



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. 3809/2020** , *** , ****

<i>Communication submitted by:</i>	Gulnaz Agadai kyzy Alieva
<i>Alleged victim:</i>	Aykhan Elbai ogly Aliev
<i>State party:</i>	Ukraine
<i>Date of communication:</i>	25 May 2020 (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 26 August 2020 (not issued in document form)
<i>Date of adoption of Views:</i>	26 July 2022
<i>Subject matter:</i>	Impossibility of having life sentence reviewed; fair trial; discrimination
<i>Procedural issue:</i>	Substantiation of claims
<i>Substantive issues:</i>	Torture, inhuman and degrading treatment; fair trial guarantee; discrimination
<i>Articles of the Covenant:</i>	7, 14 (1) and 26
<i>Article of the Optional Protocol:</i>	2

1. The author of the communication is Gulnaz Agadai kyzy Alieva. She submitted the communication on behalf of her son, Aykhan Elbai ogly Aliev, a national of Azerbaijan born in 1979. He is serving a sentence of life imprisonment in Krivoy Rog, Ukraine. She claims that Ukraine has violated his rights under articles 7, 14 (1) and 26 of the Covenant. The Optional Protocol entered into force for the State party on 25 October 1991.

* Reissued for technical reasons on 12 September 2023.

** Adopted by the Committee at its 135th session (27 June–27 July 2022).

*** 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, Carlos Gómez Martínez, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Kobauyah Tchamdja Kpatcha, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi.

**** Individual opinions by Committee members Furuya Shuichi (partially dissenting) and José Manuel Santos Pais (dissenting) are annexed to the present Views.



Factual background¹

2.1 On 3 February 2005, Mr. Aliev was found guilty of having committed crimes under articles 115 (1), 115 (2) (13) and 358 (3) of the Criminal Code (murder, murder committed by a person who has previously committed another murder, and the use of a knowingly forged document)² and was sentenced to life imprisonment³ by the Court of Appeal of Dnepropetrovsk Region in Ukraine, acting as a first instance court. Mr. Aliev's sentence of life imprisonment was upheld by the Supreme Court of Ukraine on 31 May 2005 and became executory. On 12 March 2019, the European Court of Human Rights issued a judgment with regard to application No. 41216/13, *Petukhov v. Ukraine (No. 2)*, concerning the sentencing of Volodymyr Sergiyovych Petukhov to life imprisonment. In that judgment, the European Court of Human Rights found a violation of the applicant's rights under article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), since it was not possible for prisoners serving life sentences in Ukraine to request a reduction of their sentences. Given the nature of the violation found under article 3 of the Convention, the European Court of Human Rights also required the State party to put in place a reform of the system of review of life sentences without the possibility of parole. The mechanism of such a review should guarantee the examination in every particular case of whether continued detention is justified on legitimate penological grounds and should enable prisoners serving life sentences to foresee, with some degree of precision, what they must do to be considered for release and under what conditions, in accordance with the standards developed in the case law of the European Court of Human Rights.

2.2 On an unspecified date, Mr. Aliev became aware of the European Court of Human Rights' judgment with regard to the application submitted by Mr. Petukhov. On 30 July 2019,⁴ pursuant to article 539 of the Criminal Procedural Code, Mr. Aliev filed a motion with the Romny City and District Court in Sumy region, Ukraine, with a request to commute the remaining term of his life sentence to a fixed-term sentence, in line with article 3 of the European Convention Human Rights and article 28 of the Constitution of Ukraine.⁵ In support of his motion, he referred to the European Court of Human Rights' judgment in the case of *Petukhov v. Ukraine (No. 2)*.

2.3 In his motion to the Romny City and District Court, Mr. Aliev specifically referred to article 87 (1) of the Criminal Code, which provides for the right of the President of Ukraine to pardon an individual. Pursuant to article 87 (2) of the Criminal Code, a sentence of life imprisonment imposed by a court may be commuted by an act of presidential pardon to a term of imprisonment of not less than 25 years. According to the regulations on the procedure for pardon, approved by Decree No. 223/2015 of 21 April 2015, a person sentenced to life imprisonment may submit an application for a presidential pardon after he or she has served at least 20 years of the sentence. At the time of considering an application for a presidential pardon, the following considerations are to be taken into account: (a) the gravity of the crime

¹ The facts on which the present communication is based have been reconstructed on the basis of the author's own incomplete account; Mr. Aliev's motion to the Romny City and District Court, dated 30 July 2019; the decision of the Romny City and District Court, dated 3 September 2019; Mr. Aliev's appeals to the Sumy Court of Appeal, dated 13 September 2019, 20 February 2020, 21 February 2020 and 28 April 2020; the decision of the Sumy Court of Appeal, dated 4 May 2020; and other supporting documents available on file.

² According to the information available on file, in September 2002 and April 2004, Mr. Aliev murdered two young women. In addition, in July 2003, he illegally entered the territory of Ukraine on the basis of a national passport issued by the authorities of Azerbaijan in his name but with the pages bearing the notes about his deportation from Ukraine on 15 April 2003 replaced by clean, forged pages.

³ Pursuant to article 64 (1) of the Criminal Code, the punishment of life imprisonment is imposed for particularly serious crimes and applies only in cases specifically provided for by the Code, where a court does not find it possible to impose imprisonment for a fixed term.

⁴ Mr. Aliev's motion was received by the Romny City and District Court on 2 August 2019.

⁵ Article 28 of the Constitution of Ukraine reads as follows: "Everyone has the right to respect of his or her dignity. No one shall be subjected to torture, cruel, inhuman or degrading treatment or punishment that violates his or her dignity. No person shall be subjected to medical, scientific or other experiments without his or her free consent."

committed; (b) the length of the sentence served; (c) the convicted person's personality, behaviour and sincere remorse; (d) the state of repairing the damage caused by the commission of the crime; (e) family and other personal circumstances; and (f) the opinion of the prison administration, public organizations and other entities on the advisability of a pardon. Mr. Aliev argued that the procedure for a presidential pardon established under the State party's current legal framework and providing persons sentenced to life imprisonment with the possibility of early release under certain conditions was incompatible with the European Court of Human Rights' interpretation of article 3 of the European Convention on Human Rights. According to the Court's Grand Chamber Judgment in *Vinter and Others v. the United Kingdom*, in the context of a life sentence, article 3 of the Convention must be interpreted as requiring reducibility of the sentence, in the sense of a review that allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds.⁶

2.4 Furthermore, pursuant to the European Court of Human Rights' judgment of 20 May 2014 in *László Magyar v. Hungary*, the institution of presidential pardon, taken alone (without being complemented by the eligibility for release on parole), would not allow any prisoner to know what he or she must do to be considered for release and under what conditions. In the view of the Court, the institution of presidential pardon does not guarantee a proper consideration of the changes and the progress towards rehabilitation made by the prisoner, however significant they might be.⁷ In that regard, the author argues that the State party's domestic legislation does not require the President of Ukraine to justify the decision to refuse a pardon; furthermore, it does not specify what a prisoner serving a life sentence must do to receive a pardon. Therefore, the existence of the possibility of releasing a person sentenced to life imprisonment on grounds of mercy is not sufficient to satisfy the requirements of article 3 of the European Convention on Human Rights. With reference to European Court of Human Rights case law, the author also argues that a possibility of being granted a pardon or release on compassionate grounds does not correspond to the notion of "prospect of release",⁸ that a life sentence should be reducible⁹ and that in determining whether a life sentence in a given case can be regarded as reducible or not, the Court has sought to ascertain whether a life prisoner can be said to have any prospect of release.¹⁰

2.5 In substantiation of his motion to commute the remaining term of his life sentence to a fixed-term sentence, Mr. Aliev submitted to the Romney City and District Court the following individual grounds: (a) from 25 April 2004 to 30 July 2019, that is, during his time in custody and while serving his life sentence, he did not commit any new crimes; (b) starting from 14 April 2009, he participated in a variety of educational and spiritual revival programmes; (c) from 31 May 2005 to 30 July 2019, it was not possible for him to be employed while serving his sentence, owing to the restrictions placed by the State party's law on the employment of persons sentenced to life imprisonment; (d) from 31 May 2005 to 30 July 2019, he was unable to pay the civil claims in favour of the victims, as he was unemployed for reasons beyond his control; (e) he had sincerely repented of the crimes committed and, following his possible release from custody, wished to find employment, pay off civil claims in favour of the victims and court fees, start a family and be useful to people and society; (f) he had work experience in car repairs; and (g) in December 2018, he had

⁶ Applications No. 66069/09, No. 130/10 and No. 3896/10, Grand Chamber Judgment, 9 July 2013, para. 119.

⁷ Application No. 73593/10, Judgment, 20 May 2014, para. 58.

⁸ European Court of Human Rights, *Murray v. the Netherlands*, Application No. 10511/10, Judgment, 26 April 2016, para. 100.

⁹ European Court of Human Rights, *Kafkaris v. Cyprus*, Application No. 21906/04, Judgment, 12 February 2008, para. 98.

¹⁰ European Court of Human Rights, *Öcalan v. Turkey (No. 2)*, Applications No. 24069/03, No. 197/04, No. 6201/06 and No. 10464/07, Judgment, 18 March 2014, para. 196. Analysis of the Court's case law on this point shows that where national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, this will be sufficient to satisfy article 3 of the European Convention on Human Rights.

repented of his sins, realized that his previous way of living in conflict with the law was wrong, renounced the Islamic religion and embraced Christianity.

2.6 On 3 September 2019, the Romny City and District Court rejected Mr. Aliev's request on the basis that domestic law, that is, the Criminal Code and the Criminal Procedure Code, did not provide for the possibility of commuting life imprisonment to a fixed-term imprisonment.

2.7 On 13 September 2019 and, subsequently, on 20 February 2020, 21 February 2020 and 28 April 2020,¹¹ Mr. Aliev appealed the decision of the Romny City and District Court of 3 September 2019 to the Sumy Court of Appeal, requesting that his life sentence be commuted to a sentence of 15 years' imprisonment. Mr. Aliev claimed that, contrary to the principle of the primacy of international treaties over the State party's domestic law, the Romny City and District Court had violated its obligation to directly implement international norms and to restore his rights as spelled out in article 3 of the European Convention on Human Rights, which are similar to those of article 7 of the Covenant.

2.8 On 4 May 2020, the Sumy Court of Appeal upheld the decision of the Romny City and District Court, stating that there was currently no implementation mechanism in the Criminal Code and Criminal Procedure Code of Ukraine that would allow the court to commute the sentence of life imprisonment to a fixed-term sentence. The author claims that Mr. Aliev has exhausted all domestic remedies, since the decision of the Sumy Court of Appeal is final and cannot be appealed.

Complaint

3.1 The author argues that the fact that there is no realistic prospect for Mr. Aliev's life sentence to be commuted to a fixed-term imprisonment or for him to be released at some point in the future violates his rights under article 7 of the Covenant not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In support of her claim, the author refers to the European Court of Human Rights judgment in *Petukhov v. Ukraine (No. 2)*, concerning the sentencing of the applicant to life imprisonment, in which the European Court of Human Rights found a violation of the applicant's rights under article 3 of the European Convention on Human Rights, since it was not possible for prisoners serving life sentences to request a reduction of their sentences in Ukraine. The author submits that article 3 of the Convention and article 7 of the Covenant are the same in substance. The author recalls that the Court required the State party to put in place a reform of the system of review of life sentences without the possibility of parole and that the mechanism of such a review should guarantee the examination in every particular case of whether continued detention is justified on legitimate penological grounds and should enable life prisoners serving life sentences to foresee, with some degree of precision, what they must do to be considered for release and under what conditions, in accordance with the standards developed in the Court's case law (see para. 2.1 above).

3.2 With reference to Mr. Aliev's motion to the Romny City and District Court (see paras. 2.3–2.5 above), the author submits that the lack of an implementation mechanism in the Criminal Code and Code of Criminal Procedure of Ukraine, which would allow the court to commute the sentence of life imprisonment to a fixed-term sentence, should not be used by the State party as an excuse for its non-compliance with the obligations emanating from article 3 of the European Convention on Human Rights and article 7 of the Covenant.

3.3 The author claims that, by failing to comply with their obligations under article 7 of the Covenant in considering Mr. Aliev's request to commute his life sentence to fixed-term imprisonment, the State party's domestic courts were not fair and impartial and thus violated his rights under article 14 (1) of the Covenant. The author also submits that, despite the de jure existence of the institution of presidential pardon in Ukraine, resulting in the commutation of a limited number of individual life sentences to 25 years' imprisonment, such a mechanism is highly ineffective for the following reasons: (a) commutation of life imprisonment to fixed-term imprisonment or exemption from serving the sentence on compassionate grounds does not meet the requirements of article 3 of the European

¹¹ Mr. Aliev submitted an initial appeal and three supplementary submissions.

Convention on Human Rights or, therefore, those of article 7 of the Covenant; (b) the State party's current legal framework does not offer a realistic prospect of conditional release to all sentenced prisoners, including prisoners serving a life sentence;¹² and (c) the State party's domestic legislation does not require the President of Ukraine to assess whether there continue to exist legitimate penological grounds for serving a sentence of life imprisonment, or to justify the decision to refuse a pardon.

3.4 The author claims a violation of Mr. Aliev's rights under article 26 of the Covenant on the ground that he, as a person sentenced to life imprisonment, is discriminated against compared with those who are sentenced to fixed-term imprisonment. The author refers to articles 81 and 82 of the Criminal Code, pursuant to which a possibility of being released on parole or to have the remaining part of a sentence replaced with a less strict punishment applies to persons sentenced to all forms of punishment except life imprisonment.

3.5 In the light of the foregoing, the author asks the Committee to conclude that the State party has violated Mr. Aliev's rights under articles 7, 14 (1) and 26 of the Covenant.

State party's observations on the merits

4.1 In a note verbale dated 30 December 2020, the State party submitted that, in the case of *Petukhov v. Ukraine (No. 2)*, the European Court of Human Rights had found a violation of article 3 of the Convention, in particular due to the fact that the applicant's criminal punishment in the form of life imprisonment was not subject to reduction.

4.2 According to article 46 (1) of the European Convention on Human Rights and article 2 of the law of Ukraine on the execution of judgments and the application of the case law of the European Court of Human Rights, the judgments of the Court are binding. Under the law of Ukraine, the implementation of the Court's judgment includes the payment of compensation and the taking of additional individual and general measures.

4.3 According to article 10 of the law on the execution of judgements and the application of the case law of the European Court of Human Rights, additional individual measures include restoring, as much as possible, the status that the applicant had before his or her rights under the European Convention on Human Rights were breached (*restitution in integrum*), as well as any other measure envisaged in the Court's judgment. The previous status of the applicant should be restored, inter alia, by the reopening of proceedings in the case and a new examination of the claims by the relevant administrative body.

4.4 Additional individual measures shall be applied regarding a person in whose favour the European Court of Human Rights rendered its judgment. Taking into account that Mr. Aliev has raised his claims on the basis of a judgment of the Court in relation to another person, it is impossible for the competent authorities to take individual measures for him. General measures are aimed at eliminating underlying systemic problems indicated in a judgment and in its origins, through (a) amendments to the current legislation and changes in the practice of its application; (b) improvement of administrative and judicial practice; and (c) ensuring an appropriate level of professional training on the Convention. General measures are comprehensive and envisage long-term efficiency; consequently, they take significant time to be implemented.

4.5 In the light of the fact that the systemic problem identified in the European Court of Human Rights judgment of *Petukhov v. Ukraine (No. 2)* related to the issue that life imprisonment is not subject to reduction, a series of draft laws were submitted to the Supreme Council of Ukraine (Verkhovna Rada). The draft laws, which envisage the introduction of a leniency mechanism of punishment in the form of life imprisonment, include the draft law on amendments to certain legislative acts on the execution of judgments of the European Court of Human Rights (No. 4048, dated 3 September 2020) and the draft law on amendments to the Code of Ukraine on Administrative Offences, the Criminal Code of

¹² Council of Europe, "Report to the Ukrainian Government on the visit to Ukraine carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 21 to 30 November 2016" (CPT/Inf (2017)15), para. 40.

Ukraine and the Criminal Procedure Code of Ukraine concerning implementation of judgments of the European Court of Human Rights (No. 4049, dated 3 September 2020).

4.6 Draft law No. 4049 envisages amendments to the Criminal Code and the Criminal Procedure Code, in particular through:

(a) The introduction of the possibility for a person to apply for the substitution of life imprisonment for a more lenient sentence, in cases in which the person has already served 10 years as part of a sentence of life imprisonment. If adopted, under the new procedure, life imprisonment could be replaced by a sentence of imprisonment for a term of 15 to 20 years;

(b) A mechanism of conditional early release, which may be applied after the prisoner has actually served at least three quarters of the term of the sentence imposed by the court, in the case of replacement of the sentence of life imprisonment with imprisonment for a certain term;

(c) The granting of the right to replace punishment in the form of life imprisonment with imprisonment for a term of 5 to 10 years for persons sentenced to life imprisonment, who on the day of the entry into force of the law of Ukraine on amendments to certain legislative acts on the execution of judgments of the European Court for Human Rights had served more than 10 years of the sentence imposed by the court. However, the total period of the sentence must not be less than 25 years;

(d) Requiring that criminal proceedings in the first instance court regarding consideration of the issue of replacement of life imprisonment, under article 82 of the Criminal Code, are considered collectively by a court consisting of three judges;

(e) Requiring that, during the execution of the judicial decision on sentences, the court has the right to make a decision, in particular, on replacing the sentence of life imprisonment with a more lenient one; consideration of the issue shall be carried out collectively by a court consisting of three judges.

4.7 A draft presidential decree on amendments to the regulations on the procedure for pardon was approved by the Government and was submitted to the President. The draft decree contains proposals to improve the procedure for pardon provided in Decree No. 223/2015 (see para. 2.3 above).

4.8 The draft decree provides for amendments, in particular, to paragraph 4 of the procedure, which clarifies the procedure for calculating a new sentence that would replace life imprisonment. It is assumed that if such a request were satisfied, the term for which the sentence is commuted shall be calculated from the beginning of serving the sentence of life imprisonment and may not be less than 25 years.

4.9 It is also proposed to amend paragraph 5 of the procedure and change the grounds for pardon of persons who have been convicted of serious or especially serious crimes or have two or more convictions for intentional crimes or have served a small part of their sentence.

4.10 The draft decree establishes a one-month period for consideration of the pardon commission's proposals and issuance of the decree by the President. In addition, it contains a proposed obligation to inform the pardon commission of the President's decision. Paragraph 18 of the procedure proposes a requirement that information on the status of consideration of applications for pardon and the number of satisfied and rejected applications shall be published monthly on the official website of the Office of the President of Ukraine. Such changes will make the institution of pardon in Ukraine more transparent.

4.11 The State party submits that Mr. Aliev's rights to fair trial were not violated since domestic courts were guided, when taking their decision, by national legislation, in particular by provisions of the Criminal Code that regulate the imposition of criminal punishment in the form of life imprisonment and application of conditional early release from life imprisonment, as well as legal positions described in resolutions of the Supreme Court.

4.12 Domestic courts properly examined Mr. Aliev's reference to the European Court of Human Rights' judgment in the case of *Petukhov v. Ukraine (No. 2)* and, while making relevant decisions, applied article 10 of the law on the execution of judgments and the application of the case law of the European Court of Human Rights, which prescribes that

the courts may restore the previous status of an applicant by, inter alia, repeat consideration of the case regarding a specific person in whose favour the Court rendered its judgment.

4.13 The State party submits that provisions of the Criminal Code that regulate the imposition of criminal punishment in the form of life imprisonment and the application of conditional early release from life imprisonment are legal norms. They do not exhibit any signs of discrimination and shall be applied equally to all persons.

4.14 Furthermore, according to paragraph 2 (1) of the regulations for the procedure for pardon, the pardoning of prisoners is carried out in the form of the replacement of life imprisonment with imprisonment for a term of not less than 25 years. According to paragraph 4 (2) of the regulations, if a person is sentenced to life imprisonment, a request for pardon may be submitted after serving at least 20 years of the sentence. Mr. Aliev was convicted in 2005; accordingly, he will acquire the right to apply for a pardon in 2025.

4.15 On the basis of all of the above-mentioned observations, the State party asks the Committee to recognize that there was no violation of Mr. Aliev's rights under articles 7, 14 (1) and 26 of the Covenant.

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

5.1 On 19 January 2021, the author submitted her comments on the State party's observations. She argues that the State party de facto acknowledges that life imprisonment as a form of punishment violates article 3 of the European Convention on Human Rights, owing to the irreducibility of life sentences in Ukraine and a lack of any realistic prospect of early release for persons serving such sentences. The State party, however, rejects the claim that life imprisonment in its current form also constitutes a violation of article 7 of the Covenant, despite the fact that both articles are essentially the same in substance.

5.2 The author argues that Mr. Aliev did not request the authorities to apply the European Court of Human Rights decision in *Petukhov v. Ukraine (No. 2)* in his case, pursuant to article 10 of the law on the execution of judgments and the application of the case law of the European Court of Human Rights (see paras. 4.3, 4.4 and 4.12 above), but rather to put an end to the continuing violation of article 3 of the European Convention on Human Rights and article 7 of the Covenant. Namely, he wished for the domestic courts to apply to his case the following findings of the Court in *Petukhov v. Ukraine (No. 2)*: (a) prisoners who receive a life sentence without the possibility of parole do not know from the outset what they must do to be considered for release and under what conditions;¹³ (b) the existing regime for prisoners in Ukraine who are serving a life sentence is incompatible with the aim of rehabilitation;¹⁴ and (c) in respect of the irreducibility of a life sentence, a systemic problem exists in Ukraine, requiring the implementation of measures of a general character.¹⁵

5.3 The author reiterates the initial argument that the lack of an implementation mechanism in the Criminal Code and Code of Criminal Procedure of Ukraine, which would allow the court to commute the sentence of life imprisonment to a fixed-term sentence, should not be used by the State party as an excuse for its non-compliance with the jus cogens obligations emanating from article 3 of the European Convention on Human Rights and article 7 of the Covenant. In support of her claims, the author refers to General Assembly resolution 70/146 on torture and other cruel, inhuman or degrading treatment or punishment, adopted on 17 December 2015, in which the Assembly: (a) condemns all forms of torture and other cruel, inhuman or degrading treatment or punishment, and calls upon all States to implement fully the absolute and non-derogable prohibition of torture and other cruel, inhuman or degrading treatment or punishment; and (b) also condemns any action or attempt by States or public officials to legalize, authorize or acquiesce in torture and other cruel, inhuman or degrading treatment or punishment under any circumstances, including on grounds of national security and counter-terrorism or through judicial decisions. The author also refers to General Assembly resolution 56/83 on the responsibility of States for internationally wrongful acts, adopted on 12 December 2001, and states that the responsible

¹³ *Petukhov v. Ukraine (No. 2)*, para. 174.

¹⁴ *Ibid.*, para. 184.

¹⁵ *Ibid.*, para. 194.

State may not rely on the provisions of its internal law as justification for failure to comply with its international obligations (annex, article 32).

5.4 The author submits that, despite the European Court of Human Rights' decision in *Petukhov v. Ukraine (No. 2)*, the State party did not implement a reform of the system of review of life sentences without the possibility of parole. As of January 2021, draft laws No. 4048 and No. 4049 had not yet been adopted, and there was no guarantee that they would be adopted in the foreseeable future. In that context, the author submitted copies of two explanatory memorandums concerning draft laws No. 4048 and No. 4049 prepared by the then Minister of Justice, as well as a detailed analysis of the specific provisions of those draft laws made by the legal department of the Supreme Council of Ukraine. According to the latter, there were serious shortcomings in the texts of the draft laws, which effectively meant that they would not be able to get enough votes from the deputies to pass, significantly delaying the establishment of the implementation mechanism that would allow the commutation of a sentence of life imprisonment to a fixed-term sentence. The author recalls in that context that both Mr. Aliev and Mr. Petukhov, in whose favour the Court had rendered its judgment, continued serving their life sentences in Ukraine.

5.5 The author provides information about the case of Igor Trubutsin¹⁶ as an example of the ineffectiveness of the existing presidential pardon mechanism in Ukraine. In respect of the institution of presidential pardon in Ukraine and its ineffectiveness, the author also cites the case of *Petukhov v. Ukraine (No. 2)*.¹⁷

5.6 In the light of the above considerations, the author requests the Committee to conclude that the State party has violated Mr. Aliev's rights under article 7 of the Covenant, on account of the irreducibility of life imprisonment as a form of punishment in Ukraine and a lack of any realistic prospect of early release from serving his sentence of life imprisonment.

5.7 The author claims that the State party has violated Mr. Aliev's rights under article 14 (1) of the Covenant, as the courts, while considering his request to commute his life sentence to a fixed term of imprisonment,¹⁸ failed to remedy a violation of his rights under article 7, despite their obligation to do so under article 2 of the Covenant. Furthermore, the Sumy Court of Appeal completely ignored his claims about the violation of articles 7 and 14 (1) of the Covenant and focused exclusively on the fact that the European Court of Human Rights had established a violation of article 3 of the European Convention on Human Rights in the case of *Petukhov v. Ukraine (No. 2)*, determining that there was no implementation mechanism in the Criminal Code and Code of Criminal Procedure of Ukraine that would allow the court to commute the sentence of life imprisonment to a fixed-term sentence. The author notes that, in its observations on the merits of the present communication, the State party did not make any specific comments with regard to the claims under articles 7 and 14 (1) of the Covenant.

5.8 With regard to the State party's assertion that provisions of the Criminal Code apply equally to all persons (see para. 4.13 above), the author reiterates that, pursuant to articles 81 and 82 of the Criminal Code, the possibility of being released on parole or of having the remaining part of a sentence replaced with a less strict punishment applies to persons sentenced to all forms of punishment except life imprisonment. She adds that draft laws No. 4048 and No. 4049, which are meant to redress the imbalance in the scope of the rights of people sentenced to fixed-term imprisonment and people sentenced to life imprisonment, have not yet been adopted by the Supreme Council of Ukraine and signed by the President of Ukraine. Therefore, in violation of article 26 of the Covenant, as a person sentenced to life imprisonment, Mr. Aliev continues to be discriminated against compared with those who are sentenced to fixed-term imprisonment.

¹⁶ "First I was pardoned and then they changed their mind", *Prisoner*, No. 35, No. 3 (October/November/December 2020) (in Ukrainian, accompanied by the author's unofficial translation into Russian; *Prisoner* is an independent Christian newspaper).

¹⁷ Paras. 92, 166, 175, 176 and 186.

¹⁸ The author clarified that, when Mr. Aliev submitted his appeal, he had requested the commutation of his life sentence to a sentence of 15 years' imprisonment followed by his subsequent release from prison, since by that time he would have already served 15 years' imprisonment.

5.9 In the light of the foregoing, the author asks the Committee to conclude that the State party has violated Mr. Aliev's rights under articles 7, 14 (1) and 26 of the Covenant.

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 has not contested the author's claim that all domestic remedies have been exhausted. Accordingly, the Committee finds that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication.

6.4 The Committee notes the author's claim that Mr. Aliev's rights under article 14 (1) of the Covenant have been violated, as the State party failed to take into account article 7 of the Covenant in considering his claim for commuting the life sentence to fixed-term imprisonment, and thus the domestic courts were not fair and impartial. In the light of the information before it, the Committee considers that, in the present case, the author has failed to demonstrate that the alleged "unfairness" and "impartiality" amounted to arbitrariness or denial of justice. In the absence of any other pertinent information in that respect, the Committee considers that the author has insufficiently substantiated her claim under article 14 (1) for the purposes of admissibility. Accordingly, it declares this part of the communication inadmissible under article 2 of the Optional Protocol.

6.5 With regard to the author's claim under article 26 of the Covenant that Mr. Aliev's rights have been violated since, as a person sentenced to life imprisonment, he has been discriminated against in comparison with persons sentenced to fixed-term imprisonment, as he cannot be released on parole or have the remaining part of his term in prison replaced with a less strict punishment, the Committee notes that the author has failed to provide sufficient information in support of her claim. In the absence of any other pertinent information on file, indicating that Mr. Aliev was treated differently from other persons sentenced to life imprisonment in Ukraine and that such differentiation of treatment constituted discrimination,¹⁹ the Committee considers that the author has insufficiently substantiated her claims for the purposes of admissibility and therefore considers this part of the communication inadmissible under article 2 of the Optional Protocol.

6.6 The Committee considers that the author has sufficiently substantiated the remaining claims under article 7 of the Covenant for the purposes of admissibility and proceeds with its consideration of the merits.

Consideration of the merits

7.1 The Committee has considered the case 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 takes note of the author's claims that Mr. Aliev's sentence of life imprisonment in effect cannot be commuted to a fixed-term sentence, that the procedure for applying for a presidential pardon is unreasonably prolonged as, currently, persons sentenced to life imprisonment have to serve at least 20 years' imprisonment before being eligible to apply for a presidential pardon, and that the President of Ukraine does not have an obligation to provide any reasons for refusing to grant a presidential pardon. In addition, the author claims that the mechanism for the review of life sentences should guarantee the examination in each individual case of whether continued detention is justified on legitimate penological grounds and should enable prisoners serving life sentences to foresee, with some degree of

¹⁹ General comment No. 18 (1989) on non-discrimination, para. 13.

clarity, what they must do to be considered for release and under what conditions. She claims that the lack of such a mechanism violates Mr. Aliev's right under article 7 of the Covenant not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (see para. 3.1 above). The State party, in contrast, asks the Committee to recognize that there was no violation of Mr. Aliev's rights under article 7 (see para. 4.15 above), and explains that several draft laws were submitted to the Supreme Council, the State party's parliament, that were intended to introduce mechanisms making it possible for a person to apply for a more lenient sentence, as compared with a life sentence, for the conditional early release of life prisoners, for judicial review of sentences of life imprisonment and for the review of the current procedure for a presidential pardon (see paras. 4.5–4.10 above).²⁰

7.3 The Committee recalls its long-standing jurisprudence, in that the prohibition of torture in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim.²¹ The Committee notes that it has found instances in which humiliating treatment constituted treatment incompatible with article 7 of the Covenant.²² The Committee also notes that States parties to the Covenant have special obligations towards persons deprived of their liberty, who should be treated with dignity and respect and should be protected as may be necessary against the treatment prohibited by article 7 of the Covenant, whether inflicted by individuals acting in their official capacity, outside their official capacity or in a private capacity.²³ The Committee also recalls that it has long accepted that individuals can be imprisoned for life, especially when life imprisonment is an alternative to the death penalty, including in those States parties to the Covenant that: (a) have not yet introduced a moratorium on the use of the death penalty; (b) have not yet abolished the death penalty; and (c) have not yet ratified the Second Optional Protocol thereto.²⁴ The question before the Committee in the present communication, however, is whether Mr. Aliev's sentence of life imprisonment, without a mechanism with clearly defined procedures for its review, is compatible with the State party's obligations under article 7 of the Covenant not to subject him to inhuman or degrading treatment or punishment. In that context, the Committee recalls that it has already established in one of the earlier communications before it that life imprisonment without a possibility of review violated juveniles' rights under article 7 of the Covenant.²⁵

7.4 The Committee notes that, in the present communication, according to the submissions of the author, the procedure for presidential pardon, as set out in Decree No. 223/2015, still lacks sufficient clarity and predictability, and that there is no real prospect for Mr. Aliev's life sentence to be commuted to fixed-term imprisonment. In that context, the Committee notes that, among the considerations to be taken into account during the examination of an application for a presidential pardon, the regulations on the procedure for pardon refer to the gravity of the crime committed, the length of the sentence served, the convicted person's personality, behaviour and sincere remorse, the state of repairing the damage caused by the commission of the crime, family and other personal circumstances, and the opinion of the prison administration, public organizations and other entities on the advisability of pardon (see para. 2.3 above). It also notes, however, paragraph 5 of the regulations on the procedure for pardon, which states that persons convicted for serious or particularly serious crimes, or having two or more criminal records in respect of the commission of premeditated crimes, may be granted pardon in exceptional cases and subject to extraordinary circumstances. Nevertheless, it is unclear what is meant by "exceptional cases" and "extraordinary circumstances", and there is nothing to suggest that the penological grounds for keeping someone in prison are of relevance for the interpretation of those notions under the State party's current legal framework.

²⁰ The Committee notes that, at the time of the consideration of the present communication, the draft laws had not yet been adopted.

²¹ General comment No. 20 (1992) on the prohibition of torture, or other cruel, inhuman or degrading treatment or punishment, para. 5.

²² *Zinsou v. Benin* (CCPR/C/111/D/2055/2011), para. 7.5.

²³ *Enazarov v. Kyrgyzstan* (CCPR/C/113/D/2054/2011 and CCPR/C/113/D/2054/2011/Corr.1), para. 9.5.

²⁴ *Butovenko v. Ukraine* (CCPR/C/102/D/1412/2005), para. 7.13.

²⁵ *Blessington and Elliot v. Australia* (CCPR/C/112/D1968/2010), para. 7.12.

7.5 As noted earlier by the Committee (see para. 7.2 above), the State party does not challenge the author's arguments regarding the lack of a clear and predictable procedure for a review of sentences of life imprisonment and states, instead, that a series of draft laws have been introduced to address those specific issues. The Committee notes the necessity for clarity and certainty of the existing procedures, which are not only a general requirement of the rule of law, but also underpin the process of rehabilitation.²⁶ Rehabilitation of prisoners must be understood as emphasizing not their exclusion from the community but their continuing part in it.²⁷ Therefore, prisoners sentenced to life imprisonment are entitled to know what steps they can take in order to be considered for rehabilitation and release.

7.6 The Committee also considers that applications for review of life sentences and their commutation to fixed-term imprisonment should be meaningfully considered and conclusively decided upon according to applicable procedures,²⁸ and that any decisions taken pursuant to such applications should be reasoned and subject to judicial review. It is up to the State party's authorities, however, to decide how and when such a review will occur, since they have the prerogative in matters of criminal justice and sentencing. The Committee observes in the context of the present communication that the exercise by persons sentenced to life imprisonment, including Mr. Aliev, of their right to a review of their life sentence by way of presidential pardon cannot be regarded as surrounded by sufficient clarity and predictability. Therefore, in the light of the above considerations, the Committee considers that, according to the State party's current legal framework, the procedure for obtaining a presidential pardon is based on the principles of humanity and mercy, rather than on penological grounds, and that it lacks the necessary clarity and predictability, allowing for review of Mr. Aliev's application for a presidential pardon to determine whether in his specific circumstances his life sentence could be commuted to a fixed-term imprisonment.

7.7 In the light of the above considerations and in the specific circumstances of the present communication, the Committee considers that the lack of a possibility of review and of a realistic prospect under the State party's current legal framework for Mr. Aliev's life sentence to be commuted to a fixed-term imprisonment causes him continued anguish and mental stress,²⁹ amounting to treatment contrary to article 7 of the Covenant.

8. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation of Mr. Aliev's rights by the State party under article 7 of the Covenant.

9. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide Mr. Aliev with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, *inter alia*, to take appropriate steps to: (a) provide Mr. Aliev with a meaningful review of his sentence of life imprisonment on the basis of a clear and predictable procedure; and (b) provide him with adequate compensation. The State party is also under an obligation to take steps to prevent similar violations from occurring in the future.

²⁶ European Court of Human Rights, *Petukhov v. Ukraine (No. 2)*, para. 168.

²⁷ Rule 88 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).

²⁸ The Committee similarly considers that States parties are required to allow individuals sentenced to death to seek a pardon or commutation, and that those requests should be meaningfully considered and conclusively decided upon according to applicable procedures (general comment No. 36 (2019) on the right to life, para. 47).

²⁹ *Kulieva v. Tajikistan (CCPR/C/128/D/2707/2015)*, para. 8.7.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official language of the State party.

Annex I

Individual opinion of Committee member Furuya Shuichi (partially dissenting)

1. I agree with the conclusion of the Committee in its Views that the facts before the Committee disclose a violation of Mr. Aliev's rights under article 7 "in the specific circumstances of the present communication" (para. 7.7). However, I am unable to concur with its general remarks that the application for review of life sentences and their commutation to a fixed-term imprisonment should be meaningfully considered and conclusively decided upon according to applicable procedure and that any decisions taken pursuant to such applications should be reasoned and subject to judicial review (para. 7.6).

2. As set forth in the Views (para. 7.3), the Committee considers life imprisonment as being less severe than the death penalty and has accepted it as a replacement when a State party abolishes the latter.¹ This suggests that life imprisonment per se is not considered to be contrary to the prohibition of cruel, inhuman or degrading punishment under article 7 of the Covenant. The Committee has found that the imposition of life sentences on juveniles is not compatible with article 7 of the Covenant, unless there is a possibility of review and a prospect of release.² However, it has never held that article 7 requires in general the guarantee of a review procedure under which the commutation to a fixed-term imprisonment is meaningfully considered and conclusively decided.

3. In the context of European countries where the death penalty has been abolished, it is reasonable for the European Court of Human Rights to step forward to find that life imprisonment without providing for the possibility of review and realistic prospect of release is not compatible with the prohibition of inhuman or degrading treatment or punishment. In contrast, the States parties to the Covenant still include many retentionist countries in which the death penalty exists. For those countries, life imprisonment without any possibility of release may be the most conceivable (and probably the only acceptable) penalty to serve as an alternative to the death penalty when they decide to abolish it. It is therefore undeniable that, if article 7 of the Covenant is interpreted to oblige States parties to initiate a review procedure to consider commutation of the sentence in the case of life imprisonment (the present Views actually take this position), it would have a certain negative impact on the movements to abolish the death penalty in the retentionist countries. I believe that acknowledging the obligation to undertake a review procedure for life imprisonment is the correct direction in which to proceed to enhance the rights protected under article 7 of the Covenant. However, it is premature to admit it as a general rule at present. Rather, the decision as to whether the imposition of life imprisonment without such a review procedure would constitute a violation of article 7 of the Covenant would depend upon the specific situation of the State party in question.

4. In respect of the present case, the State party abolished the death penalty in 2000. In March 2019, the European Court of Human Rights decided, in *Petukhov v. Ukraine (No. 2)*,³ that the current system of life imprisonment in the State party constituted a violation of article 3 of the European Convention on Human Rights, and required a reform of the system. Nevertheless, the State party, which has been discussing a series of draft laws to reform the system, has, for more than two years, failed to adopt them; it has also not dealt with Mr. Aliev's imprisonment individually in line with the judgment of the Court. The Committee is not in a position to discuss the implementation of the judgment of the Court in the State party, but it may evaluate Mr. Aliev's situation in the wake of the judgment. While the judgment of the Court admitted the possibility of review of Mr. Aliev's sentence, he was still subject to

¹ *Tofanyuk v. Ukraine (CCPR/C/100/D/1346/2005)*, para. 11.3; *Butovenko v. Ukraine (CCPR/C/102/D/1412/2005)*, para. 7.13; and *Quliyev v. Azerbaijan (CCPR/C/112/D/1972/2010)*, para. 9.4.

² *Blessington and Elliot v. Australia (CCPR/C/112/D1968/2010)*, para. 7.7.

³ Application No. 41216/13, Judgment, 12 March 2019.

life imprisonment without any prospect of release under the domestic law of the State party. It is imaginable, therefore, that his situation in limbo caused him severe anguish and mental stress which, in my view, amounts to treatment contrary to article 7 of the Covenant.

5. Accordingly, I conclude that, while article 7 itself does not oblige the State party to create a review procedure under which the commutation to a fixed-term imprisonment is meaningfully considered, Mr. Aliev's particular situation, which was caused by the State party's failure to respond swiftly to the judgement of *Petukhov v. Ukraine (No. 2)*, constitutes a violation of his rights under article 7 of the Covenant.

Annex II

Individual opinion of Committee member José Manuel Santos Pais (dissenting)

1. I regret not being able to concur with the Committee's Views in the present communication. In my view, the author's complaint should not have been admitted and, if admitted, I would not have found a violation under article 7 of the Covenant.
2. Mr. Aliev, a national of Azerbaijan, was sentenced to life imprisonment in Ukraine for having murdered two young women and for having used a tampered passport (para. 2.1 above). The sentence was upheld by the Supreme Court of Ukraine in May 2005. The complaint was submitted to the Committee 15 years after the sentence became executory. Under rule 99 (c) of the Committee's rules of procedure, the complaint should not have been admitted, for abuse of right of submission, since it was submitted well beyond five years after the exhaustion of domestic remedies. Otherwise, long-standing *res judicata* decisions may be reopened at any time in the future, disrupting the desirable certainty of such decisions.
3. The basic argument that the author invokes for the complaint is the judgment of the European Court of Human Rights in *Petukhov v. Ukraine (No. 2)*,¹ which concerns a Ukrainian national (paras. 2.1–2.3 above). One wonders then why the author has not addressed herself to the European Court of Human Rights instead of the Committee, in particular in view of the carefully crafted reasoning of the Court (see paras. 168–187 of the judgment), which notes that European penal policy currently places emphasis on the rehabilitative aim of imprisonment, even in the case of life prisoners, and that life prisoners are to be provided with an opportunity to rehabilitate themselves (para. 181). The Court further adduces that the obligation to offer a possibility of rehabilitation entails a positive obligation to secure prison regimes to life prisoners which are compatible with the aim of rehabilitation and enable such prisoners to make progress towards their rehabilitation (*ibid.*). Finally, the Court notes that only one clemency request from a life prisoner has been granted in Ukraine to date (para. 186).
4. The author considers that the lack of a legal mechanism for implementation in Ukraine, allowing courts to commute sentence of life imprisonment to a fixed-term sentence violates Mr. Aliev's rights under article 7 of the Covenant (paras. 3.1–3.2 above). She makes this claim even though Ukraine has made considerable efforts to implement the European Court of Human Rights' judgment (paras. 4.1–4.12 above). In that regard, the present Views do not seem to sufficiently acknowledge those efforts.
5. There is no previous case law of the Committee, except one on juveniles' rights (para. 7.3 above), on the possible violation of article 7 by a judgment imposing a life sentence. In Views adopted by the Committee on 22 October 2014,² the authors were minors at the time they committed their crimes, which may explain the reasoning therein.
6. In its general comment No. 36 (2019) on the right to life, the Committee recognizes that countries not having abolished the death penalty and not having ratified the Second Optional Protocol are not legally barred under the Covenant from applying the death penalty to the most serious crimes, subject to a number of strict conditions (para. 16). However, considerable progress may have been made towards establishing an agreement among States parties to consider the death penalty as a cruel, inhuman or degrading form of punishment (para. 51). No such statement has been made by the Committee in respect of life sentences, probably because States parties are often requested to replace death penalties with life sentences (para. 7.3 above).
7. Although personally advocating that life sentences should benefit from a mechanism with clearly defined procedures for their review, eventually allowing for fixed-term imprisonment, for penological as well as humanitarian grounds, always keeping prisoners'

¹ European Court of Human Rights, Application No. 41216/13, Judgment, 12 March 2019.

² *Blessington and Elliot v. Australia* (CCPR/C/112/D1968/2010), para. 7.12.

rehabilitation in mind, I wonder whether the reasoning of the decision by the European Court of Human Rights, taken at the European level, should now simply be extended by the Committee to the different geographical regions the Court's decision encompasses. In fact, the reasoning of the present Views closely follows the judgment of the European Court of Human Rights (see, for instance, paras. 171–174 and 177–179 of *Petukhov v. Ukraine (No. 2)* and paras. 7.4–7.6 above). It is true that the present Views concern the case at hand, namely, the presidential pardon procedure in Ukraine, but the door is now open, in the future, to apply article 7 of the Covenant to life sentences in other countries and regions as well.

8. I wholly agree that, if a country admits the review of life sentences, the procedures with regard to what steps prisoners must take to be considered for release and rehabilitation should be predictable and clear and that requests for release must be meaningfully considered and conclusively decided upon according to defined procedures (paras. 7.5–7.6 above). However, any procedure, be it a judicial review or a presidential pardon subject or not to review always entails, owing to the expectation it creates in the convicted person who submits the request, continued anguish and mental stress (para. 7.7 above), since the result of the request remains unknown at the outset of the application. This anguish and mental stress may be even stronger in cases where the review of life sentences is established by law and in the end not allowed in the individual circumstances of the requesting prisoner.

9. I would therefore have not concluded for a violation of article 7 of the Covenant in the present communication. I also consider that States should be able to establish a minimum term of imprisonment before considering any review of a life sentence (para. 4.14 above).
