International Covenant on Civil and Political Rights

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Human Rights Committee

Decision adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3141/2018*, **

Communication submitted by:	H.M.T. (represented by counsel)
Alleged victim:	J.M.T.C., the author's son
State party:	Ecuador
Date of communication:	19 September 2017
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 19 March 2018 (not issued in document form)
Date of adoption of decision:	25 March 2021
Subject matter:	Right to a homicide investigation
Procedural issue:	Exhaustion of domestic remedies
Substantive issue:	Right to life
Articles of the Covenant:	6 and 14
Articles of the Optional Protocol:	2 and 5 (2) (b)

1. The author of the communication is H.M.T., a national of Ecuador, acting on behalf of his deceased son, J.M.T.C., also a national of Ecuador. The communication was received on 19 September 2017. The author claims that his son's rights under articles 6 and 14 of the Covenant were violated. The State party ratified the Optional Protocol on 6 March 1969, and it entered into force for the State party on 7 May 1978.

Facts as submitted by the author

2.1 On 8 June 2008, at approximately 12.15 a.m., J.M.T.C. left his home in Quito in the company of his cousin. As he was crossing through a square, he came across W.S.A.B., a second lieutenant in the police who was burning garbage in the square on his day off, and R.G.P.A., the police officer's cousin. A fight broke out, and G.C.P.F., a minor who is the niece of W.S.A.B. and R.G.P.A., joined in. The fight intensified, with other people also joining in. The fight resulted in the death of the author's son from a gunshot wound.

* Adopted by the Committee at its 131st session (1–26 March 2021).

** The following members of the Committee participated in the examination of the communication: Tania Abdo Rocholl, Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Furuya Shuichi, Marcia V.J. Kran, Kobauyah Tchamdja Kpatcha, Carlos Gómez Martínez, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada, Vasilka Sancin, José Manuel Santos Pais, Soh Changrok, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi.

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2.2 After the shooting, the police initially placed Lieutenant W.S.A.B. and R.G.P.A. under arrest. According to the report in the case file, the officer's service weapon was found after his arrest in the room normally assigned to him at the premises of the criminal investigation police. The officer's father was, inexplicably, also in the room. According to a statement given by the officer on 1 September 2008, he himself had placed the weapon in a drawer in his room in the criminal investigation police building because, when he had been brought into the building under arrest, he had been told to put the weapon in its usual place.

2.3 The author notes that a later report by a ballistics expert indicated that his son had been hit by a bullet from Lieutenant W.S.A.B.'s service weapon. In addition, according to a statement in the criminal case file, the officer had on previous occasions gone to the square where the incident occurred with his service weapon, even threatening other people.

2.4 That very night, paraffin tests were performed on the men under arrest and the minor; the test performed on Lieutenant W.S.A.B. came back negative, while those performed on the right hands of R.G.P.A. and the minor G.C.P.F. came back positive. On 5 September 2008, G.C.P.F. said in a statement that she had gone to the scene of the crime with her uncle's gun because she had heard that there was a fight in the square and that her uncle was going to be killed. According to that statement, she had then threatened to fire the gun in the air. However, the author points out that, in another statement, the minor added that a boy had immediately attacked her and tried to take the gun away and that, in a third statement, she said that she had pounced on a third person who was about to fire at her uncle.

2.5 On 9 June 2008, the judge of first instance ordered that Lieutenant W.S.A.B. be placed in pretrial detention on suspicion of homicide. On 11 June 2008, the pretrial detention order was replaced by a requirement to report to the courts once a week.

2.6 On 14 October 2008, the District Prosecutor for Pichincha in the Offences against Life and Violent Deaths Unit informed the Thirteenth Criminal Court of Pichincha that he would bring no charges against Lieutenant W.S.A.B. and R.G.P.A. on the grounds that the statements implicating the officer were contradicted by the paraffin test and the location of the deceased's injuries. As for the use of the firearm, in the prosecutor's view, it could be assumed that the weapon had actually been fired by G.C.P.F., the minor. On 20 January 2009, the Pichincha Provincial Prosecutor's Office confirmed the decision, stating that, while there were facts that indicated that an offence had occurred, there was not sufficient evidence of the suspects' involvement to allow a causal link to be made between the act and the result.

2.7 On 2 April 2009, the Thirteenth Court of Pichincha issued an order suspending the case because the Prosecutor's Office had not filed charges, a step without which the proceedings could not continue. The author filed an appeal against the order, but the appeal was rejected by the Pichincha Provincial Court of Justice on 18 June 2009. The Provincial Court noted that prosecutors could investigate further and bring new charges in the case.

2.8 The investigation was resumed in late 2010 following repeated requests by the author. Further steps taken as part of the investigation included the preparation of a bullet trajectory report.

2.9 On 14 August 2014, the Pichincha Provincial Prosecutor's Office requested that a hearing be scheduled. On 2 September 2014, a hearing was held at which the Prosecutor's Office asked to file new charges against Lieutenant W.S.A.B. On 8 September 2014, the Fifteenth Criminal Trial Court of Pichincha requested clarification from the Provincial Prosecutor, given the time that had elapsed between the suspension of the case and the new charges. On 6 October 2014, the Provincial Prosecutor's Office stated that, in its view, the five-year time limit for filing charges should be calculated from 18 June 2009 and asked the Court to determine whether the five-year period had elapsed. On 21 October 2014, the Fifteenth Criminal Trial Court of Pichincha found that the new charges had been filed too late. On 7 November 2014, the Prosecutor's Office asked the Court to issue the required decision.

2.10 On 21 November 2014, the case was dismissed. The author appealed the dismissal, and on 10 March 2015 the Criminal Division of the Pichincha Provincial Court rejected his appeal. According to the author, the decision is not subject to ordinary appeal.

Complaint

3.1 The author claims that the rights of his son under articles 6 and 14 of the Covenant have been violated because, in his view, the State party has failed in its duty to investigate the killing of his son with due diligence.

3.2 The author points out that States parties have an obligation to investigate instances of deprivation of life, whether they occur at the hands of State officials or private individuals. In addition, according to the European Court of Human Rights, the competent authorities must of their own motion conduct investigations promptly and diligently, be independent from those implicated in the events and ascertain the circumstances in which the incident in question occurred.[1] According to the author, in the present case, the persons conducting the investigation were not independent, as several important steps in the investigation were taken by the criminal investigation police, even though the main suspect was a member of that police force. In particular, the criminal investigation police took statements and prepared the technical report of the ballistics expert, thereby meaning that there was a conflict of interest. Furthermore, these steps were not taken promptly, as the incident had occurred in 2008 and the first prosecutor to be assigned the case had recused himself in 2013 and been followed by other prosecutors who had also recused themselves. The delay in formulating new charges was precisely what led to the dismissal of the case in 2014. In the author's view, there was an even greater duty to act diligently and promptly in the present case because, according to the ballistics report, the homicide was committed with a service weapon provided by State law enforcement forces. In addition, the investigative measures have not shed light on the circumstances in which the incident occurred.

3.3 The author is of the view that the numerous accounts given by the minor G.C.P.F., Lieutenant W.S.A.B.'s niece, reveal a clear intention to manipulate the facts and prevent justice from being done. Moreover, according to the minor herself, she had given her first statement without having an adult or lawyer present and had lied for fear of retaliation. Similarly, the author notes that several witnesses stated that the police officer had shot the author's son, causing his death, but the judicial authorities disregarded those statements. Furthermore, the ballistics expert's technical report on bullet trajectories, dated 12 May 2014, shows a clear match between the person who opened fire first (the police officer) and the trajectory of the bullet. Lastly, the author states that it was proved that the officer's service weapon had been used in the homicide and that there was no explanation of why it had been found on the premises of the criminal investigation police.

3.4 The author asserts that his son's right to life was violated and that the ordinary justice system has not reached a verdict. The minimum standards of due diligence were not met, and there were flaws in the investigation; for example, the chain of custody of the weapon was broken, statements were given by persons not represented by counsel and the reconstruction of the crime was unclear.

3.5 The author is also of the view that his son's right to a fair trial under article 14 (1) of the Covenant has been violated. In the author's view, this right entails a duty to determine who was involved in and is liable for an offence. Furthermore, the investigation should be carried out within a reasonable time period. In the case at hand, more than eight years after the events, neither the circumstances of the offence nor the identity of the culprits has yet been determined. In addition, the author believes that the right to due process includes having the courts make a logical argument for the judicial decisions they hand down; in this case, however, no such argument can be made, as the judicial decisions that have been handed down were based on a flawed investigation.

State party's observations on admissibility

4.1 In its note verbale dated 18 May 2018, the State party contests the admissibility of the communication on the grounds that domestic remedies were not exhausted.

4.2 The State party first reviews the facts related to the communication and lists the actions taken by the authorities. First, the authorities arrested Lieutenant W.S.A.B. at his

[1] European Court of Human Rights, *Sergey Shevchenko v. Ukraine* (application No. 32478/02).

home a few hours after the incident, collected physical evidence and performed paraffin tests. Statements were taken, and the victim was autopsied. A criminal case was opened against the police officer and R.G.P.A. On 9 June 2008, a report on the on-site investigation of the crime scene was drafted; on 10 June, the medical expert performed a forensic medical examination on R.G.P.A. The record of the inspection of the crime scene was drawn up on 21 June 2008, and the record of the inspection of the evidence on 23 June. The ballistics expert's report was prepared on 28 July 2008. Statements of eyewitnesses were taken on 5 September 2008. On 14 October 2008, the District Prosecutor for Pichincha in the Offences against Life and Violent Deaths Unit decided to adopt an abstention decision,[2] in which he stated:

> The investigation appears to show that, given their trajectory and location, the minor G.C.P.F. fired the shots – in addition, doubt has been cast on the statements implicating the suspect by the paraffin test performed on him, which was negative, the location of the participants in the fight and the injuries of the deceased. Furthermore, several unfired rounds were found at the crime scene. Such rounds are apparently automatically ejected when improper handling of a firearm – as might be expected of a minor with no experience handling weapons – causes it to jam.

On 20 January 2009, the Provincial Prosecutor of Pichincha confirmed the decision made by the District Prosecutor. As a result, the case was suspended. On 21 April 2011, the Attorney General ordered further investigation of the death of the author's son. On 26 December 2012, the Prosecutor's Office ordered additional statements. On 18 April 2013, the prosecutor assigned to the case recused himself because he was related to the victim. On 27 March 2014, an expert report on bullet trajectories was requested. On 4 June 2014, a report was prepared on the forensic inspection and a three-dimensional reconstruction undertaken at the crime scene. On 14 August 2014, the Prosecutor's Office asked the Fifteenth Criminal Trial Court of Pichincha to set a date and time for a pretrial hearing held to determine whether the prosecution of W.S.A.B. and R.G.P.A. could continue. On 21 October 2014, the Fifteenth Criminal Trial Court of Pichincha found that the Prosecutor's Office had not filed the new charges within the time limits set under the law. On 21 November 2014, the Criminal Justice Unit dismissed the case.

4.3 The State party maintains that the author has neither exhausted domestic remedies nor shown that any of the remedies before the courts of the State party are unavailable or ineffective.[3] First, the author did not bring a special action for protection relating to the criminal proceedings before the Constitutional Court of Ecuador. Constitutional remedies, such as the special action for protection, are intended to effectively and immediately protect rights recognized in the Constitution and in international human rights instruments, recognize violations of one or more rights and grant full reparation for the harm caused by those violations.[4] The special action for protection is thus actually a remedy providing constitutional review of court decisions. The ruling resulting from a special action for protection may vacate the challenged decision, order that the proceedings be rolled back to the point at which the alleged violation occurred or order that the judge who handed down the decision against which the action was brought – a judge other than the one to whom the decision was referred – hand down a new decision addressing constitutional rights and due process. The State party notes that actions for special protection have led, for example, to the reversal of dismissal orders in which the grounds for dismissal were insufficiently laid out.[5] Another special action for protection resulted in the Constitutional Court's ordering full reparation and, as a restitution measure, the opening of a new investigation by the prosecuting

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[2] This is a decision in which the prosecuting authorities notify the court that they do not intend to file charges.

[3] The State party cites the Committee's Views in *I.A.A. et al. v. Denmark* (CCPR/C/114/D/2428/2014), para. 6.4.

[4] Organic Act on Judicial Safeguards and Constitutional Oversight (Act No. 0), *Registro Oficial* (the country's official gazette), supplement No. 52 (22 October 2009), art. 6.

[5] Constitutional Court of Ecuador, decision No. 136-14-SEP-CC, case No. 0148-11-EP, 17 September 2014.

authorities.[6] Moreover, the Committee on Economic, Social and Cultural Rights has found this remedy to be effective.[7]

4.4 Second, the author could have brought an action for damages against justice system officials for their alleged interference with the proceedings. Such actions can lead to an award of damages. Lastly, the State party points out that it was possible to bring an action against the State in tort, which is a remedy under administrative law that can lead to an award of reparation and compensation if the alleged violations of the author's rights are found to have occurred. This remedy is also available in cases of judicial error.

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

5.1 On 28 June 2018, the author submitted his comments on the admissibility of the communication. First, the author reviews the facts and the investigative measures. The author points out that the investigation showed that the weapon used in the crime had been altered and moved from the scene: an expert report established that the weapon used to kill the author's son was Lieutenant W.S.A.B.'s service weapon and that the weapon had not been found at the scene of the crime but rather had been placed by the officer himself in a drawer in his room on the premises of the criminal investigation police. The author reiterates other claims set forth in his initial submission.

5.2 The author argues that the special action for protection is not among the remedies that must be exhausted because, according to the Committee itself, demands for the exhaustion of procedures for the review of decisions that have entered into force cannot be made, as such procedures would not constitute an effective remedy.[8] The author also notes that, while an appeal involves the review by a higher court of a lower court's actions, a special action for protection entails a new trial. Considering the special action a judicial remedy would violate the right to effective judicial protection, as the action would require retrying a person's case before the ordinary courts rather than affording him or her protection of his or her rights. The author is of the view that the special action is not an effective remedy because its aim would not be to investigate his son's death or punish those responsible. For the State party to claim that the author should have exhausted this avenue is to disregard the State's duty to conduct a diligent and serious investigation Furthermore, in the author's view, the State party incorrectly relies on the case *I.A.A. et al. v. Denmark*. In that case, the victim had not commenced any legal action to address the violation of her rights, a situation that cannot be likened to the present case, in which there were criminal proceedings and the author appeals against the decisions to suspend and then dismiss the case – the decision of the court of first instance was challenged on each occasion. According to the Inter-American Court of Human Rights, domestic jurisdiction ceases with such appeals.[9]

5.3 With regard to the reference to the Views of the Committee on Economic, Social and Cultural Rights in *Arellano Medina v. Ecuador*, the author notes that that case dealt with a very different alleged violation, one relating to the right to work, and that in that case it was possible to restore the victim to his condition prior to the violation by means of a special action for protection. In the present case, reversing the decision to dismiss the case against the alleged perpetrators would neither restore the victim to his previous condition nor guarantee judicial protection, as the victim has already died and the State has already failed to fulfil its duty to investigate. The remedies to be exhausted are those that offer a resolution relevant to the legal status affected by the violation.

5.4 The author also emphasizes that the criminal proceedings lasted from 2009 to 2015. This delay was excessive given the lack of complexity of the case, and it must be attributed not to the author but to the inaction of the prosecuting authorities. Using the special action

[6] Constitutional Court of Ecuador, decision No. 068-18-SEP-CC, case No. 1529-16-EP, 21 February 2018.

[7] *Arellano Medina v. Ecuador* (E/C.12/63/D/7/2015), para. 8.7.

[8] *Alekseev v. Russian Federation* (CCPR/C/109/D/1873/2009), para. 8.4.

[9] Inter-American Court of Human Rights, *Suárez Rosero v. Ecuador*, judgment of 12 November 1997, series C, No. 35, para. 71.

for protection to reverse the decision would not only not remedy this violation but would also delay the proceedings even further.

5.5 With regard to the possibility of bringing an action against the State in tort under administrative law or an action for damages against justice system officials, the author stresses that this remedy would lead only to monetary compensation. The State party, according to the author, is attempting to make matters right with money, whereas what he seeks is full reparation, including justice, the truth, satisfaction and guarantees of non-repetition, particularly through the investigation of his son's death. He also points out that the Human Rights Committee has stated that if the violation that is the subject of the complaint is particularly serious, such as a violation of the right to life, remedies of a purely disciplinary and administrative nature cannot be considered sufficient or effective.[10] It does not seem logical to the author to create a parallel between the State's tort liability and a violation of the right to life. Lastly, the author points out that this type of action is rarely brought against the State because it is largely unavailable and ineffective.

State party's observations on the merits

6.1 In a note verbale dated 28 September 2018, the State party submitted its observations on the merits of the communication. The State party notes that the right to life is guaranteed by its Constitution and that violations of this right are punishable under the Criminal Code. In addition, the State party points out that under the criminal investigation police regulations, officers are prohibited from engaging in physical or psychological abuse or incitement to the commission of an offence. Thus, through the laws in force, the State party guarantees the protection of the right to life, as it is required to do under article 6 of the Covenant and the Committee's general comment No. 36 (2018).

6.2 In response to the author's claim that a State official was responsible for the victim's death, the State party underscores that the official was not on duty on the date of the incident. Moreover, the claim is baseless, as all the evidence has been examined by the justice system through various tests, including a paraffin test. All the forensic tools available at the time of the incident were used in the criminal proceedings: on-site investigation, inspection of the crime scene, ballistics testing, gunshot residue tests with paraffin, toxicological examinations and the taking of statements. The proceedings were conducted before ordinary courts, in accordance with the Police Criminal Code then in force,[11] since the offence was allegedly committed by an officer who, at the time of the events in question, was not on duty.

6.3 The State party also points out that the investigation was conducted in a reasonable time period and with due process safeguards. First, the court of first instance issued its decision in 2009, one year after the events. Furthermore, there is no indication that the relatives of the deceased filed any complaints regarding any pressure or threats during the investigation.

6.4 The State party asserts that it has fulfilled its obligations to locate the victim and identify his remains. With respect to its obligation to punish those responsible, the suspects were held in custody for the period of time provided for under the applicable law until the pretrial detention order was cancelled.

6.5 As it could not be established from the investigation that the offence had been committed by State officials, it cannot be established that the State bears responsibility in the present case. Moreover, the Committee may not reassess the evidence produced before domestic courts, as its role is not to replace those courts in assessing evidence and determining who the guilty parties may be.

6.6 With regard to the due process claims, the State party notes that its Constitution and the applicable laws provide for the equality of all persons before the law. In this context, the author's claim of discrimination and unequal treatment by the courts seems ambiguous and unfounded. In addition, the right of all persons to a fair and public hearing, with all due safeguards, by a competent, independent and impartial tribunal established by law has been

[10] *Coronel et al. v. Colombia* (CCPR/C/76/D/778/1997), para. 6.2.

[11] National Police Criminal Code, *Registro Oficial*, supplement No. 1202 (20 August 1960).

respected. The author was heard, unhindered, during the criminal proceedings, both at the hearings and in his appeals. The impartiality of the judges who heard the facts of the case was also ensured; there were no irregularities in their appointment and their make-up remained stable throughout the criminal proceedings. The author was also allowed to move forward with a private prosecution, challenge evidence and appeal.

6.7 The State party is of the view that there were sufficient grounds for the decisions to suspend and then dismiss the case, given the contradictory statements and evidence. With regard to the fact that the prosecutor handling the case recused himself in 2013, the State party explains that the criminal case was opened on the day of the incident itself and that it was in 2014 that some prosecutors, in order to preserve the parties' due process rights, recused themselves. Recusal is provided for in domestic law as a tool to ensure due process and impartial justice. Consequently, the recusal resulted not in a rights violation but in a guarantee of the impartiality of the investigation.

Additional submissions by the State party

7.1 In a note verbale dated 28 January 2019, the State party reiterates that the killing of the author's son was duly investigated, with all safeguards, and that it is not the Committee's role to take the place of the national authorities in assessing the facts or deciding whether the person suspected of committing the violation is guilty. The State party also reiterates that the author has not exhausted the remedy of the special action for protection, a remedy that is available and effective. In this regard, the State party points out that the Committee on Economic, Social and Cultural Rights examined the effectiveness of this remedy generally, not in an analysis specific to the communication in question, and that the principal requirements made of a domestic remedy were that it be effective and appropriate – that a remedy is special under Ecuadorian law has no bearing on whether it must be exhausted.

7.2 With regard to the author's statement that the State party is seeking to make matters right with money, the State party makes clear that it is seeking no such thing, as there is no violation of the Covenant in the case at hand. What it was pointing out is that, when harm is alleged, it is possible in the State party, as in many legal systems, to file an action for the harm to be recognized and, in addition, for the appropriate compensation to be awarded.

Additional comments from the author

8.1 On 3 March 2020, the author made an additional submission in which he states that his intention is not to use the Committee as a court of fourth instance but to bring a complaint regarding the violation of his son's right to life and a breach of the requirement of independence and impartiality in the investigation of the events.

8.2 In reply to the State party's argument that he should have brought a special action for protection, the author points out that, first, as this action is a special one, it is accepted at the discretion of the competent courts. In addition, he notes that it took from 2008 to 2015 for the proceedings to pass through the two lowest-level courts, which constitutes an unreasonable delay. Furthermore, in 2018 there were 14,000 cases pending before the Constitutional Court of Ecuador, with delays of up to ten years. In the author's view, it would therefore be unreasonable, after a delay of six years, to ask him to wait another ten. Remedies such as an action against the State in tort or an action for damages against the justice system are, according to the author, ineffective, as they are merely administrative and cannot provide satisfaction in terms of recognizing the violation of his son's right to life, finding the State responsible and establishing the truth.

8.3 The author claims that the State party has violated its obligations with respect to the right to life of his son in two ways. First, since the suspected perpetrator of the homicide is a State official, the State has failed in its obligation to prevent its law enforcement officers from arbitrarily threatening the life of one of its citizens. Second, by not appropriately and diligently investigating the facts surrounding the homicide, the State party has failed in its obligation to provide relief. The author wishes to make clear that he seeks to prove not that the investigation did not include the proper technical components but that the investigation and the interpretation of its results were characterized by a lack of independence. Thus, several pieces of evidence that would unequivocally lead to the culprit were arbitrarily and

deliberately disregarded. First, the author notes that paraffin tests are less reliable and less useful if not performed immediately after a shooting; in the present case, they were performed on Lieutenant W.S.A.B. and R.G.P.A. two hours after the shooting and on the minor G.C.P.F. 13 hours after the shooting.

8.4 Furthermore, the investigation was not impartial, in violation of the right to due process. The author notes that the investigation was conducted by the National Police, a force of which the main suspect is a member. All the officers involved in the preparation of the report on the on-site investigation and the ballistics report held the same rank as or a lower rank than the main suspect. In addition, the record of the inspection of the crime scene was prepared 13 days after the homicide and was signed by an officer of the National Police. The author therefore concludes that, because the officers signing off on most of the evidence have a conflict of interest, most of that evidence is tainted. The Inter-American Court of Human Rights has indicated that the requirements of independence and impartiality extend to the non-judicial bodies that carry out preliminary investigations and that this independence means that, in the event that police personnel are suspects in an alleged offence, the investigation must be conducted by a body that is independent of the police force involved and not the police force itself.[12] The European Court of Human Rights has also found that the independence of investigators can be affected when those police investigators themselves are colleagues of the suspects or have a hierarchical relationship with them.[13] In the present case, the officers carrying out the investigative measures had a hierarchical relationship with the suspect, there were flaws in certain measures that prevented them from shedding light on the case and certain lines of investigation that clearly needed to be explored were neglected.

8.5 The author notes that there are various pieces of evidence that would lead to the undeniable conclusion that the victim died as a result of homicide by firearm. This hypothesis is borne out by the death scene investigation report and the autopsy report. In addition, it can be concluded from the report of the arrest and the ballistics expert's report that the weapon used to fire the two bullets found at the crime scene was the weapon belonging to Lieutenant W.S.A.B. Moreover, an expert report on bullet trajectories was prepared six years after the homicide on the basis of the previous reports. This report establishes that, with respect to the trajectory, only the first hypothesis, which is based on three of the statements taken, is plausible, while the second and third hypotheses, which are based on the statements of the suspect's minor niece and R.G.P.A., are inconsistent with the bullet trajectory analysis. The author concludes that the statements of those two people should therefore have been discounted and that greater evidentiary weight should have been given to the statements of the persons whose accounts were consistent with the trajectory analysis. Those three accounts point unambiguously to the police officer as the perpetrator of the homicide. Under such circumstances, the proper thing to do would have been to give precedence to the accounts that were consistent with the trajectory analysis. Furthermore, a total of eight statements pointed to the officer's responsibility for the homicide, but they were disregarded by the court.

8.6 The author is also of the view that there was a violation of the right to due process because the grounds for the judicial decisions issued in the case were not duly stated. The author notes that the decisions do not state the reasons for disregarding the evidence pointing to Lieutenant W.S.A.B.'s guilt or indicate the evidence on which the orders suspending and dismissing the case were based.

8.7 The author emphasizes that there has been an unreasonable delay of over eleven years in the proceedings in this case and that the family, to this day, has still not been able to obtain the truth. In his view, the right of access to justice within a reasonable time, which forms part of the right to due process under article 14 (1) of the Covenant, has thus been violated.

8.8 Lastly, the author believes that both his and his son's right to the truth have been violated.

8.9 The author requests that the State party be asked to give the victims monetary compensation for the violations it has committed, to take measures of satisfaction and non-

[12] Inter-American Court of Human Rights, *Favela Brasilia vs. Brazil*, judgment of 16 February 2017.

[13] European Court of Human Rights, *Mustafa Tunç and Fecire Tunç v. Turkey* (application No. 24014/05), judgment of 14 April 2015, para. 222.

repetition with a view to protecting the rights that have been violated and ensuring that the violations do not recur and to order that the death of his son be investigated and those responsible for it punished.

State party's observations on the additional comments from the author

9.1 The State party reiterates that the special action for protection, a remedy that was not used by the author, is an effective and appropriate remedy in the present case. The remedy, which makes it possible to ascertain whether the rights contained in the Constitution, including the right to due process, have been violated, allows for the constitutional review of judicial decisions. The remedy may result in a declaration that a judicial decision is null and void and the return of case to a lower court to be tried appropriately. Furthermore, the State party points out that, according to the laws in force, special actions for protection must be resolved within no more than forty days. Although the Court is currently processing actions filed in earlier periods, they are being resolved quickly. Lastly, the State party notes that the perception that a remedy would take an unreasonably long period of time or be ineffective does not release an individual from the obligation to pursue the remedy, unless the pursuit has no prospect of success.

9.2 With regard to the claims that the investigation was characterized by a lack of impartiality because much of it was the work of members of the National Police, the State party notes that Lieutenant W.S.A.B., who faced prosecution and whom the author alleges to be the culprit, was on his day off at the time of the events under investigation and was therefore investigated as a private individual, not as a State official acting in his official capacity. Once it was established that the offence involved private individuals, the laws in force required that it be investigated by the ordinary courts. Consequently, the involvement of police officers in the investigation was the result not of arbitrary assignments but of the application of the State party's laws on criminal investigation. Furthermore, the prosecuting authorities also took part, together with the National Police, in the necessary investigative measures, so the officers played an auxiliary role in which they followed the prosecutors' general instructions. There is nothing to suggest that the State is responsible for a violation of the author's son's right to life, as a variety of steps, which were thoroughly studied, were taken to investigate his death; State responsibility for a violation of the right to life was thus ruled out. Given this interpretation of the facts, the Committee cannot take on the role of the domestic legal system in assessing the evidence and determining the facts of the case, as it would thereby become a court of fourth instance.

9.3 The State party reiterates once again that there is no reason to doubt the impartiality of the judges and prosecutors handling the case or to believe that there was an undue delay in the proceedings. Therefore, there is no indication that the right to due process has been violated.

Issues and proceedings before the Committee

Consideration of admissibility

10.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

10.2 The Committee notes the State party's claim that the author has not exhausted all available domestic remedies because he did not bring a special action for protection before the Constitutional Court of Ecuador with respect to the criminal proceedings that had taken place, file an action in tort against the State under administrative law or bring an action for damages against justice system officials. With regard to the special action for protection before the Constitutional Court, the Committee notes that, according to the State party, the purpose of this remedy is to effectively and immediately protect rights recognized in the Constitution and in international human rights instruments, recognize violations of one or more rights and grant full reparation for the harm caused by those violations. In addition, the State party argues that the action can lead to the setting aside of judicial decisions and has been used on other occasions to set aside dismissal orders and order that investigations be resumed. The author states that this remedy is not effective because it is a special remedy and

would involve new proceedings, its purpose would not be to investigate and it would actually entail the review of decisions.

10.3 The Committee emphasizes that the purpose of requiring that domestic remedies be exhausted is to give States parties the opportunity to perform their duty to protect and guarantee Covenant rights.[14] The Committee also emphasizes that in the case of an action for special protection that involves conducting, at a judge's discretion, a review of a court decision that has entered into force, the State party must show that the action would constitute an effective remedy.[15] In the present case, the Committee notes that the action for special protection does not, according to the information provided by both parties, depend on the discretionary power of a judge. The Committee also notes that, according to an assertion by the State party that is not contested by the author, this action has, on other occasions, led to the setting aside of dismissal orders and to the resumption of investigations. The Committee is therefore of the view that there is nothing to suggest that this action for special protection would not constitute an opportunity for the State party to fulfil its duty to protect and guarantee the Covenant right invoked by the author. According to the Committee's jurisprudence, the author's doubts about the effectiveness of domestic remedies do not, on their own, absolve him of his obligation to exhaust them.[16] The Committee thus finds that, in the specific circumstances of this case, and given the particular context of the State party's legislation in this respect, the special action for protection offered an effective remedy for the author's complaint.

10.4 In addition, the Committee notes the author's claim that he should be absolved of the obligation to resort to the special action for protection in order to exhaust domestic remedies because seeking the remedy could entail a delay of ten more years in addition to the six it had already taken for the investigation to culminate in a dismissal of the proceedings and that such an additional delay would constitute an unreasonable prolongation within the meaning of article 5 (2) (b) of the Optional Protocol. However, the Committee notes the State party's argument that actions for protection must by law be resolved within forty days. The Committee observes that despite the author's reference to the unreasonably prolonged application of this remedy, he did not bring this action for protection. If he had, the Committee could have considered whether an unreasonable delay on the part of the Constitutional Court had resulted in a denial of due process. The author's mere perception that the remedy would not be effective because it would involve undue delays does not absolve him of the obligation to attempt it. The Committee consequently finds the communication inadmissible pursuant to article 5 (2) (b) of the Optional Protocol.

11. The Committee therefore decides:

(a) That the communication is inadmissible under article 5 (2) (b) of the Optional Protocol;

(b) That the present decision shall be transmitted to the State party and to the author.

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[14] Human Rights Committee, *T.K. v. France*, communication No. 220/1987, para. 8.3.

[15] *S.P. v. Russian Federation* (CCPR/C/118/D/2152/2012), para. 11.5.

[16] See, for example, Human Rights Committee, *R.T. v. France*, communication No. 262/1987, para. 7.4, and *S.S. v. Norway*, communication No. 79/1980, para. 6.2.