



International Covenant on Civil and Political Rights

Distr.: General
27 January 2022

Original: English

Human Rights Committee

Decision adopted by the Committee under the Optional Protocol, concerning communication No. 3124/2018^{*, **}

<i>Communication submitted by:</i>	G.B. (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Latvia
<i>Date of communication:</i>	12 October 2017 (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 14 February 2018 (not issued in document form)
<i>Date of adoption of decision:</i>	5 November 2021
<i>Subject matter:</i>	Disclosure of classified files to the defence
<i>Procedural issue:</i>	Admissibility
<i>Substantive issues:</i>	Fair trial; presumption of innocence
<i>Articles of the Covenant:</i>	14 (1)–(2) and (6)
<i>Articles of the Optional Protocol:</i>	2–3 and 5 (2) (b)

* 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, Kobauyah Tchamdja Kpatcha, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi.



1. The author of the communication is G.B., a national of Latvia. He claims that the State party has violated his rights under articles 14 (1)–(2) and (6) of the Covenant. The Optional Protocol entered into force for Latvia on 22 September 1994. The author is not represented by counsel.

Facts as submitted by the author

2.1 In October and November 2004, the police carried out a special investigative experiment against the author.¹ As part of that experiment, an undercover police officer, I., pretending to be a drug dealer, contacted the author and persuaded him to become an intermediary in drug trafficking. The author submits that I., who was always dressed in civilian clothes during their meetings, did not interfere in already ongoing criminal activities but actually initiated them himself by sending text messages to the author, by prompting a supposedly accidental meeting and by repeatedly encouraging the author to supply him with drugs. The author notes that the undercover police agent did not act in a passive manner but rather incited the author to commit the offence that took place on 3 November 2004, when I. purchased drugs from the author.

2.2 On 21 October 2005, the Riga Regional Court convicted the author for the aggravated, unauthorized acquisition and possession of narcotic substances with the intent to sell and sentenced him to 10 years of imprisonment and the confiscation of funds. The Chamber of Criminal Cases of the Supreme Court and the Senate of the Supreme Court dismissed the author's appeal and cassation complaint on 15 September 2006 and 19 March 2007, respectively.

2.3 On 12 June 2007, the author submitted an application to the European Court of Human Rights. On 8 January 2013, that Court stated, *inter alia*, that where it fell to the prosecution to prove that there was no incitement, the domestic courts' powers to guarantee a fair trial would be undermined if, in assessing an incitement plea, they reached their conclusions by relying on unverified information that was in the exclusive possession of the prosecution. The Court found a violation of article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), noting that, in the criminal proceedings against the author, the domestic courts had not properly addressed his allegation of incitement and had failed to examine the relevant decisions authorizing the special investigative measures. The Court considered that the most appropriate form of redress would be the retrial of the author's case. It also awarded €5,000 in compensation for non-pecuniary damages.

2.4 On 20 June 2013, the Head Prosecutor of the Specialized Prosecution Office for Organized Crime and Other Branches reopened the criminal proceedings on the basis of newly discovered facts.

2.5 On 1 October 2013, the Senate of the Supreme Court overturned its decision of 19 March 2007 and the decision of the Chamber of Criminal Cases of 15 September 2006 and reopened the criminal proceedings. The case was transferred to the Chamber of Criminal Cases for *de novo* adjudication in order to examine the finding of the European Court of Human Rights that the author's human rights had been violated.

2.6 On 26 September 2014, the Chamber of Criminal Cases adjudicated *de novo* the merits of the criminal proceedings, addressed the author's allegation that he was incited to commit a crime and examined the classified information. The Chamber dismissed the author's allegations concerning the lawfulness of the special investigative measures against him and established that the actions of the law enforcement authorities did not amount to incitement by the police. The author submits that the Chamber, acting as a court of appeal, examined the two special investigative files pertaining to police operation "Rebus" but failed to include them with the other information on the case. He also submits that the court failed to quote the police operation "Rebus" directly in its decision on the principle that information obtained through special investigation measures should remain classified. While the author believes that the court of appeal examined the two files, he expresses concern that the information contained in the files was not verified during the court hearing. The author casts

¹ In line with articles 4 (2) and 15 (1) of the Law on Special Investigative Measures of Latvia.

doubt over the reliability of the information contained in the files, stating that quite often special investigative information consists of pure speculation, assumptions and guesses.

2.7 On 20 February 2015, the Supreme Court, acting as a cassation instance, dismissed the author's appeals. It considered that the necessary safeguards had been provided, as the court of appeal had duly acquainted itself with the contents of the disputed case files before ruling out their disclosure to the defence and thus was in the position to adopt a well-informed decision.

2.8 The author submits that the Supreme Court addressed his claims regarding the denial of access to the special investigative files and quoted the case law of the European Court of Human Rights,² which confirmed that the right of disclosure to the defence was not absolute and in certain circumstances must be balanced against the public interest and the need to protect third parties. The author submits that the court of appeal and the Supreme Court have argued that the restriction on the right of disclosure to the defence of the two special investigative files pertaining to police operation "Rebus" was based on articles 8 (3) and 24 (1) of the Law on Special Investigative Measures, according to which information contained in special investigative files is a State secret. Furthermore, the Supreme Court has declared that such a restriction was particularly necessary to protect both the fundamental rights of third parties and the public interest and that, by imposing that restriction, the court of appeal has ensured a reasonable balance between the public interest and the interest of the accused.

2.9 The author challenges the Supreme Court's argument by noting that the legal basis for imposing the restriction should not be based on the Law on Special Investigative Measures but on article 6 (1) of the European Convention on Human Rights and that the Court failed to explain why such a restriction was strictly necessary. The author also believes that the jurisprudence of the European Court of Human Rights that was quoted by the Supreme Court was irrelevant. The author argues that the court of appeal did not use all the legal options laid down in the Code of Criminal Procedure, which would have allowed the defence to exercise its right to fully examine the files. As for the Supreme Court's position that the restriction imposed was aimed at protecting the public interest, the author notes that it is unclear what public interest would have been offended had he been allowed to see the information, which was, after all, considered to be a very important piece of evidence. The author was accused of committing a crime that did not endanger State security and that was not violent. The crime that he was accused of committing did not offend the public interest in such a grave manner that it was necessary to restrict his fundamental right to defend himself to such a significant extent. Therefore, the author concludes, the Supreme Court did not ensure a reasonable balance between the public interest and the interest of the accused.

2.10 On 1 December 2016, the author's complaint to the European Court of Human Rights regarding its judgment in *Baltiņš v. Latvia* was dismissed by the Court sitting in a single judge formation and declared inadmissible on the basis that the admissibility criteria set out in articles 34 and 35 of the European Convention on Human Rights had not been met.

Complaint

3.1 The author claims that the State party has violated his rights under article 14 (1) of the Covenant because neither the court of appeal nor the Supreme Court, acting as a cassation instance, had verified the information contained in two special investigative files pertaining to the police operation "Rebus" during the court hearings, which should not have been considered as evidence but should instead have been subjected to an exclusionary rule. The restriction imposed on the right of the defence to have information relating to the police operation "Rebus" disclosed to it in a trial was neither transparent nor impartial.

3.2 Furthermore, the author alleges that his right to be presumed innocent until proven guilty, set out in article 14 (2) of the Covenant, was violated because the domestic courts were not able to prove that he would not have committed the crime of which he was accused had he not been incited to do so. The courts found him guilty because they failed to interpret the existing doubts in his favour.

² European Court of Human Rights, *Jasper v. the United Kingdom*, Application No. 27052/95.

3.3 The author requests the Committee to recommend that Latvia reverse his conviction and pay him compensation in accordance with article 14 (6) of the Covenant.

State party's observations on admissibility

4.1 By a note verbale dated 12 April 2018, the State party submitted its observations. It reports that, in February 2004, the State Police division charged with combating drugs received information from police informants alleging that the author was involved in drug-related offences. Accordingly, the officials of the division initiated the special investigative proceedings (case file No.7004204).

4.2 On 27 October 2004, the division commenced the next stage of special investigative activities, opening case file No. 7019304, and informed the Office of the Prosecutor General about the content and scope of those activities.

4.3 From 2 November to 1 December 2004, the Office of the Prosecutor General authorized several special investigative experiments against the author, during which the author met with an undercover police officer, I., supplied him with methamphetamines and discussed the possibility of regularly supplying drugs. All the conversations between the author and I., including telephone conversations, were recorded. The meetings between the author and I. ceased on 1 December 2004, when the author called him and complained that the money that he had received from I. as a payment for drugs had been chemically marked.

4.4 On 1 December 2004, the division charged with combating drugs initiated criminal proceedings against the author for the aggravated, unauthorized acquisition and possession of narcotic substances with the intent to sell.

4.5 On 6 December 2004, the author was apprehended by police officers of the division. The officers searched the author's residence and seized several items as evidence. The forensic examination confirmed that the seized items contained chemical traces of methamphetamine and cocaine.

4.6 On 4 January 2005, the author was charged for the unauthorized acquisition and possession of narcotic substances with the intent to sell. On 21 October 2005, the Riga Regional Court found the author guilty of aggravated, unauthorized acquisition and possession of narcotic substances with the intent to sell and sentenced him to 10 years of deprivation of liberty, the confiscation of property and three years of police oversight.

4.7 On 15 September 2006, the Chamber of Criminal Cases of the Supreme Court, acting as the appellate instance, upheld the judgment of the Riga Regional Court. The author lodged a cassation complaint with the Senate of the Supreme Court, alleging that he had been incited by the police to commit a crime, in breach of the Law on Special Investigative Measures.

4.8 On 1 March 2007, the Senate of the Supreme Court requested the Office of the Prosecutor General to provide information concerning the allegations made in the author's cassation complaint.

4.9 On 13 March 2007, the Office of the Prosecutor General informed the Senate of the Supreme Court about the special investigative activities against the author and maintained that the actions of the undercover police officer, I., did not amount to incitement to commit a criminal offence; instead, the police officers had intercepted and thwarted criminal activities already under way.

4.10 On 19 March 2007, the Senate of the Supreme Court rejected the author's cassation complaint, noting that the author had not been subjected to incitement by the police since the authorities had at their disposal information indicating that the author was involved in an illegal drug supply chain.

4.11 On 12 June 2007, the author lodged an application with the European Court of Human Rights complaining that he had been subjected to incitement by the police and that he had not had a fair hearing in the determination of the criminal charges against him.

4.12 On 8 January 2013, the European Court of Human Rights found a violation of article 6 (1) of the European Convention on Human Rights. However, contrary to the author's allegations raised in the communication before the Committee, the Court did not find that the

author had been subjected to incitement by the police. Instead, it held that, during the course of the criminal proceedings against the author, the domestic courts had failed to examine the relevant decisions authorizing the special investigative measures against the author and thus had not properly addressed his complaint of incitement. The Court also considered that the most appropriate form of redress would be the retrial of the criminal proceedings, should the author request such a retrial. The Court's judgment became final on 8 April 2013.

4.13 On 26 September 2014, the Chamber of Criminal Cases of the Supreme Court adjudicated de novo the merits of the criminal proceedings. In the light of the findings of the European Court of Human Rights, the Chamber addressed in particular the author's complaint concerning alleged incitement to commit a crime. The domestic court obtained from the law enforcement authorities special investigative files No.7004204 and No.7019304 pertaining to the special police operation "Rebus" and examined the classified information contained therein.

4.14 The State party observes that, given that the information obtained on the special investigating measures remained classified, the Chamber of Criminal Cases of the Supreme Court did not refer to the findings contained in the confidential case files directly. Instead, and having acquainted itself with the classified case files, the Chamber commenced by dismissing the author's allegations concerning the lawfulness of the special investigative measures against him. In particular, the domestic court ascertained that all disputed measures, including the special investigative experiment, had been authorized by the competent prosecutor of the Office of the Prosecutor General pursuant to the relevant provisions of the Law on Special Investigative Measures. In particular, the domestic court ascertained that the initial information that was at the disposal of the State Police was more than sufficient to warrant the initiation of the special investigative proceedings against the author.

4.15 The State party also observes that the domestic court then proceeded with analysing the evidence against the author. It analysed the witnesses' testimonies, including by examining them against the framework of the special investigative experiment that had been authorized by the Office of the Prosecutor General, establishing the strict rules and boundaries for the actions allowed by the undercover officers. The domestic court found no deviations from the authorized framework, as the undercover officials had acted strictly within the boundaries of the Law on Special Investigative Measures. Accordingly, having acquainted itself with the content of the classified case files, the Chamber of Criminal Cases of the Supreme Court was able to establish that the actions of the law enforcement authorities did not amount to incitement. The domestic court then proceeded with acquitting the author on one count and finding him guilty on the rest of the charges made against him.

4.16 The State party further observes that, in his cassation motion to the Supreme Court, the author had also complained, among other issues, that during the appellate proceedings he was not granted access to the confidential case files and that only the judges of the Chamber of Criminal Cases of the Supreme Court had acquainted themselves with their contents.

4.17 On 20 February 2015, the Supreme Court, acting as a cassation instance, examined and dismissed the author's cassation complaint. The Supreme Court explicitly underlined that the Chamber of Criminal Cases of the Supreme Court had acquainted itself with the relevant classified case files and ascertained, in its judgment of 26 September 2014, that the disputed special investigative experiment had been conducted in line with the prior prosecutorial authorization. The Supreme Court also addressed the author's complaint regarding the right of disclosure to the defence and referred to the relevant case law of the European Court of Human Rights, stating that the right of disclosure to the defence was not an absolute right and must be balanced against the public interest and the need to protect third parties. In the opinion of the Supreme Court, the author's case involved exactly the same challenge and the judiciary was obliged to restrict the right to disclosure. The Supreme Court also considered that, despite the need to restrict the right to disclosure, the appellate court had provided the necessary safeguards, as it had, being an independent and impartial tribunal, duly acquainted itself with the contents of the disputed case files before ruling out their disclosure to the defence and thus was in the position to adopt a well-informed decision.

4.18 On 6 September 2016, the Committee of Ministers of the Council of Europe concluded that all the measures required for the execution of the judgment of the European Court of

Human Rights had been implemented and decided to close the examination of *Baltiņš v. Latvia*.³

4.19 The State party observes that the author's repeated allegations that he was incited to commit a criminal offence are incompatible with the Covenant, as the author has failed to substantiate the alleged violation of article 14 (1). The State party recalls that, according to its well-established jurisprudence, the Committee cannot act as a "fourth instance" to re-assess the findings made by competent and impartial domestic judicial instances,⁴ and that it is generally for the courts of States parties to the Covenant to review facts and evidence, or the application of domestic legislation.⁵ In this context, the State party asserts that neither the exception of arbitrariness, nor a denial of justice is applicable to the author's case.

4.20 Referring to the author's statements that the undercover police agent had not intercepted an ongoing criminal activity but had initiated it himself by sending text messages and bringing about a supposedly accidental meeting, thus repeatedly encouraging the author to supply him with drugs, and that the undercover police agent had not acted in a passive manner but, rather, had incited the author to commit the offence, the State party observes that by doing this the author is seeking to have facts and evidence underpinning his conviction re-examined, notwithstanding the fact that his criminal case was *de novo* adjudicated by instances of the national judiciary at two different levels.

4.21 The State party stresses that the judgment of the Chamber of Criminal Cases of the Supreme Court of 26 September 2014 was extensively based on the information that the domestic court had obtained from the classified special investigative files (No. 7004204 and No. 7019304) pertaining to the special police operation "Rebus". Namely, the Chamber had fully assessed the classified information contained in both case files, which had allowed it to decide that the actions of the law enforcement authorities did not amount to incitement and that the undercover police officers had merely thwarted criminal activities already under way.

4.22 The Supreme Court confirmed that its Chamber of Criminal Cases had duly acquainted itself with the relevant classified case files and that, as a result, the Chamber had concluded that the initial information at the disposal of the law enforcement authorities was more than sufficient to warrant the opening of the special investigative proceedings against the author and to conduct the special investigative experiment. Thus, the Supreme Court had ascertained that there had been no incitement by the police and that the undercover police officers had merely thwarted ongoing criminal activities. As a result, the Supreme Court had ruled that the author's allegations were completely unfounded.

4.23 In that connection, the State party recalls that, in accordance with the Committee's jurisprudence,⁶ when an author's allegations have been presented, duly examined and recognized as unfounded by the national courts, the author's claim must be considered unsubstantiated for the purposes of admissibility before the Committee. The State party believes that the domestic judicial proceedings, including the examination of the allegations of incitement by the police, as a whole do not disclose any fact that would give grounds to assert that they were manifestly tainted by arbitrariness or amounted to a denial of justice. Thus, the State party observes that the author had failed to substantiate his claim alleging incitement by the police for purposes of admissibility, and this part of the communication must be declared as incompatible with the provisions of the Covenant and therefore inadmissible under article 3 of the Optional Protocol.

4.24 Referring to the fairness of the trial, the State party observes that the author has failed to substantiate his claims under article 14 (1). Furthermore, the State party notes that the Committee has established in its jurisprudence that the requirement of impartiality has two aspects. First, judges must not allow their judgment to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways

³ The State party provided a copy of the decision.

⁴ Human Rights Committee, *G. A. van Meurs v. the Netherlands*, communication No. 215/1986.

⁵ Human Rights Committee, general comment No. 32 (2007), para. 26.

⁶ *Gridin v. Russian Federation* (CCPR/C/69/D/770/1997 and CCPR/C/69/D/770/1997/Corr.1), paras. 6.4–6.5.

that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial.⁷

4.25 The State party notes that the author has failed to indicate a single instance during the course of the *de novo* adjudication of the criminal proceedings against him of the domestic tribunals acting in a manner indicating personal bias or prejudice against the author, or acting in a manner that would not appear impartial to a reasonable observer. Instead, the author's complaint is based on his dissatisfaction with the fact that the Chamber of Criminal Cases of the Supreme Court, under article 500 (4) of the Code of Criminal Procedure, denied the author access to the confidential case files.

4.26 In this context, the State party submits that although article 14 of the Covenant protects the right to a fair trial and although the right of the accused to have adequate facilities to prepare their defence remains an essential element of the right to a fair trial, article 14 does not set out an explicit right of the accused to have direct access to all documents used in a trial against them.⁸ The question that must be answered in such situations is whether the use of such material has violated the fairness of the proceedings as a whole and whether there were adequate safeguards in place.

4.27 The State party recalls that the issue of the safeguards had already been addressed by the Supreme Court, which considered that the Chamber of Criminal Cases of the Supreme Court, being an independent and impartial tribunal, was able to ensure the necessary safeguards. In other words, the decision to deny disclosure to the defence was not adopted in an arbitrary manner. Instead, the Chamber duly acquainted itself with the contents of the disputed confidential case files prior to ruling out disclosure to the defence and was thus, in the opinion of the Supreme Court, in a position to adopt a well-informed decision on the subject.

4.28 The State party observes that the author has failed to substantiate, for the purposes of admissibility, his allegation of a violation of the presumption of innocence and argues that this part of the communication must be declared as incompatible with the provisions of the Covenant and therefore inadmissible under article 2 of the Optional Protocol. Referring to the author's submission, the State party is of a firm view that the author has not put forward any single fact or provided any information on any specific incident that would lead to the conclusion that the conduct of the domestic judicial courts had adversely affected the author's right, protected under article 14 (2) of the Covenant, to be presumed innocent until proven guilty according to the law.

4.29 The State party invites the Committee to declare the author's complaint inadmissible pursuant to articles 3 and 5 (2) (a) of the Optional Protocol as the same matter has been examined under another procedure of international settlement. The State party recalls that the Committee has in its jurisprudence⁹ concluded that it would be reluctant to examine a case already considered by the European Court of Human Rights insofar as the provisions of the Covenant and those of the Convention invoked by the alleged victim converge.

4.30 Finally, the State party draws the Committee's attention to the fact that the author lodged his communication with the Committee two years and eight months after the adoption of the final decision by the cassation instance and one year after the adoption of the decision of the European Court of Human Rights. The State party is of the opinion that, in the absence of an explanation, the Committee may consider that submitting the communication after a long delay amounts to an abuse of the right of submission and find the communication inadmissible under article 3 of the Optional Protocol.

Author's comments on the State party's observations

5.1 On 19 July 2018, the author submits that he is aware of the competence of the European Court of Human Rights and of the Committee, neither of which can act as a "fourth instance" and reassess the findings of domestic courts. The author notes that the European

⁷ General comment No. 32 (2007), para. 21.

⁸ *Harward v. Norway* (CCPR/C/51/D/451/1991), para. 9.4.

⁹ *Kollar v. Austria* (CCPR/C/78/D/989/2001), para. 8.6.

Court of Human Rights concluded that the most appropriate form of redress would be retrial, since the domestic courts had failed to address his incitement complaint and had not acquainted themselves with the classified special investigative files pertaining to the special police operation “Rebus”. This was done only during the retrial.

5.2 The author proposes two possible options for addressing his claims: the Committee could get acquainted with the two classified special investigative files pertaining to the “Rebus” operation in order to see if the domestic courts actions have acted in a manner that amounts to a manifest error or denial of justice, or conclude that the most appropriate form of redress would be a third retrial.

5.3 The author reiterates his request to the Committee to recommend that Latvia reverse his conviction and pay him compensation in accordance with article 14 (6) of the Covenant.

5.4 Commenting on the State party’s observations regarding the lack of substantiation of the complaints, the author explains that the domestic courts breached his fundamental rights during the retrial. The author maintains that he was a victim of incitement by the undercover police officer, I., who did not act in a passive manner but rather incited him to commit an offence, and that only the evidence obtained as a result of that incitement could demonstrate his guilt. The author explains that he mentioned the issue of incitement in his communication to the Committee so that the Committee could understand how important it was for him to get acquainted with the two classified special investigative files. He was denied access to those classified files without a detailed explanation being given as to why it was strictly necessary to deny the right of disclosure to the defence.

5.5 Referring to State party’s observations about the admissibility of his claims under article 14 (2), the author underlines that the prosecution and the courts did not present any direct evidence of his guilt, yet all doubts were not interpreted in favour of the accused. He submits that the domestic courts failed to use all legal options under the Code of Criminal Procedure, which would have allowed the author to get acquainted with the two classified files and to fully exercise his fundamental rights in preparing a defence, which in turn led to a violation of his right to be presumed innocent until proven guilty. The author explains that throughout the retrial he felt that the courts had acted in a biased manner and were prejudiced against him, portraying him as guilty from the beginning and giving him signs of their predetermined judgment of his guilt. The author also mentions that he is particularly sensitive to other people’s attitude towards him.

5.6 Referring to the State party’s argument that the same matter has been examined under another procedure of international settlement, the author submits that the communication before the Committee is related to the retrial proceedings that led to the violation of his right to a fair trial, following the ruling of the European Court of Human Rights in 2013. The author further asserts that he submitted the communication to the Committee within a reasonable time frame.

State party’s observations on the merits

6.1 By a note verbale dated 13 August 2018, the State party submitted further observations. Regarding the author’s claims of incitement by the police, the State party observes that the judgment of the European Court of Human Rights refers to two distinct obligations of States, both of which relate to the fairness of trials.

6.2 The first obligation, arising out of the substantive limb of the right to a fair trial, implies that the investigative activities of law enforcement authorities must not go beyond that of undercover agents, in other words, it needs to be established whether the offence would have been committed without the authorities’ intervention.¹⁰ Also with regard to the substantive obligation, the State party emphasizes that, contrary to the allegations raised by the author in his communication, the European Court of Human Rights never concluded that the actions of the domestic law enforcement authorities had in fact gone beyond that allowed of undercover agents, thus subjecting the author to incitement.

¹⁰ European Court of Human Rights, *Baltiņš v. Latvia*, Application No. 25282/07, judgment of 8 January 2013, para. 56.

6.3 In its conclusions, the European Court of Human Rights referred instead to an entirely different obligation, in other words to the procedural aspect of the right to a fair trial whereby a determination on a claim of incitement has to be reached by the domestic courts to ensure that the rights of the defence are adequately protected. In other words, where an arguable claim of incitement is made during criminal proceedings, the domestic courts have to take the steps necessary to establish that no police incitement has taken place.¹¹

6.4 The State party observes that it was the procedural aspect of the right to a fair trial that was at stake during the de novo adjudication of the criminal proceedings against the author. The State party underlines that the outcome of de novo adjudication, in turn, forms the essence of the author's current complaint before the Committee.

6.5 The State party recalls that, in its judgment of 8 January 2013, the European Court of Human Rights had identified several deficiencies with regard to the author's initial trial, in particular the lack of in-depth review and assessment of the actions of the undercover police officers by the competent domestic courts, which resulted in a violation of the procedural aspect of the right to a fair trial and the subsequent retrial.

6.6 In that regard, the competent domestic courts did their utmost to thoroughly address and remedy the issues identified by the European Court of Human Rights in its judgment of 8 January 2013 and to fulfil the obligation arising out of the procedural aspect of the right to a fair trial. Moreover, during the course of the retrial, the domestic courts fully dismissed the author's allegations concerning incitement by the police with well-reasoned and motivated rulings.

6.7 Regarding the author's allegations that the de novo adjudication of the criminal proceedings lacked impartiality and transparency owing to the restrictions imposed by the domestic tribunal on the right of disclosure to the defence, the State party is convinced that the author has failed to indicate a single instance where the domestic tribunals acted in a manner that would indicate personal bias or prejudice against the author or acted in a manner that would not appear impartial to a reasonable observer. The State party reiterates that article 14 of the Covenant does not set out an explicit right of the accused to have direct access to all documents used in trials against them.

6.8 The State party recalls that both the Chamber of Criminal Cases of the Supreme Court and the Supreme Court, acting as a cassation instance, had already emphasized that the right of disclosure to the defence was not an absolute right and had to be balanced against the public interest and the need to protect third parties. In that regard, the State party wishes to underline that the interpretation provided by the domestic judiciary was fully consistent with the approach taken by the Committee. The Supreme Court also indicated that the nature of the specific special investigative activities warranted the restriction, as it was necessary to protect those cooperating with the law enforcement agencies.

6.9 The State party recalls that the issue of safeguards has been already addressed by the Supreme Court, which had found that the decision to rule out disclosure was not adopted in an arbitrary manner. The domestic court had duly acquainted itself with the contents of the disputed confidential case files prior to ruling out disclosure to the defence and thus, in the opinion of the Supreme Court, the Chamber of Criminal Cases of the Supreme Court was in a position to adopt a well-informed decision on the subject matter.

6.10 Concerning the right to be presumed innocent until proven guilty, the State party recalls that the Committee does not accept allegations of violations that are couched in general terms without mentioning specific incidents.¹² The State party maintains that the mere fact that the domestic courts disagreed with the author's interpretation of the events at issue cannot in itself substantiate and constitute a violation of article 14 of the Covenant.¹³ In this context, the reasoning used by the domestic courts and the final ruling on the author's conviction per se cannot be seen as amounting to a denial of the benefit of doubt. The State party concludes that the domestic courts examined the criminal case in depth, both on the

¹¹ Ibid., para. 57.

¹² See, for example, *Cámpora Schweizer v. Uruguay*, communication No. 66/1980, para. 17.5.

¹³ *Bertelli Gálvez v. Spain* (CCPR/C/84/D/1389/2005), para. 4.5.

basis of the evidence and of the law, in order to exclude any reasonable doubt about the author's guilt.

Author's comments on the State party's observations

7. On 25 October 2018, the author maintained that he was not able to get acquainted with the classified files and that the files had not been verified by the domestic courts, which had failed to use all available legal options, which in turn would have allowed the author to exercise his right to defend himself.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 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.

8.2 The Committee takes note of the State party's submission that the complaint should be declared inadmissible as the same matter has been examined under another procedure of international settlement, namely the European Court of Human Rights. It notes that, when it acceded to the Optional Protocol, the State party did not make a declaration, *inter alia*, to reflect its position that the Committee should not consider any communication unless it has been ascertained that the same matter is not being examined under another procedure of international investigation or settlement. The Committee observes, however, that the European Court of Human Rights found the author's second complaint inadmissible in December 2016. Since the same matter is not currently being examined under another procedure of international investigation or settlement, the Committee finds that it is not precluded from considering the author's complaint under article 5 (2) (a) of the Optional Protocol.

8.3 The Committee also takes note of the State party's argument that the author abused the right of submission with the Committee since he lodged his communication after a long delay, that is, after the adoption of the final decision by the cassation instance and after the adoption of the decision taken by the European Court of Human Rights, sitting in a single judge formation, without a valid explanation. However, the Committee notes that the communication was submitted two and a half years after exhaustion of domestic remedies and one year after the adoption of the decision by the Court. The Committee notes that the communication was submitted well within the five-year time frame from the exhaustion of domestic remedies and the three-year time frame from the Court's decision established in rule 99 (c) of its rules of procedure. The Committee therefore concludes that the delays in the present case cannot constitute an abuse of the right of submission, and considers that it is not precluded by article 3 of the Optional Protocol from examining the communication.

8.4 The Committee further takes note of the author's claims under article 14 (1) of the Covenant that the domestic proceedings were neither transparent nor impartial since the court of appeal and the Supreme Court, acting as a cassation instance, failed to verify the information contained in two special investigative files pertaining to the police operation "Rebus" during the court hearings and that the author was denied access to those classified files without a detailed explanation being given as to why it was strictly necessary to deny the right of disclosure of that information to the defence. The Committee notes, however, that the competent domestic courts appear to have done their utmost to thoroughly address and remedy the procedural issues identified by the European Court of Human Rights in its judgment of 8 January 2013, and that the appellate court had provided the necessary safeguards and duly acquainted itself with the contents of the two disputed classified files before ruling out their disclosure to the defence. In that respect, the Committee finds particularly relevant the State party's argument that such a restriction was particularly necessary in order to protect both the fundamental rights of third parties, namely those cooperating with law enforcement agencies, and the public interest, therefore ensuring a reasonable balance between the public interest and the interest of the accused. In such circumstances, the Committee considers that the domestic courts had assessed whether it was necessary to deny disclosure. In the light of these considerations, and in the absence of any

other information of pertinence on file, the Committee considers that the author has failed to sufficiently substantiate this claim and declares it inadmissible under article 2 of the Optional Protocol.

8.5 The Committee notes the author's claims under article 14 (2) of the Covenant. In the absence of any further pertinent information or explanations on file, the Committee considers, however, that the author has failed to sufficiently substantiate, for the purposes of admissibility, this allegation. Accordingly, it declares this part of the communication inadmissible under article 2 of the Optional Protocol.

8.6 As regards the author's allegations under article 14 (6) of the Covenant, the Committee observes that, in the present case, the author's conviction has never been reversed by any later judicial decision and that the author has never been pardoned. Accordingly, the Committee considers that article 14 (6) does not apply in the present case and that the author's claim is inadmissible *ratione materiae* under article 3 of the Optional Covenant.

9. The Committee therefore decides:

- (a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;
 - (b) That the present decision shall be transmitted to the State party and to the author.
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