the claim that the alleged remarks were ever made by the presiding judge and refers to the official transcript of the proceedings. While noting that the effectiveness of the alleged remedy is contested by the authors, the pursuit of such a remedy would have, at the very least, established the contested facts, notably whether the judge had in fact made the remarks alleged by the authors. Thus, without having to establish whether the claim itself comes within the scope of article 14, paragraph 1, the Committee considers that this claim is inadmissible for non-exhaustion of domestic remedies under article 5, paragraph 2 (b) of the Optional Protocol.

6.4 So far as concerns the claim under article 18, the State party contests the claim of the third and fourth authors that they were obliged to declare their religious or non-religious beliefs prior to taking the oath during the proceedings. It argues that under the terms of articles 218 and 220 of the CPP, a witness has the choice of taking either the religious or the civil oath and is not obliged to make any declaration as described by the authors. The Committee is unable to reconcile disputed interpretations of both facts and law. As to the issue relating to the error in recording the type of oath taken by the third and fourth authors, the Committee notes the State party's explanation and the authors' apparent recognition that this was clearly an administrative error which could easily be rectified. For these reasons, the Committee considers that the authors have failed to substantiate their claims under article 18, for purposes of admissibility, and this part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.5 Without determining whether article 20 may be invoked under the Optional Protocol, the Committee considers that the authors have insufficiently substantiated the facts for the purposes of admissibility. Thus, this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.6 As to the claim of a violation of article 26 in conjunction with article 2, the Committee considers that the authors have provided sufficient substantiation to consider these claims on the merits.

Consideration of the merits

7.1 The Committee notes that the authors claim violations of article 26 in conjunction with article 2 of the Covenant, insofar as the Anti-Racism Law 927/79 is said to be inadequate for the purpose of protecting individuals against discrimination and because in this case the courts application of the law failed to protect the first and second authors from discrimination based on racial origin. The Committee notes that article 26 requires that all persons are entitled, without discrimination, to equality before the law and to receive equal protection of the law.

7.2 The Committee notes that the Anti-Racism Law provides for sanctions in the event of a violation. It observes that the signatories of the impugned letter were tried under article 2 of this Law but were subsequently acquitted. An acquittal in itself does not amount to a violation of article 26 and in this regard the Committee recalls that there is no right under the Covenant to see another person prosecuted.² The authors challenge the failure of the Court to convict the defendants on the basis of the Court's interpretation of the domestic law, in particular, whether the requirement of "intent" is a necessary prerequisite for the finding of a violation of article 2 of the Anti-Racism Law. Both the authors and State party provide conflicting views in this regard. They also present conflicting opinions on the English translation of certain parts of the impugned letter. The Committee is not in a position to reconcile these disputed issues of fact and law. Upon a thorough review of the information before it, and bearing in mind the conflicting views of the authors and State party, the Committee finds that the authors have failed to demonstrate that either the terms of the Anti-Racism Law 927/79 or the application of the law by the courts discriminated against them within the terms of article 26.

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 disclose a violation of any of the articles 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.]

² Communications No. 578/94, *De Groot v. the Netherlands*, Decision adopted on 14 July 1995, and No. 396/90, *M.S. v. the Netherlands*, Decision adopted on 22 July 1992.

Appendix

Individual opinion of Committee member Mr. Abdelfattah Amor (dissenting)

“Without determining whether article 20 may be invoked under the Optional Protocol, the Committee considers that the authors have insufficiently substantiated the facts for the purposes of admissibility. Thus, this part of the communication is inadmissible under article 2 of the Optional Protocol.” This is the conclusion reached by the Committee in paragraph 6.5 of its Views in the Vassilari case.

I cannot agree with this conclusion, which prompts me to make the following remarks:

(1) The Committee has not ventured an opinion on the applicability of article 20, paragraph 2, to individual cases. While it may, of course, decide to do so in the future, the reasons for evading the question are puzzling. There is no logical or objective reason to do this. In stating that “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”, article 20, paragraph 2, provides protection for individuals and groups against this type of discrimination. Article 20 is not an invitation to add another law to the legal arsenal merely for form’s sake. Even if this was the purpose, which is not the case in Greece, such a law would be ineffective without procedures for complaints and penalties. In fact, the invocation of article 20, paragraph 2, by individuals who feel they have been wronged follows the logic of protection that underlies the entire Covenant and consequently affords protection to individuals and groups. It would be neither logical nor legally sound to consider excluding its applicability under the Optional Protocol. By declining to give an opinion on this aspect of the communication, the Committee allows uncertainty to persist on the scope of article 20, paragraph 2, particularly as, given the points raised, discussion was needed at the very least with regard to the question of admissibility. In my opinion, this approach is, frankly, questionable, especially given that.

(2) The State party did not object to the admissibility of the communication either on the grounds of the applicability of article 20, paragraph 2, or any other grounds. The Committee’s settled jurisprudence holds that, when the State party raises no objection to admissibility, the Committee declares the communication admissible unless the allegations are manifestly groundless or not serious or do not meet the other requirements set out in the Protocol.

(3) The Greek courts concerned ruled directly on the merits, without raising questions of admissibility or the individual nature of the complaint of racism.

(4) To say that, in the case in point, the authors have insufficiently substantiated the facts for the purposes of admissibility relies on an assessment that cannot be confirmed or justified by the contents of the file. While the facts may be discussed on the merits, they are sufficiently serious not to present an obstacle to admissibility under article 2 of the Optional Protocol. The case in point concerns a letter signed by 1,200 non-Roma individuals, entitled “Objection against the Gypsies: Residents gathered signatures for their removal”. The letter accuses the Roma, as a group, of physical assault, battery and arson. The signatories demand that the Roma be “evicted” — ”removed” according to the State party — from their settlement and threatened to take “militant action”. Individual Roma, as individual victims, initiated judicial proceedings for the public expression of offensive

ideas expressing discrimination, hatred and violence on account of their racial origin, under the Greek Anti-Racism Law. The court hearing the case found no violation of that law, as “doubts remained regarding the ... intention to offend the complainants by using expressions referred to in the indictment”. The authors took their case to the Committee, claiming to be the victims of a violation by the State party of article 20, paragraph 2, read in conjunction with article 2, paragraph 1, of the Covenant, because the court “failed to appreciate the racist nature of the impugned letter and to effectively implement the Anti-Racism Law 927/1979 aimed at prohibiting dissemination of racist speech”. This allegedly “discloses a violation of the State party’s obligation to ensure prohibition of the advocacy of racial hatred that constitutes incitement to discrimination, hatred or violence”. Was it advocacy of racial hatred or just words? Was a racist offence committed or not? Was there the intention to offend, and who must prove this? These are questions that should be discussed, analysed and assessed on the merits. To say subsequently “the facts have been insufficiently substantiated for the purposes of admissibility” (para. 6.5 above) is *indefensible both legally and factually*. Sometimes there are reasons which the legal mind knows nothing of!

(Signed) Mr. Abdelfattah **Amor**

[Done in French, English 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 members Mr. Ahmad Amin Fathalla and Mr. Bouzid Lazhari

We associate ourselves with the opinion of Mr. Abdelfattah Amor's in this case.

(Signed) Mr. Ahmad Amin **Fathalla**

(Signed) Mr. Bouzid **Lazhari**

[Done in French, English 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.]

**PP. Communication No. 1574/2007, *Slezák v. Czech Republic*
(Views adopted on 20 July 2009, Ninety-sixth session)***

<i>Submitted by:</i>	Mr. Jaroslav and Ms. Alena SLEZÁK (not represented)
<i>Alleged victim:</i>	The authors
<i>State party:</i>	The Czech Republic
<i>Date of communication:</i>	10 April 2006 (initial submission)
<i>Subject matter:</i>	Discrimination on the basis of citizenship with respect to restitution of property
<i>Procedural issue:</i>	Abuse of the right of submission
<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 20 July 2009,

Having concluded its consideration of communication No. 1574/2005, submitted on behalf of Mr. Jaroslav and Ms. Alena Slezák under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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

1. The authors of the communication are Jaroslav and Alena Slezák, naturalized American citizens residing in Massachusetts, United States of America, born in Czechoslovakia on 28 February 1926 and 20 December 1930 respectively. They claim to be victims of a violation by the Czech Republic of article 26 of the International Covenant on Civil and Political Rights.¹ They are not represented.

* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Mr. Lazhari Bouzid, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli and Mr. Krister Thelin.

The text of an individual opinion signed by Committee member Mr. Krister Thelin is appended to the present Views.

¹ The Optional Protocol entered into force for the State party on 22 February 1993.

The facts as submitted by the authors

2.1 The authors state that they left Czechoslovakia for political reasons in 1969, and have lived in the United States ever since. In 1980, they both obtained the United States citizenship and lost their Czechoslovak citizenship.²

2.2 In January 1971, the District Court of Olomouc sentenced them *in absentia* to a jail term, and to the confiscation of their property, including their family home in Sternberk, estimated by the authors to be worth 2.5 million Czech crowns.

2.3 Following the enactment of Act No. 119/1990, the authors were rehabilitated and their sentence, including the property confiscation, was overturned *ex tunc*. They asked their nephew, who had bought the house from the State, to return it to them, but he refused to do so. The authors then filed a court action in 1994. The District Court of Olomouc decided in November 1998 that the authors did not qualify for restitution under Act No. 87/1991 as they had lost their Czech citizenship when they became United States citizens. The Regional Court confirmed this decision on appeal on 25 February 1999. The authors then appealed to the Constitutional Court, which rejected it on formal grounds on 15 December 1999. The authors also refer to the Constitutional Court decision of 4 June 1997, which rejected all claims for restitution from persons who were not Czech citizens at the time of filing their claim.

The complaint

3.1 The authors allege that they are victims of discrimination, and argue that the requirement of citizenship for restitution of their property under Act No. 87/1991 is in violation of article 26 of the Covenant.

The State party's observations on admissibility and merits

4.1 In its submission of 15 January 2008, the State party addresses both the admissibility and the merits of the communication. So far as the facts are concerned, the State party notes that the authors lost Czechoslovak citizenship as a consequence of their acquiring U.S. citizenship, on the basis of the Naturalisation Treaty of 1928 between the two countries. The authors re-acquired Czech citizenship by declaration made on 10 May 2000. The State party reviews the various court proceedings initiated by the authors, until the last decision of the Constitutional Court of 15 December 1999, which dismissed the authors' appeal, as it was not represented by a lawyer, as required. The State party reviews the relevant applicable law, namely, Act No. 119/1990 on Judicial Rehabilitation and Act No. 87/1991 on Extra-judicial Rehabilitation, and refers to the Constitutional Court's decision of 11 March 1997, which established that final court decisions adopted under Act 119/1990 do not constitute a proper instrument for the acquisition of property. In a subsequent decision,³ the Constitutional Court ruled that persons claiming the surrender of a property under Act No. 87/1991 had to comply with all the requirements set forth in the law, including the citizenship requirement.⁴

² On the basis of the United States-Czechoslovakia bilateral "Naturalization Treaty" of 16 July 1928, article I.

³ Decision of 3 May 2005.

⁴ The State party also notes that the requirement of permanent residence, which used to be a mandatory criteria within Act No. 87/1991 (in addition to the citizenship criteria) was abolished by a Constitutional Court decision published under No. 164/1994 in the Official Gazette.

4.2 The State party notes that the authors consider themselves to be victims of a violation of article 26 of the Covenant as a result of the lack of success in the restitution proceedings they had initiated. On admissibility, the State party notes that the last domestic decision in the authors' case was adopted on 15 December 1999. Thus, more than 6 years elapsed before the author approached the Committee. In the absence of new facts since the adoption of the last domestic decision, and in the absence of any reasonable explanation whatsoever,⁵ which may justify such delay, the State party invites the Committee to consider the communication inadmissible on the ground that it constitutes an abuse of the right to submit a communication, within the meaning of article 3 of the Optional Protocol. To support its claim, the State party invokes the Committee's decisions in communications No. 1434/2005 *Fillacier v. France*,⁶ No. 787/1997 *Gobin v. Mauritius*,⁷ and No. 1452/2006 *Chytil v. the Czech Republic*.⁸

4.3 Subsidiarily, the State party argues that the claim is inadmissible *ratione temporis*, as the authors' property was forfeited in 1971, i.e. long before the Covenant and the Optional Protocol entered into force for the Czech Republic.

4.4 On the merits of the case, the State party notes that the right under article 26 of the Covenant, invoked by the authors, is an autonomous right, independent of any other right guaranteed by the Covenant. It recalls that in its jurisprudence, the Committee has reiterated that not all differences of treatment are discriminatory, and that a differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.⁹ Article 26 does not imply that a State would be obliged to set right injustice of the past, especially considering the fact that the Covenant was not applicable at that time of the former communist Czechoslovakia.

4.5 The State party further notes that it was not feasible to remedy all injustices of the past, and that as part of its legitimate prerogatives, the legislator, using its margin of discretion, had to decide over which factual areas, and in which way it would legislate, so as to mitigate damages, knowing that it would need to take into consideration a number of antagonistic interests. The authors' action was not successful because they did not comply with the citizenship requirement in Act No. 87/1991. The State party invokes other arguments it previously submitted to the Committee. The State party concludes that it did not violate article 26 in the present case.

Authors' comments on the State party's observations

5.1 In their comments dated 18 February 2008, the authors maintain that Act No. 87/1991 is discriminatory, and in violation of the Covenant. They invoke the Committee's

⁵ The State party notes that the authors should have provided a "reasonable explanation that has an objective basis and that is also sustainable", also noting the general principle *ignorantia legis non excusat*, and the fact that the authors' subjective interests cannot outweigh the needs for legal certainty.

⁶ Inadmissibility decision of 27 March 2006.

⁷ Inadmissibility decision of 16 July 2001.

⁸ Inadmissibility decision of 24 July 2007. *A contrario*, the State party invoked communication No. 1533/2006 *Zdenek and Ondracka v. the Czech Republic*, Views adopted on 31 October 2007. The State party also notes that the Committee has not been consistent with regard to the time period it considers to be an abuse of the right of submission, and stresses that it shares the dissenting opinion of Committee member Mr. Abdelfattah Amor in the *Zdenek* case.

⁹ The State party refers to communication No. 182/1984, *F.H. Zwaan-de Vries v. the Netherlands*, Views adopted on 9 April 1987.

concluding observations on the second periodic report of the Czech Republic¹⁰ and Views in similar cases, where there had been a finding of violation. They argue that the domestic rulings invoked by the State party, including the Constitutional Court decisions, cannot take precedence over the Covenant.

5.2 Regarding the issue of delay and the contention that the authors abused their right of submission, the authors reject the State party's argument. They note that the Optional Protocol does not establish any deadline for the submission of complaints, and claim that the delay in submitting the communication was caused by lack of information. They state in this respect that the State party does not publish and translate Committee decisions.

5.3 The authors disagree with the State party's argument that their claim should be considered inadmissible *ratione temporis*, since the relevant Czech restitution laws and court decisions were adopted after the Covenant had entered into force for the Czech Republic.

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 another procedure of international investigation or settlement.

6.3 The Committee has noted the State party's argument that the communication should be declared inadmissible as an abuse of the right of submission because of the long delay between the final judicial decision in the case and the submission of the communication to the Committee. The Committee notes that the Optional Protocol does not establish time limits within which a communication must be submitted. It is only in exceptional circumstances that the delay in submitting a communication can lead to the inadmissibility of a communication.¹¹ In the circumstances of the present case, the Committee considers that the delay of nearly six and a half years between the last decision of the relevant authority and the submission of the communication to the Committee does not render the communication inadmissible as an abuse under article 3 of the Optional Protocol.

6.4 The Committee has also considered whether the violations alleged can be examined *ratione temporis*. It notes that although the confiscations took place before the entry into force of the Covenant and of the Optional Protocol for the Czech Republic, the new legislation that excludes claimants who are not Czech citizens has continuing consequences subsequent to the entry into force of the Optional Protocol for the Czech Republic, which could entail discrimination in violation of article 26 of the Covenant.¹²

6.5 In the absence of any further objections to the admissibility of the communication, the Committee declares the communication admissible in so far as it may raise issues under article 26 of the Covenant, and proceeds to its consideration on the merits.

¹⁰ CCPR/C/CZE/CO/2. The Committee inter alia "urg[ed] the State party to implement all of its Views, including those under Act No. 87/91 of 1991, in order to restore the property of persons concerned, or otherwise compensate them". (Ibid., para. 7).

¹¹ See *Fillacier v. France* (note 6 above), para. 4.3, and *Gobin v. Mauritius* (note 7 above), para. 6.3.

¹² Communication No. 586/1994, *Adam v. the Czech Republic*, Views of 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 is whether the application to the authors of Act No. 87/1991 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 26.¹³

7.3 The Committee recalls its Views in the numerous Czech property restitution cases,¹⁴ where it held that article 26 had been violated, and that it would be incompatible with the Covenant to require the authors to obtain Czech citizenship as a prerequisite for the restitution of their property or, alternatively, for the payment of appropriate compensation. Bearing in mind that the authors' original entitlement to their properties was not predicated on their citizenship, the Committee found that the citizenship requirement was unreasonable. In *Des Fours Walderode*,¹⁵ the Committee observed that a citizenship requirement in the law as a necessary condition for restitution of property previously confiscated by the authorities makes an arbitrary and 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 authors of the present communication. The Committee therefore concludes that the application to the authors of the citizenship requirement laid down in Act No. 87/1991 violated their rights under article 26 of the Covenant.

8.1 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 International Covenant on Civil and Political Rights.

8.2 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 property in question cannot be returned. The Committee reiterates that the State party should review its legislation and practice to ensure that all persons enjoy both equality before the law and equal protection of the law.

8.3 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

¹³ See *Zwaan-de Vries v. The Netherlands* (note 9 above), paragraph 13.

¹⁴ Communications No. 516/1992, *Simunek v. Czech Republic*, Views adopted on 19 July 1995, para. 11.6; No. 586/1994, *Adam v. Czech Republic*, Views adopted on 23 July 1996, para. 12.6; No. 857/1999, *Blazek v. Czech Republic*, Views adopted on 12 July 2001, para. 5.8; No. 945/2000, *Marik v. Czech Republic*, Views adopted on 26 July 2005, para. 6.4; No. 1054/2002, *Kriz v. Czech Republic*, Views adopted on 1 November 2005, para. 7.3; No. 1445/2006, *Polackova and Polacek v. Czech Republic*, Views adopted on 24 July 2007, para. 7.4; No. 1463/2006, *Gratzinger v. Czech Republic*, Views adopted on 25 October 2007, para. 7.5; and *Zdenek and Ondracka v. Czech Republic* (note 8 above), para. 7.

¹⁵ Communication No. 747/1997, *Des Fours Walderode v. Czech Republic*, Views adopted on 30 October 2001, paras. 8.3–8.4.

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.]

Appendix

Individual opinion of Committee member Mr. Krister Thelin (dissenting)

The majority has found the communication admissible and considered it on the merits.

I respectfully disagree.

Delay in submitting a communication does not in itself constitute an abuse of the right of submission under article 3 of the Optional Protocol. However, from the jurisprudence of the Committee, as it could be understood, it follows that undue delay, absent exceptional circumstances, should lead to inadmissibility of a communication. In a number of cases the Committee has found a period of over five years to constitute undue delay.^a

In the present case, the author has let almost six and a half years elapse before submitting the communication. The author's explanation for the delay, a mere reference to lack of information, does not constitute an exceptional circumstance, which could justify the delay. The late communication should therefore be considered an abuse of the right of submission and, consequently, inadmissible under article 3 of the Optional Protocol.

(Signed) Mr. Krister **Thelin**

[Done in French, English 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 Communications No. 1434/2005, *Fillacier v. France*, inadmissibility decision of 27 March 2006, and No. 787/1997, *Gobin v. Mauritius*, inadmissibility decision of 16 July 2001; Cf. communications No. 1452/2006, *Chytil v. Czech Republic*, inadmissibility decision of 24 July 2007; No. 1484/2006, *Lnenicka v. Czech Republic*, Views adopted on 25 March 2008; No. 1485/2006, *Vlcek v. Czech Republic*, Views adopted on 10 July 2008; and No. 1582/2007, *Kudrna v. Czech Republic*, inadmissibility decision of 21 July 2009 (below).

**QQ. Communication No. 1585/2007, *Batyrov v. Uzbekistan*
(Views adopted on 30 July 2009, Ninety-sixth session)***

<i>Submitted by:</i>	Batyrova Zoolfia (represented by counsel, Verenin S.)
<i>Alleged victim:</i>	Batyrov Zafar (author's father)
<i>State party:</i>	Uzbekistan
<i>Date of communication:</i>	6 July 2007 (initial submission)
<i>Subject matter:</i>	Alleged violation of right to freedom of movement of complainant
<i>Procedural issue:</i>	Non-substantiation of claim
<i>Substantive issues:</i>	Rights to leave any country, including one's own; evaluation of facts and evidence
<i>Articles of the Covenant:</i>	12, paragraphs 2 and 3; 14 paragraphs 1, 3 (b) and 3 (e) and 15, 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 30 July 2009,

Having concluded its consideration of communication No. 1585/2007, submitted to the Human Rights Committee on behalf of Mr. Batyrov Zafar 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 Zoolfiya Batyrova, a citizen of Uzbekistan born in 1971 submitted the communication on behalf of her father Zafar Batyrov, also citizen of Uzbekistan born in 1946. The author claims that Uzbekistan violated her father's rights under article 12, paragraphs 2 and 3; article 14 paragraphs 1, 3 (b) and (e); and article 15, paragraph 1, of the Covenant. The Optional Protocol entered into force for the State party on 12 December 1995. She is represented by counsel, Verenin S.

* The following members of the Committee participated in the examination of the present communication: Mr. Mohammed Ayat, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Ms. Christine Chanut, 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. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

The facts as presented by the author

2.1 On 25 September 2006, the author's father was convicted and sentenced to five years imprisonment under sections 184, paragraph 3, 205, paragraph 2 (a) and (b) and 223, paragraph 2 (c), of the Criminal Code of Uzbekistan, for "failing to pay taxes in particularly great amounts", "abuse of power of office, which caused a particularly severe damage" and "Illegal travelling abroad or illegal exit from the Republic of Uzbekistan".

2.2 On or about 29 May 2006, the author's father, then a manager of a public gas company as well as a deputy of the regional council of Khorezm region and a deputy of the Supreme Council of the Republic of Karakalpakstan, was sent on an official business trip to Ashgabat, Turkmenistan, to participate in negotiations over the transport of natural gas from Turkmenistan to Uzbekistan. The trip was prompted by an official invitation letter from the Turkmen Government.

2.3 The author's father was then a resident of the Khorezm Province in Uzbekistan, near the Turkmen border. To attend the business meetings he crossed the border from Uzbekistan to the bordering Turkmen Dashoguz region by car, fulfilling all procedural requirements and formalities at Boundary Post 1. The author submits that there is an agreement between the two countries entitled "On movements of citizens and simplification of rules for citizens who reside in border areas", signed in 2004, which allows the citizens, residents of Khorezm and Bukhara regions of Uzbekistan to travel to and from Dashoguz and Lebap regions of Turkmenistan without visas for no more than three days once a month. The passport of the author's father bears a stamp, which could confirm that he stayed in Turkmenistan less than three days. He then used the entry visa issued by Turkmenistan to travel to Ashgabat by plane.

2.4 On 1 and 2 June 2006, the author's father participated in negotiations in Ashgabat over the transport of natural gas between the two countries, which ended with the signature of a protocol on the terms and provisions of future contracts. On 2 June 2006, the author's father returned to Dashoguz region, Turkmenistan by plane. He then crossed the border to Uzbekistan without any incidents through the same Boundary Post 1 fulfilling the necessary procedures of the border control.

2.5 On 25 August 2006, the author's father was arrested and charged with illegal crossing of the Uzbek-Turkmen border with an expired Uzbek exit visa issued by the Department for Visas and Registration, and with failing to obtain consent from the Mayor of Khorezm Province and the Chair of the Supreme Council of the Republic of Karakalpakstan before leaving for Turkmenistan in alleged violation of section 223, paragraph 2 (c) of the Criminal Code of Uzbekistan. Under this provision the travel of officials abroad requires a special permission. The author argues that the section 223, paragraph 2 (c) of the Criminal Code omits any information on procedures to obtain such consent, including information on its form, terms and conditions. Therefore, she claims that when the Mayor of her father's home province was absent at the time of his departure, he arranged his departure with the Mayor's Assistant. Furthermore, his trip to Turkmenistan was for business purposes only. The author has submitted copy of a letter from the Supreme Council of the Republic of Karakalpakstan stating that no parliamentary delegation of Karakalpakstan visited Turkmenistan in 2006.

2.6 The author claims that according to Annex 1 to the Decree of the Cabinet of Ministers No 8 of 6 January 1995 and Instruction No 760 of 1 July 1999 confirmed by the Ministry of Justice travel of Uzbekistan citizen to Commonwealth of Independent States (CIS) member States, including Turkmenistan, does not require exit visa. She also invokes the terms of another agreement between Uzbekistan and Turkmenistan entitled "On the crossing of Uzbek – Turkmen border by citizens serving economic objects, located in border areas of both countries" signed in 2004, under which the citizens of one country

pursuing economic objects may enter, leave and stay without visas in the territory of the border areas in both countries on the basis of permissions issued at the border by authorized State agencies and on the basis of lists of names made available in advance. The author refers to the correspondence between the Ministry of Foreign Affairs of Uzbekistan and the public gas company, which authorized her father's business trip, and claims that such a list including the name of her father was issued according to the procedures.

2.7 The author's father was also charged with "Evasion of tax or other payments" under section 184, paragraph 3, of the Criminal Code of Uzbekistan. Tax evasion is partly defined as "a deceit of tax organs aimed at hiding and reducing the size of obligatory deductions in favour of the state or local budget in significant amounts." The author argues that no information obtained from investigations, be it audit reports or witness statements, offered any evidence that her father participated in any such acts.

2.8 The author's father was also charged with "Abuse of Authority" under section 205, paragraph 2, of the Uzbek Criminal Code. Abuse of authority is defined partly as "intentional abuse of authority by an official, which causes [...] significant damage to the rights and interests of citizens or to the state and public interests." The author argues that neither any preliminary investigation nor court investigation ever established the amount of damage caused by the author as a result of any such action.

2.9 On 25 September 2006, the author's father was convicted under sections 184, paragraph 3, 205, paragraph 2 (a) and (b) and 223, paragraph 2 (c) of the Uzbek Criminal Code and sentenced to five years in prison by the Bagat District Court. The author complains of numerous procedural violations during the court proceedings against her father, of partiality of the trial court and of contradictions in the sentence to the facts of the case.

2.10 She claims that her father's lawyer was not notified of the proceedings and thus could not defend her father during major parts of the proceedings, although the court had all his contact details. The lawyer learned about the start of the court proceeding from a third source. This violation was pointed out to the court by his lawyer at one of the court hearings, during which the lawyer learned that the court investigation was complete. The lawyer appealed this procedural violation and requested that the proceedings be restarted, however his appeal was rejected. Another appeal requesting to re-start the proceedings due to new circumstances, namely availability of new witnesses, was also rejected.

2.11 In addition, the author argues that her father's lawyer was denied access to meet him in detention. The lawyer complained to the office of the Prosecutor and to the court, requesting access to the author's father.

2.12 The author claims that there are inconsistencies and contradictions about facts and evidence in the sentence. Nine pages of defence motions and another 18 annexes were not examined by the court. The sentence did not indicate on what grounds the court rejected the evidence and documents presented by the defence. All these violations were appealed by the author's lawyer to the Regional Court of Khorezm. Prior to the beginning of the appeal hearing the lawyer requested a meeting with the author's father, which was again rejected. He did not even get permission to meet him alone before the beginning of the hearing in the court building, and only met him during the hearing. His request was denied by the chair of the Court collegium which examined the case.

2.13 The author submits that during the appeal hearing, the lawyer pointed out procedural violations during the trial in the District Court. The appeal court rejected the claims and confirmed the sentence of the Bagat District Court. The lawyer then appealed to the Khorezm Regional Court to lodge an objection under supervisory review, which was rejected on 28 November 2006. His following appeal to the Supreme Court under supervisory review was rejected on 16 March 2007.

2.14 On 30 November 2006, the Uzbek Parliament issued a decree entitled “On pardon in connection with the fourteenth anniversary of Uzbekistan’s independence”. The pardon was not applied to the author’s father, despite the fact that he reached 60 by the time the decree was issued and should have benefited according to the criteria established. The lawyer appealed to the Main Department on Enforcement of Sentences and Bagat District Court requesting to clarify the reasons why the pardon was not applied to the author. No response has been received.

The complaint

3.1 The author claims that her father was convicted illegally for travelling abroad on business, which did not constitute a threat to national security, public order, public health or morals or the rights and freedoms of others, in violation of his rights under article 12, paragraphs 2 and 3 of the Covenant.

3.2 The author submits that inconsistencies and contradictions about facts and evidence in the sentence as well as non examination of defence motions by the courts amount to violation of article 14 paragraphs 1 of the Covenant.

3.3 The author also claims that her father’s lawyer was not notified of the proceedings and, thus, could not defend her father during major parts of the court proceedings and was denied access to meet him in detention in violation of article 14, paragraph 3 (b). She claims that denial of the lawyer’s request to invite additional witnesses amount to violation of article 14, paragraph 3 (e) of the Covenant.

3.4 The author argues that her father was found guilty for acts that did not constitute a crime in violation of article 15, paragraph 1.

State party’s observations on admissibility and merits

4.1 In its submission dated 15 October 2007, the State party reiterates the facts as presented by the author and submits that the author’s father’s guilt was established on the basis of evidence that was obtained during the investigation process and corroborated during the court proceedings. It argues that the author’s actions were evaluated correctly and the sentence determined according to the law.

4.2 It further provides subsequent facts to his case that on 20 August 2007, the Tashkent City Criminal Court handed down another sentence convicting the author’s father under sections 167, paragraph 3 (a) and (b) on embezzlement or misappropriation; 179 on false entrepreneurship; 205, paragraph 2 (a),(b) and (c) on abuse of authority and of official powers; 209, paragraph 2, (a) and (b) on falsification of documents; 210, paragraph 3 (a), (b) and (c) on taking bribe; and 242, paragraph 1 on organization of criminal conspiracy, of the Criminal Code and under article 59 of the Criminal Code of the State party sentenced him to 12 years and 6 months of imprisonment. The State party submits that by linking and combining the sentence, issued on 25 December 2006 and 20 August 2007, the author was sentenced to 13 years’ imprisonment. According to the decree on Pardon of 30 November 2006, the length of the sentence was later reduced by one fourth.

Author’s comments on State party’s observations

5.1 In comments dated 10 December 2007, the author submits that the observations of the State party do not refute but prove the absence of any crime on her father’s part. She submits that none of the claims of violations of the Covenant have been refuted by the State party.

5.2 The author submits that the second criminal case examined by the Tashkent Criminal Court was merely an attempt to correct the mistakes of the investigation and of the court proceedings in the first case. During the pretrial investigation for the second criminal case, her father's lawyer filed numerous complaints about breaches of procedure in the collection and evaluation of evidence, and violations of his defence rights. All these complaints were ignored.

5.3 She submits that before the beginning of the second trial, the Judicial Division of the Tashkent City Court ignored the petitions presented by her father's lawyer to invite one more lawyer. The criminal case against her father was not examined in substance during the trial. The author provides a list of examples related to each section, in which the court did not accept or examine testimonies and other documentary evidence. If the amount of material damage caused by her father was so great, why then there were no civil claims for these amounts from anyone? Requests to invite witnesses whose testimonies would have been essential in his case were all rejected. At the same time, none of the requests made by the prosecution side were rejected.

5.4 The author adds that the protocol of court proceedings was issued 14 days after the sentence was issued. This allowed for falsification and additions to the protocol, as it contained many inaccuracies. The author submitted a note to the protocol of court proceedings to the Tashkent Municipal Court for Criminal Cases.

5.5 She adds that the allegations above also amount to violations of articles 6, 7, 10, and 14, paragraphs 2 and 3 (d) of the Covenant.

Author's further submissions

6. On 21 March 2009, the author submits that the health condition of her father has significantly deteriorated. He has been kept under ambulatory observation at the Cardiologic Centre and was diagnosed with "Ischemic Heart Disease of Arrhythmic form and Ciliary Arrhythmia of Paroxysmal Form." The author's father had been diagnosed with hypertension of first degree in 2003 in addition to cardiac diseases and benign prostate gland hyperplasia. In 2005, hypertension reached the second degree. In July 2007, in prison, prison medical staff confirmed Ischemic Heart Disease, Stenocardia Stabile FK'2, Paroxysmal Ciliary Arrhythmia and Hypertension of the second degree. In addition, they diagnosed pancreatic diabetes of the second type. The author claims that these diagnoses show that her father's life is at risk, if no preventive measures are taken on time. She requests the Committee to accelerate examination of the case to avoid irreparable damage.

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 notes, as required by article 5, paragraph 2 (a) and (b), of the Optional Protocol, that the same matter is not being examined under any other international procedure of investigation or settlement. It also notes that the State party has not contested that domestic remedies have been exhausted in the case.

7.3 The Committee has noted that the author's allegations about the manner in which the courts handled her father's case, assessed evidence, qualified his alleged criminal acts, and determined his guilt, which are said to raise issues under article 14, paragraphs 1, 3 (b) and

3 (e), of the Covenant. It observes, however, that these allegations relate primarily 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 In the absence of any other pertinent information, the Committee considers that this part of the communication has been insufficiently substantiated, for purposes of admissibility, under article 2 of the Optional Protocol.

7.4 The Committee notes the author's claims that her father's right under articles 15, paragraph 1, of the Covenant was violated. However, the author does not provide sufficient information to illustrate her claims in this respect. Accordingly, this part of the communication is deemed inadmissible, as insufficiently substantiated, for purposes of admissibility, under article 2 of the Optional Protocol.

7.5 The Committee has further noted that in one of her latest submissions the author also claimed violations of articles 6, 7, 10, and 14, paragraphs 2 and 3 (d), of the Covenant, which have not been raised before. It considers that the author has not provided sufficient information to substantiate these additional claims. The Committee considers that this part of the communication is inadmissible under article 2 of the Optional Protocol, for lack of substantiation.

7.6 The Committee considers that the author's remaining allegations, which appear to raise issues under article 12, paragraphs 2 and 3, of the Covenant, have been sufficiently substantiated, for purposes of admissibility, and declares them admissible.

Consideration of 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 claim that her father's right to leave any country, including his own, under article 12, paragraphs 2 and 3, was violated. The Committee notes that the State party has not refuted the author's allegations, but merely stated that the charges were based on evidence obtained during the investigation process and verified in court proceedings.

8.3 The Committee recalls its general comment No. 27 (1999) on article 12, where it stated that the liberty of movement is indispensable condition for the free development of an individual.² It however also recalls that the rights under article 12 are not absolute. Paragraph 3 of article 12 provides for exceptional cases in which the exercise of rights covered by article 12 may be restricted. In accordance with the provisions of that paragraph, a State party may restrict the exercise of those rights only if the restrictions are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in Covenant. In general comment No. 27, the Committee noted that "it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them" and that "restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function."³ In the

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

² *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40 (A/55/40)*, vol. I, annex VI, sect. A, para. 1.

³ *Ibid.*, para. 14.

present case, however, the State party has not provided any such information that would point to the necessity of the restriction nor justify it in terms of its proportionality. In these circumstances the Committee concludes that there has been a violation of article 12, paragraphs 2 and 3 of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 12, paragraphs 2 and 3, of the International Covenant on Civil and Political Rights.

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, as well as to amend its legislation concerning exit from the country to comply with the provisions of 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 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.

[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. 1587/2007, *Mamour v. Central African Republic*
(Views adopted on 20 July 2009, Ninety-sixth session)***

<i>Submitted by:</i>	Mr. Junior Mackin Mamour (represented by counsel, Maixent Lequain)
<i>Alleged victim:</i>	His father, Bertrand Mamour
<i>State party:</i>	Central African Republic
<i>Date of communication:</i>	19 February 2007 (initial submission)
<i>Subject matter:</i>	Arbitrary detention of the author's father by the security services of the State party
<i>Procedural issue:</i>	State party's failure to cooperate
<i>Substantive issues:</i>	Arbitrary detention; freedom of movement
<i>Articles of the Covenant:</i>	9 and 12
<i>Article of the Optional Protocol:</i>	None

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

Meeting on 20 July 2009,

Having concluded its consideration of communication No. 1587/2007 submitted to the Human Rights Committee by Junior Mackin, on behalf of his father Bertrand Mamour, 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 19 February 2007, is Junior Mackin Mamour, acting on behalf of his father Bertrand Mamour, a Central African citizen born in 1956 and currently under "house arrest" in the Central African Republic. He claims that his father, Bertrand Mamour, is a victim of violations by the Central African Republic of articles 9 and 12 of the Covenant. The Central African Republic has been a party to the Covenant and the Protocol thereto since 8 August 1981. The author is represented by counsel, Maixent Lequain.

* 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 Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Hellen Keller, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sánchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin. The text of a dissenting opinion signed by Mr. Abdelfattah Amor is appended to the present document.

The facts as submitted by the author

2.1 On 18 November 2006 at 11 a.m., a presidential decree published by the National Radio appointed Colonel Bertrand Mamour, previously Field Commander, to the post of Special Adviser in the Ministry of the Civil Service. On the same day, at 3 p.m., he was arrested on undisclosed grounds by the presidential security services and taken to Camp Roux in Bangui. Another decree appointed Lieutenant Colonel Ludovic Ngaïfeï to the post of Field Commander. The Government and the military hierarchy appear to accuse Colonel Mamour of colluding with the rebels of the Union des Forces Démocratiques pour le Rassemblement (UFDR). He is suspected of being a UFDR informer. He was probably arrested as a result of a report accusing him of informing the rebels about the positions of the Forces Armées Centrafricaines (FACA) and of divulging their strategies.

2.2 Under the regime of President Ange Félix Patassé, Colonel Mamour had already been detained on 16 May 2002 at the Ngaragba prison, on the charge of collusion with the rebellion led by General François Bozizé. The Working Group on Arbitrary Detention had issued an opinion (No. 18/2002) addressed to the Government of the Central African Republic in December 2002. In that opinion, the Working Group had expressed the view that Colonel Mamour had been held in arbitrary detention from 15 June 2002. Colonel Mamour was released at the time of the coup d'état on 15 March 2003. The period of detention in 2002–2003 does not form part of the present communication.

2.3 During his detention between 18 November 2006 and April 2007, Colonel Mamour was deprived of all contact with his family and subjected to inhuman and degrading treatment which had an impact on his health. Moreover, a member of his family died in October 2006 in similar conditions.

2.4 On 24 April 2007, counsel informed the Committee that Mr. Mamour's detention had ended, but that he was nevertheless not authorized to leave the country and was "in a manner of speaking, 'under house arrest'".

The complaint

3.1 The author considers that his father was detained in the absence of a court decision or any legal document, and that he was therefore a victim of a violation of article 9 of the Covenant. Regarding the exhaustion of domestic remedies, the author argues that, since his father was deprived of all contact with the outside world, he had been unable to have access to a lawyer for the purpose of defending his rights and, thus, exhausting domestic remedies.

3.2 The author states that his father's case was also referred to the United Nations Working Group on Arbitrary Detention.

3.3 The author also considers that his father is the victim of a violation of article 12 of the Covenant, inasmuch as he is not authorized to leave his country.

State party's failure to cooperate

4. On 22 August 2007, 14 May and 29 July 2008 and 12 February 2009, the Committee requested the State party to provide it with 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 regarding 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 provided. 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 decide, in accordance with rule 93 of its rules of procedure, whether the communication 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 arguments concerning the exhaustion of domestic remedies and the lack of cooperation from the State party, the Committee considers that the provisions of article 5, paragraph 2 (b), of the Optional Protocol are not an impediment to examination of the communication.

5.4 With regard to article 12, the Committee notes that the author provides no evidence to show that his father is not able to leave his country. Consequently, the Committee considers that the author has not sufficiently substantiated his claims under article 12 for the purposes of admissibility, and finds that this part of the communication is inadmissible under article 2 of the Optional Protocol.

5.5 The Committee considers that, in the absence of information from the State party, the claim of a violation under article 9 has been sufficiently substantiated and is therefore admissible.

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

6.2 With regard to the alleged violation of article 9, the Committee takes note of the author's claim that his father was not informed of the reasons for his arrest at the time of arrest, and that he had been unable to have access to a lawyer for the entire period of detention. In the absence of any pertinent information from the State party which would contradict the author's allegations, the Committee considers that the facts before it reveal a violation of 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 facts before it reveal a violation by the State party of article 9 of the Covenant.

8. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author's father with an effective remedy, including appropriate compensation. The State party is also under an obligation to take measures 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 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 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 French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Appendix

Dissenting opinion of Committee member Mr. Abdelfattah Amor

This communication was submitted by Mr. Junior Mackin Mamour, represented by counsel, on behalf of his father, Bertrand Mamour. The latter was detained by the Central African authorities on 18 November 2006. During his detention, he was deprived of all contact with his family. On 24 April 2007, counsel informed the Committee that Bertrand Mamour's detention had ended, but that he was nevertheless not authorized to leave the country and was "in a manner of speaking, 'under house arrest'". The author, who produced no evidence to show that his father was not able to leave his country (para. 5.4), was no more forthcoming about the situation of being "in a manner of speaking, 'under house arrest'". In fact there is no evidence that his father was unable, as from 24 April 2007, to submit the communication himself or to give his son power of attorney for this purpose. This raises the question of whether the son had the *locus standi* to act on behalf of his father. The Committee has not sought to answer this question, in a change from its settled jurisprudence. I cannot endorse this position.

The Committee ought to have raised this question as a matter of course, even though the State party did not cooperate or provide any information regarding either the admissibility or the merits, despite being contacted three times.

Only an individual with standing can bring a case before the Committee. While the author may have been entitled to represent his father between 19 November 2006 and April 2007 — when his father was deprived of all contact with his family — this was no longer the case after April 2007. Although it is not required to do so, the Committee, through its secretariat, could have asked the author for evidence of his standing once his father had been released. In communication No. 1012/2001, *Brian John Lawrence Burgess v. Australia*,^a the Committee notes that a reading of the file shows that, after receiving the initial submission, the secretariat asked counsel, on 19 July 2001, "to provide (...) written authorization from Mr. Burgess himself and from his family members if you also wish them to appear as victims" (para. 6.3). After receiving an authorization to act on behalf of Mr. Burgess only, and not on behalf of his wife and children, the Committee declared that counsel had no standing before the Committee with respect to Mrs. Burgess or the Burgess children (para. 6.3). The part of the communication concerning them was therefore declared inadmissible.

I believe that the Committee ought to have declared the present communication inadmissible as a matter of course, or at least to have asked the author for evidence that he was entitled to act on behalf of his father before the Committee. The Committee's position in the present communication with regard to the author's standing is at odds with its settled jurisprudence.

In communication No. 915/2000, *Darmon Sultanova v. Uzbekistan*,^b the Committee notes the following, in paragraph 6.2: "... the author has not provided any proof that she is authorized to act on behalf of her husband, despite the fact that *by the time of consideration*

^a Views adopted on 19 November 2005.

^b Views adopted on 19 April 2006.

of the Communication by the Committee he should have already served his sentence. Neither has she substantiated why it was impossible for the victim to submit a communication on his own behalf. In the circumstances of the case and in the absence of a power of attorney or other documented proof that the author is authorized to act on his behalf, the Committee must conclude that as far as it relates to her husband, the author has no standing under article 1 of the Optional Protocol” (emphasis added).

The same concern is raised in communication No. 946/2000, *L.P. v. Czech Republic*, (para. 6.4): “The Committee notes that the author in his submissions also alleged that his son’s rights had been violated. However, since he does not claim that he is representing his son, the Committee finds that this part of the communication is inadmissible under article 1 of the Optional Protocol.”^c The same approach by the Committee can be found in several other communications, including No. 565/1993, *H. v. Italy*;^d No. 1163/2003, *Umsinai Isaeva v. Uzbekistan*;^e and No. 1510/2006, *Dušan Vojnović v. Croatia*.^f This jurisprudence is only qualified if there are special circumstances, as in the case of communication No. 397/1990, *P.S. v. Denmark*,^g where it is pointed out in paragraph 5.2 that: “The Committee has taken notice of the State party’s contention that the author has no standing to act on behalf of his son, as Danish law limits this right to the custodial parent. The Committee observes that standing under the Optional Protocol may be determined independently of national regulations and legislation governing an individual’s standing before a domestic court of law. In the present case, it is clear that T.S. [a minor] cannot himself submit a complaint to the Committee; the relationship between father and son and the nature of the allegations must be deemed sufficient to justify representation of T.S. before the Committee by his father.”

In sum, the present communication (*Mamour v. Central African Republic*) deserved closer attention from the Committee.

(Signed) Mr. Abdelfattah Amor

[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.]

^c Views adopted on 25 July 2002.

^d Inadmissibility decision of 8 April 1994.

^e Views adopted on 20 March 2009.

^f Views adopted on 30 March 2009.

^g Inadmissibility decision of 22 July 1992.

**SS. Communication No. 1792/2008, *Dauphin v. Canada*
(Views adopted on 28 July 2009, Ninety-sixth session)***

<i>Submitted by:</i>	John Michaël Dauphin (represented by counsel Alain Vallières)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Canada
<i>Date of communication:</i>	29 May 2008 (initial submission)
<i>Subject matter:</i>	Expulsion order against a Haitian national who has been a permanent resident since the age of 2, inadmissible to Canada on grounds of serious criminality
<i>Procedural issues:</i>	Failure to substantiate allegations; incompatibility <i>ratione materiae</i> with the provisions of the Covenant
<i>Substantive issues:</i>	Right to life; prohibition of torture; recognition as a person before the law; protection against arbitrary or unlawful interference with privacy; right to family life; principle of non-discrimination
<i>Articles of the Covenant:</i>	6; 7; 16; 17; 23; and 26
<i>Articles of the Optional Protocol:</i>	2 and 3

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

Meeting on 28 July 2009,

Having concluded its consideration of communication No. 1792/2008, submitted to the Human Rights Committee by John Michaël Dauphin 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, his counsel 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 Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

The texts of individual opinions signed by Committee members Mr. Krister Thelin and Ms. Ruth Wedgwood are appended to the present Views.

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

1.1 The author of the communication dated 29 May 2008 is John Michaël Dauphin, a Haitian citizen. He is currently residing in Canada and is due to be deported to Haiti, having been declared inadmissible to Canada after being sentenced to 33 months' imprisonment for robbery with violence. He claims that his deportation to Haiti would constitute a violation by Canada of articles 6, 7, 16, 23 and 26 of the International Covenant on Civil and Political Rights. The author is represented by counsel.

1.2 On 2 June 2008, in accordance with article 92 of the Committee's rules of procedure, the Special Rapporteur on New Communications and Interim Measures requested the State party not to deport the author while his case was under examination by the Committee. On 28 July 2008, 2 October 2008 and 17 March 2009, following requests made by the State party, the Special Rapporteur refused to lift the interim measures.

1.3 On 28 July 2008, the Special Rapporteur on New Communications and Interim Measures decided not to separate consideration of the admissibility and the merits of the communication.

1.4 On 22 October 2008, counsel for the author informed the Committee that, during proceedings to review the grounds for detaining the author, the State party had considered whether the interim measures ordered by the Committee should be observed. On 23 October 2008, this information was transmitted to the State party, with a reminder of its obligations under rule 97 of the rules of procedure.

The facts as submitted by the author

2.1 The author, born in 1987, is from Haiti and is the oldest in a family of four children. He lived in Haiti for the first two years of his life, then in Canada, where he was educated. Not long after turning 18 years of age, he was sentenced to 33 months' imprisonment for robbery with violence. While serving his sentence, he discovered that he was not a Canadian citizen, as his parents had never completed the process for obtaining citizenship in his case, although all the other members of his family had become Canadian citizens.

2.2 While he was in prison, the Canadian authorities initiated proceedings to deport him from Canada on the grounds of his criminal conviction, in accordance with the Immigration and Refugee Protection Act.¹ On 5 November 2007, the Immigration Division of the Immigration and Refugee Board held an admissibility hearing. The author claims that he attempted, unsuccessfully, to prove to the Division that he had no links with Haiti and that, being Canadian citizens, his family were all in Canada. The Immigration Division allegedly refused to examine any information on that subject, as it deemed such information irrelevant in the light of the restrictions imposed under the Act.

2.3 The author appealed to the Immigration Appeal Division, which, on 18 March 2008, found that it did not have jurisdiction. The author applied for review of this decision and submitted an application for suspension of deportation to the Appeal Division of the Federal Court, which rejected his application on 10 June 2008. At the same time, the author appealed the Immigration Division's decision before the Federal Court, which rejected his application on 22 April 2008.

¹ Article 36 (1) (a) of the Immigration and Refugee Protection Act, S.C., 2001, c. 27, provides as follows: "A permanent resident or a foreign national is inadmissible on grounds of serious criminality for (a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed."

2.4 The State party then suggested that the author should apply for a pre-removal risk assessment (PRRA). On 9 May 2008, the Canadian authorities rejected his application on the ground that he faced no risk in the event of his return to Haiti. The author points out that this decision was taken within one month, whereas it is usually necessary to wait one year for such a decision. The author applied to the Federal Court to review the decision, but his application was rejected on 2 June 2008.

The complaint

3.1 The author claims that his deportation to Haiti would endanger his life and physical integrity, which would constitute a violation by Canada of articles 6² and 7 of the Covenant. He alleges that the Canadian authorities are aware of this risk, as there is a moratorium preventing people being deported to Haiti. He claims that any person there may be killed, kidnapped or ill-treated, and that the Haitian authorities would be unable to protect him. Furthermore, the author emphasizes that the protection of life and physical integrity are absolute rights which cannot be set aside, even for criminals.

3.2 The author argues that the State party would violate article 16 if he were deported, as he would be prevented from stating his case against his removal to Haiti. The author claims that the powers of the Immigration Division are limited by law, so that the official making the pre-removal risk assessment has a particularly important role. The author maintains that the assessment did not take into account his personal circumstances and that this amounts to a denial of his legal personality. The author adds that the failure to examine his personal circumstances prevents him from receiving a sentence proportional to his crime. The Canadian system allegedly does not take into account the relationship between the act and the punishment, as any person sentenced to two or more years in prison will be liable to deportation, without the possibility of defence and without any examination of his or her personal circumstances.

3.3 The author submits that his removal would prevent him from maintaining links with his family and would constitute a violation of article 23.³ Prior to his arrest, he was living with his family in Canada and had no family links to Haiti, where he had spent no more than his first two years. In addition, he claims to have been, since 2001, in a stable relationship with his girlfriend, whom he met at school.

3.4 The author claims that there has been discrimination in his case, in violation of article 26. He belongs to a particular group of foreign nationals living in Canada to which the State party denies any possibility of a fair trial.⁴ He claims that, if one of the aims of the Immigration and Refugee Protection Act is to protect Canadian residents, it is doubtful whether the automatic deportation of any person who has been sentenced to two years in prison achieves that aim. Dangerous criminals with the means to pay for talented lawyers may be sentenced to less than two years' imprisonment, whereas a person of modest income who has no lawyer may be sentenced to two years or more and deported. Furthermore, the author argues that, of all the foreign nationals living in Canada, only those sentenced to two years' imprisonment or more are denied access to judicial procedures for the assessment of their personal circumstances, subjected to double punishment with no

² See, for example, communications No. 469/1991, *Charles Chitat Ng v. Canada*, Views adopted on 5 November 1993, paragraph 15.6; and No. 470/1991, *Joseph Kindler v. Canada*, Views adopted on 30 July 1993, paragraph 14.6.

³ See communication No. 1272/2004, *Fatima Benali v. Netherlands*, Views adopted on 23 July 2004, para. 6.3.

⁴ The author cites the case law relative to article 15 of the Canadian Charter of Rights and Freedoms.

possibility of review and removed from the country without having access to genuine judicial proceedings.⁵

State party's observations on admissibility and the merits

4.1 On 18 July 2008, the State party transmitted its observations on the admissibility of the communication and a request for the Committee to lift the interim measures.

4.2 The State party submits that the communication is based on mere suppositions and fails to advance prima facie evidence of a violation of the Covenant. In particular, it notes that all of the author's allegations have been examined in depth by the national authorities, which concluded that they were unfounded. In the absence of proof of a manifest error, abuse of process, bad faith, obvious bias or serious irregularities in the process, the Committee should not substitute its own findings of fact for those of the Canadian authorities. It is for the courts of States parties to evaluate the facts and evidence in particular cases. The State party maintains that the communication should be found inadmissible under article 2 of the Optional Protocol for failure to substantiate claims. It adds that the communication is incompatible with the Covenant with regard to the alleged violation of articles 16, 23 and 26 and that these parts of the communication should therefore be found inadmissible *ratione materiae* under article 3 of the Optional Protocol.

4.3 The State party recalls the facts as submitted by the author and emphasizes that, on 18 July 2006, the author was sentenced to four years' imprisonment, reduced to 33 months to take account of the time spent in detention, for robbery with violence or threatened violence against seven individuals, one of whom sustained serious injuries. On 12 December 2006, after having examined the author's case file, the Canada Border Services Agency recommended that he be deported from Canada.⁶ This recommendation was confirmed on 27 April 2007 by a representative of the Minister of Citizenship and Immigration. On 5 November 2007, after having heard the author and his counsel, the Immigration Division of the Immigration and Refugee Board determined that all the conditions for "inadmissibility to Canada on grounds of serious criminality" had been met, i.e. that the author was not a Canadian citizen and had been sentenced to a prison term longer than six months.⁷ At the hearing, the author stated that the official from the Canada Border Services Agency had not met him in person, that the Immigration Division was not an independent court and that the procedure for removal provided for in the Immigration and Refugee Protection Act was unconstitutional. On 12 March 2008, the author's appeal to the Immigration Appeal Division was rejected on the grounds of lack of jurisdiction under the Immigration and Refugee Protection Act, which provides that a person found inadmissible for serious criminality cannot lodge an appeal. On 21 April and 10 June 2008, the Federal Court rejected the two applications for judicial review of the Immigration Division and the Immigration Appeal Division decisions.

4.4 The author's application for pre-removal risk assessment was denied on 9 May 2008 on the grounds that he was not personally targeted or particularly at risk of kidnapping and

⁵ The author compares the legal situation in Canada to six European countries: Belgium, Denmark, Germany, Italy, Portugal and the United Kingdom. He concludes that a criminal conviction can lead to a removal order being issued where the existence of a threat to public order has been established by examination of the specific case.

⁶ Article 36 of the Immigration and Refugee Protection Act (note 1 above).

⁷ The State party notes that the procedure for deporting foreign nationals for serious criminality has been challenged on a number of occasions and has always been upheld by the national courts. See, for example, *Powell v. Canada* [2005] FCA No. 929 (FCA); *Ramnanan v. Canada* [2008] FCA No. 543 (FC).

that the risk in question was a general one which affects the entire Haitian population. On 2 June 2008, the Federal Court rejected the application to stay his deportation. On 24 July 2008, the Federal Court rejected his application for leave and for judicial review of the rejection of his application for a pre-removal risk assessment.

4.5 With regard to the alleged violation of articles 6 and 7, the State party maintains that the risk alleged by the author is of a general nature and that he did not claim to belong to a category of persons particularly at risk of kidnapping or being personally targeted. The author has provided no evidence of his alleged risk of death, kidnapping or ill-treatment, or of the inability of the authorities to protect him. The State party points out that the stay of deportation to Haiti mentioned by the author and adopted by Canada in February 2004 for humanitarian reasons should not be interpreted as an admission by Canada of the alleged risks to the author. The stay is a voluntary measure that goes beyond international obligations under the Covenant. Under paragraph 230 (3) (c) of the Immigration and Refugee Protection Regulations, the stay does not apply to individuals who are inadmissible because they have committed criminal acts. The State party maintains that this part of the communication should be found inadmissible, as the author has not sufficiently substantiated his claims.

4.6 As to the alleged violation of article 16, the State party claims inadmissibility *ratione materiae*, since the Covenant does not guarantee the right to a hearing before a judge in immigration proceedings. It notes that article 16 protects the right to recognition as a person before the law and not the right to bring legal proceedings.⁸ The State party maintains that this part is manifestly without merit.

4.7 With respect to article 23, the State party submits that the allegation is inadmissible *ratione materiae*, as article 23 does not guarantee the right to family. In the alternative, it submits that the author's mere claim that he has family in Canada and not in Haiti is not sufficient to substantiate admissibility and cannot prevent his deportation. Furthermore, the State party emphasizes that, even if the author has not invoked article 17, his deportation would not constitute unlawful or arbitrary interference with his privacy, his family or his home, since it was ordered in accordance with the law and the domestic remedies took into account relevant factors, including the fact that the author's family lives in Canada. Moreover, the State party submits that the communication in this case cannot be compared with the *Winata v. Australia* case,⁹ or with the *Canepa v. Canada* case,¹⁰ given that the author has neither a wife nor a child in Canada and there is no indication that his family is necessary to his rehabilitation. Furthermore, his deportation constitutes a reasonable measure in the circumstances, proportional to the gravity of the crimes that he has committed.

4.8 With respect to article 26 of the Covenant, the State party submits that the author did not sufficiently substantiate, for the purposes of admissibility, his claim that the Immigration and Refugee Protection Act was discriminatory and had produced an unfair or inequitable outcome in his case. In these circumstances, the State party maintains that it could not be expected to speculate on the purport of the author's allegations, much less to refute any possible interpretations. The State party maintains that this part of the communication is incompatible with the Covenant and is therefore inadmissible *ratione materiae*.

⁸ Nowak, Manfred, *UN Covenant on Civil and Political Rights*, second edition, Kehl am Rhein: Strasbourg, 2005, pp. 370–371: “Article 16 is limited exclusively to the capacity to be a person before the law and does not cover the capacity to act.”

⁹ Communication No. 930/2000, *Winata v. Australia*, Views adopted on 11 May 2000, para. 7.3.

¹⁰ Communication No. 558/1993, *Giosue Canepa v. Canada*, Views adopted on 3 April 1997.

4.9 Moreover, the State party submits that differential treatment of persons who have committed serious criminal acts is not prohibited under article 26. It is a universally recognized practice in respect of immigration, and foreign nationals who have committed serious crimes can legitimately be denied certain privileges that are afforded to other foreign nationals. Moreover, this criterion for differential treatment is both objective and reasonable, given that the author himself is responsible for his inclusion in the category of inadmissible persons.

4.10 On 1 October 2008, the State party gave its opinion on the merits of the communication and reiterated its request that interim measures be lifted, citing inter alia a statement by the Senior Protection Officer at the Office of the United Nations High Commissioner for Refugees (UNHCR) in Haiti to the effect that there is no apparent reason to continue to call for the non-refoulement of Haitian nationals. Furthermore, the State party submits that deportation would not cause irreparable damage under rule 92 of the Committee's rules of procedure because it could be reversed: the author could be granted leave to return if the Committee concluded that articles 17 and/or 23 had been violated.

4.11 The State party submits, as a subsidiary argument to its observations on admissibility and on the same grounds, that the communication should be found inadmissible on the merits as it fails to demonstrate any violation of articles 6, 7, 16, 23 or 26.

5. On 2 October 2008 and 9 February, 17 March and 19 May 2009, the Committee asked the author to submit comments on the State party's observations on admissibility and the merits, but has received no response.

State party's additional observations

6. On 30 January 2009, the State party submitted additional observations on admissibility and the merits, clarifying its observations on article 23. It recalls that, in the Committee's jurisprudence, deporting a person with family on the State party's territory does not of itself constitute arbitrary interference with his or her family.¹¹ It points out that the author has neither children nor a wife in Canada, that he has no dependants and is himself not dependent on his family's help. The State party notes that the author lived for the most part in youth centres and foster homes from the age of 13 and received no help from his family when he turned to a life of crime and drug abuse; there was no indication that his family was necessary to his rehabilitation, nor was there any evidence of the existence of close links between the author and his family. The State party points out that the fact that the author has spent most of his life in Canada is not in itself an exceptional circumstance from the standpoint of article 17 or article 23. The State party argues that, even if the author's deportation constituted interference with his family, it would be reasonable in the circumstances and proportional to the seriousness of his crimes.

¹¹ See, for example, communications No. 1222/2003, *Byahuranga v. Denmark*, Views adopted on 1 November 2004; No. 893/1999, *Sahid v. New Zealand*, Views adopted on 28 March 2003, paragraph 8.2; No. 1011/2001, *Madafferi v. Australia*, Views adopted on 26 July 2004.

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 article 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 The Committee notes that it is not disputed that the author has exhausted all available domestic remedies and that the conditions laid down in article 5, paragraph 2 (b), of the Optional Protocol have therefore been met.

7.4 With respect to the alleged violation of articles 6 and 7 of the Covenant, the Committee must ascertain whether the conditions laid down in articles 2 and 3 of the Optional Protocol have been met. With respect to articles 6 and 7, on the basis of the information before it, the Committee cannot find that the author has substantiated, for the purposes of admissibility, his claim that his deportation to Haiti and separation from his family in Canada would place his life in danger (art. 6) or amount to cruel, inhuman or degrading treatment within the meaning of article 7. The Committee recalls that, in accordance with its practice,¹² the author must show that deportation to a third country would pose a personal, real and imminent threat of violation of articles 6 and 7. In his communication, the author simply states that “any person there [in Haiti] may be killed, kidnapped or ill-treated [...] and that the Haitian authorities are not able to protect individuals, who are left to fend for themselves”. The Committee notes the statement by the State party, citing the UNHCR office in Haiti, which contains the view that it is no longer necessary to extend the moratorium of February 2004 on the removal of Haitian nationals, which does not cover persons inadmissible for having committed crimes. 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 the evaluation was clearly arbitrary or amounted to a denial of justice.¹³ This jurisprudence has also been applied to expulsion procedures.¹⁴ The Committee does not believe that the material before it shows that the proceedings before the authorities in the State party suffered from any such defects. The Committee accordingly considers that the author has failed to substantiate his claims under articles 6 and 7, for purposes of admissibility, and it concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.¹⁵

7.5 With regard to article 16, the Committee notes that the right to a hearing before a judge in a deportation case is not provided for by article 16, which covers only the right to recognition as a person before the law and is not applicable to the right to institute legal proceedings. The Committee therefore considers that this part of the communication is

¹² See, for example, communications No. 706/1996, *G.T. v. Australia*, paragraphs 8.4–8.6; No. 692/1996, *A.R.J. v. Australia*, paragraph 6.14; and general comment No. 31 (2004), *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40 (A/59/40)*, vol. I, annex III, paragraph 12.

¹³ See, for example, communication No. 541/1993, *Errol Simms v. Jamaica*, decision adopted on 3 April 1995, paragraph 6.2.

¹⁴ See communication No. 1234/2003, *P.K. v. Canada*, decision adopted on 20 March 2007.

¹⁵ See, for example, communication No. 1315/2004, *Daljit Singh v. Canada*, inadmissibility decision adopted on 30 March 2006, paragraph 6.2.

inadmissible under article 3 of the Optional Protocol and incompatible with the provisions of the Covenant.

7.6 With regard to the alleged violation of article 26, the Committee notes the author's argument that there has been discrimination in this case insofar as he belongs to the category of foreign offenders and has consequently been denied access to a judicial procedure for the assessment of his personal circumstances. The Committee recalls that differential treatment based on reasonable and objective criteria does not amount to discrimination as prohibited under article 26. In this case, the author has failed to substantiate, for the purposes of admissibility, his claim of discrimination and the Committee concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

7.7 As to articles 17 and 23, the Committee notes the State party's arguments on article 17 and considers it appropriate to examine the communication in the light of this article as well. The Committee notes that the author spent only two years of his life in Haiti and the rest in Canada where his family still lives. It takes note of the State party's observation that the author has neither a wife nor children in Canada and that he is not financially dependent on his family. The Committee nevertheless recalls that, a priori, there is no indication that the author's situation is not covered by article 17 and article 23, paragraph 1, and thus concludes that the matter should be considered on the merits.

7.8 The Committee declares the communication admissible insofar as it appears to raise issues under articles 17 and 23, paragraph 1, of the Covenant, and proceeds to a consideration of the merits.

Consideration of the merits

8.1 As to the alleged violation under articles 17 and 23, paragraph 1, 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 in 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 in the territory of a State party does not necessarily mean that requiring other members of the family to leave involves such interference.¹⁶

8.2 In this instance, the author has lived in the State party's territory since the age of two and was educated there. His parents and three brothers and sisters live in Canada and have Canadian nationality. The author is to be deported after having been sentenced to 33 months' imprisonment for robbery with violence. The Committee notes the author's claim that his entire family is in Canada, that he lived with his family before his arrest and that he has no family in Haiti. The Committee also notes the State party's arguments referring to a rather casual link between the author and his family, since he had lived mainly in youth centres and foster homes and received no help from his family when he turned to a life of crime and drug abuse.

8.3 The Committee recalls its general comments Nos. 16 (1988) and 19 (1990),¹⁷ whereby the concept of the family is to be interpreted broadly. In this case, it is not disputed

¹⁶ See, for example, communications No. 930/2000, *Winata v. Australia*, Views adopted on 26 July 2001, paragraph 7.1; No. 1011/2001, *Madafferi v. Australia*, Views adopted on 26 July 2004, paragraph 9.7; and No. 1222/2003, *Byahuranga v. Denmark*, Views adopted on 1 November 2004, paragraph 11.5.

¹⁷ *Official Records of the General Assembly, Forty-third Session, Supplement No. 40 (A/43/40)*, annex VI para. 5; and *Ibid.*, *Forty-fifth Session, Supplement No. 40 (A/45/40)*, vol. I, annex VI, sect. B, paragraph 2.

that the author has no family in Haiti and that all his family live in the territory of the State party. Given that this is a young man who has not yet started a family of his own, the Committee considers that his parents, brothers and sisters constitute his family under the Covenant. It finds that the State party's decision to deport the author, who has spent all his life since his earliest years in the State party's territory, was unaware that he was not a Canadian national and has no family ties whatsoever in Haiti, constitutes interference in the author's family life. The Committee notes that it is not disputed that this interference had a legitimate purpose, namely the prevention of criminal offences. It must therefore determine whether this interference was arbitrary and a violation of articles 17 and 23, paragraph 1, of the Covenant.

8.4 The Committee notes that the author considered himself to be a Canadian citizen and it was only on his arrest that he discovered that he did not have Canadian nationality. He has lived all his conscious life in the territory of the State party and all his close relatives and his girlfriend live there, and he has no ties to his country of origin and no family there. The Committee also notes that the author has only a single previous conviction, incurred just after he turned 18. The Committee finds that the interference, with drastic effects for the author given his very close ties to Canada and the fact that he appears to have no link with Haiti other than his nationality, is disproportionate to the legitimate aims pursued by the State party. The author's deportation therefore constitutes a violation by the State party of articles 17 and 23, 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 information before it discloses a violation of articles 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 Haiti. 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, 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 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. Krister Thelin (dissenting)

The majority has found a violation of articles 17 and 23, paragraph 1, of the Covenant.

I respectfully disagree.

The author, born 1987, is a citizen of Haiti. He has been sentenced to 33 month's imprisonment for robbery with violence in Canada and has for this reason been subject to a lawful decision of deportation to Haiti by the Canadian authorities.

While the author's wish to avoid being expelled to his country of citizenship, where he has no family and the general conditions are less favourable than in Canada, is understandable, the issue before the Committee is whether an execution of the legitimate deportation order would be a disproportionate interference with the author's family life. Considering that he lacks family of his own in Canada, although his parents, brothers and sisters are there, and the seriousness of the crimes for which he has been convicted, an expulsion to Haiti would in my view not amount to a violation of articles 17 and 23, paragraph 1, of the Covenant.

(Signed) Mr. Krister **Thelin**

[Done in French, English 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 Ms. Ruth Wedgwood (dissenting)

Even in a globalized world, the regulation of immigration is a matter of importance to nation States. It includes not only the right to set conditions for obtaining citizenship, but also for long-term residence. The Committee has never purported to suggest that the Covenant contains a detailed code for how States can regulate both matters. In a limited number of cases, however, the Committee has found that articles 17 and 23 set some outer boundary, in particular, where the deportation of a non-citizen parent would leave a citizen child without full parental care.^a In the *Sahid v. New Zealand* case, the Committee set out the test that limiting a State's enforcement of its immigration law on grounds of a right to family life would require the demonstration of "extraordinary circumstances".

In the current case, the Committee has not applied this jurisprudence with consistency. The author in the instant case did not plead article 17 of the Covenant in his communication to the Committee, even though he was assisted by legal counsel. But even within the standards of article 17 combined with article 23, it is hard to see how any violation can be well-founded.

At the age of 18, the author was convicted and sentenced to jail for a term of four years for a serious crime of violence, namely, "robbery with violence or threatened violence against seven individuals, one of whom sustained serious injuries".^b He is now 22 years old. He is not married and has no child, though he avers to have had a "stable relationship with his girlfriend" since 2001.^c

The Committee does not suggest any ground for barring the author's deportation from Canada, upon his release from jail, except the claimed right to family life under the Covenant.^d Yet the author's distance from his family is the only reason given in the record to explain why, unlike his siblings, the author did not become a naturalized citizen. He states that "his parents had never completed the process of obtaining citizenship in his case".^e Prior to committing the violent robbery, he "lived for the most part in youth centres and foster homes from the age of 13" and "received no help from his family when he turned to a life of crime and drug use".^f

Any person of humane feeling would wish that the author's life had a better outcome. But the State party also has a legitimate right to consider a pattern of criminal behavior in refusing to permit continued residency by a non-citizen. Canada initiated deportation proceedings against the author under article 36(1) (a) of the Immigration and Refugee Protection Act, which mandates that a permanent resident or foreign national

^a See communications No. 930/200, *Winata v. Australia*, Views adopted on 29 July 2001 (deportation of authors would deprive 13-year-old juvenile of parental care); No. 1222/2003, *Byahuranga v. Denmark*, Views adopted on 1 November 2004 (deportation of husband would deprive citizen wife and four minor children of his support); and No. 1011/2001, *Madafferi v. Australia*, Views adopted on 26 July 2004 (deportation of husband would de facto compel citizen wife and four minor children also to leave). Compare with communication No. 893/1999, *Sahid v. New Zealand*, Views adopted on 28 March 2003 (no violation in deportation of non-citizen maternal grandfather, where children still cared for by citizen parents).

^b See Views of the Committee (above), paragraph 4.3.

^c *Ibid.*, paras. 3.3 and 4.7.

^d *Ibid.*, para. 8.3.

^e *Ibid.*, para. 2.1.

^f *Ibid.*, para. 6.

becomes inadmissible “on grounds of serious criminality” for conviction of an offense where a “term of imprisonment of more than six months has been imposed”.

The jurisprudence of the European Court of Human Rights, including its dissenting opinions, at times seems to be a source of inspiration to the Committee – albeit those cases arise under a different convention and have no direct authority in our construction of the Covenant. One might also wish that the travaux préparatoire of the Covenant — including the deliberations and negotiations of its drafters — were as readily available and as often consulted.

But regardless, it is interesting to note that just as the Human Rights Committee has limited the reach of articles 17 and 23, so too, the European Court of Human Rights has deferred to State decisions on residence and naturalization in the face of serious criminal conduct by a resident.

One may note the pertinent case of *Bouchelkia v. France*.^g There, the non-citizen applicant was convicted for the crime of “aggravated rape” as a minor and was deported to Algeria. He returned to France to reunite with his companion, had a child, and married. Because of the situation in Algeria, his wife and child could not accompany him to Algeria. In addition, he had a “particularly close” relationship with his mother “even during his imprisonment”. Nonetheless, the European Court concluded that in light of the “seriousness and gravity” of his prior crime, there was no basis to interfere with the State’s decision to deport him for a second time. The Court concluded that “[t]he authorities could legitimately consider that the applicant’s [initial] deportation was ... necessary for the prevention of disorder and crime” and that the balance had not changed.^h

Judge Elizabeth Palm, later to join the Human Rights Committee as our colleague, dissented in the *Bouchelkia case* and concluded that “As a rule, second-generation migrants ought to be treated in the same way as nationals. Only in exceptional circumstances should a deportation of these non-nationals be accepted.” Despite profound respect for Judge Palm’s learning and experience, this minority view of the European Court of Human Rights has not been the rule of the Human Rights Committee under the Covenant.

So, too, in the case of *Boujlifa v. France*, No. 122/1996/741/1940 (21 October 1997), the European Court of Human Rights found no unlawful violation of family life in the deportation of an applicant after his conviction for armed robbery. He had resided in France since the age of 5, “seem[ed] to have remained in touch” with his parents and eight siblings who were lawful residents, and had “cohabited with a French national”. Nonetheless, by a vote of 6–3, the European Court held that states could “maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens. To that end they have the power to deport aliens convicted of criminal offences”.

This is an area where the Committee should tread cautiously. Rules can have unexpected consequences. And if the reference to family life is used as a method of creating a de facto ban on the consideration of criminal conduct in decisions on residence (and even, perhaps, on citizenship), States may react by rebuilding the borders that made emigration far more difficult for persons who wished to seek new economic or social opportunity.

(Signed) Ms. Ruth Wedgwood

^g Council of Europe, European Court of Human Rights, *Reports of Judgments and Decisions, 1997*, *Bouchelkia v. France*, 29 January 1997, No. 112/1995/618/708.

^h *Ibid.*, paras. 51–53.

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

Annex VIII

Decisions of the Human Rights Committee declaring communications inadmissible under the Optional Protocol to the International Covenant on Civil and Political Rights

A. Communication No. 1018/2001, *N. G. v. Uzbekistan* (Decision adopted on 30 October 2008, Ninety-fourth session)*

<i>Submitted by:</i>	L. G. (not represented by counsel)
<i>Alleged victim:</i>	N. G. (the author's son)
<i>State party:</i>	Uzbekistan
<i>Date of communication:</i>	16 October 2001 (initial submission)
<i>Subject matter:</i>	Imposition of death sentence after unfair trial with resort to torture during preliminary investigation
<i>Procedural issues:</i>	Evaluation of facts and evidence; substantiation of claim
<i>Substantive issues:</i>	Torture; forced confession; unfair trial
<i>Articles of the Covenant:</i>	6; 9; 10; 14; 15; 16
<i>Articles of the Optional Protocol:</i>	1; 2
<i>The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,</i>	
<i>Meeting on 30 October 2008,</i>	
<i>Adopts the following:</i>	

Decision on admissibility

1.1 The author of the communication is L. G., an Uzbek national born in 1961. She submits the communication on behalf of her son, N. G., an Uzbek national born in 1979, who at the time of submission of the communication was on death row, following a death sentence imposed by the Tashkent City Court on 29 March 2001. The author claims that her son is a victim of violation, by Uzbekistan, of his rights under articles 6; 9; 10; 14; 15; and

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Ms. Helen Keller, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

16, of the International Covenant on Civil and Political Rights. The author is unrepresented by counsel.

1.2 While registering the communication, and pursuant to rule 92 of its rules of procedures, the Human Rights Committee, acting through its Special Rapporteur on New Communications and Interim Measures, requested the State party not to carry out N. G.'s death sentence, pending the consideration of his communication.

The facts as submitted by the author

2.1 On 29 March 2001, the Tashkent City Court found N. G. guilty of theft, robbery, attempted robbery, and murder committed with particular violence, and sentenced him to death penalty. The sentence was upheld on appeal, on 29 April 2001, by the appeal panel of the Tashkent City Court.

2.2 The author claims that her son's sentence was particularly severe and groundless, and did not correspond with his personality. He was positively assessed by his neighbours and his employer and documents to this effect were submitted to the court. Also, according to the author, the court had no grounds to conclude that the murder her son was convicted for was committed with the intention to rob the victim. Some items were taken from the victim's apartment only in order to simulate a robbery.

2.3 The author further contends that the court failed to clarify the exact role and the nature of the acts of each of the individuals present at the crime scene. It wrongly concluded that the murder was committed with a particular violence.

2.4 The court allegedly did not take into account the fact that prior to the murder, her son was provoked by the victim Mrs Normatova, who humiliated him in the presence of his girlfriend. As a result, he got in a state of deep emotion. This should have been seen as a mitigating circumstance.

2.5 The author also claims that the court, in determining her son's sentence, had ignored a Ruling of the Supreme Court of 20 December 1996, pursuant to which even if the death penalty is provided by law, it is not mandatory.

2.6 The court allegedly also disregarded another ruling of the Supreme Court according to which in death penalty cases, courts must take into account all circumstances of the crime and the personality of both the accused and the victims. The author claims that the court did not pay attention to the negative data on the personality of the murdered Mrs. Normatova. The trial court also ignored the requests of the defence to order an additional psychiatric examination of her son.¹

2.7 L. G. points out that pursuant to article 23 of the Uzbek Criminal Procedure Code, it is not incumbent on the accused to prove his/her innocence, and any remaining doubts are to his/her benefit. However, the court did not comply with these requirements in her son's case.

2.8 In an additional submission dated 27 October 2001, the author reiterates her initial allegations and adds that her son was beaten and tortured by the police during the preliminary investigation, and thus forced to confess guilt.² According to the author, her

¹ In this connection, the author affirms that her son's initial psychiatric expert's examination was made very superficial, with no hospitalization.

² The author submits a copy of an undated letter of her son, sent from a detention centre, prior to the court trial. He explains that he was beaten by the police, at the police station, but not at the Detention Centre where he was kept at the moment. From the documents on file it appears that these allegations

son had confessed the murder during the investigation, but did not recall the exact circumstances because he was in a state of deep emotion when the crime was committed. According to her, the court also disregarded a ruling of the Supreme Court of 1996 indicating that evidence obtained through unauthorized methods of investigation was inadmissible.

The complaint

3. The author claims a violation of her son's rights under articles 6; 9; 10; 14; 15; and 16, of the Covenant.

State party's observations and absence of author's comments thereon

4.1 The State party submitted its observations on 2 August 2005. It notes that on 29 March 2001, the Tashkent City Court found N. G. guilty under articles 127 (involvement of a minor in anti-social behaviour); 227 (acquisition, destruction, damaging or concealment of documents, seals, etc.); 164 (robbery in a particular serious amount, committed by an organised group; attempted robbery); 97 (intentional murder, under aggravating circumstances, committed with particular violence in order to conceal another crime). For the totality of these crimes N. G. was sentenced to death. This sentence was confirmed on appeal by the Appeal Panel of the Tashkent City Court, on 29 April 2001.

4.2 The State party explains that N. G. was a member of an organized group led by one Sermiagina. On 12 July 2000, the group broke into the apartment of one Ms. Rasulova, in Tashkent, and stole items for an amount of 2,551,900 soms and personal documents. On 22 July 2000, N. G. committed an attempted robbery in the apartment of one Ms. Fedorina, but failed to achieve his purpose for reasons beyond his control.

4.3 Again on 22 July 2000, the group visited an acquaintance, Mrs. Normatova, in her apartment. After having consumed alcohol, N. G. kicked Mrs. Normatova in the head with a dumbbell, and then strangled her with a belt; in the meantime, Mrs. Sermiagina stabbed the victim with a scalpel. Mrs. Normatova died as a result. N. G. and Mrs. Sermiagina escaped from the crime scene after stealing items for 2,388,000 soms.

4.4 The State party explains that N. G. was not subjected to torture or other unlawful treatment either during the preliminary investigation or during the trial. All the investigation acts and the trial were carried out in compliance with the legislation into force. N. G. was represented by a lawyer since his arrest, and all interrogations and other investigative acts were held in the lawyer's presence.

4.5 The State party concludes by affirming that N. G.'s guilt was confirmed by his confessions, the depositions of Mrs. Sermiagina and those of his brother, witnesses' testimonies, and other evidence (expert's conclusions, records, medical-forensic examinations, etc.).

4.6 On 18 January 2007, the State party submitted further information. It explains that on 12 February 2002, the Supreme Court of Uzbekistan re-examined N. G.'s case and commuted the death penalty to 20 years of imprisonment. Subsequently, six different

were not raised on appeal. By letter of 25 June 2001, the author informed the Minister of Justice of the alleged beatings of her son and asked to have his case reconsidered. She submits a copy of a letter dated 4 October 2001, by which the Head of the OSCE Office in Tashkent wrote to the Chairman of the Supreme Court, with reference to L.G.'s allegations on the use of unlawful methods of investigation against her son during the preliminary investigation. No information is on file on the outcome of this correspondence.

Amnesty Acts were applied to the author's son. On 30 April 2004, the Karshinsk City Court ordered N. G.'s transfer to a prison colony. On 24 December 2006, the remaining term to serve by N. G. consisted of one month.

4.7 The author did not submit any comments on the State party's observations, despite the fact that they were duly addressed to her and several reminders were sent.

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 communication is admissible under the Optional Protocol to the Covenant.

5.2 The Committee notes, as required by article 5, paragraph 2 (a) and (b), of the Optional Protocol, that the same matter is not being examined under any other international procedure of investigation or settlement, and that it is uncontested that domestic remedies have been exhausted.

5.3 The Committee has noted the author's claims that her son's rights under articles 9, 10, 15, and 16 of the Covenant have been violated. However, she does not provide any information to substantiate her claims. In the absence of any other pertinent information in this respect, this part of the communication is deemed inadmissible, as insufficiently substantiated for purposes of admissibility, under article 2 of the Optional Protocol.

5.4 The Committee has noted that the author's allegations about the manner in which the courts handled her son's case, assessed evidence, qualified his acts, and determined his guilt, may raise issues under article 14 of the Covenant. The State party has rejected these allegations. The Committee observes that in any case, these allegations relate primarily 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.³ In the present case, the Committee considers that in the absence of other pertinent information from the author, and in the absence in the case file of any court records or trial transcripts, which would make it possible to verify whether the trial in fact suffered from the defects alleged by the author, this part of the communication is inadmissible under article 2 of the Optional Protocol as insufficiently substantiated.

5.5 The Committee has noted the author's allegations that her son was beaten and tortured, and thus forced to confess guilt in the crimes he was later convicted for. It observes however that the author did not formulate these particular allegations in her initial communication but only at a later stage, and that she did not provide detailed information in that regard, such as the identity of those responsible or the methods of torture used. The author has also failed to explain whether any attempt to have her son examined by a medical doctor was ever made, or whether any complaint was filed in this connection. It remains also unclear whether these allegations have been drawn to the attention of the trial court. In addition, the Committee notes that the appeal filed on N. G.'s behalf to the Appeal Body of the Tashkent City Court does not contain any reference to acts of ill-treatment or otherwise unlawful methods of investigation. In the absence of any other pertinent information in this connection, the Committee considers that the author has failed to

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

sufficiently substantiate her claims, for purposes of admissibility. Accordingly, this part of the communication is also inadmissible under article 2, of the Optional Protocol.

5.6 In light of the above findings, and taking into account that the alleged victim's death sentence was commuted on 12 February 2002, the Committee does not consider it necessary to examine the author's claims under article 6 of the Covenant.

6. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

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

**B. Communication No. 1309/2004, *Podolnov v. Russian Federation*
(Decision adopted on 28 July 2009, Ninety-sixth session)***

<i>Submitted by:</i>	Mrs. Yevgeniya Podolnova (not represented by counsel)
<i>Alleged victim:</i>	The author's son, Mr. Mikhail Podolnov
<i>State party:</i>	Russian Federation
<i>Date of communication:</i>	26 July 2004 (initial submission)
<i>Subject matter:</i>	Alleged partiality of the State party's courts
<i>Procedural issues:</i>	Evaluation of facts and evidence; denial of justice
<i>Substantive issue:</i>	Presumption of innocence
<i>Article of the Optional Protocol:</i>	2
<i>Article of the Covenant:</i>	14, paragraph 2

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

Meeting on 28 July 2009,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mrs. Yevgeniya Podolnova, a Russian national born in 1952. She submits the communication on behalf of her son, Mr. Mikhail Podolnov, also a Russian national, born in 1978, who was imprisoned in the Russian Federation at the time of submission of the communication.¹ The author claims that her son is a victim of a violation by the Russian Federation of his rights under article 14, paragraph 2, of the International Covenant on Civil and Political Rights. She is unrepresented. The Optional Protocol entered into force for the Russian Federation on 1 January 1992.

Factual background

2.1 The author's son was a junior sergeant in the Armed Forces of the Russian Federation. In July 2000, he was commissioned to participate in the second military operation in the Chechen Republic. On 16 August 2001, he led a reconnaissance unit charged with blockading the settlement of Zentoroi in the Kurchaloevsky district of the Chechen Republic. The unit's task was to control movements of inhabitants and transport,

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Mohammed Ayat, Mr. Prafullachandra Natwarlal Bhagwati, 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. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

¹ Facility USHCH-382/4, Pugachev, Saratov region.

to prevent the entry into and exit from the settlement of groups of and individual armed insurgents by, inter alia, establishing temporary checkpoints, observation posts and mobile patrols, and by organising ambushes. The unit was ordered to detain suspicious individuals and particularly those found outside the settlement of Zentoroi.

2.2 At around 7 a.m. on 16 August 2001, the author's son decided to detain Mr. Rasul Dzhamalov on suspicion of belonging to an illegal armed group and of keeping under surveillance the reconnaissance unit under the command of the author's son. Mr. Dzhamalov attempted to escape while one of the subordinates of the author's son was untying his hands. As Mr. Dzhamalov did not comply with the summons to stop, the author's son shot Mr. Dzhamalov in the head and killed him.

2.3 On 23 May 2002, the author's son was convicted by the North Caucasus District Military Court under article 105, part 1, of the Criminal Code (premeditated murder), and sentenced to 9 years' imprisonment and stripped of his military rank. As transpires from the copy of the judgment provided by the author, the North Caucasus District Military Court found that Mr. Dzhamalov had been detained by the author's son, assisted by two of his subordinates. The subordinates wrapped Mr. Dzhamalov's jacket around his head and brought him to the unit's military location. Upon the order of the author's son, one of the subordinates then tied Mr. Dzhamalov's hands and took him away to a ravine for interrogation. The court established that Mr. Dzhamalov was only a few meters away from the author's son when he was shot in the head, and that after the initial shot which in fact killed Mr. Dzhamalov, the author's son shot him twice again at close range, once in the head and once in the chest, allegedly because Mr. Dzhamalov was still showing signs of life. Afterwards, the author's son dragged Mr. Dzhamalov's body under a tree, where he shot him once more in the chest at close range, and stabbed him in the back twice with a hunting knife. At around 2 p.m. the same day, the author's son, together with his subordinates, transported Mr. Dzhamalov's body in an armoured carrier and hid it in the bushes a few kilometres away from the crime scene, allegedly to avoid enraging the local population.

2.4 According to the judgment of the North Caucasus District Military Court, Mr. Dzhamalov, who was an inhabitant of the settlement, was 17 years old at the time of his death. The court found that on 18 August 2001, the author's son was summoned to the military prosecutor's office. The next day, he confessed to the killing of Mr. Dzhamalov and informed the authorities of the body's location. During the court hearing, he explained that he had fired at Mr. Dzhamalov "mechanically", to prevent him from escaping, and had no recollection of his subsequent actions. His earlier testimony was based on the description of the facts provided by his subordinate, whose deposition he trusted. The court concluded that the author's son did not have sufficient grounds to open fire on the adolescent Mr. Dzhamalov, as his attempted escape did not pose any real threat to the author's son and his subordinates, and that the escape could have been prevented by means other than the infliction of physical injury. According to the testimony of the author's son and witness statements of his subordinates, Mr. Dzhamalov, while trying to avoid contact with military servicemen, did not resist and did not behave aggressively when detained. Furthermore, he did not have any objects that would pose any threat to the author's son and his subordinates.

2.5 The North Caucasus District Military Court examined available psychological and psychiatric evidence about the author's son's mental state, which indicated that although he was mentally sane, he suffered from battle fatigue and "combatant's accentuation", caused by a lengthy stay in the combat zone in the Chechen Republic, and that he reacted aggressively to any external threat. The court concurred with the expert conclusion that in the circumstances, these factors could have contributed to the negative perception by the author's son of Mr. Dzhamalov, whom he did not perceive to be a civilian person and to the

peculiar behavioural pattern of his own actions and the “lowering of quality in the exercise of duties as the head of the reconnaissance unit”. The court took all these factors into account before finding the author’s son guilty of premeditated murder under article 105, part 1 (6 to 15 years’ imprisonment), rather than of murder under aggravating circumstances under article 105, part 2, of the Criminal Code, as requested by the prosecution (8 to 20 years’ imprisonment, death penalty or life imprisonment). The court also considered as extenuating circumstances the confession of the author’s son and his positive conduct and approach during the second military operation in the Chechen Republic, prior to the incident in question.

2.6 The North Caucasus District Military Court acquitted the author’s son of the charge under article 286, part 3, of the Criminal Code (exceeding one’s authority). It found that, taking into account the military nature of the tasks that the reconnaissance unit had been given, and the short-term duration of Mr. Dzhamalov’s detention prior to his attempted escape, the intention of the author’s son to interrogate Mr. Dzhamalov without reporting to his superior officers beforehand could not be interpreted as clearly exceeding his authority, within the meaning of article 286 of the Criminal Code.

2.7 The cassation appeal of the author’s son to the Military Chamber of the Supreme Court, filed on 13 June 2002, was dismissed on 3 October 2002. The court rejected the request of the author’s son lawyer to modify the legal character of his actions from article 105, part 1, to article 109 of the Criminal Code (causing inadvertent death) and to give him a conditional sentence. The court established that the argument of inadvertence was refuted by the fact that after the first shot in the head, the author’s son, instead of giving medical assistance to Mr. Dzhamalov, fired three more shots on his head and chest and stabbed him twice in the back. The court concluded that the author’s son had a direct criminal intent to kill Mr. Dzhamalov.

2.8 On an unspecified date, the author’s son requested the Presidium of the Supreme Court to initiate the supervisory review procedure in his criminal case. In the appeal, the author’s son disagreed with the legal position taken up by his lawyer, which was to modify the legal character of his actions from article 105, part 1, to article 109 of the Criminal Code, and claimed that there were no constituent elements of *corpus delicti* set out in article 109 of the Criminal Code. He further argued that he had opened fire on Mr. Dzhamalov in full compliance with the requirements of the Charters of the Armed Forces of the Russian Federation (Charters of the Armed Forces) and superior orders, that Mr. Dzhamalov was dead after the first shot and that, consequently his actions could not legally be characterised as murder, since the constituent elements of the *corpus delicti* set out in article 105, part 1, of the Criminal Code were absent in his action. In his opinion, the court’s decision was politically motivated, since the settlement of Zentoroi was an ancestral place of the President of the Chechen Republic. Furthermore, the court’s decision was influenced by the fact that in June 2001, the author’s son was awarded a medal “for military valour” for the conduct of a military operation which had resulted in the capture of a Chechen warlord. After this award, the author’s son had been threatened by the local population on many occasions.

2.9 On 22 April 2003, a judge of the Supreme Court dismissed the author’s son’s request to initiate the supervisory review procedure. He concluded that there was no evidence to support the claim of the author’s son about the existence of superior orders to apply lethal force against unidentified individuals, forming concentration of an illegal armed group in the settlement of Zentoroi, Mr. Dzhamalov’s cooperation with the said group, and the political nature of his conviction.

2.10 On an unspecified date, an application was submitted to the European Court of Human Rights. On 19 December 2003, a panel of three judges of the Court declared the author’s application No. 30876/03 inadmissible, because it did not comply with the

requirements of articles 34 and 35 of the European Convention on Human Rights. The Court found that the final decision for the purposes of article 35, paragraph 1, of the European Convention on Human Rights was taken on 3 October 2002 and that, therefore, the application had been submitted after the expiry of a six-months period.

The complaint

3.1 The author contends that her son was wrongly convicted of premeditated murder, because the State party's courts ignored the fact that he acted in full compliance with the requirements of the Charters of the Armed Forces, which have the status of a federal law and compliance with which is compulsory for all servicemen. She attaches an extract from the Charter of Garrison and Guard Service of the Armed Forces of the Russian Federation (Charter of Garrison and Guard Service) adopted by the Ministry of Defence in 1994. Paragraph 201 thereof sets out that a military serviceman is to "warn detained persons who are attempting to escape with the cry 'Stop or 'I'll shoot', and in the event of non-compliance with this demand use the weapons against them". The author refers to the conclusion of the North Caucasus District Military Court that her son did not have sufficient grounds to open fire on Mr. Dzhamalov, as his attempted escape did not pose a real threat to the author's son and his subordinates, and argues that this conclusion is contrary to the Charter of Garrison and Guard Service and all the circumstances of the case. This Charter, the author contends, makes it compulsory for military servicemen to carry out orders and to execute military tasks given by superior officers. The reconnaissance unit of her son had been in the vicinity of the settlement of Zentaroi for the execution of a specific military task, and the attempted escape of Mr. Dzhamalov, lawfully detained, jeopardised execution of this task.

3.2 The author claims that in order to be convicted of premeditated murder under article 105, part 1, of the Criminal Code, there should be evidence of a hostile relationship or a fight, or motive of revenge on the part of a defendant, and that no such element was established by the State party's courts in her son's case. Moreover, to find a defendant guilty of a specific crime, the court should spell out in its judgment the *actus reus* attributed to the defendant, evidence thereof, as well as the form of *mens rea* and the motive for having committed the crime(s) in question. The author notes that the judgment of the North Caucasus District Military Court did not make reference to any motive for her son to kill Mr. Dzhamalov intentionally. Furthermore, as her son's first shot on the head killed Mr. Dzhamalov, his subsequent actions had no bearing on the legal aspect of the crime attributed to her son. She concludes that her son's right to be presumed innocent under article 14, paragraph 2, of the Covenant, was violated.

The State party's observations on admissibility and merits

4.1 On 17 January 2005, the State party reiterates the facts summarised in paragraphs 2.1 – 2.4, 2.7 and 2.9 above and contends that the conviction of the author's son was lawful, well-founded and justified. It states that his guilt intentionally to kill the adolescent Mr. Dzhamalov was established on the basis of the totality of evidence examined by the court, the credibility of which is not in any way in doubt. The courts fully and thoroughly examined evidence corroborating the motives and the purpose of her son's actions, a form of his *mens rea* and his *modus operandi*, and described their analysis in their judgments.

4.2 The State party submits that the author's son had a direct criminal intent to deprive Mr. Dzhamalov of his life. The motive for his actions was to prevent Mr. Dzhamalov from leaving the detention site. Mr. Dzhamalov's detention, however, was unlawful, and justified his subsequent actions. Furthermore, it was ascertained that Mr. Dzhamalov was a civilian, who herded cattle on the day of his death. The author's son did not have any ground to

detain Mr. Dzhamalov, to prevent him from leaving the detention site, or to apply the lethal force against him.

4.3 The State party refutes the author's claim that her son acted in full compliance with the requirements of the Charters of the Armed Forces. It refers to article 11 of the Charter of Internal Service of the Armed Forces of the Russian Federation (Charter of Internal Service), according to which military servicemen, as a last resort, may use weapons for strictly regulated purposes: (a) for the protection of military servicemen and civilians from the attack, threatening their life and health, if there are no other means for their protection; (b) the detention of a person who committed a crime or was caught committing a grave and dangerous crime, if he offers armed resistance; (c) the detention of an armed person if he refuses to comply with a lawful demand to surrender the weapon and there are no other means and methods to quell the resistance, to detain this person or to seize the weapon.

4.4 Under article 12 of the Charter of Internal Service, the use of a weapon must be preceded by a warning about the intent to use them and, if the weapons are used by military servicemen, they should take all possible measures to ensure the security of others and when necessary, provide medical assistance to victims. It is prohibited to use weapons against women and minors. The State party argues that by opening fire on Mr. Dzhamalov, the author's son also breached the requirements of the Charter of Internal Service.

4.5 Lastly, the State party challenges the admissibility of the communication on the basis of article 5, paragraph 2(b), of the Optional Protocol. It submits that neither the author herself nor her son availed themselves of a remedy provided by article 406, part 4, of the Criminal Procedure Code, by requesting the Chairperson of the Supreme Court or his deputies to initiate the supervisory review procedure in the criminal case of Mr. Podolnov.

Author's comments on the State party's observations

5.1 In her comments dated 16 February 2005, the author contends that the arguments advanced by the State party are not borne out by the circumstances of the case. She reiterates that the judgment in her son's case does not refer either to the motives and purpose of her son's actions, the form of *mens rea* or *modus operandi* on his part. She adds that the State party does not explain what other means could have been used by her son to prevent Mr. Dzhamalov's escape, especially in view of the secretive nature of the military task given to her son's reconnaissance unit. It was exactly for this reason that he was issued a weapon with a silencer.

5.2 The author refutes the State party's claim that the motives for her son's actions were to prevent Mr. Dzhamalov from leaving the detention site and that his detention was unlawful. She reiterates that Mr. Dzhamalov was detained in pursuance of the unit's military task and superior orders. His successful escape would have revealed the location of the reconnaissance unit and would have jeopardised the execution of the military task, potentially resulting in the death of military servicemen. Although there is no reference in her son's judgment to the Charters of the Armed Forces with which he complied, the author submits that a loud warning shot required by one of the Charters would also have revealed the location of the reconnaissance unit. Moreover, she adds that, at the time of his detention, Mr. Dzhamalov did not have any identification to prove that he was then 17 years and 6 months old, and there was no evidence to suggest that her son was aware that Mr. Dzhamalov was a minor.

5.3 The author challenges the State party's claim that domestic remedies have not been exhausted and submits that she, her son and his lawyer had on numerous occasions requested the Chairperson of the Supreme Court to initiate the supervisory review procedure. She submits a copy of such requests dated 28 December 2002, 10 January 2003,

30 December 2003, 15 January 2004 and 9 April 2004, all addressed to the Chairperson of the Supreme Court. All these requests were dismissed.

Supplementary submissions by State party

6. On 27 July 2005, the State party withdrew its objection to the admissibility of the communication for non-exhaustion of domestic remedies. On the merits, it refutes the author's argument that her son's actions were determined exclusively by the military task to blockade the settlement of Zentoroi and that there were no other motives for her son to use violence against Mr. Dzhamalov. Rather, the killing of Mr. Dzhamalov and subsequent concealment of his body by Mr. Podolnov did not derive either from the military task or the ensuing circumstances. The direct intent to deprive Mr. Dzhamalov of his life is confirmed by the fact that the author's son fired further shots and stabbed Mr. Dzhamalov in the back, when he no longer posed a threat to the military servicemen. The North Caucasus District Military Court thoroughly examined the motives for her son's actions and concurred with the expert conclusions that her son suffered from battle fatigue and "combatant's accentuation".

Issues and proceedings before the Committee

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 As required by article 5, paragraph 2(a), of the Optional Protocol, the Committee has ascertained that a similar complaint submitted by the author was declared inadmissible by a panel of three judges of the European Court for Human Rights on 19 December 2003 (application No. 30876/03), since it had been submitted after the expiry of a six-months period. Article 5, paragraph 2(a), however, does not preclude the Committee from examining the present communication as the issue is no longer being examined by the European Court and the State party has formulated no reservation under article 5, paragraph 2(a), of the Optional Protocol.

7.3 With respect to the requirement of exhaustion of domestic remedies under article 5, paragraph 2(b), of the Optional Protocol, the Committee notes that the State party has withdrawn its claim that there are domestic remedies that could still have been exhausted by the author.

7.4 As to the author's claim that her son's right to the presumption of innocence was violated, because the State party's courts ignored the fact that he acted in full compliance with the requirements of the Charters of the Armed Forces and that his actions were determined by the specific military task given to his unit by superiors, the Committee notes that these allegations relate primarily to the evaluation of facts and evidence in the case. The Committee reiterates its jurisprudence² that it is generally for the courts of States parties to evaluate facts and evidence in a particular case, unless it can be demonstrated that the evaluation was clearly arbitrary or amounted to a denial of justice. In this respect, the Committee notes that the State party's courts and authorities in fact addressed all these arguments of the author and concluded that the *modus operandi* of her son did not derive either from the military task of his reconnaissance unit or the ensuing circumstances of its activities in the vicinity of the Zentoroi settlement.

² Communication No. 541/1993, *Errol Simms v. Jamaica*, inadmissibility decision of 3 April 1995, para. 6.2.

7.5 Consequently, on the basis of the material before it, the Committee concludes that the author has failed to substantiate sufficiently for purposes of admissibility that the decisions of the State party's courts were arbitrary or amounted to a denial of justice. For these reasons, the Committee concludes that this claim is inadmissible under article 2 of the Optional Protocol.

8. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That the present decision shall be communicated to the State party and to the author.

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

**C. Communication No. 1455/2006 *Kaur v. Canada*
(Decision adopted on 30 October 2008, Ninety-fourth session)***

<i>Submitted by:</i>	Ms. Surinder Kaur (represented by counsel, Mr. Stewart Istvanffy)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Canada
<i>Date of communication:</i>	24 February 2006 (initial submission)
<i>Subject matter:</i>	Deportation to India following denial of asylum claim
<i>Procedural issue:</i>	Inadmissibility
<i>Substantive issue:</i>	Effective remedy, right to life, torture or cruel inhuman or degrading treatment or punishment, "suit at law"
<i>Articles of the Covenant:</i>	2, 6, 7, and 14
<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 30 October 2008,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Ms. Surinder Kaur, an Indian citizen who is of Sikh origin, who voluntarily returned to India from Canada in December 2007. She claims to be a victim of violations by the State party of article 6; article 7; article 2; and article 14, of the International Covenant on Civil and Political Rights. She is represented by counsel; Mr. Stewart Istvanffy.

1.2 On 27 February 2006, the Rapporteur for New Communications and Interim Measures requested the State party not to deport the author to India while her case is under consideration by the Committee, in accordance with rule 92 of the Committee's rules of procedures. On 21 March 2006, the State party acceded to the request but requested the Rapporteur to lift the interim measures. On 11 May 2006, having reviewed the State party's request and author's comments thereon, dated 31 March 2006, the Rapporteur denied the request, considering that the author had made out a prima facie case.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Ms. Helen Keller, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

Facts as presented by the author

2.1 The author states that she was raped and severely abused by the police of the Indian province of the Punjab, while they were conducting an investigation into the activities of militants from the pro-Sikh Khalistani movement. As a result, she suffers from post-traumatic stress disorder. In the early 1990s, her husband was detained and tortured by the police because of his suspected association with the same movement. In early 2000, he disappeared after having been tortured by the police. To escape police raids, the author went to the United States, where she applied for refugee status. She was refused and was deported back to India where she was raped again. In 2003, following further abuse by a police inspector in her area and threats made against her son, she came to Canada. Her son remained in India.

2.2 In late 2003, the author applied for refugee status in Canada. On 24 April 2004, the Immigration and Refugee Board (“the Board”) determined that she was not a refugee pursuant to the terms of the Refugee Convention due to her lack of credibility. On 3 August 2005, a request for leave to apply for judicial review of this decision was dismissed. On 24 January 2004, applications for a Pre-Removal Risk Assessment (“PRRA”) and a Request for Exemption from Immigrant Visa Requirements on humanitarian and compassionate grounds (H&C application) were denied. On 20 February 2006, she filed an application for leave to apply for judicial review of the negative PRRA decision as well as a stay of her removal, with the Federal Court of Canada. On 24 February 2006, the request for a stay of deportation was denied, and on 12 April 2006, judicial review was denied. According to the author, judicial review is not an appeal on the merits, but rather a narrow review for gross errors of law and has no suspensive effect.

2.3 The author alleges that most of the evidence submitted to the Immigration and Refugee Board was not considered by the decision-maker of the PRRA, due to section 113 of the Immigration and Refugee Protection Act, which states that, “only new evidence that arose after [the applicant’s] rejection or was not reasonably available or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of rejection ...”, will be considered. Thus, the PRRA officer rejected evidence that could have been available earlier including: a further affidavit from her “sarpanch” in India, an affidavit from her son in November 2005, and a letter of support from Khalra Mission Committee of 10 October 2004. The author also refers to a medical certificate of 24 February 2004 which was rejected by the Board despite the fact that it attests to the author’s claim that she was raped. The author includes in her submission to the Committee, the latest report by the organization ENSAAF, which is alleged to testify to a current wave of repression in the Punjab, and of a real risk of torture. She further adds that impunity for Sikh torture victims in India is a very serious problem.

The complaint

3.1 The author claims to have exhausted all domestic remedies available to her which would have the effect of preventing her deportation. She claims a violation by Canada of articles 6 and 7 if she is deported, as there is a severe risk of her being “arrested, detained, beaten, tortured or executed” at the hands of the Indian police because of her religious origin and her real or imputed political beliefs. She also claims that she will suffer from emotional trauma if returned to India.

3.2 The author also claims a violation of articles 2 and 14 of the Covenant, as the PRRA procedure and the humanitarian review procedures do not fulfil the State party’s obligation to ensure that she had an effective remedy to appeal the deportation decision. She makes general claims about the procedures, including a claim that the risk assessment is undertaken by immigration agents who have no competence in matters of international

human rights or in legal matters generally, and who are not impartial, independent or competent.

The State party's submission on admissibility and merits

4.1 On 25 August 2006, the State party provided its submission on the admissibility and merits of the communication. It sets out the facts of the case and provides the detailed reasoning of the Board, the PRRA officer, and the officer who examined the author's H&C application. The Board found, *inter alia*, that the medical certificate of 24 February 2004 had low probative value, as it did not include a telephone number or the registration number of the doctor providing the certificate, as required by the Medical Council of India. A document provided by the author to explain that the phone number in question is used within the hospital was found to lack credibility, as it was dated before the hearing and before the issue was raised as a problem at the hearing. The PRRA officer found, *inter alia*, that the psychological evaluation, which concluded that the author was suffering from post-traumatic stress disorder, was similarly given low probative value, as it was provided by a psychotherapist with a Master's degree in education, a professional and academic background not recognized as competent to deliver a psychological diagnosis.

4.2 The State party contests the admissibility of the communication. It submits that the author has failed to exhaust domestic remedies with respect to her claims under articles 6 and 7, as she did not apply for judicial review of the decision on her H&C application. It contests her argument that such a review would be ineffective, given that it is based on the same facts as the PRRA, as both procedures take different considerations into account. While the PRRA considers risk upon return, the H&C procedure considers whether an applicant would suffer unusual and undeserved or disproportionate hardship if he or she had to return to his or her country of origin. The assessment looks at a variety of factors including establishment in Canada, integration into the community and family relationships. Although it would not stay the author's deportation, a positive finding would result in the issuance of a permanent resident visa and allow the author to remain in/or return to Canada. The State party refers to the Committee's own jurisprudence as well as that of the Committee against Torture, to demonstrate that judicial review is widely and consistently accepted as an effective remedy that must be exhausted for the purpose of admissibility.¹ In particular, it refers to the fact that the Committee against Torture has recently noted the effectiveness of judicial review of the H&C decisions by the Federal Court to ensure the fairness of the refugee determination system in Canada.²

4.3 The State party submits that the author has failed to substantiate her claims under articles 6 and 7. The lack of credibility of the author's allegations, and the absence of a credible connection between her own personal risk of death and/or torture and the objective evidence of Sikhs and militants and their supporters who are subjected to torture or ill-treatment in the Punjab, leads to the conclusion that the author has failed to establish a risk beyond a mere "theory or suspicion" as required by the Committee against Torture. Documentary evidence indicates that presently torture and ill-treatment are only targeted at

¹ Communications No. 654/1995, *Adu v. Canada*, Views adopted on 18 July 1997; No. 603/1994, *Badu v. Canada*, Views adopted on 18 July 1997; No. 604/1994, *Nartey v. Canada*, Views adopted on 17 July 1997; No. 939/2000, *Dupuy v. Canada*, Views adopted on 18 March 2005. The State party also refers to the jurisprudence of the Committee against Torture, as follows: communications No. 66/1997, *P.S.S. v. Canada*, Views adopted on 13 November 1998; and No. 86/1997, *P.S. v. Canada*, Views adopted on 18 November 1999.

² Communications No. 273/2005, *Aung v. Canada*, Views adopted on 15 May 2006, para. 6.3; and No. 183/2001, *B.S.S. v. Canada*, Views adopted on 12 May 2004, para. 11.6.

high-profile militants, and that Sikhs are no longer targeted on the basis of perceived political opinions.

4.4 The State party refers to the assessment by the domestic tribunals, which concluded that the author would not be personally at risk. It argues that it is not credible that she would be suspected of involvement in a terrorist organization that persecutes Sikhs (Lashkar-E-Toiba). Although, she claims to the Committee that she was alleged to have been suspected of involvement in a different organization (the pro-Sikh Khalistani movement), the State party submits that this is self-serving and lacks credibility. Moreover, the Board and PRRA officer relied on objective evidence to find that Sikhs are currently not a persecuted group in India and that the current Prime Minister is of Sikh background, a fact inconsistent with any allegations of systematic persecution of Sikhs. Even if the State party were to accept that the author was tortured in the past, it does not follow that she would be at risk of torture now. Moreover, she has not established that she does not have an internal flight alternative in India.

4.5 As to her allegations that she would suffer from severe emotional trauma, it submits that the author has not substantiated this claim even on a prima facie basis and notes that she relies upon the same evidence that has already been before the domestic tribunals: documents which have already been carefully assessed and found not to be credible. The psychological evaluation dated 24 November 2004, was found to lack credibility by domestic tribunals due to the credentials of the assessor. In addition, the credibility of the document is called into question, as in her PIF (initial statement to the Board) the author alleges that her father had died in 2001 but in her interview with the psychotherapist she alleged that, “she suffers from the knowledge of arrests and torture her father experienced and the uncertainty about his fate and possible death”. The other documents presented, including a letter from a social worker and a doctor at the CLSC, were all assessed by the officers of the Board, the H&C and PRRA officers, and found to be of limited probative value as they were not corroborated by objective evidence. Moreover, although the documents note that the author suffered from psychological and stress-related problems, they provide no evidence with respect to the actual psychological impact that return to India would have on the author. Even if the author’s mental health is aggravated through deportation, according to the jurisprudence of the Committee against Torture, this is generally insufficient, in the absence of other factors, to amount to cruel, inhuman or degrading treatment.³

4.6 The State party submits that article 2 does not guarantee a separate right to individuals but describes the nature and scope of the obligations of State parties. It refers to the Committee’s jurisprudence that under article 2, the right to a remedy arises only after a violation of a right has been established and argues that consequently this claim is inadmissible.⁴ Alternatively, the author has failed to substantiate her allegations under this provision, given the broad range of effective remedies available in Canada. The State party argues that refugee and protection determination proceedings do not fall within the terms of article 14. These proceedings are in the nature of public law, the fairness of which is guaranteed by article 13.⁵ The State party accordingly concludes that this claim is

³ *B.S.S. v. Canada* (note 2 above).

⁴ See communication No.275/1988, *S.E. v. Argentina*, inadmissibility decision of 26 March 1990, para. 5.3.

⁵ The State party refers to the decision of the European Court which considered that the decision whether or not to authorise an alien to stay in a country of which he is not a national does not entail any determination of his civil rights or obligations or of any criminal charge against him within the meaning of article 6, paragraph 1, of the European Convention. *Maaouia v. France*, Application No. 39652/98 (5 October 2000).

inadmissible *ratione materiae* under the Covenant. In the alternative, the State party contends that the immigration proceedings satisfy the guarantees of article 14. The author had her case heard by an independent tribunal, was represented by counsel, had access to judicial review of the negative refugee determination and had access to both the PRRA and H&C processes, including access to apply for leave to judicially review those decisions.

4.7 The State party argues that it is not within the scope of review of the Committee to consider the Canadian refugee determination system in general, but only to examine whether in the present case it complied with its obligations under the Covenant. It submits that the PRRA procedure is an effective domestic mechanism for the protection of those who may be at risk upon removal. As confirmed by the Federal Court in its denial of the author's application for a stay, the decision states that "the PRRA officer properly considered and dealt with the evidence before him in accordance with his statutory obligation. Thus, rejection of evidence that was not "new" was entirely proper and reasonable." As to the author's argument that the PRRA officer and the Federal Court "ignored" evidence, the author herself admits having failed to file the required materials within the requisite timeframe and, according to the Committee's jurisprudence, an author must exercise due diligence in the pursuit of available remedies. The State party sets out in detail the reasons why each piece of evidence was considered but subsequently rejected as invalid by the PRRA. The State party submits that the author's broad allegations against the PRRA are entirely unsubstantiated and the fact that there is a low acceptance rate at the PRRA stage reflects the fact that most persons in need of protection have already received it from the Board.

4.8 Finally, the State party submits that the Committee should not substitute its own findings on whether the author would reasonably be at risk of treatment in violation of the Covenant upon return to India, since the national proceedings disclose no manifest error or unreasonableness and are tainted by abuse of process, bias or serious irregularities. It is for the national courts of the States parties to evaluate the facts and evidence in a particular case. The Committee should refrain from becoming a "fourth instance" tribunal competent to re-evaluate findings of fact or review the application of domestic legislation.

Author's comments on the State party's submission

5.1 On 31 March 2006, 2 May 2006, and 24 March 2007, the author reiterates the arguments made in her initial submission. She clarifies that she will be persecuted on account of the alleged links her husband had with military groups, the fact that he was tortured, that she too suffered past abuse, and because she is a Sikh. On judicial review, she argues that all of the issues raised by that submission were raised and argued before the Court in the request for a stay and the request for judicial review of the refusal of refugee status before the Board. The Ministry of Justice constantly pleads before the Federal Court that this H&C type of decision is discretionary and that the Court should not intervene. The author submits that the Government should not so argue in the domestic courts and then argue before the international forum that they are effective recourses.

5.2 The author submits that the State party's submission largely repeats the decisions of the Board and PRRA officer and provides no serious analysis of whether these are well founded. She provides responses in point form to the findings of the Board and PRRA officer. As an example, with respect to the argument on the low probative value of the confidential psychological report, the author submits that a simple telephone call to the number in question would have established that it is a number at the hospital. As to the qualifications of the psychotherapist who did the psychological report, the author submits that the same individual has produced many reports before the Board and her credentials are clearly established. The author denies, as argued by the PRRA officer and the State

party, that she had said that her husband and father were members or supporters of Lash-E-Toiba, an extremist Muslim group.

5.3 The author denies there is a reasonable internal flight alternative and argues that she has provided sufficient evidence to demonstrate otherwise. She provides more information and documentation on the general human rights situation in India, to demonstrate that there is evidence that torture with impunity, as well as extrajudicial executions are still continuing. She also provides reports about the alleged problems in the decision-making process of the Board.

Author's supplementary submission and the State party's response thereon

6.1 On 2 April 2008, author's counsel informed the Committee that the author had returned voluntarily to India during the month of December. She had informed her counsel that she could not continue living without her husband or son and that she felt isolated in Canada. She also informed him that her brother-in-law was going to get married at the end of December in the Punjab and that all of her family and closest relatives would be present. Her counsel helped her obtain the necessary documents. During the month of January counsel learnt that she had been detained upon arrival and was taken to Tihar Fort in Delhi and was very badly treated but does not have any details. She was freed on bail after a period of 20/30 days and there is allegedly a criminal trial pending against her for using false documents to leave India. Counsel alleges that people close to the author believe that something terrible happened to her in detention but he has no details. He spoke to the author's husband who has expressed the wish to continue with this communication and ask the Committee not to close the case or take any decision without having the results of an investigation, counsel intends to undertake with the Punjab Human Rights Organization.

6.2 On 21 May 2008, the State party responded that the author's voluntarily return to India is indicative of an absence of subjective fear of persecution or death. If her fear of return had been genuine, she would not have voluntarily returned to India to attend her brother-in-law's wedding. The fact that she chose to go back despite having the benefit of assistance from experienced legal counsel, indeed with assistance of her counsel, is strongly indicative of her lack of fear of mistreatment in India. As acknowledged by counsel, there is no evidence that the author had been detained or treated poorly. Counsel is only able to recount third party anecdotes. He does not appear to have spoken to the author herself, despite the fact that her friends from Canada have been allegedly able to do so, as he provides no first hand accounts of any such conversation.

6.3 According to the State party, there can be no credible risk of mistreatment to the author in India while her husband, whose involvement in a terrorist group was the reason the author herself feared persecution, is apparently alive, contactable by phone and able to speak freely with author's counsel. Indeed, in 2006 the author alleged that her husband had been disappeared and was possibly murdered by the police during the police torture since 2000. The fact that this is the first time since 2006 that the author mentions her husband's status is further evidence of her lack of credibility. The State party notes that the author's statement about a criminal charge relating to the use of false documents is also not credible as the author herself previously acknowledged that she left India on a valid passport. The State party submits that the author's request without evidence or clear understanding of what if any investigation will be undertaken is an attempt to delay consideration of the author's communication indefinitely.

Issues and proceedings before the Committee

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.

7.2 The Committee notes that the State party challenges the admissibility of the entire communication. With respect to the author's claims under articles 6 and 7, the Committee recalls that States parties are under an obligation not to expose individuals to a real risk of being killed or subjected to torture or cruel, inhuman or degrading treatment or punishment upon entering in another country by way of their extradition, expulsion or refoulement.⁶ It also notes that the Refugee Division of the Immigration and Refugee Board, after a thorough examination, rejected the author's asylum application on the basis of her lack of credibility. The author's application for leave to apply for judicial review of this decision to the Federal Court was dismissed. The Pre-Removal Risk Assessment Officer found that there was no serious reason to believe that her life would be at risk or that she would be the victim of cruel and unusual punishment or treatment and a judicial review of this officer's decision was rejected by the Federal Court. Finally, the author's application for permanent residence in the State party on humanitarian and compassionate grounds (H&C) was rejected as it could not be said that State protection for the author was inadequate in India.

7.3 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 the evaluation was clearly arbitrary or amounted to a denial of justice.⁷ It also recalls that the same jurisprudence has been applied to removal proceedings.⁸ The material before the Committee does not show that the proceedings before the authorities in the State party suffered from any such defects. Accordingly, the Committee considers that the author has failed to substantiate her claims under articles 6 and 7, for purposes of admissibility, and it concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

7.4 As to the author's allegation under article 14 that she was not afforded an effective remedy, the Committee has noted the State party's argument that deportation proceedings do not involve either "the determination of any criminal charge" or "rights and obligations in a suit at law". The Committee observes that the author has not been charged or convicted for any crime in the State party and that her deportation is not by way of sanction imposed as a result of a criminal proceeding. The Committee accordingly concludes that the author's refugee determination proceedings do not constitute determination of a "criminal charge" within the meaning of article 14.

7.5 The Committee recalls that the concept of a "suit at law" under article 14, paragraph 1, of the Covenant is based on the nature of the right in question rather than on the status of one of the parties.⁹ In the present case, the proceedings relate to the author's right to receive protection in the State party's territory. The Committee recalls its jurisprudence¹⁰ that

⁶ See communication No. 1302/2004, *Khan v. Canada*, inadmissibility decision of 25 July 2006, paragraph 5.4.

⁷ See for example communication No. 541/1993, *Errol Simms v. Jamaica*, inadmissibility decision adopted on 3 April 1995, paragraph 6.2.

⁸ Communication No. 1234/2003, *P.K. v. Canada*, Inadmissibility decision adopted on 20 March 2007.

⁹ Communications No. 112/1981, *Y.L. v. Canada*, inadmissibility decision adopted on 8 April 1986, para. 9.1 and 9.2; No. 441/1990, *Casanovas v. France*, Views adopted on 19 July 1994, para. 5.2; and No. 1030/2001, *Dimitrov v. Bulgaria*, decision on admissibility adopted on 28 October 2005, para. 8.3.

¹⁰ *P.K. v. Canada* (note 8 above).

proceedings relating to an alien's expulsion, the guarantees in regard to which are governed by article 13 of the Covenant, do not also fall within the ambit of a determination of "rights and obligations in a suit at law", within the meaning of article 14, paragraph 1. It concludes that the deportation proceedings of the author do not fall within the scope of article 14, paragraph 1, and are inadmissible *ratione materiae* pursuant to article 3 of the Optional Protocol.

7.6 With regard to the author's claims under article 2 of the Covenant, the Committee recalls that the provisions of article 2 of the Covenant, which lay down general obligations for State parties, cannot, by themselves and standing alone give rise to a claim in a communication under the Optional Protocol. The Committee considers that the author's claim to this effect cannot be sustained, and that accordingly it is inadmissible under article 2 of the Optional Protocol.

8. The Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author, through her counsel.

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

**D. Communication No. 1489/2006, *Rodríguez Rodríguez v. Spain*
(Decision adopted on 30 October 2008, Ninety-fourth session)***

<i>Submitted by:</i>	José Rodríguez Rodríguez (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	26 March 2006 (initial submission)
<i>Subject matter:</i>	Extent of the review of criminal case against complainant on appeal by Spanish courts
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; failure to substantiate claims
<i>Substantive issues:</i>	Right to have the conviction and sentence reviewed by a higher tribunal according to law
<i>Article of the Covenant:</i>	14, paragraph 5
<i>Articles of the Optional Protocol:</i>	2; 5, paragraph 2 (b)
<i>The Human Rights Committee</i> , established under article 28 of the International Covenant on Civil and Political Rights,	
<i>Meeting on 30 October 2008,</i>	
<i>Adopts the following:</i>	

Decision on admissibility

1.1 The author of the communication, dated 26 March 2006, is José Rodríguez Rodríguez, a Spanish national born in 1948. He claims to be a victim of a violation by Spain of article 14, paragraph 5, of the Covenant. The Optional Protocol entered into force for Spain on 25 April 1985. The author is not represented by counsel.

1.2 On 9 November 2006, the Rapporteur on New Communications and Interim Measures decided that the admissibility of the communication should be considered separately from the merits.

Factual background

2.1 On the basis of information obtained by telephone tapping, on 23 November 2000, the Central Investigating Court No. 5 opened a criminal investigation against the author and

* The following members of the Committee took part in the consideration of the communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanut, Mr. Maurice Glèlè-Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Ms. Helen Keller, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

two other persons allegedly involved in an international drug trafficking operation. Following the investigation, the case was referred to the fourth section of the Criminal Division of the National Court (*Audiencia Nacional*), where a trial was held. On 21 May 2003, the National Court sentenced the author and the two other persons to 20 years' imprisonment and ordered the payment of a fine of 18,783,775.25 euros and legal costs, finding them guilty of an offence against public health (trafficking in cocaine), aggravated by the large quantity of drugs confiscated (595 kg), their membership of a criminal organization and the extremely serious nature of the offence (Criminal Code, art. 370).¹

2.2 On 30 October 2003, the author lodged an appeal in cassation with the Second Chamber of the Supreme Court, on 11 grounds. These included: dismissal of evidence; the right to have his conviction and sentence subjected to a full and effective review by a higher tribunal; the right to confidentiality of communications; and the improper application of article 370 of the Criminal Code.

2.3 In its judgement of 8 July 2004, the Supreme Court, having examined each of the grounds of the appeal in cassation, partially upheld the appeal insofar as the improper application of article 370 of the Criminal Code was concerned and consequently issued a new ruling maintaining the fine but reducing the sentence to 12 years' imprisonment. With regard to the complaint that the right to have the sentence and conviction reviewed by a higher tribunal had been violated, the Court stated:

“Article 14.5 of the International Covenant on Civil and Political Rights does not refer explicitly to a second hearing, but rather to the right of every person convicted of an offence to have his or her conviction and sentence reviewed by a higher tribunal, according to law, which allows some leeway in the application of the provision in different legal systems ... nor should it be understood as meaning that the provision obliges States to provide for a second hearing with a full retrial, thus implying not a review but new proceedings, with all the difficulties that this entails. It is for this reason that referring the conviction and sentence to a higher court cannot alter the nature of individual testimony, whose evaluation is based on the assumption of immediacy.

“...[t]he right to an appeal in cassation must be viewed in the manner that is most favourable to the accused. One consequence of this requirement that the interpretation most favourable to the person on trial must be adopted has been that Spanish jurisprudence has been transformed by these decisions and has been broadened to an extraordinary degree insofar as the traditional limits of cassation recognized by the Supreme Court prior to the entry into force of the Constitution and

¹ *Article 370*: “The penalty imposed shall be one or two degrees higher than the one established in article 368 when:

1. Minors under the age of 18 or persons with mental disabilities are used to commit these offences;
2. The person sentenced is a head, administrator or employee of an organization described in article 369, paragraphs 1 (2a) and 1 (3a);
3. The acts described in article 368 are of an extremely grave nature.

Cases of an extremely grave nature are cases in which the quantity of the substances referred to in article 368 is considerably greater than what is deemed significant, or in which vessels or aircraft have been used for transport, or the acts indicated have been carried out by simulating international commercial transactions, or involve international networks dedicated to such activities, or when three or more of the circumstances set out in article 369, paragraph 1, are present.

In the cases set out in paragraphs 2 and 3 above, those found guilty shall also be liable to a fine in an amount three times the value of the drugs that are the subject of the offence.

the notion of matters of law that can be appealed are concerned. This has been accompanied by a corresponding reduction in questions of fact excluded from the remedy of cassation to those that would require the resubmission of evidence in order to permit its re-evaluation. Thus a decision on evidence can be corrected in appeal when the court that heard the case departed from the rules of logic, the axioms of experience or scientific knowledge.”

2.4 On 19 January 2005, the author submitted an application for *amparo* with the Constitutional Court, alleging, inter alia, violations of his right to a trial with all guarantees owing to a violation of the right to a second hearing set out in article 14, paragraph 5, of the Covenant, of the presumption of innocence and the confidentiality of telephone communications. In a decision dated 16 January 2006, the Constitutional Court rejected the application, maintaining, inter alia, that the Supreme Court had reviewed his conviction and sentence in accordance with the requirements of article 14, paragraph 5, of the Covenant.

Complaint

3. The author alleges that there is no higher court in the State party that can make a full and impartial assessment of the evidence and questions of fact raised during his initial hearing in the National Court (*Audiencia Nacional*). The remedy of appeal in cassation before the Supreme Court is only a partial review that does not meet the requirements of article 14, paragraph 5, of the Covenant, and thus he has been deprived of his right to have his conviction and sentence reviewed in full by a higher court.

State party’s observations on admissibility

4.1 In its observations dated 6 October 2006, the State party argues that the author did not raise in either the Supreme Court or the Constitutional Court the question of the alleged limited nature of the review through the remedy of cassation. Consequently, it maintains that the communication should be considered inadmissible on the basis of a failure to exhaust domestic remedies.

4.2 The State party argues that, according to the jurisprudence of the Supreme Court,² appeal in cassation is not limited to a review of the applicable law. The State party refers also to decisions of the Committee³ in which the adequacy of the remedy of appeal in cassation in the light of article 14, paragraph 5, of the Covenant is acknowledged.

4.3 The State party claims that the task at hand is not to formulate general and abstract opinions on its system of remedies but to determine whether, in the present case, the right to have one’s conviction and sentence reviewed has been respected. It goes on to say that the communication does not specify which points or which evidence ought to have been reviewed but simply that a review ought to have taken place. The State party points out that, in the present case, the Supreme Court did review the sentence that had been appealed and modified the penalty imposed. On the basis of the foregoing, the State party concludes that the communication is clearly unfounded and constitutes an improper use of the Covenant, and should therefore be declared inadmissible under article 3 of the Optional Protocol.

² The State party refers to the decision of 29 July 2002 in the *Banesto* case.

³ These include communications No. 1356/2005, *Parra Corral v. Spain*, decision on admissibility of 29 March 2005, and No. 1389/2005, *Bertelli Galvez v. Spain*, decision on admissibility of 25 July 2005.

Author's comments

5.1 On 23 January 2008, the author submitted his comments on the State party's observations on admissibility. The author claims that he raised the issue of a lack of a full review of his conviction and sentence before the State party's courts. In this connection, the author states that this complaint was the second ground set out in his application for an appeal in cassation before the Supreme Court, in which he cited the lack of a full and effective review by that Court, which could not reassess the evidence but could only consider the formal and legal aspects of his conviction. As for the remedy of *amparo* before the Constitutional Court, the lack of defence resulting from this absence of a review was cited as the first ground of the application. In the light of the foregoing, the author alleges that he has exhausted domestic remedies, and that it is for this reason that the violation of his right to a full review of his conviction was raised in every court to which he applied.

5.2 The author notes that the review of his conviction by the Supreme Court was limited to questions of form and legality. The modification of his sentence by the Supreme Court is a question of legality relating to the remedy of appeal in cassation that poses no impediment to his complaint relating to the absence of a second hearing.

Issues and proceedings before the Committee

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

6.2 The Committee has ascertained, as required by article 5, paragraph 2 (b), 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 takes note of the State party's observations that the author did not exhaust all available domestic remedies. The Committee observes, however, that the author filed a complaint of violation of his right to a second hearing with both the Supreme Court and the Constitutional Court, and that both courts ruled against him.⁴ The Committee therefore concludes that domestic remedies have been exhausted.

6.4 With regard to the State party's observation that the communication should be declared inadmissible due to lack of substantiation, the Committee notes that the decision by the Supreme Court makes it clear that the Court thoroughly examined each of the grounds for appeal adduced by the author, and that the Court considered that the author's claim regarding the improper application of article 370 of the Criminal Code was valid and accordingly reduced the penalty imposed on him from 20 years' imprisonment to 12 years. Consequently, the Committee is of the view that the complaint relating to article 14, paragraph 5, is not sufficiently founded for purposes of admissibility and therefore determines that it is inadmissible under article 2 of the Optional Protocol.⁵

7. The Committee therefore decides:

(a) That the communication is inadmissible in the light of article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

⁴ See paragraphs 2.3 and 2.4.

⁵ See communications No. 1375/2005, *Subero Beisti v. Spain*, decision of 1 April 2008, paragraph 6.4; No. 1399/2005, *Cuartero Casado v. Spain*, decision of 25 July 2005, paragraph 4.4; and No. 1059/2002, *Carvalho Villar v. Spain*, decision of 28 October 2005, paragraph 9.5.

[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.]

**E. Communication No. 1490/2006, *Pindado Martínez v. Spain*
(Decision adopted on 30 October 2008, Ninety-fourth session)***

<i>Submitted by:</i>	José Ramón Pindado Martínez (represented by counsel, Manuel Cobo del Rosal)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	6 April 2006 (initial submission)
<i>Subject matter:</i>	Alleged violations of the rights to presumption of innocence; to be tried by an impartial tribunal; and to have the sentence and conviction reviewed by a higher tribunal
<i>Procedural issues:</i>	The case has been submitted to another procedure of international investigation or settlement; insufficient substantiation
<i>Substantive issues:</i>	Torture and cruel, inhuman or degrading treatment or punishment; right to be tried by a competent, independent, impartial tribunal; presumption of innocence; right to have the sentence and conviction reviewed by a higher tribunal
<i>Articles of the Covenant:</i>	7; 14, paragraphs 1, 2 and 5
<i>Articles of the Optional Protocol:</i>	2; 5, paragraph 2 (a)
<i>The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,</i>	
<i>Meeting on 30 October 2008,</i>	
<i>Adopts the following:</i>	

Decision on admissibility

1.1 The author of the communication, dated 6 April 2006, is José Ramón Pindado Martínez, a Spanish national born in 1955. The author claims to be a victim of a violation by Spain of article 7 and article 14, paragraphs 1, 2 and 5, of the Covenant. The Optional Protocol entered into force for Spain on 25 April 1985. The author is represented by counsel, Manuel Cobo del Rosal.

* The following members of the Committee took part in the consideration of the communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanut, Mr. Maurice Glèlè-Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Ms. Helen Keller, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

1.2 On 31 October 2006, the Rapporteur on New Communications and Interim Measures decided that the admissibility of the communication should be considered separately from the merits.

Facts of the case

2.1 On 23 November 1990, the author was appointed head of the Spanish Civil Guard's Central Drugs Squad (UCIFA). In 1991, as a result of a criminal complaint made by a member of the Civil Guard, Central Investigating Court No. 5, under judge Baltasar Garzón, opened an investigation against the author and others for alleged crimes against public health (drugs trafficking) and smuggling that occurred in the course of operations involving "controlled delivery" of drugs.

2.2 On 16 November 1992, the author requested judge Garzón's withdrawal under article 219, paragraphs 9, 10 and 11, of the Judiciary Act.¹ The author claimed to have been under the immediate supervision of and legally subordinate to the judge at the time the alleged offences occurred. The challenge was dismissed by Central Investigating Court No. 1 on 21 November 1992.

2.3 The trial took place between March and July 1997 before the Criminal Division of the National Court (Audiencia Nacional). During this stage most of the defendants changed the statements they had made during the investigation stage. The author claims that this was because the statements made during the investigation had been extracted under duress.

2.4 On 3 October 1997, the Criminal Division of the National Court handed down a conviction sentencing the author to eight years' imprisonment, a fine and disqualification for a continuing offence against public health. He was further sentenced to one year in prison and a fine for a continuing offence of misrepresentation of facts in a public instrument.

2.5 The author filed an appeal in cassation with the Criminal Division of the Supreme Court. In that appeal the author cited nine grounds for cassation, including the right to be tried by an impartial judge, the right to presumption of innocence, the right to trial with due process guarantees and the right to effective judicial remedy, with reference to the probative value accorded to statements obtained under duress. On 11 January 1999, the Supreme Court, after separately considering each of the nine grounds for the appeal, partially upheld the National Court judgement, acquitting the author of the offence of misrepresentation of facts in a public instrument.² As to the possibility of a fresh evaluation of the evidence, the Court ruled that evaluation of the evidence was the sole and exclusive prerogative of the court of first instance.³ It nevertheless reviewed the evidence and

¹ *Article 219*: Grounds for withdrawal or, where appropriate, challenge. ... (9) Close friendship with or overt hostility towards one of the parties; (10) Direct or indirect interest in the dispute or case; (11) Involvement in the investigation of the criminal matter or in the settlement of the dispute or case in another instance ...

² The National Court had found the author guilty of misrepresentation inasmuch as he had diverged from the truth in the statements he had prepared for the investigating judge and in several reports to the prosecutor's office on the outcome of the operations. The Supreme Court found that there was no malicious intent to deceive ... although he might have been attempting to cover his tracks, which is not punishable since, as a general rule, no one may be compelled to testify against themselves.

³ *"No adulteration of the remedy of cassation can be permitted such as to transform it into a second or third hearing and ... it is important to bear in mind that immediate apprehension of the evidence is only possible in the lower courts, principally through oral proceedings ... Consequently, the sole task of the court of cassation is to consider whether or not there existed direct or circumstantial*

concluded that sufficient evidence existed and that it was legal. With regard to pressure on some of the witnesses, the Court said that it did not have enough information or evidence to determine whether any such pressure had been exerted and said that coercion of that kind should be reported at the proper time.

2.6 The author applied for *amparo* in respect of the Supreme Court ruling, citing the same facts and circumstances as at cassation. The application was rejected by the Constitutional Court on 27 March 2000. On the right to presumption of innocence, the Constitutional Court stated that both judgements, at first instance and in cassation, explained what evidence the court considered incriminatory and sufficient to support a guilty verdict and a criminal conviction. The Constitutional Court further stated that it was not a third judicial instance and could not and should not reassess the evidence or alter the proven facts.

2.7 On 14 July 2000, the author applied to the European Court of Human Rights; the application was declared inadmissible by the Court on 5 March 2002.⁴ On the alleged violation of the right to presumption of innocence, the Court stated that, according to its case law, absent arbitrariness, it is for the domestic courts to interpret facts and domestic law. It went on to state that the information available in the file showed no violation of any of the rights invoked. As to the violation of the right to an impartial tribunal, the European Court considered that the relationship of cooperation or subordination referred to by the author was of no importance since the subordination related to different events and operations, albeit of a similar nature. It further held that the existence of a professional relationship between the author and the investigating judge did not in itself mean that the judge was “tainted” and therefore unfit to handle the investigation of a case based on different facts; it stressed that the alleged lack of impartiality referred to the investigating judge and not the trial judges. Both complaints were accordingly declared inadmissible as manifestly unfounded under article 35, paragraphs 3 and 4, of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

2.8 As to the complaint concerning the lack of a second hearing in criminal matters as required by article 14, paragraph 5, of the Covenant, the European Court stated that it was not competent to examine alleged violations of rights under the Covenant. It also pointed out that a second hearing in criminal matters was not guaranteed by the European Convention and recalled that Spain was not a party to Protocol No. 7 to the Convention. Accordingly, that part of the claim was declared inadmissible under article 35, paragraph 3, of the European Convention.

Complaint

3.1 The author claims to be the victim of a violation by Spain of article 7 and article 14, paragraphs 1, 2 and 5, of the Covenant. Concerning article 7, the author says that during the investigation phase steps were taken to attempt to get him to change his statement, including presenting him in handcuffs to the media, sending him to a civil rather than a military prison, and keeping him incommunicado for an extended period for no reason. The author argues that these measures constitute treatment contrary to the provisions of article 7 of the Covenant.

incriminating evidence with sufficient probative value, and whether such evidence may be in any way unlawful.”

⁴ European Court of Human Rights, Fourth Section, application No. 61341/00, decision on admissibility, 5 March 2002.

3.2 The author alleges a violation of article 14, paragraph 1, on grounds of lack of subjective and objective impartiality on the part of the investigating judge, who apparently authorized the operations for which the author was subsequently convicted. With regard to article 14, paragraph 2, he claims to have been convicted in the absence of sufficient evidence to set aside the principle of presumption of innocence.

3.3 Lastly, with regard to article 14, paragraph 5, the author argues that the remedy of cassation does not constitute a second hearing but is an extraordinary remedy that can only be invoked on specific grounds defined by law. In his view the lack of any right to a full review of the conviction and sentence is a violation of article 14, paragraph 5, of the Covenant. In this regard he cites the Committee's Views in *Gómez Vázquez v. Spain*.⁵

State party's observations on admissibility and merits

4.1 On 9 October 2006, the State party submitted its observations on the admissibility of the communication. The State party recalls that the subject matter of this communication has already been examined by the European Court of Human Rights, which found no violation of the rights and freedoms asserted by the author, and that that constitutes grounds for inadmissibility under article 5, paragraph 2 (a), of the Optional Protocol. Here the State party refers to the Committee's decision in *Ferragut Pallach v. Spain*,⁶ which was declared inadmissible under that article, as modified by the State party's reservation.

4.2 As to the investigating judge's alleged lack of impartiality, the State party argues that, since it falls to the central investigating court to investigate drug trafficking offences committed by organized groups, it would be strange if the author, as former commander of UCIFA, did not have a professional relationship with all of those courts. The State party repeats the argument advanced by the Supreme Court and accepted by the European Court that the central investigating courts would be unable to do their job if they were to recuse themselves every time a member of the security forces was involved. Regarding subjective impartiality, the fact that the author worked with the investigating judge in the performance of his duties need not mean that their working relationship affected other matters of a similar nature. As to article 219, paragraph 11, of the Judiciary Act, the author is not cited in the pretrial proceedings as the judge's subordinate. As to objective impartiality, no previous relationship between the court and the subject of the proceedings can be found that might give rise to prejudice or partiality.

4.3 Regarding the alleged violation of article 7, the State party considers that the author's claims lack credibility and points out that the author was always assisted by counsel, and that no lawyer would have permitted the actions allegedly taken by the judge. The State party asserts that, notwithstanding the author's insistence that the statements were obtained under duress, the National Court judgement reviewed the extensive evidence attesting to the facts deemed proven on which the conviction was based.

4.4 With regard to article 14, paragraph 5, the State party argues that the author makes statements of a generic nature but does not say specifically which facts were not reviewed, thereby leaving him without a defence. Although cassation may not constitute a second hearing, that does not mean that the Supreme Court does not consider whether there was evidence for the prosecution and whether such evidence was legal. The State party further points out that the Supreme Court conducted an extensive assessment of the verdict and the sentence, even going so far as to revoke the National Court's finding of guilty of misrepresentation of facts in a public instrument. The State party refers to various of the

⁵ Communication No. 701/1996, Views adopted on 20 July 2000.

⁶ Communication No. 1074/2002, decision on admissibility, 31 March 2004, para. 6.2.

Committee's Views in which it found that an appeal in cassation complies with the requirements of article 14, paragraph 5, of the Covenant.⁷

4.5 Accordingly, the State party argues that the communication should be declared inadmissible on the grounds that the same matter has been submitted to another international procedure, that the author is availing himself of the Covenant in clear abuse of its purpose, and that the communication fails to substantiate any violation of the Covenant.

Author's comments

5.1 On 20 December 2006, the author responded to the State party's observations. With regard to the consideration of the matter by the European Court of Human Rights, he points out that, since it declared the application inadmissible, that Court did not consider the case on the merits, and he cites the Committee's case law to the effect that complaints dismissed by other international procedures on formal grounds are not deemed to have been considered on the merits and may be brought before the Committee for its consideration. Moreover, cases that have been submitted to another international procedure may be brought before the Committee if they claim the broader protection afforded by the Covenant.

5.2 The author again claims a violation of article 14, paragraph 5, of the Covenant, since the Supreme Court, as a court of cassation, is not a second tribunal able to make a fresh assessment of the facts and the evidence.

Issues and proceedings before the Committee

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 that the State party has not submitted any information suggesting the non-exhaustion of domestic remedies, and therefore considers there to be no impediment to examining the communication under article 5, paragraph 2 (b), of the Optional Protocol.

6.3 As to the State party's contention that the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol in conjunction with the State party's reservation to this provision,⁸ the Committee notes that, with the exception of the claim under article 7 of the Covenant, the claims submitted by the author to the European Court of Human Rights were the same as those now brought before the Committee. The Committee also observes that, after analysing in detail the complaints regarding the right to presumption of innocence and to be tried by an impartial tribunal, the European Court, in a reasoned 15-page decision, declared those complaints inadmissible under article 35, paragraphs 3 and 4, of the European Convention as manifestly unfounded. In this regard the Committee recalls its case law to the effect that, when the European Court bases a declaration of inadmissibility not solely on procedural grounds but also on reasons that

⁷ See, inter alia, communications No. 1356/2005, *Parra Corral v. Spain*, decision on admissibility, 29 March 2005; and No. 1399/2005, *Cuartero Casado v. Spain*, decision on admissibility, 25 July 2005.

⁸ "The Spanish Government accedes to the Optional Protocol to the International Covenant on Civil and Political Rights, interpreting article 5, paragraph 2, of the Protocol to mean that the Human Rights Committee shall not consider any communication from an individual unless it has ascertained that the same matter has not been or is not being examined under another procedure of international investigation or settlement."

include a certain consideration of the merits of the case, then the same matter should be deemed to have been “examined” within the meaning of the respective reservations to article 5, paragraph 2 (a), of the Optional Protocol.⁹ Accordingly, the Committee finds that the complaints relating to article 14, paragraphs 1 and 2, of the Covenant are inadmissible under article 5, paragraph 2 (a), of the Optional Protocol and Spain’s reservation to that provision.

6.4 With regard to article 14, paragraph 5, of the Covenant, the Committee notes that the European Court declared inadmissible that part of the application concerning the right to a second hearing in criminal matters on the grounds that this right is not guaranteed in the European Convention and that Spain is not a party to Protocol No. 7 to that Convention. The Committee recalls that, according to its case law, where the rights protected under the European Convention differ from the rights established in the Covenant, a matter that has been declared inadmissible by the European Court as incompatible with the Convention or its protocols cannot be deemed to have been “examined” within the meaning of article 5, paragraph 2, of the Optional Protocol, such as to preclude the Committee considering it.¹⁰

6.5 The Committee notes, however, that the Supreme Court decision makes it clear that the Court thoroughly examined each of the grounds for appeal adduced by the author, and that the Court considered that the author’s claim regarding the misrepresentation of facts in a public instrument was valid and accordingly found the author not guilty of that offence and reduced the penalty initially imposed. With regard to the principle of presumption of innocence, the Supreme Court found that there was sufficient evidence to outweigh such presumption. The Committee therefore considers that the complaint under article 14, paragraph 5, has not been sufficiently substantiated for the purposes of admissibility and accordingly finds it inadmissible under article 2 of the Optional Protocol.¹¹

6.6 Regarding the alleged violation of article 7 of the Covenant, the Committee notes the author’s claims that his treatment during the investigation phase of the trial was contrary to this provision. However, the Committee believes this complaint has not been sufficiently substantiated for the purposes of admissibility and accordingly finds it inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under article 2 and article 5, paragraph 2 (a), of the Optional Protocol;
- (b) That this decision shall be communicated to the State party and to the author.

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

⁹ See, inter alia, communications No. 1396/2005, *Rivera Fernández v. Spain*, decision on admissibility, 28 October 2005, paragraph 6.2; *Ferragut Pallach v. Spain* (note 6); No. 744/1997, *Linderholm v. Croatia*, decision on admissibility, 23 July 1999, para. 4.2; No. 168/1994, *V.O. v. Norway*, decision on admissibility, 17 July 1985, paragraph 4.4; No. 121/1982, *A.M. v. Denmark*, decision on admissibility, 23 July 1982, paragraph 6.

¹⁰ See communication No. 441/1990, *Casanovas v. France*, Views of 15 July 1994, paragraph 5.1.

¹¹ See communications No. 1375/2005, *Subero Biesti v. Spain*, decision of 1 April 2008, paragraph 6.4; No. 1399/2005, *Cuartero Casado v. Spain* decision of 25 July 2005, paragraph 4.4, and No. 1059/2002, *Carvalho Villar v. Spain*, decision of 28 October 2005, paragraph 9.5.

**F. Communication No. 1504/2006, *Cornejo Montecino v. Chile*
(Decision adopted on 30 October 2008, Ninety-fourth session)***

<i>Submitted by:</i>	José Patricio Cornejo Montecino (represented by counsel, Eduardo Lavanderos)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Chile
<i>Date of communication:</i>	2 August 2006 (initial submission)
<i>Subject matter:</i>	Protection of a detainee from assaults committed on him by other inmates
<i>Procedural issues:</i>	Lack of substantiation
<i>Substantive issues:</i>	Violation of the author's right to have his complaints investigated
<i>Articles of the Covenant:</i>	3; 6, paragraph 1; 9, paragraphs 1 and 3; 10, paragraph 2 (a); 14, paragraph 1; and 26
<i>Article of the Optional Protocol:</i>	2
<i>The Human Rights Committee</i> , established under article 28 of the International Covenant on Civil and Political Rights,	
<i>Meeting on 30 October 2008,</i>	
<i>Adopts the following:</i>	

Decision on admissibility

1. The author of the communication, dated 2 August 2006, is José Patricio Cornejo Montecino, a Chilean citizen born in 1973. He claims to be the victim of violations by Chile of articles 3; 6, paragraph 1; 9, paragraphs 1 and 3; 10, paragraph 2 (a); 14, paragraph 1; and 26 of the Covenant. The author is represented by counsel. The Optional Protocol entered into force for the State party on 28 August 1992.

The facts as submitted by the author

2.1 In 2005 the author was being held in pretrial detention ordered by the 26th Criminal Court of Santiago, having been charged with the murder of a drug dealer. He states that during his detention he was subjected to threats and attacks by other prisoners on a number of occasions, first in the South Santiago remand centre, where he was the victim of a failed murder attempt, and later in Colina II prison.¹ As a result of an assault committed on him in

* The following members of the Committee participated in the consideration of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Ms. Helen Keller, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

¹ The following letters from the 26th Criminal Court are included in the file:

Colina II on 16 December 2005, he had to be interned in the prison hospital.² The author filed a complaint concerning these incidents with the 26th Criminal Court which sent a letter to the prison governor requesting, inter alia, that he consider transferring the author to Los Andes prison. Despite this, no protective measures were taken. He states further that on 5 December 2005 his lawyer informed the judge that an individual had offered a 500,000 peso reward for killing him in prison. The judge sent three letters to the prison governor, but despite this, no measures were taken to protect the author.

2.2 On 31 December 2005 he was again threatened and beaten by other prisoners in Colina II prison, causing serious injuries. As a result he was transferred for his own protection to a punishment cell in the same block, which, according to the author, did not provide any protection as he was still in the block in which he had been attacked.

2.3 In view of the above, the author filed an application for protection of constitutional guarantees with the Santiago Court of Appeal on 3 January 2006. On 30 January 2006 the court declared the appeal inadmissible on the grounds that the case lay outside the scope of this procedure. According to the court, the procedure of application for constitutional protection is intended to restore the rule of law when it has been disrupted by arbitrary or illegal acts or omissions that threaten, interfere with or deny the legitimate exercise of any of the guarantees explicitly referred to in article 20 of the Political Constitution of the Republic, without prejudice to other legal proceedings.

2.4 On 2 February 2006, the author filed an appeal with the same Court, which declared it inadmissible on 6 February 2006. The author filed proceedings for review of leave to appeal with the Supreme Court on 8 February 2006. Those proceedings were rejected on 24 May 2006.

The complaint

3. The author claims that the facts described constitute a violation of articles 3; 6, paragraph 1; 9, paragraphs 1 and 3; 10, paragraph 2 (a); 14, paragraph 1; and 26 of the Covenant. He states that the offences committed against him were not investigated by the prosecutor's office or the courts with which he had filed complaints, that is the 26th Criminal Court and the Santiago Court of Appeal. Neither had any measure been taken to protect the author in prison.

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- A letter dated 13 July 2005 addressed to the South Santiago remand centre, requesting the latter to take appropriate security measures to protect the author, "and to consider a transfer to another prison in view of the serious assaults to which the prisoner has been subjected. We inform you that the accused requests a transfer to the Puente Alto remand centre or, failing that, Colina II prison."
 - A letter dated 14 December 2005, addressed to the governor of Colina II prison, requesting the latter to "take appropriate security measures to protect the accused José Patricio Cornejo Montecinos, who says he has been assaulted and threatened with death by other inmates. Mr. Cornejo Montecinos, in a statement to this court, expressed the wish to be transferred from cell block 13, where he is currently being held, since this is a cell block for convicted prisoners."

² The file contains a report dated 16 January 2006 from the prison governor to the President of the Court of Appeal informing him of the incident and the author's request for a transfer, first to cell block 8, which was not possible, and then to block 9. The report states that the transfer to cell block 9 was carried out on 3 January 2006, and that the prisoner had "remained there without any problem with his fellow inmates, and maintained his request for a transfer to Los Andes, Casablanca or Melipilla prison, regarding which a decision should be taken by the competent court".

The State party's observations

4.1 In its observations of 19 June 2007 the State party informs the Committee that the author was interned in the South Santiago pretrial detention centre on 15 June 2005 on a murder charge. On 25 July 2005 he was transferred to Colina II prison as a protective measure, having received death threats from inmates of the former facility, as he stated in his intake interview, for having murdered a drug dealer in Pudahuel municipality. After completing the required procedures in the classification office of Colina II prison, he was placed in isolation blocks 13 and 12 in order to ensure his safety. On 16 December 2005 he appeared at the door to block 13, his clothes bloodied, stating that he had been attacked by other prisoners. He was given first aid in the prison infirmary and transferred to the Colina emergency medical unit, where he was diagnosed with a "penetrating abdominal injury". He was transferred from there to the prison hospital, where he stayed until he was discharged and returned to Colina II on 19 December 2005.

4.2 In view of the gravity of the incident, and in accordance with article 175 of the Code of Criminal Procedure, the governor of Colina II prison reported the incident to the local prosecutor's office of Colina, first by telephone and subsequently in incident report No. 126 dated 16 December 2005.

4.3 On 20 December 2005, the author was reclassified and placed in block 12, where prisoners are held for their personal protection. However, he was thrown out of that block by the other prisoners on 1 January 2006. He was therefore transferred to isolation wing 16, where he remained until 3 January 2006, when he was again reclassified and placed in cell block 9 for inmates classified as low-level offenders.

4.4 On 25 January 2006 he was transferred to Los Andes prison on the order of the 26th Criminal Court of Santiago. The Security Department of the national prison service, however, proposed that the author be kept in Colina II, since he was classified as a high-level offender, was a multiple recidivist, and had received a large number of reprimands and sanctions for breaches of prison rules, including attacks on inmates and threats to staff. In view of his record, his transfer to Los Andes represented a custody risk, given the overcrowded conditions in that facility. The prison service suggested that he be transferred to Valparaiso prison complex, since it met the necessary security requirements to hold this type of prisoner.

4.5 In his intake interview in Los Andes he stated that he "received death threats in other facilities and that there is a price on his head, since he killed a dealer and abducted his daughter in a drug snatch". During his stay in that facility he received a large number of reprimands and sanctions for breaches of prison rules.

4.6 According to a statement by the author on 3 January 2007, on that date he was in good health, did not have any problems with other inmates and was attending a furniture-making workshop. According to a medical report dated 12 January 2007, he was in excellent health and was not suffering any after-effects of his injuries.

4.7 The State party asserts that since the author's internment in the prison system he has been constantly provided with all the necessary measures to protect his life and physical integrity and has received appropriate medical assistance; there had been no violation of his rights. It states further that there is no record of his having been a victim of a murder attempt during his detention.

The author's comments

5.1 On 3 January 2008 the author replied to the State party's observations. He points out that when he was threatened with death no protective measures were taken, and that he was held with convicted prisoners even though he was awaiting trial. The death threats and

murder attempts to which he was subjected were never investigated, despite the fact that he reported these offences.

5.2 The author again points out that the remedies he sought were unsuccessful and that when he filed an application for protection he requested a hearing from the Court of Appeal, but that the court did not grant his request.

Issues and proceedings before the Committee

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 As it is obliged to do pursuant to article 5, paragraph 2 (a), of the Optional Protocol, the Committee ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The issue before the Committee is whether the author's rights under the Covenant were violated in that the threats and attacks to which he was allegedly subjected were not investigated, and no protective measures were taken to prevent their recurrence. The Committee observes that the governor of Colina II prison informed the local public prosecutor's office of Colina of the incidents that occurred on 16 December 2005. However, the author does not provide any information on action taken on that report by the public prosecutor's office, or on any applications he made while in prison to have the various incidents effectively investigated. The author only informed the Committee that an application for protection was filed and processed. From the documents in the file, including the decisions of the Court of Appeal, the Committee concludes that the application for protection was not the appropriate remedy for investigating the offences allegedly committed against the author.

6.4 Concerning the author's claim that he was not provided with protective measures to prevent assaults from other prisoners, the Committee observes that the author was transferred several times to ensure his protection. On 25 July 2005 he was transferred from the South Santiago detention centre to Colina II prison, where he stayed in blocks 13, 12, 16 and 9, each time being moved in order to ensure his protection, until he was finally transferred to Los Andes prison. The author has not said that other measures should have been taken to guarantee his safety.

6.5 In view of the foregoing, the Committee considers that the author has not substantiated his claims sufficiently for purposes of admissibility and considers that the communication is inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision be transmitted to the State party and to the author.

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

**G. Communication No. 1506/2006, *Shergill et al. v. Canada*
(Decision adopted on 30 October 2008, Ninety-fourth session)***

<i>Submitted by:</i>	Sucha Singh Shergill and 21 members of the Canadian Coloured Citizen Seniors Society (unrepresented)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Canada
<i>Date of communication:</i>	28 July 2006 (initial submission)
<i>Subject matter:</i>	Alleged discrimination in the granting of Old Age Benefits for Canadian citizens based on their colour and origin
<i>Procedural issues:</i>	Exhaustion of domestic remedies; abuse of the right to submission; insufficient substantiation for purpose of admissibility
<i>Substantive issue:</i>	Discrimination on the basis of colour and national origin
<i>Articles of the Covenant:</i>	2 and 26
<i>Articles of the Optional Protocol:</i>	2; 3; and 5, paragraph 2 (b)
<i>The Human Rights Committee</i> , established under article 28 of the International Covenant on Civil and Political Rights,	
<i>Meeting on 30 October 2008,</i>	
<i>Adopts the following:</i>	

Decision on admissibility

1.1 The authors of the communication, initially dated 28 July 2006, are Sucha Singh Shergill and 21 members of the Canadian Coloured Citizen Seniors Society. They claim to be victims of violations by Canada of article 2 and article 26 of the Covenant. They are not represented.

1.2 On 27 April 2007, the Human Rights Committee, through its Special Rapporteur on New Communications, decided to examine the question of admissibility of the communication separately from the merits.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhango, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Ms. Helen Keller, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

Factual background

2.1 The principal author of the communication is Sucha Singh Shergill, born on 2 February 1929, in India. He moved to Canada on 26 March 1996 when he was 67 years old and as an immigrant sponsored by his daughter, who agreed to provide for his essential needs for a period of ten years under the immigration regulations then in force. He became a Canadian citizen on 17 November 2000.

2.2 The principal author applied for his Old Age Security (OAS) pension successively in 1998, 2001 and 2006. His first two applications were denied by the Minister of Human Resources Development (Minister) because he had not resided in Canada for the minimum required period of at least 10 years. He started to receive an OAS pension in April 2006, having resided in Canada for 10 years.

2.4 Regarding exhaustion of domestic remedies, the principal author first applied for an OAS pension on 13 March 1998; this was denied by the Minister of Human Resources Development (Minister). He did not appeal this decision. He again applied for an OAS pension on 11 September 2001. That application was also denied by the Minister for the same reason. The Minister's decision was confirmed on 13 December 2001 after a request for reconsideration. The principal author appealed the Minister's decision to the Review Tribunal. The Review Tribunal decision, dated 6 November 2002, dismissed his appeal because it considered that the same issue had already been decided in the *Pawar* class action of which the author was a member.

2.5 On 6 June 2002, the principal author filed a Statement of Claim against Her Majesty the Queen in Right of Canada, challenging the constitutionality of the residence requirement of the Old Age Security Act. By order of a Prothonotary of the Federal Court, dated 7 November 2002, the Statement of Claim was struck out and the matter dismissed. The Prothonotary dismissed the claim after finding that the principle of estoppel applied to the issues raised and that "there is not a scintilla of a cause of action or an issue which can be litigated by way of an amendment to the present Statement of Claim". He further stated that indeed the action was "an attempt to re-litigate an issue in which the Plaintiff was directly involved and in which the Plaintiff received a final determination, on exactly the same issue, and therefore is clearly an abuse of process." The author appealed to the Federal Court – Trial Division, which also dismissed his appeal on 19 December 2002. The Federal Court noted that the *Pawar* decision had finally and conclusively disposed of the matter, and that the principal author was a member of the class who had given the plaintiff in *Pawar* his express written consent to act on his behalf. The principal author further appealed to the Federal Court of Appeal relying on a recent decision of the Supreme Court of Canada in the case of *Lavoie v. Canada*, where the Supreme Court had held that the Canadian citizenship requirement for Civil Service employment was discriminatory and contrary to section 15 of the *Canadian Charter of Rights and Freedoms*. The Federal Court of Appeal rejected his appeal on 4 December 2003. A panel of three judges of the Supreme Court of Canada refused leave to appeal against the decision of the Federal Court on 13 May 2004.

2.6 The other 21 authors are members of the Canadian Coloured Citizen Seniors Society, who were also born in India, immigrated to Canada and who were granted Canadian citizenship. No information is provided with regard to the exhaustion of domestic remedies in the case of these authors.

The complaint

3.1 The authors allege that the State party has violated their rights under articles 2 and 26 of the Covenant insofar as they did not qualify for an Old Age Security (OAS) pension prior to April 2006. They claim they were discriminated against on the grounds of their skin

color and their South Asian origin, and state that they should have been entitled to old age benefits on the same basis as any other Canadian citizens from the date they were granted Canadian citizenship.

3.2 The authors allege that the 10 year residency requirement imposed by section 3 of the OAS Act constitutes direct discrimination, because it denies benefits to some senior Canadian residents. They also allege indirect discrimination because such a residency requirement, although it seems to have a neutral face as being applicable to all, in fact prejudices senior Canadian residents born abroad and leaves unaffected senior Canadian residents born in Canada. They note that such a residency requirement is not applied to foreign nationals originating from the “State party’s selected countries”, i.e. countries with which Canada has a reciprocal benefits agreement and allege therefore that international social security agreements introduce direct discrimination between senior permanent residents born abroad in countries with and without reciprocal agreements with Canada.

3.3 They also claim that the 10 year residency requirement imposed as a condition of eligibility for OAS Act benefits constitutes a violation of the equality rights embodied in section 15 of the Canadian Charter of Rights and Freedoms which reads as follows: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental and physical disability”.

State party’s submissions on admissibility

4.1 By submission dated 2 April 2007, the State party provides its submission on the admissibility of the communication. As to the 21 authors, it contends that it is not in a position, based on the information provided in the communication, to determine whether the 21 other complainants’ claims are similar to the ones emanating from the principal author. It argues that without legible full legal names, dates of birth and Social Insurance Numbers, it cannot confirm that they are indeed in a similar position to the author insofar as they (a) have applied for OAS pensions, (b) were at least 65 years of age at the time they made their applications. In addition, it is not clear if they have been denied OAS pensions because they have not resided in Canada for at least 10 years, or had not worked or resided in a country with which Canada has a reciprocal agreement. The State party requests that, should the Committee find this communication admissible, those 21 individuals should submit further and full particulars and evidence demonstrating that they are in a similar position to the principal authors that the State party may respond appropriately on the admissibility and merits of their allegations.

4.2 As to the principal author, the State party challenged the admissibility of the communication, arguing that the various aspects of the communication are inadmissible for several reasons, including abuse of the right of submission on account of delay and insufficient substantiation.

4.3 With regard to the facts, the State party explains that the Canada’s Old Age Security (OAS) pension system provides income support to elderly persons who meet its legislative eligibility requirements. The OAS pension is a non-contributory benefit meant to give a measure of partial income security for senior Canadians, in recognition of their contribution to and participation in Canadian society. The core eligibility requirements for the OAS pension include the following: (a) making an application for the OAS pension, (b) having attained 65 years of age, and (c) satisfying the applicable residence requirement immediately prior to the approval of the OAS pension application. The current residence requirements require an applicant (a) to have resided in Canada, after reaching age 18, for an aggregate period of 40 years to receive a full pension or (b) to have resided in Canada for a minimum of 10 years to receive a partial pension, and (c) having a legal resident status

or Canadian citizenship on the day preceding the day on which the application is approved. The State party considers it reasonable to expect that persons live in Canada for a minimum period of time before being granted the right to a lifelong public benefit.

4.4 When an OAS pension applicant is a person who has emigrated from a country with which Canada has a reciprocal international social security agreement, that applicant's periods of residence and/or contributions in the other country can be added to his or her periods of residence in Canada in order to meet the minimum 10 year residence requirements for a partial OAS pension. The State party further explains that Canada has signed reciprocal international social security agreement with fifty countries and provides a detailed list of the objectives pursued by Canada when entering into these agreements. The State party summarizes the objectives it pursues in entering into these agreement as follows: (a) to reduce or eliminate restrictions, based on citizenship, which may prevent Canadians from receiving benefits under the social security laws of the other country, (b) to reduce or eliminate restrictions on the payment of pensions abroad, (c) to make it easier to become eligible for benefits by adding together periods of social security coverage under the programs of two or more countries, and (d) to permit continuity of social security coverage when a person works temporarily in another country and to prevent situations when a person would have to contribute to both countries' social security program for the same work. The State party notes that, in addition to the OAS pension the principal author has been receiving since April 2006, he also receives a non-taxable Guaranteed Income Supplement (GIS). GIS is payable to low-income pensioners whose incomes is below a certain threshold and which, in the author's case, brings his total OAS benefits to an amount equal to the OAS pension payable to a pensioner who is receiving his or her full OAS pension after 40 years of residence as of age 18.

4.5 The State party argues that the communication is an abuse of the right of submission pursuant to article 3 of the Optional Protocol. It notes that although no specific time-limit exists for the submission of a communication, the Committee has held that the late submission of a complaint can amount to such abuse in the absence of any justification and refers to the decision in *Gobin v. Mauritius*,¹ where an unexplained delay of five years was considered an abuse of the right of submission. In the present case, the State party argues that the author has offered no explanation or justification for the delay in submission between the Supreme Court of Canada's decision dismissing the author's request for leave to appeal in May 2004 and the filing of his complaint before the Committee in July 2006. The State party further argues that in light of the numerous judicial challenges brought by the author, first through a class action introduced in 1996 and then by the author's own litigation started in 2002, the delay in submitting the complaint to the Committee should be considered excessive.

4.6 The State party further submits that the author has not substantiated his allegation of a violation of article 26, for purpose of admissibility. It also submits that the State party's jurisprudence defining and interpreting equality rights under the Canadian Charter of Rights and Freedoms closely resembles the equality protection in article 26 of the Covenant. It further argues that the author has received judicial consideration that respects rules of natural justice, the Canadian Constitution and the Covenant,² as clearly evidenced by various judicial levels in Canada which consistently rejected his claims, presented either as

¹ Communication No. 787/1997, inadmissibility decision adopted on 16 July 2001.

² See communications No. 761/1997, *Singh v. Canada*, inadmissibility decision of 29 July 1997; No. 886/1993, *Schedko v. Belarus*, inadmissibility decision of 3 April 2003; No. 1097/2002, *Mercader et al. v. Spain*, inadmissibility decision of 21 July 2005; and No. 1138/2004, *Arenz et al. v. Germany*, inadmissibility decision of 24 March 2004.

a class action or by the author himself. The State party notes that in total, the author's claims have been rejected seven times by Canadian judicial instances.

4.7 The State party also submits that the residence requirement of the OAS Act and being from a country with which Canada has a reciprocal social security agreement are both neutral requirements that are not related to citizenship, color or national origin, and therefore do not discriminate in purpose or in effect. Length of residency is not a prohibited ground of discrimination and does not come within the meaning of "other status" within the scope of article 26 of the Covenant. The State party adds that being an immigrant from a country with which Canada does not have a reciprocal international social security agreement does not fall within the meaning of "other status" within the scope of article 26.³

4.8 In the alternative, should the Committee consider that the length of residency, or being a immigrant from a country with which Canada does not have a reciprocal international social security agreement falls within the scope of the notion of "other status", the State party submits that the differential treatment clearly does not amount to discrimination within the meaning of article 26. It refers to a Committee decision which found that differential treatment is permitted only if the grounds therefore are reasonable and objective⁴ and that not all differentiated treatment constitutes discrimination if it is based on objective and reasonable criteria and the purpose sought is legitimate under the Covenant.⁵ The State party submits that the differential treatment experienced by the author based on the fact that he did not emigrate from a country with which Canada has a reciprocal social security agreement is both objective and reasonable in light of the nature of those agreements and the State party's objective in entering into them. With regard to the residency requirement, the State party submits that it is reasonable to establish a residency requirement for the purposes of receiving an OAS pension. It refers to the Committee's decision in *Oulajin and Kaiss v. the Netherlands*, where the Committee found no violation in the allocation of child benefits and considered that "the scope of article 26 of the Covenant does not extend to differences resulting from the equal participation of common rules in the allocation of benefits".⁶ Furthermore, the State party asserts that the length of the residency requirement is not arbitrary but consistent with the State party's role in balancing competing arrays of social and economic considerations. Lastly, the State party refers to the individual opinion appended to the case *Oulajin and Kaiss* in which it was stated that "with regard to the application of article 26 of the Covenant in the field of economic and social rights, it is evident that social security legislation, which is intended to achieve aims of social justice, necessarily must make distinctions. It is for the legislature of each country, which best knows the socio-economic needs of the society concerned, to try to achieve social justice in the concrete context. Unless the distinctions made are manifestly discriminatory or arbitrary, it is not for the Committee to re-evaluate the complex socio-economic data and substitute its judgments for that of the legislature of States parties".⁷

³ See communication 988/2001, *Diaz v. Spain*, inadmissibility decision of 3 November 2004.

⁴ See communication No. 395/1990, *Sprenger v. The Netherlands*, Views adopted on 31 March 1992, paragraph 7.4.

⁵ See communication 932/2000, *Gillot et al v. France*, Views adopted on 15 July 2002, paragraph 13.5.

⁶ See communication No. 426/1990, *Oulajin and Kaiss v. the Netherlands*, Views adopted on 23 October 1992, paragraph 7.5.

⁷ *Ibid.*, appendix.

Authors' comments on the State party's submissions

5.1 By letter of 12 June 2007, 25 August 2007, 21 November 2007, 8 January 2008, 8 February 2008, 7 March 2008, 10 March 2008 and 7 April 2008, the author challenges the State party's submissions.

5.2 With regard to the 21 other authors, the principal author argues that they all belong to the same category and that in order to prove that they all suffered from the same discrimination, the author gave his own story as an example. He further argues that providing full details for each complainant would have involved baseless extra labour and that the signatures of the 19 authors on behalf of whom he was submitting the complaint were annexed to the initial submission.

5.3 With regard to the State party's allegation of lack of substantiation, the principal author reiterates that the 10-year residency requirement in the OAS Act, in addition to the requirement of being a Canadian citizen, is discriminatory and that the international social security agreements create a situation of discrimination towards Canadian citizens who come from countries not covered by such agreements. He also reiterates that the Canadian OAS system makes discriminatory distinctions based on social origin and place of birth and does not take into account health conditions as a basis for granting social benefits.

5.4 The principal author challenges the State party's contention that the question at issue is identical to that already decided in the *Pawar* case. He claims that he had objected to belonging to *the Pawar* class action and that as a result, he was dismissed from the primary membership of this class action.

5.5 The principal author further challenges the State party's interpretation of the Federal Court of Appeal decision of 4 December 2003. He alleges that this decision held that the denial of OAS benefits to Canadian Citizen Seniors was illegal and unjustified. He reiterates previous assertions according to which the residency requirement, although its application appears neutral, prejudices senior Canadians residents born abroad and leaves unaffected senior Canadians residents born in Canada. He therefore argues that the ground of distinction – born abroad – is not an enumerated ground in section 15 of the Canadian Charter of Rights and Freedoms and does not fall under the “other status” ground enumerated in article 26 of the Covenant. As to the reason given by the State party to legitimize international social security agreements, the author argues that the ground of distinction – acquisition of credits under plans that exist in the countries where they have resided before coming to Canada – is not an enumerated ground and does not fall under the notion of “other status” in article 26 of the Covenant.

5.6 With regard to the State party's comment that the principal author's claim has been rejected by seven different instances, the principal author submits that there had been “frauds in connivance of the judiciary” and that he had submitted several affidavits dated 30 June 2004, 8 February 2005 and 15 December 2005 for “fraud, corruption, racism, partiality, inefficiency, incapability, fraudulent intentions, playing with the court records and lacking the knowledge of the justice system”. He further alleges that both the Spouse Allowance Act and the Disability Act are discriminatory because they both require different residency requirements for citizens and non citizens.

Supplementary submissions of the State party

6.1 On 28 May 2008, the State party responded to the author's comments. It notes the serial nature of the author's submissions, with numerous repetitive and often unclear assertions and at times blatantly false claims and accusations. It further notes that the author demonstrated similar vexatious tendencies in his many instances of domestic litigation.

6.2 The State party submits that the author's various baseless allegations of judicial fraud and corruption and any additional allegations relating to his daughter's sponsorship undertaking and his ineligibility for a disability pension or the spousal allowance should be considered inadmissible by the Committee as the author has not exhausted domestic remedies in their regard, and, in any case, has failed to substantiate sufficiently such claims.

6.3 The State party reiterates that the author's claim is inadmissible, particularly because it is insufficiently substantiated. To the extent that the author has clarified his submissions to claim discrimination against Canadian citizens or a positive obligation on the State party to provide preferential Old Age Security pension treatment for Canadian citizens, the State party submits that these are primarily based on nonsensical interpretations of domestic law and jurisprudence that cannot substantiate any violation of the Covenant and, in any case, are mere variations on the original claim that are insufficiently substantiated for the same reasons.

Issues and proceedings before the Committee

Consideration of admissibility

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

7.2 The Committee first 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.

7.3 The Committee notes that, apart from the principal author, the 21 other authors failed to provide any information about exhaustion of domestic remedies. It recalls that, pursuant to article 5, paragraph 1, of the Optional Protocol, it shall consider communications received "in light of all written information made available to it by the individual and the State party concerned". It also recalls rule 90 (1) (f) of its rules of procedure according to which applicants must sufficiently demonstrate in their communication that they have exhausted all domestic remedies. The Committee finds that it is not in a position to ascertain whether these 21 authors have exhausted all available domestic remedies and declares the communication inadmissible to the extent that it relates to them.

7.4 The Committee notes also the State party's argument that the communication should be considered inadmissible as constituting an abuse of the right to submit communications under article 3 of the Optional Protocol, in view of the delay in submitting the communication to the Committee. The State party recalls that the principal author waited for about two years and three months after the decision of the Canadian Supreme Court before submitting his complaint to the Committee. In the instant case, and having regard to the reasons given by the author, the Committee does not consider the delay to amount to an abuse of the right of submission.⁸

7.5 The Committee notes that the author does not provide any information in support of his claim of a violation of article 2. The Committee recalls that the provisions of article 2 of the Covenant, which lay down general obligations for State parties, cannot, in isolation,

⁸ See communications No. 1445/2006, *Polacková and Polaced v. Czech Republic*, Views of 24 July 2007, paragraph 6.3, and No. 1305/2004, *Victor Villamon Ventura v. Spain*, Views of 31 October 2006, paragraph 6.4.

give rise to a claim in a communication under the Optional Protocol.⁹ The Committee considers that the author's contentions in this regard are inadmissible under article 2 of the Optional Protocol.

7.6 With regard to the authors' claim that the fact that the State party applies a 10 year residency condition to become eligible for old age benefits to Canadian citizens originating from South Asia, whereas foreign nationals originating from countries with which Canada has a bilateral agreement are granted old age benefits from the day of the arrival constitutes a violation of article 26, the Committee notes that the author has not shown how this difference in treatment is based on the race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status of these category of persons. The Committee, therefore, concludes that the facts submitted by the author do not raise any issues under article 26 and thus declares it inadmissible under article 3 of the Optional Protocol.

8. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol with respect to the 21 other authors;

(b) That the communication is inadmissible under article 2 and 3 of the Optional Protocol with regard to the principal author;

(c) That this decision shall be communicated to the authors and the State party.

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

⁹ See, inter alia, *C.E.A. v. Finland*, Case No. 316/1988, decision of 10 July 1991, paragraph 6.2.

**H. Communication No. 1511/2006, *García Perea v. Spain*
(Decision adopted on 27 March 2009, Ninety-fifth session)***

<i>Submitted by:</i>	Eugenia and José Antonio García Perea (represented by counsel, José Luis Mazón Costa)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Spain
<i>Date of communication:</i>	3 July 2006 (initial submission)
<i>Subject matter:</i>	Inequitable estate distribution in violation of the will of the deceased
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; lack of substantiation
<i>Substantive issues:</i>	Right to privacy; right to non-discrimination
<i>Articles of the Covenant:</i>	17, paragraph 1; and 26
<i>Articles of the Optional Protocol:</i>	2; 5, paragraph 2 (b)

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

Meeting on 27 March 2009,

Adopts the following:

Decision on admissibility

1.1 The authors of the communication, dated 3 July 2006, are Eugenia and José Antonio García Perea, both of Spanish nationality. They claim to be victims of violations by Spain of article 17, paragraph 1, and article 26 of the Covenant. The Optional Protocol entered into force for Spain on 25 April 1985. The authors are represented by counsel, José Luis Mazón Costa.

1.2 On 16 October 2007, the Rapporteur on New Communications and Interim Measures, acting on behalf of the Committee, decided that the admissibility of the communication should be considered separately from the merits.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Lazhari Bouzid, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

The facts as submitted by the author

2.1 The father of the authors died in 1981. In a will drawn up in July 1974, he granted his wife a life usufruct of his estate and named his three children – Eugenia, María Teresa and José Antonio – as the heirs to his estate, to be divided equally.

2.2 The distribution of the estate took place on 4 July 1987. The widow renounced the usufruct, and an adjudication of the assets known at the time was made to the three siblings. Subsequent to the distribution, the authors learned that their sister, María Teresa, had taken possession of assets not included in the distribution, which meant that the assets had not been distributed equally among the heirs as required by the testamentary disposition, and that the will of the deceased had not been respected. The omitted assets consisted of a hill on which a marble quarry is located and constructions built on the said piece of land.

2.3 The authors filed a claim against their sister before the Cieza District Court. In a ruling of 17 May 1999, the claim was rejected on the grounds that the time period of four years for filing a claim for damages under article 1074 of the Spanish Civil Code had been exceeded.¹ The authors argue that the ruling does not constitute an interpretation of domestic legislation that is consistent with the will of the deceased.

2.4 The authors appealed against the ruling before the Murcia Provincial Court which, on 4 November 2000, rejected the appeal and upheld the decision in first instance. In addition, an appeal in cassation was lodged with the Civil Chamber of the Supreme Court, where it was rejected on 25 November 2003. Lastly, the authors submitted an application for *amparo* to the Constitutional Court, citing the right to an effective legal remedy and the right to due process. The Constitutional Court rejected the application on 22 March 2004.

The complaint

3.1 The authors allege a violation of the right to privacy embodied in article 17, paragraph 1, of the Covenant, since the personal wishes of their father expressed in the will were not respected.

3.2 The authors also allege a violation of article 26 of the Covenant on the grounds of discrimination in relation to their sister, who received a larger share of the inheritance.

The State party's observations on admissibility

4.1 In its observations dated 19 January 2007, the State party argues that the authors' complaint concerns a question that is strictly inheritance-related and has nothing to do with the privacy and family rights protected in article 17.

4.2 In addition, at no time were the rights set out in the Covenant invoked before the domestic courts. Consequently, the State party maintains that the communication should be declared inadmissible due to non-exhaustion of domestic remedies and because it constitutes a clear abuse of the purpose of the Covenant under article 3 of the Optional Protocol. In the alternative, the State party requests that the matter be declared to lie outside the material scope of application of the Covenant.

¹ Spanish Civil Code, article 1074: distributions may also be rescinded for damages of more than one quarter, based on the value of the assets at the time of their adjudication.

The authors' comments on the State party's observations

5.1 On 17 December 2007, the authors submitted their comments on the observations of the State party on admissibility. The authors reiterate their argument that the unequal distribution of the estate violates the will of their deceased father to divide his assets equally among his three children and thus constitutes a violation of article 17 of the Covenant. They maintain that respect of the personal will of the testator is part of his private life and that, as the authors are his heirs, they preserve the right to have the will of the deceased respected.

5.2 With regard to the non-exhaustion of domestic remedies, the authors argue that, given the Constitutional Court's interpretation in case law² of the right to privacy, no invocation of article 17 of the Covenant would have been successful. In that regard, the authors refer to the Committee's case law, pursuant to which a remedy does not have to be exhausted if it has no chance of being successful.³

Issues and proceedings before the Committee

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 takes note of the observations of both parties regarding the exhaustion of domestic remedies. The Committee observes that, although it has recognized in its case law that there is no obligation to exhaust domestic remedies if they have no chance of being successful, mere doubts as to the effectiveness of those remedies do not absolve the authors from the obligation to exhaust them.⁴ Moreover, the authors have not submitted to the Committee sufficient or relevant information on the case law of the Spanish Constitutional Court relating to the rights protected under article 17, paragraph 1, which might enable it to conclude that the remedies would have been ineffective.

6.3 With regard to article 26 of the Covenant, the Committee observes that the authors do not provide any explanation as to the reasons why the present complaint was not referred to the domestic courts. In addition, the Committee notes that the authors confine themselves to asserting that there has been a violation of article 26 of the Covenant, without giving reasons in support of the allegation. Consequently, the Committee considers that the authors have not sufficiently substantiated the complaint to justify admissibility and that the complaint must therefore be declared inadmissible in accordance with article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That, in accordance with article 2 and article 5, paragraph 2 (b), of the Optional Protocol, the communication is inadmissible; and

(b) That this decision shall be communicated to the State party and to the authors.

[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.]

² The authors are referring to Constitutional Court rulings 37 of 15 February 1989 and 206 of 24 September 2007.

³ Communication No. 896/2001, *Semey v. Spain*, Views of 30 July 2003.

⁴ See, inter alia, communication No. 674/1995, *Kaaber v. Iceland*, decision on admissibility of 5 November 1996, paragraph 6.2.

**I. Communication No. 1529/2006, *Cridge v. Canada*
(Decision adopted on 27 March 2009, Ninety-fifth session)***

<i>Submitted by:</i>	Ms. Josephine Lovey Cridge (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Canada
<i>Date of communication:</i>	1 June 2006 (initial submission)
<i>Subject matter:</i>	Alleged judicial bias and denial of a fair hearing by an independent and impartial tribunal; attacks on honour and reputation
<i>Procedural issues:</i>	Lack of substantiation of claims; incompatibility with the provisions of the Covenant; exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to a fair trial, right to equal protection of the law; right not to be subjected to unlawful attacks on honour and reputation
<i>Articles of the Covenant:</i>	14, paragraph 1; 17; and 26
<i>Articles of the Optional Protocol:</i>	2; 5, paragraph (2) (b); and 3
<i>The Human Rights Committee</i> , established under article 28 of the International Covenant on Civil and Political Rights,	
<i>Meeting on 27 March 2008,</i>	
<i>Adopts the following:</i>	

Decision on admissibility

1.1 The author of the communication is Ms. Josephine Lovey Cridge, a Canadian national born on 9 July 1933. She claims to be a victim of violations by Canada of her rights under articles 14, 17 and 26 of the International Covenant on Civil and Political Rights. The author is not represented by counsel.

1.2 On 7 February 2007 the Committee, acting through its Special Rapporteur on New Communications and Interim Measures, decided to examine the admissibility of the communication separately from the merits.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Lazhari Bouzid, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

The facts as submitted by the author

2.1 In 1962, the author and her husband, now deceased, hired a lawyer, William Moresby, to assist with a real estate transaction between themselves and another party (the Riches). According to the author, the transaction did not proceed smoothly and in November 1963 legal action was initiated (civil action no 1) by the other party to the transaction. The author retained a new counsel, Marney Stevenson, on the recommendation of Mr. Moresby. On 6 August 1964, a decision was rendered by the Supreme Court of British Columbia against the author and her husband. Ms. Stevenson filed an appeal with the British Columbia Court of Appeal, which was dismissed on 23 April 1965. The author and her husband were financially destroyed by the result of the civil claim and considered that Ms. Stevenson was responsible for having lost the case.

2.2 The author decided to sue Ms. Stevenson for negligence (civil action no 2). Frustrated in her attempt to find a counsel willing to deal with the case, she sought the advice of the Law Society of British Columbia and was referred to Harper Gilmour Grey (now Harper Grey Easton) law firm. Harper Grey Easton initiated a lawsuit on behalf of the author and her husband. During the 18 years Harper Grey Easton conducted the author's civil claim against Ms. Stevenson, the author and her family suffered emotional distress as a result of the financial burden they endured resulting from the lawsuit initiated by the Riches. The author and her husband got divorced, and the ex-husband later died. In 1986, the author discovered that Harper Grey Easton had been lying to her and had failed in its duty to prosecute her civil claim against Ms. Stevenson in a professional and diligent manner. The author then dismissed Harper Grey Easton and asked for a return of her files, but Harper Grey Easton returned only a portion of those files and concealed from her incriminating documents that were finally disclosed at a later trial against Harper Grey Easton.

2.3 From 1992 to 1994, the author retained a series of lawyers with other law firms in British Columbia to assist her with her lawsuit against Ms. Stevenson. According to the author, these other lawyers continued the pattern of "professional delay, procrastination and neglect" that had been adopted by Harper Grey Easton.

2.4 In 1994, when the author was unrepresented by legal counsel, the Supreme Court of British Columbia, at the request of Ms. Stevenson, dismissed the claim of the author for want of prosecution. The author then, without counsel, sued Harper Grey Easton for negligence (civil action no 3). The author was unrepresented by legal counsel because no lawyer would act for her. The trial was heard before a judge who had been a member of the Law Society of British Columbia during a part of the period during which the misconduct of Harper Grey Easton has occurred.

2.5 The Supreme Court of British Columbia rendered a decision in favour of the author on 27 January 2004 and awarded her nominal damages of Can\$ 100, but failed to award proper and suitable compensatory damages. The trial judge made comments, which in the author's view indicated that the judgment was neither based in logic or reason.

2.6 The author appealed, claiming damages for lost opportunities, aggravated distress and punitive damages. The respondents filed a cross appeal for legal costs. Prior to the trial, Harper Grey Easton made an offer of settlement, which the author rejected. On 20 January 2005, the Court of Appeal for British Columbia dismissed the appeal and allowed the cross appeal, awarding legal costs to the author assessed until the date of the Harper Grey Easton settlement offer, and holding the author liable for the legal cost of Harper Grey Easton from that point onward. According to the author, the reasons given by the Court of Appeal had no legal basis. Furthermore, the author alleges that the judges made unnecessary and ungentlemanly attacks on the character of the author, thereby undermining her honour and reputation.

2.7 The author then appealed to the Supreme Court of Canada, claiming institutional bias on the part of the judicial apparatus and the legal profession of Canada. This appeal was rejected in August 2005, without providing any reasons.

The complaint

3.1 The author claims to be a victim of a violation of article 14, as the judicial system to which she applied for remedy lacked independence and impartiality, and articles 14 and 26 with regard to equality before the courts. The author also claims a violation of article 17 in that the court attacked her reputation and dignity by being too dismissive of her claim. Finally, the author claims a violation of her right to own property under article 17 of the Universal Declaration of Human Rights.

3.2 The author alleges that as her claims were directed against a prominent law firm with close linkages to the political, legal and judicial elites of Canada, she could not obtain a hearing of her civil claim before an independent, impartial and competent tribunal in Canada, she was denied her right to equality before the law and the courts, was deprived arbitrarily of her property and was subject to inappropriate attacks upon her honour and reputation.

3.3 The author claims that her failure to obtain a resolution according to Canadian law in the Canadian civil dispute resolution system is a result of institutional and/or organizational bias, where a self-insured legal profession has been granted a semi-exclusive monopoly on the provision of legal services for real estate transactions and an exclusive monopoly on the provision of advocacy services and the positions of judges in the Canadian courts.

3.4 The author claims that her problems were exacerbated by the fact that the self-insurance fund of the legal profession in British Columbia was technically insolvent at the time her case was before the courts in British Columbia. Accordingly, both the judiciary and the legal profession had a financial self-interest in assuring that she lost her claim.

State party's observations

4.6 On 30 January 2007, the State party challenged the admissibility of the communication.

4.7 The State party claims that the author's allegations with respect to violations of her right to own property are inadmissible *ratione materiae*, as the right to own property is not a right protected in the Covenant. The loss of the author's property and the initial litigation involving that loss occurred before 19 August 1976, the date on which the Covenant entered into force for Canada and before 23 August 1976, the date on which the Optional protocol entered into force. This allegation is therefore also inadmissible *ratione temporis*. Furthermore, the allegations with respect to the loss of property relate to errors on the part of legal counsel representing the author at the time. The allegations of negligence on the part of the author's privately retained legal counsel cannot be ascribed to Canada.

4.8 The State party submits that the author has failed to exhaust domestic remedies. The communication does not disclose any actions taken by the author since Canada has been a party to the Covenant in which the author has raised in domestic proceedings issues of judicial bias or any other failure to ensure her a fair hearing, or allegations of unwarranted attacks on her honour or reputation on allegations of discrimination or unequal treatment before a tribunal or court. No domestic court, tribunal or other body has been afforded an opportunity to rectify any perceived violation of the author's rights under the Covenant.

4.9 The State party submits that the civil action at the heart of this communication is civil action no 3. At the trial level in civil action no 3, the author did not seek to have the trial judge exclude herself on grounds of bias or lack of impartiality. Civil action no 3 did not allege any violation of applicable human rights legislation. In her appeal in civil action no 3, the author did not raise any of the allegations that form the basis for this communication. Her failure to raise issues at trial cannot now be turned into allegations of bias against Canadian courts for the purposes of a complaint under the Covenant. The issues raised by the author on appeal in civil action no 3 were as follows (Decision of the Court of Appeal for British Columbia dated 20 January, 2005, paragraph 10): “Ms. Cridge advances three grounds for her appeal. She contends that the judge erred in failing to assess damages for a lost opportunity, in failing to award general or aggravated damages for distress, and in failing to award punitive damages.”

4.10 The State party submits that the author’s allegations that non-lawyers seeking justice for alleged wrongs done by lawyers cannot find justice in Canadian courts because Canadian judges are all former lawyers, do not remove her obligation to at least attempt to seek redress for violations of Covenant rights in domestic fora.

4.11 The State party further submits that the communication contains sweeping allegations of judicial bias which are not substantiated to any degree that would render them worthy of consideration as possible violations of rights protected by the Covenant. This constitutes an abuse of the right to submission pursuant to article 3, and the allegations in respect of article 14, paragraph 1, should be declared inadmissible pursuant to article 3 of the Optional Protocol and rule 90 (c) of the Committee’s rules of procedure.

4.12 With regard to attacks on the author’s honour or reputation, the State party submits that the reasons for judgment contain no unwarranted attacks on the character or honour of the author. Neither the trial decision nor the decision of the Court of Appeal disclose anything that could be characterized as a violation of article 17, and the allegations in respect of article 17 should be declared inadmissible pursuant to article 3 of the Optional Protocol and rule 90 (c) of the Committee’s rules of procedure.

4.13 The State party submits that the author’s reliance on article 26 is inadmissible *ratione materiae*, as there is no evidence that demonstrates that the author was discriminated against. The facts contained in the communication do not demonstrate that the author’s alleged differential treatment is attributable to her belonging to any identifiable group or category of persons which could be exposed to discrimination.

Author’s comments on the State party’s observations

5.1 By letter received 20 November 2007, the author challenged the State party submission. The author explains that she referred to her loss of property rights in 1962 as background information to give the Committee an understanding of why she sought relief from Canada’s civil dispute resolution system.

5.2 The author submits that although her lawyers were privately retained, private lawyers are, under Canadian law, officers of the court, an arm of the State, and the lawyers are ministers of justice – a State function.

5.3 The author submits that she exhausted domestic remedies when she made application for leave to appeal to the Supreme Court of Canada and her application was refused without reason. She is unaware of any domestic forum where she can pursue her grievance against the members of the judiciary. There are no remedies available in Canada in a case where a party encountered judicial bias at trial, except through the appeal process which she exhausted. She set out detailed evidence of institutional bias by the judiciary and

legal profession in British Columbia in her application for leave to the Supreme Court of Canada.

5.4 The author submits that in her initial submission she provided corroborating evidence supporting her allegation that the civil dispute resolution system in Canada is not independent in cases where a person is suing a lawyer.

5.5 With regards to the non-substantiation of the allegations of judicial bias, the author claims that some of these are observations concerning the nature of Canada's dispute resolution system, and its members are notorious in the global legal jurisprudence where a frequent recurring criticism of the Anglo-American common law system of dispute resolution is its reliance on lawyers and the sub-group of lawyers who occupy the judicial function. The author claims that she also set out specific instances of conduct by the trial judge that substantiate her allegations of judicial bias.

5.6 With reference to the State party's submission that there has been no attack on her honour and reputation, the author claims that the judges at trial and at the Court of Appeal attacked her credibility and, falsely, and found fault with her rather than the lawyers who failed her at every level.

5.7 Finally, the author submits that her allegations are not as "sweeping and general" as the State party suggests, but are narrowly focused on the issue of bias that arises in a case where a party is suing a lawyer in a court system managed and operated by the legal profession.

Issues and proceedings before the Committee

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 As it is obliged to do pursuant to article 5, paragraph 2 (a), of the Optional Protocol, the Committee ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 With regard to the author's claim concerning her loss of property, this right is not protected by the Covenant. Thus, since the Committee is only competent to consider allegations of violations of any of the rights protected under the Covenant, the author's allegations with regard to the loss of property are inadmissible *ratione materiae*, under article 3 of the Optional Protocol, as incompatible with the provisions of the Covenant.

6.4 With regard to the author's claim under article 17 of the Covenant, the Committee observes that the communication discloses no effort by the author to bring this issue before one of the State party's courts to seek redress of her situation. This claim is therefore inadmissible for non-exhaustion under article 5, paragraph 2 (b) of the Optional Protocol.

6.5 With regard to the alleged violation of article 14, paragraph 1, and article 26, the Committee considers that the allegations relate in substance to the assessment of facts and evidence made by Canadian courts. The Committee recalls its jurisprudence¹ and reiterates that it is generally 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. The Committee considers that the author has not sufficiently substantiated her complaint to be able to state

¹ See, inter alia, communication No. 541/1993, *Errol Simms v. Jamaica*, inadmissibility decision of 3 April 1995

that such denial of justice existed in the present case, and consequently believes that this claim must be found inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2, 3 and 5, paragraph 2 (b), of the Optional Protocol;

(b) That the present decision shall be communicated to the State party and to the author.

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

**J. Communication No. 1536/2006, *Cifuentes Elgueta v. Chile*
(Decision adopted on 28 July 2009, Ninety-sixth session)***

<i>Submitted by:</i>	María Cifuentes Elgueta (not represented by counsel)
<i>Alleged victim:</i>	José Alejandro Campos Cifuentes
<i>State party:</i>	Chile
<i>Date of communication:</i>	23 September 2006 (initial submission)
<i>Subject matter:</i>	Enforced disappearance of persons
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; admissibility <i>ratione temporis</i>
<i>Substantive issues:</i>	Lack of effective remedy; right to life; right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment; right to liberty and security of person; and right to recognition as a person before the law
<i>Articles of the Covenant:</i>	2, paragraph 3; 6; 7; 9; 10; and 16
<i>Articles of the Optional Protocol:</i>	2; and 5, paragraph 2 (b)
<i>The Human Rights Committee</i> , established under article 28 of the International Covenant on Civil and Political Rights,	
<i>Meeting on 28 July 2009,</i>	
<i>Adopts the following:</i>	

Decision on admissibility

1.1 The author of the communication, dated 23 September 2006, is María Cifuentes Elgueta, a Chilean national, who is submitting the communication on behalf of her disappeared son, José Alejandro Campos Cifuentes, a Chilean national born in 1950. Although the author does not invoke specific articles of the Covenant, her allegations suggest potential violations of article 2, paragraph 3; taken together with article 6; article 7; article 9; article 10; and article 16 of the Covenant. The author is not represented by counsel.

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

The texts of individual opinions signed by Committee members Mr. Rajsoomer Lallah, Ms. Christine Chanet, Ms. Zonke Zanele Majodina, Mr. Fabian Omar Salvioli and Ms. Helen Keller are appended to the present decision.

1.2 The International Covenant on Civil and Political Rights entered into force for the State party on 23 March 1976 and the Optional Protocol to the Covenant on 28 August 1992.

Factual background

2.1 José Alejandro Campos Cifuentes was a nursing student and leader of the Revolutionary Left Movement (*Movimiento de Izquierda Revolucionaria* (MIR)) for the Temuco region of Chile. After several raids on his family's residence, he turned himself in to the authorities, who, the author claims, had been pursuing him because of his political opinions. On 16 October 1973, he was sentenced by a military court to 15 years in prison on charges of high treason. Following this conviction, he spent two years in jail, where he was subjected to torture. His sentence was later commuted to exile. As a result, in February 1976, he left his country for Denmark.

2.2 After spending seven years in exile, the victim requested permission from the Chilean Embassy in Denmark to return to his country, but permission was denied.

2.3 On 19 February 1981, the victim and another exile attempted to enter Chile across the Argentine-Chilean border using false identities. They were arrested by Argentine gendarmes who, on the basis of existing agreements between the security forces of the two countries, allegedly turned the victim over to the Chilean police. The victim's whereabouts since that day remain unknown. The author has unofficial information indicating that her son was killed by Chilean security forces.

2.4 On 18 July 1981, an application for *amparo* was filed on behalf of the victim before the Santiago Appeal Court (case No. 597-81). At that time, the State party declared that it had no information concerning the victim; consequently, on 3 September 1981, the application was rejected. On 30 June 2000, a brother of the victim filed a criminal complaint for aggravated kidnapping against former president Augusto Pinochet. The author provides no information on the outcome of those proceedings. At an unspecified date the author filed a writ of habeas corpus in Argentina; in 1995 she lodged a complaint with the Office of the Under-Secretary for Human Rights of the Argentine Ministry of the Interior, without result.

2.5 On 4 July 1990, the author and a brother of the victim testified before the National Truth and Reconciliation Commission. In 1991, the Commission submitted a report (the "Rettig Report") in which the victim is listed as a disappeared detainee.

The complaint

3.1 The author claims that her son was a victim of enforced disappearance. She states that the enforced disappearance of persons violates a whole range of human rights, in particular, the right to recognition as a person before the law, the right to liberty and security of person, the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment, and the right to life.

3.2 She adds that, in general, enforced disappearance violates the right to found a family, as well as various economic, social and cultural rights. The author's submissions also allege that she was not provided with an effective remedy for those violations.

State party's observations on admissibility

4.1 On 13 February 2007, the State party submitted its observations on the admissibility of the communication. It points out that the disappearance of Mr. Campos Cifuentes is under judicial investigation in connection with a criminal complaint (case No. 2182-98)

lodged on 12 January 1998. The Ministry of the Interior of the State party, through its Human Rights Programme, is an intervener in the matter, in which no one has yet been charged.

4.2 The State party adds that, in May 2005, a special judge was assigned to this case, which means that one judge's time is devoted exclusively to this investigation. The State party notes that proceedings in the case are still pending and that no final judgement has yet been issued. In order to demonstrate that the proceedings are pending, the State party has attached a copy of requests for reports submitted on 15 January 2007 by lawyers of the Human Rights Programme. In view of the foregoing, the State party requests that the case be declared inadmissible for failure to exhaust domestic remedies.

Author's comments on the State party's submission

5.1 On 27 April 2007, the author submitted her comments on the State party's submission on admissibility. In relation to the exhaustion of domestic remedies, the author reports that she filed an application for *amparo* (case No. 597-81) in the Santiago Appeal Court on 18 July 1981, but that her application was rejected. She states that she sought other legal remedies, but at the height of the dictatorship there were no guarantees of due process and such remedies were unreasonably prolonged.

5.2 The author claims that, in the period from 26 June 1981 to 10 March 1990, no specific or effective measures were taken to obtain information on the disappearance of her son. With regard to the investigation currently under way (case No. 2182-98), such measures are part of a collective investigation into the disappearance of more than 500 members of the Revolutionary Left Movement and are the product of "bridging laws".

State party's observations on the merits

6.1 On 1 June 2007, the State party submitted its observations on the merits of the communication. It repeats that the enforced disappearance of the victim is being investigated in connection with case No. 2182-98, referred to as "Operation Condor". In this case, a criminal complaint was filed on behalf of the victim and is still pending. In 2005, the Interior Ministry's Human Rights Programme appointed a lawyer to pursue the victim's case. Various petitions have been submitted requesting measures to identify those responsible for the offence in question. In May 2005, the Human Rights Programme requested that the victim's death be investigated as part of the inquiry into the Neltume crimes (case No. 1675). This request was denied.

6.2 The State party maintains that there are conflicting theories regarding the victim's kidnapping and that this slows the investigation, especially if one takes into account the fact that the events in question relate solely to coordination between Latin American security agencies during the Argentine and Chilean dictatorships. The State party maintains that the victim was arrested in Argentina in February 1981 by Argentine security forces without a warrant from a competent court. Based on the foregoing, the State party argues that the case has not been unreasonably prolonged.

6.3 The State party emphasizes that, with the transition to democracy, victims of the military regime have been able to count on the full cooperation of the authorities since 1990. The Human Rights Programme has brought proceedings in cases of enforced disappearance and has obtained convictions in some cases. It has also made considerable efforts to find evidence that will shed light on the fate of the victims and permit those responsible to be punished. In the case of disappeared detainees or executed persons whose remains have not been recovered, the Supreme Court has embraced the line of reasoning according to which they continue to be kidnapped within the meaning of article 141 of the

Criminal Code. It argues that kidnapping is a continuing offence – or one whose effects are continuing – and is dealt with as such until the person is found alive or dead.

6.4 The State party points out that the acts complained of by the author occurred prior to the entry into force of the Optional Protocol for Chile in August 1992. In addition, the Optional Protocol was ratified with the following declaration: “In recognizing the competence of the Human Rights Committee to receive and consider communications from individuals, it is the understanding of the Government of Chile that this competence applies in respect of acts occurring after the entry into force for that State of the Optional Protocol or, in any event, to acts which began after 11 March 1990.” The State party therefore understands that the competence of the Committee to receive and consider communications is applicable to acts that took place after 28 August 1992 or, in any event, to acts which began after 11 March 1990. In this connection, it draws attention to communications submitted to the Committee containing complaints against Chile that were declared inadmissible *ratione temporis*.¹

Author’s comments on the State party’s submission

7.1 In her comments dated 6 November 2007, the author claims that she does not know the lawyers referred to by the State party and that she was not informed of any steps taken by these lawyers. The author states that the events surrounding her son’s disappearance are public knowledge and that accounts of them have been published in several books. She claims that she was never called on to testify with regard to the Neltume crimes.

7.2 The author lists the human rights violations that result from the enforced disappearance of persons,² which is not defined as an offence in the Chilean Criminal Code.

Issues and proceedings before the Committee

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 The author claims that the disappearance of her son constitutes a violation of various provisions of the Covenant. The State party argues that the communication should be declared inadmissible *ratione temporis*, since the acts on which it is based occurred or began prior to the entry into force of the Optional Protocol for Chile. The State party also recalls that its ratification of this instrument was accompanied by a declaration restricting the Committee’s competence to acts occurring after the entry into force of the Optional Protocol for Chile on 28 August 1992 or, in any event, to acts which began after 11 March 1990.

8.3 The Committee notes that the victim’s disappearance occurred in February 1981, at which time the Covenant was in force for the State party. However, this was not true of the Optional Protocol to the Covenant, which entered into force for the State party on 28 August 1992 and under which the State party recognized the competence of the Committee to receive and consider communications from individuals who claimed to be victims of violations of the rights set forth in the Covenant. In accordance with the Committee’s

¹ Communications No. 746/1997, *Humberto Menanteau Aceituno et al. v. Chile*, decision on admissibility adopted on 26 July 1999, and No. 1078/2002, *Norma Yurich v. Chile*, decision on admissibility adopted on 2 November 2005.

² See paragraphs 3.1 and 3.2.

jurisprudence,³ the Optional Protocol cannot be applied retroactively, unless the acts that gave rise to the complaint continued after the entry into force of the Optional Protocol.

8.4 The Committee must therefore determine whether the enforced disappearance of the author's son continued beyond 28 August 1992 or if, in any event, it began after 11 March 1990. In this connection, the Committee notes that the definition of enforced disappearance contained in article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance of 20 December 2006 provides that: "... 'enforced disappearance' is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law".⁴

8.5 In the present case, the original act of deprivation of liberty and the subsequent refusal to give information about the whereabouts of the victim – both key elements of the offence or violation – occurred prior to the entry into force of the Optional Protocol for the State party, and even before 11 March 1990. In addition, the author makes no reference to any action by the State party after these dates that would constitute a perpetuation by the State party of the enforced disappearance of her son. Accordingly, the Committee considers that even though the Chilean courts, like the Committee, regard enforced disappearance as a continuing offence, the State party's invocation of its declaration *ratione temporis* requires it to take account of that declaration. It is clear that the present case concerns events that occurred before the State party's ratification of the Optional Protocol or that, in any event, began before 11 March 1990. It is therefore precisely covered by the State party's declaration. In the light of the foregoing and in accordance with its jurisprudence,⁵ the Committee finds that the communication is inadmissible *ratione temporis* under article 1 of the Optional Protocol. The Committee does not deem it necessary, therefore, to address the question of the exhaustion of domestic remedies.

9. The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under article 1 of the Optional Protocol;
- (b) That this decision shall be transmitted to the State party and to the author of the communication.

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

³ Communications No. 1367/2005, *Tim Anderson v. Australia*, decision on admissibility adopted on 31 October 2006, para. 7.3; No. 457/1991, *A.I.E. v. the Libyan Arab Jamahiriya*, decision on admissibility adopted on 7 November 1991, para. 4.2; and No. 310/1988, *M.T. v. Spain*, decision on admissibility adopted on 11 April 1991, para. 5.2.

⁴ International Convention for the Protection of All Persons from Enforced Disappearance of 20 December 2006, art. 2, 61/177. See also the Rome Statute of the International Criminal Court of 17 July 1998, art. 7 (2) (i), 2187 United Nations Treaty Series, p. 3; Inter-American Convention on Forced Disappearance of Persons of 9 June 1994, art. II, OAS A-60; Declaration on the Protection of All Persons from Enforced Disappearance of 18 December 1992, 47/133.

⁵ Communications No. 1078/2002, *Norma Yurich v. Chile*, decision on admissibility adopted on 2 November 2005, para. 6.4; No. 746/1997, *Humberto Menanteau Aceituno and Mr. José Carrasco Vasquez. v. Chile*, decision on admissibility adopted on 26 July 1999, para. 6.4; and No. 717/1996, *Acuña Inostroza et al. v. Chile*, decision on admissibility adopted on 28 July 1999, para. 6.4.

Appendix

Individual opinion of Committee members Ms. Christine Chanet, Mr. Rajsoomer Lallah and Ms. Zonke Majodina (dissenting)

We are unable to agree with the majority decision of the Committee that this communication is inadmissible *ratione temporis*. We substantially share the reasoning already adopted by a number of members of the Committee in their dissenting opinion on this issue in communication No. 1078/2002, *Norma Yurich v. Chile*, decision of 2 November 2005. Our main reasons for dissenting may be summarized as follows:

- With regard to the phenomenon of an “enforced disappearance”, the majority of the Committee relies (paragraph 8.4 of the decision) on the definition given to that phenomenon in article 2 of the International Convention for the Protection of All Persons from Enforced Disappearances of 20 December 2006, with additional support in footnotes referring to the Rome Statute of the International Criminal Court, the Inter-American Convention on Forced Disappearance of Persons and the Declaration on the Protection of All Persons from Enforced Disappearance.
- In adopting that definition, the majority of the Committee looked only at the original acts (paragraph 8.5 of the decision) constituting “the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorisation, support or acquiescence of the State followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such person outside the protection of the law”. An “enforced disappearance” is not a term or concept used in the Covenant, though it clearly has a negative impact on a number of rights consecrated by the Covenant.
- In basing the thrust of their reasoning on the constituent elements of a definition which is the creation of other international instruments, the majority in the Committee unfortunately failed to appreciate the fact that it is the provisions of the Covenant and its Optional Protocol which the Committee has the mandate to apply. In this regard, the majority consequently failed to appreciate that the Committee must determine whether the State party has or has not failed in fulfilling the obligations it has undertaken under the Covenant in relation to the violation of a number of the Covenant rights of the alleged victim.
- What are those rights in the light of the allegations of the author and, more importantly, what are the ever present and continuing obligations of the State in relation to the protection and safeguard of those rights? The Committee itself was of the view (paragraph 1.1 of the decision) that those rights and obligations relate to article 2, paragraph 3, in conjunction with articles 6, 7, 9, 10 and 16 (paragraph 3.1 of the decision), including, we would suggest, article 23 paragraph 1 (paragraph 3.2 of the decision).
- Thus, after a person is reported to have disappeared, the State continues to have an obligation under article 2 paragraph 3 to conduct diligent and serious enquiries to determine what has happened to that person, what is his present status as a human being, is he dead or alive? (article 16); if he is dead, the State has a continuing obligation to conduct effective and sustained investigations to determine who is

responsible for his death or, if he is still alive, to take immediate steps to ensure that his life is not at risk (article 6). The State also has a continuing obligation to ensure that he has not been or is not being subjected to torture or inhuman or degrading treatment (articles 7 and 10) or to arbitrary detention or that he is not otherwise deprived of his liberty and security (article 9). Similarly, the State has a continuing obligation to ensure that, in his capacity as member of a family as “the fundamental group unit of society”, he is given the protection which the State and society owe to him (article 23 paragraph 1). In relation to those rights, the State is, furthermore, under a basic obligation (article 2 paragraph 3 and paragraph 18 of the Committee’s general comment No. 31 (2004)^a) to ensure, in these circumstances, that the proceedings entered in 1998 or 2000 are diligent, vigorous and effective and that those eventually responsible, if any, are brought to justice to face the legal consequences of their action.

- As illustrated in the instances we have examined above, a disappearance, which the majority in the Committee appear to concede (paragraph 8.4 of the decision), inherently has continuing effects on a number of Covenant rights. It has a continuing character because of the continuing violative impact which it inevitably has on Covenant rights. The continuity of this negative impact is irrespective of at what point in time the acts constituting the disappearance itself occurred. Inevitably the State party’s obligations continue in relation to those rights.

We conclude, therefore, that a communication complaining of continuing violations of the Covenant in relation to an alleged victim precludes the application of the *ratione temporis* exception and that the communication is not inadmissible on this ground.

(Signed) Ms. Christine **Chanet**

(Signed) Mr. Rajsoomer **Lallah**

(Signed) Ms. Zonke **Majodina**

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

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

Individual opinion of Committee members Ms. Helen Keller and Mr. Fabián Salvioli (dissenting)

1. We are regretfully unable to agree with the majority decision of the Committee regarding the inadmissibility of communication No. 1536/2006, *Cifuentes Elgueta v. Chile*. Given the complexity of this matter, a number of different topics must be addressed. One of the relevant issues concerns the Committee's views on the nature and validity of the declaration made by Chile at the time it acceded to the Optional Protocol, bearing in mind the interpretive criteria which the Committee should use to guide it in exercising its jurisdiction. Another deals with the frameworks or the precise basis for the Human Rights Committee's interpretation and application of international legal instruments. Yet another is the question of how the provisions of the International Covenant on Civil and Political Rights relate to acts constituting enforced disappearance.

I. The nature and validity of the declaration made by Chile at the time it acceded to the Optional Protocol: interpretive criteria in the Human Rights Committee's exercise of its jurisdiction

2. When, on 27 May 1992, Chile acceded to the Optional Protocol to the International Covenant on Civil and Political Rights, the Government of Chile issued a statement in which it said that it was its understanding that the competence of the Committee to consider communications from individuals applies in respect of acts occurring after the entry into force for that State of the Optional Protocol or, in any event, to acts which began after 11 March 1990.

3. By virtue of the principle of "competence-competence", which is inherent in the work of international bodies in general and international human rights bodies in particular, the Human Rights Committee is the only international organ empowered to interpret the written instrument submitted by Chile within the context of the Covenant and its Optional Protocol. There is no reason why the Committee should automatically accept a State's interpretation of the scope of its own reservations, declarations or statements of intent. As an international oversight body, it is the Committee's prerogative to evaluate them and their legal effects in the light of the aim, object and purpose of the international instruments it applies.

4. Although the statement made by Chile is entitled a "declaration", it does not appear to fit the legal definition of one, inasmuch as it does not clarify the meaning of a provision of the Protocol. Rather, its evident purpose is to exclude the Committee's competence in respect of acts which occurred before the entry into force of the Optional Protocol for Chile or which "began" before 11 March 1990.

5. It is up to the Committee to determine whether or not this "declaration" can be regarded as a reservation, or as an instrument capable of placing a time limit on its competence to consider individual cases concerning Chile, and whether or not this "declaration" is compatible with the object and purpose of the Optional Protocol and the Covenant.

6. As noted in the Protocol's preamble, its object is to achieve the purposes of the International Covenant on Civil and Political Rights and the implementation of its provisions. It was therefore deemed appropriate to enable the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant.

7. The limitations on the Committee's competence to receive and consider communications from individuals are expressly set forth in the Protocol. The Committee shall consider inadmissible any communication which is anonymous, or which is an abuse of the right of submission of such communications or is incompatible with the provisions of the Covenant (article 3 of the Protocol). In addition, the Committee shall not consider any communication unless it has ascertained that the same matter has not been examined under another procedure of international examination or settlement and that all available domestic remedies have been exhausted (art. 5, para. 2).

8. Ratification or accession to the Protocol, which, in essence, constitutes a recognition of the Committee's competence, is a juridical act subject to the terms of that instrument. There is nothing in the Protocol that authorizes a State to enter "reservations" or make "declarations" for the purpose of restricting the Committee's competence under circumstances other than those expressly stated in the preceding paragraph. It can hardly be argued that the "declaration" made by Chile at the time of its accession to the Protocol is actually compatible with the aim set forth therein or with its object and purpose. It should therefore be concluded that this "declaration" may under no circumstances have the legal effect of rendering the Committee incompetent to consider a matter such as the case presented by Ms. Cifuentes Elgueta, which may involve continuing violations of some of the Covenant rights owing to the unique nature of the crime of enforced disappearance.

9. It is the obligation of an international human rights body such as the Committee to interpret a covenant as broadly as possible when it is a matter of recognizing or guaranteeing rights or the international competence to exercise oversight and to interpret it as narrowly as possible when it is a matter of restricting rights or the international competence of oversight bodies. Consequently, in the absence of any of the circumstances mentioned in paragraph 7 of this dissenting opinion, the Committee should have found the communication to be admissible and should therefore have proceeded to consider the matter on its merits.

II. Precise nature of the frameworks to be used for the interpretation and/or application of legal instruments by the Human Rights Committee

10. As is clearly stated in the dissenting minority opinion of the Human Rights Committee in *Norma Yurich v. Chile*, it is the Committee's obligation to "apply the Covenant, the whole Covenant and nothing but the Covenant".^a This does not, however, prevent the Committee from employing an evolutive interpretation of the International Covenant on Civil and Political Rights and enriching it by drawing upon elements of the contemporary corpus juris of international human rights law in order to accomplish its object and purpose more fully and arrive at an effective interpretation.

11. This interpretive task, which is an intrinsic function of a body belonging to a comprehensive international system for the promotion and protection of the inherent rights of each and every woman and man, should be performed on the basis of the *pro persona* principle and in line with that postulate's implications. International bodies have a responsibility to make sure that they do not end up adopting a decision that weakens standards already established in other jurisdictions. However, any new interpretation based on their own areas of competence that leads to the introduction of more protective interpretations makes a contribution to the system as a whole, creates greater safeguards for

^a Communication No. 1078/2002, decision of 2 November 2005, appendix.

the rights of victims of human rights violations and sends a signal to States regarding their future conduct. This is without prejudice to the fact that, in any individual case, all that the Human Rights Committee has to decide is whether or not a communication is admissible and, if so, whether or not the established facts constitute one or more violations of the Covenant.

III. Enforced disappearance and its legal treatment in the International Covenant on Civil and Political Rights

12. Enforced disappearance is a grave violation of various rights set forth in the Covenant. It is important to understand the legal complexities that the temporal dimension of enforced disappearance, a continuing crime by definition, poses for an international tribunal such as the Human Rights Committee.

13. We are of the view that, for the reasons discussed in section I of this dissenting opinion, the Committee is competent to consider the facts and events constituting enforced disappearance in violation of the Covenant (starting with illegal deprivation of liberty). The consideration of possible violations of article 2, paragraph 3, read together with articles 6, 7, 9, 10, 16 and even article 23, paragraph 1, would seem to be in order.

14. We also believe that, even if the “declaration” made by Chile were to be given weight, in the *Cifuentes Elgueta* case the Committee could have considered possible violations which began after Chile acceded to the Protocol. There may well have been, for example, a violation of article 2, paragraph 3 (a), of the Covenant, which stipulates that each State party undertakes to ensure that any person whose rights or freedoms as therein recognized are violated has an effective remedy.

15. The obligation established in article 2, paragraph 3, of the Covenant entails, in our view, both obligations of means and obligations of result. As noted by the Human Rights Committee, “Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States parties must ensure that individuals also have accessible and effective remedies to vindicate those rights ... Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies ...” (emphasis added by the authors).^b

16. Furthermore, paragraph 16 of general comment No. 31 states that “Article 2, paragraph 3, requires that States parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged ... The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.”

17. General comment No. 31 goes on to state that “Where the investigations referred to in paragraph 15 reveal violations of certain Covenant rights, States parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of

^b Human Rights Committee, general comment No. 31 (2004), “The nature of the general legal obligation imposed on States parties to the Covenant”, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40 (A/59/40)*, vol. I, annex III, para. 15.

the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (art. 7), summary and arbitrary killing (art. 6) and enforced disappearance (arts. 7 and 9 and, frequently, 6). Indeed, the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations ...” (para. 18).

18. Article 2, paragraph 3 (a), of the Covenant, which provides broad scope for seeking a remedy before competent judicial, administrative, legislative or other authorities, also clearly establishes the right to effective legal protection when one or more Covenant rights have been violated. This provision is reinforced by article 2, paragraph 3 (b), which establishes the obligation of any such authority to develop the possibilities of judicial remedy.

19. The right to effective judicial protection has evolved and developed over time and has taken on a specific meaning when applied to the Covenant rights that may have been violated. When international tribunals began to consider cases of enforced disappearance, they found that the existing general conventions (such as the International Covenant on Civil and Political Rights and other regional agreements) did not specifically address the question of enforced disappearance. This did not, however, prevent them from identifying human rights violations within their respective jurisdictions, as is apparent in the settled case law of the Human Rights Committee on the subject.

20. The practice of enforced disappearance has given rise to the formulation of new rights and their introduction, through evolutive interpretation, into these general instruments; the “right to the truth” is one example. Massive or systematic violations of fundamental human rights are an affront to the international community as a whole, generate *erga omnes* obligations and give rise to a duty to thoroughly investigate the relevant facts and events. The right to the truth thus has two different facets: an individual aspect (with the right holders being the victims of such violations and their families) and a collective one (the community). Within the United Nations, both the social dimension of the right to the truth and the individual’s right to know have been fully recognized.^c The actual exercise of the right to the truth is an important component of full reparation, but it is not in and of itself sufficient for that purpose. Revelation of the truth must be combined with the administration of justice in order to meet the requirements of contemporary international law for action against impunity.

21. The right to the truth is relevant to the work of the Human Rights Committee, which, in its consideration of reports submitted by States parties, has said that victims of human rights violations must be allowed “... to find out the truth about those acts, to know who the perpetrators of such acts are and to obtain appropriate compensation”.^d

22. In keeping with this view, in its consideration of a number of individual communications under the Optional Protocol procedure, the Human Rights Committee stated that the author in a case concerning the enforced disappearance of her daughter had the right to know what had happened to her.^e

23. Where does the “right to the truth” figure in the Covenant? Clearly it arises in connection with the right to an effective remedy (art. 2, para. 3 (a)), read in conjunction

^c United Nations, “Updated Set of principles for the protection and promotion of human rights through action to combat impunity” (E/CN.4/2005/102/Add.1), principles 1, 2, 4 and 5.

^d Human Rights Committee, “Concluding observations of the Human Rights Committee: Guatemala” (CCPR/C/79/Add.63), para. 25.

^e Human Rights Committee, communication No. 107/1981, *Elena Quinteros v. Uruguay*, para. 14.

with the general obligation to respect and to ensure to all individuals the rights recognized in the Covenant, without distinction of any kind (art. 2, para. 1).

24. Under the Covenant, the right to the truth entails the right to obtain a clarification from the competent State bodies of the events constituting violation(s) and the persons responsible for them. Accordingly, the State must undertake an effective investigation of enforced disappearances in order to identify, prosecute and punish the perpetrators and instigators of such violations.

25. In *Nidia Erika Bautista de Arellana v. Colombia*, the Committee noted that States parties have a duty to thoroughly investigate human rights violations and to try and punish those deemed responsible for such violations.^f This duty applies a fortiori in cases in which the perpetrators have been identified. This jurisprudence has been upheld in subsequent cases.^g

26. In the light of the individual and social right to truth, the duty to investigate and try offences such as enforced disappearance has gradually been making the transition from being an obligation of means to being an obligation of result. A distinction should therefore be drawn among the different components of this State obligation.

27. The obligation to investigate refers to the pursuit of an exhaustive investigation by all means at the State's disposal, and the State must do away with any legal or material obstacle that would hinder or limit that investigation. This obligation cannot be discharged merely through the adoption of formal measures or general actions. In order to fulfil its duty to investigate, the State must ensure that all public institutions extend all necessary facilities to the trial court. This means that they must furnish any information and documentation that the court requests, bring before the court any persons it designates, and take any steps that they are instructed to perform in that regard. The Committee should have examined the facts of the *Cifuentes Elgueta* case in this light, especially if the required parameters call for nothing more than a collective investigation as a consequence of the so-called "bridging laws". Investigations are supposed to establish the truth about what occurred and lead to the identification of the responsible parties so that they may be brought to justice.

28. There is an obligation to try alleged violators once they have been identified. The trial of such persons should be conducted in such a way as to fully uphold all the guarantees and rights set forth in the Covenant.

29. The obligation to make the whereabouts of disappeared persons known when the State is responsible for their disappearance is, in our view, an obligation of result. When the State has been responsible, it is not only ethically but also legally unacceptable for it to fail to provide family members with the answers they need to be able to mourn, as is their right, disappeared persons who have been extrajudicially executed. An "effective remedy" within the meaning of article 2, paragraph 3 (a), should be understood as a remedy that fulfils the purpose for which it was created, and in the case of an enforced disappearance, an effective remedy is one that allows the victim's whereabouts to be established. If the State has managed to "disappear" someone, then it should be able to explain how it did so and where that person is, or where his or her remains are to be found.

30. Another violation that may occur in this type of case, although it was not alleged in the communication submitted by Ms. Cifuentes Elgueta, is the one occasioned by the cruel

^f Communication No. 563/1993, Views adopted on 27 October 1995.

^g Human Rights Committee, communication No. 612/1995, *José Vicente and Amado Villafañe Chaparro, Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres v. Colombia*, Views adopted on 29 July 1997, para. 8.8.

or inhuman treatment experienced by a family member of someone who has disappeared as the result of an act or omission for which the State is responsible when the State withholds all information regarding the disappeared person's fate. In *Norma Yurich v. Chile*,^h the Committee had the opportunity to express its views on that line of argument. Unfortunately, the majority opinion does not explain why that alleged violation was not explored from a legal standpoint.

31. In fact, the anguish suffered by someone with emotional ties to a disappeared person (e.g., a close relative, such as the person's mother) who does not know the victim's fate constitutes, in the absence of evidence to the contrary demonstrating a lack of genuine affection, a violation of article 7 of the Covenant. If the person has died, family members must be allowed to exercise their right to mourn the person so that they may try to continue on as best as they can under such tragic circumstances, and the State should guarantee them that right.

IV. Concluding remarks

32. Given the complexity of cases of enforced disappearance, it is incumbent upon the Human Rights Committee to pay very close attention to the time when the possible human rights violations were committed in deciding whether or not it is competent to consider a case. It must be understood that there are instances in which the point in time when an act constituting an autonomous violation of the Covenant was committed may be subsequent to the time when the person was deprived of his or her liberty.

33. International human rights law has clearly been evolving towards a point where justice can be effectively rendered to victims of aberrant violations such as enforced disappearances. We have moved beyond the false dichotomy of truth and justice, and attempts to render effective material justice should be staunchly supported by international human rights bodies to the extent that their terms of reference allow them to do so.

34. Crimes against humanity do serious harm to international society as a whole and are not to be tolerated under contemporary international law. The investigation and punishment of persons responsible for such crimes are ethical imperatives that place upon States an obligation to deploy all possible efforts to put an end to impunity and learn the truth about what happened.

35. It is our hope that in the future the Human Rights Committee's jurisprudence may move forward along the line of reasoning outlined in this dissenting opinion based on a sincere understanding that not only is it legally compatible with the International Covenant on Civil and Political Rights and its Optional Protocol, but that this is also the most effective interpretation of the object and purpose of these instruments.

(Signed) Ms. Helen **Keller**

(Signed) Mr. 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.]

^h Note a above.

**K. Communication No. 1540/2007, *Nakrash and Liu v. Sweden*
(Decision adopted on 30 October 2008, Ninety-fourth session)***

<i>Submitted by:</i>	Mr. Mahmoud Walid Nakrash and Ms. Liu Qifen (not represented by counsel)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Sweden
<i>Date of communication:</i>	3 January 2007 (initial submission)
<i>Subject matter:</i>	Expulsion of the authors to their countries of origin
<i>Procedural issues:</i>	Lack of substantiation
<i>Substantive issues:</i>	Risk of torture or cruel, inhuman or degrading treatment or punishment; no respect of family life
<i>Articles of the Covenant:</i>	7; 17
<i>Articles 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 October 2008,

Adopts the following:

Decision on admissibility

1.1 The authors of the communication are Mr. Mahmoud Walid Nakrash, a Sunni Muslim citizen of the Syrian Arab Republic, born in Saudi Arabia in 1979, and Ms. Liu Qifen, a citizen of China, born in 1977. They also submit the communication on behalf of their son, Nor-Edin, born in 2004 in Sweden. They do not invoke any particular article of the Covenant and are not represented by counsel.

1.2 When registering the communication on 9 January 2007, and pursuant to rule 92 of its rules of procedure, the Committee, acting through its Special Rapporteur on New Communications and Interim Measures, requested the State party not to deport the authors to the Syrian Arab Republic and China respectively while their case was under examination. As a result, the State party decided to grant a stay-of-enforcement of its decision to expel the authors.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Ms. Helen Keller, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Ms. Elisabeth Palm did not participate in adoption of the Committee's decision.

The facts as submitted by the authors

2.1 Mr. Nakrash states that his father was a member of the Muslim Brotherhood, a political party prohibited in the Syrian Arab Republic, and that in 1979 his father and cousin were arrested by the Syrian Police. His father escaped from detention and fled with his family to Saudi Arabia. Later on, he learnt that he had been sentenced to death in absentia in the Syrian Arab Republic and that his cousin had been hanged in 1980 by decision of the Syrian Government.

2.2 In 1986, the author visited the Syrian Arab Republic with his mother and brother. When they decided to return to Saudi Arabia, the Syrian authorities did not allow him and his brother to leave the country. As a result, their mother returned to Saudi Arabia alone and they stayed with their grandfather (from their mother's side). In 1990, their mother returned to the Syrian Arab Republic and their father decided to go to Sweden, where he asked for asylum and obtained a residence permit.

2.3 The author states that, while in the Syrian Arab Republic security men came on one occasion to their house and took him and his brother for questioning. For years they were subjected to constant harassment by the intelligence services. He also states that he had to leave school because of measures taken against him for his lack of affiliation to the Baath party.

2.4 Between 1998 and 2000, the author assisted at meetings organized by the Muslim Brotherhood party, which had political and religious contents. After one of the meetings the author and other participants were arrested by the police. He remained in detention without any charges for two weeks, during which he was beaten and insulted repeatedly. He was released after his uncle pay bribes, but was forbidden from travelling inside the country. Some months later, while he was at work, the police searched his house and confiscated tapes and books among other things. He was also requested to contact the Political Security Branch as soon as possible. The author did not return home and went into hiding for about five months. In the meantime, he learnt that some of his friends and the leader of the group had been arrested and that the police were looking for him. He managed to obtain a false passport and a Turkish visa and fled to Turkey. He arrived in Ankara in February 2000, where he contacted the Swedish Embassy and asked for a visa on the basis of his father's ties with Sweden. However, his application was refused.

2.5 The author arrived in Sweden in June 2003 and submitted an asylum request on 4 July 2003. He was interviewed on 9 January 2004 and got the first negative response from the Immigration Service on 9 November 2004. He made an appeal with the Aliens Appeals Board on 29 March 2005. On 21 April 2005 the Board issued a negative decision. A further negative decision was issued on 11 May 2006.

2.6 The author attaches to his communication an extract of a police record in which it is indicated that on 21 March 2000 he was sentenced in absentia by the State Security Court to "nine years with labor" for membership in an illegal opposition group. He was also sentenced in absentia to three years of imprisonment by a military court, on 11 May 2000, for failure to perform the mandatory military service.

2.7 Mr. Nakrash further states that he suffers from a severe disease, similar to cancer, called "langerhans histiocytes" and has undergone chemotherapy treatment. As a result, he has inter alia difficulties to digest food and has to take pain-relieving medicines.

2.8 While in Sweden Mr. Nakrash met Ms. Liu Qifen, a citizen of China who arrived in Sweden in July 2003 and whose request for asylum was also rejected. They have a son born on 20 November 2004. She applied for asylum on his behalf on the same day he was born.

2.9 While in China Ms. Liu Qifen lived with her brother, a Falun Gong teacher. In 1998, she started practicing Falun Gong herself and in early 2002, she and her brother were

arrested. She was released a few days later after paying a fine. She was thereafter summoned to the police a few times, interrogated in relation to her practice of Falun Gong and asked to provide names of other Falun Gong followers. She was beaten on several occasions and finally accepted to sign a document indicating that she would stop practicing. Her brother was sentenced to 10 years of imprisonment. When she visited him in prison she saw that he had been beaten. She decided to leave the country in March 2003.

2.10 Ms. Liu Qifen's request for asylum was rejected by the Migration Board on 21 December 2004 and by the Migration Appeals Board on 21 April 2004.

The complaint

3.1 Mr. Nakrash claims that if he is deported to the Syrian Arab Republic he will be arrested and will face torture and ill-treatment. He will be under the jurisdiction of the military courts, which do not apply the minimum standards of justice. He might stay in detention without trial for longtime and will not be able to see his girlfriend and son again.

3.2 Ms. Liu Qifen also claims that if she is deported to China she will be at risk of being arrested and separated from her son because of her brother's involvement with Falun Gong. She also fears discrimination because of the fact that she is a single mother. Finally, she claims that the permanent separation of her son with his father would amount to cruel treatment. She has no relatives in China other than her brother.

3.3 The authors claim that, if deported, the family will be divided and they won't be able to visit each other, as their respective countries will not allow them to travel even if they are not in detention.

3.4 The authors do not invoke specific articles of the Covenant. However, their claims might raise issues under articles 7 and 17.

State party's observations on admissibility and merits

4.1 On 22 August 2007, the State party submitted that, in the course of his interviews with the Migration Board, Mr. Nakrash reported that his problems with the Syrian authorities began in 1998, when he was enlisted for military service. It had then been revealed that he was not a member of the Baath Party and that his father had links with the Muslim Brotherhood. He was interrogated by officials from different departments of the security services and the security police.

4.2 On 9 November 2004, the Migration Board rejected Mr. Nakrash's application for asylum and a residence permit. It noted that the author had not been able to substantiate the alleged harassment, interrogations and abuse from the Syrian authorities, nor had he been able to substantiate that he lived for three years in Turkey. The Board found it very unlikely that he would attract any interest from the Syrian authorities if returned, in view of the fact that his father had left Syria as long ago as 1979. Furthermore, his mother and brother had not experienced any problems with the Syrian authorities. The author had left the Syrian Arab Republic with a valid passport and necessary travel documents. This would not have been possible if he had been of any interest to the Syrian authorities. According to information available to the Board, the sentence for refusing to do military service in the Syrian Arab Republic varies between two and six months of imprisonment. This in itself does not constitute a sufficient ground for being granted asylum in Sweden. Moreover, it is very common for the Syrian president to grant amnesty and is unusual for such sentences to be served.

4.3 Before the Aliens Appeals Board the author added that he had been sentenced to nine years imprisonment for belonging to illegal opposition organizations and claimed that

a friend of his had obtained a document showing that he had actually been sentenced for the two crimes. He also added that he was co-habiting with Ms. Liu Qifen and had a son together. Despite his disease, he was working part time at a restaurant in Lulea. He submitted a birth certificate concerning the son. However, the document contained no indication regarding the identity of the father. The Board rejected the application essentially on the same grounds as the Migration Board.

4.4 As for Ms. Liu Qifen, the Migration Board rejected her application on 21 December 2004. According to the Board, the Chinese regime had pursued a wide-ranging campaign against followers of the Falun Gong movement since 1999. However, ordinary practitioners had not attracted any special interest from the authorities. The Aliens Appeal Board case-law indicated that mere membership of Falun Gong could not be a sufficiently strong reason for being granted a residence permit. Ms. Liu Qifen had been active at a low level and the relatively short prison sentence she had served indicated that the authorities had no particular interest in her. After having signed a document in 2001 stipulating that she would no longer practice Falun Gong she was able to live a relatively normal life in China until she left the country on 11 March 2003. She submitted a fax copy of a summons to the police which the Board considered had a low level of value as evidence. The Board concluded that she had not been able to substantiate her claim that she was at risk of being persecuted by the Chinese authorities.

4.5 In her appeal before the Aliens Appeals Board she added that even practitioners at her level were persecuted and that her escape from China had most likely strengthened the suspicions against her. According to her friends in China the police were still looking for her. Moreover, she had been removed from the national registration of citizens and would therefore be regarded as a stateless person in China. She also stated that Mr. Nakrash would not be allowed to enter China since he was not known to the authorities and he could also be suspected of being a practitioner of Falun Gong. The family would therefore be divided if they were to be sent to different destinations.

4.6 On 21 April 2005, the Aliens Appeals Board upheld the decision of the Migration Board basically on the same grounds. It was known to the Board that a person could be struck from the Chinese national registration of citizenship and that she would have to re-register if returned to China. However, the author had not substantiated her assertion that she had been struck from the national registration of citizens and lost her Chinese citizenship. It had not been substantiated either that the family would not be able to reunite in either the Syrian Arab Republic, China or a third country.

4.7 The Migration Board examined the cases again under the temporary wording of Chapter 2, Section 5 b of the 1989 Aliens Act. In a decision of 11 May 2006 it concluded that the authors could not be granted a residence permit and that the circumstances could not be considered to be of such nature as to involve an urgent humanitarian interest. Moreover, the authors had not developed such ties to Sweden that they qualified for a residence permit on these grounds. It followed from the temporary legislation that special consideration *inter alia* was to be given to a child's social situation, its period of residence in and ties to Sweden.

4.8 The State party acknowledges the fact that all domestic remedies have been exhausted. It argues, however, that the communication should be considered inadmissible under articles 2 and 3 of the Optional Protocol. First of all, a right of asylum as such is not protected by the Covenant. Neither does the Covenant guarantee socio-economic rights, such as the rights to housing free of charge, work, free medical assistance or the right to claim financial assistance from the State to maintain a certain standard of living. Should the case be considered to be based on a claim of entitlement under the Covenant to any of those rights, it would relate to a matter that is outside the Covenant and should thus be declared inadmissible *ratione materiae*.

4.9 Secondly, it may be questioned whether the “treatment” that the authors allegedly risk being subjected to upon return to the Syrian Arab Republic and China would be on a sufficient level for article 7 of the Covenant to be applicable. The Covenant does not contain any definition of the concepts covered by article 7. The definition contained in article 1 of the Convention against Torture should be of relevance in the present context. However, it seems very unlikely that the alleged “treatment” could amount to torture. The concept of torture requires the infliction of severe pain or suffering intentionally and for a specific purpose. No support can be found for a proposition that the Syrian Arab Republic or China would intentionally inflict such grave treatment on the authors. As for the concept of inhuman or degrading treatment, the Committee has held that the assessment of what constitutes such treatment within the meaning of article 7 depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim. The treatment and living conditions that the authors would allegedly face upon return to their respective countries of origin, even taking into account their personal circumstances, may not be sufficiently difficult to meet the level of severity required for the purposes of article 7. Consequently, their claim would fall outside the scope of the Covenant and should be declared inadmissible *ratione materiae*. The “non-refoulement principle” established under article 7 of the Covenant cannot be considered to impose an obligation to refrain from expelling the authors in this particular case, even if the State party recognizes that the general human rights situation in both the Syrian Arab Republic and China is in many ways problematic. Accordingly, also for this reason the communication should be declared inadmissible *ratione materiae* pursuant to article 3 of the Optional Protocol.

4.10 Finally, the State party submits that the communication fails to rise the basic level of substantiation required for the purposes of admissibility. This is also the case with regard to the claim under article 17 of the Covenant.

4.11 As for the merits, the State party asserts that Swedish immigration authorities have gained considerable experience in assessing claims from asylum-seekers from the Syrian Arab Republic. Great weight must therefore be attached to the opinions of the Swedish immigration authorities.

4.12 The first time Mr. Nakrash claimed that he had been sentenced to prison for being a member of prohibited opposing groups was during his appeal to the Aliens Appeals Board. In support of this claim he submitted the excerpt of the police record which he also submitted to the Committee. The excerpt was submitted only in photocopy, although the author stated that his friend and his brother had obtained the original from the Criminal Department at the Security Service. The Swedish Embassy in Damascus engaged an attorney-at-law to look into the authenticity of the document. He concluded that the excerpt was not authentic on the basis of the following findings. Neither the State Security Court’s decision number, nor the Military Court’s decision number were indicated, although they were supposed to be. There was no indication either of the Military Court which sentenced the author. It was indicated that the execution of the nine-year sentence for membership in prohibited opposing groups had been stayed. However, a “stay of execution” is not used in the criminal courts and the State Security Court, since there is no legal basis in the Syrian legal system for such a decision at these courts. The attorney searched for the author’s name at the archives of the State Security Court and the centre for all the Military Courts in Damascus but found no case-file regarding the author. At the archives of the Syrian Ministry of Interior he found out that a warrant had actually been issued for the author in Aleppo in 2003 regarding his failure to join the military service. However, this warrant had been revoked and nullified following an amnesty in 2003. At the Syrian Migration authority the attorney found no information that the author was wanted for any crime. The attorney explained that if someone is wanted by the Syrian authorities information on that person is

entered into the migration authorities' records, so that he/she may be arrested when leaving or entering the country.

4.13 According to the State party, the obvious conclusion to be drawn from the result of the investigation is that Mr. Nakrash had not been sentenced for the alleged crimes. Thus, he is not at risk of being arrested and subjected to ill-treatment on those accounts if he has to return to the Syrian Arab Republic. Furthermore, the fact that he has provided false information and documentation to the Swedish authorities and to the Committee should be regarded with great seriousness and gives reason to call into question his general credibility and the veracity of his claims.

4.14 The State party further argues that Mr. Nakrash provided contradictory statements. For instance, during the second interview before the Migration Board he stated that he had participated in only one political meeting, whereas before the Committee he claims that he had participated in several. Before the Swedish authorities he stated that several other persons that had participated in the meeting had been arrested by the police and that he had been arrested in the summer or autumn of 1999. Before the Committee however he claims that they had been arrested directly after a meeting. Before the Migration Board he stated that it had taken him 10 months to get 3 months respite for doing military service; however, during a visit to the Swedish Embassy in 1998, he instead stated that he had received a respite until 2000. During the Migration Board's examination of his case under the temporary legislation, he made no mention of the alleged outstanding nine-year prison sentence.

4.15 The State party concludes that Mr. Nakrash has not been able to substantiate his claim that, upon return to the Syrian Arab Republic, he would be at risk of being tortured or subjected to cruel, inhuman or degrading treatment or punishment. It is very unlikely that he would attract any interest from the authorities due to his father's political activities, bearing in mind that his father left the Syrian Arab Republic in 1979 and his alleged political activities have been very limited and at a low level. As for Mr. Nakrash's statement regarding his state of health, he has not claimed that his disease is life-threatening or that necessary medical treatment is not available in the Syrian Arab Republic. In view of this, the Aliens Appeals Board concluded that he could not be granted asylum and a residence permit on humanitarian grounds.

4.16 As for Ms. Liu Qifen and her son the State party considers it unlikely that she would attract any interest from the Chinese authorities. She has not been able to demonstrate that she would be persecuted upon her return to China. Hence, the complaint does not amount to a violation of article 7. The documentation and circumstances invoked by the complainants do not suffice to show that the alleged risk of ill-treatment fulfils the requirement of being real and personal. The authors have therefore failed to substantiate their claim that an expulsion to the Syrian Arab Republic and China would entail inhuman or degrading treatment within the meaning of article 7.

4.17 Regarding the claim that the expulsion of the authors from Sweden would split up the family and interfere with their right to family life, the Aliens Appeals Board, in its decision of 21 April 2005, stated that a temporary splitting up of the family would not amount to a violation of their right to respect for family life under article 8 of the European Convention. The family would be able to reunite in either the Syrian Arab Republic, China or a third country and the authors had not demonstrated that this would be impossible. For the sake of clarifying the matter further, the State party requested the assistance of the Swedish Embassy in Damascus to examine the possibilities under Syrian legislation for the authors to reunite in the Syrian Arab Republic. The Embassy engaged an attorney-at-law to look into the matter. According to him, it should be possible for the family to be reunited in the Syrian Arab Republic. If the expulsion order against Mr. Nakrash is enforced, Ms. Liu Qifen and her son should be able to apply for a visa at the Syrian Embassy and after

entering the Syrian Arab Republic apply for residence permits on the basis of their ties to Mr. Nakrash. It has not been possible for the State party to determine the possibilities for the family to reunite in China. The State party concludes that an expulsion to different destinations cannot be considered to constitute arbitrary or unlawful interference with family life within the meaning of article 17.

Authors' comments to the State party's observations

5.1 On 6 February 2008 the authors submitted comments on the State party's observations. Mr. Nakrash stated that, as he had indicated to the Migration Board, he had been under arrest several times between 1997 and 1999, and that even as a child, he had to report to the police periodically. The arrest he referred to in his initial submission took place in March 1999, after one of the meetings he attended. He was also arrested in one occasion in August or September 1999 and remained in custody for four days. The last meeting he attended was in October 1999. After that, he went into hiding and fled to Turkey in February 2000.

5.2 Regarding his military service, Mr. Nakrash states that he asked for a postponement because his mother was sick and he had to take care of her. However, in view of the fact that his father had been involved with opposition groups, the chairman of the Division Recruitment Centre delayed the approval. As a result, it took him 10 months to get the respite.

5.3 When his case was reviewed under the temporary legislation his lawyer focussed primarily on the family situation. He did not mention the nine-year sentence because this issue had already been raised with the Swedish authorities.

5.4 The author claims that although his father left the Syrian Arab Republic long time ago, there is still a death sentence against him and that Law 49/1980 sentencing to death anyone who is active with the Muslim Brotherhood is still in force.

5.5 After his brother went to the criminal security department to obtain his criminal record, two police officers came to his brother's house and left a document requesting the author to report to the military police by 1 February 2005. Failure to do so would be punished by doubling the duration of his military service. The author disagrees with the conclusion of the attorney hired by the Swedish Embassy and states that the document concerning his police record is authentic. He says that most probably the attorney did not have the power to obtain the kind of information required. Moreover, he was probably trying to cooperate with both the Syrian government and the Swedish Embassy at the same time, thus making it easy for the State party to deport him to the Syrian Arab Republic. Under the state of emergency currently in force, Syrian authorities can arrest anybody at any time. They don't need to inform the migration service to arrest somebody when leaving or entering the country. They particularly watch Syrian citizens returning to the country after many years, those who are deported, those who return from "hostile countries" and those suspected to be active in the opposition. When these citizens arrive at the airport or other border points they are transferred to the notorious Intelligence Centre, where they can be subjected to thorough investigation and subjected to torture. He refers to the case of another Syrian citizen who was deported from the United Kingdom in 2005, after the British authorities found out that he had no convictions and there was no detention order against him. Upon his arrival in the Syrian Arab Republic he was arrested, tried for alleged membership to the Muslim Brotherhood and sentenced to death, reduced later to 12 years of imprisonment. He says that this case is similar to his and that he will face the same fate. He also refers to reports of Amnesty International and the Syrian Human Rights Committee pointing out at human rights violations in the country.

5.6 The author disagrees with the State party's argument that the family could be reunited in the Syrian Arab Republic. As both of them would be deported to different countries, they would have to initiate a procedure with the Syrian authorities which would take time and might not be successful. Furthermore, Ms. Liu refuses to live in the Syrian Arab Republic and his family refuses his relationship with a non-Muslim woman. The different culture, traditions and religion are one of the main reasons preventing Ms. Liu from living in the Syrian Arab Republic. Moreover, because of their unstable situation Ms. Liu refuses to get married, which makes their situation particularly complicated vis-à-vis Civil Syrian law and constitute an obstacle to obtain a residence permit from the Syrian authorities.

5.7 Ms. Liu Qifen adds that her son will not be recognized as Chinese by the Chinese authorities, as he was born outside China and his father is a foreigner. According to the Chinese law, the child is considered to have the nationality of his father and has no right to obtain the nationality of his Chinese mother.

5.8 Mr. Nakrash further states that they have integrated into Swedish society. Their son goes to school and his father and four of his brothers live in Sweden. His family links with Sweden are therefore more important than those with the Syrian Arab Republic.

Additional observations from the State party

6.1 On 10 April 2008, the State party noted that some of the additional statements submitted by the authors in their comments entail an escalation in comparison with their earlier statements. Thus, Mr. Nakrash now claims that his problems with the Syrian authorities began already during August-September 1997 and that a number of arrests were made during the following two years. However, during the second interview before the Board, which took place on 9 January 2004, he claimed that his problems with the authorities had begun when he applied for postponement of his military service and that between 1998 and 2000 he had been summoned several times to the security service and questioned about his father. He also claimed that he had participated in a single meeting at the end of 1999.

6.2 Mr. Nakrash refers, for the first time, to a note issued by the police on 15 January 2005 asking him to appear before the authorities on 1 February 2005. It is correct that an uncertified copy of the alleged document was submitted to the Swedish Migration Board together with the application for residence permits under the temporary legislation. However, the alleged document was not submitted in original and it was never invoked as evidence during the asylum proceedings before the Board.

6.3 The State party refers to the fact that the Swedish Embassy in Damascus engaged an attorney-at-law to investigate the authenticity of certain documents. Should Mr. Nakrash be wanted by the authorities for failing to obey the instructions to appear before the authorities on a certain date the State party is confident that the attorney-at-law would have reported to the Embassy that such a document had been issued by the authorities. However, the existence of the document is not accounted for or even mentioned in the report of the attorney-at-law.

6.4 According to information available to the Swedish Migration Board, the sentence for refusing to do military service varies between two and six months imprisonment. However, amnesties are apparently very common and it is unusual for such prison sentences ever to be served. In conclusion, the State party maintains that the alleged document does not in itself constitute sufficient ground for being granted asylum in Sweden.

6.5 Regarding Mr. Nakrash's state of health, the State party refers to the jurisprudence of the European Court of Human Rights. Only if there are very exceptional circumstances

and when there are compelling humanitarian considerations at stake, may the enforcement of an expulsion decision entail a violation of the European Convention on Human Rights on grounds related to the state of health of the alien concerned. Moreover, the first author has not claimed that necessary medical treatment is not available in the Syrian Arab Republic. The State party therefore concludes that Mr. Nakrash's state of health does not constitute either sufficient grounds for being granted asylum in Sweden.

Issues and proceedings before the Committee

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

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

7.3 The Committee notes that the authors are not represented by counsel and that they do not specify which articles of the Covenant they consider would be violated by the State party in case they are returned to their respective countries of origin. The Committee considers, however, that some of their claims can be examined under article 7. Thus, Mr. Nakrash states that he will be at risk of being arrested and subjected to torture and ill-treatment upon return to the Syrian Arab Republic. The Committee recalls that States parties are under an obligation not to expose individuals to a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. The Committee must therefore decide whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of his removal to the Syrian Arab Republic, there is a real risk that the author would be subjected to treatment prohibited by article 7. The Committee notes that both the Immigration Board and the Aliens Appeals Board, after a thorough examination, rejected the asylum application of the author on the basis of lack of credibility and the existence of contradictory statements. 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 the evaluation was clearly arbitrary or amounted to a denial of justice. The material before the Committee does not show that the proceedings before the authorities in the State party suffered from any such defects. The Committee accordingly considers that Mr. Nakrash has failed to substantiate his claims under article 7, for purposes of admissibility, and it concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.¹ As for Ms. Liu Qifen, she claims that she will be at risk of being arrested upon her return to China. However, she does not provide sufficient evidence to the effect that she would be subjected to treatment contrary to article 7 of the Covenant. Accordingly, this part of the communication is also inadmissible, under article 2 of the Optional Protocol, for lack of substantiation.

7.4 Both authors claim that their expulsion from the State party would entail the separation of the family. The Committee has examined this claim as it might raise issues under article 17 of the Covenant. It notes, however, that the Immigration Board and the Aliens Appeals Board also looked into this issue and concluded that the authors had not demonstrated that the family would be unable to reunite in either the Syrian Arab Republic, China or a third country. The Committee considers that the materials before it do not show

¹ See communication No. 1234/2003, *P.K. v. Canada*, decision of 20 March 2007, paragraph 7.3.

that the evaluation of facts and evidence carried out by the State party's authorities in this regard was arbitrary or amounted to a denial of justice and concludes that this part of the communication is also inadmissible under article 2 of the Optional Protocol.

8. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the authors.

[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.]

**L. Communication No. 1550/2007, *Brian Hill v. Spain*
(Decision adopted on 28 July 2009, Ninety-sixth session)***

<i>Submitted by:</i>	Brian Anthony Hill (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	19 January 2006 (initial submission)
<i>Subject matter:</i>	Detention of the author, who had been released on parole, to serve his full sentence
<i>Procedural issues:</i>	Lack of substantiation; non-exhaustion of domestic remedies
<i>Substantive issues:</i>	Arbitrary detention; torture; lack of a review by a higher tribunal; interference with a person's privacy and family
<i>Articles of the Covenant:</i>	2, paragraphs 2 and 3; 7; 9, paragraph 1; 14, paragraphs 5 and 7; and 17, paragraphs 1 and 2
<i>Articles of the Optional Protocol:</i>	2; 5, paragraph 2 (b)

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

Meeting on 28 July 2009,

Adopts the following:

Decision on admissibility

1.1 The author of the communication, dated 19 January 2006, is Brian Anthony Hill, a British citizen born in 1963. He claims to be the victim of violations by Spain of article 2, paragraphs 2 and 3; article 7; article 9, paragraphs 1, 2, 3 and 4; article 10, paragraph 1; article 14, paragraphs 1, 3 (a), 5 and 7; and article 17, paragraphs 1 and 2, of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The author is not represented by counsel.

1.2 On 23 July 2007, the Rapporteur on New Communications and Interim Measures, acting on behalf of the Committee, agreed to the State party's request that the admissibility of the communication should be considered separately from the merits.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Mohammed Ayat, Mr. Prafullachandra Natwarlal Bhagwati, 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. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

The facts as submitted by the author

2.1 In 1986, the author and his brother were sentenced to six years in prison by the Provincial High Court of Valencia for setting fire to a bar. In 1988, they were granted parole after serving half of their respective sentences. In 1992, they submitted a communication to the Committee claiming that their rights under the Covenant had been violated with respect to their detention and trial. In 1997, the Committee adopted Views concluding that there had been violations of article 9, paragraph 3; article 10; and article 14, paragraphs 3 (c) and (d) and 5. The Committee also concluded that the Hill brothers were entitled to an effective remedy entailing compensation.¹

2.2 With a view to obliging the State party to take measures to follow up on the Views of the Committee, the author filed a complaint invoking the financial responsibility of the State for the failings of the justice system, which was rejected by the Ministry of Justice in a decision of 2 November 2002. The author then filed an administrative appeal with the National High Court on 19 February 2003.

2.3 At the same time, the author requested an annulment of the proceedings leading to the verdict of 20 November 1986. This request was dismissed by a decision of the National High Court on 12 November 1999 on the grounds that it was time-barred. In response to this dismissal, the author submitted an application for *amparo*. The Constitutional Court declared it inadmissible in a decision of 13 November 2000, deeming that *amparo* was not the right procedure for annulling a criminal conviction and that the appropriate remedy was a judicial review, as provided for in the Code of Criminal Procedure.

2.4 Accordingly, the author filed an application for judicial review before the Supreme Court. This resulted in a decision of 25 July 2002, which annulled the proceedings subsequent to the submission of the appeal in cassation against the verdict of the trial court. Consequently, the author lodged an appeal in cassation, invoking the Committee's Views and claiming, inter alia, that his right to a fair trial, and in particular to the presumption of innocence, had been violated. The Court re-examined, inter alia, the police record, the record of the identification parade and the testimony of the primary witness. Finding no irregularities in the evaluation of the evidence by the trial court, it rejected the appeal on 11 September 2003. On 5 November 2003, the Provincial High Court of Valencia upheld the original sentence and announced that proceedings would be brought against the author and his brother with a view to obliging them to serve it in full.

2.5 In response to the decision in cassation, the author submitted an application for *amparo* on 30 October 2003, invoking the violation of the right to effective legal protection and to a defence, because there was no effective interpretation from English to Spanish during the testimony given in the pretrial phase; the right to a fair trial, because the identification proceedings by which he was identified as the person who started the fire were not carried out in accordance with due process of law; and, lastly, his right to be presumed innocent, because he was convicted without sufficient evidence. The Constitutional Court concluded that the decision in cassation did not violate those rights and declared the application inadmissible on 27 March 2006.

2.6 Then, on 7 April 2005, the Provincial High Court ordered the author's detention. In response, the author lodged an application for reconsideration on 13 April with the Court claiming that, owing to the time that had elapsed since the conviction, the crime was time-barred. The Court declared the appeal inadmissible on 20 April 2005, finding that no time-bar was applicable. In response, the author filed an action for annulment on 22 April 2005,

¹ Communication No. 526/1993, *Hill v. Spain*, Views of 2 April 1997. The case remains open in accordance with the procedures for follow-up to the Committee's Views.

which was dismissed on 10 May 2005. Subsequently, on 18 May 2005, he requested the suspension of his sentence, which was denied on 20 May 2005. Finally, the author submitted an application for *amparo* before the Constitutional Court, which was declared inadmissible on 1 March 2006 on the grounds that it was submitted after the legal deadline. Regarding the request for suspension of the sentence, the Court indicated that the judicial remedy preceding such a request had not been exhausted, because, when the suspension of a sentence is denied, it is possible to lodge an application for reconsideration with a higher court.

2.7 On 8 October 2005, the author was arrested at Lisbon airport under a European arrest warrant issued at the request of the Provincial High Court. On 14 November 2005, he was handed over to the Spanish authorities at Badajoz. He states that he was not informed of the reasons for his arrest and that when he asked for an interpreter and a lawyer to be assigned to him he was told that they were not necessary. After spending two hours in a police station, he was transferred to the Badajoz jail. He states that when he appeared before a judge two days later, he declared that he had been granted parole in 1988 in due form and that he had informed the relevant authorities of his address in the United Kingdom.

2.8 The day after he was handed over to the Spanish authorities, he filed a habeas corpus petition. By a decision of 17 November 2005, the investigating judge (No. 2 of Badajoz) declined to initiate the proceedings, on the grounds that the author was under the authority of the Provincial High Court of Valencia and that his case had none of the elements of an illegal detention. On 27 December 2005, he wrote to the prison warden for information on his situation. By way of reply, he received a spreadsheet detailing the sentence served and that remaining to be served. The author believed that the calculation was incorrect, and therefore submitted a complaint to the Prison Supervision Court on 29 December 2005.

2.9 On 1 February 2006, he was placed under a grade 2 regime, which meant that he must remain in prison for six months. The author contested this decision before the prison warden. On 19 February 2006, he received a document from the Provincial High Court of Valencia which set out in detail the portion of his sentence as yet unserved. The author wrote to the Court to say that he did not agree with the calculation. He also made a request to the deputy warden to place him under a grade 3 regime, which would allow him to be released conditionally as a foreign offender. On 28 February 2006, he was placed under the grade 3 regime. However, he was not conditionally released until 11 April 2006, despite repeated requests to be released sooner on the grounds that his father was seriously ill. His father died in the United Kingdom on 7 April 2006.

The complaint

3.1 The author claims that the legal remedies and procedures needed to comply with the Committee's Views do not exist in Spain. He maintains that the failure to recognize the validity of the Views is a violation of article 2, paragraph 2, of the Covenant. Furthermore, the decisions of the Provincial High Court of Valencia and the European arrest warrant issued against him are contrary to the Committee's Views and constitute a violation of article 2, paragraph 3, of the Covenant.

3.2 The author also maintains that his arrest in 2005 contravenes article 9, paragraph 1, of the Covenant, since under Spanish law the statute of limitations for the crime of which he was convicted expired in 2003, 15 years after the decision in cassation of 6 July 1988 upholding his conviction. Furthermore, his arrest was contrary to the Committee's Views and, when it took place, there was still an application for *amparo* pending before the Constitutional Court.

3.3 The Supreme Court could argue that its decision of 25 July 2002, annulling the proceedings subsequent to the submission of the appeal in cassation against the verdict of the trial court, interrupted the 15-year period. However, article 116 of the Criminal Code stipulates that the time-bar period begins to run on the date of the enforceable judgement or of a violation of the terms of his sentence, if the sentence has begun. According to the State party, the author did not fully serve his sentence, and therefore violated its terms, which caused the Provincial High Court of Valencia to order his arrest on 1 March 1989. The period of 15 years therefore began on 1 September 1988 (the date on which, as a condition of parole, the author had to appear before the court but failed to do so, since at the time of his previous appearance they had told him it was not necessary) and ended on 1 September 2003. The author attaches a note of 20 December 1988 from the Supreme Court to the Embassy of the United Kingdom, in which it declares that the appeal in cassation against the verdict of the trial court was dismissed on 6 July 1988, and that therefore the judgement of the Provincial High Court was enforceable. Furthermore, the Criminal Code of 1995 lowered the time-bar period from 15 to 10 years, and the author might well have benefited retroactively from that change.

3.4 The author claims that he is the victim of a violation of article 9, paragraphs 2 and 3, of the Covenant, since the Spanish authorities to whom he was handed over following his arrest in Portugal did not inform him of the reasons for his arrest, or bring him before a judge or any other officer authorized by law to exercise judicial power.

3.5 The author also claims that a violation of article 9, paragraph 4, occurred, since his habeas corpus petition was summarily dismissed and since, given the nature of the case, the judge should have consulted a higher authority. Furthermore, there was no remedy against the decision to dismiss the habeas corpus petition.

3.6 The author also claims that a violation of article 10, paragraph 1, occurred, since the letters he sent to various authorities (the Provincial High Court of Valencia, the Constitutional Court, the Prime Minister and the King) went unanswered; the actions taken by the British authorities were unsuccessful; the Provincial High Court took five months to give the author the documents setting out the balance of his sentence, which he needed in order to request his release; the judge of the Prison Supervision Court took three months to respond to his request for an urgent meeting; and on two occasions the prison authorities denied his request for special leave to visit his seriously-ill father solely because his father lived abroad.

3.7 The author also claims that a violation of articles 7 and 17, paragraphs 1 and 2, of the Covenant occurred. In his view, the fact that he has spent 21 years seeking recognition of the injury inflicted on him by the State party; that he was arrested in Lisbon in front of his wife and daughter and spent six months in prison in deplorable conditions; that he lost his job in the United Kingdom as a result, and that he was unable to visit his seriously-ill father, constitutes torture as well as interference with his privacy and his family.

3.8 The author also claims that a violation of article 14, paragraph 1, of the Covenant occurred, since while he was detained he was not granted a public hearing or a fair trial. He contends that article 14, paragraph 3 (a), of the Covenant was violated, since he was not informed promptly, in a language he understood, of the nature and cause of the charge against him. He also states that article 14, paragraph 5, of the Covenant was violated, since the Supreme Court denied him the right to judicial review, the only remedy that would allow a proper consideration of all aspects of the case, in particular new facts and evidence.

3.9 Lastly, the author claims that article 14, paragraph 7, of the Covenant was violated, since he was punished again for a crime for which he had already been convicted, served his sentence, and discharged his criminal responsibility.

State party's observations on admissibility

4.1 In a note verbale of 23 May 2007, the State party states that the communication should be considered inadmissible. It points out that it has, on various occasions, informed the Committee about proceedings brought by the author in which he invoked the Committee's Views. In particular, it recalls that the Supreme Court, in a decision of 25 July 2002 arising from the judicial review, annulled the proceedings subsequent to the submission of the appeal in cassation against the verdict of the trial court. Subsequently, on 11 September 2003, the Supreme Court confirmed the verdict of the Provincial High Court, a decision which was fully substantiated and which paid special attention to all questions raised by the author.

4.2 Contrary to what was stated by the author, the terms of his parole in 1988 required him to appear before the court on the first and fifteenth day of every month. The author stated that he had given his address as the British Embassy because he was looking for accommodation, and that, as soon as he found some, he would forward the address. The State party attaches a copy of a note of 9 January 1989 from the Directorate-General of the Civil Guard to the Provincial High Court, which indicates that on their release from prison the author and his brother, whose last known address was the British Embassy in Madrid, had left Spain and gone to Portugal. In a decision of 1 March 1989, the Provincial High Court declared that the author had violated his parole.

4.3 Once the judgement of 11 September 2003 had upheld the original sentence, there was nothing irregular in adopting timely measures for its enforcement, including the issuance of an international arrest warrant, which was later executed by the Portuguese authorities. The documents provided by the author himself demonstrate that on his arrest by those authorities he was promptly informed of his rights and he even challenged the reasons for his arrest. Subsequently, within the context of the habeas corpus procedure, the public prosecutor issued a report in which it was stated that the author was under the authority of the Provincial High Court of Valencia for the enforcement of his sentence and that there was an international arrest warrant against him. In response to the judge's decision that the author's detention was not illegal, the author filed no appeal of any kind, not even an application for *amparo*; therefore domestic remedies have not been exhausted in this respect. The alleged violations of various provisions of article 9 are irrelevant, since they are contradicted by the documents provided by the author himself, regarding both his appearance before the Portuguese court and the outcome of the habeas corpus procedure.

4.4 The alleged violations of article 14, paragraphs 1, 3 (a) and 7, are also irrelevant, because the detention resulted from the enforcement of a sentence upheld by the Supreme Court and not from new proceedings or from a punishment for a new offence for which he had been convicted. It was simply a matter of enforcing a sentence.

4.5 Article 2, paragraph 2, of the Covenant does not bestow a right on the author. As for paragraph 3, the author makes a general reference, with no substantiation, to the issuance of a European arrest warrant, which bears no relation per se to the right to an effective remedy. Regarding the alleged violation of article 17, the matter was not raised in the domestic courts, and is totally unfounded.

4.6 The only clearly identifiable claims in the communication refer to the lack of an effective remedy, the lack of an effective review of the verdict and the punishment, and the time-bar supposedly applicable to the sentence. Regarding the review of the sentence, the Supreme Court, taking into consideration the Committee's Views, annulled the decision that had been made in cassation and conducted a new appeal in cassation, reaching a decision on 11 September 2003. This decision unquestionably constitutes a review of the verdict and the punishment, not only examining the legal questions but also decisively

reviewing the evidence. There was therefore no violation of article 14, paragraph 5, of the Covenant.

4.7 Finally, the main thrust of the communication seems to concern the alleged time-bar applicable to the sentence after 15 years had elapsed. However, the decisions of the Provincial High Court which rejected the application for annulment on that basis were not appealed in a timely way. Therefore, the author did not exhaust domestic remedies with respect to that matter.

Author's comments on the State party's submission

5.1 On 12 September 2007, the author provided his comments on the observations of the State party. He indicates that, in order for the Committee to consider the key aspects of his communication, he wishes to withdraw his complaints regarding a possible violation of article 9, paragraphs 2, 3 and 4, article 10, paragraph 1, and article 14, paragraphs 1 and 3 (a), even though the facts as presented raise questions in relation to those provisions.

5.2 According to the author, the Supreme Court, in its decision of 25 July 2002, offered only a partial response to the author's application for a judicial review, offering instead an appeal in cassation. That remedy did not allow for a full review of the conviction and sentence. Nor did it take into consideration new facts, or the validity of the evidence on which the conviction was based. Therefore, it cannot be stated that the author had access to all the remedies available under Spanish law. He nevertheless maintains that he has exhausted all the remedies to which he had access.

5.3 The author states that, although his communication refers to a specific fact, namely his return to detention, the detention cannot be considered separately from the events dating back to 1985. After the Committee issued its Views in 1997, the author lodged an appeal for annulment before the Provincial High Court of Valencia, three applications for *amparo* before the Constitutional Court, an application for judicial review before the Supreme Court and a second appeal in cassation, also before the Supreme Court. Furthermore, his lawyer filed an application for reconsideration against the decision of the Provincial High Court to issue a European arrest warrant, claiming that the author's criminal responsibility had been extinguished in 2003 under the statute of limitations. When that application was rejected, the author submitted an application for annulment before the same Court, followed by a request for the suspension of his sentence. When he was arrested in October 2005, he had an application for *amparo* pending, which was ruled upon on 1 March 2006, after he had spent several months in prison. The author states that he does not know what other remedies were available. Were there any, they would not have been effective, since he was extradited and detained while appeals were still pending. In any case, the processing of those appeals was delayed in a deliberate and unreasonable manner by the State party.

5.4 In the view of the author, the parole granted in 1988 has already been examined by the Committee, and therefore is not germane to the question of admissibility.

5.5 With respect to the decision dismissing the habeas corpus petition, the author recalls that it cannot be appealed, according to the regulatory law. The State party suggests that the author could have submitted an application for *amparo*. However, at that time the author had two *amparo* applications pending, one of which was related to the European arrest warrant. Given the time it takes to complete the *amparo* procedure, such a remedy could not have achieved the goal of putting an immediate end to a violation related to arbitrary detention.

5.6 In the view of the author, none of the many violations of which he was a victim, as set out by the Committee in its Views, have been redressed, in spite of the remedies sought.

5.7 With respect to the time-bar for the crime of which he was convicted, the author reiterates that on 1 August 2003, 15 years had passed since his release, and that, consequently, this was the date on which his criminal responsibility was extinguished. The author rejects the argument of the State party that domestic remedies were not exhausted, and recalls that his lawyer raised the matter of the time-bar when he contested the Provincial High Court's decision to issue the European arrest warrant.

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 In his initial communication, the author claimed that he was the victim of violations of article 2, paragraphs 2 and 3; article 7; article 9, paragraphs 1, 2, 3 and 4; article 10, paragraph 1; article 14, paragraphs 1, 3 (a), 5 and 7; and article 17, paragraphs 1 and 2, of the Covenant by Spain arising from his arrest in October 2005 under the arrest warrant issued by the Provincial High Court of Valencia. Subsequently, in his comments on the State party's observations, the author withdrew his claims regarding the possible violation of article 9, paragraphs 2, 3 and 4; article 10, paragraph 1; and article 14, paragraphs 1 and 3 (a). The Committee shall therefore only consider the facts in relation to article 2, paragraphs 2 and 3; article 7; article 9, paragraph 1; article 14, paragraphs 5 and 7; and article 17, paragraphs 1 and 2, of the Covenant.

6.4 The author claims that his arrest on 8 October 2005 and his subsequent stay in prison until 11 April 2006, under an order issued by the Provincial High Court of Valencia for the purpose of having him serve the full sentence imposed on him in 1986, gave rise to several violations of the Covenant. He invokes article 2, paragraphs 2 and 3, on the grounds that the State party did not recognize the validity of the Committee's Views of 2 April 1997, and that the arrest warrant contravened those Views. The Committee recalls its jurisprudence under which the provisions of article 2 of the Covenant, which set out the general obligations of States parties, cannot, in themselves, give rise to a complaint in a communication submitted under the Optional Protocol. The Committee therefore finds that the author's claims in this regard are inadmissible under article 2 of the Optional Protocol.²

6.5 The author claims that the fact that he has spent 21 years seeking recognition of the injury inflicted on him by the State party and that, as a result of his most recent arrest, which took place in front of his family, he spent six months in prison in deplorable conditions, lost his job and was unable to visit his seriously-ill father, constitutes torture and consequently entails a violation of article 7 of the Covenant. The Committee considers, however, that these complaints have not been sufficiently substantiated for purposes of admissibility, and are therefore inadmissible under article 2 of the Optional Protocol.

6.6 With regard to the facts referred to in the preceding paragraph, the author claims that they also constitute a violation of article 17, paragraphs 1 and 2, of the Covenant. The Committee notes the assertion by the State party that the matter was not raised in the domestic courts, and the absence from the file of any indication that it was. Consequently, the Committee considers that the author failed to exhaust domestic remedies with regard to

² Communication No. 802/1998, *Rogerson v. Australia*, Views of 3 April 2002, para. 7.9.

this part of the communication, in accordance with article 5, paragraph 2 (b), of the Optional Protocol.

6.7 The author asserts that his arrest violated article 9, paragraph 1, and article 14, paragraph 7, of the Covenant because, when it occurred, the offence was time-barred. The author declares that he had filed, with the Provincial High Court of Valencia, an application for reconsideration regarding the arrest warrant, invoking the existence of a statute of limitations, and then an appeal for annulment. He also requested a suspension of his sentence. Subsequently, he submitted an application for *amparo*, which was pending when he was arrested. The State party argues that the decisions of the Provincial High Court denying the appeal for annulment were not challenged in a timely manner. The Committee points out that, although the author filed an application for *amparo*, it was inadmissible because it was filed after the legal deadline had passed. The Committee also points out that the author did not explain his reasons for not complying with this legal requirement and therefore finds that domestic remedies were not exhausted, as required by article 5, paragraph 2 (b), of the Optional Protocol, with respect to this part of the communication.³

6.8 The author claims that there was a violation of article 14, paragraph 5, of the Covenant, because the Supreme Court denied him the right to a judicial review, the only remedy allowing for a legitimate examination of all aspects of the case. The Committee notes, however, that it is evident from the rulings of the Constitutional Court on 27 March 2006 and of the Supreme Court on 11 September 2003 that the latter court examined, during the appeal in cassation, the grounds for appeal submitted by the author, in particular the alleged infringement of his right to a fair trial and his right to be presumed innocent, and concluded that the evidence was sufficient to outweigh the presumption of innocence. The Committee therefore finds that the claim related to article 14, paragraph 5, is insufficiently substantiated for the purposes of admissibility, and is therefore inadmissible under article 2 of the Optional Protocol.⁴

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 and article 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the author and to the State party.

[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.]

³ Communication No. 1003/2001, *P.L. v. Germany*, decision of 22 October 2003, para. 6.6.

⁴ Communications No. 1490/2006, *Pindado v. Spain*, decision of 30 October 2008, para. 6.5, and No. 1441/2005, *García v. Spain*, decision of 25 July 2006, para. 4.3.

**M. Communication No. 1551/2007, *Tarlue v. Canada*
(Decision adopted on 27 March 2009, Ninety-fifth session)***

<i>Submitted by:</i>	Mr. Moses Solo Tarlue (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Canada
<i>Date of communication:</i>	12 March 2007 (initial submission)
<i>Subject matter:</i>	Unlawful arrest, arbitrary detention and threat of deportation to Liberia
<i>Procedural issues:</i>	Exhaustion of domestic remedies, non-substantiation of claims, incompatibility <i>ratione materiae</i> , re-evaluation of findings of facts and evidence
<i>Substantive issues:</i>	Discrimination on the ground of belonging to a social group – right not to be subjected to cruel, inhuman or degrading treatment or punishment – arbitrary arrest and detention – right to compensation – freedom to leave any country – right to defend himself in person or through legal assistance
<i>Articles of the Covenant:</i>	2; 7; 9, paragraphs 2, 3 and 5; 12, paragraph 2; 14, paragraph 3 (d) and (e)
<i>Articles of the Optional Protocol:</i>	2; 3, 5, paragraph 2 (b)
<i>The Human Rights Committee</i> , established under article 28 of the International Covenant on Civil and Political Rights,	
<i>Meeting on 27 March 2009,</i>	
<i>Adopts the following:</i>	

Decision on admissibility

1.1 The author of the communication is Moses Solo Tarlue, a Liberian citizen born on 12 August 1968. He claims to be a victim by Canada of violations of article 2; article 7; article 9, paragraph 2; article 9, paragraph 3; article 9, paragraph 5; article 12 paragraph 2; article 14, paragraph 3 (d) and (e) of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 19 May 1976. The author is unrepresented.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Lazhari Bouzid, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

1.2 On 3 April 2007, the Secretariat informed the author that the Committee, through its Special Rapporteur on New Communications and Interim Measures, had decided not to issue a request for interim measures under rule 92 of the Committee's rules of procedure. The author was deported to Monrovia, Liberia, on 24 April 2007.

1.3 On 15 August 2007, the Special Rapporteur on New Communications and Interim Measures, on behalf of the Committee, determined that the admissibility of this case should be considered separately from the merits.

Facts as presented by the author

2.1 The author, a member of the Krahn tribe, worked for the Liberian National Police between 1988 and 1990 and was then selected to be a member of the elite presidential security force. He became a businessman after the fall of President Doe's regime and he arrived in Canada on 25 October 2004 and requested refugee status on the same day. His claim was referred to the Refugee Protection Division (RPD). On 14 November 2005, the RPD held its hearing to assess the author's claim for refugee protection. During the hearing, the author was told by an immigration official that members of the late President Doe's Krahn tribe who served in his government were not permitted to live in Canada, as they were responsible for starting the civil war in Liberia.

2.2 On 7 December 2005, the RPD found that the author had been involved in war crimes and crimes against humanity and accordingly, excluded him, pursuant to article 1(F) of the 1951 Convention relating to the status of Refugees, from the refugee definition and from being a person in need of protection. The RPD decision stated inter alia that the author had been associated with the Liberian police force for most of President's Doe's term, that he had risen quickly in the ranks to be head of a department with 180 people reporting to him, and that he had been responsible for emergency operations and investigations in Monrovia. It also found that the author had been mandated to act as a security guard in the Executive Mansion and was chosen for this position not only because he, like Mr. Doe, was Krahn, but also because he was a confidant for the former President. The decision further added that there might not have been any hard evidence to show that the author was the one to pull the trigger, but there was compelling evidence to show that all the security forces under President Doe were guilty of crimes against humanity.

2.3 The author did not seek judicial review to the Federal Court of Canada of the RPD's decision because his lawyer, who had been recommended by Legal Aid, informed him afterwards that filing appeals was not among his duties.

2.4 Since December 2005, following the RPD's decision, the author repeatedly requested the Immigration Office in Toronto to have his passport returned to him so as to enable him to leave Canada and attempt to resettle with his family in the United States. The immigration authorities requested a visa guarantee from the United States authorities before they would return the author's passport. The United States Government also required a letter from the Canadian immigration authorities indicating the date at which the author was to leave Canada before they could proceed with issuing a visa guarantee.

2.5 On 10 November 2006, the author went to the Toronto immigration office to obtain such a letter. On his arrival, he was told that he was under arrest on suspicion of having committed war crimes and crimes against humanity. As no warrant was presented to him, he refused to cooperate with the arresting officers. One of the officers left and came back an hour later with a warrant, explaining that there had been a misunderstanding as the author's file was in Montreal. The author was then taken to Metro West Detention Centre in Toronto. The order for his detention indicated as the reasons for his arrest, involvement in war crimes, crimes against humanity and threatening an officer with death, all of which the author denies. The author was placed in a cell for the mentally ill for one week, where he

allegedly was hit repeatedly in the face by another inmate. He was then transferred to a normal cell upon recommendation of a psychiatrist. Later, he was placed in isolation for nine days at the request of immigration officials, who objected to his calling them to inquire about his case.

2.6 The author received three letters signed by one Senator Mobutu Vlah Nyenpan of the *Liberian Senate Committee on Human Rights and Petition*, stating that there was no record of him being involved in war crimes during the civil war in Liberia and also stating that the author's life would be in danger if he was deported to Liberia due to the war crime allegations made against him by Canada. Mr. Nyenpan also specified on the third letter that the author's detention for allegedly committing war crimes and crimes against humanity created "animosity within Liberian society" (sic).

2.7 On 15 November 2006, the author was notified that he would be removed from Canada. On 30 November 2006, he submitted a Pre-Removal Risk Assessment Application and relevant submissions (PRRA). On 16 January 2007, his PPRA application was rejected, as he was not determined to be at personal risk in Liberia. The author did not apply to the Federal Court for leave to apply for judicial review of this decision because he received a copy of the decision on 31 January 2007, on the last day of the deadline to file an appeal, and also because the text of the PRRA decision did not mention that an appeal should be filed within 15 days.

2.8 On 24 March 2007, the author was transferred to a maximum security prison in Lindsay, Ontario, awaiting his deportation to Monrovia, Liberia.

2.9 On 25 April 2007, the author was deported to Liberia and immediately detained upon his arrival due to the fact that his deportation was based on war crimes charges. On 29 April 2007, after Liberian authorities had determined that he had not committed any war crimes, the author was released "on signature".

The complaint

3.1 On article 2, paragraph 1, the author claims that the statement made by some Immigration Department officials according to which members of President Doe's Krahn tribe should not have been permitted to live in Canada are discriminatory and racist. He points out that other members of President Doe's regime have been given refugee status in Canada and provides examples.

3.2 In his initial complaint and prior to his removal to Liberia, the author had argued that his forced return to Liberia would constitute a violation of article 7 of the Covenant. He had claimed that during the civil war, he was specifically targeted and his wife and parents were executed solely because the former was his wife and the latter because of their links with the author and their membership in the same tribe. He had left the country to seek a safe haven for his family. He had claimed that there were widespread allegations that he was a war criminal and was detained in Canada, news which was broadcast on Liberian radio and that his life or personal integrity would be in danger if he were to be forcibly returned to Liberia. He had claimed that the danger would emanate both from the public at large and from the warring factions that fought against the tribe of the former President.

3.3 The author claims a violation of article 7 because he was placed in a cell for the mentally ill where he was assaulted by another inmate and, later, put in an isolation cell for nine days. The author adds that he has been in detention for almost five months after having being denied bail because he was considered to be dangerous to the public, although he had lived for two years in Canada without incident other than his refusal to be arrested without a warrant.

3.4 The author claims a violation of article 9, paragraphs 2 and 3, as Canadian officials tried to arrest him for war crimes and crimes against humanity without a warrant and detained him without a conviction for war crimes or crimes against humanity. He further claims that as a victim of unlawful arrest and detention, he should be compensated under article 9, paragraph 5.

3.5 The author argues that after having been denied refugee status, Canadian officials refused to return his passport and to allow him to leave the country, in breach of article 12, paragraph 2.

3.6 The author submits that article 14, paragraph 3 (d) was violated because legal aid in Canada does not cover appeal proceedings in asylum cases. As a result, the author could not lodge an appeal against the RPD's decision excluding him from the Convention refugee definition and from the status of a person in need of protection. The author was also denied legal aid during the hearings reviewing the legality of his detention and held in detention for nearly five months without being granted bail in breach of article 14, paragraph 3 (d).

3.7 The author further claims a violation of article 14, paragraph 3 (e) for having been falsely accused of war crimes and crimes against humanity by Canada while he was never accused of such crimes by either Liberia or any other international tribunal. He submits that he never indicated in his Personal Information Form to the Immigration and Refugee Board that he was a member of the Presidential Security and that he had 189 men in his department in charge of investigation at the Liberian National Police force, as indicated in the RPD's decision.

3.8 The author makes further general claims on the emotional and financial consequences his detention had on his children.

State party's observations on admissibility

4.1 On 6 July 2007, the State party challenged the admissibility of the communication. It clarifies that in October 2004, the author left Liberia and travelled to China, then the United Kingdom, and finally arrived in Toronto, Canada, on 25 October 2004. Despite holding a valid Liberian passport, the author travelled to Canada using a false one. Accordingly, on 25 October 2004, a Departure Order was signed by the immigration officer, as there were grounds to believe that the author was inadmissible for failing to comply with the *Immigration and Refugee Protection Act* (IRPA) requirement to have a valid visa on entry. The Departure Order was automatically stayed until such time as the author's claim for refugee protection was determined. The same day, the author's claim was forwarded to the Refugee Protection Division ("RPD") of the Immigration and Refugee Board (IRB) and his Liberian passport was seized pursuant to subsection 140(1) of IRPA. In the interim, the author filed an application for a student visa, which was denied on 13 December 2004. The RPD reached a decision on the author's claim for refugee protection on 7 December 2005 and gave notice of its decision to the author and his counsel on 13 December 2005. On 12 April 2006, the author requested return of his Liberian passport in order to travel to Japan on business. The request was denied by immigration authorities, who needed the passport in order to execute the author's removal. Following the author's exclusion from the refugee protection process under IRPA, the Departure Order against the author became enforceable and he was summoned to a pre-removal interview scheduled for 19 May 2006 which he did not attend. A warrant for his arrest was issued on 24 August 2006 on the ground that he was unlikely to appear for subsequent pre-removal interviews. On 10 November 2006, the author voluntarily came to the Immigration Office in Mississauga (near Toronto), apparently to reclaim his passport or to obtain other travel documents that would allow him to go to the United States. At this time, the immigration enforcement division proceeded to execute the warrant for his arrest, as the order for his

removal from Canada was in force. As the author was extremely uncooperative and threatening, an order for his detention was issued, based on the enforcement officer's opinion that the author was unlikely to appear for his subsequent removal appointments given his prior failure to comply with immigration laws as well as the author's violent disposition. On 14 November 2006, the author received his first detention review hearing and had then six subsequent detention review hearings on 21 November and 19 December 2006, 16 January, 13 February, 13 March and 13 April 2007. The author was represented by counsel during most of these hearings.

4.2 The State party challenges the admissibility on the grounds that some of the rights asserted are not protected by the Covenant and the claims are incompatible *ratione materiae*. In the alternative, the State party submits that the totality of the author's communication is inadmissible on the grounds of non-substantiation of the allegations and therefore manifestly ill-founded. In a further alternative, the communication is inadmissible deemed on the grounds that the author failed to exhaust all available domestic remedies. The State party also argues that the author cannot request the Committee to act as a "fourth instance" to re-assess the findings made by competent and impartial domestic decision-makers instances.

4.3 With regard to the alleged violations of article 14, paragraph 3 (d) and (e), and although the author did not raise them during the hearings themselves, the State party submits that the detention review hearings are "immigration proceedings" and, in light of the fact that article 14 offers guarantees in the context of the criminal proceedings, the author claims rights that do not extend to immigration proceedings.¹ The State party therefore submits that this part of the author's communication is inadmissible *ratione materiae*. In the alternative, the State party submits that the author clearly did not substantiate any alleged violation of article 14, paragraph 3 (d) and (e), including his complaint of being denied legal representation.

4.4 The State party argues that the author failed to substantiate all his claims and that his communication should be declared inadmissible on this ground. In relation to his claim under article 7, it points out that the allegations of risk were examined by the PRRA officer who concluded that the material did not provide any probative evidence that the author would be subjected to a risk of torture, to his life or cruel and unusual treatment or punishment if returned to Liberia. Furthermore, no evidence was offered that the current Liberian government is indeed interested in individuals who were associated with the former President or his regime. Contrary to the author's assertions, the State party submits that the letters presented by the author at his PRRA indicate that the current Liberian government is not concerned about the author's association with the former President.

4.5 On the author's claims under article 7, the State party notes that firstly, the RPD decision found that there were reasonable grounds to believe the author to be *complicit* in the commission of war crimes and crimes against humanity. The State party submits that any confirmation by Liberian officials that there is "no record of the author *having committed* war crimes or crimes against humanity" relates to a different matter. In fact, for the purposes of an application for refugee protection, which is the context in which the RPD made its finding of complicity, it is irrelevant that the author was not charged with or put on trial for war crimes or crimes against humanity, either in Canada or Liberia. Secondly, the author was arrested and detained by Canadian immigration authorities not because of his alleged involvement in war crimes or crimes against humanity but rather

¹ See communications No. 1341/2005, *Zundel v. Canada*, inadmissibility decision of 20 March 2007, paragraphs 6.7 and 6.8; No. 1234/2003, *P.K. v. Canada*, inadmissibility decision of 20 March 2007, paragraph 7.4.

because of his failure to report to a pre-removal interview and his subsequent violent behavior toward immigration officials. Thirdly, the author was removed from Canada and returned to Liberia because the domestic processes, which have not been demonstrated to have been flawed, concluded that he was not at risk of torture if returned to Liberia.

4.6 The State party submits that the author has not substantiated his general allegations with respect to discrimination (article 2), arbitrary arrest and detention (article 9), right to leave Canada (article 12), maltreatment or torture during detention (article 7), inappropriate legal assistance (article 14), denial of bail (article 14), his children's misery (no article invoked) or right to compensation for unlawful arrest and detention on even a prima facie basis. The author has produced little more than bare assertions of various allegations, making it impossible to defend against or evaluate the merits of any of the allegations made. He had ample opportunity to provide the particulars of his allegations during his six detention reviews. The State party argues that without particulars and dates of alleged events, it cannot be reasonably expected to reply to allegations ranging from the author being hit in the face by another inmate, to the author's placement in segregation for a few days and whether it amounted to an infliction of severe pain and suffering or treatment meeting the threshold for being considered under article 7. It refers to the Committee's case law in which it indicated that it does not entertain abstract or unsupported claims of violations.² The State party concludes that the allegations contained in the author's communication are devoid of substantiation on even a prima facie basis and should be declared inadmissible.

4.7 Finally, the State party argues that the author failed to pursue various judicial and administrative remedies available to him. Although the RPD decision clearly mentioned that judicial review was possible, with leave, before the Federal Court, the author did not apply for it. Instead, his counsel, seemingly newly hired by the author, filed an application for leave to review the Departure Order issued on 25 October 2004, which was dismissed due to his failure to file an Application Record. The author could have also sought permission to have his PRRA decision reviewed by the Federal Court but did not do so, arguing that he was not afforded sufficient time when his legal representative could have easily obtained an extension to file his application. Moreover, the author could have submitted a humanitarian and compassionate application (H&C application), the Committee having recognized H&C applications as being an effective domestic remedy.³ Similarly, the author could have sought judicial review of his detention review hearings decision but he did not do so. The State party invokes the Committee's jurisprudence according to which authors are bound by procedural rules such as filing deadlines applicable to the exhaustion of domestic remedies, provided that the restrictions are reasonable.⁴ The State party submits that the reason advanced by the author for missing the deadline to apply for judicial review in respect of his PRRA is implausible, in light of the fact that he was then represented by legal counsel, and simply demonstrates a lack of diligence.⁵ The author has not shown how a 15-day deadline for the application was unfair

² *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40 (A/56/40)*, Vol. 1, paragraph 113; *Ibid.*, *Sixty-first Session, Supplement No. 40 (A/61/40)*, Vol. 1, paragraph 119; communication No. 1056/2002, *Khachatrian v. Armenia*, inadmissibility decision of 16 October 2005.

³ See communication No. 1302/2004, *Khan v. Canada*, inadmissibility decision of 25 July 2006, paragraph 5.5.

⁴ See communication No. 982/2001, *Bhullar v. Canada*, inadmissibility decision of 31 October 2006, paragraph 7.3.

⁵ See Committee against Torture, communication No. 284/2006, *R.S.A.N. v. Canada*, inadmissibility decision of 21 November 2006, paragraph 6.4, where the Committee did not accept that mistakes by author's counsel could excuse the non-observance of the exhaustion rule.

or unreasonable. Regarding his treatment in detention, the author could have brought his various claims, including any alleged mistreatment during one or more of his detention review hearings, followed by judicial review if he so wished. The same is true for some of his other allegations, including his allegation of discrimination in regard of his exclusion from refugee protection and his allegation of a right to compensation for unlawful arrest and detention. These claims could have been raised either in the context of judicial review proceedings or by initiating legal actions based on domestic provisions that are equivalent to his claims under the Covenant, i.e. sections 9 and 15 (1) of the *Canadian Charter of Rights and Freedoms*.

Author's comments on the State party's submissions on admissibility

5. On 23 June 2008, the author reiterates all his previous allegations and adds new ones. He claims that he was removed from Canada on 25 April 2007 by two immigration officers via Germany and Belgium, who presented copies of the author's passport Belgian and German authorities designating him as a "war criminal". He explains that upon his arrival in Monrovia, he was put in prison for two days and was then released. He asserts that he should be allowed back into Canada to conduct business activities through a company he owns there and which is registered in Ontario. He adds that during his four-year stay in Canada prior to deportation, he always complied with Canadian laws. He adds that because of the danger created by false allegations of war crimes he allegedly committed which were broadcasted on Liberian radio, his children as well as and those of his late brother had to flee the country for safety reasons.

Additional comments by the State party

6.1 On 25 September 2008, the State party argues, with regard to the alleged violation of article 12, paragraph 1, that States have no obligation to allow aliens onto their territory.⁶ Nor does the Covenant contain any right of an alien to conduct business on the territory of another state. Therefore, the State party submits that the author has not substantiated, on even a prima facie basis, his claim under article 12 and that this portion of his complaint is inadmissible.

6.2 With regard to the alleged violation of article 7, the State party reiterates that the author failed to substantiate any violation. It stresses that the author at no time referred to physical maltreatment or torture he would have suffered at the hands of the Liberian authorities. It also reiterates that, prior to the author's deportation to Liberia, it had been determined that the author did not face a real risk of torture or of cruel, inhuman or degrading treatment or punishment if deported to Liberia.

Issues and proceedings before the Committee

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 that the State party challenges the admissibility of the entire communication.

⁶ See Human Rights Committee, general comment No. 15 (1986), on the position of aliens under the Covenant, *Official Records of the General Assembly, Forty-first Session, Supplement No. 40* (A/41/40), chap. IV, sect. B.2, para. 5.

7.3 With regard to the author's claims under article 2 of the Covenant, the Committee recalls that the provisions of this article, which lay down general obligations for State parties, cannot by themselves and standing alone give rise to a claim in a communication under the Optional Protocol. The Committee considers that the author's claim to this effect cannot be sustained, and that accordingly it is inadmissible under article 2 of the Optional Protocol.⁷

7.4 With regard to the author's claim under article 7, the Committee recalls that States parties are under an obligation not to expose individuals to a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment upon entering another country by way of their extradition, expulsion or refoulement.⁸ It notes that the RPD considered and rejected the author's asylum application, invoking the exclusion clause of article 1F (a) of the 1951 Refugee Convention. It further notes that the author's application for Pre-Removal Risk Assessment (PPRA) was denied on 16 January 2007. 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 apparent that the evaluation was clearly arbitrary or amounted to a denial of justice.⁹ It notes that this jurisprudence has also been applied to removal proceedings.¹⁰ The material before the Committee is insufficient to show that the proceedings before the authorities in the State party suffered from any such defects. The Committee accordingly considers that the author has failed to substantiate his claims under article 7, for purposes of admissibility, and concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

7.5 As to the alleged violation of article 7 relating to the author's conditions of detention, the Committee has noted the State party's argument that the author did not advance any such claim during any of his detention review hearings. The Committee recalls its jurisprudence, according to which the requirement of exhaustion of domestic remedies, which allows the State party to remedy an alleged violation before the same issue is raised before the Committee, oblige authors to raise the substance of the issues submitted to the Committee before domestic courts. Noting that the author has failed to raise the alleged violation of article 7 on the conditions of his detention, before domestic courts, the Committee declares this part of the communication inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

7.6 With respect to the author's claims under article 9, the Committee notes that the author did not challenge the State's party assertion that he had six detention reviews, none of which he appealed. The Committee further notes that the author has not demonstrated how his detention prior to deportation should have been deemed to be unlawful or arbitrary. The Committee accordingly finds that the claims under article 9 have been insufficiently substantiated, for purposes of admissibility, and is thus inadmissible under article 2 of the Optional Protocol.

7.7 With respect to the author's claims under article 12, the Committee notes that pursuant to article 12, paragraph 3, an individual may be restricted from leaving a country in certain limited situations. The Committee notes that the author has failed to respond to

⁷ *Bhullar v. Canada* (note 4 above), para. 7.6.

⁸ See communications No. 1302/2004, *Khan v. Canada*, inadmissibility decision of 25 July 2006, paragraph 5.4. and No. 1234/2003, *P.K. v. Canada*, inadmissibility decision of 20 March 2007, paragraph 7.2.

⁹ See for example communication No. 541/1993, *Errol Simms v. Jamaica*, inadmissibility decision adopted on 3 April 1995, paragraph 6.2.

¹⁰ See communication No. 1234/2003, *P.K. v. Canada*, inadmissibility decision adopted on 20 March 2007.

the State party's argument that his passport was seized pursuant to subsection 140 (1) of the Immigration and Refugee Protection Act (IRPA), for the purposes of executing the author's removal under the same Act. Taking account of the particular circumstances of the present case, the Committee concludes that the author has failed to substantiate for the purposes of admissibility any claim under article 12 of the Covenant and this claim is inadmissible under article 2, of the Optional Protocol.

7.8 With regard to the author's claims under article 14, paragraph 3 (d) and (e), the Committee notes that the author was not charged with, or found guilty of, any offence in the State party, and that the decision to deport him did not constitute a sanction imposed as a result of criminal proceedings. The Committee recalls that deportation proceedings following a negative asylum determination decision against the author do not constitute the "determination of a criminal charge" within the meaning of article 14 of the Covenant, and concludes that the complaint relating to article 14, paragraph 3 (d) and (e), is thus inadmissible *ratione materiae*, under article 3 of the Optional Protocol.

8. The Committee therefore decides:

- (a) That the communication is inadmissible under articles 2, 3 and 5, paragraph 2 (b), of the Optional Protocol;
- (b) That this decision shall be communicated to the author and to the State party.

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

**N. Communication No. 1575/2007, *Aster v. Czech Republic*
(Decision adopted on 27 March 2009, Ninety-fifth session)***

<i>Submitted by:</i>	Herman Aster (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	The Czech Republic
<i>Date of communication:</i>	16 February 2007 (initial submission)
<i>Subject matter:</i>	Discrimination on the basis of citizenship with respect to restitution of property
<i>Procedural issue:</i>	Non-exhaustion of domestic remedies
<i>Substantive issues:</i>	Equality before the law; and equal protection of the law
<i>Article of the Covenant:</i>	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 27 March 2009,

Adopts the following:

Decision on admissibility

1. The author of the communication is Herman Aster, born on 1 May 1934 in Rychnov and Kneznou in the former Czechoslovakia, now residing in the United States of America. He claims to be a victim of a violation by the Czech Republic¹ of article 26 of the Covenant. The author is not represented.

The facts as presented by the author

2.1 On 6 July 1969, the author left Czechoslovakia. Before that date, he had bought a co-operative apartment in Brno, Vystavni St. No. 20. On 28 August 1970, he was sentenced *in absentia* to two years imprisonment for leaving the country and his property was confiscated. On 7 September 1988, he obtained United States citizenship, thereby losing his Czech citizenship, pursuant to the Naturalisation Treaty of 16 July 1928 between the two countries.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Lazhari Bouzid, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

¹ The Optional Protocol entered into force for the Czech Republic on 1 January 1993, as a consequence of the Czech Republic's notification of succession of the international obligation of Czechoslovakia, which had ratified the Optional Protocol in March 1991.

2.2 The decision to confiscate his property was annulled under Law no. 119/90 on Rehabilitation. The author thereupon filed a lawsuit in the Brno Regional Commercial Court to have his apartment returned to him. However on 4 May 2000, the Court rejected his claim as he was not a citizen of the Czech or Slovak Federal Republic, as required by Act No. 87/1991. This Law on Extra-judicial Rehabilitation had been adopted by the Czech Government in 1991, and it set out the conditions for recovering property, confiscated under Communist rule.

2.3 On 28 August 2001, the European Court of Human Rights (ECHR) rejected the author's application No. 62940/00, as the facts occurred before the entry into force of the European Convention for the Czech Republic.

The complaint

3. The author claims a violation of article 26 of the Covenant, on the basis of the citizenship requirement of Act. No. 87/1991.

The State party's submission on admissibility and merits

4.1 On 15 January 2008, the State party commented on the admissibility and merits of the communication. On the facts, it submits that on 31 October 1995, the author first brought an action before the Brno Municipal Court against the Drubža Housing Construction Cooperative concerning the conclusion of an agreement on the surrender of a membership share, based on Act. No. 87/1991 on Extra-judicial Rehabilitations. Due to lack of jurisdiction, the action was transferred to the Brno Regional Commercial Court. According to the State party, due to missing documents, the Cooperative in question could neither prove nor rebut the author's claim that he held a membership share in the original cooperative, which also included the right to use the apartment.

4.2 The State party submits that the communication is inadmissible for: non-exhaustion of domestic remedies; *ratione temporis*; and as an abuse of the right of submission. In regard to non-exhaustion, the State party submits that the author did not appeal the judgement of the Brno Regional Commercial Court, and that this was the reason why ECHR actually dismissed his case. The State party further submits that the property in question was forfeited in 1970, prior to the entry into force of the Covenant and Optional Protocol in the Czechoslovak Socialist Republic; and consequently the communication is inadmissible *ratione temporis*.

4.3 The State party invokes the jurisprudence² of the Committee to argue that the submission of the communication six and a half years after the last domestic decision in the case and five and a half years after the rejection of the author's application before ECHR, is an abuse of the right of submission. In the State party's view, the author should be required to provide a reasonable objective explanation as to why he delayed addressing the Committee. If the principle of *ignorantia legis non excusat* has any meaning the explanation of the author for failure to pursue his rights within a reasonable timeframe cannot depend on the extent to which the author *ex post facto* succeeds in advancing a subjective pretext as to why he/she delayed his/her submission to the Committee. In this regard, the State party notes that the author has provided no explanation in this case as to why a period of five and a half years elapsed after the decision of ECHR before addressing the Committee.

² Communications No. 787/1997, *Gobin v. Mauritius*, decision of 16 July 2001. No. 1434/2005, *Fillacier v. France*, decision of 16 July 2001. No. 1452/2006, *Chytil v. the Czech Republic*, decision of 24 July 2007.

4.4 On the merits, the State party contends that the communication is “ill-founded”, as the Brno Regional Commercial Court rejected the author’s action for the surrender of the membership share in the cooperative, on two equivalent grounds: for failure to comply with the citizenship requirement and by reason of the fact that the Restitution Act no. 87/1991 did not apply to the case in question. The Court explicitly noted that the second ground for rejecting the action would have applied even if the author had complied with the citizenship requirement.³

4.5 The State party invokes its Civil Code: thus, Section 119 categorizes “things”, in the legal sense, as movable and immovable property. Although the Code itself does not define “a thing”, according to the established legal interpretation, it refers to “a controllable tangible object or a uncontrollable natural force that serves human needs”. According to this definition, no legal regulation defines a membership share in a cooperative as a “thing”; therefore, *a contrario*, it is a right or a pecuniary value.

4.6 The State party notes that the author never challenged the Regional Court’s interpretation of Act No. 87/1991 to the extent that it does not apply to forfeited shares in cooperatives. The State party argues that article 26 provides the legislator with a certain margin of appreciation as to whether, and to what extent, it can provide redress for injustices committed during the previous non-democratic regime. The legislator could choose whether or not to include membership shares in housing cooperatives within the subject matter covered by Act No. 87/1991. The legislator considered that it was unfair to interfere with the rights of those people who were placed in these flats after the author’s departure and were not responsible for his departure.

4.7 In addition, the State party submits that regardless of the fact that the author’s possession of a membership share in the housing co-operative was never proven, he would not have had any “ownership” title in the apartment, but only the right to use it. The State party admits that injustices committed in the past have not been mitigated and that the author may well believe that the non-surrender to him of the membership share in the cooperative constituted one such injustice. However, that does not mean that he was discriminated against on exactly those grounds. As to the citizenship requirement, the State party reiterates its arguments made in relation to earlier, similar, property cases.

The author’s comments

5. On 28 February 2008, the author reiterates his initial arguments and submits that there is no doubt about his ownership of the property in question. He considers it “useless” to analysis the court decisions, since they are obviously discriminatory.

³ The Court stated the following: “Another legal ground is the nature of the claim raised. Apart from certain special claims explicitly provided for, Act No. 87/1991 provides for the surrender of property acquired in ways envisaged in Section 2 of this Act. A membership share in a cooperative does not constitute a thing within the meaning of Section 2 of this Act. A membership share in a cooperative does not constitute a thing within the meaning of Section 119 of the Civil Code. This provision distinguishes movable and immovable property. However, a membership share represents a set of property and personal rights which is entirely outside the scope of Section 119 of the Civil Code. Even if the claimants ... were Czech Republic citizens, Act No. 87/1991, as amended, would not have applied to the surrender of the membership share in the cooperative.”

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. 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.

6.2 The State party has argued that the communication is inadmissible, *inter alia*, for non-exhaustion of domestic remedies. It also argues that the author has not proven that he had a membership share in the original cooperative in question and that, in any event, the Regional Commercial Court considered that, irrespective of the question of citizenship, the author would not have been entitled to recover the property due to the fact that the nature of the property being such it did not fall within the scope of Act No. 87/1991 on Extra-judicial Rehabilitation. The Committee observes that the author has failed to raise this issue before any court in the State party and also failed to pursue his claim following its rejection by the Brno Regional Commercial Court. The Committee notes that the pursuit of a court action would have, *inter alia*, clarified the contested facts, as well as the interpretation of domestic law, which the Committee is not in a position itself to evaluate. Notably, it would have clarified whether the author had in fact held a member share in the cooperative in question, and whether such property rights (shares in a cooperative) fell within the scope of Act No. 87/1991. In any event, the Committee also notes that the author has not argued either before the domestic courts or indeed in his claim before the Committee how the Regional Court's interpretation of Act No. 87/1991 amounts to prohibited discrimination within the meaning of article 26. It recalls that article 5, paragraph 2 (b) of the Optional Protocol, by referring to "all available domestic remedies", refers in the first place to judicial remedies.⁴ Accordingly, the Committee concludes that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol, for failure to exhaust domestic remedies.

6.3 The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (b) of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

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

⁴ Communications No. 262/1987, *R.T. v. France*, decision of 30 March 1989 and No. 1515/2006, *Herbert Schmidl v. Germany*, decision of 1 April 2008.

**O. Communication No. 1576/2007, *Kly v. Canada*
(Decision adopted on 27 March 2009, Ninety-fifth session)***

<i>Submitted by:</i>	Mr. Yussuf N. Kly (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Canada
<i>Date of communication:</i>	16 February 2007 (initial submission)
<i>Subject matter:</i>	Forced retirement of the author on alleged discrimination grounds
<i>Procedural issues:</i>	Exhaustion of domestic remedies; unreasonably prolonged remedy; non-substantiation of claim
<i>Substantive issues:</i>	Discrimination based on age and race
<i>Articles of the Covenant:</i>	2 (1) and (3), 5; 7; 14 (1) and 3 (c, d and e); 20 and 26
<i>Articles of the Optional Protocol:</i>	2; 5 (2b)

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

Meeting on 27 March 2009,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 16 February 2007 and 26 November 2007, is Dr. Yussuf N. Kly, a Canadian citizen. He claims to be a victim of violations of article 2; article 5; article 7; article 14, paragraphs 1 and 3 (c, d and e); article 20 and article 26, of the International Covenant on Civil and Political Rights, by Canada. The author is unrepresented.

The facts as presented by the author

2.1 The author was born on 25 October 1935 and turned 65 on 25 October 2000. At that time, he worked as a Professor at the University of Regina, Saskatchewan. Pursuant to the

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Lazhari Bouzid, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

University's Collective Agreement,¹ and despite attempting to stay on for an additional two years, he was required to retire on 30 June 2001, after 12 years of service. He alleges that he was forced to retire against his will and that this constitutes discrimination on the basis of age, as well as ancestry, place of origin and nationality.

2.2 On 23 April 2003, he lodged a complaint with the Saskatchewan Human Rights Commission (SHRC), underlining that as a visible minority, it took a period of more than 10 years after receiving his Ph.D. to secure employment and that he therefore needed to work longer than the forced retirement age of 65. The fact that once employed by the University of Regina, he achieved the status of Professor Emeritus attests that his earlier inability to find appropriate employment was not due to lack of merit. In its response to the SHRC, the University of Regina submitted that the Saskatchewan Human Rights Code defines age as meaning "any age over 18 years or more but less than 65 years". In its view, therefore, the author's retirement at age 65 was not discrimination prohibited by the Code and article 3 ("non-discrimination"), of the University Regina Collective Agreement.² The University Regina further argued that the mandatory retirement policy was applicable to all members covered by the Collective Agreement and that no evidence suggested that the author was asked to retire because of his ancestry, place of origin, or nationality.

2.3 On 22 June 2004, the SHRC informed the author that their investigation was complete and on 24 March 2005, the SHRC advised the author that a lead case "Louise Carlson v. Saskatoon Public Library Board and the Canadian Union of Public Employees, Local 2669" on the mandatory retirement issue was before the Saskatchewan Human Rights Tribunal.³ With regard to the resolution in the author's case, the University of Regina indicated to the SHRC that they would prefer to wait for the outcome in the Carlson lead case. On 18 July 2005, the Commission informed the author that his case file was held in abeyance until a decision was rendered by the Tribunal in the Carlson test case. On 14 October 2005, the University of Regina Professors Against Age Discrimination, the author and Mona Acker requested to intervene in the Carlson test case. They were granted limited status to participate in the hearing by providing a written argument on the effect the decision on the merits of the case would have on the organization.

2.5 On 1 November 2007, the SHRC informed the author of the 24 October 2007 Tribunal decision in the precedent Carlson case on mandatory retirement. That case was declared inadmissible on the grounds that the Canadian Supreme Court had already ruled on the issue of mandatory retirement,⁴ and that it was therefore up to the Legislature to determine if there was to be a change of the law. On 17 November 2007, amendments to the age provision of the Saskatchewan Human Rights Code⁵ came into force. On 7 August

¹ "The normal retirement date for academic staff members is 30 June following their 65th birthday (except for members who were elected in 1975 and chose to retain a different normal retirement date)."

² *Article 3 – Non-Discrimination of the University of Regina Collective Agreement* reads: "3.1 The parties agree that there shall be no discrimination practiced by reason of age (except for retirement age as provided for in the Academic Pension Plan), ancestry, race, creed, colour, national origin, political or religious affiliation or belief, sex, sexual orientation, marital status, physical handicap (except where the handicap would clearly prevent the carrying out of the required duties and subject to the provisions of the Salary Continuance Plan), and membership or activity in the Association".

³ *Louise Carlson v. Saskatoon Public Library Board and the Canadian Union of Public Employees, Local 2669*: The complaint was brought by Louise Carlson, a library assistant, against her employer and the Union of Public Employees for age discrimination in that she was forced to retire at age 65 under a collective bargaining agreement.

⁴ *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229.

⁵ Changing article 2, paragraph 1 (a), of the Saskatchewan Human Rights Code to "age means any age of 18 years or more".

2008, the Queen's Bench for Saskatchewan dismissed the SHRC appeal in the Carlson case concluding that it was moot.

The complaint

3.1 With regard to exhaustion of domestic remedies, the author explains that he decided not pursue his case through the Canadian Court system because the Saskatchewan Human Rights Commission had told him that they expected a swift ruling in a so-called Carlson test case, as well as because of his financial constraints. The author argues that he has been waiting over six years for a resolution by the SHRC in his case and that he was not been given the opportunity to be heard. He claims that the length of the procedure before the SHRC renders that remedy ineffective and fails to provide redress for victims of age and systemic discrimination. Underlining in particular his old age, ill health and difficult financial situation, the author submits that he should not be required to exhaust domestic remedies.⁶

3.2 The author alleges that his forced retirement by the University of Regina constituted age and systemic discrimination, given that as a visible minority it took him longer to secure employment. He alleges to be a victim of violations of article 2, paragraph 1 and article 26, of the Covenant.

3.3 The author maintains that the Saskatchewan Human Rights Commission by having his case held in abeyance until a decision in the Carlson test case was rendered violated his right to a fair trial or hearing, in particular because of the undue delay in his case and the absence of any hearing for more than six years. He claims to be victim of a violation of article 5 and article 14, paragraphs 1 and 3 (c, d and e), of the Covenant.

3.4 According to the author, the undue delay and the unfair judgement in the Carlson test case renders the remedy before the Saskatchewan Human Rights Commission ineffective, thus violating article 2, paragraph 3, of the Covenant. In addition to that, the author maintains that the Saskatchewan Human Rights Tribunal in the proceedings with regard to the Carlson test case appeared to ignore international human rights obligations and that "the judge" seemed not to respect impartiality and independence principles, which may constitute a violation of article 5 and article 20, of the Covenant.

3.5 The author claims that by denying retroactivity for pending cases of mandatory retirement, the Tribunal violated his right to compensation or restitution thus violating article 2 of the Covenant.

3.6 The author also claims that the waiting time for the resolution in his case before the SHRC together with systemic discrimination amounted to cruel, inhuman and degrading treatment, and violated article 7, of the Covenant.

3.7 Finally, the author submits that in the Carlson test case before the Saskatchewan Human Rights Tribunal, "the judge" appears to have been greatly influenced by the desires of the Canadian Union of Public Employees and the University of Regina to save money in connection with human rights cases. He claims that independence and impartiality principles appear to have been violated by the Saskatchewan Human Rights Tribunal. He submits that the SHRC resembled more a government-sponsored Ombudsman and did not

⁶ See Human Rights Committee, general comment No. 20 on article 7, (*Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI), general comment No. 3 on article 2 (*ibid.* A/36/40, annex VII), and article 2, paragraph 3, of the Covenant; communication No. 4/1977, *Torres Ramirez v. Uruguay*, Views adopted on 23 July 1980, paragraph 5.

enforce universal human rights, which may constitute an unintentional violation of article 2, paragraphs 1 and 2, of the Covenant.

The State party's submission on admissibility and merits

4.1 On 28 February 2008, the State party filed its observations on admissibility and merits. In complement to the facts as submitted by the author, the State party specifies that the author was hired by the University of Regina on 1 July 1993, and that on 1 July 1998 he was promoted to the rank of Professor. Following his retirement on 30 June 2001, the author was given an additional six-month appointment until 31 December 2001. From 31 December 2001 to 31 October 2004, the author held an unremunerated appointment as Adjunct Professor and in February 2002, he was granted the title of Professor Emeritus.

4.2 The State party further notes that on 27 August 2003, the author's complaint was formalized and served on both the University of Regina and the University of Regina Faculty Association, despite certain reservations in view of the age definition in the Saskatchewan Human Rights Code and the lack of evidence provided by the author on the systemic discrimination argument. On 22 June 2004, the SHRC indicated that it would prefer to delay a decision in the author's case until the resolution of the Carlson test case. The University of Regina and the University of Regina Faculty Association agreed to the deferral of a decision in the author's case and the author did not object it.

4.3 The State party submits that the SHRC had indicated that it was originally optimistic about a timely decision in the Carlson case and that this optimism might likely have been conveyed to the author. The SHRC however also underlined that it had explained to the author that the complaint process would be lengthy.

4.4 The State party challenges the admissibility of the communication on the grounds that the author has failed to exhaust all available domestic remedies, as required by article 2 and article 5, paragraph 2 (b), of the Optional Protocol; that the author failed to demonstrate that the application of remedies was unreasonably prolonged and that he failed to substantiate his claims.

4.5 The State party argues that the author failed to exhaust all available domestic remedies, as he did not commence a court action in due time, with which he could have challenged the constitutional validity of the age definition in the Saskatchewan Human Rights Code. The State party underlines in particular that two other University of Regina Professors brought a similar court application (*Leeson v. University of Regina*) to the Saskatchewan Court of Queen's Bench and that following an unsuccessful application; their case was currently in the stage of appeal. The State party also submits that the author failed to bring a grievance process under the University of Regina Collective Agreement claiming discrimination. This process could not have altered the Collective Agreement; however it could have addressed differences related to meaning, interpretation or application of the terms in the Collective Agreement. It further invokes the Committee's jurisprudence in the case of *J.S. v. Canada*⁷ claiming that in the current case, the author's matter was still before the SHRC and that therefore domestic remedies have not been exhausted. It further notes that according to the Committee's observations in the cases *A. and S.N. v. Norway*⁸ and *Adu v. Canada*,⁹ the author's doubts about the effectiveness of domestic remedies does not absolve him from their exhaustion. Furthermore, the State party contests any similarity of

⁷ Communication No. 130/1982, Inadmissibility decision adopted on 6 April 1983, para. 6.

⁸ Communication No. 224/1987, Inadmissibility decision adopted on 11 July 1988, para. 6.2.

⁹ Communication No. 654/1995, Inadmissibility decision adopted on 12 August 1997, para. 6.2.

the author's situation with the situation in the communication *Ramirez v. Uruguay*,¹⁰ in which the State party only provided a general description of the remedies available, without specifying which ones were available to the author.

4.6 With regard to the author's argument that the SHRC remedy was unreasonably prolonged, the State party argued that the author has not explained why his initial attendance at the SHRC office was on 12 December 2002, while he was required to retire on 30 June 2001 and his six-month contract with the University expired on 31 December 2001.¹¹ The State party further argues while relying only on the complaint to the SHRC, the author failed to pursue alternative remedies and to demonstrate why their pursuit would have been unreasonably prolonged. Furthermore, the author did not object that his complaint be held in abeyance until the outcome in the Carlson case, while he could have requested the SHRC to address his complaint. The State party holds that the same principle as in communication *Dupuy v. Canada*¹² should be applied given that the author did not make any official complaints about the delays in the procedure under the Saskatchewan Human Rights Code.

4.7 With regard to the author's claim that he was a victim of systemic discrimination suggesting that being a visible minority it took him longer to secure employment, the State party argues that the author did not provide any information on his efforts to obtain employment after his PhD and that he did not afford any evidence linking his visible minority status to his alleged employment status. The State party submits that the author's claim of systemic or adverse effect discrimination (article 2, of the Covenant) is a simple allegation that remains unsubstantiated and should be declared inadmissible, according to the rule 96 (b), of the rules of procedure.

4.8 The State party argues that the author's claims under articles 2 and 14, of the Covenant, are not substantiated and should therefore also be declared inadmissible. The State party holds that the author has not sufficiently substantiated why the SHRC would have restrained him from receiving a fair trial or hearing other than alleging that the SHRC put him in a situation where he believed he was blocked from bringing a court action after prolonged waiting for a resolution by the SHRC. The State party submits that, in spite of the difficulties posed by the age definition in the Saskatchewan Human Rights Code, the SHRC demonstrated sensitivity to claims of individuals who felt wronged by mandatory retirement provisions by advancing the Carlson test case. It further argues that the SHRC informed the author of these difficulties. The State party also submits that the author's claim of an unintentional violation of article 2, paragraphs 1 and 2, of the Covenant with regard to the type of Human Rights Commission in Saskatchewan and its adequacy in protecting international human rights, is unsubstantiated.

4.9 As to the author's allegation of a lack of independence or impartiality of the Saskatchewan Human Rights Tribunal "judge" in the Carlson test case, the State party submits that the author has not provided any evidence to support his allegation. It maintains that the author's claim that the Saskatchewan Human Rights Tribunal was influenced by the Auditor General's alleged effort to save money and by the desires of the Canadian Union of Public Employees and the University of Regina to save money in connection with human rights cases is not substantiated and it recalls the Committee's jurisprudence in *Robinson v. Jamaica*,¹³ in which it stated that it can only examine arbitrariness, denial of justice or

¹⁰ Communication No. 4/1977, Views adopted on 23 July 1980.

¹¹ See communication No. 184/1984, *H.S. v. France*, Inadmissibility decision adopted on 10 April 1986, paragraph 9.4.

¹² No. 939/2000, *Dupuy v. Canada*, Inadmissibility decision adopted on 18 March 2003, para. 7.3.

¹³ Communication No. 731/1996, *Robinson v. Jamaica*, Views adopted on 29 March 2000, para. 9.4.

manifest violations of the judge's obligation to impartiality. The author's allegation remained general at best and he did not provide any evidence which would suggest that the Tribunal was influenced by personal bias, harboured preconceptions about the Carlson test case; that it acted in a way that promoted the interests of one of the parties over another; or that the Tribunal appeared to a reasonable observer to be partial.

4.10 With regard to the merits, the State party notes that the author's claim with respect to systemic discrimination is not sufficiently substantiated given that the author does not provide any evidence why mandatory retirement had a greater adverse effect on him being of African American ancestry. With regard to the author's allegation of age discrimination, the State party recalls the Committee's General Comment No. 18 and its jurisprudence on age discrimination¹⁴ and submits that the age definition in the Saskatchewan Human Rights Code, as it existed before the legislative change in November 2007, was based on reasonable and objective criteria. With regard to the prolonged proceedings before the SHRC, the State party submits that both the complexity of the case and the behaviour of the parties justified the length of the proceedings. The State party argues that the author was aware of the significant legal hurdles to cross, in particular the age definition in the Saskatchewan Human Rights Code, the Supreme Court case "McKinney", and the dependency of his case on the outcome of the Carlson test case. Finally, the State party submits that, anxiety caused by the length of proceedings¹⁵ would be insufficient to engage article 7, of the Covenant.

The author's comments

5.1 With regard to the exhaustion of domestic remedies, the author reiterates that the SHRC remedy was unreasonably prolonged and explains that previous to his forced retirement, he had requested a hearing before the University of Regina Faculty Association to explain his situation in particular the previous discrimination suffered as a visible minority to secure pension-guaranteeing employment. The author claims that this hearing was refused three times. With regard to the author's delay to attend the office of the SHRC, he argues that until the end of his additional six-month appointment, he was hoping to be employed by the University Durban-Westville, with which he had negotiated an exchange agreement, with financial contribution of the University of Regina. Once he had realized that there was no prospect of further extension of his employment, he claims that he was trying, in vain, to find an affordable lawyer to bring his case to the Canadian court system, that he was employed on a short-term consulting contract by the Department of Justice in Saskatchewan, that he compiled evidence to support his charge of systemic discrimination, and that he needed to be hospitalized. The author further explains that the cost estimation for the resolution of his case in the regular court system would have exceeded one third of his pension. The financial argument together with the optimistic assessment by the SHRC led him to lodge his complaint only before the SHRC. The author underlines that the authorities do not appear to have acted with the necessary diligence in his case, significantly delaying its resolution.

5.2 The author reiterates that the optimism of a timely decision in the Carlson test case as conveyed by the SHRC and the estimation of the costs of using the regular Canadian Court system prevented him from filing a complaint under the regular court system. This

¹⁴ See Human Rights Committee, general comment No. 18 (1989), *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40 (A/45/40)*, Vol. I; communications No. 983/2001, *Love v. Australia*, Views adopted on 25 March 2003, paragraph 14; and No. 1016/2001, *Solis v. Peru*, Views adopted on 27 March 2006, paragraph 8.

¹⁵ Communication No. 265/1987, *Vuolanne v. Finland*, Views adopted on 7 April 1989, para. 9.2.

together with the prolongation of the trial process of the Carlson test case before the Saskatchewan Human Rights Tribunal and the absence of any hearing in his case violated his right to a fair trial or hearing. The author holds that the State party has not provided the Committee with a satisfactory explanation for the delay caused in his case.

5.3 The author further maintains that the SHRC appears not to have been set up to scrutinize the Constitution in relation to relevant human rights violations in Saskatchewan. He argues that the SHRC did not request further evidence with regard to his claim of systemic discrimination and only addressed his age discrimination claim. The author maintains that he followed the advice of the investigator of the SHRC and did not to pursue his systemic discrimination complaint being under the impression that the age discrimination complaint would allow redress. He further maintains that the SHRC neglected its duty to adequately inform the victims of the range of their legal options.

5.4 With regard to his allegation of systemic discrimination, the author submits that statistical data confirms that as a visible minority, it takes significantly longer to secure employment. The author claims that he received over 100 rejection letters by Canadian Universities and when he was refused employment at the University of Windsor, his complaint to the Ontario Human Rights Commission was settled with a friendly agreement, promising that the author would be considered for the next opening, however this never materialized.

5.5 The author maintains that the undue delay of the proceedings in his case, the absence of a fair hearing and the sense of being again victim of systemic minority discrimination created such mental pain, anxiety, fear, and together with the negative outcome in the Carlson test case, it led to a feeling of helplessness, which in total amounts to cruel, inhuman and degrading treatment.¹⁶

5.6 The author furthermore reiterates that the Saskatchewan Human Rights Tribunal lacked independence and impartiality and appeared to have been guided by the wish to solve human rights cases without cost implications. The author cites a rumour holding that staff from the Auditor General's office allegedly stated that, in a different case, the trial process should be extended until the victim died.

5.7 Finally, the author underlines that by changing the discriminatory provision in the Saskatchewan Human Rights Code, the Government acknowledged that the Code had contravened international human rights obligations.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

6.3 On the issue of exhaustion of domestic remedies, the Committee observes that the author's case remains pending before the SHRC. It takes note of the State party's argument

¹⁶ See communication No. 1015/2001, *Perterer v. Austria*, Views adopted on 20 July 2004, paragraph 9.2.

that the author failed to institute regular court action and that he failed to lodge a grievance process under the University of Regina Collective Agreement. The Committee also notes the author's argument that he decided not to institute regular court action given the optimistic assessment by the SHRC with regard to a timely decision in the Carlson test case, and due to his lack of financial means. The Committee further notes the author's claim that he had, in vain, requested a hearing before the University Regina Faculty Association.

6.4 As to the allegations of violations of articles 2, paragraph 1 and 26, the Committee recalls its jurisprudence according to which financial considerations or doubts about the effectiveness of domestic remedies does not absolve the author from exhausting them.¹⁷ It concludes that, while the case before the SHRC remains pending and in light of the author's decision not to institute regular court action, domestic remedies with regard to the age and systemic discrimination claims under these provisions have not been exhausted. In addition, hearings before the SHRC are not in the nature of a "judicial remedy". The Committee further concludes that despite the expression by the SHRC of initial optimism of a swift ruling in the Carlson test case, the State party cannot be held responsible for the author's failure to institute regular court action, and that in accordance with the Committee's jurisprudence, failure to adhere to procedural time limits for filing of complaints amounts to failure to exhaust domestic remedies.¹⁸ The Committee therefore finds that this part of the communication is inadmissible under article 2 and article 5, paragraph 2 (b), of the Optional Protocol.

6.5 As to the claim that the author was deprived of a fair trial or hearing as well as to an effective remedy, the Committee takes note of the State party's argument that the author failed to demonstrate why alternative remedies were unreasonably prolonged and that he did not object to his case with the SHRC being held in abeyance until the outcome in the Carlson test case. The Committee also notes the undisputed facts that the author first attended the SHRC office on 12 December 2002 and that on 22 June 2004, he did not object to have his case being held in abeyance until the outcome in the Carlson test case. The Committee further notes that the SHRC kept the author informed of the developments in the Carlson test case throughout.

6.6 The author did not object to delay the resolution of his case until the outcome in the Carlson test case despite the SHRC assessment that a final resolution was not to be expected before a considerable period of time. The author further does not appear to have requested the SHRC for a hearing in his case and he also failed to complain to the domestic authorities about the delay in the proceedings before the SHRC. The Committee concludes that it is clear that the author acquiesced in the delay of the proceedings before the SHRC. It is therefore unable to conclude that the domestic remedies, which according to both parties, are in progress, have been unduly prolonged in a manner that would exempt the author from exhausting them. The Committee thus finds that claims under article 14, paragraph 1 and article 2, paragraph 3, are inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.7 With regard to the author's claim of a violation of article 14, paragraph 3, the Committee notes that, this provision only applies to criminal proceedings, which are not at

¹⁷ See communications No. 224/1987, *A and S.N. v. Norway*, Inadmissibility decision adopted on 11 July 1988, paragraph 6.2; No. 397/1990, *P.S. v. Denmark*, Inadmissibility decision adopted on 22 July 1992, paragraph 5.4; and No. 550/1993, *Faurisson v. France*, Views adopted on 8 November 1996, paragraph 6.1.

¹⁸ See communication No. 743/1997, *Truong v. Canada*, Inadmissibility decision adopted on 5 May 2003, paragraph 7.6.

issue in the present case. This claim is thus inadmissible *ratione materiae* as incompatible with the provision of the Covenant, under article 3, of the Optional Protocol.

6.8 With respect to the alleged violation of article 7, of the Covenant, the Committee considers that the author failed to sufficiently substantiate, for purposes of admissibility, how the anxiety caused by the length of the proceedings before the SHRC would amount to torture or to inhuman or degrading treatment. This part of the communication is therefore inadmissible under article 2, of the Optional Protocol.

6.9 Finally, with regard to the allegations related to the proceedings in the Carlson test case before the Saskatchewan Human Rights Tribunal and the type of Human Rights Commission the State party has established in Saskatchewan, the Committee finds that the author has not substantiated, for the purpose of admissibility, the claim of partiality and lack of independence of the Saskatchewan Human Rights Tribunal in the proceedings of the Carlson test case. Nor has he substantiated the claim of a violation of article 2, paragraphs 1 and 2, of the Covenant in this regard. The Committee thus concludes that this part of the communication is also inadmissible under article 2, of the Optional Protocol.

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 2, and article 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

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

**P. Communication No. 1578/2007, *Dastgir v. Canada*
(Decision adopted on 30 October 2008, Ninety-fourth session)***

<i>Submitted by:</i>	Mr. Javed Dastgir (represented by counsel, Mr. Stewart Istvanffy)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Canada
<i>Date of communication:</i>	26 July 2007 (initial submission)
<i>Subject matter:</i>	Deportation to Pakistan following denial of asylum claim
<i>Procedural issue:</i>	Inadmissibility on account of non-exhaustion
<i>Substantive issues:</i>	Effective remedy: right to life; torture or cruel inhuman or degrading treatment or punishment; "suit at law", freedom of religion
<i>Article of the Covenant:</i>	6; 7; 14; 18; and 2
<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 30 October 2008,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Mr. Javed Dastgir, a Pakistani citizen and Shia Muslim, whose whereabouts are currently unknown. He claims that if he is removed to Pakistan he will be a victim of violations by the State party of article 6; article 7; article 14; article 18; and article 2, of the International Covenant on Civil and Political Rights. He is represented by counsel; Mr. Stewart Istvanffy.

1.2 On 30 July 2007, the Rapporteur on New Communications and Interim Measures, on behalf of the Committee, denied the author's request for interim measures of protection.

Facts as presented by the author

2.1 The author lived in Lahore in the province of Punjab, which is the stronghold for the Sunni sectarian group, the Sipah-E-Sahaba Pakistan (SSP). He alleges that he was

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Ms. Helen Keller, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

persecuted by the SSP because of his prominent membership in the Shia group, and his involvement with a benevolent organization (Anjuman Hussainia) associated with his temple (Imambargah) in Lahore. He alleges that he was subjected to beatings by members of the SSP on three occasions. On 14 January 1998, he was beaten subsequent to a speech he made at a protest against the SSP. On 31 May 2000, he was beaten and stabbed, receiving 21 stitches to his leg, when supervising the erection of a community welfare centre on behalf of the Anjuman Hussainia. He alleges that he made a statement to the police and wrote to the Deputy Commissioner of the police of Lahore regarding this event, but that no action was taken. On 3 August 2001, he was attacked and beaten by SSP members. He complained to the police about this incident but no action was taken. He provides medical reports as alleged evidence of these beatings.

2.2 According to the author, on 25 June 2000, SSP members harassed his family by forcibly entering their home, in search of the author. On 2 October 2001, the SSP fired shots outside their home and threatening them. The author alleges that the strain of these incidents led to the illness and death of his mother in October 2001. He also alleges that in 2005, his brother was murdered by the police, due to the latter's political associations and ties with militants.

2.3 After consulting with the leadership in his community and his family, and considering that there was nowhere in Pakistan where he could go to avoid persecution, the author decided to seek refuge outside the country. He travelled to Canada and requested refugee status in September 2001. On 19 June 2003, the Immigration and Refugee Board (IRB) determined that the author was not a Convention Refugee, largely on the basis that he had failed to establish his identity. According to the author, the Board did not take sufficient account of the documentation provided in support of his case and was made by a member of the Board, who is alleged to refuse most asylum seekers.

2.4 On 17 September 2003, a request for judicial review of this decision was denied. On 17 March 2007, the author made an application for a Pre-Removal Risk Assessment (PRRA), which was denied on 2 May 2007. Similar allegations as those made against the Board member were made against the PRRA Officer involved in the case. On 19 June 2007, the author filed for judicial review of this decision and an application for a stay of deportation. He claims that judicial review by the Federal Court is not an appeal on the merits but a very narrow review on gross errors of law and has no suspensive effect. On 23 July 2007, the application for a stay was refused, as the author had not proved irreparable harm.¹ The author states that he did not apply for a visa on humanitarian and compassionate grounds, as the case would be the same as before the PRRA and his real reasons for staying in Canada are related to the risk of his being murdered in Pakistan.

2.5 The author claims that the general human rights situation in Pakistan is critical, and there have been numerous car bombings and massacres of civilians, particularly Shias. There is a situation of impunity in Pakistan for those persecuting him and this is well-documented in human rights reports and newspaper articles.

The complaint

3.1 The author claims to have exhausted all domestic remedies available to him that would have the effect of preventing his deportation. He claims a violation of articles 6 and 7 if he is deported, as there is a risk that he may be subjected to torture and/or murdered,

¹ In its submission of 11 December 2007, the State party informed the Committee that his application for judicial review of the PRRA decision was denied on 6 September 2007.

particularly in light of the two previous murder attempts against him and the murder of his brother.

3.2 He also claims a violation of article 2, as the PRRA and the humanitarian and compassionate review procedures do not fulfil the State party's obligation to ensure that he has an effective remedy. He claims a violation of article 14, for the "lack of due process for fundamental rights" and a violation of article 18 "because of the persecution for his religious beliefs."

3.3 The author advances general claims about the asylum review procedures in Canada, including an allegation that the risk assessment is undertaken by immigration agents who have no competence in matters of international human rights or in legal matters generally, and who are not impartial, independent or competent.

The State party's submission on admissibility and merits

4.1 On 11 December 2007, the State party provided its submission on admissibility and merits. It provides detailed explanations of the IRB, the PRRA officer, and the judicial review of the PRRA decision. The IRB found, inter alia, that the author's claims were not credible and that the story he presented was "a complete fabrication". It came to this conclusion on the grounds that the author: had not established his identity; lacked credibility, in that he provided contradictory information and; failed to establish a fear of persecution and the unavailability of protection in Pakistan. Among the factors that led to substantial doubt about his identity were: his use of a false passport; his explanation about the alleged use of a nickname; the lack of conformity of his identity card; the ease with which the author could obtain false documents; and his use of three or even four different names. The State party submits that although the author did file for leave to apply for judicial review of the IRB decision, his application was dismissed due to his failure to file an Application Record (the supporting documentation required for the application). Thus, his application for leave to apply for judicial review was never properly submitted to the Federal Court and was dismissed due to lack of diligence in completing the application process.

4.2 The PRRA officer concluded that the evidence tendered did not demonstrate any personal risk to the author should he be returned to Pakistan. The newspaper articles had a low probative value by reason of the fact that; they were photocopies thereby rendering difficult verification of their authenticity; the author's name was not mentioned in the articles and; the facts listed in the article do not establish a link between the author and his allegations of risk. The PRRA officer concluded that despite the continuing sectarian violence and political conflict in the country, the author failed to establish any risk to him personally. He had failed to establish a link between his alleged brother's death and his claim of a risk of persecution. The reasoning behind the denial of his application for a stay of the removal order was based not only on the author's failure to prove irreparable harm but on the fact that his "allegations of risk if returned to Pakistan were addressed and decided by the PRRA officer" and that "there [was] no need for this court to intervene at this stage because the officer's analysis on the allegations of risk is not flawed and unreasonable." Following the negative PRRA decision, the author was ordered to leave Canada on 31 July 2007 pursuant to the removal order. However, the author failed to appear at the airport and a warrant was issued for his arrest. His whereabouts remain unknown.

4.3 The State party challenges the admissibility of the communication, arguing that the claims under articles 6 and 7 are inadmissible for failure to exhaust domestic remedies and for lack of substantiation, and that the claims under articles 2, 14 and 18 are inadmissible, on the ground of incompatibility with the Covenant and non-substantiation. It submits that

the author has not exhausted domestic remedies, as he failed to complete his application for leave to apply for judicial review of the negative IRB decision and failed to make an application for permanent residence on humanitarian and compassionate grounds. It refers to the jurisprudence of the Committee, as well as the Committee against Torture, to demonstrate that judicial review is recognized to be an effective remedy that must be exhausted for the purposes of admissibility of a communication and the author could have made the same arguments upon judicial review of the IRB's decision as he did to the Committee, namely that evidence was dismissed arbitrarily and that the IRB does not consider cases seriously.² In particular, it refers to the fact that the Committee against Torture has recently noted the effectiveness of judicial review of the humanitarian and compassionate decisions by the Federal Court to ensure the fairness of the refugee determination system in Canada.³

4.4 The State party submits that the humanitarian and compassionate application is an available and effective remedy and both the Committee against Torture and this Committee have in recent Views considered this procedure to be a remedy that is required to be exhausted before a communication is considered admissible.⁴ The test is whether the applicant would suffer unusual, undeserved or disproportionate hardship if he had to apply for a permanent resident visa from outside Canada. Such an application can be based on risk, in which case the officer assesses the risk the applicant may face in the country to which he is to be returned, included in this assessment are considerations of the risk of being subjected to unduly harsh or inhuman treatment, as well as poor conditions in the receiving country.

4.5 The State party submits that the author has not substantiated his claims under articles 6 and 7. His claims are based on the same facts and evidence presented before the domestic authorities, and there is nothing new to suggest that the author is at a personal risk of torture or any ill-treatment in Pakistan. The State party relies on the decisions of its domestic authorities and submits that it is not within the scope of the Committee to re-evaluate findings of credibility made by competent domestic tribunals unless, as stated by the Committee that, "it is manifest that the evaluation was arbitrary or amounted to a denial of justice". If that the Committee wishes to re-evaluate the findings of the domestic authorities, the State party provides the reasoning of these authorities in detail.

4.6 The State party submits that article 2 does not guarantee a separate right to individuals but describes the nature and scope of the obligations of State parties. It refers to the Committee's jurisprudence⁵ that under article 2, the right to a remedy arises only after a violation of a Covenant right has been established and argues that consequently this claim is inadmissible. Alternatively, the author has failed to substantiate her allegations under this provision, given the broad range of effective remedies available in the State party. The author has had opportunities under different domestic bodies to challenge his deportation

² Communications No. 654/1995, *Adu v. Canada*, Views adopted on 18 July 1997; No. 603/1994, *Badu v. Canada*, Views adopted on 18 July 1997; No. 604/1994, *Nartey v. Canada*, Views adopted on 18 July 1997; No. 939/2000, *Dupuy v. Canada*, Views adopted on 18 March 2005. The jurisprudence of the Committee against Torture includes as follows: Communications No. 66/1997, *P.S.S v. Canada*, Views adopted on 13 November 1998; No. 86/1997, *P.S. v. Canada*, Views adopted on 18 November 1999; No. 42/1996, *R.K. v. Canada*, Views adopted on 20 November 1997; No. 95/1997, *L.O. v. Canada*, Views adopted on 15 May 2000; and that of the European Court of Human Rights, *Vilvarajah and Others v. United Kingdom* (14 E.H.R.R. 218 (1991)).

³ Communications No. 273/2005, *Aung v. Canada*, Views adopted on 15 May 2006, para. 6.3 and No. 183/2001, *B.S.S v. Canada*, Views adopted on 12 May 2004, para. 11.6.

⁴ *Aung v. Canada* (note 3 above), para. 6.3, and *B.S.S v. Canada* (note 3 above), para 11.6.

⁵ See communication No. 275/1988, *S.E. v. Argentina*, Decision of 26 March 1990, paragraph 5.3.

before impartial decision-makers. He failed to diligently follow through his application for judicial review of the IRB decision and to make a humanitarian and compassionate application to which he could have sought judicial review in the event of a negative decision. He did pursue judicial review of the PRRA decision, but was denied leave to apply. Thus, he has not shown how this system, either through its individual mechanisms or as a whole, failed to provide him with an effective remedy.

4.7 The State party argues that refugee and protection determination proceedings do not fall within the terms of article 14. These proceedings are in the nature of public law, the fairness of which is guaranteed by article 13.⁶ The State party accordingly concludes that this claim is inadmissible *ratione materiae* under the Covenant. In the event that the author's reference to article 14 is an error and the Committee wishes to consider his allegations under article 13, the State party submits that the allegations are inadmissible on grounds of incompatibility. Since the author is not at risk in Pakistan and he is the subject of a lawful removal order, he is not "lawfully in the territory" of Canada. In the alternative, the State party submits that the author has not established that the proceedings leading to the removal order against him were not in accordance with lawful procedures or that the Canadian Government acted in bad faith or abused its power.⁷ His case heard by an independent tribunal, was represented by counsel, and had a full opportunity to participate, including testifying orally and making written submissions. He had access to judicial review of the IRB decision and to both the PRRA and humanitarian compassionate processes, including access to apply for leave to judicially review those decisions.

4.8 The State party argues that it is not within the scope of the Committee to consider the Canadian refugee determination system in general, but only to examine whether in the present case it complied with its obligations under the Covenant. It submits that the PRRA procedure is an effective domestic mechanism for the protection of those who may be at risk upon removal. The State party refers the Committee to several decisions of the Federal Court, among them *Say v. Canada* (Solicitor General),⁸ where the independence of the PRRA decision-makers was considered in detail. On the argument that the PRRA officer did not consider evidence previously presented to the IRB, the State party submits that this course of action is in conformity with the PRRA officer's jurisdiction under s. 113 (a) of the IRPA. The officer correctly stated that, "*le processus d'examen des risques avant renvoi ne constitue par [sic] un pallier d'appel ou de révision de la décision négative de la section de la protection des réfugiés.*" The State party submits that the author's broad allegations against the PRRA are entirely unsubstantiated and the fact that there is a low acceptance rate at the PRRA stage reflects the fact that most persons in need of protection already received it from the Board.

4.9 The State party submits that the Committee should not substitute its own findings on whether the author would reasonably be at risk of treatment in violation of the Covenant upon return to Pakistan, since the national proceedings disclose no manifest error or unreasonableness and were not tainted by abuse of process, bias or serious irregularities. It is for the national courts of the States parties to evaluate the facts and evidence in a particular case. The Committee should refrain from becoming a "fourth instance" tribunal.

4.10 As to the author's claim of a violation of article 18, the State party assumes that the author is arguing that if he were to be deported he would be subjected to religious persecution, on the ground that he claims to be a Shia Muslim. The State party argues that

⁶ The State party refers to communications No. 1341/2005, *Zundel v. Canada*, Views adopted on 20 March 2007, and No. 1234/2003, *PK v. Canada*, Views adopted on 20 March 2007.

⁷ It refers to communication No. 58/1979, *Maroufidou v. Sweden*, Views adopted on 9 April 1981.

⁸ 2005 FC 739.

the domestic authorities, at all levels, did not believe that he was in danger or at risk because of his religion. In addition, the article in question does not prohibit a state from removing a person to another state that may not adhere to the protection of this article. The Committee has only exceptionally given an extraterritorial application to rights guaranteed by the Covenant, thereby protecting the essentially territorial nature of the rights guaranteed therein. According to the State party, limiting the power given to a state to control who immigrates across its borders by giving extraterritorial power relating to articles of the Covenant would deny a states' sovereignty over removal of foreigners from its territory.

5. Despite a request to counsel for comments on the State party's submission, dated 12 December 2007, as well as two subsequent reminders, dated 8 May 2008 and 4 August 2008, the author did not comment on the State party's arguments.

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.

6.2 On the issue of exhaustion of domestic remedies, the Committee notes the State party's argument that the author failed to pursue several avenues of domestic redress. He failed to complete his application for leave to apply for judicial review of the negative IRB decision, on the basis of which his application was dismissed and he failed to make a humanitarian and compassionate leave application, as he believed that it would merely affirm the decision of the PRRA. The Committee recalls that mere doubts about the effectiveness of domestic remedies do not absolve an author of the requirement to exhaust them, and that the fulfilment of reasonable procedural rules is the responsibility of the applicant himself.⁹ It also notes that, despite several reminders to the author, he has failed to respond to the State party's arguments on non-exhaustion of domestic remedies, in particular with respect to his application for judicial review of the IRB decision. Thus, the Committee considers that the author has failed to exhaust domestic remedies, under articles 2 and 5, paragraph 2(b), of the Optional Protocol.

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 2, and article 5, paragraph 2(b), of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author, through counsel.

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

⁹ Communications No. 1543/2007, *Aduhene, and Agyemam v. Germany*, Decision adopted on 21 July 2008 and No. 982/2001, *Bhullar v. Canada*, Decision adopted in 31 October 2006.

**Q. Communication No. 1580/2007, *Gonzales v. Canada*
(Decision adopted on 30 October 2008, Ninety-fourth session)***

<i>Submitted by:</i>	F.M. (represented by counsel, Johanne Doyon)
<i>Alleged victims:</i>	The author, his wife M.C. and their children S. (20), P.C. (17), P. (14), L. (11) and P. (10)
<i>State party:</i>	Canada
<i>Date of communication:</i>	26 July 2007 (initial submission)
<i>Subject matter:</i>	Removal of the claimants to Mexico
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; unsubstantiated allegations incompatible with the Covenant
<i>Substantive issues:</i>	Right to life; right to protection from cruel, inhuman or degrading treatment or punishment; right to security of the person; right to be heard by a competent, independent and impartial tribunal; right of children to protection
<i>Articles of the Covenant:</i>	6; 7; 9, paragraph 1; 13; 14; and 24, paragraph 1
<i>Article of the Optional Protocol:</i>	5, paragraph 2 (b)
<i>The Human Rights Committee</i> , established pursuant to article 28 of the International Covenant on Civil and Political Rights,	
<i>Meeting on 30 October 2008,</i>	
<i>Adopts the following:</i>	

Decision on admissibility

1.1 The author of the communication dated 26 July 2007 is Mr. F.M., who is submitting the communication also on behalf of his wife and their five children (20, 17, 14, 11 and 10 years of age, respectively), all Mexican citizens who were deported to Mexico after submission of the communication. They claim to be victims of violations by Canada of articles 6; 7; 9, paragraph 1; 13; 14; and 24, paragraph 1, of the Covenant. They are represented by counsel.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Ms. Helen Keller, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

1.2 On 9 August 2007, the Special Rapporteur on New Communications and Interim Measures decided to deny the request for interim measures of protection made by the authors in their initial submission.

Facts as presented by the author

2.1 Mr. F.M. states that his half-sister was married to M.C., alleged to be a member of a gang of drug traffickers in Mexico. F.M. reported his sister and her husband missing to the Office of the Public Prosecutor in Atizapan on 18 September 2005, as he had not heard from them for some time. The following day, their bodies were discovered in a car. They had allegedly been shot in the head on the orders of the leader of a rival gang of drug traffickers, known as “El Compadre”. Since then, their three children have been in the custody of F.M. and his wife. The double killing was allegedly carried out by one S.M.

2.2 The Atizapan judicial police conducted an investigation into the double killing, led by Police Commander Contreras. F.M. was questioned on 19 September 2005. The victims’ home was searched in his presence on 19 and 22 September 2005. Police officers allegedly stole personal effects, including drugs, from the victims’ home and threatened F.M. to keep him silent.

2.3 Towards the end of September 2005, F.M. and his family began to receive anonymous telephone threats and were watched from a vehicle parked outside their house. On 13 October 2005, the family received two suspicious telephone calls at the home of F.M.’s mother. On 18 October 2005, the vehicle that had been parked outside their house was seen in front of the house of the murdered couple while the family was there to fetch the children’s personal effects. On 21 October 2005, the author went to the Office of the Public Prosecutor in Atizapan to make a complaint. An official there told him that he should go to the judicial police, which he was not willing to do because he was afraid of Police Commander C.

2.4 On 23 October 2005, the alleged victims and eight other family members left Mexico. They arrived in Canada the same day and immediately applied for asylum. The Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada (IRB) rejected the asylum application on 17 May 2006. It considered that the alleged victims had failed to demonstrate well founded fear of persecution in Mexico and concluded that they were neither refugees nor protected persons. Moreover, it concluded that the alleged victims’ asylum applications would have failed even had their allegations been credible, since internal flight in Mexico was possible. The alleged victims were sent back to Mexico on 19 October 2007.

The complaint

3.1 Mr. F.M. claims to be a victim of violations by the State party of articles 6; 7; 9, paragraph 1; 13; 14; and 24, paragraph 1, of the Covenant. He claims that his and his wife’s and children’s life and safety are in danger because they belong to the family of an alleged drug trafficker who was murdered. They have received threats from drug traffickers and/or the police/judicial authorities. He claims that they cannot obtain protection from the Mexican State and that there is no internal flight alternative in Mexico. He asserts that the alleged killer of his half-sister and her husband is known to have attacked and threatened to kill the family members of his victims, and that drug traffickers are protected by corrupt police.

3.2 Mr. F.M. also contends that IRB has not assessed the credibility of the alleged threats against them. Even if the allegations were credible, IRB considered that there was an internal flight alternative in Mexico and noted that other family members of the

deceased remained in Mexico. Mr. F.M. considers that they are at greater risk than other family members, in particular as the children of the persons killed are now in their care.

3.3 The author asserts that police corruption is widespread in Mexico and that they cannot hope for any protection from the police, in particular against drug traffickers, who act with impunity.

3.4 The author argues that they have exhausted domestic remedies, as humanitarian applications and pre-removal risk assessment (PRRA) are not effective remedies. Decisions on humanitarian applications are not made on a legal basis but are rather granted as favours by a minister. PRRA is not an effective remedy either, as only new evidence is considered and petitions are systematically rejected, as confirmed by the case law of the Committee against Torture (communication No. 133/1999, *Falcon Rios v. Canada*, Views adopted on 23 November 2004).

State party's observations on admissibility and merits

4.1 In February and September 2008, the State party contested the admissibility and merits of the communication. It regards the communication as inadmissible because domestic remedies have not been exhausted. The alleged victims could have submitted a request for leave and judicial review of the negative decision by RPD to the Federal Court. The author contends that they did not do so as they did not have the right to appeal the decision. According to the State party, although there is no right to judicial review of an RPD decision, the Federal Court examines every request for leave to apply for judicial review in detail. A number of Federal Court rulings presented by the author in support of his claim demonstrate that the request for leave to apply for judicial review is an effective remedy. On a number of occasions, the Human Rights Committee and the Committee against Torture have declared communications inadmissible because their authors had not exhausted available domestic remedies, including request for leave and judicial review to the Federal Court (communication Nos. 1302/2004 and 273/2005, respectively). The alleged victims could also have asked the Federal Court for leave to apply for judicial review of the PRRA decision and the decision on their application on humanitarian grounds. At the same time, they could have requested the Federal Court to order suspension of the expulsion order until a decision was issued on their request for leave, or, if leave was granted, until completion of the judicial review.

4.2 The State party also submits that the communication is manifestly unfounded and that some of the allegations made by the author are incompatible with the Covenant. It recalls that, according to the Committee's general comments on articles 6 and 7,¹ an individual must demonstrate that there is a real and personal risk that their rights will actually be violated. However, the author did not establish prima facie violations of articles 6 and 7 of the Covenant. No violation of article 9, paragraph 1 can be established in the present case in the absence of a real personal risk to life or risk of torture or cruel, inhuman or degrading treatment.

4.3 Both RPD and the PRRA officer found that the alleged victims' allegations lacked credibility and that they had not produced evidence in support of their claims. When RPD observed that other family members were living in Mexico without a problem, the alleged victims indicated that that was because these persons did not live in Atizapan. The alleged

¹ General comments No. 6 (1982), *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40)*, and No. 20 (1992), *Ibid.*, *Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI.

victims were not able to explain why their safety would continue to be threatened if they moved to another town in Mexico.

4.4 The State party contests the assertion that Mexican drug traffickers are protected by corrupt police. The newspaper articles presented by the author as evidence show that the alleged killer of the two persons mentioned above has, in fact, been arrested.

4.5 With regard to article 24, paragraph 1, of the Covenant, the State party maintains that this allegation adds nothing to the allegations submitted under articles 6 and 7 of the Covenant. In the alternative, it recalls that the alleged victims have not demonstrated that their expulsion would deprive the four children of the protection they are entitled to as minors.

4.6 The State party maintains that the allegations under articles 13 and 14 of the Covenant are incompatible *ratione materiae* with the provisions of the Covenant. Article 13 is not applicable in this case, since the alleged victims were not legally in Canada when the expulsion order was issued. Alternatively, the State party maintains that there was no violation of article 13, since the expulsion order was issued only once their asylum application had been rejected after careful consideration and with the possibility of judicial review.

4.7 The State party contests the applicability of article 14 to the determination of refugee status or to the protection that a State may grant an asylum-seeker. Alternatively, the State party submits that the alleged victims have not shown that the RPD and PRRA procedures were not conducted in accordance with article 14 of the Covenant.

4.8 The State party therefore requests the Committee to declare the communication inadmissible. If the communication is declared admissible, the State party maintains that it is unfounded for the same reasons.

Author's comments

5.1 On 8 May 2008 the author submitted his comments on the State party's observations. He states that they did not submit a request for leave and judicial review of the RPD decision to the Federal Court because their representative at the time had advised them against doing so. The representative had made it clear that an application to the Federal Court was unnecessary, would be too costly and would almost certainly not succeed.

5.2 The author reiterates that neither PRRA nor the humanitarian application are effective remedies in Canada. Therefore, requests for leave and judicial review of PRRA and humanitarian decisions cannot be considered effective remedies for the author in this instance.

5.3 The author states that the RPD finding that their arguments lack credibility was based on unlikely circumstances or inconsistencies that were of no relevance, and RPD had not addressed the main ground for their request for protection. He also points out that internal flight was not an alternative for him and his family owing to human rights violations and crime rates in Mexico.

Deliberations of the Committee

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

6.2 The Committee has ascertained, as required 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 The Committee notes that the State party argues that the communication is inadmissible because domestic remedies have not been exhausted. In particular, it points out that the alleged victims could have submitted a request for leave and judicial review of the negative IRB decision to the Federal Court. They could also have applied to the Federal Court for leave to apply for judicial review of the PRRA and humanitarian decisions. At the same time, they could also have requested the Federal Court to order the suspension of the expulsion order until a decision was issued on the request for leave and, if leave was granted, until completion of the judicial review. The Committee notes that the author has argued in turn that these requests did not constitute effective remedies. The Committee refers to its case law to the effect that mere doubts about the effectiveness of domestic remedies do not relieve the author of a communication from the duty to exhaust them.² In these circumstances, the author of this communication has thus failed to exhaust domestic remedies. The communication is therefore inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.4 In the light of this finding, the Committee does not need to consider the other claims submitted concerning the admissibility of the communication.

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the author and to the State party.

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

² See communication No. 654/1995, *Kwame Williams Adu v. Canada*, decision of 18 July 1997, paragraph 6.2.

**R. Communication No. 1582/2007, *Kudrna v. Czech Republic*
(Decision adopted on 21 July 2009, Ninety-sixth session)***

<i>Submitted by:</i>	Ms. Vera Kudrna (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	The Czech Republic
<i>Date of communication:</i>	23 December 2006 (initial submission)
<i>Subject matter:</i>	Discrimination on the basis of citizenship with respect to restitution of property
<i>Procedural issue:</i>	Abuse of the right of submission
<i>Substantive issues:</i>	Equality before the law; equal protection of the law without any discrimination
<i>Article of the Covenant:</i>	26
<i>Articles 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 21 July 2009,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mrs. Vera Kudrna, a United States citizen and former citizen of Czechoslovakia, born in 1934, currently residing in the United States. She claims to be a victim of a violation by the Czech Republic of article 26 of the International Covenant on Civil and Political Rights.¹ She is not represented.

The facts as submitted by the author

2.1 The author left Czechoslovakia with her husband in September 1965. On 12 March 1976 she lost her Czechoslovak citizenship, and on 30 April 1976 she obtained citizenship of the United States.

* 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. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli and Mr. Krister Thelin.

The text of an individual opinion signed by Committee member Mr. Rafael Rivas Posada is appended to the present decision.

¹ The Optional Protocol to the International Covenant on Civil and Political Rights entered into force for the Czech Republic on 1 January 1993.

2.2 The author owned one half of a villa in Prague. Her part of the villa was confiscated after she left the country and is now owned by the municipality. The author was rehabilitated by law 119/1990, but her property was never returned, as she did not fulfil the citizenship criteria.

2.3 On 17 October 1995, the author brought an action before the Praha 6 District Court, which rejected her complaint on the grounds that she had confirmed that she did not meet the precondition of citizenship envisaged in Act No. 87/1991. She appealed this decision to the Prague Municipal Court, which dismissed her complaint on 16 June 1998. She then made an appeal to the Supreme Court, which was rejected on 18 December 1998, on the grounds that she had obtained American citizenship and had lost her Czechoslovak citizenship, and thus does not meet the requirements of restitution law 87/1991. She then made an application before the Constitutional Court, which was rejected on 15 November 1999, on the same grounds.

The complaint

3. The author claims that the State party's refusal to proceed with the restitution of her property for failure to meet the citizenship criteria 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 commented on the admissibility and merits of the communication.

4.2 On admissibility, the State party submits that the case is inadmissible for abuse of the right of submission, due to the fact that the author waited for over seven years after the decision of the Constitutional Court of 15 November 1999 before submitting her case to the Committee. While acknowledging that there is no explicit time limit for the submission of communications to the Committee, the State party refers to the limitation period of other international instances, notably the Committee on the Elimination of Racial Discrimination — six months following exhaustion of domestic remedies — to demonstrate the unreasonable length of time the authors waited in this case. Even if the State party were to tolerate a slight deviation in the application of such a rule, it would not consider a period of more than one year to be reasonable. It argues that the author has failed to provide a reasonable objective explanation, which could include the provision of new facts, justifying the delay in her submission. The State party agrees with Mr. Amor's dissenting opinion in *Zdenek and Ondracka v. the Czech Republic*,² and notes that the Committee's jurisprudence in this area is rather inconsistent.

4.3 The State party also submits that the communication is inadmissible *ratione temporis* given that the author's property was forfeited in 1966, a long time prior to the ratification of the Covenant and Optional Protocol by the Czechoslovak Socialist Republic.

4.4 On the merits, the State party refers to its earlier submissions in similar cases, and indicates that its restitution laws, including Act No. 87/1991, were part of two-fold efforts: to mitigate the consequences of injustices committed during the Communist rule, on one hand, and to carry out a comprehensive economic reform with the objective of introducing a well-functioning market economy, on the other. Since it was not possible to redress all injustices committed earlier, the restrictive preconditions were put in place, including that of citizenship, its main objective being to encourage owners to take good care of the

² Communication No. 1533/2006, Views adopted on 31 October 2007.

property in the process of privatization. The State party does not wish to reiterate its arguments in support of its policy contained in a number of earlier Czech property communications.

The author's comments

5. On 2 July 2008, the author commented on the State party's submission, reiterating arguments previously made and explaining that she did not submit her complaint to the Committee immediately after the Constitutional Court decision, as she was waiting for an amendment in the law, which had happened before, and which would have prevented her from having to submit a communication to 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, 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. It also notes that the author has exhausted domestic remedies.

6.3 The Committee has noted the State party's argument that the communication should be declared inadmissible as an abuse of the right of submission because of the long delay between the final judicial decision in the case and the submission of the communication to the Committee. The Committee notes that the Optional Protocol does not establish time limits within which a communication must be submitted. It is only in exceptional circumstances that the delay in submitting a communication can lead to the inadmissibility of a communication.³ In this regard, it observes that the author waited over seven years after the date of the Constitutional Court judgment before submitting her complaint to the Committee. To justify the delay, the author simply argues that she was anticipating an amendment to the law with respect to the citizenship criteria, which would have averted the need to submit a communication to the Committee. However, she has failed to provide any clarification on the basis for her belief that such an amendment would be adopted. Nor has she demonstrated that the legislature was even considering such an amendment. In the particular circumstances of the present case, the Committee regards the delay to be so unreasonable and excessive as to amount to an abuse of the right of submission, which renders the communication inadmissible under article 3 of the Optional Protocol.

7. The Committee therefore decides:

- (a) That the communication is inadmissible under article 3 of the Optional Protocol;
- (b) That this decision shall be communicated to the author and to the State party.

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

³ See communications No. 1434/2005, *Fillacier v. France*, inadmissibility decision adopted on 27 March 2006, paragraph 4.3; and No. 787/1997, *Gobin v. Mauritius*, inadmissibility decision adopted on 16 July 2001, paragraph 6.3.

Appendix

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

The Human Rights Committee found the complaint submitted by Ms. Vera Kudrna against the Czech Republic to be inadmissible for abuse of the right of submission, on account of what it considered the “unreasonable and excessive” delay in submitting her complaint to the Committee. I disagree with this decision for two fundamental reasons.

The first concerns a problem often encountered by the Committee when it has to decide what constitutes an excessive delay in the submission of communications, which has so far been the only reason for applying the concept of abuse of the right to submission and consequently declaring a complaint inadmissible. It is common knowledge that neither the Optional Protocol to the International Covenant on Civil and Political Rights nor the Committee’s rules of procedure set a time limit for the submission of communications, but the Optional Protocol does identify abuse of the right of submission — though without specifying what it consists of — as grounds for finding a communication inadmissible. As the Optional Protocol makes no mention of permissible time limits, the debate has focused on the importance of setting out some criterion for the rejection of communications for excessive delay and, at the same time, on the relationship between excessive delay and abuse of the right to submission as grounds for inadmissibility. The Committee has not yet found a formula for setting a time limit for the submission of complaints, which has given rise to never-ending debates on the issue and to inconsistent and erratic jurisprudence, with the result that decisions are often contradictory and in many cases arbitrary. In the past, communications have been found admissible after delays of three, four, five or even seven years, in some cases without taking account of possible reasons for such delays or, in other cases — including complaints of alleged violations of article 26 of the Covenant by the Czech Republic — the particular circumstances in the State party that might explain the delays in sending communications to the Committee.

In the decision that concerns us here, the Committee set aside the majority of cases in which it had found communications submitted after a considerable lapse of time to be admissible, and considered that there was no acceptable justification in this case. However, in a number of earlier cases concerning possible violations of article 26 of the Covenant by the Czech Republic, the Committee had adjudged complaints submitted several years after the author had exhausted domestic remedies to be admissible, regardless of any reasons the complainant might have given for the delay. The Committee’s conclusion in the present case seems to me unjustified as it applies a different criterion to that used in the past to resolve similar cases.

The second reason for my dissent concerns the discriminatory nature of the Committee’s decision. In deciding to justify it on the grounds of excessive delay, for which the author has given no satisfactory explanation, the Committee has treated her differently from previous complainants alleging violations of article 26, who received favourable treatment in that their communications were deemed admissible and the Czech Republic was found to have violated article 26, notwithstanding the delay in submission. Ms. Kudrna has therefore been unfairly discriminated against, which is a rather curious act of discrimination by the Committee itself, in finding inadmissible a case of alleged discrimination by the State party.

As long as the current vagueness persists over an acceptable time limit for the submission of communications, and over a definition of abuse of the right of submission as grounds for inadmissibility, the difficulties the Committee has encountered in deciding on cases like this one will also persist, with negative consequences for the necessary consistency of this treaty body's jurisprudence.

For the reasons given, I consider that the Committee should have found communication No. 1582/2007 admissible, although this opinion cannot be considered as prejudging the merits of the case, that is, whether or not the State party's conduct constituted a violation.

(Signed) Mr. Rafael **Rivas Posada**

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

**S. Communication No. 1584/2007, *Chen v. The Netherlands*
(Decision adopted on 30 October 2008, Ninety-fourth session)***

<i>Submitted by:</i>	Ms. Meng Qin Chen (represented by counsel, Mr. Michel A. Collet)
<i>Alleged victim:</i>	The author
<i>State party:</i>	The Netherlands
<i>Date of communication:</i>	4 April 2007 (initial submission)
<i>Subject matter:</i>	Deportation of the author and her daughter (born in the Netherlands) back to the Peoples' Republic of China
<i>Procedural issue:</i>	Admissibility
<i>Substantive issue:</i>	Not to be subjected to arbitrary or unlawful interference with one's privacy, family, home or correspondence
<i>Article of the Covenant:</i>	17
<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 30 October 2008,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Ms. Meng Qin Chen, a Chinese national, born on 14 December 1987, also writing on behalf of her daughter, Wenni, who was born in the Netherlands on 18 May 2004, both of whom are currently awaiting deportation from the Netherlands to the Peoples' Republic of China. The author claims to be a victim of violations by the Netherlands of article 17, of the International Covenant on Civil and Political Rights. She is represented by counsel; Mr Michel Collet.

1.2 On 28 November 2007, on behalf of the Committee, the Special Rapporteur on New Communications and Interim Measures decided to examine first the admissibility of the communication.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Ms. Helen Keller, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

The facts as presented by the author

2.1 On 14 July 2003, the author arrived in the Netherlands, and was placed under supervision in the *Aanmeldcentrum* under article 6 of the Dutch Alien Act 2000. On 16 July 2003, the Dutch immigration service (IND) notified the Court of Amsterdam of this procedure. On 24 July 2003, the Court of Amsterdam ruled that the author should be placed in a facility suitable for minors. The IND appealed against this decision before the Council of State. On 20 November 2003, the Council of State confirmed the ruling of the Court of Amsterdam.

2.2 Upon her arrival in the Netherlands, on 14 July 2003, the author applied for asylum. Her application was rejected by the IND on 18 July 2003. The IND also refused to give the author a permit as a single minor. The decision was appealed, but rejected by the Court of Haarlem on 7 October 2003 as inadmissible. The author filed a complaint with the IND against the decision of not granting her a permit as a single minor. The IND did not believe that the author was in fact a minor and had her collarbone X-rayed. The author gave birth to a daughter on 18 May 2004. On the basis of the results of the x-ray, the IND rejected the appeal on 17 June 2005. The author appealed this decision before the Court of Breda, which rejected the appeal on 10 July 2006. The author then appealed to the Council of State which rejected the appeal on 10 October 2006.

The complaint

3. The author alleges a violation of article 17, as the State party's authorities denied her a permit to stay in the Netherlands, thus constituting interference in the private life she has built up in the State party. She asserts that, by not expelling her immediately, the State party consented to her building a new life in the Netherlands. As she came to the State party as a minor, 16 years old, she claims that she should have been granted a permit to stay. However, due to the IND's reliance on a "faulty method" to determine her age, i.e. an x-ray of her collarbone, the State party failed to recognize that she was a minor. According to the author, the State party's authorities did not attach sufficient weight to: her age; to the fact that she has no family or relatives left in the Peoples' Republic of China; also to the fact that she has a daughter who was born in the State party and who has never been to the Peoples' Republic of China; and that there are marked cultural differences between the Netherlands and the author's country of origin. In any event, she claims that she cannot return to the Peoples' Republic of China as she has no identity documents and the Chinese authorities would not recognize her as a Chinese citizen.

State party's submission on admissibility and the author's comments thereon

4. On 15 October 2007, the State party contested the admissibility of the communication on grounds of non-exhaustion of domestic remedies. It submits that the author has not invoked the matters raised under article 17 of the Covenant before the domestic courts, and has thus denied the State party the opportunity to respond to this claim raised by the author. Moreover, the author has not substantiated her argument that she cannot return to the Peoples' Republic of China because she does not have the necessary documents. She has not provided any evidence of any efforts on her part to obtain such documents. Furthermore, there is no factual basis for her argument that the Dutch authorities consented to her building a new life in the State party. As early as 18 July 2003 by a decision of that date the author was informed that she was required to leave the State party without delay. Although the author was not immediately expelled and remained in the Netherlands for the duration of the procedures relating to her application, she was never given assurances that she would be granted a residence permit.

5. On 23 November 2007, the author commented on the State party's submission, arguing that the right to a private life is "an absolute right" and that consequently the fact that it was not invoked before the domestic authorities is irrelevant. She states that it is generally known in the State party that the Chinese Embassy is not willing to provide the necessary documents if an individual cannot prove that he or she is originally from the Peoples' Republic of China, and without any documents in her possession it is difficult to prove her origins. In addition, as her child was born in the State party, the birth of the child is not registered in the Peoples' Republic of China, and therefore it will not be possible to obtain any documents on her daughter's behalf.

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.

6.2 The Committee notes that the State party contests the admissibility of the communication on grounds of non-exhaustion of domestic remedies. It observes that the only article of the Covenant relied upon by the authors relating to the facts of this case is article 17. It also observes that the author admits not having raised the issues under this provision before the State party's authorities and does not contest that such issues could have been raised before the State party's courts. The only argument put forward by the author for not having done so is that, in her view, the right to privacy is an "absolute right" and her failure to invoke this right in the domestic court is thus "irrelevant". The Committee recalls its jurisprudence that mere doubts about the effectiveness of the remedies, or in this case about the relevance of such remedies, do not absolve an individual from exhausting available domestic remedies. For this reason, the Committee considers that the communication is inadmissible for non-exhaustion of domestic remedies, under article 2, and article 5, paragraph 2 (b), of the Optional Protocol.

7. The Committee therefore decides:

- (a) That the communication is inadmissible under articles 2 and 5, paragraph 2 (b), of the Optional Protocol;
- (b) That this decision shall be communicated to the author's counsel and to the State party.

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

**T. Communication No. 1614/2007, *Dvorak v. Czech Republic*
(Decision adopted on 28 July 2009, Ninety-sixth session)***

<i>Submitted by:</i>	Ms. Dagmar Dvorak (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	The Czech Republic
<i>Date of communication:</i>	24 November 2006 (initial submission)
<i>Subject matter:</i>	Discrimination on the basis of citizenship with respect to property restitution
<i>Procedural issues:</i>	Abuse of the right of submission; exhaustion of domestic remedies; substantiation of claim
<i>Substantive issues:</i>	Equality before the law; equal protection of the law
<i>Articles of the Covenant:</i>	14, paragraph 7; and 26
<i>Articles of the Optional Protocol:</i>	2; 3; and 5, paragraph 2 (b)
<i>The Human Rights Committee</i> , established under article 28 of the International Covenant on Civil and Political Rights,	
<i>Meeting on 28 July 2009,</i>	
<i>Adopts the following:</i>	

Decision on admissibility

1. The author of the communication is Dagmar Dvorak, a citizen of the United States and the Czech Republic, currently residing in the United States of America. The author was born on 23 January 1921 in Prague. She claims to be a victim of violations by the Czech Republic of article 14, paragraph 7, and article 26 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 22 February 1993. The author is not represented.

Facts as presented by the author

2.1 The author is the only child and heir of her mother, who owned an apartment building in downtown Prague. In this building she had a large apartment and during the German occupation she accepted a married couple as subtenants. As the subtenants were very untidy, the author's mother complained to the office in charge of dwellings to request another subtenant.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Mohammed Ayat, Mr. Prafullachandra Natwarlal Bhagwati, 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. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

2.2 After the war, the subtenants went to the Prague National Committee to denounce the author's mother for having gone to the German authorities with her complaint.¹ As a result, the author's mother was fined. In a later amnesty of 20 December 1948 her mother was pardoned.

2.3 After the communist coup in February 1948, the Regional National Committee reopened the case and decided to confiscate the apartment building pursuant to Decree No. 108/45. The author's mother was evicted. She died in 1956.

2.4 The author re-acquired Czech citizenship on 30 September 1991. After the overthrow of the former communist government, she tried to recover the confiscated property in Prague. The Regional Court of Prague rejected her restitution claim under Act No. 87/1991 on 31 January 1994, on the grounds that she was not a resident of the Czech Republic. The author appealed to the City Court of Prague which, on 29 June 1994, confirmed the previous decision. An appeal to the Constitutional Court was rejected on 21 November 1994.

The complaint

3. The author claims a violation of article 14, paragraph 7, and article 26 of the Covenant by the Czech Republic.

The State party's observations on admissibility and merits

4.1 In its submission of 13 May 2008, the State party addresses both admissibility and merits of the communication. As to admissibility, it maintains that the author failed to exhaust all available domestic remedies. It recalls that Section 3 of Act No. 87/1991 on Extra-judicial Rehabilitations defines who is an "entitled person" for the purpose of seeking property restitution. According to the original wording of that provision, one of the requirements was permanent residence in the Czech or Slovak Republics. This provision was declared unconstitutional by the Constitutional Court in July 1994 and, consequently, it was repealed.

4.2 In the light of the decision of the Constitutional Court, all persons who did not meet the residence requirement were granted a new opportunity to seek property restitution. However, the author of this communication did not seek property restitution under Act No. 87/1991 again. Under the circumstances, the State party considers that the communication should be declared inadmissible for non-exhaustion of domestic remedies.

4.3 In addition, the State party notes that the last domestic decision was delivered on 21 November 1994. Thus, more than 12 years had passed when the author approached the Committee on 24 November 2006. In the State party's opinion, this delay is entirely unreasonable. The State party is aware that the Optional Protocol does not establish any time limits for submitting a communication, but points to jurisprudence of the Committee which stated that when the delay is clearly unreasonable and unjustified it may constitute an abuse of the right of submission.² The State party refers to other international complaint mechanisms, such as the European Court of Human Rights or the Inter-American

¹ The author alleges that during the German occupation there were no other than German authorities in charge of the office of dwellings.

² Inter alia, communications No. 787/1997, *Gobin v. Mauritius*, inadmissibility decision adopted on 16 July 2001, and No. 1434/2005, *Fillacier v. France*, inadmissibility decision adopted on 27 March 2006.

Commission on Human Rights, where a six-month time limit for the filing of complaints exists.

4.4 In the absence of any explanation by the author of the reason for the delay, the State party invites the Committee to consider the communication inadmissible as an abuse of the right to submit a communication, under article 3 of the Optional Protocol.

4.5 On the merits of the case, the State party distinguishes this case from previous cases on property restitution dealt with by the Committee. In the present case, the issue is not the requirement of citizenship as a precondition for property restitution under the relevant laws.

4.6 The State party indicates that the author acquired Czech citizenship as early as September 1991, four days after she requested it. The State party explains that there were two reasons for the court of first instance to reject the author's action. First, the passage of the ownership title to the property in question from the author's mother to the State took place outside the relevant period covered by the restitution laws, i.e. before 25 February 1948. Secondly, the author failed to meet the requirement of permanent residence.

4.7 The appellate court disagreed with the court of first instance that Act No. 87/1991 was inapplicable *ratione temporis*, but considered that a transfer of property pursuant to Decree No. 108/1945 did not meet the requirements of article 2 of Act No. 87/1991. The appellate court considered that the author's mother was found guilty of sympathizing with Nazism after due and properly held administrative proceedings, in accordance with Decree No. 138/1945, which has not been repealed. Since the preconditions under article 2 for the passage of the property to the State were not met, the appellate court did not consider it necessary to deal with the requirements to be met by "entitled persons", i.e. permanent residence. The Constitutional Court upheld the decision of the court of first instance that the passage of the title to the property had taken place outside the relevant period, and therefore did not deal with the requirement of permanent residence either.

4.8 In view of the domestic courts' decisions, the State party notes that the failure to meet the requirement of permanent residence was only a collateral reason for the rejection of the author's claim at first instance. In addition, the Constitutional Court later declared this requirement unconstitutional. The State party highlights that the author does not comment on the other reasons for rejection and does not specify how these reasons discriminated against her.

4.9 The State party recalls that the property was *de jure* confiscated under Decree No. 108/1945 before the relevant period of Act No. 87/1991, although the *de facto* dispossession took place in 1953. The State party refers to the decision of the Committee in *Drobek v. Slovakia*³ where it was held that legislation adopted to compensate the victims of the communist regime did not appear to be *prima facie* discriminatory because it did not compensate the victims of injustices committed by earlier regimes.

4.10 The State party adds that, even if Act No. 87/1991 was applicable, the requirements of Section 2 of the law were not met. It argues that the property confiscation was the result of the author's mother being found guilty of approving of Nazism, which constituted an administrative infraction under Decree No. 138/1945, and that the instant case does not involve any injustice committed by the Communist regime.

4.11 As regards the alleged violation of article 14, paragraph 7, of the Covenant because of the conviction under Decree No. 138/1945 and the ensuing confiscation, the State party notes that these events took place before the Covenant and its Optional Protocol entered into force for the State party.

³ Communication No. 643/1995, admissibility decision of 14 July 1997, para. 6.5.

Author's comments on the State party's observations

5.1 In comments dated 26 June 2008, the author reiterates that, pursuant to an amnesty issued in 1948, the sentence against her mother was quashed. She considered that confiscating her mother's property, after five years, was in violation of article 14, paragraph 7, of the Covenant. The author states that her mother was never pronounced a Nazi criminal or traitor.

5.2 As regards exhaustion of domestic remedies, the author states that no domestic remedies were available to her.

5.3 The author rejects the State party's argument that her communication is inadmissible as an abuse of the right of submission. She explains that the delay in submitting the communication was because neither her nor her lawyer in the Czech Republic were aware of the existence of the Committee and its decisions. She contends that the State party does not publish the Committee's decisions.

Additional comments by the parties

6.1 On 11 December 2008, the State party submitted additional observations in reply to the author's comments. It argues that the 1948 amnesty only stated that certain minor administrative penalties under Decree No. 138/1945 would not be served, and not that they would be quashed or erased.

6.2 As regards the alleged lack of information on the work of the Committee, the State party considered the explanation given by the author unreasonable, especially in relation to her Czech lawyer. The State party maintains that both the Covenant and the Optional Protocol were duly published in its *Official Gazette*.

7. On 6 January 2009, the author informed the Committee of two new suits of law initiated by her: On 4 June 2004, the District Court of Prague rejected her ownership claim arguing that it was not competent to examine the factual correctness of the confiscation, which was decided according to valid administrative rules. On 25 October 2007, the City Court of Prague confirmed the decision of the District Court. The appellate court added that the author's mother did not own the property at the time of her death and thus, the author could not become an owner through inheritance.

8. On 3 June 2009, the State party submitted additional observations on the claim on article 14, paragraph 7, made by the author. It states that the claim is inadmissible *ratione personae*, as the author is not the victim of the alleged violation, and *ratione temporis*, as the confiscation of property took place before the entry into force of the Optional Protocol for the State party. The State party adds that the claim is manifestly ill-founded, as the author's mother was not tried or punished again for an offence for which she had already been finally convicted or acquitted. The confiscation was a consequence of having committed an administrative offence under decree No. 138/1945.

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 article 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 that the author considers the requirement of permanent residence in Act No. 87/1991 to be in violation of article 26 of the Covenant. In this regard,

the Committee has already had occasion to hold that laws relating to property rights may violate article 26 of the Covenant if they are discriminatory in character. The question the Committee must therefore resolve in the instant case is whether Act No. 87/1991, as applied to the author, was indeed discriminatory.

9.3 The Committee observes that permanent residence was not the only reason invoked by the court of first instance in its rejection of the author's restitution claim under Act No. 87/1991, which was also dismissed *ratione temporis*. The appellate court and the Constitutional Court, in turn, rejected the restitution claim under articles 2 and 1 of the law, respectively, without making reference to the requirement of permanent residence.⁴

9.4 The Committee notes that the instant case differs from those property restitution cases previously dealt with by it, in that the requirement of permanent residence was not crucial for the rejection of the author's claim. The Committee further notes that the author has not argued how, apart from the issue of permanent residence, the application of Act No. 87/1991 to her case amounts to prohibited discrimination within the meaning of article 26. In view of the above, the Committee considers that this claim has been insufficiently substantiated, for purposes of admissibility.

9.5 The author has also alleged that the State party violated article 14, paragraph 7, of the Covenant. The author does not advance any meaningful arguments in substantiation of her claim, which accordingly is deemed inadmissible.

10. The Human Rights Committee therefore decides:

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

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

⁴ See above paragraphs 4.6 and 4.7.

**U. Communication No. 1632/2007, *Picq v. France*
(Decision adopted on 30 October 2008, Ninety-fourth session)***

<i>Submitted by:</i>	Raymond-Jacques Picq (represented by counsel, Alain Garay)
<i>Alleged victim:</i>	The author
<i>State party:</i>	France
<i>Date of communication:</i>	28 May 2007 (initial submission)
<i>Subject matter:</i>	Classification of the Plymouth Brethren as a “cult” in a parliamentary report
<i>Procedural issues:</i>	Lack of standing as a victim; <i>actio popularis</i>
<i>Substantive issues:</i>	Right to an effective remedy; right to a fair hearing; freedom of religion
<i>Articles of the Covenant:</i>	2, paragraph 3; 14 and 18
<i>Articles of the Optional Protocol:</i>	1 and 2

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

Meeting on 30 October 2008,

Adopts the following:

Decision on admissibility

1.1 The author of the communication, dated 28 May 2007, is Raymond-Jacques Picq, a French national, born on 11 September 1943 in France. He claims to be the victim of violations by France of article 2, paragraph 3, and articles 14 and 18 of the Covenant. The author is represented by counsel, Alain Garay. The Covenant and the Optional Protocol to the Covenant entered into force for France on 4 February 1981 and 17 May 1984, respectively.

1.2 On 26 February 2008, the Special Rapporteur on New Communications and Interim Measures, on behalf of the Committee, decided that the admissibility of this case should be considered separately from the merits.

* The following members of the Committee participated in the consideration of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Ms. Hellen Keller, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Iulia Antoanella Motoc, Mr. Michael O’Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sánchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

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 facts as presented by the author

2.1 The author is a member of the Plymouth Brethren, a Protestant movement founded in the United Kingdom. He is also the president of the National Union of Plymouth Brethren in France. This cultural association ensures the legal representation and protection of the 13 local associations of Plymouth Brethren.

2.2 On 22 December 1995, a parliamentary commission of inquiry published a report on cults in France. The report defined 10 criteria for identifying cults¹ and listed 172 movements that met at least one of these criteria. The Plymouth Brethren did not appear on the list. In 1999, a second parliamentary commission was established. Again, the Plymouth Brethren did not appear in the report. At the initiative of the deputies who served on the first two parliamentary commissions of inquiry on cults, a law aimed at “strengthening the prevention and suppression of cult movements” was adopted on 12 June 2001. This law defines a cult movement as “a group pursuing activities with the purpose or effect of inducing, maintaining or exploiting the psychological or physical subjection of persons participating in its activities”.

2.3 In 2006, a third parliamentary commission of inquiry was established to discuss the influence of cult-like movements and their practices on the physical and mental health of minors. The chairman of the commission and the rapporteur sent a questionnaire comprising 30 questions to two local associations of Plymouth Brethren. The National Union of Plymouth Brethren in France replied on behalf of the two associations. On this occasion, the Plymouth Brethren were included in the commission’s report. According to the author, the parliamentary commission of inquiry based its conclusions solely on testimony gathered from persons known to be hostile to the religious and moral interests of the Plymouth Brethren and did not even interview members of the group.

2.4 It is claimed that the parliamentary inquiry reports gave rise to a series of negative reactions against the Plymouth Brethren. The Inter-Ministerial Task Force to Monitor and Combat Abuse by Cults (MIVILUDES) criticized the Plymouth Brethren in its 2006 annual report.² Owing to the wide media coverage given this official report, the Plymouth Brethren have suffered numerous problems, such as denial of property insurance and the publication of hostile articles in the press. The Plymouth Brethren sent several letters to MIVILUDES, which merely acknowledged receipt of the letters but did not respond to them. According to the author, the National Assembly turned the Plymouth Brethren into second-class citizens, to be feared and avoided.

The complaint

3.1 The author believes that the parliamentary reports on cults and the MIVILUDES annual reports constituted a direct violation of the rights and freedoms of the Plymouth Brethren. He considers that the national authorities became directly involved in religious controversies, in violation of the constitutional principle of secularism.

¹ These criteria are mental destabilization, exorbitant financial demands, severing of ties with the original social environment, attacks on physical integrity, indoctrination of children, antisocial discourse, breaches of public order, legal problems, bypassing of traditional economic networks and infiltration of the authorities.

² On 7 October 1998, the French Government issued a decree establishing an inter-ministerial task force responsible for combating cults. The task force trained public employees to combat cults and inform the public of their dangers. It was replaced, by a decree of 28 November 2002, with the Inter-Ministerial Task Force to Monitor and Combat Abuse by Cults, hereinafter “MIVILUDES”.

3.2 The author claims a violation of article 2, paragraph 3, of the Covenant, read together with article 18. He argues that an individual or religious movement alleging injury as a result of a measure taken by parliament must have a remedy before a “national authority”, so that the allegation may be ruled on and redress obtained if necessary. He asserts that members of parliament, without any form of prior process and in violation of the adversarial principle, gratuitously maintained, without citing any judicial decision in support of their claim, that the Plymouth Brethren were engaging in “cult activities”. The author’s letter of response, dated 6 October 2006, to the deputies’ request for information was in vain (see paragraph 2.3 above). They confined themselves to gathering testimony from one former member of the Plymouth Brethren. The author points out that, following the publication of the parliamentary report in 2006, a media campaign of denigration against the Plymouth Brethren spread throughout the country. He has no effective remedy against the parliamentary reports, however, in violation of article 2, paragraph 3.

3.3 With regard to article 14, the author asserts that he has no access to a judicial procedure whereby he may challenge, in a fair hearing, the conclusions reached by parliament and the administration and that his right to be presumed innocent has not been respected. He points out that the content and effects of the parliamentary reports are accorded total and absolute legal immunity. For example, the 2006 parliamentary report accuses the author at length of committing abusive cult activities, a criminal offence since the adoption of the law of 12 June 2001. The author has no remedy against this accusation. Under cover of parliamentary immunity, the author was tried and convicted in the report, without any of the usual procedural guarantees of fairness. As to MIVILUDES, the author explains that it is an administrative service coming under the Prime Minister and, this being the case, there is no possibility of challenging the subjects it chooses to investigate or the results of the inquiries. He has thus no means of securing a fair hearing by a competent tribunal, owing to the legal immunity accorded the work of parliament and the legal status of the administrative reports of MIVILUDES. In addition, the author explains that the conclusions drawn by parliament and the administration constitute a serious violation of the principle of the presumption of innocence guaranteed by article 14, paragraph 2. He asserts that the authorities have a duty of discretion once accusations, particularly criminal accusations, are made.³ In the present case, the author’s right to be presumed innocent was not respected during the legal proceedings (parliamentary and administrative), seriously undermining his civil rights before any trial could take place.

3.4 Concerning article 18, the author asserts that the authorities seriously impaired the exercise of his freedom of religion. He points out that the parliamentary reports referring to the Plymouth Brethren as a “cult” triggered a series of unjustified administrative controls and a campaign of hostility in the media against the group. Members were subjected by the authorities to numerous discriminatory measures. The author cites general comment No. 22 (1993) on article 18, which states that this provision “protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.”⁴ The terms ‘belief’ and ‘religion’ are to be broadly construed” and the Committee views with concern “any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established”.⁵ He explains that the Plymouth Brethren are often subjected to monitoring and controls, without any judicial procedure. He asserts that the restrictions and limitations imposed by the authorities constitute negative measures that violate his freedom

³ See communication No. 770/1997, *Gridin v. Russian Federation*, Views adopted on 20 July 2000.

⁴ *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40 (A/48/40)*, annex VI, para. 2.

⁵ *Ibid.*

to manifest his beliefs and are neither prescribed by law, nor necessary to protect public safety, order, health or morals, or the rights and freedoms of others.

3.5 As to exhaustion of domestic remedies, the author explains that the decisions of the parliamentary commissions of inquiry are not subject to any judicial remedy, although the commissions have very broad powers of investigation. They may decide to hold in camera hearings arbitrarily and without justification. Evidence may be gathered from dubious sources and used against individuals or groups, who have no right of defence. Refusal to cooperate with a commission may lead to criminal proceedings and, ultimately, a fine or imprisonment. It is impossible to challenge the procedures followed by the commissions or their conclusions. In particular, owing to parliamentary immunity, there is no domestic remedy whereby the author may secure the cessation of the violation of his rights. In addition, the author asserts that any action to set aside or contest the departmental orders on combating cults, documents based explicitly on the conclusions reached by parliament, would have no chance of success.

State party's observations on admissibility

4.1 On 4 February 2008, the State party summarized the law applicable in respect of parliamentary inquiries and parliamentary immunity. Regarding parliamentary commissions of inquiry, the State party emphasized that, under article 6 of Order No. 58–1100 of 17 November 1958, such commissions “are set up to gather information, either on specific events or on the management of public services or public enterprises, with a view to submitting their conclusions to the assembly that established them”. These commissions are temporary in nature and their mission ends with the filing of their report.

4.2 Concerning parliamentary immunity, the State party explained that there are two types: exemption from liability (substantive immunity, which is absolute, covers all acts performed by deputies in the exercise of their mandates — from both criminal prosecution and civil actions — and is permanent, since it extends beyond the end of the mandate) and inviolability (procedural immunity, which enables deputies to fulfil without hindrance the obligations arising from their mandates, covers acts performed by them outside the scope of their functions and is thus temporary).

4.3 With regard to admissibility, the State party considers that the communication is inadmissible because the author lacks standing as a victim, in several respects moreover. It observes that the communication is submitted by the author as a natural person. Yet the documents produced by the author in support of his communication relate to the National Union of Plymouth Brethren in France, an association with the status of a legal person and referred to as such in the contested documents. Even though the author is the president of this association, it is in a personal capacity that he claims infringement of his rights guaranteed by the Covenant. He cannot therefore avail himself of the status of victim from this standpoint.

4.4 The State party adds that the author cannot claim to have been the victim of a “violation of any of his rights” set forth in the Covenant. By their very nature, the reports of the parliamentary commissions of inquiry challenged by the author are devoid of any legal import and cannot represent grounds for a complaint. The State party makes clear that the Plymouth Brethren appear only in the 2006 report (the author himself is not mentioned at all). The work of parliamentary commissions of inquiry is simply to reflect on and study from a theoretical perspective the questions of the day, to address social issues and to seek to propose outlines of the measures to be taken. This takes place as part of the democratic debate and is justified by the need to give elected members the opportunity freely to express their views on social problems. It is to guarantee this freedom that deputies are accorded legal immunity in the exercise of their functions, notably in respect of acts they perform in

relation to parliamentary reports. It is for this reason that the administrative courts decline jurisdiction to hear cases in which the State's legislative bodies are called into question.

4.5 In any case, a parliamentary inquiry report consists of recommendations and advice directed at lawmakers and has no legal force or prescriptive import.⁶ It has no direct effect on national regulations and creates no rights and no obligations towards third parties. It cannot therefore result in any violation of the Covenant. This is precisely the case of the 2006 report, the perusal of which demonstrates that it has no direct legal effect and does not modify national laws or practices in any way. In addition, the State party emphasizes that the author is not able to cite any provision of one of the parliamentary reports that infringes, directly and personally, one of his rights protected by the Covenant. Nor is he able to cite a law or regulation adopted on the basis of the parliamentary report in question that could have violated his rights. Moreover, had he been able to do so, the author could have submitted his case to the competent national courts, which would have examined the conformity of the law or regulation at issue.

4.6 The State party comments that, in reality, the author is contesting *in abstracto* the national regulations and practices relating to the modus operandi of parliamentary commissions of inquiry, without proving as far as he is personally concerned a violation of a right protected by the Covenant, notably his right to religious freedom. The State party recalls the Committee's case law on *actio popularis*.⁷ In order for the author to be considered a victim, it is not sufficient for him to maintain that, by its very existence, a law or, still less, a parliamentary report violates his rights. He must establish that the disputed text has been applied to his disadvantage, causing him direct, personal and definite harm; this has not been established in the present case. Lastly, while the communication challenges certain measures to which the association's members have allegedly been subjected since the publication of the parliamentary report, this does not render it more admissible. In conclusion, the State party argues that the communication is inadmissible because the author is not a victim.

Author's comments on the State party's observations

5.1 On 25 April 2008, the author explained that the sole legal remedy available to him for the reinstatement of his rights consists in contesting the validity of the only domestic decision having become final, namely, the legal decision on the publication of the 2006 parliamentary report. He observed that the State party had not responded to his allegations of violations of article 2, paragraph 3, and article 14 of the Covenant, concerning procedural guarantees and the principle of the presumption of innocence. It had confined itself to summarizing the major general principles ensuring the legal protection of deputies, without being able to provide valid justification for the lack of an effective remedy in domestic law against the decision to produce, publish and disseminate the 2006 parliamentary report or to explain how these actions did not infringe the presumption of innocence.

5.2 The author explains that his family and given names were included in the 2006 parliamentary report, contrary to the State party's assertion. He acknowledges that domestic law protects deputies from frivolous actions brought against them. He believes, however,

⁶ The State party cites a decision of the European Court of Human Rights concluding that "a parliamentary report has no legal effect and cannot serve as the basis for any criminal or administrative proceedings" (Application No. 53430/99, *Fédération chrétienne des Témoins de Jéhovah de France v. France*, decision of 6 November 2001).

⁷ See communication No. 35/1978, *Ameeruddy-Cziffra et al. v. Mauritius*, Views adopted on 9 April 1981.

that this is not true of his application to challenge certain administrative decisions of the National Assembly, such as the decisions to produce, publish, print and disseminate the 2006 report. He argues that the legal regime of parliamentary immunity covers only the deputies of the National Assembly as natural persons, not their reports. Some decisions should incur specific legal liability. Indeed, by taking the decisions to produce, publish, print and disseminate the 2006 parliamentary inquiry report, the administrative services rendered themselves fully liable. These decisions were not intrinsically connected with the exercise of the deputies' mandates. Thus, the State party cannot maintain that no valid legal proceedings may be instituted in respect of the legal decision to produce the parliamentary report and the subsequent administrative decisions on its dissemination. The author maintains that there has been a violation of article 2, paragraph 3, read together with article 18. He further maintains that there has been a violation of article 14, since his treatment by parliament and the administration seriously infringed his right to be presumed innocent.

5.3 Regarding his standing as a victim, the author claims that he is, simultaneously, a direct, indirect and potential victim. He points out that he is complaining of several violations of the Covenant both in a personal capacity, having suffered material and moral harm, and in his capacity as the administrator representing a legal person, the National Union of Plymouth Brethren, the collective legal interests of the Plymouth Brethren having been undermined. Neither the author, nor the National Union of Plymouth Brethren, which he represents, has an effective remedy against the 2006 parliamentary report. The State party cannot maintain that the author is not a victim of the publication of the report, since he and his co-religionists are continuing to suffer the consequences of belonging to a denomination characterized as cult-like. The mere fact that the Plymouth Brethren are characterized as a "cult" constitutes, of itself, an infringement of the author's personal and religious beliefs and convictions. The concept of cult is sufficiently pejorative for its use alone to represent a serious violation of the author's rights.

5.4 The author argues that every member of the Plymouth Brethren is a victim, directly and indirectly, of the conclusions made public in the 2006 parliamentary report. He considers that the concept of indirect victim is applicable if there is a specific and personal link between the author and the direct victim. In the present case, the legal and institutional relationship between the author and the National Union of Plymouth Brethren is specific and personal in nature. The author is also an indirect victim if the violation of the international guarantee causes him harm or if he has a legitimate personal interest in securing the cessation of the violation. Like the Plymouth Brethren, as natural or legal persons, taken individually or collectively, the National Union of Plymouth Brethren has been targeted by the range of administrative measures for monitoring and combating abuse by cults. The author, as the president of the National Union, therefore has an interest in the cessation of these measures.

5.5 The author cites the case law of the European Court of Human Rights, according to which a "potential victim" is a person whose legal situation precludes him from exercising freely the rights guaranteed internationally. A person may claim to be the victim of a violation by reason of the existence of legislation under which he may be penalized, without having to prove that the legislation was actually applied to him. The harm may result from the mere fact of a violation of a guaranteed right, even if this violation has not manifested itself in a positive act, such as a criminal conviction or interference with private property or private life.⁸ In the present case, the author believes he has demonstrated that there is reasonable and compelling evidence of the likelihood of a violation of his rights,

⁸ See European Court of Human Rights, *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, *Series A*, No. 45.

either personally, or through acts committed against the Plymouth Brethren, taken individually or collectively.

5.6 The author considers that his communication does not constitute an *actio popularis*. He is acting in a personal capacity: on the one hand, as a direct victim suffering material and moral harm on account of the aforementioned violations of the Covenant and, on the other hand, as an indirect victim, being the president of the National Union of Plymouth Brethren. He argues that it is not possible to conclude, on the basis of the procedural context of his complaint, thus established, that it is an *actio popularis*. An *actio popularis* is equivalent to a class action, whereas the present communication was submitted solely by the author.

5.7 The author stresses that his complaint regarding the publication of the 2006 parliamentary report and its tangible effects on the exercise of his rights and freedoms is not theoretical. The report's publication constituted a material measure that has specifically infringed his rights. Notwithstanding the author's explicit explanations, addressed to the parliamentary commission of inquiry in his letters of 6 October 2006 and 18 and 30 November 2006, the published report offered no response to the information transmitted by him to the commission. The parliamentary report merely reproduced the replies to the commission's questionnaires. Moreover, the fact that the author had to explain himself before the deputies in the context of their inquiry into cult activities indicates that monitoring and suppression measures were already being implemented, against the author's interests. The inquiry constituted a monitoring measure that damaged his honour, reputation and religious standing. Thus, the publication of the 2006 report was indeed the realization of the risk incurred by the author and had tangible effects.

5.8 As to whether the public recommendations contained in the 2006 parliamentary report have binding force or practical impact, the author argues that it is inaccurate, from a legal and material standpoint, to maintain that parliamentary reports are devoid of legal effect. They have legal effect if they make conclusions and recommendations that result in either the adoption of new legal norms or the implementation of specific administrative practices, or at the very least in the formulation of official pronouncements cloaked in the authority of parliament. Given that the parliamentary inquiry method is intended to be authoritative, the conclusions — when published in a report given wide public and media coverage — are tantamount to accusations for those whose actions are qualified as cult-like.

Issues and proceedings before the Committee

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

6.2 As required 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 Concerning the author's allegations relating to articles 14 and 18 of the Covenant, the Committee observes that a person may not claim to be a victim within the meaning of article 1 of the Optional Protocol unless his rights have actually been violated. However, no person may, in theoretical terms and by *actio popularis*, object to a law or practice which he holds to be at variance with the Covenant.⁹ Any person claiming to be a victim of a

⁹ See communications No. 318/1988, *E.P. et al. v. Colombia*, inadmissibility decision of 25 July 1990, paragraph 8.2; and No. 35/1978, *Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*, Views adopted on 9 April 1981, paragraph 9.2.

violation of a right protected by the Covenant must demonstrate either that a State party has by an act or omission already impaired the exercise of his right or that such impairment is imminent, basing his argument for example on legislation in force or on a judicial or administrative decision or practice. The Committee recalls that, in the present case, the author complained of a series of hostile reactions to the Plymouth Brethren following the publication of the 2006 parliamentary report (a campaign of hostility in the media, for example). However, it considers that the author has not demonstrated that the report's publication had the purpose or effect of violating his guaranteed rights. In any case, it takes note of the State party's argument that a parliamentary report is without legal effect. It observes that the facts of the case do not show that the State party's position vis-à-vis the Plymouth Brethren constitutes an actual violation, or an imminent threat of violation, of the author's right to the presumption of innocence or his freedom of religion. After considering the arguments and material before it the Committee concludes therefore that the author cannot claim to be a "victim" of a violation of articles 14 and 18 of the Covenant within the meaning of article 1 of the Optional Protocol.¹⁰

6.4 The Committee points out that article 2 of the Covenant may be invoked by individuals only in relation to other provisions of the Covenant and observes that article 2, paragraph 3 (a), provides that each State party shall undertake "to ensure that any person whose rights or freedoms as recognized [in the Covenant] are violated shall have an effective remedy". Article 2, paragraph 3 (b), guarantees protection to persons claiming to be victims if their complaints are sufficiently well-founded to be protected under the Covenant. A State party cannot reasonably be required, on the basis of article 2, paragraph 3 (b), to make such procedures available in respect of complaints which are less well-founded.¹¹ Since the author of the present complaint cannot claim to be a "victim" of violations of articles 14 and 18 of the Covenant, his allegation of violations of article 2 of the Covenant is also inadmissible under article 2 of the Optional Protocol.

7. The Committee decides therefore:

- (a) That the communication is inadmissible under articles 1 and 2 of the Optional Protocol;
- (b) That the present decision shall be communicated to the State party and to the author.

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

¹⁰ See communications No. 429/1990, *E.W. et al. v. the Netherlands*, inadmissibility decision of 8 April 1993, paragraph 6.4; No. 645/1995, *Bordes and Temeharo v. France*, inadmissibility decision of 22 July 1996, paragraph 5.5; No. 1400/2005, *Beydon and 19 other members of the association DIH Mouvement de protestation civique*, inadmissibility decision of 31 October 2005, paragraph 4.3; and No. 1440/2005, *Aalersberg et al. v. the Netherlands*, inadmissibility decision of 12 July 2006, paragraph 6.3.

¹¹ See communications No. 972/2001, *Kazantzis v. Cyprus*, inadmissibility decision of 7 August 2003, paragraph 6.6; and No. 1036/2001, *Faure v. Australia*, Views adopted on 31 October 2005, paragraph 7.2.

**V. Communication No. 1638/2007, *Wilfred v. Canada*
(Decision adopted on 30 October 2008, Ninety-fourth session)***

<i>Submitted by:</i>	Mr. Harmon Lynn Wilfred (represented by counsel, Mr. Guneet Chaudhary)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Canada
<i>Date of communication:</i>	7 November 2007 (initial submission)
<i>Subject matter:</i>	Alleged human rights violations committed by a non-State party to the Optional Protocol, in complicity with a State party
<i>Procedural issues:</i>	Lack of substantiation of claim; petition against a non-State party to the Optional Protocol
<i>Substantive issues:</i>	Right to life; torture; cruel, inhuman or degrading treatment or punishment; conditions of detention; liberty and security of person; fair trial; discrimination
<i>Articles of the Covenant:</i>	6; 7; 9, paragraphs 1 and 5; 10, paragraph 1; 12; 13; 14; 15; 16; 17; and 26.
<i>Articles of the Optional Protocol:</i>	1 and 2.

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

Meeting on 30 October 2008,

Adopts the following:

Decision on admissibility

1. The author of the communication is Harmon Lynn Wilfred, originally a citizen of the United States of America, who renounced his United States citizenship and currently resides in New Zealand. He claims to be a victim of violations by Canada and the United States of America of article 6, article 7, article 9, paragraphs 1 and 5; article 10, paragraph 1, article 12; article 13; article 14; article 15; article 16; article 17; and article 26 of the Covenant. The Optional Protocol entered into force for Canada on 19 May 1976. The author is represented by counsel, Mr. Guneet Chaudhary.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Ms. Helen Keller, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

The facts as submitted by the author

2.1 In 1992, the author was employed by commercial real estate contractors to support the renovation and sale of commercial properties purchased by the El Paso County Pension Fund in the United States. In the process of leasing, restoring and selling these properties on behalf of the Pension Fund, he discovered that significant amounts of money were being embezzled. In 1994, he reported this information to the District Attorney, who failed to initiate an investigation. The author later discovered that the District Attorney office was allegedly involved in the embezzlement scheme.

2.2 The author also reported these irregularities to the Federal Bureau of Investigation (FBI), which forced the District Attorney to open an investigation. As a result, a number of Pension Fund Board members were fined and dismissed. The author believes that his whistle blowing caused him difficulties in relation to subsequent family court matters in El Paso County.

2.3 In 1996, the author started work as an international financial consultant. His services were retained by the Central Intelligence Agency (CIA) to act as a financial advisor and intermediary in a transaction involving humanitarian assistance to Guatemala. In 1998, the United States Securities and Exchange Commission (SEC) commenced a public investigation and asserted that a financial transaction in which the author was involved was illegitimate. The author sought to provide the SEC with information evidencing that the transaction was indeed legitimate, but the SEC did not accept any of the documented information offered. While the investigation was still ongoing, the author claims to have received death threats.

2.4 During the same period, the author filed for divorce from his former wife and relocated to Ontario, Canada, with his children. While he was in Canada, a hearing was held and an American judge awarded custody of the children to his wife. On 17 October 1997, a charge of "violation of custody order" was filed against him, and a warrant for his arrest was issued. The El Paso County District Attorney gained approval to seek extradition of the author from Canada.

2.5 On 14 February 1998, the Canadian authorities arrived at the author's home in Canada, took the children and returned them to Colorado, United States of America. They arrested the author at his home, without allegedly reading him his rights. The officer who arrested him stated that he did not have any documentation or evidence from the United States to confirm or substantiate any charges and that he was simply executing an arrest order. The author was incarcerated in Ontario for 89 days before he was released on bail. While in prison, he claims to have been subject to cruel, inhuman or degrading treatment. On 27 April 1998, while incarcerated, he was declared legally divorced by the Colorado family court.

2.6 On 1 June 1998, the author was brought before a Canadian Court for an extradition hearing. He claims the extradition was allowed solely on the basis of hearsay evidence from the El Paso County District Attorney. The author was re-incarcerated by the Canadian judge for an additional 31-day period, awaiting his extradition to Colorado. The author appealed the extradition order decision and he was released on bail in July 1998.

2.7 On 5 April 2000, the author was extradited to the United States. He claims that although by virtue of the rule of specialty he could only be confronted in the United States for the extradition offences for which he was ordered to be extradited and not for any other cause, he was incarcerated in El Paso for unrelated offences. To those offences he pleaded not guilty and was released on bail.

2.8 On 7 April 2000, the author returned to Canada. While in Canada, he claims that secret charges were laid against him and when he returned to the United States he was

arrested on non-payment of child support charges previously unknown to him. On 26 May 2000, a United States federal judge dismissed these charges on the ground of violation of the United States-Canada Extradition Treaty. However, although his immediate release was ordered, he was re-arrested and kept in a detention centre for four days. He was not informed of the reasons for the arrest, nor was he brought before a judge to challenge it. Finally, on 30 May 2000, the author was released and returned to Canada, without being convicted of any offence.

The complaint

3.1 The author claims to be a victim of violations by Canada and the United States of America of article 6, article 7, article 9, paragraphs 1 and 5; article 10, paragraph 1, article 12; article 13; article 14; article 15; article 16; article 17; and article 26 of the Covenant.

3.2 On article 6 the author states in general terms that he fears for his life should he ever return or be returned to the United States or Canada.

3.3 With respect to article 7, the author complains about the conditions of detention in the Canadian prison, which would amount to torture or cruel, inhuman or degrading treatment. In particular, he allegedly suffered constant sleep deprivation, disproportionate restrictions to outside exercise, and unnecessary use of handcuffs, chains and shackles.

3.4 In relation to article 14, the author states that he was arrested without being informed of his rights in Canada.

Issues and proceedings before the Committee

4.1 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 the communication is admissible under the Optional Protocol to the Covenant.

4.2 The Committee observes that several of the author's allegations appear to be directed against the authorities of the United States of America. Since the United States of America has not ratified or acceded to the Optional Protocol to the Covenant, the Committee considers those parts of the communication inadmissible under article 1 of the Optional Protocol.¹

4.3 The Committee further notes that the author has made several other general and unspecified allegations of violation of provisions of the Covenant, without providing meaningful evidence to substantiate his claims of violations of article 6, article 7, article 9, paragraphs 1 and 5; article 10, paragraph 1, article 12; article 13; article 14; article 15; article 16; article 17; and article 26 of the Covenant by Canada. Rather, he confines himself to general denunciations, without offering information to substantiate the alleged violations. In the circumstances, the Committee finds that the author has failed to sufficiently substantiate, for purposes of admissibility, that he is a victim of the alleged violations of the Covenant. The claim is therefore inadmissible under article 2 of the Optional Protocol.

4.4 The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 1 and 2 of the Optional Protocol;

¹ Communications No. 319/1988, *Cañón García v. Ecuador*, Views adopted on 5 November 1991, para. 5.1; and No. 409/1990, *E.M.E.H. v. France*, Inadmissibility decision adopted on 19 December 1990, para. 3.2.

(b) That the decision be transmitted to the State party, to the author and to his counsel.

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

**W. Communication No. 1639/2007, *Vargay v. Canada*
(Decision adopted on 28 July 2009, Ninety-sixth session)***

<i>Submitted by:</i>	Mr. Peter Zsolt Vargay (represented by Dr. Istvan Barbalics)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Canada
<i>Date of communication:</i>	9 October 2007 (initial submission)
<i>Subject matter:</i>	Pleadings struck in family law proceeding for child custody
<i>Procedural issues:</i>	Exhaustion of domestic remedies; non-substantiation of claims
<i>Substantive issues:</i>	Unfair trial; discrimination; child protection; servitude; freedom of expression; freedom of thought and religion; equality of spouses
<i>Articles of the Covenant:</i>	2, paragraph 3; 8, paragraph 2; 14, paragraph 1; 18, paragraphs 2 and 4; 19, paragraph 2; 23, paragraph 4; and 26
<i>Articles of the Optional Protocol:</i>	2 and 5 paragraph 2 (b).
<i>The Human Rights Committee</i> , established under article 28 of the International Covenant on Civil and Political Rights,	
<i>Meeting</i> on 28 July 2009,	
<i>Adopts</i> the following:	

Decision on admissibility

1. The author of the communication is Mr. Peter Zsolt Vargay, a Hungarian national born in 1969. He claims to be a victim of a violation, by Canada, of his rights under articles 2, paragraph 3; 8, paragraph 2; 14, paragraph 1; 18, paragraphs 2 and 4; 19, paragraph 2; 23, paragraph 4; and 26 of the Covenant. The author is represented by Dr. Istvan Barbalics. The Optional Protocol entered into force for the State party on 19 May 1976.

The facts as presented by the author

2.1 The author and Agnes Vargay had a child, named Tamara Vargay, born on 7 March 2001. They subsequently married on 21 April 2001 in Hungary. On 20 February 2004, they, together with the child, arrived in Toronto, Ontario (Canada). The spouses' relationship had

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Mohammed Ayat, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Mr. Lazhari Bouzid, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

deteriorated along the years. On 9 April 2004, the spouses had an argument. The following day, Mrs Vargay left their home with the child. The author has not seen his daughter since.

2.2 On 13 April 2004, she initiated proceedings regarding the custody and support for the child. The Ontario Court of Justice issued a temporary order on 14 April 2004, granting Mrs Vargay interim custody of the child, without prejudice to the respondent's rights on return of motion, and restraining the respondent from harassing, molesting or annoying the applicant. The order also specified that the child was not to be removed from the State of Ontario. On 11 May 2004, the author requested the Court to dismiss the claim. He also requested joint custody of the child, access to the child and disclosure of information about her education, health and welfare. On 13 May 2004, Mrs Vargay amended her claim and requested the Court to grant her sole custody of the child; to prohibit the author's access to their daughter; to order the author to pay for child and spousal support; and to issue an order restraining the author from molesting, annoying, harassing and communicating with or coming within 500 meters near her and the child. The Ontario Court acceded to Mrs Vargay's claim and ordered the author to produce copies and records from 2003 to May 2004 of his bank accounts in Hungary; and to produce updated bank statements of his accounts from February to May 2004. The Court gave Mrs Vargay interim custody of the child and the author, interim access to the child.

2.3 On 21 May 2004, Mrs Vargay made an amendment to her financial statement and estimated her needs to Can\$ 727 per month. On 15 July 2004, the Court ordered the author to provide Mrs Vargay with copies of all records for 2003 and 2004 concerning his business and personal accounts in Hungary as well as proof of the status of his partnership in a computer company he owned in Hungary. The Court authorized the author's access to his child for three hours a week under supervision. According to the author, the banks in Hungary gave valid certificates about the balance of his bank accounts. Moreover, the author's father, who is the other owner of the company wrote a letter to the judge stating that the company was making negative profit, had only one part-time employee and had no assets. The Court insisted that the author should provide proof of the status of his partnership in the company. The author refused to disclose the requested information without the other owner's permission. As he did not obtain such permission, the author kept refusing to respond to the Court's request. On 7 October 2004, the Court decided that, if the author failed to provide this information, Mrs Vargay might bring a motion. The Court also ordered the author to provide a job search list.

2.4 The author claims that he provided the Court with documents showing the efforts made to fulfil the Court's request. However, on 27 January 2005, the Court ordered that the author's Answer be struck, that Mrs Vargay should have final custody of the child and that the author should pay both child and spousal support commencing 9 April 2004.¹

2.5 When trying to appeal the striking order, his lawyer was informed that one of the parties had to reside in Ontario for the Court to be declared competent.² As the author no longer resided in Ontario, he needed to obtain a declaration of residency from Mrs Vargay. He failed to obtain such declaration and was therefore not entitled to appeal the Ontario Court's order.

¹ Answer can be struck pursuant to rule 15(5) of the Canadian Family Law Act.

² The pleadings had been struck. Therefore a whole new procedure had to be restarted. For this purpose, the author or his wife had to prove residency in Ontario.

The complaint

3.1 The author considers that the State party has violated his right to fair trial and equality of arms under article 14, paragraph 1. He alleges that the Ontario Court of Justice did not take into account the valid marriage contract, which was in force between the parties and which recognized the applicability of Hungarian law and the jurisdiction of Hungarian Courts for any disagreement arising from the contract itself. He considers that the Court prevented him from being heard and from appealing its decision. He adds that the non-disclosure of the documents requested by the Court resulted from acts beyond his control, namely the negative decision by the co-owner regarding his partnership in the computer company. He further considers that the Court's decision was based only on the other party's arguments and that it lacks reasoning as regards the amount that he was ordered to pay for child and spousal support. The author also considers that the Court acted in a discriminatory manner and therefore alleges a violation of article 26 of the Covenant.

3.2 A violation of article 2, paragraph 3 is said to have occurred in that the author was prevented from filing an appeal against the Ontario Court's decision. The author submits that Mrs Vargay did live in Ontario when the appeal was brought, but she took advantage of her right not to disclose her address. He also submits that the decision of the Court was unfair, as the non-disclosure of the documents requested by the Court resulted from conducts that were beyond his control. He concludes that due to shortcomings in Canadian legislation, he had no access to an effective legal remedy.

3.3 The author alleges a violation of his rights under article 8, paragraph 2 of the Covenant stating that the errors made by the Ontario Court in estimating his income would put him in a situation of servitude because all the money he could possibly earn must be transferred to his child and wife for their support. His estimated income was calculated by the Court based on the income of mathematicians with a Canadian degree and 15 years of work experience in Canada, which is not his case since he just arrived in the country. On this ground, the author also claims a violation of article 26 of the Covenant.

State party's observations on admissibility and merits

4.1 In its observations dated 7 July 2008, the State party challenges the admissibility of the communication for non-exhaustion of domestic remedies, incompatibility with the provisions of the Covenant and non-substantiation. Should the Committee declare the communication admissible, the State party considers that the communication is without merits and groundless.

4.2 According to the State party, the author has failed to exhaust all available domestic remedies. It is the Human Rights Committee's constant jurisprudence to consider that the author must exercise due diligence in the pursuit of available remedies. In the present case, the author has failed to exercise due diligence despite the availability, in the domestic family legislation of the Province of Ontario, of specific mechanisms to address complaints such as the author's. According to the State party, the author's lawyers attempted to get him to file the required material so that his Answer would not be struck, and to get instructions from the author in order to commence the appeal within the statutory deadlines. However, the author appeared not to have responded to his lawyers' requests nor did he take measures on his own behalf to exhaust the remedies available.

4.3 An appeal from a decision of the Ontario Court of Justice in a family law proceeding may be sought at the Superior Court of Justice. Further appeals from decisions of the Superior Court are available to two higher levels of court (the Ontario Court of Appeal and the Supreme Court of Canada), although leave may be required. In order to start an appeal from a Final Order of the Ontario Court, a party must within 30 days serve a Notice of Appeal on the other party affected by the appeal. Then, within ten days of serving the

Notice of Appeal, the party must file it with the Court. The Law also provides that a case must be started in the municipality where a party resides, or, if custody and access of a child is in issue, in the municipality where the child ordinarily resides. In order to commence an appeal in the Toronto Superior Court of Justice, the author had to demonstrate that he or Mrs Vargay resided in Toronto. Mrs Vargay's lawyer was willing to provide a sworn statement that Mrs Vargay resided in Toronto. However, the author took no steps to contact Mrs Vargay's lawyer, nor did he seek an extension of the time period for filing an appeal.

4.4 With regard to the author's allegations of lack of equality of arms under articles 14, paragraph 1, and 26 of the Covenant, the State party submits that the Covenant rights are protected in the Canadian Constitution, which is the supreme body of Law in Canada. Any law that is inconsistent with the provisions of the Constitution is of no force or no effect. The Canadian Charter of Rights and Freedoms is part of the Canadian Constitution and provides for the right to fair trial, equality of arms and prohibition of all forms of discrimination. The author could have applied to a court for a Charter remedy. The State party emphasizes that the Committee against Torture has recognized that constitutional challenges to legislation are available and effective remedies in Canada. The author's doubts about the effectiveness of domestic remedies do not absolve him from exhausting them.

4.5 The State party claims that the author's allegations under articles 2 paragraph 3, and 8 paragraph 2 are incompatible with the provisions of the Covenant. In the alternative, these allegations are inadmissible on the grounds of non-substantiation. With regard to article 2 paragraph 3, the State party understands the author's claim as an attempt to invoke it as an independent right. Article 2 does not establish independent rights but instead impose duties on the State parties based on the rights recognized in the Covenant. Under article 2, the right to a remedy arises only after a violation of a Covenant right has been established. In the alternative, should the Committee choose to examine article 2 in the light of the author's allegations, it maintains that the principle of an effective remedy is tied to the principle of exhaustion of domestic remedies and therefore, the author failed to substantiate his allegation that Canada did not fulfil its obligation under article 2 paragraph 3 of the Covenant.

4.6 With regard to article 8 paragraph 2, it is the State party's position that neither an obligation to pay child support, in accordance with Canadian Law, nor an obligation to pay spousal support constitutes "servitude" as prohibited in article 8, paragraph 2 of the Covenant. Every parent has an obligation to provide financial support for his or her child during the child's infancy. The Canadian Child Support Guidelines provide standard amounts that a non-custodial parent must pay, based on the parent's annual income and the number of children subjected to the order for support. If the parent does not provide the Court with proof of his or her income or if the court does not accept that the parent's income reflects his or her ability to pay, a court has the authority to impute a parent's income to such an amount that the parent is deemed capable of earning, based on his or her level of education and market salary. In Mrs Vargay's case, she has limited education, speaks little English and has a young child to take care for. A spousal support is therefore necessary. The factual requirements for servitude imply something more repressive than the author is alleging. The State party therefore requests that the Committee considers this part of the communication incompatible *ratione materiae* with the provisions of the Covenant. In the alternative, the State party submits that the author has failed to substantiate his allegations, as the author has not taken any steps to comply with his legal obligation to pay monthly child support. The author could not have suffered any financial detriment since he never complied with the Court's order.

4.7 The State party takes the position that the author has not sufficiently substantiated, for the purpose of admissibility, his allegations with respect to articles 14 paragraph 1, and 26 of the Covenant. Article 14 of the Covenant guarantees procedural equality and fairness only. It cannot be interpreted as ensuring an absence of error on the part of the competent tribunal. The author does not allege any partiality or lack of independence on the part of the courts. In regards to the author's submission that the Court mistakenly ignored a marriage contract between the author and Mrs Vargay, the State party maintains that it is up to the domestic courts to review evidence before them and to determine the appropriate weight to give to each piece of evidence.

4.8 The State party submits that the striking of the author's Answer in the family law proceedings in no way constitutes a denial of justice. Moreover, the author has not demonstrated that he has been treated differently than any other party to a family law proceeding in the Province of Ontario. Equality of arms means that the same procedural rights are to be provided to all parties unless distinctions made are based on law and can be justified on objective and reasonable grounds. Any disadvantage the author suffered was due solely to his failure to comply with the requirements of the law to provide financial disclosure, as well as his failure to participate in the Court hearing on 27 January 2005. The State party firmly believes in the importance of full financial disclosure in family law proceedings involving support claims. A party who fails to comply with a disclosure order risks being held in contempt and having his or her pleadings struck with costs. The author was given eight months to disclose this information and still did not take any step to provide the necessary disclosure or to provide sufficient evidence to convince the family judge that he was unable to obtain the necessary information despite his lawyer's repeated requests. As for the author's attendance in court, he did not appear to have given advance notice to his lawyer nor did he seek to make a request to the Court to have the matter adjourned until such time as he was able to return to Toronto. Further, the author's subsequent inability to obtain a hearing where he could appeal the Final Order was due to his failure to contact Mrs Vargay's lawyer to obtain the necessary affidavit stating that Mrs Vargay still resided in the jurisdiction.

4.9 The State party argues that the author alleges, without further explanation, that his right to equality before the law, as protected by article 26 of the Covenant has been violated. As demonstrated above, the author has failed to demonstrate that he was treated differently than any other party to a family law proceeding in Ontario.

Author's comments on the State party's observations

5.1 In his comments to the State party's observations, the author adds, that the State party has violated articles 18, paragraphs 2 and 4; 19, paragraph 2; and 23, paragraph 4. The author alleges that his rights under article 18 paragraph 4 have been violated because he has never been given access to his daughter since his wife left the family home on 9 April 2004. Moreover, the author considers that his rights under articles 18 paragraph 2 and 19 paragraph 2 were violated on the grounds that Mrs Vargay has received state-funded counsel in her family law matter; Mrs Vargay has sought spousal support from her husband in order to benefit from social assistance benefits and therefore the author felt obliged to express himself during the hearing to protect his own rights. Moreover, his Answer was struck in the family law proceedings and therefore he was denied his right to express himself. At the same time, the author claims that the situation he found himself into where he was forced to communicate with his lawyer's wife in order to obtain a declaration of residency constitutes a violation of his right under article 18, paragraph 2. Finally, the author claims that the State party has violated article 23, paragraph 4, by denying him access to his child without any valid reason.

5.2 On 19 September 2008, the author requests the Committee to be granted temporary access to his child until the Committee makes a decision on the merits. In addition to the arguments already developed in his initial submission, the author states that the domestic remedies were neither available nor effective. The author failed to contact his wife's lawyer to obtain a declaration of residency because he did not wish to do so. He quotes the Canadian Rules of Professional Conduct which prohibits a lawyer of one of the parties from being engaged in direct coordination, negotiation and bargaining with the client of the other party. The author did not wish to contradict the Rules of Professional Conduct and therefore, decided not to request the declaration of residency to Mrs Vargay's lawyer. The author adds that his lawyer contacted his wife's lawyer to obtain the declaration, however, Mrs Vargay's lawyer interrupted the process as he wished to deal directly with the author and not with his lawyer. Since the author refused, no declaration was obtained and the appeal was barred. Mrs Vargay could have appealed the Ontario Court of Justice's judgement but the author could not, which is a violation of the equality of arms principle. The mere fact that the author was forced to communicate with his wife's lawyer constitutes *per se* a violation of his freedom of thought and expression.³ In the author's opinion, the Ontario Court of Justice acted partially during the proceedings. The allocation of spousal support to his wife, who had been living in Canada for a year at the time of the initial submission and had taken English classes was not justified. This contravenes the principle of independence of judges. The allocation of spousal support also serves the definition of servitude and violates the right to equality of spouses.⁴

5.3 With regard to the leave to appeal before the Ontario Court of Appeal and the Supreme Court of Canada, the author considers them as "extraordinary remedies" which do not need to be exhausted. They are processes in respect of which the court has discretion to grant or not to grant the remedy. With regard to constitutional challenges, they are also to be qualified as extraordinary remedies as confirmed by the jurisprudence of the European Court for Human Rights. Constitutional challenges imply a change of legislation and do not relate to a specific case but to a problem deriving from a concrete case. Therefore, it cannot be considered an ordinary remedy.

5.4 The author considers that the striking of his pleadings and the violations deriving from it might be in conformity with Canadian law but not with the Covenant. He is not in a position to find an effective remedy for violations which are in conformity with Canadian law. The fact that the law imposes a serious disadvantage on a group, and is equally applied to everybody within the group, does not mean a lack of discrimination, but only that the entire group suffers an equal degree of discrimination. He considers that he did not fail to provide the financial statements requested by the Court. The financial information was available and only pieces were missing that were not necessary for the decision. The complete bookkeeping and all the bank account statements of the company were missing because the other owner of the company had denied his request to issue them. With the information provided, the judge could have estimated the amount of his income. He claims good faith in trying to obtain the necessary financial documents. The State party itself recognized that the documents had been requested but did not arrive in time. This good faith should have been taken into account and not led to the author's disqualification of the proceedings. With regard to his appearance in Court, the author emphasizes that both parties have to be present at the hearing. This implies that he or his legal representative should appear before the judge. In the author's situation, his lawyer was present during the hearing. The non-appearance in Court was in any case not among the reasons for his disqualification.

³ The author refers to articles 18 paragraph 2 and 19 paragraph 2 of the Covenant.

⁴ The author refers to article 23 paragraph 4 of the Covenant.

5.5 The author argues that the impossibility for him to challenge the legality of the decision puts him in a state of servitude where he has to work for another person and has no access to his child and no supervision over her education and religious choices. This violates his right to effective remedy and constitutes a denial of justice. The author also claims that the judgement of the Ontario Court of Justice has not been made public.

5.6 The State party stated that the author had not “demonstrated that he has suffered any detriment as a result of the support order since, to date, he has not taken any steps to comply with the order”. The author considers, on the contrary, that he paid a serious price for fighting the Ontario Court’s judgement, as a result of which, his health has deteriorated. In addition, he has not seen his child for several years, which should in itself demonstrate the detriment caused by the judgement. The only motive to deprive the author of his right to see his child should depend on whether he has ever harmed his child. This should not, according to the author, depend on his possible failure in the proceedings.

5.7 The State party has argued that article 2, paragraph 3, could not be invoked independently. The author agrees and emphasizes that he has never intended to raise it separately but in conjunction with the violation of the articles mentioned in his claim.

Additional submission by the State party

6.1 In its supplementary response dated 9 February 2009, the State party addresses in particular the author’s allegations in respect of articles 18 paragraph 4; 19 paragraph 2 and 23 paragraph 4 of the Covenant.

6.2 With regard to the author’s argument that his rights under article 18 paragraph 4 have been violated because he does not have access to his daughter, the State party emphasizes that there was no order made as to access by the author to his child. The author could have established regular access with his daughter, as was initially ordered by the Court. His current lack of access is based on his own actions, including his failure to make the arrangements for supervised visits, and ultimately his decision to leave the jurisdiction of Ontario, while court proceedings were ongoing and without giving sufficient instructions to his counsel. This resulted in the Final Order containing no order as to the author’s access to his daughter. The author’s current lack of participation in his daughter’s moral or religious instruction is not a result of any action taken by Canada. It is also still open to the author to return to Ontario to attempt to appeal the Final Order to obtain access to his daughter. For those reasons, the State party considers that the author has failed to establish a violation of article 18, paragraph 4, of the Covenant and requests the Committee to declare this part of the communication inadmissible.

6.3 The State party considers that the author’s allegation under article 19, paragraph 2, is inadmissible on the grounds of incompatibility with the provisions of the Covenant. In the alternative, the author’s claim under article 19, paragraph 2, is inadmissible on the grounds of non-substantiation. According to the State party, the author includes in the violation of article 19, paragraph 2, the provision of legal aid to Mrs Vargay and not to him, the allowance of social assistance to Mrs Vargay and not to him, and the striking of his Answer during the proceedings. The State party observes that the availability of legal aid and the requirement to pursue support from a former spouse fall outside the scope of freedom of expression. The author appears to be alleging that the requirement obliged him to respond and his freedom of expression was thus violated. However, the requirement, which exists to ensure the integrity of the social assistance scheme, does not amount to a situation of forced expression. The author was not compelled to express himself. On the third ground, the State party recalls that several jurisdictions in Canada permit a court to strike a party’s pleadings on the basis of inadequate financial disclosure. Such measure is considered the “ultimate sanction” against an uncooperative party. In order to make such a ruling, there must be

clear evidence of deliberate default and a complete disdain for orders of the court. Freedom of expression does not, according to the State party, encompass the freedom to express oneself in any forum and in any manner that one desires. The author is free to express himself in any forum including the court so long as he does so according to the rules which are in place to ensure fair and effective proceedings. The allegations relating to freedom of expression are therefore incompatible *rationae materiae* with the provisions of the Covenant. In the alternative, the restrictions imposed on the author's freedom of expression are justified under article 19, paragraph 3, and are necessary to achieve legitimate purposes.

6.4 As for the author's allegation that the State party has violated his right under article 23, paragraph 4, by denying him access to his child without any valid reason, the State party states that the initial order from the Court granted the author access to his child. Despite the Order of the Ontario Court of Justice, it appears that these visits never occurred. On July 2004, a further interim Order was made granting the author weekly supervised access to the child to commence as soon as arrangements were made with the supervised access centre. It appears that no steps were taken to arrange the access since a subsequent order was issued reminding the parties of the arrangements to be made. The author argues that he was denied access to his child due to his failure to provide financial information to the court. According to the State party, every parent has an obligation to provide financial support for their child during his or her infancy. Canadian courts have held that the obligation to pay child support is unconditional. However, a child's right to support is independent of a child's right to access, and an access parent may not be denied visits with his or her child by reason only of his or her failure to pay child support. Moreover, since the best interests of children are never static, custody and access orders are never final. If the author wishes to establish access with his daughter in the future, he will need to take the necessary steps to challenge the Final Order.⁵ The State party therefore submits that the author has failed to establish any violation of article 23, paragraph 4, of the Covenant and asks the Committee to declare this part of the communication inadmissible.

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 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.

7.3 The Committee takes note of the author's claims that the decision of the Ontario Court of Justice dated 27 January 2005 to give Mrs Vargay custody of the child and order the author to provide child and spousal support violated a number of his rights under the Covenant. The Committee, however, notes the State party's argument that the author failed to appeal the Court's decision and that such failure can only be attributed to his own behaviour. The Committee also notes that, the author's claims regarding the conduct of the Court, have not been brought before the domestic authorities either. The Committee further notes the State party's argument that the author is still in a position to request access to his daughter. While it is true that local remedies must only be exhausted to the extent that they are both available and effective, it is an established principle that authors must exercise due

⁵ Children's Law Reform Act, R.S.O. 1990, c. C. 12, ss.20, 24.

diligence in the pursuit of available remedies.⁶ The author's doubts or assumptions about the effectiveness of domestic remedies do not absolve him from exhausting them.⁷ The Committee considers that in the present case, the author has failed to demonstrate that he has exhausted all available domestic remedies. The Committee concludes that the requirements of article 5 paragraph 2 (b) of the Optional Protocol have not been met.

8. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (b) of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

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

⁶ Communications No. 246/1987, *N.A.J. v. Jamaica*, adopted on 11 July 1988; No. 407/1990, *Dwayne Hylton v. Jamaica*, adopted on 8 July 1994; No. 433/1990, *A.P.A. v. Spain*, adopted on 25 March 1994; No. 463/1991, *D.B.B. v. Zaire*, adopted on 8 November 1991; No 982/2001, *Jagjit Singh Bhullar v. Canada*, adopted on 31 October 2006.

⁷ Communications No. 192/1985, *S.H.B. v. Canada*, adopted on 24 March 1987; No. 224/1987, *A. and S.N. v. Norway*, adopted on 11 July 1988; and No. 358/1989, *R.L. et al. v. Canada*, adopted on 5 November 1991.

**X. Communication No. 1746/2008, *Goyet v. France*
(Decision adopted on 30 October 2008, Ninety-fourth session)***

<i>Submitted by:</i>	Farida Goyet (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	France
<i>Date of communication:</i>	25 June 2007 (initial submission)
<i>Subject matter:</i>	Classification of Nichiren Daishonin, a denomination of Buddhism, also known as Soka Gakkai France, as a “cult” in parliamentary reports
<i>Procedural issues:</i>	Lack of standing as victim, <i>actio popularis</i> ; failure to exhaust domestic remedies
<i>Substantive issues:</i>	Right to effective remedy; right to a fair hearing; freedom of religion
<i>Articles of the Covenant:</i>	2, paragraph 3; 14; and 18
<i>Articles of the Optional Protocol:</i>	1; 2; and 5, paragraph 2 (b)
<i>The Human Rights Committee</i> , established under article 28 of the International Covenant on Civil and Political Rights,	
<i>Meeting on 30 October 2008,</i>	
<i>Adopts the following:</i>	

Decision on admissibility

1.1 The author of the communication, dated 25 June 2007, is Farida Goyet, a French national born in France on 20 January 1963. The author claims to be a victim of violations by France of articles 2, paragraph 3, 14 and 18 of the Covenant. The author is not represented by counsel. The Covenant and the Optional Protocol entered into force for France on 4 February 1981 and 17 May 1984, respectively.

1.2 On 6 May 2008, the Special Rapporteur on New Communications and Interim Measures, acting on behalf of the Committee, decided that the admissibility of the communication should be considered separately from the merits.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Ms. Helen Keller, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Iulia Antoanella Motoc, Mr. Michael O’Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

Pursuant to rule 90 of the Committee’s rules of procedure, Committee member Ms. Christine Chanet did not participate in the adoption of this decision.

The facts as submitted by the author

2.1 The author is a member of Nichiren Daishonin, a denomination of Buddhism also known as Soka Gakkai France. On 29 June 1995, the National Assembly adopted a resolution establishing a parliamentary commission to look into the question of cults and, if appropriate, propose amendments to the law. On 22 December 1995, the commission issued its report No. 2,468 on the subject of cults in France. Soka Gakkai France appeared on the list of cult movements contained in the report. The author notes that the commission decided to include this movement on the list after having interviewed, in camera, people who were either former members or “known to be hostile” to the groups mentioned. The commission never gave representatives of groups it describes as “cults” an opportunity to defend themselves from the accusations made against them. Two further commissions of enquiry were established, one in 1999 and one in 2006. Soka Gakkai France was again mentioned in their reports. Meanwhile, in 1998, an inter-ministerial task force on cults had been set up to train public officials in combating cults and providing information on their dangers to the general public. The task force was replaced in 2002 by the Inter-ministerial Task Force to Monitor and Combat Abuse by Cults (MIVILUDES).

2.2 The author has been manager of Kohésion, a management and human resources consultancy firm, since August 2000. Kohésion provided consultancy services to BW Marketing until 2003. On 1 April 2003 both parties signed an agreement terminating their contract. The agreement states that BW Marketing ended its contractual relationship with Kohésion because of rumours that the author was a member of a “cult”. According to a statement from the managing director of BW Marketing that was attached to the agreement, contractual ties were broken because the author’s membership in Soka Gakkai France, which is listed as a cult in the report of the parliamentary enquiry, could cause “definite harm” to his company’s business. He stated that he had no complaints about the author in professional terms and that, if Soka Gakkai France ceased to be listed as a cult in a parliamentary report, he would not hesitate to call on Kohésion’s services again. The author believes that the rumours about her, as well as negative press articles about Soka Gakkai France, led to the severing of financial ties with one of her major customers.

2.3 On 12 June 2003, the author filed criminal indemnification proceedings with the Aix-en-Provence regional court against persons unknown for discrimination by reason of membership in a religion and violation of privacy. On 17 November 2004, the investigating judge withdrew from the case, stating that, over the years, she had come to believe that Soka Gakkai France was “a cult characterized by unsafe behaviours, beliefs and methods”. The case was assigned to another investigating judge. On 25 April 2006, the case was dismissed on the grounds that Soka Gakkai France is not a religion and that the termination of a contract by BW Marketing because the author was a member of Soka Gakkai France therefore did not constitute criminal discrimination. The author appealed against the dismissal order, but on 5 September 2006, the Aix-en-Provence appeals court upheld the lower court’s decision. The author then appealed in cassation, but on 3 April 2007, the criminal division of the court of cassation dismissed her application on the grounds that it included no point of law on which it could be admitted.

The complaint

3.1 The author believes that the parliamentary reports on cults and the MIVILUDES annual reports constitute a direct violation of the rights and freedoms of the followers of Nichiren Daishonin Buddhism. She considers that the national authorities became directly involved in religious controversies, in violation of the constitutional principle of secularism.

3.2 The author alleges a violation of article 2, paragraph 3, of the Covenant, read together with article 18. She argues that an individual or a religious movement alleging

injury as a result of a measure taken by parliament should have recourse to a remedy before a “national authority” so that the allegation may be ruled upon and so that redress may be obtained if necessary. She asserts that members of parliament, without any form of prior process and in violation of the adversarial principle, gratuitously maintained, without citing any judicial decision in support of their claim, that Soka Gakkai France constituted a “cult” or were engaging in “cult abuses”. The author points out that, following the publication of the first parliamentary report in 1995, a media smear campaign targeting the followers of Nichiren Daishonin Buddhism was conducted throughout the country. Yet she has no effective remedy against the parliamentary reports, in violation of article 2, paragraph 3.

3.3 With regard to article 14, the author asserts that she has no access to a judicial procedure whereby she may challenge, in a fair hearing, the conclusions reached by parliament and the Administration and that her right to be presumed innocent has not been respected. She points out that total and absolute legal immunity is accorded in respect of the content and effects of the parliamentary reports. As to MIVILUDES, the author explains that it is an administrative service coming under the Prime Minister and, this being the case, there is no possibility of challenging the subjects it chooses to investigate or the results of its enquiries. She thus has no means of securing a fair hearing by a competent tribunal, owing to the legal immunity accorded the work of parliament and the legal status of the administrative reports of MIVILUDES. In addition, the author explains that the conclusions drawn by parliament and the Administration constitute a serious violation of the principle of the presumption of innocence guaranteed by article 14, paragraph 2. She asserts that the authorities have a duty of discretion once accusations, particularly criminal accusations, are made.¹ In the present case, the author’s right to be presumed innocent was not respected during parliamentary and administrative legal proceedings, seriously undermining her civil rights before any trial could take place.

3.4 Concerning article 18, the author asserts that the authorities have seriously impaired the exercise of her freedom of religion. She points out that the parliamentary reports referring to Soka Gakkai France as a “cult” triggered a series of unjustified administrative controls and a smear campaign in the media against the followers of Nichiren Daishonin Buddhism. They were subjected by the authorities to numerous discriminatory measures. The author cites general comment No. 22 (1993) on article 18, which states that this provision “protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.”² The terms ‘belief’ and ‘religion’ are to be broadly construed” and that the Committee views with concern “any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established”.³ She asserts that the restrictions and limitations imposed by the authorities constitute negative measures that violate her freedom to manifest her beliefs and are neither prescribed by law nor necessary to protect public safety, order, health or morals, or the rights and freedoms of others.

3.5 As to exhaustion of domestic remedies, the author explains that the decisions of the parliamentary commissions of enquiry are not subject to any judicial remedy, although the commissions have very broad powers of investigation. They may decide to hold in camera hearings arbitrarily and without citing any reason for doing so. Evidence may be gathered from dubious sources and used against individuals or groups who have no right of defence. Refusal to cooperate with a commission may lead to criminal proceedings and, ultimately, to a fine or imprisonment. It is impossible to challenge the procedures followed by the

¹ See communication No. 770/1997, *Gridin v. Russian Federation*, Views adopted on 20 July 2000.

² *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40 (A/48/40)*, annex VI, para. 2.

³ *Ibid.*

commissions or their conclusions. In particular, owing to parliamentary immunity, there is no domestic remedy whereby the author may secure the cessation of the violation of her rights. In addition, the author asserts that any action to set aside or contest the departmental orders on combating cults, documents that draw explicitly on the conclusions reached by parliament, would have no chance of success.

State party's observations on admissibility

4.1 On 28 April 2008, the State party outlined the laws applying to parliamentary enquiries and parliamentary immunities. Regarding parliamentary commissions of enquiry, the State party emphasized that, under article 6 of Order No. 58–1100 of 17 November 1958, such commissions “are set up to gather information, either on specific events or on the management of public services or public enterprises, with a view to submitting their conclusions to the assembly that established them”. These commissions are temporary in nature and their mission ends with the filing of their report.

4.2 Concerning parliamentary immunities, the State party explained that there are two types. One is exemption from liability. This is substantive immunity from both criminal prosecution and civil actions. It is absolute, covers all acts performed by deputies in the exercise of their mandates and is permanent, since it extends beyond the end of the mandate. The other is inviolability. This is procedural immunity that enables deputies to fulfil the obligations arising from their mandates without hindrance; it covers acts performed by them outside the scope of their functions and is thus temporary.

4.3 With regard to admissibility, the State party notes that the communication falls into two parts, dealing with two different allegations. On the complaint concerning the Soka Gakkai France association as such, the State party considers that the communication is inadmissible because the author lacks standing as a victim. It observes that the communication is submitted by the author as a natural person. Yet the documents produced by the author in support of her communication relate to Soka Gakkai France, an association with the status of a legal person and referred to as such in the contested parliamentary reports. Even though the author is a member of this association, no parliamentary report refers to her personally and she cannot therefore avail herself of the status of victim in respect of the provisions of the Covenant.

4.4 The State party adds that the author cannot claim to have been the victim of a “violation of any of her rights” as set forth in the Covenant. By their very nature, the reports of the parliamentary commissions of enquiry that are being challenged by the author are devoid of any legal import and cannot represent grounds for a complaint. The work of parliamentary commissions of enquiry is simply to reflect on and study the questions of the day from a theoretical perspective, to address social issues and to propose the broad outlines of measures to be taken. They pursue their work as part of the democratic debate, and their existence is justified by the need to give elected officials the opportunity to freely express their views on social problems. It is to guarantee this freedom that members of parliament are accorded legal immunity in the exercise of their functions, notably in respect of acts they perform in connection with the preparation of parliamentary reports. This is why administrative courts decline jurisdiction to hear cases involving the State's legislative bodies, especially those challenging the opinions they express in their reports.

4.5 In any case, a parliamentary enquiry report consists of recommendations and advice for lawmakers and has no legal force or prescriptive import.⁴ It has no direct effect on

⁴ The State party cites a decision of the European Court of Human Rights in which the Court concluded that “a parliamentary report has no legal effect and cannot serve as the basis for any criminal or

national regulations, and it creates no rights or obligations in respect of third parties. It therefore cannot result in any violation of the Covenant. The State party emphasizes that the author is unable to cite any portion of a parliamentary report that infringes, directly and personally, one of her rights under the Covenant. Although the author states that various regulatory texts, including Ministry of Justice circulars, the decrees establishing MIVILUDES and Act No. 2001–504 of 12 June 2001 on the prevention and suppression of cult movements, were adopted in the wake of the reports, the State party argues that there is no causal link between the adoption of these texts and a direct, personal violation of the author's rights. Even if there had been, the author could have submitted her case to the competent national courts, which would have examined the provisions at issue.

4.6 As to the claim relating to the business contract, the State party observes that, in the first place, it concerns a business dispute between two legal persons governed by private law and that, in the second place, the dispute was settled by means of a written agreement whereby “the parties forgo all proceedings and/or action caused or occasioned by their contractual relationship or in respect thereof, thereby renouncing any claim, present or future, regarding the interpretation, implementation or termination of said contractual relationship”. The State party therefore wonders what obligation the author seeks to ascribe to it under the Covenant, at least at this stage of the dispute. It observes, moreover, that the author filed a suit for damages against persons unknown in which she claimed that the settlement agreement made reference to rumours that the author belonged to a “cult” and that, on that basis, she sought redress for violation of privacy and discrimination. The State party argues that the only grounds on which the author could claim that she had been harmed are the reasons given by BW Marketing for breaking off the contractual relationship. Certainly the contested parliamentary reports cannot be seen as constituting the legal basis for that decision. The author had the right under domestic law to raise any matter she believed to constitute discrimination or a violation of her privacy in the national courts. She had been unable to lodge a complaint against BW Marketing on these grounds because she had chosen to sign an amicable settlement with that company and, in so doing, she had actually deprived the domestic courts of the ability to redress an alleged violation. Accordingly, this part of the communication is inadmissible on the grounds of non-exhaustion of domestic remedies.

4.7 The State party comments that, in reality, the author is contesting *in abstracto* the country's regulations and practices relating to the *modus operandi* of parliamentary commissions of enquiry without substantiating, as far as she is personally concerned, any violation of a right protected by the Covenant, notably her right to religious freedom. The State party recalls the Committee's case law on *actio popularis*.⁵ In order for the author to be considered a victim, it is not sufficient for her to maintain that, by its very existence, a law or, still less, a parliamentary report violates her rights. She must establish that the disputed text has been applied to her detriment, causing her direct, personal and definite harm; this has not been established in the present case. In conclusion, the State party argues that the communication is inadmissible because the author lacks standing as a victim.

Author's comments on the State party's submission

5.1 On 23 June 2008 the author wrote that the State party's discussion of the “two different claims” is a distortion of the facts and the points of law she has raised. The case

administrative proceedings” (Application No. 53430/99, *Fédération chrétienne des Témoins de Jéhovah de France v. France*, decision of 6 November 2001).

⁵ See communication No. 35/1978, *Ameeruddy-Cziffra et al. v. Mauritius*, Views adopted on 9 April 1981.

does not concern a narrow claim arising out of a professional dispute over a business contract but rather the prosecution of acts constituting criminal offences punishable under the Criminal Code. The author notes that the State party believes that “the only grounds on which the author could claim that she had been harmed are the reasons given by BW Marketing for breaking off the contractual relationship”; this amounts to an admission of material evidence of discrimination against the author with a view to obstructing her financial and professional activities.

5.2 The author points out that she has never claimed to have been mentioned in the parliamentary reports on cults or to be challenging those reports or the settlement of a business dispute or to be attempting an *actio popularis*. She has tried unsuccessfully to secure the prosecution and punishment of a series of discriminatory acts and has exhausted domestic remedies. The criminal actions brought by the author have concerned just two offences: discrimination and violation of privacy. It was not simply a matter of the severance of business relations between her company and BW Marketing. She had instituted criminal proceedings because she was the object of discrimination owing to her beliefs and her practice of Buddhism, quite apart from any contractual relationship that might happen to arise. She had brought those actions in order to establish who precisely had started the defamatory rumours and revelations concerning her membership in a cult, which continue to cause her real harm in financial and professional terms. She points out that the possibility of undertaking criminal proceedings was allowed and provided for under article 3 of the agreement, given that the purveyors of the rumours were not from BW Marketing. Moreover, she does not believe that the fact that she has instituted criminal proceedings has made it impossible for the domestic courts to provide redress. She argues that she has exhausted all effective and useful remedies.

5.3 As to her status as a victim, the author points out that the Soka Gakkai movement has been listed as a “cult” in parliamentary reports and that this has had significant consequences in law and in practice. The severance of contractual ties between BW Marketing and Kohésion proves it. There is thus a direct link between the parliamentary reports in question and the discrimination suffered by the author. With respect to the agreement signed by the two companies, the author argues that it is not legally binding on her because she is a physical person with rights that differ from those of Kohésion. She points out that, in a statement that was attached to the agreement, the managing director of BW Marketing said that contractual relations were severed because of the author’s membership in Soka Gakkai France, which is classified as a cult in a parliamentary report, and that, were Soka Gakkai France no longer to be listed as such, he would not hesitate to call on Kohésion’s services again. In addition, the author argues that the parliamentary findings to some extent constitute the *ratio legis* underlying the decisions to dismiss her criminal proceedings for discrimination. She notes that the Aix-en-Provence appeals court referred to Soka Gakkai France as a “movement listed as a cult in various parliamentary reports” in its decision of 5 September 2006. In her view, therefore, the findings made public in those reports were used to her detriment by the Aix-en-Provence appeals court in issuing a ruling that caused her direct, personal and definite harm and that was upheld by the court of cassation on 3 April 2007.

Issues and proceedings before the Committee

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 or not 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 Concerning the author's allegations relating to articles 14 and 18 of the Covenant, the Committee observes 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. However, 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*.⁶ Any person claiming to be a victim of a violation of a right protected by the Covenant must demonstrate either that a State party has, by an act or omission, already impaired the exercise of that right or that its impairment is imminent, based on, for example, legislation in force or a judicial or administrative decision or practice. The Committee recalls that, in the present case, the author complained of a series of hostile reactions (a smear campaign in the media, for example) to Soka Gakkai France following the publication of parliamentary reports in 1995, 1999 and 2006. It considers, however, that the author has not demonstrated how the reports' publication had the purpose or effect of violating her rights. The Committee also notes that the author complains of the severance of a business contract between her company and a marketing company on the grounds that she belonged to a movement categorized as a cult in the parliamentary reports referred to above. The Committee takes note, however, of the State party's argument to the effect that this was a business dispute between two legal persons governed by private law which has already been addressed by a written agreement. In any case, it also notes the State party's argument that a parliamentary report is without legal effect. After considering the arguments and information before it, the Committee therefore concludes that the author cannot claim to be a victim of a violation of articles 14 and 18 of the Covenant within the meaning of article 1 of the Optional Protocol.⁷

6.4 The Committee points out that article 2 of the Covenant may be invoked by individuals only in relation to other provisions of the Covenant and observes that article 2, paragraph 3 (a), provides that each State party shall undertake "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy". Article 2, paragraph 3 (b), guarantees protection to persons claiming to be victims if their complaints are sufficiently well-founded to be protected under the Covenant. A State party cannot reasonably be required, on the basis of article 2, paragraph 3 (b), to make such procedures available in respect of complaints which are less well-founded.⁸ Since the author of the present complaint cannot claim to be a victim of violations of articles 14 and 18 of the Covenant within the meaning of article 1 of the Optional Protocol, her allegation of violations of article 2 of the Covenant is inadmissible under article 2 of the Optional Protocol.

7. The Committee therefore decides:

- (a) That the communication is inadmissible under articles 1 and 2 of the Optional Protocol;
- (b) That this decision shall be transmitted to the State party and to the author of the communication.

⁶ See communications No. 318/1988, *E.P. et al. v. Colombia*, inadmissibility decision of 25 July 1990, paragraph 8.2; and *Ameeruddy-Cziffra et al. v. Mauritius* (note 5 above), paragraph 9.2.

⁷ See communications No. 429/1990, *E.W. et al. v. the Netherlands*, inadmissibility decision of 8 April 1993, paragraph 6.4; No. 645/1995, *Bordes and Temeharo v. France*, inadmissibility decision of 22 July 1996, paragraph 5.5; No. 1400/2005, *Beydon and 19 other members of the association DIH Mouvement de protestation civique v. France*, inadmissibility decision of 31 October 2005, paragraph 4.3; and No. 1440/2005, *Aalersberg et al. v. the Netherlands*, inadmissibility decision of 12 July 2006, paragraph 6.3.

⁸ See communications No. 972/2001, *Kazantzis v. Cyprus*, inadmissibility decision of 7 August 2003, paragraph 6.6; and No. 1036/2001, *Faure v. Australia*, Views adopted on 31 October 2005, paragraph 7.2.

[Adopted in English, French and Spanish, the French text being the original version. The text has also been translated into Arabic, Chinese and Russian as part of the present report.]

**Y. Communication No. 1766/2008, *Anani v. Canada*
(Decision adopted on 30 October 2008, Ninety-fourth session)***

<i>Submitted by:</i>	Ziad Anani and Andrea Anani (not represented by counsel)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Canada
<i>Date of communication:</i>	2 October 2007 (initial submission)
<i>Subject matter:</i>	Alleged judicial bias and denial of a fair hearing by a competent, independent and impartial tribunal
<i>Procedural issues:</i>	Level of substantiation of claims; admissibility <i>ratione materiae</i> ; exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to a fair trial; equality before the law and equal protection of the law; right to an effective remedy
<i>Articles of the Covenant:</i>	2, paragraphs 1 and 3; 14, paragraph 1; and 26
<i>Articles of the Optional Protocol:</i>	2; 3; and 5, paragraph 2 (b)
<i>The Human Rights Committee</i> , established under article 28 of the International Covenant on Civil and Political Rights,	
<i>Meeting on 30 October 2008,</i>	
<i>Adopts the following:</i>	

Decision on admissibility

1. The authors of the communication are Mr. Ziad Anani (first author) and his wife, Ms. Andrea Anani (second author), both Canadian nationals, born on 9 December 1935 and 11 February 1959, respectively. The first author was born on 9 December 1935 in Jerusalem, then Palestine. The second author was born on 11 February 1959 in Jacksonville, United States of America. The authors claim to be victims of violations by Canada¹ of article 2, paragraphs 1 and 3, and of articles 7; 14, paragraph 1; 20; 25 (c); and 26 of the Covenant. They are not represented by counsel.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Ms. Helen Keller, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

¹ The International Covenant on Civil and Political Rights and the Optional Protocol both entered into force for the State party on 19 August 1976.

The facts as submitted by the author

2.1 The first set of proceedings relates to an application that the first author filed with the Canadian Intellectual Property Office on 4 March 1998 to patent an invention entitled 'Controlled and Self Regulating Sound Intensity to Control the Sound Level of Sound Producing Apparatus or Machinery'. He also requested financial assistance from the Ministry of Industry to market the invention, through its specialized operating agency Technology Partnerships Canada (TPC) and the Industrial Research Assistance Program (IRAP) of the National Research Council. On 24 September 2001, the Canadian Intellectual Property Office granted and issued the patent. However, the IRAP required the first author to incorporate his business in order to qualify for financial assistance. After the first author had incorporated a company, his request for financial assistance was rejected on the ground that his invention was already being commercially exploited.

2.2 On 3 November 2003, the first author filed a claim with the Supreme Court of British Columbia challenging the rejection of his request for financial assistance by the Ministry of Industry. On 26 February 2004, Justice H., who had replaced Justice T. despite the first author's objection, dismissed the claim and further directed that the action be tried in the Federal Court of Canada.

2.3 On 4 April 2006, the first author dissolved his company for lack of activity and lack of funds.

2.4 The second set of proceedings relates to a dispute between the authors and 'Uniglobe Travel International' concerning a franchise agreement that the authors and Uniglobe signed on 22 February 1999. After Uniglobe had terminated the agreement on 31 October 2001, the authors filed an action in the Supreme Court of British Columbia on 21 December 2001 seeking damages for breach of contract by Uniglobe, wrongful termination of the franchise agreement, fraud and loss of opportunity to earn profits. The authors also alleged that Uniglobe had made attempts on their life in 2002. On 18 June 2004, the Court dismissed the claim and awarded Uniglobe \$2,700 for its counterclaim for monies owing and damages for lost royalties. The authors' appeals were dismissed by the Court of Appeal for British Columbia and, on 9 June 2005, by the Supreme Court of Canada.

2.5 On 14 January 2005, a Master of the Supreme Court of British Columbia assessed the legal costs to be paid by the authors to Uniglobe at \$80,000. The authors did not appear at the assessment hearing. By letter dated 19 January 2005, counsel for Uniglobe advised them that there was no transcript of the assessment hearing, as submissions and rulings made in such hearings are not recorded. The authors' applications for leave to appeal to the Court of Appeal for British Columbia and, subsequently, to the Supreme Court of Canada were dismissed on 7 February and 9 June 2005, respectively.

2.6 The third set of proceedings relates to a claim filed against the authors in the Provincial Court of British Columbia by Mr. A. I., the President and only director of Malaspina Coach Lines Ltd, who had used the authors' travel agency for his tour operations. On 2 October 2002, Judge M. ordered the authors to pay Malaspina \$2945.31 plus court-ordered interest. At the same time, he dismissed their \$7,013.98 counterclaim for breach of contract. On 2 May 2003, the British Columbia Supreme Court dismissed the authors' appeal against the judgment of the Provincial Court.

2.7 The authors subsequently filed a claim against Mr. A. I., his wife and Malaspina Coach Lines Ltd. for perjury, forgery, fraud, conspiracy and defamation and for deceptive and unconscionable acts under the Trade Practice Act seeking \$79,000 damages. On 14 October 2003, the Supreme Court of British Columbia dismissed the claim and, on 29 June 2004, the Court of Appeal of British Columbia dismissed the authors' appeal and prohibited them from commencing or continuing any legal proceedings against the defendants without first obtaining leave from the Court. The Supreme Court of Canada upheld the order.

2.8 On 27 April 2006, the authors filed a statement of claim against the State of Canada in the Federal Court of Canada asking the Court to vacate the “apartheid” orders of the Supreme Court of British Columbia and the Court of Appeal for British Columbia dated 18 and 29 June 2004, respectively. On 28 April 2006, the Registry advised the authors of the decision of Justice B. that the Federal Court had *prima facie* no jurisdiction on the matter and that the Registrar should not file the claim.

2.9 On 2 May 2006, the authors filed a new statement of claim with the Ontario Superior Court of Justice, which dismissed the claim for re-litigation and abuse of process on 29 June 2006. On 18 October 2006, the Court of Appeal for Ontario dismissed the authors’ appeal against the decision of the Ontario Superior Court of Justice.

2.10 On 15 December 2006, the authors filed a notice of application for leave to appeal to the Supreme Court of Canada, again asking for vacation of the lower courts’ decisions and seeking damages. On 29 March 2007, the Court dismissed the application with costs.

The complaint

3.1 In relation to all three proceedings, the authors claim that they were denied a fair and public hearing by a competent, independent and impartial tribunal, in violation of article 14, paragraph 1, of the Covenant. They further allege violations of articles 2, paragraph 1, and 26 of the Covenant because the judges discriminated against them on the basis of their Muslim faith and the Palestinian ethnic origin of the first author. By denying them an effective remedy to seek compensation for their lost profits (i.e. \$12,500,000 for the commercial exploitation of the patent between 2001 and 2021, \$1,109,500 for the remaining profitable seven years and six months of the terminated franchise agreement, and approximately \$7,000 for their counterclaim against Malaspina) and legal costs, the State party also violated article 2, paragraph 3, of the Covenant.

3.2 As regards the first set of proceedings, the authors claim that the IRAP made false allegations that the first author’s patent was already being commercially exploited. They allege that by denying the first author the right and the opportunity to have access to a public service offered by Industry Canada and by discriminating against him in the access to financial assistance, the State party also violated his rights under articles 25 (c) and 26 of the Covenant. They further submit that they were unable to appeal the Master’s order in the assessment hearing to a judge of the Supreme Court of British Columbia, in the absence of any transcripts of the submissions or the ruling made in the hearing.

3.3 With regard to the second set of proceedings, the authors allege that the trial judge denied them the right to a fair trial by allowing Uniglobe to call surprise witnesses and to cross-examine adverse witnesses without allowing the authors to cross-examine the defendants’ witnesses and “by believing impeached witnesses for not telling the truth under oath.”

3.4 In relation to the third set of proceedings, the authors submit that Mr. A. I. and his wife fabricated defamatory evidence. Judge M. accepted hearsay evidence to justify his ruling in favour of Mr. A. I. and his wife. The dismissal of the authors’ action against Mr. A. I. and his wife showed that the judges were biased against them because of their Muslim faith and that they favoured Mr. A. I. and his wife who belonged to the Pentecostal Church. For the authors, the State party’s conduct amounts to advocacy of racial and religious hatred that constitutes incitement to discrimination, hostility or violence against the authors, in breach of article 20, paragraph 2, of the Covenant.

3.5 The authors claim that by refusing to receive their statement of claim, the Federal Court of Canada denied them equal access to the courts and tribunals. Their treatment during the hearing by Justice H. in the Ontario Superior Court, who allegedly made fun of

the authors, and in the Court of Appeal for Ontario was degrading and contrary to article 7 of the Covenant.

3.6 The authors submit that they have exhausted all available domestic remedies and that the same matter is not being examined under another procedure of international investigation or settlement.

Issues and proceedings before the Committee

4.1 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.

4.2 The Committee considers that, even assuming that the authors' claims would not be inadmissible due to non-exhaustion of domestic remedies (article 5, paragraph 2 (b), of the Optional Protocol), they are inadmissible either because they fall outside the scope of any of the provisions of the Covenant invoked by the authors, or because they have not been sufficiently substantiated for purposes of admissibility.

5. The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;
- (b) That this decision shall be communicated to the authors and, for information, to the State Party.

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

**Z. Communication No. 1771/2008, *Sama Gbondo v. Germany*
(Decision adopted on 28 July 2009, Ninety-sixth session)***

<i>Submitted by:</i>	Mr. Mohamed Musa Gbondo Sama (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Germany
<i>Date of communication:</i>	25 October 2005 (initial submission)
<i>Subject matter:</i>	Allegedly unfair domestic proceedings
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; abuse of right of submission; non-substantiation of claims
<i>Substantive issues:</i>	Fair trial; arbitrary detention; freedom of expression; prohibited discrimination
<i>Articles of the Covenant:</i>	7; 9, paragraphs 1–4; 14, paragraphs 1–3 and 5; 19; and 26
<i>Articles of the Optional Protocol:</i>	2; 3; and 5, paragraph 2 (b)

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

Meeting on 28 July 2009,

Adopts the following:

Decision on admissibility

1.1 The author of the communication dated 25 October 2005, is Mohamed Musa Gbondo Sama, a German national born in 1946 in Sierra Leone. He claims to be a victim of a violation by Germany of article 7; article 9, paragraphs 1 to 4; article 14, paragraphs 1 to 3 and 5; article 19; and article 26, of the Covenant. He is not represented.

1.2 On 4 July 2008, the Special Rapporteur on New Communications and Interim Measures decided that the admissibility of the communication should be considered separately from the merits.

1.3 On 2 March 2009, the Special Rapporteur on New Communications and Interim Measures decided not to issue a request for interim measures pursuant to rule 92 of the Committee's rules of procedure.

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

The text of an individual opinion signed by Committee member Ms. Ruth Wedgwood is appended to the present decision.

Factual background

Proceedings for forgery of documents in conjunction with other offences

2.1 On 31 March 1998, an arrest and search warrant were issued against the author who was charged with forgery of documents, indirectly abetting the certification of false documents, fraud, and violations of the Aliens Act. Pursuant to a search warrant, the premises of the author's business and home were searched on 2 April 1998. From 3 April to 4 May 1998, as ordered by the Berlin Tiergarten District Court, the author was held in pre-trial detention for danger of flight and collusion. On 19 June 1998, the Berlin Regional Court¹ rejected the author's appeals against both the arrest and search warrant on the merits. Following his release on 4 May 1998, the author's passport was seized. He was obliged to report twice a week to the police and was prohibited from leaving Berlin until the ban was lifted on 19 January 2000. His passport was returned to him on 15 August 2000.

2.2 On 24 June 2002, the Berlin Tiergarten District Court sentenced the author to a suspended sentence of nine months imprisonment with a two-year probation period, for forgery of documents, indirectly abetting the certification of false documents, fraud and violation of the Aliens Act. On 19 June 2003, the Berlin Regional Court² amended the decision and confirmed the sentence and probation period. The author's appeals against his conviction were rejected, including on 24 May 2006 by the Federal Court.

2.3 On 26 January 2005, the Berlin Regional Court³ rejected the author's application for re-trial for failure to meet the pre-conditions set forth in the Code of Criminal Procedure. It also rejected the author's request for legal aid ruling that the legal aid granted in the initial proceedings continues to be in effect in the re-trial proceedings. On 4 April 2006, the Federal Constitutional Court confirmed this judgement. On 13 April 2006, the Berlin Court of Appeal⁴ rejected the author's request for a hearing in the re-trial proceedings, for lack of substantiation. The Federal Constitutional Court confirmed this judgement on 24 May 2006.

2.4 On 18 May 2005, the author was informed that the decision on revocation of his suspended sentence of nine months' imprisonment depended on the outcome of proceedings against him for suspected libel. On 16 May 2007, the Berlin Tiergarten District Court,⁵ revoked the suspended sentence in light of the author's other convictions during the probation period, on libel charges for insults on 9 March and 30 September 2004, as well as for other libel for which proceedings had not yet been concluded. The court rejected the author's request for legal aid. On 27 June 2006, the author's request for compensation was rejected and on 6 March 2007, his appeal was rejected on the merits. On 23 April 2008, his request for pardon was also rejected.

Libel proceedings

2.5 On 17 February 2005, the author was sentenced to a fine for libel against a police officer who had visited his home regarding a violation of transport regulations. The author claims that the court based its decision solely on the police officer's statement and did not consider his own version of the incident. He submits that it was the police officer who

¹ Landgericht Berlin.

² Landgericht Berlin.

³ Criminal Chamber of the Landgericht Berlin.

⁴ Kammergericht Berlin.

⁵ Amtsgericht Tiergarten.

insulted him first when he called him “*Schwarzer Neger*”⁶ and that he simply responded by telling him that “anybody who calls an African ‘*Schwarzer Neger*’ may be assumed to have a racist tendency”. On 18 May 2005, the Tiergarten District Court sentenced the author on two additional libel counts against another police officer and the public prosecutor. The author claims that he only made general comments, which were not personally directed against these two officials. The author’s appeals against both convictions for libel were rejected, including by the Federal Constitutional Court.

Summary offence against the law on legal services

2.6 On 16 May 2006, the Göttingen District Court sentenced the author to a fine for offering legal services without a valid license. The author contested the findings, claiming that he had successfully completed University legal training (*Erstes juristisches Staatsexamen*). On 4 July 2006, the Göttingen Regional Court dismissed the author’s appeal, who had contested the independence of the judge. On 1 August 2006, the Federal Constitutional Court rejected the author’s appeal for lack of substantiation and due to abusive language.⁷ On 13 December 2007, in the absence of any payment, the Göttingen Regional Court ordered the author’s imprisonment, because of his non-payment of the fine despite repeated reminders.

Proceedings for tax evasion

2.7 On 31 August 1999, the Financial Office of Berlin issued an order for the suspension of the author’s businesses based on non-payment of his taxes for the fiscal year 1997. On 1 February 2001, the first instance finance court⁸ declared inadmissible the author’s appeal against the tax imposition for 1997. The author’s request for legal aid was also rejected. On 22 November 2005, the author was convicted of tax evasion for fiscal year 1997. His request for free legal representation was rejected for lack of an indictable offense. All appeals were rejected, including by the Federal Constitutional Court. On 2 July 2007, the second instance court⁹ granted the author’s revision request for lack of access to the author’s file, insufficient time allocated for the preparation of his defence and absence of counsel.

The complaint

3.1 The author claims that his pre-trial detention from 3 April to 4 May 1998 and the ban imposed on him to refrain from leaving the city of Berlin until 19 January 2000 violated article 9, paragraphs 1 to 4, of the Covenant.

3.2 The author claims that his conviction in proceedings for forgery of documents with other offences was based on evidence given by unreliable persons who were in conflict with him and some of whom had a criminal record. He further submits that witness evidence in his favour was discarded on the grounds of lack of credibility. He claims that the domestic courts were biased (article 14, paragraph 1), that they did not respect his right to be presumed innocent before proven guilty (article 14, paragraph 2) and that the witnesses on his behalf were not deemed credible (article 14, paragraph 3 (e)).

⁶ “Black nigger”.

⁷ The author claims that the German judicial system is criminal, arbitrary and has a Neo-Nazi tendency.

⁸ Finanzgericht Berlin.

⁹ Kammergericht Berlin.

3.3 The author further claims that, as more than four years passed from the opening of the criminal investigation against him to his conviction, the trial for forgery of documents with other offences violated his right to a trial within reasonable time (article 14, paragraph 3 (c)). In this respect, he submits that he was co-operative in the investigation and that the nature of the charges against him did not justify such a delay.

3.4 The author further maintains that, contra article 14, paragraph 3 (d), of the Covenant, he was denied free legal assistance in the review proceedings for falsification of documents in conjunction with aiding indirect falsification of official records, fraud and a minor crime in accordance with the Aliens Act.

3.5 The author claims a violation of article 14, paragraph 5, as his appeals in the proceedings for forgery of documents with other offences were rejected without a hearing.

3.6 He maintains that, in the trial for forgery of documents with other offences, he was convicted despite a lack of incriminating evidence against him. He therefore claims that his conviction was based on discriminatory grounds, e.g. the colour of his skin and his African origin. He thus claims to be a victim of discrimination, in violation of article 26.

3.7 With regard to the revocation, on 16 May 2007, of the suspended sentence for forgery of documents with other offences, and the order for him to start serving his sentence, the author claims that the suspended sentence was arbitrarily revoked after eight years. He claims that this constitutes a violation of article 9, paragraph 3 and article 14, paragraph 3 (c).

3.8 As regards the libel proceedings against two police officers and a public prosecutor, the author submits that these convictions were based exclusively on the officials' testimonies and that his version of the events was summarily dismissed. He claims in this respect a violation of his right to freedom of expression under article 19.

3.9 Concerning the proceedings for tax evasion, the author claims that the time lapse of more than seven years before bringing charges against him on this count reveals a violation of article 14, paragraph 1. He notes that the police carried out a search of his business premises on 2 April 1998, and that charges were only filed against him on 22 November 2005. He claims that the procedure was prescribed, considering that all matters on tax evasion suspicion need to be addressed within three years.

3.10 Finally, the author submits that all of the legal proceedings against him constituted cruel, inhuman or degrading treatment or punishment, in violation of article 7 of the Covenant.

The State party's submission on admissibility

4.1 By submission of 19 June 2008, the State party challenged the admissibility of the author's communication and requested the Committee to consider admissibility separately from the merits. It maintains that the allegations are not sufficiently substantiated, that the claim with regard to the absence of an oral hearing on appeal is incorrect and constitutes an abuse of the right of submission according to the Covenant, and that the author did not exhaust available and effective domestic remedies.

4.2 The State party clarifies the facts as submitted by the author. On 24 June 2002, the author was convicted by the Tiergarten District Court to nine months' imprisonment suspended on probation for two years for forgery of documents in conjunction with other offences. Following oral hearings that began on 22 April 2003, the Berlin Regional Court amended the sentence with regard to the qualification of the crimes (forgery of documents in conjunction with abetting indirect forgery of official records, fraud and a misdemeanour under the Aliens Act) but otherwise confirmed the lower court's sentence. This judgement

became executory on 15 January 2004. On 14 January 2004, the Berlin Court of Appeal rejected the author's appeal on the merits. On 30 September 2005, the Federal Constitutional Court declared the author's appeal against the first and second instance judgements of 24 June 2002 and 19 May 2003 inadmissible for lack of substantiation. On 19 March 2008, the Federal Constitutional Court also rejected the author's appeal against the Berlin Court of Appeal judgement of 14 January 2004 without reasons.

4.3 On 26 January 2005, the Berlin Regional Court declared the author's request for re-opening the proceedings inadmissible and rejected legal assistance for these proceedings, stating that the free legal assistance in the principal proceedings also applied to the re-opening proceedings. On 1 September 2006 and on 21 December 2007, the Berlin Court of Appeal rejected the author's appeals. On 19 September 2006, the Registrar of the Federal Constitutional Court requested the author to advise if he sought a judicial ruling with regard to his appeal against the Berlin Court of Appeal judgement of 1 September 2006. As the author did not respond, no ruling was issued.

4.4 On 17 February 2005, the author was sentenced to a libel fine for insults made on 6 May 2004. On 18 May 2005, the author was sentenced to another fine for insults made on 9 March and 30 September 2004. On 12 September 2005, the Berlin Regional Court, after joining the two matters, rejected the author's appeals against both judgements. On 8 May 2006, the Berlin Court of Appeal rejected the author's appeal and therefore the Berlin Regional Court judgement became executory on 9 May 2006.

4.5 On 16 May 2007, the Tiergarten District Court revoked the suspended sentence issued on 24 June 2002, as amended by the Berlin Regional Court on 19 June 2003 on grounds of several procedural actions against the author during his probation period. On 27 June 2006, he was sentenced to a suspended prison term of four months for insults made on 22 July 2005. On 18 October 2006, he was sentenced to a fine for insult made on 28 July 2005. Additional proceedings were initiated with regard to insults allegedly made on 10 June 2004, 20 September 2004, 19 April 2005, 30 June 2005 and 1 November 2005. The State party submits that the author never denied authorship of the letters leading to the proceedings. On 12 September 2007, the Federal Constitutional Court denied leave to appeal of the author's appeal regarding the 16 May 2007 judgement revoking the suspended sentence for failure to exhaust all available remedies. On 19 November 2007, the Berlin Regional Court rejected the author's appeal against the revocation order. This was confirmed on 23 April 2008 by the Berlin Court of Appeal. On 16 January 2008, the Federal Constitutional Court rejected a second appeal by the author. On 23 April 2008, the Senate Administration of Justice rejected his pardon application.

4.6 The State party submits that the communication is inadmissible, as the requirements in articles 1, 2, 3 and 5, paragraph 2, of the Optional Protocol are not met. It maintains that the author has not sufficiently substantiated his claim of a violation of article 9, paragraph 3 and article 14, paragraph 3 (c), concerning the alleged delay of eight years between the first instance judgement of 24 June 2002 and its revocation. It underlines that the revocation of the suspended sentence complies with the requirements of the German Criminal Procedure Code (*Strafprozessordnung – StPO*). The suspended sentence became executory on 15 January 2004 and was revoked on 16 May 2007, three years and four months later in accordance with the Criminal Code, which provides that the suspended sentence can be revoked if the convict commits a crime or serious offence during the probation period. The author committed crimes on 9 March 2004, 6 May 2004 and 30 September 2004 and his libel conviction became executory on 9 May 2006. The State party maintains that, as of May 2005, the author was duly informed of the possible consequences that the libel proceedings could have for the execution of the previously suspended prison sentence. The State party submits that revocation one year and four months after the end of the probation period complies with established case-law and State party practice under the Criminal

Procedure Code. Therefore, the State party maintains that the author has not sufficiently substantiated why the revocation of the suspended sentence and the invitation to serve the sentence would violate articles 9, paragraph 3, or 14, paragraph 3 (c), of the Covenant.

4.7 With regard to the author's claim that he was deprived of an appeal hearing before the Berlin Regional Court, the State party submits that this allegation is incorrect, given that the author did participate in a hearing before this court. The State party submits that this part of the communication should be declared inadmissible as an abuse of the right of submission, in accordance with article 3 of the Optional Protocol.

4.8 Lastly, the State party submits that the author's claims relating to legal aid under article 14, paragraph 3 (d) are inadmissible for non-exhaustion of domestic remedies. Despite the request for clarification from the Federal Constitutional Court on 19 September 2006, the author did not provide sufficient substantiation of his claim and did not request a Federal Constitutional Court ruling. The State party maintains that this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

Author's further comments

5.1 The author maintains by submission of 15 August 2008 that all domestic remedies have been exhausted but that, contrary to article 14, the Federal Constitutional Court rejected all his appeals without a hearing. He underlines that he did not receive a fair trial, as a key defence witness in the proceedings for forgery of documents in conjunction with other offences was not heard because of the absence of a valid address. The author claims that he was in a position to provide that witness' address. He adds that he was denied legal assistance in his appeal proceedings, as the lawyer refused to continue to represent him.

5.2 On 6 January 2009, the Public Prosecutor of Göttingen summoned the author to serve a prison sentence of 17 days for failure to pay the fine imposed by the Regional Court Göttingen for offering unlicensed legal advice (see paragraph 2.6). On 26 January 2009, the Federal Constitutional Court rejected the author's appeal in this respect. On 9 and 21 February 2009, the author requested the Committee to issue interim measures of protection on his behalf with regard to his imprisonment. He argues that his imprisonment would amount to a violation of article 9, article 14, paragraph 2 and article 19. He underlines that his ill health¹⁰ does not allow his imprisonment. He reiterates earlier claims about the absence of witness examination and a hearing in the appeal process and claims to be a victim of discrimination.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

6.3 With regard to the author's claim that his pre-trial detention from 3 April to 5 May 1998 and the order not to leave the city of Berlin was arbitrary and in violation of article 9,

¹⁰ Attested by a medical certificate.

paragraphs 1 to 4, the Committee notes that the pretrial detention and order not to leave Berlin were both issued and terminated by the Tiergarten District Court, that the author was duly informed of the reasons for his arrest and the order not to leave Berlin, and that he appealed the decision. The information before the Committee does not indicate that the proceedings before the authorities of the State party suffered from any defects. Accordingly, the Committee considers that the author has not, for purposes of admissibility, sufficiently substantiated his allegations under article 9 and concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.4 With respect to the allegations under article 14, paragraphs 1, 2 and 3 (e), the Committee observes that these complaints refer primarily to the appraisal of evidence adduced at the trial, a matter falling in principle to the national courts, unless the evaluation of evidence was clearly arbitrary or constituted a denial of justice.¹¹ In the present case, the Committee is of the view that the author has failed to demonstrate, for purposes of admissibility, that the conduct of the criminal proceedings in his case was arbitrary or amounted to a denial of justice. It consequently considers that this part of the communication has not been sufficiently substantiated, and thus finds it inadmissible under article 2 of the Optional Protocol.

6.5 As to the author's claim under article 14, paragraph 3 (c), concerning the alleged unreasonable delay of four years between his arrest on 3 April 1998 and conviction on 24 June 2002 in the proceedings for forgery of documents in conjunction with other offences, the Committee notes that official charges were brought against the author on 10 March 2002. The Committee observes that the author has not presented sufficient information to indicate why this delay is considered excessive. In the light of the information before the Committee, finds that this claim is insufficiently substantiated and therefore declares it inadmissible under article 2 of the Optional Protocol.

6.6 The Committee further notes that the author's libel convictions were based on his conduct during his probation period (2004–2006), and that these convictions became final by judgement of the Berlin Court of Appeal on 8 May 2006. The author's suspended sentence was subsequently revoked on 16 May 2007. The Committee considers that the author has not presented sufficient information to show why this delay would be considered excessive.¹² In light of the information before the Committee, it concludes that this claim is insufficiently substantiated and thus inadmissible under article 2 of the Optional Protocol.

6.7 With regard to the author's claim under article 14, paragraph 3 (d), of the Covenant, claiming that legal assistance was denied for the appeal proceedings related to charges for forgery of documents in conjunction with other offences, the Committee notes that in the domestic courts, the author did not reply to a letter from the Registry of the Constitutional Court of 18 September 2006, informing him that there were serious doubts about the

¹¹ See Human Rights Committee, general comment No. 32 (2007), Right to equality before courts and tribunals and to a fair trial (article 14), Official Records of the General Assembly, Sixty-second Session, Supplement No. 40 (A/62/40), Vol. I, annex VI, paragraph 26; see inter alia communications No. 541/1993, *Errol Simms v. Jamaica*, Inadmissibility decision adopted on 3 April 1995, paragraph 6.2; No. 867/1999, *Smartt v. Republic of Guyana*, Views adopted on 6 July 2004, paragraph 5.3; No. 917/2000, *Arutyunyan v. Uzbekistan*, Views adopted on 29 March 2004, paragraph 5.7; No. 927/2000, *Svetik v. Belarus*, Views adopted on 8 July 2004, paragraph 6.3; No. 1006/2001, *Martínez Muñoz v. Spain*, Views adopted on 30 October 2003, paragraph 6.5; No. 1084/2002, *Bochaton v. France*, decision of 1 April 2004, paragraph 6.4; No. 1120/2002, *Arboleda v. Colombia*, Views adopted on 25 July 2006, paragraph 7.3; No. 1138/2002, *Arenz v. Germany*, decision of 24 March 2004, paragraph 8.6; No. 1167/2003, *Ramil Rayos v. Philippines*, Views adopted on 27 July 2004, paragraph 6.7; and No. 1399/2005, *Cuartero Casado v. Spain*, decision of 25 July 2005, paragraph 4.3.

¹² See general comment No. 32 (note 11 above), paragraph 35.

admissibility of his constitutional challenge, and that it was not properly motivated or documented. 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.

6.8 With regard to the author's claim that he was not granted an oral hearing in the appeal proceedings, the Committee refers to its general comment No. 32 (2007), which states that article 14, paragraph 5, of the Covenant does not require a full retrial or a "hearing",¹³ as long as the tribunal carrying out the review can look at the factual dimensions of the case. It therefore considers that this part of the communication has not been sufficiently substantiated and thus finds it inadmissible under article 2, of the Optional Protocol.

6.9 With respect to the alleged violation of article 26, of the Covenant, the Committee considers that the author failed to substantiate sufficiently, for purposes of admissibility, why he considers that the domestic court ruled against him on discriminatory grounds or that it took into account the colour of his skin and/or national origin. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.10 With respect to the alleged violation of article 9, paragraph 3 and article 14, paragraph 3 (c) concerning the proceedings leading to the revocation of the suspended sentence, the Committee notes the State party's correction of the facts submitted by the author and notes that neither the documents submitted by the author nor by the State corroborate the author's claim that the judge in the libel proceedings mentioned that his ruling would not bear any consequence on the suspended prison sentence. The Committee considers that the author failed to sufficiently substantiate his claim for purposes of admissibility, and declares it therefore inadmissible under article 2 of the Optional Protocol.

6.11 As to the author's claim that the libel proceedings against him constitute a violation of article 19, the Committee considers that, in the light of the information before it, the matter is not sufficiently substantiated and it therefore declares this part of the communication inadmissible under article 2 of the Optional Protocol.

6.12 With respect to the alleged violation of article 14, paragraph 1, of the Covenant concerning the undue delay in the proceedings for tax arrears, the Committee notes that, on 2 July 2007, the author's revision request was granted and the Berlin Regional Court was ordered to revise its decision. The Committee therefore considers this part of the communication inadmissible for failure to exhaust all domestic remedies according to article 5, paragraph 2 (b), of the Optional Protocol.

6.13 As to the author's claim that the order of imprisonment for failure to pay a fine imposed by the District Court of Göttingen violates article 9, article 14, paragraph 2, and article 19, of the Covenant, the Committee refers to its conclusions in paragraphs 6.3; 6.4 and 6.11 and considers this part of the communication insufficiently substantiated and thus inadmissible under article 2, of the Optional Protocol.

6.14 With respect to the author's claim that all of the legal proceedings against him constituted inhuman, cruel and degrading treatment, in violation of article 7, the Committee notes that the author makes this claim in a sweeping and unsubstantiated form, without offering a minimum of documentary materials, explanations or arguments in support of his claim. The Committee therefore considers this claim incompatible with the provisions of the Covenant according to article 3 of the Optional Protocol.

¹³ Ibid., para. 48. See also communications No. 1110/2002, *Rolando v. Philippines*, Views adopted on 3 November 2004, paragraph 4.5; No. 984/2001, *Juma v. Australia*, decision of 28 July 2002, paragraph 7.5; and No. 536/1993, *Perera v. Australia*, decision of 28 March 2005, paragraph 6.4.

7. The Committee therefore decides:
 - (a) That the communication is inadmissible under articles 2, 3 and 5, paragraph 2 (b), of the Optional Protocol;
 - (b) That this decision shall be communicated to the State party and to the author.
- [Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Appendix

Individual opinion of Committee member Ms. Ruth Wedgwood (partially dissenting)

In finding that this communication is inadmissible in its entirety, the Committee has acted based on a record that does not include complete copies of the various court decisions whose effect we are asked to assess. It is always helpful to the Committee to receive such materials from the parties.

Based on this incomplete record, however, there is one claim by the author as to which the Committee has, in my view, not adequately explained its finding of inadmissibility. I would have asked the State party to comment on the merits of that issue.

In 2002, the author was given a suspended sentence of nine months imprisonment and two years probation on a conviction for forgery and other crimes. In May 2005, he was informed that the suspension of his sentence might be revoked, and therefore he would have to serve his original sentence, depending on the outcome of various libel actions brought against him.

On 16 May 2007, the author was sent to jail under his suspended sentence, as a consequence of the judgments in the various libel actions. One of these stemmed from an encounter between a policeman and the author occurring in his home on May 6, 2004. On that date, the author claims that he was visited by the police officer on an inquiry concerning an alleged violation of transport regulations, and that the officer addressed him with a raw racial epithet that needs no translation. This allegation may or may not be true, but the State party has not addressed the matter on the facts. The author then is said to have replied by accusing the police officer of racism. The author was sentenced to a fine for his part in this episode on 17 February 2005, and the conviction became one of the bases for his revocation of probation on 16 May 2007.

The author has specifically invoked article 19 of the Covenant, and article 26 might seem to have relevance as well. To be sure, an encounter between a police officer and a civilian involves a social obligation on the part of both sides to act with courtesy and restraint, and sometimes it is a fraught situation in which “fighting words” may be seen as actionable and provocative. But if it were true that a racial epithet was used in direct address by a public officer, the type of reply attributed to the author might not constitute actionable libel. Admittedly, the author seems to have offered a wide-ranging set of opinions in other public settings, including courtrooms. But further elucidation of the issues arising from the events of May 6, 2004 would have been helpful in appropriately disposing of this communication.

(Signed) Ms. Ruth **Wedgwood**

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

**AA. Communication No. 1774/2008, *Boyer v. Canada*
(Decision adopted on 27 March 2009, Ninety-fifth session)***

<i>Submitted by:</i>	Mr. Jean-Marc Boyer (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Canada
<i>Date of communication:</i>	3 March 2007 (initial submission)
<i>Subject matter:</i>	Allegation of judicial bias and denial of justice
<i>Procedural issues:</i>	Substance of the allegations; admissibility <i>ratione materiae</i>
<i>Substantive issues:</i>	Right to a fair trial; recognition before the law
<i>Articles of the Covenant:</i>	14, paras. 1; and 16
<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 27 March 2009,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Jean-Marc Boyer, a Canadian citizen born in 1965. He alleges he is a victim of violations by the State party under articles 14 and 16 of the International Covenant on Civil and Political Rights. He is not represented by counsel.

The facts as presented by the author

2.1 The author worked in the civil service. He was employed as a regional analyst at the Commission de la santé et de la sécurité du travail (CSST) (Occupational Health and Safety Board). He was a member of the *Association professionnelle des ingénieurs du Gouvernement du Québec* (APIGQ) (Professional Association of Quebec Government Engineers), which may represent engineers employed by the Quebec Government as an exclusive bargaining agent. Every official working for CSST had an identity code and password giving him or her access to the computer system. The author was responsible for ensuring that the Laval regional office employees abided by this policy. For that purpose,

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Bouzid Lazhari, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

the employer had provided him with information technology tools that allowed him to manage and monitor the system.

2.2 In August 2000 the author's supervisor asked him to "act against the policy of accountability of his employer", which the author refused to do. According to the author, his supervisor began harassing him from that moment on. The author asked him to fill out a "professional injury complaint form for harassment", which the supervisor refused to do. According to the author, he threatened "to use an atomic bomb" if he was asked to fill out the form once more.

2.3 On 11 December 2002 the author was suspended, in his view for no reason. He decided that same day to lodge a harassment complaint. He was not supported by APIGQ, and the Commission des lésions professionnelles (CLP) (Professional Injury Board) turned down his complaint.

2.4 On 3 February 2003 the author was dismissed. He challenged his dismissal before an arbitration commission in accordance with the complaint procedure provided for in the Collective Labour Agreement between CSST and APIGQ. An arbitrator, a former Quebec government official, was chosen by his employer, according to the author, "in collusion" with APIGQ, so that he had no say in the matter. The author was not able to express his views at the hearing. He was also allegedly prevented from submitting a written defence, and the APIGQ lawyer presented only one of the author's four grievances. On 8 June 2005 the arbitrator rejected his complaint but did not forward him a copy of the decision. He was informed of the decision by an unsigned letter from APIGQ.

2.5 On 7 July 2005 the author submitted an application for judicial review of the arbitration decision before the Supreme Court of Quebec. He put forward several objections regarding the conduct of the arbitration proceedings, and asserted that his rights guaranteed by articles 14 and 16 of the Covenant had been violated. On 27 July 2005, having listened to CSST for 16 minutes, the judge interrupted the author after he had managed to say only "a few words". His application was rejected by the Court.

2.6 On 6 September 2005 the author filed an action to set aside the arbitration decision of 8 June 2005 before the Supreme Court of Quebec. On the day of the hearing the author was informed that CSST had submitted a complaint challenging the admissibility of his action and that this complaint would be heard at the same session. The author's action to set aside the decision was rejected by the judge, on the grounds that the arbitration procedure had been properly conducted, and the CSST application for inadmissibility was accepted by a judgement of 15 November 2005.

2.7 On 6 December 2005 the author appealed the 15 November 2005 decision of the Supreme Court before the Court of Appeals of Quebec. He complained about the way in which the arbitration and the proceedings before the Supreme Court had been conducted. On 6 February 2006 his appeal was rejected by a decision in which the Court recalled in particular the monopoly of the union's representation with respect to labour relations. By a decision of the Supreme Court of 14 December 2005 and pursuant to CSST's request, the author was declared a vexatious litigant. He lodged an appeal to set aside this order which was also rejected.

2.8 On 23 March 2006 the author introduced before the Supreme Court of Canada a request for authorization to appeal the decision of the Court of Appeal of Quebec of 6 February 2006, which was also rejected. He filed a complaint against APIGQ before the Commission des droits de la personne (Human Rights Commission), the Tribunal des droits de la personne (Human Rights Tribunal) and the Commission des relations du travail (Labour Relations Commission). According to the author, none of these actions succeeded.

The complaint

3. The author states that the facts as presented constitute a violation of articles 14 and 16 of the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

4.1 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.

4.2 With regard to the author's claims under articles 14, paragraph 1, and 16 of the Covenant, the Committee notes that it would appear that the author was dismissed from his position in the public service for disciplinary reasons. However, the author has failed to provide the factual information necessary to establish whether the claims themselves fall within the scope of the provisions invoked. For this reason, the Committee considers that the author's allegations of violations of articles 14 and 16 have not been sufficiently substantiated for the purposes of admissibility and concludes that this communication is inadmissible under article 2 of the Optional Protocol.

5. The Committee therefore decides:

- (a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;
- (b) That this decision shall be communicated to the author and, for information, to the State party.

[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.]

**BB. Communication No. 1871/2009, *Vaid v. Canada*
(Decision adopted on 28 July 2009, Ninety-sixth session)***

<i>Submitted by:</i>	Mr. Satnam Vaid (represented by counsel, Raven, Cameron, Ballantyne & Yazbeck Barristers and Solicitors)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Canada
<i>Date of communication:</i>	4 November 2008 (initial submission)
<i>Subject matter:</i>	Alleged discrimination of civil servant of State party's Parliament
<i>Procedural issue:</i>	Adequate substantiation of claim
<i>Substantive issues:</i>	Discrimination; right to an effective remedy
<i>Articles of the Covenant:</i>	2, paragraphs 1–3; 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 July 2009,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Satnam Vaid, a Canadian national of Indian origin born in 1942, who claims to be victim of violations by Canada of his rights under article 2, paragraphs 1–3; and article 26, of the Covenant. He is represented by counsel. The Optional Protocol entered into force for the State party on 19 August 1976.

The facts as presented by the author

2.1 From 1984 to 1994, the author worked as driver for successive speakers of the Canadian House of Commons. In 1994, Mr. Gilbert Parent assumed the office of Speaker of the House. During his first meeting with the author, Mr. Parent asked him, *inter alia*, questions in connection to his ethnic origin, religion, and education. According to the author, the Speaker asked him in particular why a man with his (academic) education wanted to work as a driver. Later in 1994, Mr. Parent asked to meet the author and his wife and suggested him to consider other positions.¹ The author was also asked to wash dishes in

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Mohammed Ayat, Mr. Prafullachandra Natwarlal Bhagwati, 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. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

¹ According to the author, the Speaker had suggested that this would be better for "his home life".

the Speaker's office. From March to September 1994, the author was told that he could not work as a driver, because he was wearing a cervical collar (due to an injury), despite a doctor's assessment that he could continue driving. In September 1994, when the author wanted to resume his duties, he was informed that he should look for a work in another department, which he refused. On 22 September 1994, he was told not to report to work any more, while his salary continued to be paid. In October 1994, the author wrote to the Speaker's Office, insisting to return to work. Instead, other positions were offered to him, which he declined.

2.2 On 11 January 1995, the author received a termination notice for failure to accept alternate employment. On 27 July 1995, the adjudicator of the Public Service Staff Regulations Board directed the Speaker to re-instate the author to his previous position. Upon his return to work however, the author was advised that there was a new bilingual requirement (English and French), although, according to the author, the person who acted as a driver at that time only spoke English. The author was offered and followed a French language training, but on 8 April 1997, following the Speaker's Office refusal to let him return to work, he addressed a complaint to his employer, claiming that the bilingual requirement had not been issued *bona fide* and was discriminatory. On 29 May 1997, the author was advised that the driver position was to be made redundant. The author recalls that the Speaker of the House continued to enjoy the services of a driver after 29 May 1997. Subsequently, the author was transferred to another position.

2.3 On 10 July 1997, the author filed two complaints under the Canadian Human Rights Act, alleging discriminatory treatment in the course of employment, one against the House of Commons, and a second against the Speaker. On 25 April 2001, the Human Rights Tribunal dismissed motions by the House of Commons and the Speaker (who were arguing that the Canadian Human Rights Act does not apply to employees of Parliament). Following an appeal, the Federal Court ruled, on 4 November 2002, that the complaint proceed to a hearing before the Human Rights Tribunal. On 28 November 2002, the Federal Court of Appeal confirmed this decision. The House of Commons and the Speaker appealed against this decision to the Supreme Court of Canada.

2.4 On 20 May 2005, the Supreme Court ruled that parliamentary employees enjoyed the protection of the Human Rights Act (CHRA). It ruled, however, that alleged violations under the CHRA by the House of Commons, as an employer, should be subject to the grievance procedure under the Parliamentary Employment and Staff Relations Act. On 21 June 2005, the author filed a complaint under the Parliamentary Employment and Staff Regulations Act. On 28 March 2007, the adjudicator of the Public Service Labour Relations Board dismissed his complaint on ground of delay without reasonable explanation. In this connection, the author points out that in a similar case against the same employer, the Public Service Labour Relations Board granted an extension to the time to file a grievance (*Dupéré v. Canada* (House of Commons), 2007 FCA 180, para. 20).

2.5 The author initiated an appeal before the Federal Court but later abandoned it, as he considered that it would be futile in his situation, in particular having regard to sections 62 and 63 of the Parliamentary Employment and Staff Relations Act, according to which a complaint will not be adjudicated if it does not involve termination of employment or disciplinary actions.

The complaint

3.1 The author claims that the State party has failed to enact laws that provide him with effective protection from discrimination, as his status as an employee of Parliament precludes him from using the system for redress provided under the Canadian Human

Rights Act. He claims thus to be victim of violations of his rights under article 2, paragraphs 2 and 3, of the Covenant.²

3.2 The author further claims to be a victim of discrimination for which he did not have the possibility to receive redress under the State party's legal system. This is said to constitute a violation of his rights, by the State party, under both articles 2, paragraph 1; and 26, of the Covenant.

Issues and proceedings before the Committee

4.1 Pursuant to rule 93 of its rules of procedure, before considering any claim contained in a complaint, the Human Rights Committee must determine whether it is admissible under the Optional Protocol to the Covenant on Civil and Political Rights.

4.2 The Committee notes, first, that in the present case, the author claims a violation of his rights under article 2 of the Covenant, as he considers that the State party has failed to enact legislation that would provide him with effective protection from discrimination, as his status as an employee of Parliament precludes him from using the system for redress provided under the Canadian Human Rights Act. The Committee considers that the author has failed to sufficiently substantiate this particular claim, for purposes of admissibility, and declares this part of the communication inadmissible under article 2 of the Optional Protocol.

4.3 The Committee further notes that the author claims to be a victim of discrimination, in violation of his rights both under articles 2 and 26 of the Covenant, as he was unable to receive redress under the State party's legal system. In the circumstances of the present case, the Committee considers that this part of the communication is incompatible *ratione materiae* with the provisions of the Covenant, and that it is therefore inadmissible under article 3 of the Optional Protocol.

5. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) That the decision be transmitted to the State party and to the author.

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

² In this respect, the author refers to the concluding observations on the State party's fifth periodic report (CCPR/C/CAN/CO/5), where the Committee expressed, inter alia, "concern that human rights commissions still have the power to refuse referral of a human rights complaint for adjudication" (para. 11). He notes that the Committee has recommended to the State party to ensure "that its relevant human rights legislation is amended (...) and its legal system enhanced, so that all victims of discrimination have full and effective access to a competent tribunal and to an effective remedy" (ibid.).

**CC. Communication No. 1877/2009, *Bagishbekov v. Kyrgyzstan*
(Decision adopted on 30 July 2009, Ninety-sixth session)***

<i>Submitted by:</i>	Mr. S.B. (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Kyrgyzstan
<i>Date of communication:</i>	29 September 2008 (initial submission)
<i>Subject matter:</i>	Alleged refusal by State party administration to provide public information
<i>Procedural issue:</i>	Level of substantiation of claim
<i>Substantive issues:</i>	Freedom of expression; right to receive information
<i>Articles of the Covenant:</i>	2, paragraph 3; 19, paragraph 2 (a).
<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 July 2009,

Adopts the following:

Decision on admissibility

1.1 The author of the communication dated 29 September 2008 is Mr. S. B., a Kyrgyz national and human rights defender, born in 1979. He claims to be a victim of violation, by Kyrgyzstan, of his rights under article 2, paragraph 3 (a), and article 19, paragraph 2, of the International Covenant on Civil and Political Rights. The author is not represented.

1.2 The Optional Protocol entered into force for the State party on 7 January 1995.

The facts as presented by the author

2.1 In April 2007, the author requested the Legal Department of the Ministry of Justice of Kyrgyzstan to provide him with information on the number of death sentences pronounced in Kyrgyzstan between 9 November 2006 and 30 March 2007, as well as the names of the courts and the judges who had imposed such sentences. The author explains that he wanted to obtain this information because a new Constitution proclaiming the prohibition of death penalty had been adopted on 9 November 2006. For him, "it was particularly important to know" the number of persons sentenced to death penalty after the death penalty was abolished under the new Constitution.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Mohammed Ayat, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

2.2 On 10 May 2007, the Legal Department refused to provide him the requested information, on the basis that such statistics were produced for internal use only. In May 2007 (exact date not provided), the author complained against this refusal to the Bishkek Inter-district Court. On 13 September 2007, during the consideration of his case in court, the Legal Department provided information on the general number of persons sentenced to death penalty for the fourth quarter of 2006 and the first quarter of 2007. On 14 September 2007, the Bishkek Inter-district Court held that the Legal Department had to satisfy the author's request partly, and had to provide him with the information given by the Legal Department for the fourth quarter of 2006 (7 death sentences) and the first quarter of 2007 (3 death sentences). The author declared that he was not satisfied, because his request referred specifically to the period from 9 November 2006 to 30 March 2007, and he received no information on the courts that had handed down death sentences. According to him, the Court's decision thus constituted *de facto* a denial of his request for information.

2.3 On 23 October 2007, author's counsel filed an appeal against the Bishkek Inter-district Court in the Bishkek City Court, requesting the Legal Department to be obliged to provide comprehensive answer to his questions. On 21 November 2007, the Bishkek City Court confirmed the decision of the Bishkek Inter-district Court.

2.4 On 17 January 2008, the author's counsel submitted an application for supervisory review with the Supreme Court, requesting the annulment of the previous court decisions. On 10 April 2008, the Supreme Court upheld the previous decisions in the author's case.

The complaint

3. The author refers to article 14 of the Kyrgyz Constitution, pursuant to which everyone has the right to "*freely collect, store, and use information and disseminate it orally, in written or any other form*". He adds that on 23 January 2007, the Kyrgyz Parliament adopted a Law "On the access to information available to governmental authorities and local-government institutions". According to the provisions of this law, disclosure of information classified only as "top secret", "secret", or "confidential" is subject to restrictions. Information about death penalty sentences does not fall under any of these categories, and thus the author's rights under articles 2, paragraph 3 (a) and 19, paragraph 2, were violated by the State party.

Issues and proceedings before the Committee

Consideration of admissibility

4.1 Pursuant to rule 93 of its rules of procedure, before considering any claim contained in a complaint, the Human Rights Committee must determine whether it is admissible under the Optional Protocol to the Covenant on Civil and Political Rights.

4.2 The Committee notes that in the present case, the author has sought information from the Kyrgyz administration in relation to the exact number of death sentences, by court, pronounced after the adoption, in 2006, of the new Constitution abolishing the capital punishment. It notes that the author has not explained why exactly he, personally, needed the information in question; rather, he contended that this was a "matter of public interest". Under these circumstances, and in the absence of any other pertinent information, the Committee considers that the present communication constitutes an *actio popularis* and that therefore it is inadmissible under article 1 of the Optional Protocol.

5. The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under article 1 of the Optional Protocol;
- (b) That the decision be transmitted to the State party and to the author.

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

Annex IX

Follow-up of the Human Rights Committee on individual communications under the Optional Protocol to the International Covenant on Civil and Political Rights

This report sets out all information provided by States parties and authors or their counsel since the last annual report (A/63/40).

State party	Algeria
Case	<i>Boucherf, 1196/2003</i>
Views adopted on	30 August 2006
Issues and violations found	Disappearance, arbitrary arrest and detention – articles 7 and 9 of the Covenant in relation to the author’s son, and article 7 in relation to the author, in conjunction with a violation of article 2, paragraph 3
Remedy recommended	An effective remedy, including a thorough and effective investigation into the disappearance and fate of the author’s son, his immediate release if he is still alive, adequate information resulting from its investigation, and adequate compensation for the author and her family for the violations suffered by the author’s son. The State party is also under a duty to prosecute criminally, try and punish those held responsible for such violations. The State party is also under an obligation to take measures to prevent similar violations in the future. The Committee recalls the request made by the Special Rapporteur on New Communications and Interim Measures dated 23 September 2005 (see paragraph 1.2) and reiterates that the State party should not invoke the provisions of the draft amnesty law (Projet de Charte pour la Paix et la Réconciliation Nationale) against individuals who invoke the provisions of the Covenant or have submitted or may submit communications to the Committee.
Due date for State party response	14 August 2007
Date of State party response	None
State party response	None
Author’s comments	On 30 March 2006, the author’s mother had informed the Committee that since its Views were adopted, the State party had made no effort to implement them: no investigation had been carried out and no criminal prosecution/s made. Contradictory information was provided by the State party to the author’s mother. Firstly, she was told that the author had not disappeared and then on 14 July 2004 she received an official notification that he had disappeared, without any explanation. As no investigation had taken place and having received

information herself from a witness that her son had died in prison as a result of torture, she stated that she was not satisfied with the State party's explanation at the time that he had disappeared. She said that she may seek compensation on the basis of the official notification of disappearance. However, the receipt of such compensation would be subject to her future silence on the matter pursuant to the Amnesty Law (Charte pour la paix et la réconciliation nationale). She objected to this law, inter alia, as it results in impunity as well as much distress for the disappeared person's family and in certain cases is not even granted on the grounds that the spouse has an income. Such compensation under such a condition cannot be considered "appropriate" under international law.

On 11 September 2008, the author informed the Committee that the State party has still failed to implement its Views. Having been demoralised by the lack of an investigation into her son's disappearance and having financial difficulties she began the process under Ordinance 06-01 of the "Charte pour la paix et la réconciliation nationale", in accordance with which she subsequently received compensation. However, she has never given up her right to know what happened to her son and where he is buried. On 24 January 2008, she sent several letters to the President, the Chief of Government, several Ministers and the Public Prosecutor of the Hussein Court. The latter responded on 12 May 2008, that the investigation did not manage to find her son's remains. On 25 May 2008, she was summoned by the same Prosecutor and met by his assistants who forbade her to lodge any complaints, and gave her a declaration stipulating that her request was no longer within the competence of the Prosecutor given the fact that she had availed herself of the "Charte pour la paix et la réconciliation nationale". On 2 July 2008, the author wrote again to the Prosecutor reminding him of her right to know where her son has been buried and have the investigation completed as recommended by the Views.

Consultations with the State party

In light of the State party's failure to provide follow-up information on any of the Committee's Views (five cases in all: 992/2001, *Bousroual*; 1172/2003, *Madani*; 1085/2002, *Taright*; 1196/2003, *Boucherf*; 1297/2004, *Medjnoune*), the Secretariat on behalf of the Rapporteur requested a meeting with a representative of the Permanent Mission during the last session of the Committee which took place between 7 and 25 July 2008. A representative from the Permanent Mission in Geneva requested a formal written request for a meeting, which was duly sent to the mission on 11 July 2008 with suggested dates for a meeting, as requested. Unfortunately, the State party did not respond to this request.

A meeting was scheduled for the ninety-fourth session but it did not take place.

Committee's Decision

The Committee considers the dialogue ongoing.

State party	Algeria
Case	<i>Medjnoune Malik, 1297/2004</i>
Views adopted on	14 July 2006
Issues and violations found	Arbitrary arrest, failure to inform of reasons for arrest and charges against him, torture, undue pretrial delay – articles 7; 9, paragraphs 1, 2 and 3; and 14, paragraph 3 (a) and (c), of the Covenant.
Remedy recommended	An effective remedy, which includes bringing Malik Medjnoune immediately before a judge to answer the charges against him or to release him, conducting a full and thorough investigation into the incommunicado detention and treatment suffered by Malik Medjnoune since 28 September 1999, and initiating criminal proceedings against the persons alleged to be responsible for those violations, in particular the ill-treatment. The state party is also required to provide appropriate compensation to Malik Medjnoune for the violations.
Due date for State party response	16 November 2006
Date of State party response	None
State party response	None
Author's comments	On 12 February 2009, the author's lawyer submits that the State party has made no effort to implement the Committee's Views and that the author remains detained and without a hearing in his case for nearly 10 years. Since the Committee's decision, 19 other criminal cases have been heard by the court in Tizi-Ouzou. The author went on hunger strike on 31 January 2009, and the following day the prosecutor of the tribunal came to the prison to inform him that his case would be heard after the elections. A year ago, during his last hunger strike, the judicial authorities also made the same promise explaining that his case was "politically sensitive" and that they did not have the power to decide to hear his case.
Consultations with the State party	<p>The author's submission was sent to the State party on 16 February 2009 and no reply has been received to date.</p> <p>In light of the State party's failure to provide follow-up information on any of the Committee's Views (five cases in all: 992/2001, <i>Bousroual</i>; 1172/2003, <i>Madani</i>; 1085/2002, <i>Taright</i>; 1196/2003, <i>Boucherf</i>; 1297/2004, <i>Medjnoune</i>), the Secretariat on behalf of the Rapporteur requested a meeting with a representative of the Permanent Mission during the ninety-third session of the Committee (7 and 25 July 2008). Despite a formal written request for a meeting, the State party did not respond.</p> <p>A meeting was eventually scheduled for the ninety-fourth session but it did not take place.</p> <p>A new effort to arrange a meeting between the State party and the new Special Rapporteur should be arranged for the</p>

	ninety-seventh session in October 2009.
Committee's Decision	The Committee considers the dialogue ongoing.
State party	Austria
Case	<i>Perterer, 1015/2001</i>
Views adopted on	20 July 2004
Issues and violations found	Equality before the courts – Article 14, paragraph 1
Remedy recommended	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 payment of adequate compensation. The State party is also under an obligation to prevent similar violations in the future.
Due date for State party response	23 October 2004
Date of State party response	28 July 2008 (the State party had responded on 29 October 2004 and 8 March 2006)
State party response	<p>On October 2004, the State party had submitted that the office of the State Attorney and the Government of the Province of Salzburg were examining the author's claims for damages under the Austrian Official Liability Act. It also confirmed that the Views have been published.</p> <p>On 8 March 2006, the State party had submitted that the Views were published by the Federal Chancellery in English and in a non-official German version. The author made specific claims in a letter of 1 September 2004 vis-à-vis the Attorney General's Department and, after his claims were dismissed, he brought a liability action and a "State liability action" against the federal authorities and the State of Salzburg in the summer of 2005 with the Salzburg Regional Court. The federal authorities and the State of Salzburg submitted comments, rejecting his claims. His request for legal aid was granted at the second instance. Moreover, he also laid "an information" against the Senate of the Administrative Court determining his case, on which as far as the State party is aware no decision has yet been taken.</p> <p>The State party submits that the Ombudsman's Office, to which the author turned in the early autumn of 2004, was trying to reach a consensus in the form of a settlement between the State of Salzburg (as the Austrian authority responsible for the violations) and the author thus acting in conformity with the case-law of the European Court of Human Rights (ECHR). Against the background of the claims raised by the author, the Ombudsman's Office decided to make no further efforts for the time being.</p> <p>In its response dated 28 July 2008, the State party informed the Committee, as it had done in earlier responses that the Ombudsman Board, which is an independent body responsible to Parliament only, tried to mediate a settlement</p>

— on the basis of the case law on compensation of the ECHR — between the Province of Salzburg and the author. The State party would have welcomed such an agreement. However, his claims went far beyond the amount of compensation which would have been granted under the case law of the ECHR and, thus, for this reason the Ombudsman decided to discontinue its efforts to mediate in the case. The Board elaborated extensively on the case and explained why it considered further activities to be futile. The author is in regular contact with various Austrian authorities involved in the case and regularly publishes his views on several websites. The State party is of the view that the author is not interested in reaching an agreement with it. For this reason, the State party requests the Committee to discontinue this case under the follow-up procedure. In the Ombudsman's report, it highlighted its view that while the Committee's Views are not legally binding it would be unconscionable not to implement them. Thus, it considered the Views on the same level as decisions of the ECHR. In light of the violation found and for the purposes of providing a remedy it was decided that the case should be considered as if there had been a violation of ECHR. For this reason a figure of damages of 700 euros per year of court proceedings undergone plus an award of court costs of 3,500 euros would be appropriate compensation.

Author's comments

On 23 August 2008, the author provided what he refers to as a, "Legal statement" on follow-up to his case. According to this submission, the author has attempted to speak to the Chancellor, who it is believed is the competent representative of the State party. In his view, the Ombudsman does not represent the Government and is thus not competent to negotiate for it. As to the State party's reference to ECHR, the author states that apart from the fact that compensation from this court can amount to very large payments and *restitutio ad integrum*, this case does not concern a judgement of ECHR but the Committee, and thus it is irrelevant what ECHR would offer in such instances. In his view, the State party is under an obligation to ensure that he is put in the same position as he would have been had the decision which violated his rights not been made and that if this is not possible the payment of adequate damages. If his position had not been terminated he would have received his monthly salary and pension entitlements.

Committee's Decision

In light of the State party's response and despite the author's dissatisfaction with the quantum of compensation proposed by the Ombudsman, the Committee considers the State party's offer of compensation as a satisfactory response and does not intend to consider this matter any further under the follow-up procedure.

State party**Australia****Case*****Dudko, 1347/2005*****Views adopted on**

27 July 2007

Issues and violations found	Absence of unrepresented defendant during appeal – article 14, paragraph 1
Remedy recommended	Effective remedy
Due date for State party response	25 August 2008
Date of State party response	27 May 2008
State party response	On 27 May 2008, the State party had informed the Committee of new Rules of Court adopted by the High Court in 2004, which took effect from 1 January 2005. In recognition of the nature of special leave applications, these rules give primary emphasis to written arguments. If an applicant for special leave to appeal is not represented by a legal practitioner that applicant must present his or her argument to the Court in the form of a draft notice of appeal and written case. These documents are considered by two Justices who decide either that the papers should be served on the respondent or that the application should be dismissed without calling on the respondent to answer. Any application for special leave that has been served on the respondent (whether represented by a lawyer or not) may be decided without listing the application for hearing. Most applications for special leave are now decided by the Court without oral hearing. If the application reveals that the Court may be assisted by oral argument the application will be listed for hearing. In that event, if one of the parties is not represented by counsel, the Court will generally seek to arrange for counsel to appear for the party concerned without charging a fee. According to the State party, these changes reduce the likelihood of a situation such as the author's arising again. The State party also reaffirms that the outcome of the author's case was not affected by her absence or the absence of counsel appearing on her behalf.
Author's comments	On 24 August 2008, the author responded to the State party's submission. Her Counsel stated that he considers it unfair that, according to the new rules, it will be at the discretion of two judges how the papers are served on the applicant. In addition, the new rules do not change the situation for an applicant who does not have legal assistance. Thus, the amended rules are not an adequate remedy as the right to legal assistance is "absolute".
Committee's Decision	The dialogue is ongoing.
State party	Belgium
Case	<i>Sayadi and Vinck, 1472/2006</i>
Views adopted on	22 October 2008
Issues and violations found	Presence of authors' names on the United Nations sanctions committee's list – articles 12 and 17 of the Covenant.
Remedy recommended	The State party is bound to provide the authors with an effective remedy. Although the State party is itself not competent to remove the authors' names from the sanctions committee's list, the Committee is nevertheless of the view that the State party has the duty to do all it can to have their

	names removed from the list as soon as possible, to provide the authors with some form of compensation and to make public the requests for removal.
Due date for State party response	1 June 2009
Date of State party response	None
State party response	None
Other	On 20 July 2009, the Secretariat received information to the effect that the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities finally decided to remove Mr. Sayadi and his wife from the sanctions list.
Author's comments	None
Committee's Decision	While welcoming the removal of the authors from the sanctions list, the Committee awaits information from the State party on the full implementation of its Views. The Committee considers that the follow-up dialogue is ongoing.
State party	Colombia
Case	<i>Sanjuán Arévalo brothers, 181/1984</i>
Views adopted on	3 November 1989
Issues and violations found	Disappearance, arbitrary detention – articles 6 and 9.
Remedy recommended	Relevant measures taken by the State party in respect of the Committee's Views and, invites the State party to inform the Committee of further developments in the investigation of the disappearance of the Sanjuán brothers.
Due date for State party response	None. (No follow-up procedure in place at the time of adoption).
Date of State party response	Not known
State party response	On an unknown date after the adoption of the Views on 3 November 1989, the State party indicated to the Committee that in the absence of a specific remedy recommended by the Committee, the Ministerial Committee set up pursuant to Act No. 288/1996 did not recommend that compensation be paid to the victim.
Author's comments	On 31 July 2008, sisters of Alfredo Rafael and Samuel Humberto Sanjuán Arévalo (Sanjuán brothers), requested the Committee to urge the State party to compensate the Sanjuán brothers' family for the damages caused due to their unlawful detention and forced disappearance. According to the authors, the State party refuses to grant any compensation, as compensation was not specifically recommended as a remedy by the Committee (resolution 15/1996, Ministry of Foreign Affairs). Apparently, the relatives of the other 11 people who were with the Sanjuán brothers and who were detained and involuntarily disappeared as well, have been compensated, because their case was presented to the Inter-American Commission of

	Human Rights, which concluded (report 1/92, case No. 10235) that “Colombia should grant compensation to the victims’ relatives”.
Consultations with the State party	The Committee members were reminded that on 18 July 2008, during the ninety-third session, a meeting was attended by Ivan Shearer, Special Rapporteur on follow-up, members of the Secretariat, Ms. Alma Viviana Perez Gomez and Mr. Alvaro Ayala Melendez from the Colombian permanent mission (see A/63/40, Vol. II, <i>Nydia Erika Bautista, Case No. 563/1993</i> , p. 523). The State party representatives responded on all of the Views adopted by the Committee. Of relevance to this case is the State party’s response on compensation generally. The representatives referred to a written response from the State party (dated 18 July 2008) in which it stated in relation to the payment of compensation in four cases (<i>Fals Borda</i> No. 46/1979; <i>Salgar de Montejo</i> , No. 64/1979; <i>Sanjuan Arevalo brothers</i> , No. 181/1984; and <i>Fei</i> , No. 514/1992), that, as the Committee did not specifically recommend compensation in these cases, under Law 288/1966, the Committee of Ministers cannot make such a recommendation.
Committee’s Decision	The Committee considers the dialogue ongoing.
State party	Germany
Case	<i>M.G., 1482/2006</i>
Views adopted on	23 July 2008
Issues and violations found	Interference to privacy honour and reputation disproportionate and thus arbitrary – article 17, in conjunction with article 14, paragraph 1
Remedy recommended	An effective remedy including compensation.
Due date for State party response	27 February 2009
Date of reply	13 February 2009
State party response	The State party submits that the legal proceedings giving rise to the communication are still pending before the Ellwangen Regional Court (Landgericht). The course of the proceedings up to May 2008 was summarized in the Views (A/63/40, Vol. II, annex V, communication No. 1482/2006, paragraphs 8.1 to 8.12). The President of the Ellwangen Regional Court has informed the Ministry of Justice that the third Chamber of the Court plans to schedule an oral hearing for March 2009, to which both parties will be summoned to attend in person. No experts will be invited to attend the hearing. The Chamber intends to give both parties the opportunity to state their views regarding the Views of the Committee. The hearing is meant to provide the author with an opportunity to state her case regarding the matters raised in the communication, and to remedy the lack of a personal hearing before the order of November

2005.

The State party mentions that the composition of the Chamber has completely changed since November 2005. In the State party's view, these measures provide adequate reparation as set out in the Committee's general comment No. 31(2004) on the nature of general legal obligations imposed on State parties to the Covenant (para. 16).

On the issue of compensation, to date the author has not filed any claims for compensation with the Federal Government. There has been a note requesting the payment of a clearly exaggerated sum for unsubstantiated costs from Jürgen Hass who claims to have acted on behalf of the author. Mr. Hass has not produced any power of attorney. Mr. Hass has an extensive criminal record in Germany and is currently residing in Paraguay. He has been sentenced in Germany for a variety of offences, including fraud and fraudulent use of professional titles. There are no indications that he has in any way materially contributed to the case in question. His note has therefore been disregarded.

According to the State party, as the Views of the Committee refer only to the question of issuing an order for medical examination by the court without previously hearing the author in person, they have no bearing on the distribution of costs in the legal proceedings giving rise to the communication, which will depend on the eventual outcome of these proceedings.

The State party submits that the Views of the Committee have been translated into German. The Federal Ministry of Justice has sent the translated Views together with a legal analysis – to the effect that the Views require the courts generally to issue orders for an examination of someone's capacity to take part in the proceedings only after an oral hearing – to the Ministries of Justice of the Länder, requesting them to inform the courts.

The Länder have informed the Federal Ministry of Justice that the Views have been made known to all the Higher Regional Courts, who in turn will distribute them to the lower courts. The Federal Courts of Justice have been informed likewise. In addition, the Views of the Committee have been published in German on the Website of the Federal Ministry of Justice.

Author's comments

Awaiting author's comments

Committee's Decision

The follow-up dialogue is ongoing.

State party

Greece

Case

Kalamiotis, 1486/2006

Views adopted on

24 July 2008

Issues and violations found	Torture, or cruel, inhuman or degrading treatment and punishment, obligation to investigate complaints maltreatment, effective remedy – Article 2, paragraph 3, read together with article 7 of the Covenant
Remedy recommended	Effective remedy and appropriate reparation
Due date for State party response	30 January 2009
Date of State party response	19 January 2009
State party response	<p>The State party submitted that the author may institute an action for compensation under article 105 of the Introductory Law to the Civil Code for damages suffered due to his ill-treatment. According to article 105, “The State shall be liable for compensation for illegal acts or omissions of organs of the State in the exercise of the public power entrusted to them, unless such acts or omissions violated a provision of general interest ...”</p> <p>The State party submitted that its courts often award large amounts of compensation for such violations. In addition, the effectiveness and appropriateness of this type of remedy has been confirmed in the context of judgements of the European Court of Human Rights (ECHR), in respect of which the State party’s Court of Cassation considered that the victim/s in question could institute a claim under articles 104 and 105 of this law for compensation pursuant to a finding in their favour by the ECHR. According to the State party, in this regard the decisions of the Human Rights Committee are analogous to that of the ECHR, and the only question to be considered by the courts with respect to such a claim would be the amount of compensation to be paid.</p> <p>The State party also submitted that the Views would be published on the website of the Legal State Council and transmitted to the President, the Public Prosecutor of the Court of Cassation, and the Hellenic Police</p>
Author’s comments	<p>On 30 March 2009, the authors submit that despite what was promised by the State party, the Views have not yet been published on the website of the Legal Council of State. In the author’s view, the State party has in effect rejected the Committee’s Views and refers to the response on 22 September 2008 by the Minister of Justice to a question on the follow-up to this case in which the Minister refuted the Committee’s decision. The author informs the Committee that there is no indication that any domestic investigation will be re-opened to ensure punishment of the police officers involved. In this context, he attaches information sent from the State party to the Committee of Ministers of the Council of Europe concerning the execution of judgements of the ECHR, in which it refers to the State party’s intention to have the competent prosecutor re-examine the files of certain cases. In the author’s view,</p>

the same procedure should be applied in his case.

As to the State party's claim that the author can seek compensation by filing a lawsuit, the author submits that the limitation period for such claims is five years and thus expired on 31 December 2006; the courts are extremely slow at considering these type of cases for which ECHR have found many cases against the State party; and in addition this is not the most appropriate procedure, as this administrative court is normally seized of cases which first demand a finding of liability of the State and then as to quantum of compensation. In the current case, it is merely a question of the amount of compensation to be awarded with the Legal Council of State has the authority to approve. As the State party has acknowledged that the Views are equivalent to the judgements of ECHR and constitute *res judicata* leaving only the question of the amount of compensation to be decided, the author submits that the amounts awarded in similar Greek cases by ECHR can serve as a fair basis for his compensation through a similar decision of the Legal Council of State and the Minister of Economy and Finance.

Committee's Decision	The follow-up dialogue is ongoing.
State party	Iceland
Case	<i>Haraldsson, 1306/2004</i>
Views adopted on	24 October 2007
Issues and violations found	Discrimination in business of commercial fishing quotas – article 28.
Remedy recommended	An effective remedy, including adequate compensation and review of its fisheries management system.
Due date for State party response	2 June 2008
Date of State party response	26 February 2009 (the State party had also responded on 11 June 2008.)
State party response	On 11 June 2008, the State party had provided a detailed response to the Committee's Views, which is only summarized below. The State party provided detailed information on the development of fishing rights in the State party and submitted that it could not infer from the Views how far it should go for its measures to be considered "effective". It asked the Committee whether minor adaptations and changes in the Icelandic Fisheries Management System would suffice or whether more radical changes were needed. In any event, it was of the view that caution was required and that overturning the Icelandic fisheries management system would have a profound impact on the Icelandic economy, and in some respects it would appear to be impossible to wind down the system e.g. by recovering the quota for the State, unless the State treasury were prepared to pay some sort of compensation to the persons affected by the confiscation. The State party submitted that the manifesto of the Government at the time

included a decision to “conduct a study of the experience of the quota system for fisheries management and the impact of the system on regional development” but that this was a long term plan and the system could not be dismantled in six months. The State party submitted that there were no grounds for paying compensation to the authors, as this could result in a run of claims for compensation against the State; and such claims are untenable under Icelandic law. To ensure equality, the State would have to compensate all those who found themselves in a similar situation and it would constitute an admission that anyone who possesses or buys a vessel holding a fishing permit would be entitled to allocation of catch quotas. This would have unforeseeable consequences for the management of the State party’s fisheries resources, protection of the fish stocks around Iceland and economic stability in the country.

Author’s comments

On 10 August 2008, the authors responded in detail to the State party’s submission. They argued that despite the State party’s claim that compensation may have to be paid to fishing operators if the foundation of the fisheries management system is removed, the provision of the Constitution referred (s 75.1) to does not provide for compensation for such restriction, as in cases when ownership rights according to the section are restricted. They referred to a decision of the Supreme Court, which they claim supports their view. They claimed that they were disappointed by the State party’s reply, which contained no plans, or even suggestions, on how to make the Icelandic fisheries management system conform with article 26. The authors understood the Committee’s suggested remedy of “review” to mean an obligation on the State party to revise and change the system and regarded the State party’s long term plan as of no value in achieving this goal. As to the effect that it would have on the economy, the authors stated that if all catch entitlements were put up for sale in order to comply with article 26, supply would be greatly increased, and their prices would accordingly fall, as dictated by the laws of supply and demand, and thus would not have such a profound effect on the economy as anticipated by the State party. As to the claim of a run of claims for compensation from others in the event that the authors were granted compensation, they argued that the danger of compensation liability to others was not a valid reason for denying compensation to them. Others seeking relief would have to do so through the courts and each case would be considered on its merits. They also argued that if the system was itself made lawful before others sought redress, there would be no compensation, as a remedy would have already been provided. Finally, they informed the Committee that on 8 May 2008, the Supreme Court informed them that their request to reopen the case on the basis of the Committee’s Views had been denied.

On 6 August 2008, the Committee received a response

	<p>from the Icelandic Liberal party, an opposition party represented in the Icelandic Parliament. The Liberal Party supported the Committee's Views and stated that it has been campaigning against the fisheries management system since 1998. Upon adoption of the Committee's Views, the Liberal Party submitted a draft parliamentary resolution advocating compliance with the Views. Parliament has not yet had the opportunity to comment on the proposal.</p>
State party further response	<p>On 26 February 2009, the Minister of Fisheries and Agriculture responded to all the information provided to date. He affirmed the commitment of the current Government to honour the promises made by its predecessor set out in its reply to the Views on 11 June 2008. He referred to the collapse of the majority coalition Government at the end of January and the taking of office of the current minority Government on 1 February 2009. Elections had been scheduled for 25 April 2009. He also informed the Committee of the effect of the global financial crisis on the State party, which had necessitated the intervention of the International Monetary Fund (IMF). Given the financial, economic and political circumstances, he requested, on behalf of the State party, the Committee's understanding of the need for a longer time frame to fulfil its commitments.</p>
Committee's Decision	<p>The Committee considers the dialogue ongoing.</p>
State party	Jamaica
Case	<i>Simpson, 695/1996</i>
Views adopted on	23 October 2001
Issues and violations found	Inhuman conditions of detention and absence of legal representation – article 10, paragraph 1, 14, paragraph 3 (d).
Remedy recommended	An appropriate remedy, including adequate compensation, an improvement in the present conditions of detention and due consideration of early release.
Due date for State party response	5 February 2002
Date of reply	18 June 2003
State party response	<p>On 18 June 2003, the State party had advised that the author had received medical attention and that his detention conditions had improved. The Courts would need to decide on his parole eligibility – the Registrar of the Court of Appeal was making arrangements for the matter to be placed before a judge of the court. The assignment of legal representation was being awaited.</p>
Author's comments	<p>On 18 February 2002, counsel had asked whether the State party had responded with follow-up information. He noted that the author's non-parole period had still not been reviewed as required by law since the commutation of his death sentence in 1998, rendering him ineligible for parole. In addition the State party had taken no steps to address the</p>

	author's medical problems.
	On 26 March 2008, the author informed the Committee that his conditions of detention had worsened and that he had not been considered for release.
	On 1 September 2008, the author informed the Committee that his lawyer had lodged an application for parole on the basis of the Mc Cordie Morrison judgement delivered on 2 March 2004, which decided that an automatic right to apply for parole arises where a case has not been reviewed by a judge of the Court of Appeal within seven years from the imposition of a life sentence commuted from a death sentence. As the author's death sentence was commuted on 22 December 1997, he should have been eligible for parole in December 2005 but was not informed by his lawyer until 2006. An application was made on his behalf on 18 October 2006.
Committee's Decision	The follow-up dialogue is ongoing.
State party	Nepal
Case	<i>Sharma, 1469/2006</i>
Views adopted on	28 October 2008
Issues and violations found	Disappearance, failure to investigate – articles 2, paragraph 3; 7, 9; 10; and 2, paragraph 3, read together with article 7, 9 and 10 with regard to the author's husband; article 7, read together with article 2, paragraph 3, with regard to the author's herself.
Remedy recommended	An effective remedy, including a thorough and effective investigation into the disappearance and fate of the author's husband, his immediate release if he is still alive, adequate information resulting from its investigation, and adequate compensation for the author and her family for the violations suffered by the author's husband and by themselves. While the Covenant does not give individuals the right to demand of a State the criminal prosecution of another person, the Committee nevertheless considers the State party duty-bound not only to conduct thorough investigations into alleged violations of human rights, particularly enforced disappearances and acts of torture, but also to prosecute, try and punish those held responsible for such violations.
Due date for State party response	28 April 2009
Date of reply	27 April 2009
State party response	The State party submits that Mrs. Yeshoda Sharma, will be provided with the sum of NRs. 200,000.00 (around 1,896.67 euros) as an immediate remedy. With respect to an investigation, the case of the alleged disappearance of Mr. Surya Prasad will be referred to the Independent

	Disappearance Commission to be constituted by the Government. A Bill has already been submitted to the Parliament and once legislation has been enacted, the Commission is being constituted as a matter of priority.
Author's comments	Awaiting author's comments
Consultations with the State party	A meeting should be arranged between the State party and the Rapporteur during the ninety-seventh session in October 2009.
Committee's Decision	The Committee considers the dialogue ongoing.
State party	Norway
Case	<i>A. K. H. A., 1542/2007</i>
Views adopted on	17 July 2008
Issues and violations found	Review of conviction and sentence – article 14, paragraph 5
Remedy recommended	Effective remedy, including the review of his appeal before the Court of Appeals and compensation.
Due date for State party response	2 March 2009
Date of reply	27 February 2009 and 28 May 2009
State party response	<p>On 27 February 2009, the State party submitted that upon a review of the relevant law, the Supreme Court concluded that all the Court of Appeal's decisions on denial of leave to appeal, according to the Criminal Procedure Act, section 231, subsection 2, shall include reasons for its decision. In this regard, in its judgement of 17 July 2008, the Supreme Court made reference to the Committee's Views. In addition, the Ministry of Justice has stated that it will take the initiative to amend the Criminal Procedure Act, so that the applicable requirement for written reasons in such circumstances is expressed in the wording of the Act. In addition, the State party submitted that it published the Committee's Views on the Court Administrations' homepage and the government page and that the Views were also referred to several times in the Norwegian media.</p> <p>In December 2008, the Ministry of Justice paid a total of NOK 194,100 to the plaintiff's counsel, which partly covers the counsel's work on the case before the Committee (NOK 184,100) and partly translation expenses (NOK 10,000). Following a request for additional compensation from the author for damages for non-economic loss, on 28 October 2008 the Attorney General informed the author that the claim for additional compensation cannot be settled until the author's application for leave to appeal has been tried by the courts once again.</p> <p>On 27 December 2008, the Norwegian Criminal Cases Review Commission decided to reopen the Appeals</p>

Selection Committee of the Supreme Court's decision 19 July 2006 in the author's case. In its reasons for re-opening the case, the Review Commission refers to section 391 No. 2 b of the Criminal Procedure Act, which sets out the circumstances in which a case may be reopened following a decision by the Human Rights Committee.

Author's comments

On 24 March 2009, the author welcomed the measures taken so far by the State party, however submitted that he has not been awarded full compensation in accordance with the Committee's decision. According to the author, the Ministry of Justice and the Attorney General have stated that his claim for compensation cannot be settled until his application reopening his leave to appeal has been heard in court. Moreover, the Attorney General claims that compensation will only be awarded if the author is in fact given leave to appeal and the conviction against him is changed by the Court of Appeal. The author considers the Attorney General's view as disregard for the State party's obligations under the Covenant and that he should be entitled to compensation for the human rights violation in itself, irrespective of the outcome of his application for review. He submits that the Committee did not qualify the obligation to provide compensation with any such conditions and that compensation should be awarded to remedy a violation which he has already been made a victim of.

The author also disagrees with another of the Attorney General's arguments, that compensation will only be awarded as provided for under Norwegian law, and only if the criteria under Norwegian law are fulfilled. According to the author, if the Committee had wished to tie the entitlement to compensation to the Norwegian rules concerning damages, the Committee would have expressed itself differently. For example, it would have requested "compensation according to law". In the author's view, if the Attorney General's argument was accepted it would mean that compensation for human rights violations as ordered by the Committee would become essentially futile. Any State could simply avoid its obligation by way of its national laws.

Finally, the author provided detailed information of the losses he has suffered to date as a result of the judgement and prison sentence, inter alia: the loss of his house; indebtedness to the amount of approximately 437,500 euros; is currently a disabled pensioner; the bank refusal to disburse his credit insurance and the town treasurer extracts tax payments as deductions from his disability pension. He is also threatened with bankruptcy.

State party's further comments

On 28 May 2009, the State party refutes the author's allegations that it has failed to adequately follow-up on the

Views and reiterates the measures already taken by the State party. It states that since 19 December 2008, the Norwegian Court of Appeal and the Supreme Court have given reasons for their denials of leave to appeal and that the proposal for an amendment of the Criminal Procedure Act will be sent for public hearing in May 2009.

As to the author's case, the State party states that on 26 January 2009, the Appeal Committee of the Supreme Court decided that the decisions of the Borgarting Appeal Court of 1 June 2006, to deny the appeal from the author in the criminal case against him, should be quashed, and that his appeal shall be tried again by one of the other courts of appeal, Gulating Appeal Court. The Government expects the decision soon.

In the State party's view, the economic losses that the author claims to be caused "by the human rights violations", were not caused by the Borgarting Appeals Court's failure to give reasons for its denial of appeal, but rather by the fact that the author was convicted by the districted court and has served his time in prison. All losses described in counsel's letter of 24 March 2009 appear to flow from his conviction as such. Whether this conviction was correct or erroneous is still a pending issue, but will, in due course, be decided by the Gulating Appeal Court. If his is acquitted then he has been subject to unwarranted prosecution, at which point he will have the right to both pecuniary and non-pecuniary losses. If his conviction is confirmed, neither it nor his time in prison has been unwarranted. However, even so, he may file a claim for compensation for pecuniary and/or non-pecuniary losses pursuant to a special rule in the Criminal Procedure Act. The State party makes reference to the Committee's general comment No. 31 (2004) for the proposition that remedies do not have to be in the form of pecuniary compensation.

Author's further comments	On 2 June 2009, the author reiterates that the State party's decision to date to pay compensation only for legal expenses does not fulfil the Committee's requirement for "compensation" set out in its Views. The claims for compensation the author may make under the Criminal Procedure Act are tied to a different set of circumstances and do not relate to the violation of his rights under article 14 of the Covenant.
Committee's Decision	The follow-up dialogue is ongoing.
State party	Peru
Case	<i>Victor Campos, 577/1994</i>
Views adopted on	6 November 1997
Issues and violations found	Ill-treatment in detention, public display in a cage, detention in isolation, faceless judges – articles 7, 10,

	paragraph 1, and 14, paragraph 1.
Remedy recommended	The Committee considers that Mr. Polay Campos should be released unless Peruvian law provides for the possibility of a fresh trial that does offer all the guarantees required by article 14 of the Covenant.
Due date for State party response	9 April 1998
Date of State party response	21 March 2008 (the State party had responded on 14 April and 2 June 1998)
State party response	<p>The Committee will recall that in its submission of April and June 1998, the State party had contested the Committee's findings in this case. It stated that a sentence can be reviewed by an extraordinary appeal measure, the recourse of revision foreseen in article 361 of the Code of Criminal Procedure. The Supreme Court has the power to annul the imposed sentence and order a retrial.</p> <p>On 25 May 2009, the State party responded to a request from the Secretariat of 20 October 2008 for an update on this case. It submitted that on 21 March 2006, the National Criminal Court sentenced him to two years imprisonment and 5,000,000 PEN (around 1,640,000 US dollars) for crimes inter alia of terrorism, and aggravated terrorism. Following an extraordinary appeal on 12 March 2008, the permanent criminal chamber of the Supreme Court confirmed the judgment but increased the sentence to 35 years of prison. (It is not clear whether the case in question relates to the subject matter of the Views of the Committee)</p>
Author's comments	Awaiting the author's comments.
Committee's Decision	The follow-up dialogue remains ongoing.
Case	<i>Gutierrez Vivanco, 678/1996</i>
Views adopted on	26 March 2002
Issues and violations found	Undue delay, no impartiality or independence, faceless judges – article 14, paragraphs 1 and 3 (c).
Remedy recommended	The State party has the obligation to provide an effective remedy, including compensation, to Mr. José Luis Gutiérrez Vivanco. In addition, the State party has the obligation to ensure that similar violations do not occur in the future
Due date for State party response	25 September 2002
Date of State party response	15 January 2009
State party response	The State party informs the Committee that the author has not filed a lawsuit against the State party claiming damages. By resolution dated 24 December 1998, he was pardoned and, thus, all warrants of arrest against him have been cancelled and all criminal records arising from this

	process have been deleted.
Author's comments	Awaiting reply.
Committee's Decision	The follow-up dialogue is ongoing.
Case	<i>Gómez Casafranca, 981/2001</i>
Views adopted on	22 July 2003
Issues and violations found	Torture, liberty and security of person, – articles 7; 9, paragraphs 1 and 3; 14 and 15.
Remedy recommended	The State party is under an obligation to release Mr. Gómez Casafranca and pay him appropriate compensation.
Due date for State party response	19 November 2003
Date of State party response	15 January 2009
State party response	The State party informs the Committee that the trial against the author and others for crimes against public order is currently pending at the Penal Chamber of the Supreme Court.
Author's comments	Awaiting comments.
Committee's Decision	The follow-up dialogue is ongoing.
Case	<i>Celis Laureano, 540/1993</i>
Views adopted on	25 March 1996
Issues and violations found	Disappearance, protection of a minor, torture, right to life – articles 6, paragraph 1; 7; and 9, paragraph 1; 2, paragraph 1; 24, paragraph 1.
Remedy recommended	The State party to open a proper investigation into the disappearance of Ana Rosario Celis Laureano and her fate, to provide for appropriate compensation to the victim and her family, and to bring to justice those responsible for her disappearance, notwithstanding any domestic amnesty legislation to the contrary.
Due date for State party response	30 July 1996
Date of State party response	15 January 2009
State party response	The State party informed the Committee that despite the investigations having been carried out to date the whereabouts of Ana Celis Laureano are unknown. In view of the fact that her participation in the terrorist organization “Shining Path” (<i>Sendero Luminoso</i>) has been proven, she could be in hiding.
Author's comments	Awaiting comments
Committee's Decision	The follow-up dialogue is ongoing.

Case	<i>K.N.L.H, 1153/2003</i>
Views adopted on	24 October 2005
Issues and violations found	Abortion, right to a remedy, inhuman and degrading treatment and arbitrary interference in one's private life, protection of a minor – articles 2, 7, 17, 24.
Remedy recommended	In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to furnish the author with an effective remedy, including compensation. The State party has an obligation to take steps to ensure that similar violations do not occur in the future.
Due date for State party response	9 February 2006
Date of State party response	7 March 2006
State party response	<p>The Committee will recall that as set out in the annual report A/61/40, Vol. II, the State party had informed it of the publication of a report by the national human rights Council (<i>Consejo Nacional de Derechos Humanos</i>), based on the K.N.L.H. case. The report proposed the amendment of articles 119 and 120 of the Peruvian Criminal Code or the enactment of a special law regulating therapeutic abortion. The National human rights council had required the Ministry of Health to provide information as to whether the author had been compensated and granted an effective remedy. No such information was provided in the letters sent by the Health Ministry in reply to the National Human Rights Council.</p> <p>The Committee will also recall that during consultations with the State party on 3 May 2006, Mr. José Burneo, Executive Secretary of the National Human Rights Council of Peru, said that the absence of a response was deliberate, as the question of abortion was extremely sensitive in the country. His Office was nevertheless thinking of drafting a bill allowing the interruption of pregnancy in cases of anencephalic foetuses.</p>
Author's comments	<p>By letter of 16 June 2006, the Centre for Reproductive Rights (which represents the author) had contended that by failing to provide the complainant with an effective remedy, including compensation, it had failed to comply with the Committee's decision.</p> <p>On 6 March 2007, the author informed the Committee that the new Government has continued to question the Committee's Views. On 1 December 2006, the author met with representatives of the Human Rights Council (<i>Consejo Nacional de Derechos Humanos</i>) who also spoke for the Ministry of Justice. In that meeting, the State party's representatives explained that the State was willing to comply with the Committee's Views. However, the author considered that the government proposed action, which would consist in the payment of \$10,000 dollars in</p>

compensation as well as the introduction of a proposal to amend legislation in order to decriminalize abortions in cases of anencephalic foetuses, to be insufficient. Compensation would reportedly be made only in relation to the violation of article 24 of the Covenant, as the State party representatives allegedly indicated that they considered that there had been no violation of other articles of the Covenant. She contended that, in fact, such legislative change is unnecessary as therapeutic abortion already exists in Peru and should be interpreted in accordance with international standards to include cases where the foetus is anencephalic.

The author recalled that the Constitutional Court of Peru (*Tribunal Constitucional Peruano*) has considered that the Committee's Views are definitive international judicial decisions that must be complied with and executed in accordance with article 40° of Law No. 23506 and article 101° of the Constitution.¹ She provides a detailed proposal for reparations totaling \$96,000 dollars (the proposal includes \$850 dollars for payment of expenses such as the birth and baby's burial, \$10,400 dollars for psychological rehabilitation, \$10,000 dollars for diagnostic and treatment of physical consequences, \$50,000 dollars for moral damages and \$25,000 for "life project" (lost opportunities). The State party should retract its proposal in which women seeking a therapeutic abortion must seek a judicial authorisation.

On 7 January 2008, the author submitted that there are currently no technical guidelines or procedures regarding the voluntary termination of pregnancy that could provide guidance to women and doctors, at the national level, on how to terminate a pregnancy because of medical reasons. The Ministry of Health had prepared a proposal, which was submitted to the Cabinet in May 2007, for their review and advice. Those guidelines are currently with the Minister of Health, but according to the author, there is a lack of political will to approve them. The State party has not taken any measures to allow women to have safe therapeutic abortions. It has made changes to the Penal Code, allowing for therapeutic abortion in case of anencephaly, but not for other reasons that also may cause harm to women's mental health. The author has not accepted the offer of \$10,000 made to her, as: (1) Peru has not accepted responsibility in relation to violations of articles 2, 7 and 17 of the Covenant and (2) The compensation offered is not commensurate to the damage caused. The State party has not yet published the Views.

¹ Tribunal Constitucional Peruano, *En la acción de amparo por Rubén Toribio Muñoz Hermoza*, EXP.N° 012-95-AA/TC. The authors also refer to a decision by the same court in 105-2001-AC/TC.

On 17 March 2009, the author informed the Committee that with respect to the obligation to prevent similar incidents in the future, there is a need for the State party to adopt legislation regulating the legalization of abortion. A “medical protocol”, in accordance with the World Health Organization (WHO) guidelines, is a much needed instrument. As of now, there is no such medical protocol to set guidelines for therapeutic abortion in Peru, and the State party has no intention of issuing such a document. With respect to proposed “technical guidelines” mentioned in the communication, the author states that there hasn’t been much progress. The guidelines were the object of an adverse legal opinion by one of the ministries. Hospitals continue to fail to perform therapeutic abortions and a medical protocol approved by a local government has been suspended. During 2008, there were 12 cases similar to that of Karen Llantoy (anencephalic foetuses) and the women did not benefit from terminations of their pregnancies, hence, the State party is not complying with its obligations as directed by the Committee. The State party has ignored the petition made by Cladem pursuant to the views to issue the guidelines. The State party is studying a project for a new law which would further restrict the possibilities for women to have abortions. The State party offered \$10,000 in 2007, which the author rejected, because the State party does not recognize the violations of the Covenant and because is not commensurate with the damage suffered. The Views have not been disseminated nor published so far.

Committee’s Decision	The follow-up dialogue is ongoing.
State party	Philippines
Case	<i>Pimentel et al., 1320/2004</i>
Views adopted on	19 March 2007
Issues and violations found	Unreasonable length of time in civil proceedings, equality before the Courts – article 14, paragraph 1 in conjunction with article 2, paragraph 3.
Remedy recommended	Adequate remedy, including compensation and a prompt resolution of their case on the enforcement of the United States judgement in the State party.
Due date for State party response	3 July 2007
Date of State party response	24 July 2008
State party response	The State party informs the Committee that on 26 February 2008, the presiding judge of the Regional Trial Court issued an order setting the case for judicial dispute resolution (JDR). Three JDR conferences have already taken place, however due to the confidentiality of the process no further information on the status of the process

	may be divulged.
Author's comments	<p>On 1 October 2007, the authors had informed the Committee that the State party had failed to date to provide them with compensation and that the action to enforce the class judgement remained in the Regional Trial Court of Makati following remand of the case in March 2005. It was not until September 2007, that the court determined, per motion for consideration, that service of the complaint on the defendant estate in 1997 was proper. The authors requested the Committee to demand of the State party prompt resolution of the enforcement action and compensation. Following the jurisprudence of the European Court of Human Rights (ECHR), inter alia <i>Triggiani v. Italy</i> (1991) (series A No. 197), and other reasoning, including the fact that the class action is made up of 7,504 individuals, they suggest a figure of 413, 512,296 dollars in compensation.</p> <p>On 22 August 2008, the authors responded to the State party's submission of 24 July 2008. They confirm that they met with the presiding judge on several occasions to discuss settlement and that although they made earnest proposals the Marcos Estate showed no interest in doing so. By order of 4 August 2008, the JDR phase was terminated. According to the authors, the State party's delay in the enforcement proceedings, at the time of their submission extending 11 years, is part of a pattern and practice by the State party to ensure that the class never realizes any collection on its United States judgement, and provides other examples of this practice. The authors require the Committee to quantify the amount of compensation (and other relief), to which they claim the Committee has already held the class to be entitled. (The Order of 4 August 2008 states, "Considering that this case has been pending in the courts for 11 years already, it is imperative that trial on the merits commence without further delay." The records of the case have been sent back to the Regional Trial Court for "proper disposition".)</p>
Committee's Decision	The follow-up dialogue is ongoing.
Case	<i>Lumanog and Santos, 1466/2006</i>
Views adopted on	20 March 2008
Issues and violations found	Undue delay with respect to review of conviction and sentence to higher tribunal – article 14, paragraph 3 (c).
Remedy recommended	Effective remedy, including the prompt review of their appeal before the Court of Appeals and compensation for the undue delay.
Due date for State party response	10 October 2008

Date of State party response	11 May 2009
State party response	The State party explains what action has been taken to date since the case in question as brought before the Supreme Court. On 13 August 2008, following a request by the petitioners to declare unconstitutional the penalty of <i>reclusion perpetua</i> without the benefit of parole”, the third division of the court transferred this case to the Court En Banc. On 19 January 2009, this Court requested the parties to submit their respective memoranda and has been waiting for compliance with this resolution since then.
Author’s comments	Awaiting comments
Committee’s Decision	The follow-up dialogue is ongoing.
State party	The Republic of Korea
Case	<i>Yeo-Bum Yoon, 1321/2004; Myung-Jin Choi, 1322/2004; Hak-Cheol Shin, 926/2000; Keun-Tae Kim, 574/1999; Jong-Kyu Dohn, 518/1992; Jeong-Eun Lee, 1119/2002; Kang, 878/1999; and Park, 628/1995.</i>
Views adopted on	1321/2004 and 1322/2004 – 3 November 2006 926/2000 – 16 March 2004 574/1999 – 3 November 1998 518/1992 – 19 July 1995 1119/2002 – 20 July 2005 878/1999 – 15 July 2003 628/1995 – 20 October 1998
Issues and violations found	Conscientious objection – article 18, paragraphs 1 and 3 (1321 and 1322/2004); Freedom of expression – article 19, paragraph 2 (926/2000, 574/1999 and 518/1992); Freedom of expression, thought conscience and religion – 19, paragraph 2 and 18 (1119/2002); Freedom of expression and belief, solitary confinement, discrimination – article 10, paragraphs 1 and 3, and articles 18, paragraph 1, and 19, paragraph 1, in conjunction with 26, of the Covenant (878/1999); Freedom of expression – article 19 (628/1995).
Remedy recommended	1321/2004 and 1322/2004 – An effective remedy, including compensation. 926/2000 – An effective remedy, including compensation for his conviction, annulment of his conviction, and legal costs ... it should return the painting to him in its original condition, bearing any necessary expenses incurred thereby. 574/1999 – An effective remedy. 518/1992 – An effective remedy, including appropriate compensation, for having been convicted for exercising his right to freedom of expression ... invites the State party to review article 13(2) of the Labour Dispute Adjustment Act. 1119/2002 – An effective remedy, including appropriate compensation. The Committee recommends that the State

party amend article 7 of the National Security Law, with a view to making it compatible with the Covenant.

878/1999 – An effective remedy ... although the author has been released, the State party is under an obligation to provide the author with compensation commensurate with the gravity of the breaches in question.

628/1995 – An effective remedy, including appropriate compensation for having been convicted for exercising his right to freedom of expression.

Date of State party response The State party provided responses to each of these cases previously, see volume II of annual reports A/62/40, A/59/40, A/63/40.

On 9 September 2008, the authors in case Nos. 1321/2004 and 1322/2004 reiterated that their cases had not been implemented.

State party response

Following a request for a meeting by the Rapporteur on follow-up to Views, the State party provided follow-up information on the cases under review in particular relating to specific questions posed by the Rapporteur in an aide-memoire sent to the State party.

Regarding case Nos. 1321/2004 and 1322/2004 on conscientious objection, the State party informed the Committee that the “Alternative Service System Research Committee” (see A/63/40, vol. II, annex VII, p. 539), which was set up to review the issues involving conscientious objection to military service and an alternative service system had met on eight occasions but had not completed its work. In addition, the Ministry of National Defence was undertaking the process of collecting public opinion on the possibility of introducing an alternative service system.

Regarding case Nos. 926/2000 and 574/1999, the State party reiterated that in the latter case the author had been rehabilitated and had recovered his citizenship and that in relation to the former case the Views had been published – it did not respond to the question raised by the Rapporteur on the process of abolition or amendment of the National Security Law which the State party had referred to in its correspondence of 2004 and 2006.

Regarding case No. 628/1995, the State party submitted that the author had been rehabilitated and the Views published. The Views were also published in case No. 878/1999. No further information was provided in these cases.

Regarding case No. 1119/2002, the State party maintains its reservation to article 22 and submits that as the National Assembly has not reached any conclusions regarding the amendment or abolition of the National Security Act, the Government is continuing its efforts to minimize the

	possibility of arbitrary interpretation and abuse in the application of the Act in question. On 30 July 2003, the State party abolished the law-abidance oath system.
	As to the implementation of individual communications generally, the State party submits that the final decisions of domestic courts cannot be invalidated by the Committee's Views and that the task of developing specific remedies in the context of the domestic judicial system remains challenging unless additional legislative resources by the National Assembly are in place. The Government intends to carry out a comparative analysis on the merits of the means used by other countries to implement the Views.
Author's comments	See volume II of annual reports A/62/40, A/59/40, A/63/40.
Committee's Decision	The follow-up dialogue is ongoing.
State party	The Russian Federation
Case	<i>Konstantin Babkin, 1310/2004</i>
Views adopted on	3 April 2008
Issues and violations found	Trial and punishment for the same offence twice and unfair trial – article 14, paragraph 1, read in conjunction with article 14, paragraph 7.
Remedy recommended	Compensation and a retrial in relation to the author's murder charges
Due date for State party response	3 April 2008
Date of reply	29 January 2009
State party response	The State party submits that the Committee's Views were forwarded by the Supreme Court to the Supreme Courts of the republics to ensure that this type of violation will not occur again. The Views were widely published and the author has lodged another "petition" in the Supreme Court. The State party does not clarify what type of petition was lodged.
Author's comments	On 28 February 2009, the author commented that the State party has failed to implement this case and that the Supreme Court refused to reconsider this case under the supervisory review procedure.
Consultations with the State party	A meeting should be arranged between the State party and the Rapporteur during the ninety-seventh session in October 2009.
Committee's Decision	The follow-up dialogue remains ongoing.
State party	Spain
Case	<i>Michael and Brian Hill, 526/1993</i>
Views adopted on	2 April 1997

Issues and violations found	The authors were not given any food during the first five days of police detention; they were not granted release on bail; their right to defend themselves was not respected; their right to have their conviction and sentence reviewed was denied to them – Articles 9, paragraph 3; 10; 14, paragraphs 3 (c) and 5.
Remedy recommended	An effective remedy, entailing compensation.
Due date for State party response	August 2007
Date of State party response	16 November 2004, 2 November 2005, and 9 October 1997
State party response	The Committee will recall that on 9 October 1997, the State party had provided information on the possibility of seeking compensation. On 16 November 2004, it informed the Committee about the measures being pursued by the author to seek redress and in particular to the fact that some applications were pending. On 2 November 2005, the State party submitted that Mr. Hill was re-tried by the Supreme Court, which upheld his conviction. Although there was an <i>amparo</i> still pending before the Constitutional Court, it submitted that his extradition could take place at any time.
Authors' comments	On 3 November 2008, the author informed the Committee that after 10 years of having pursued all domestic procedures available to him in the State party all have proven fruitless. He gives a detailed account of the procedures pursued in connection with two separate actions – an administrative claim for compensation against the Spanish Ministry of Justice and a Judicial appeal before the Provincial Court of Valencia to annul the legal process which had led to his sentence and conviction. He requests the Committee, inter alia, to pursue the follow-up of this case with the State party.
Committee's Decision	The follow-up dialogue is ongoing.
State party	Sri Lanka
Case	<i>Nallaratanam Singarasa, 1033/2001</i>
Views adopted on	21 July 2004
Issues and violations found	Burden of proof with respect to the extraction of a statement under duress, unfair trial, undue delay – article 14, paragraphs 1, 2, and 3 (c), and article 14, paragraph (g), read together with articles 2, paragraph 3, and 7 of the Covenant.
Remedy recommended	An effective and appropriate remedy, including release or retrial and compensation. The State party is under an obligation to avoid similar violations in the future and should ensure that the impugned sections of the Prevention of Terrorism Act (PTA) are made compatible with the provisions of the Covenant.

Due date for State party response 8 November 2004

Date of State party response 2 February 2005

State party response The Committee will recall that on 2 February 2005, the State party had submitted, *inter alia* (see A/60/40, vol. II, p. 530–532) that the Constitution of Sri Lanka and the prevailing legal regime did not provide for release, retrial or the payment of compensation to a convicted person, after his/her conviction had been affirmed by the highest appellate court, the Supreme Court. To take such steps would be contrary to the Constitution and be tantamount to an interference of the independence of the judiciary.

Although not specifically provided by the State party, the Committee is reminded of the Sri Lankan Supreme Court decision of 15 September 2006 in this case, relating to a request to have the author retried while referring to the Committee's Views. In this decision, the Supreme Court decided that the accession of the Sri Lankan Government to the Optional Protocol to the Covenant is inconsistent with the Constitution, as the treaty had not been implemented by legislation. The Court concluded that in the absence of such domestic implementing legislation, the accession to the Optional Protocol by the President in 1997 had no legal effect in Sri Lanka.

Author's comments On 30 June 2008, the author responded to a request on the significance if any on his case of the Supreme Court judgement of 17 March 2008 (Supreme Court Ref No. 01/2008). The author responded that this judgement had no practical significance for his case for three reasons. Firstly, the Supreme Court decision in his own Application for Revision, of 15 September 2006, is a binding and non-reviewable decision, in which it rejects the possibility of giving effect to the Committee's decision and makes it clear that neither the Covenant nor the Views have any effect in Sri Lanka. Consequently, a subsequent decision cannot and does not have any effect on that judgement. Secondly, the Supreme Court decision of 17 March 2008 is premised on a finding that Covenant rights are protected in the Sri Lankan legal order through existing laws and the Constitution. It does not anticipate a new basis or right of challenge. The author explains that some rights enshrined in the International Covenant on Civil and Political Rights – including some of the fair trial guarantees applicable in his case – are not effectively protected in the Constitution or statute and provides details of such rights. Thirdly, the judgement will have no effect in practice on the restrictions of his rights through the PTA, as its provisions are not subject to review. Despite the author's view that the judgement in question will have no effect on his case, he expresses the view that it could prove important in principle in affirming that all rights enshrined in the

	International Covenant on Civil and Political Rights are directly applicable and justiciable under domestic law, which should be interpreted as including those rights in respect of which Sri Lanka has been found in breach in the author's case. It should, in principle, require that the Supreme Court revisit the decision in this case. However, the author is doubtful as to whether this judgement will have any real impact in practice.
Consultations with the State party	During a consultation in March 2008, in New York, between State party representatives and the Special Rapporteur on follow-up to concluding observations, the representatives provided the Rapporteur with a copy of another judgement of the Supreme Court (SC Ref No. 01/2008) in response to some of the issues raised. According to this judgement the Constitution, the International Covenant on Civil and Political Rights Act and other domestic laws give adequate recognition to the civil and political rights contained in the Covenant, and rights recognized in the Covenant are justiciable through the medium of the legal and constitutional processes prevailing in the State party. This judgement was sent to the author with a request for comments on how if at all it would affect his case in particular with respect to the Supreme Court judgement in his own case. The author's submission was sent to the State party for comments by 1 April 2009.
Committee's Decision	The follow-up dialogue is ongoing.
State party	Uzbekistan
Case	<i>Azamat Uteev, 1150/2003</i>
Views adopted on	26 October 2007
Issues and violations found	Torture for purposes of confession and sentence to death – article 7 and article 14, paragraph 3 (g), read together with article 6, paragraph 2.
Remedy recommended	Effective remedy, including compensation.
Due date for State party response	5 June 2007
Date of State party response	23 April 2008
State party response	The State party rejects the Committee's Views. It sets out the facts of the case and the decision to sentence him to capital punishment. The sentence was confirmed on appeal by the Supreme Court on 6 August 2002. It recalls that his guilt was proven by objective evidence, including testimonies from the victim's parents, a number of witnesses' depositions, the record on the discovery and seizure (from the author) of the crime weapon, several medical, forensic and other experts' conclusions, etc. The author's allegations that he had testified against himself

	<p>during the preliminary investigation, as he was threatened by the “real murderer” and that the latter had forced him to temporarily hide the stolen items in his apartment, had been, according to the State party, duly verified by the courts. His allegations before the Committee are thus groundless. The preliminary investigation was conducted in conformity with the Criminal Procedure Legislation and from the moment of his arrest (7 April 2002), he was represented by a lawyer. Neither the author nor his lawyers ever complained about the use of unlawful methods of investigation to obtain forced confessions throughout the preliminary investigation. In determining his punishment, the Court took into account all circumstances of the case. The punishment was proportionate to the crime committed.</p>
Author’s comments	None
Committee’s Decision	The Committee is of the view that the information provided by the State party should have been provided prior to the Committee’s consideration of the case. It considers the State party’s response unsatisfactory and considers the dialogue ongoing.
State party	Zambia
Case	<i>Chongwe, 821/1998</i>
Views adopted on	25 October 2000
Issues and violations found	Articles 6, paragraph 1, and 9, paragraph 1 – Attempted murder of the chairman of the opposition alliance.
Remedy recommended	Adequate measures to protect the author’s personal security and life from threats of any kind. The Committee urged the State party to carry out independent investigations of the shooting incident, and to expedite criminal proceedings against the persons responsible for the shooting. If the outcome of the criminal proceedings reveals that persons acting in an official capacity were responsible for the shooting and hurting of the author, the remedy should include damages to Mr. Chongwe.
Due date for State party response	8 February 2001
Date of State party response	The State party had responded on 10 October and 14 November 2001, and 28 December 2005.
State party response	In 2001, the State party had contended that the Committee had not indicated the quantum of damages payable and provided copies of correspondence between its Attorney-General and the author, in which the author was provided assurances that the State party would respect his right to life and invited him to return to its territory. As to the issue of compensation, the Attorney-General indicated to the author that this would be dealt with at the conclusion of further investigations into the incident, which had been hindered by the author’s earlier refusal to cooperate. By

letter of 28 February 2002, the State party noted that the domestic courts could not have awarded the quantum of damages sought, that the author had fled the country for reasons unrelated to the incident in question, and that, while the Government saw no merit in launching a prosecution, it was open to the author to do so. By note verbale of 13 June 2002, the State party reiterated its position that it was not bound by the Committee's decision as domestic remedies had not been exhausted. The author chose to leave the country of his own will, but remained at liberty to commence proceedings even in his absence. In any event, the new President had confirmed to the author that he was free to return. Indeed the State hoped that he would do so and then apply for legal redress. Mr. Kaunda, who was attacked at the same time as the author, is said to be a free citizen carrying on his life without any threat to his liberties.

On 28 December 2005, the State party provided the following information. It stated that it had offered the author 60,000 US dollars on a without prejudice basis. The author had rejected the offer, which is more than adequate under Zambian law, particularly in light of the fact that Zambia is one of the 49 countries classified by the United Nations as Least Developed Countries. In spite of the offer, the author is still at liberty to commence legal proceedings in the Zambian Courts over this matter. As an act of good faith, the Zambian Government will waive the statute of limitations of his case and allow this matter to be heard in courts of law.

Author's response

The Committee will recall that, as set out in the March 2003 follow-up report, the author had referred to the State party's failure to provide him with a remedy on 5 and 13 November 2001.

In March 2006 (letter undated), the author responded to the State party's submission. It appeared that the author had returned to Zambia in 2003. He submits that he does not intend to make any new claims in the Zambian courts. Although he recognizes the efforts being made by the judiciary to improve he states that the problems are not yet solved. Thus, he would have no confidence that a claim would be handled appropriately by the courts. To begin such a complaint nearly 10 years after the incident would be useless. It would be impossible to conduct such an investigation on his own and would fear for his safety in doing so. In any event, he is not interested in finding the particular "minion of the Zambian Government" who tried to kill him.

The author submits that the State party has not implemented the Views and has not provided him with security. He submits that the Government made no effort to help him and his family resettle from Australia back to

Zambia and refers to the offer of compensation as “petty cash” which he is obliged to receive on a “like it or lump it basis”. He says that he has no intention of negotiating with the Zambian Government on the basis of the State party’s response of 28 December 2005.

On 15 July 2008, the author provided an update on his case. He refers to a meeting he had with the Attorney General in April 2008, during which they discussed the payment of damages and the Attorney-General’s wish to have the matter finalized. According to the author, over the years certain members of the Government have blocked the payment of compensation for the violations found by the Committee. He is of the view that the intention of the State party is to delay this matter, as his rights to compensation will cease upon his death – he is now approaching his seventieth birthday.

Committee’s Decision	The follow-up dialogue is ongoing.
Case	<i>Chisanga, 1132/2002</i>
Views adopted on	18 October 2005
Issues and violations found	Right to life, ineffective remedy on appeal and ineffective remedy with respect to commutation – article 14, paragraph 5, together with articles 2, 7, 6, paragraph 2, and 6, paragraph 4, together with article 2.
Remedy recommended	To provide the author with a remedy, including as a necessary prerequisite in the particular circumstances, the commutation of the author’s death sentence.
Due date for State party response	9 February 2006
Date of State party response	27 May 2008 (previously responded on 17 January 2006)
State party response	<p>The Committee will recall that on 17 January 2006, the State party had provided its follow-up response, in which it argued extensively on the admissibility of the communication (see annual report A/61/40, Vol. II, annex V).</p> <p>It also submitted that the President had declared publicly that he would not sign any death warrants during his term in office. No death sentence has been carried out since 1995, and there is a moratorium on the death penalty in Zambia.</p>
Author’s comments	On 12 November 2008, the author’s wife informed the Committee that in August her husband’s death sentence had been commuted to life imprisonment. Both his wife and the author himself have been petitioning the office of the President from 2001 to 2007 requesting a pardon and ask the Committee for its assistance in this regard.
Committee’s Decision	The Committee will recall that it had decided (annual report A/61/40, vol. II), that the State party’s arguments on

admissibility should have been included in its comments on the communication prior to consideration by the Committee, that it regarded the State party's response as unsatisfactory and considers the follow-up dialogue ongoing.

The Committee decided that it would consider the issue of the commutation of the author's death sentence at its next session when a Rapporteur on follow-up would be appointed.

