



# International Covenant on Civil and Political Rights

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## Human Rights Committee

### Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3278/2018\*, \*\*, \*\*\*

<i>Communication submitted by:</i>	Dorin Șeremet et al. (represented by counsel, Sorina Macrinici, Veronica Mihailov Moraru and Eduard Digore)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Republic of Moldova
<i>Date of communication:</i>	10 August 2018 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 5 March 2019 (not issued in document form)
<i>Date of adoption of Views:</i>	21 October 2021
<i>Subject matter:</i>	Participation in presidential elections by nationals abroad
<i>Procedural issues:</i>	Incompatibility with the provisions of the Covenant
<i>Substantive issues:</i>	Right to vote; right to an effective remedy; access to court
<i>Articles of the Covenant:</i>	2 (1), 14 (1) and 25 (b)
<i>Articles of the Optional Protocol:</i>	2 and 3

1. The authors of the communication are Dorin Șeremet (born in 1998), Simion Doibani (born in 1988), Oleg Dolganiuc (born in 1988), Mihail Plugaru (born in 1987), Natalia Plugaru (born in 1983), Andrei Cebotari (born in 1988), Petru Maxian (born in 1983), Natalia Maxian (born in 1986), Viorica Muntean (born in 1987), Veronica Botnaru (born in 1988), Liuba Botnaru (born in 1978), Vlada-Valeria Botnaru (born in 1998), Sergiu Botnaru (born in 1969), Alexei Botnaru (born in 1975), Maria Cotea (born in 1962) and Valeriu Lupu (born in 1976). They are all nationals of Republic of Moldova living either in Italy or in the United Kingdom of Great Britain and Northern Ireland. They claim that the State party has violated

\* Adopted by the Committee at its 133rd session (11 October–5 November 2021).

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

\*\*\* An individual opinion by Committee member Furuya Shuichi is annexed to the present Views.



their rights under articles 2 (1), 14 (1) and 25 (b) of the Covenant. The Optional Protocol entered into force for the State party on 23 April 2008. The authors are represented by counsel.

### **Facts as submitted by the authors**

2.1 Until fairly recently, in the Republic of Moldova, presidents were elected by Parliament. However, following a Constitutional Court decision dated 4 March 2016, the State party adopted the system of direct election. The first presidential election was scheduled for late in 2016.

2.2 The Electoral Code regulates voting abroad. The number and geographical distribution of polling stations abroad was to be decided by the Government in collaboration with the Ministry of Foreign Affairs and European Integration, on the basis of two grounds: (a) preliminary online registration of citizens who live outside the country; and (b) participation of voters abroad in the previous parliamentary elections (2014). In accordance with article 49 (3) of the Electoral Code, a maximum of 3,000 ballots were to be issued for each polling station established abroad.<sup>1</sup>

2.3 Between 10 May and 19 September 2016, 3,570 citizens of the Republic of Moldova living outside the country registered to vote. On 26 September 2016, the Government approved the number of out-of-country polling stations and their locations. As a result, 100 polling stations were set up abroad.

2.4 The first round of the presidential election took place on 30 October 2016. No candidate received more than 50 per cent of the votes, so a second round was held. For the first round, the Central Electoral Commission distributed 270,350 ballots to polling stations abroad, where 67,205 voters exercised their right to vote.

2.5 During the first round, in eight of the individual polling stations abroad,<sup>2</sup> about 2,000 votes were cast. In one polling station, the ballots ran out before polls closed.<sup>3</sup> After the first round, one of the top two presidential candidates, Maia Sandu, notified the Moldovan authorities about a mobilization of voters abroad and the risk that there would be insufficient ballots. On 2 November 2016, she sent an official letter to the Government, the Ministry of Foreign Affairs and European Integration and the Central Electoral Commission, with a request to increase the number of polling stations abroad for the second round. The unprecedented mobilization of Moldovan citizens living abroad for the second round was reported on in the mass media and through social media. On 3 November 2016, Ms. Sandu published on social media a public letter addressed to Parliament, the Government, the Ministry of Foreign Affairs and European Integration and the Central Electoral Commission, claiming that they were responsible for obstructing the right of citizens living abroad to vote in the second round of the presidential election. However, the authorities took no action regarding the number of polling stations abroad for the second round.

2.6 The second round took place on 13 November 2016. The Central Electoral Commission had slightly increased the number of ballots provided to polling stations abroad, from 270,350 to 288,850, but took no action regarding the number of polling stations. On the day of the second round of voting, the number of Moldovan voters abroad increased to 138,720 – approximately double the number of voters in the first round. A significant number of citizens were unable to cast their vote in 18 polling stations abroad,<sup>4</sup> because the 3,000

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<sup>1</sup> The Electoral Code provides that polling stations will be set up to serve between 30 and 3,000 voters.

<sup>2</sup> No. 1/314, in Montreal, Canada (1,989 votes); No. 1/317, in Moscow (2,044 votes); No. 1/325, in Dublin (2,068 votes); No. 1/347, in Paris (1,971 votes); No. 1/359, in Mestre, Italy (1,886 votes); No. 1/365, in Padua, Italy (1,898 votes); No. 1/366, in Parma, Italy (1,964 votes); and No. 1/389, in Bucharest (2,373 votes).

<sup>3</sup> No. 1/336, in London Stratford.

<sup>4</sup> No. 1/314 in Montreal, Canada; Nos. 1/317 and 1/318, in Moscow; No. 1/325, in Dublin; No. 1/328, in Brussels; Nos. 1/335 and 1/336, in London; No. 1/346, in Frankfurt, Germany; No. 1/347, in Paris; No. 1/349, in Villeneuve-Saint-Georges, France; No. 1/350, in Montreuil, France; No. 1/355, in Bologna, Italy; No. 1/359, in Mestre, Italy; No. 1/365, in Padua, Italy; No. 1/366, in Parma, Italy; No. 1/375, in Verona, Italy; and Nos. 1/389 and 1/390, in Bucharest.

allocated ballots had proved insufficient.<sup>5</sup> The authors were among those who could not vote for that reason in London and in Bologna, Mestre and Parma, Italy.

2.7 On 13 November 2016, 4,031 Moldovan citizens, including the authors, filed complaints at the polling stations abroad, alleging a violation of their right to vote because of the insufficient quantity of ballots.<sup>6</sup> The electoral bureaux of the polling stations abroad declined their competence and sent the complaints to the Chisinau District Electoral Council, which is the hierarchically superior electoral body, without informing the complainants. Moldovan citizens abroad organized protests around the world, expressing their disagreement with the poor organization and the results of the second round of the presidential election.

2.8 By two decisions, dated 16 and 17 November 2016, the Chisinau District Electoral Council took note of the complaints submitted by the citizens who could not cast their vote in polling stations abroad and, without making any pronouncement on the alleged violation of the right to vote, sent those complaints to the Constitutional Court for consideration while confirming the results of the elections.<sup>7</sup> It was only on 18 November 2016, when the two decisions were published on the official website of the city hall, that the complainants, including the authors, learned about the decisions. However, the Constitutional Court refused to admit the complaints and referred them back to the District Electoral Council, which redirected them to the Central Electoral Commission for examination.

2.9 On 18 November 2016, the Central Electoral Commission approved its report on the results of the presidential election. In the report, the Commission, referring to the complaints of the citizens who could not vote in the polling stations abroad, stated that it considered that it was for the Constitutional Court to assess the allegations and any impact that they might have on the voting results.

2.10 On 21 November 2016, representatives of 133 Moldovan citizens living abroad, including the authors, brought court proceedings to have the decisions of 16 and 17 November 2016 of the Chisinau District Electoral Council declared null and void insofar as the manner of examination of their complaints was concerned. They claimed a violation of their right to vote, and discrimination based on residence, because the authorities did not take measures to guarantee their right to vote. During the hearings, the complainants also raised the constitutionality of article 49 (3) of the Electoral Code, which limits the number of ballots distributed to each polling station abroad to 3,000, whereas such a limit does not apply to the polling stations within the country. By an incidental decision dated 28 November 2016, the Central Chisinau court of first instance refused the complainants' request to broadcast the whole process live. By another incidental decision, dated 29 November 2016, the court of first instance refused to refer to the Constitutional Court the claim regarding the constitutionality of article 49 (3) of the Electoral Code, because the Constitutional Court had already pronounced itself twice on the matter. Finally, by an incidental decision dated 30 November 2016, the court of first instance dismissed the complainants' request to hear a journalist and one of the authors in their capacity as witnesses to the events in Italy.

2.11 On 1 December 2016, the Central Chisinau court of first instance rejected the complaint. The court did not find any legal grounds on which to annul its own decisions of 16 and 17 November 2016. It rejected the video recordings submitted as evidence of the long lines at the polling stations abroad, because the complainants did not indicate the person who had made the recordings, the time of the recordings and the conditions in which the recordings were made, as required. The court declared that the set-up of the polling stations abroad and the distribution of ballots were in line with legal provisions. In reaching that conclusion, the court referred to a previous decision of the Constitutional Court, in which the latter acknowledged a State prerogative in the organization of polling stations abroad based

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<sup>5</sup> At the same time, according to the minutes of the polling stations published by the Central Electoral Commission, several polling stations in the country received more than the limit of 3,000 ballots provided by the Electoral Code. The authors mention eight polling stations that received between 3,005 and 4,045 ballots.

<sup>6</sup> A total of 1,434 citizens submitted individual complaints, while 2,597 lodged a collective complaint.

<sup>7</sup> The Electoral Code and the Central Electoral Commission regulation on complaints mandate the Chisinau District Electoral Council to review complaints against decisions of the electoral bureaux established abroad.

on a set of criteria, such as pre-registration of the voters abroad, as well as to the jurisprudence of the European Court of Human Rights, which did not impose on the States parties to the first Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) an obligation to enable citizens living abroad to exercise the right to vote.<sup>8</sup> The court of first instance considered that Moldovan citizens living abroad were treated in the same manner as those living in the country, that is, they enjoyed their right to vote and to bring individual or collective complaints. Additionally, Moldovan citizens living abroad were allowed to vote using an expired passport and at any of the 100 polling stations established abroad. Those 100 stations had the capacity to process 288,850 voters, while only 139,066 voters participated in the second round. Establishing a higher number of polling stations for the second round would have amounted to a breach of the law, because the two rounds must take place under the same conditions. Finally, the court of first instance took note of the fact that voters from polling stations where ballots had run out were directed to nearby polling stations.<sup>9</sup>

2.12 The authors, together with the other complainants, appealed this decision. They argued, *inter alia*, that establishing a threshold of 3,000 ballots per polling station amounted to a limitation on their right to vote. On 6 December 2016, the Chisinau Court of Appeal upheld the first-instance decision, considering that the decisions of 16 and 17 November 2016 of the Chisinau District Electoral Council were lawful because it was for the Constitutional Court to decide on the alleged violation of the right to vote when confirming the results of the election. The establishment of the number of polling stations abroad and the provision of a maximum of 3,000 ballots for each were also in accordance with the legal provisions in place. The Court of Appeal noted that, during the first round, voters did not contest the number of the polling stations or the number of ballots supplied to each of the stations. Regarding the claimants' allegation that the alternative of voting in a neighbouring polling station would have amounted to discrimination because of the travel costs, the Court of Appeal recalled that the right to vote was not an absolute right, and that those who had wished to exercise that right had had a real possibility to do so. Finally, the Court of Appeal noted that the claimants did not expressly contest the first-instance incidental decision of 30 November 2016, in which their request to hear two witnesses was dismissed.

2.13 On 12 December 2016, the Supreme Court of Justice declared inadmissible the appeal on points of law introduced by the authors and the other claimants because their arguments were centred around the conclusion of the Court of Appeal instead of pointing to a wrongful application of the law.

2.14 On 13 December 2016, the Constitutional Court confirmed the results of the presidential election and validated the mandate of the President. The Constitutional Court noted that, following the lodging of individual and collective complaints on 13 November 2016 at the polling stations abroad in respect of an alleged violation of the right to vote, the Central Electoral Commission, instead of deciding on the existence of a violation, had declined its jurisdiction. The Constitutional Court clarified that it was for the electoral bodies and ordinary courts to examine the complaints submitted on voting day, and that they should not have declined their competence. By failing to examine the circumstances of those cases, the lower bodies had prevented the Constitutional Court from having before it a legal assessment of the facts; the Constitutional Court examines only legal questions, not factual ones. Therefore, the Constitutional Court recommended that Parliament clarify the legislation that applied to the examination of complaints regarding the organization and holding of the elections. In particular, the Constitutional Court recommended that Parliament regulate, separately and explicitly, the complaint procedures for various types of elections, as well as separate procedures for the case of two rounds of voting.

2.15 The Constitutional Court further held that the right to vote was relative, not absolute, hence the State enjoyed a large margin of discretion and the exercise of the right could suffer some implicit limitations. It also held that equality regarding the right to vote did not imply

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<sup>8</sup> See *Sitaropoulos and Giakoumopoulos v. Greece*, Application No. 42202/07, Judgment, 15 March 2012.

<sup>9</sup> The court gives the example of two polling stations in Italy that were at a distance of 31 km and 45 km, respectively, from the station where citizens originally sought to vote.

that the right could be exercised under the same conditions inside and outside the country, given the different juridical situations of citizens living inside and outside the country. It then noted that the first Protocol to the European Convention on Human Rights did not guarantee a right of nationals of a State party to vote abroad. Also, in the Code of Good Practice in Electoral Matters, the European Commission for Democracy through Law (Venice Commission) acknowledged that place of residence may have an influence on the exercise of the right to vote.

2.16 While presuming that the 4,031 citizens who lodged complaints were not able to exercise their right to vote,<sup>10</sup> the Constitutional Court could not identify any objective evidence that the State authorities did not act in good faith when establishing the number of polling stations abroad. For example, taking into account that the highest number of complaints was lodged by Moldovan citizens living in Italy, the Court noted that 25 polling stations had been established in that country. A total of 75,000 ballots had been provided to those stations, and 51,738 voters had participated in the elections during the second round. However, taking into account that a great number of Moldovan citizens residing abroad could not vote on 13 November 2016, the Constitutional Court recommended that Parliament amend the legislation on the voting mechanism abroad and provide additional criteria for the calculation of the number and geographic distribution of ballots provided to polling stations abroad, including the provision of a number of reserve ballots for those stations.

2.17 Following this decision by the Constitutional Court, the authors and other complainants requested the Supreme Court to review its decision of 12 December 2016, arguing that they had not benefited from an effective judicial control of the Chisinau District Electoral Council decisions of 16 and 17 November 2016, and that the electoral bodies and judicial courts had not offered them a fair trial in accordance with the provisions of the law and the principle of good faith in the citizen's interest. On 22 March 2017, the Supreme Court declared inadmissible the request for review, because allowing the request would have implied that the Constitutional Court had declared unconstitutional a law that had been applied by the lower courts in deciding the case.

## Complaint

3.1 The authors allege that the State party has violated their rights under article 25 (b), read alone and in conjunction with article 2 (1), and under article 14 (1), of the Covenant.

3.2 The authors submit that the Electoral Code provides for a limitation of 3,000 ballots per polling station. As a consequence, they could not cast their vote in the second round of the presidential election because at five polling stations situated outside the territory of the State party, where they went to vote, the ballots ran out before closing time. They consider that the failure to respect and fulfil their right to vote originated in the poor planning and organization of the election abroad, when the authorities established the number and geographical distribution of the polling stations abroad. The Republic of Moldova has experienced mass emigration and there is no exact and reliable data on the number of Moldovans residing abroad. According to various studies and data issued by the national authorities, between 800,000 and 1 million Moldovans live abroad. For a country with a total of 3.6 million citizens, this has dramatic effects, including in electoral matters, which the authorities should have taken into account when making arrangements for voting abroad and when adopting legislation and policy documents in that respect.

3.3 The authors state that, according to the legislation in force at the time of the events, the number and geographical distribution of polling stations abroad was to be decided by the Government in collaboration with the Ministry of Foreign Affairs and European Integration, based on two criteria: preliminary online registration of citizens who were abroad, and participation of voters abroad in the previous parliamentary elections. Preliminary online registration is a relatively new tool in the Republic of Moldova, introduced for the 2014 parliamentary elections and used for the second time in the 2016 presidential election. Many

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<sup>10</sup> Given the difference of 67,488 votes between the two presidential candidates in the second round, the Constitutional Court declared that even if validated, those 4,031 votes could not have influenced the results of the vote, all the more so since it could not be assumed that all would have been cast in favour of the same candidate.

people reported on social media that in the last month of preliminary registration the online system had not worked properly. In addition, the authorities did not organize mass information campaigns for Moldovans abroad about the preliminary registration procedure.

3.4 Regarding the second criterion, the authors claim that the authorities neglected the recommendation of the Promo-LEX Association to increase the number of polling stations in locations where over 2,000 voters per polling station had cast votes in the 2014 parliamentary elections. In almost all of those polling stations, the ballots ran out before the polls closed on 13 November 2016. The authors thus consider that the number of polling stations abroad was insufficient. For example, the available data showed that, at the time, 142,266 Moldovan citizens were living in Italy. The authorities had established 25 polling stations there, thus guaranteeing the right to vote to only 75,000 of them.

3.5 The authors submit that following legislative amendments in 2017, the maximum number of ballot papers issued per polling station increased from 3,000 to 5,000, and additional criteria for the establishment of polling stations were added.

3.6 The authors claim that the electoral bodies did not properly examine and address their complaints, a fact also noted in the Constitutional Court decision of 13 December 2016. The mechanism for the resolution of disputes related to elections lacks clarity, including the system of complaints concerning voting abroad. Furthermore, the election observation mission deployed by the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe recommended that the elections dispute resolution system be reviewed, in order to eliminate gaps and inconsistencies and thus provide for effective legal redress. It highlighted that consideration should be given to establishing clear procedures and jurisdiction for the handling of complaints concerning out-of-country voting.<sup>11</sup> However, Parliament still has not amended the chapter on the complaint procedure in the Electoral Code. Only the Central Electoral Commission amended its regulation, stating that complaints regarding the exercise of the right to vote in polling stations abroad must be submitted to the national courts on the day of the elections.

3.7 The authors further claim that they were discriminated against as compared with voters within the Republic of Moldova, who did not face any problems regarding the number of polling stations or the number of ballot papers. This different treatment in exercising their right to vote constituted direct discrimination based on residence status. For the second round of the presidential election, at least eight polling stations within the Republic of Moldova received more than the limit of 3,000 ballots provided for in the Electoral Code, which amounts to different treatment of the voters within the country compared to those outside the country.

3.8 The authors further raise a violation of article 14 (1) of the Covenant, alleging denial of access to justice, equality of arms and a fair hearing, and non-compliance with the principle of publicity. The electoral bodies declined their competence to examine the complaints the authors brought on the day of elections in respect of their right to vote, and sent them to the Constitutional Court for examination under its mandate to validate the election. The national courts rejected the complaints on both substantive and procedural grounds, declaring that the complaints should have been brought before the electoral bodies on the day of the election, not before the courts. However, the Constitutional Court held that neither the electoral bodies nor the national courts should have declined their competence, and that they should have investigated the violations reported on the day of the election. Therefore, the authors did not enjoy equal access to justice, owing to their residence status.

3.9 The Central Chisinau court of first instance violated the principle of equality of arms when it did not agree to hear two witnesses from two polling stations abroad on behalf of the complainants. The court refused to take into account as evidence the video recordings and photos that showed the long lines at the polling stations abroad, even though the lawyers had respected the procedural rules for submitting this type of evidence. The various intervening courts also arbitrarily rejected the authors' and other complainants' claims without

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<sup>11</sup> Office for Democratic Institutions and Human Rights, "Election observation mission final report, presidential election 30 October and 13 November 2016", 15 February 2017, pp. 27–28. Available at <https://www.osce.org/odhr/elections/moldova/300016?download=true>.

motivation, which is contrary to the principle of effective and equal access to the courts. Lastly, the courts violated the principle of publicity because they did not publish the decisions on the courts' web pages, despite a legal obligation to do so. The Central Chisinau court of first instance also rejected the complainants' request for live transmission of the trial.

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

4.1 On 3 May 2019, the State party submitted its observations on admissibility and the merits, in which it argues that the communication should be declared inadmissible for incompatibility *ratione materiae* with the provisions of the Covenant. Should the Committee find the communication to be admissible, the State party submits that it is without merit.

4.2 Regarding the admissibility of the communication, the State party refers to the jurisprudence of the European Court of Human Rights, which has declared that the rights bestowed by article 3 of the first Protocol to the European Convention on Human Rights are not absolute, that there is room for implied limitations and that the contracting States enjoy a wide margin of appreciation in this sphere.<sup>12</sup> The State party submits that the same approach has been followed by the Committee, which has recalled its general comment No. 25 (1996), in which it indicates that the right to vote and to be elected is not an absolute right, and that restrictions may be imposed on it provided they are not discriminatory or unreasonable.<sup>13</sup>

4.3 According to the State party, article 25 of the Covenant guarantees the right to vote, but not the right to voting abroad. The latter depends on the discretionary power of the State, which enjoys a wide margin of appreciation as to the organization of its electoral system. In this sense, the European Commission of Human Rights declared inadmissible a series of cases alleging restrictions on the right to vote based on the residency criterion.<sup>14</sup>

4.4 The State party explains that the European Court of Human Rights has indicated that article 3 of the first Protocol to the European Convention on Human Rights does not impose on the contracting States an obligation to establish a system that allows citizens overseas to vote from outside the country.<sup>15</sup> The European Court also noted that neither the relevant international and regional treaties, such as the Covenant, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights, nor their interpretation by the competent international bodies provided a basis for concluding that voting rights for persons temporarily or permanently absent from the State of which they were nationals extended so far as to require the State concerned to make arrangements for their exercise abroad.<sup>16</sup>

4.5 The State party therefore considers that the right of expatriates to vote from their place of residency is not guaranteed by the Covenant, but depends on a margin of appreciation allowed to States, which are free to choose the modalities through which it will facilitate such voting. The Covenant does not impose on the States parties a positive obligation to guarantee to citizens living outside the national territory the exercise of their right to vote in their country of residence. Not being able to exercise the right to vote in the country of residence when that right can be exercised in the country of origin does not alter the substance of the right to vote.

4.6 Regarding the merits, the State party recalls that in the case of *Sitaropoulos and Giakoumopoulos v. Greece*, the European Court of Human Rights has analysed the legislation of the members of the Council of Europe relating to out-of-country voting. The analysis indicated that in the majority of those States that authorized out-of-country voting, citizens

<sup>12</sup> European Court of Human Rights, *Hirst v. the United Kingdom (no. 2)*, Application No. 74025/01, Judgment, 6 October 2005, paras. 60–61.

<sup>13</sup> See also *Yevdokimov and Rezanov v. Russian Federation* (CCPR/C/101/D/1410/2005), para. 7.4.

<sup>14</sup> See, for example, *X. v. the United Kingdom*, Application No. 7566/76, decision on admissibility, 11 December 1976; *X. v. the United Kingdom*, Application No. 7730/76, decision on admissibility, 28 February 1979; *X. v. the United Kingdom*, Application No. 8873/80, decision on admissibility, 13 May 1982; *Polacco and Garofalo v. Italy*, Application No. 23450/94, decision on admissibility, 15 September 1997; and *Luksch v. Germany*, Application No. 35385/97, decision on admissibility, 21 May 1997.

<sup>15</sup> *Sitaropoulos and Giakoumopoulos v. Greece*, para. 71.

<sup>16</sup> *Ibid.*, para. 72.

who wished to benefit from that possibility needed to register for placement on electoral lists before a certain date. In the case at hand, the organization of the polling stations abroad was based on the citizens' pre-registration and on the number of those who had participated in the previous elections.

4.7 Pre-registration was used to establish the number of voters living abroad, in order to determine the necessary number of polling stations and ballots for each station. During the pre-registration period for the presidential election of 2016, which lasted for more than four months,<sup>17</sup> 3,570 voters registered. Based on this information, and taking into account that 73,311 voters had participated in the parliamentary elections of 2014, the Government approved the establishment of 100 polling stations abroad for the presidential election of 2016. A total of 270,350 ballots were distributed to those polling stations for the first round and, following requests from the voters, 288,850 ballots were distributed for the second round. A total of 95 of the 100 polling stations received the maximum amount of 3,000 ballots provided for under article 49 (3) of the Electoral Code.

4.8 The State party therefore considers that it acted with diligence in the circumstances of the case. It also mentions that in some polling stations, the number of voters increased considerably during the second round as compared to the first round. Overall, 67,205 out-of-country voters participated in the first round; this number doubled in the second round, to 138,720. This variation between the first and second rounds of the presidential election of 2016 could not have been foreseen by the authorities, who had based their decisions taking into account the participation of voters outside the country during the previous elections. Results of presidential elections held in two rounds in other countries indicate that participation in the first round is often higher than participation in the second round.<sup>18</sup>

4.9 The State party therefore considers the authors' case to be isolated and without precedent, which does not reveal a recurrent or a systemic problem. Since the 2016 elections, several measures have been taken to improve and effectively guarantee to citizens living abroad the right to vote. This has included changes to the pre-registration system and the criteria for establishing polling stations abroad, and an increase, from 3,000 to 5,000, in the number of ballots that may be distributed to each polling station. However, the State party recalls that the European Court of Human Rights has considered that the laws and practices of the member States have not reached the stage where a common approach or consensus in favour of recognizing an unlimited right to vote for non-residents can be identified.<sup>19</sup>

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

5.1 On 5 August 2019, the authors submitted comments on the State party's observations, noting that, in contrast with the situations in some other States members of the Council of Europe (see para. 4.6 above), the State party has recognized the right of Moldovan citizens outside the country to vote abroad, and has provided for detailed procedures in the Electoral Code in that sense. Moreover, in paragraph 3 of its general comment No. 25 (1996), the Committee states that, in contrast with other rights and freedoms recognized by the Covenant, article 25 protects the rights of "every citizen", and no distinctions are permitted between citizens in the enjoyment of those rights.

5.2 The authors note that the preliminary online registration of voters in the State party is not a precondition for the exercise of the right to vote, but was introduced in the Electoral Code as a criterion for the establishment of the polling stations abroad. However, the authorities did not organize information campaigns for Moldovans abroad about the preliminary registration procedure, and the electronic system did not work properly.

5.3 The authors also note that the State party has not submitted observations on the alleged violation of article 14 (1) of the Covenant, and maintain their allegations regarding the violation of this article.

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<sup>17</sup> From 10 May 2016 to 19 September 2016.

<sup>18</sup> The State party refers to the numbers of voters in two-round presidential elections in Bulgaria (2016), France (2017), Lithuania (2014), Slovakia (2019) and Ukraine (2019).

<sup>19</sup> European Court of Human Rights, *Shindler v. the United Kingdom*, Application No. 19840/09, Judgment, 7 May 2013, para. 115.

## Issues and proceedings before the Committee

### *Consideration of admissibility*

6.1 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.

6.2 The Committee has ascertained, as required under article 5 (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 contests the admissibility of the communication under article 3 of the Optional Protocol, on the grounds that article 25 of the Covenant does not guarantee the right to out-of-country voting. It also notes the authors' response that according to general comment No. 25 (1996), article 25 of the Covenant protects the rights of every citizen, and that the State party has recognized the right of its citizens living outside the country to vote abroad.

6.4 The Committee notes that the text of article 25 (b) of the Covenant guarantees the right to vote of every citizen, without any of the distinctions mentioned in article 2 of the Covenant. The Committee observes that, in its own legislation, the State party recognizes the right to vote of its citizens living abroad. As far as the domestic law grants a right to vote to its citizens living abroad, the State party is obliged to guarantee that right in accordance with article 25. Accordingly, the Committee finds that this claim is not incompatible *ratione materiae* with article 25 of the Covenant and is therefore admissible under article 3 of the Optional Protocol.

6.5 The Committee notes the authors' claim under article 25 (b) of the Covenant, read in conjunction with article 2 (1), that their inability to vote in the 2016 presidential elections amounted to discrimination based on their residence abroad. The State party submitted that the Covenant did not impose on the States parties a positive obligation to guarantee to citizens living outside the national territory the exercise of their right to vote in their country of residence. However, the Committee considers that, for the purpose of admissibility, the authors have adequately explained the reasons for which they claim discriminatory treatment based on residence. Therefore, the Committee finds this claim admissible.

6.6 The Committee notes the authors' claims under the second sentence of article 14 (1) of the Covenant that the Central Chisinau court of first instance did not agree to hear two witnesses on their behalf, that it refused to take into account as evidence the video recordings made and photos taken on election day and rejected the request for live transmission of the trial, and that the courts' decisions were not published on their web pages. The Committee notes that the claim in respect of publicity is unsubstantiated. It also notes that the other claims relate to the application of domestic law by the courts of the State party. The Committee recalls that it is generally for the courts of States parties 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.<sup>20</sup> Accordingly, the Committee declares this part of the communication inadmissible under article 2 of the Optional Protocol.

6.7 The Committee therefore finds that the authors' claims based on article 25 (b), read alone and in conjunction with article 2 (1) of the Covenant, and relating to the violation of their right to vote on an equal basis as other citizens, and their claims based on the first sentence of article 14 (1) and relating to their lack of access to a court to resolve their complaints, have been sufficiently substantiated for the purposes of admissibility and therefore proceeds to consider them on the merits

<sup>20</sup> *Riedl-Riedenstein et al. v. Germany* (CCPR/C/82/D/1188/2003), para. 7.3; *Schedko v. Belarus* (CCPR/C/77/D/886/1999), para. 9.3; and *Arenz et al. v. Germany* (CCPR/C/80/D/1138/2002), para. 8.6.

*Consideration of the merits*

7.1 The Committee has considered the communication in the light of all the information submitted to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

7.2 The Committee notes the authors' claims under article 25 (b), read alone and in conjunction with article 2 (1) of the Covenant, in the sense that the State party has violated their right to vote in their capacity as citizens who live outside the country and has discriminated against them on the basis of their residency status. They contest the manner in which the State party established the number of polling stations abroad and the legal provision that limited to 3,000 the number of ballots that could be distributed to each of those stations. The Committee also notes the State party's submission that the number of polling stations abroad and ballots was established based on citizens' pre-registration and on the number of voters abroad who had participated in the previous parliamentary elections, that the State party could not have expected that the number of voters abroad would more than double in the second round of the 2016 election, and that it acted with diligence in the circumstances of the case in order to allow its citizens living outside the country to exercise their right to vote from abroad.

7.3 The Committee recalls its general comment No. 25 (1996), in which it indicates that the right to vote is not an absolute right, and that restrictions may be imposed on it provided they are not discriminatory or unreasonable.<sup>21</sup> The Committee notes in the present case that the domestic law of the State party recognizes the right to vote for its citizens living abroad. The Committee observes, however, that despite this recognition the authors were not able to vote from abroad, as the polling stations in their cities had reached the maximum number of ballots assigned to them and allowed under the Electoral Code.

7.4 The Committee must assess whether the restrictions faced by the authors as voters abroad in the 2016 presidential election were unreasonable. The Committee notes the argument of the State party that there is no agreement in international law that voting rights for persons temporarily or permanently absent from the State of which they are nationals extend so far as to require the State concerned to make arrangements for their exercise abroad. The State party also submits that an analysis of the legislation of the members of the Council of Europe relating to out-of-country voting reveals that in the majority of those States that authorize out-of-country voting citizens who want to benefit from this possibility must register to be placed on electoral lists before a certain date.

7.5 The Committee nonetheless notes that the State party belongs to that category of States that have chosen to protect the right to vote of their citizens abroad. In practical terms, in order to decide on the number and location of the polling stations required to allow its citizens abroad to exercise their right to vote, the State party must assess the number of citizens who would likely wish to exercise their right to vote. This calculation is effectively based on the number of citizens who have an interest in exercising their right to vote, be it in the form of interest already manifested in the past and revealed by the statistics of previous elections or as a concrete manifestation of interest for specific future elections in the form of pre-registration. The Committee does not consider that the method used to forecast the number of would-be voters is unreasonable.

7.6 *In concreto*, the Committee notes that 288,850 ballots were distributed to the polling stations outside the country, while about 139,000 out-of-country voters participated in the second round. It further notes that 73,311 voters had participated in the parliamentary elections held two years earlier, in 2014, that 67,205 voters had participated in the first round of the 2016 presidential election without any reported problems, and that only 3,570 voters had pre-registered for the 2016 election. In the light of all the above, the Committee does not consider that the total number of ballots that the State party had estimated for citizens who wished to vote abroad in the 2016 presidential elections was unreasonable. The Committee observes that, despite this general estimation, the authors were unable to cast their vote due to the fact that their polling stations had run out of ballots. However, the Committee notes that the authors have failed to demonstrate that in the area corresponding to those polling stations the State party should have estimated more than 3,000 voters, either through pre-

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<sup>21</sup> See also *Yevdokimov and Rezanov v. Russian Federation*, para. 7.4.

registered voters or through participation rates in previous elections. The authors have also not demonstrated that being directed towards neighbouring polling stations situated within a range of 30 to 45 kilometres and where ballots were still available would have placed an excessive burden on them. The Committee also takes note of the legislative amendments in 2017 in the State party, regarding pre-registration and criteria for establishing polling stations abroad, that allow an increase from 3,000 to 5,000 of the number of ballots that may be distributed to each polling station.

7.7 In the light of all of the above, and considering that the 2016 election was the first direct presidential election since 1996, that the overall estimation of votes abroad was largely sufficient in the light of the previous number of voters and pre-registrations, and that the incidents of running out of ballots appear to have occurred in a minority of polling stations, where voters were offered the option of voting in nearby stations, the Committee considers that the situation described by the authors does not reveal a violation of their right to vote under article 25 (b) of the Covenant.

7.8 As to the authors' allegation that their inability to vote in the 2016 presidential elections amounted to discrimination based on their residence, the Committee notes that the Electoral Code provides that polling stations will have between 30 and 3,000 voters. That article refers to polling stations in general, without any distinction as to whether they are located within or outside the country. In the circumstances of the case, 95 of the 100 polling stations established abroad received the maximum number of 3,000 ballots stipulated in article 49 (3) of the Electoral Code. The Committee therefore considers that this limitation to 3,000 ballots per polling station applies without distinction as to whether the polling station is established inside or outside the country. The Committee therefore observes that the limitation of the number of ballots available in the author's city was due to a shortfall in the local estimation of voters rather than a legal distinction based on residence. Having concluded that in the light of the statistical and registration information available to the State party the general estimation of ballots and polling stations for the 2016 elections was not unreasonable, even though it may have fallen short in very specific cases, and in the absence of any additional information by the authors, the Committee concludes that the facts before it do not reveal discriminatory treatment of the authors based on their residence abroad under article 25 (b), read in conjunction with article 2 (1), of the Covenant.

7.9 In view thereof, the Committee is not able to conclude that the information before it shows that the authors' rights under article 25 (b), read alone and in conjunction with article 2 (1), of the Covenant were violated.

7.10 The Committee further notes the authors' allegations under article 14 (1) of the Covenant that their complaints brought on the day of the election in respect of a violation of their right to vote were not considered by the electoral bodies or by the courts. In this respect, the Committee takes note of the decision of 13 December 2016 of the Constitutional Court, in which the Court clarified that it was for the electoral bodies and the ordinary courts to examine the complaints submitted on voting day, and that they should not have declined their competence. However, although the Constitutional Court pointed to some inconsistencies in the process of examination of the complaints introduced by the authors, the Committee notes that domestic courts nonetheless pronounced themselves on those complaints before the Constitutional Court confirmed the results of the presidential election and validated the mandate of the President of the Republic of Moldova on 13 December 2016. Although the Committee notes that the legislative framework itself is not clear as to the competent authorities that should examine complaints related to the exercise of the right to vote during the day of elections, it also notes that the authors did have the possibility to address their complaints to the courts of the State party and to have their case heard, as provided for under article 14 (1) of the Covenant. In view thereof, the Committee is not able to conclude that the State party has failed in its duty to ensure that the authors have access to a court, as provided for by article 14 (1) of the Covenant.

8. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it do not disclose a violation by the State party of article 14 (1) or article 25 (b), read alone and in conjunction with article 2 (1), of the Covenant.

## Annex

### **Individual opinion of Committee member Furuya Shuichi (dissenting)**

1. I am unable to concur with the conclusion in the Views that the authors' allegation that they could not vote due to the fact that the ballots ran out does not constitute a violation of their right to vote under article 25 (b) of the Covenant.

2. Under article 25 (b), States parties must take effective measures to ensure that all persons entitled to vote are able to exercise that right.<sup>1</sup> This means that States parties are obliged not only to refrain from impeding the exercise of the right to vote, but also to take positive measures to guarantee the free expression of the will of the electors. Article 25 does not impose on States parties an obligation to guarantee to the citizens living outside the territory the exercise of their right to vote in their country of residence. Nevertheless, a State party is obliged to guarantee that right in accordance with article 25 as far as its domestic law grants a right to vote to its citizens living abroad. While the right to vote does not imply that this right must be exercised in the same conditions within and outside the country, given the different situation of the citizens living within and outside the country, a State party is obliged to fulfil the obligation under article 25 as far as the given situation permits.

3. In the present case, the State party has recognized the right of Moldovan citizens living abroad to vote and provided for detailed procedures for expatriate voting in the Electoral Code. At issue, therefore, is whether the State party took all the appropriate measures to guarantee the exercise by those citizens living outside the State party of the right to vote in accordance with article 25.

4. In accordance with the legislation of the State party, the number and geographical distribution of polling stations abroad was decided based on two criteria: preliminary online registration of citizens who were abroad, and the participation of voters abroad in the previous parliamentary elections. However, the State party submits that, while it acted with diligence in the circumstances of the case, the difference in the number of voters between the first and second rounds of the presidential election of 2016 could not have been foreseen by the authorities, who had based their decisions taking into account the participation of voters outside the country during the previous elections.

5. In my view, however, it is doubtful that the State party acted with due diligence in the given circumstances. I can point to four facts. The first is the unreliability of the preliminary registration. In the present case, preliminary online registration of voters was not a precondition for the exercise of the right to vote, but was used as a criterion for the establishment of the polling stations abroad. According to the statistics presented by the State party, 3,570 persons had completed the preliminary registration while 67,205 out-of-country voters participated in the first round (paras. 4.7–4.8). This means that the actual number of voters in the first round was approximately 19 times higher than the number of persons who had completed the preliminary registration, which clearly demonstrated that the preliminary registration did not work properly as a criterion for calculating the expected number of voters in the second round. The State party should have paid more attention to this fact before the second round. Second, even in the first round, the ballots ran out before closing time at one polling station: No. 1/336 in London Stratford (para. 2.5, footnote 3). At the time, the State party knew or should have known about the possibility that ballots might run out before closing time in other polling stations in the second round. Third, a presidential candidate, Maia Sandu, officially brought this to the attention of the Ministry of Foreign Affairs and European Integration and the Central Electoral Commission. Furthermore, the unprecedented mobilization of Moldovan citizens living abroad for the second round was reported on in mass media and through social media (para. 2.5). The State party, however, did not take any action, except to increase the number of ballots provided to polling stations abroad from 270,350 to 288,850, that is, a mere 6.8 per cent increase. Fourth, despite the legislation

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<sup>1</sup> Human Rights Committee, general comment No. 25 (1996), para. 11.

providing for the allocation of the maximum of 3,000 ballots per polling station, the Central Electoral Commission provided more than 3,000 ballots for eight polling stations for the second round (para. 2.6, footnote 5). This suggests that the State party could have increased the number of ballots allocated to polling stations beyond the fixed maximum number if it had taken the possibility of an increase in voters in the second round more seriously.

6. In light of these facts, I cannot consider that the State party acted with due diligence and took every possible measure in order to ensure that Moldovan citizens living abroad, including the authors, could exercise their right to vote in the second round. Accordingly, I must conclude that the facts submitted before the Committee show a violation of article 25 of the Covenant.

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