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Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2372/2014*, **

<i>Communication submitted by:</i>	Evelio Ramón Giménez (represented by Hugo Valiente, Ximena López Giménez, Base Investigaciones Sociales (BaseIS) and the Paraguayan Human Rights Coordinating Committee (CODEHUPY))
<i>Alleged victim:</i>	The author
<i>State party:</i>	Paraguay
<i>Date of communication:</i>	30 July 2013 (initial submission)
<i>Document references:</i>	Decision pursuant to rules 92 and 97 of the Committee's rules of procedure, transmitted to the State party on 3 April 2014 (not issued in document form)
<i>Date of decision:</i>	25 July 2018
<i>Subject matter:</i>	Due process; right of peaceful assembly
<i>Procedural issues:</i>	Facts and evidence
<i>Substantive issues:</i>	Right of peaceful assembly
<i>Articles of the Covenant:</i>	14 (1), 14 (3) (a), 15 and 21
<i>Articles of the Optional Protocol:</i>	3 and 5 (2) (b)

1.1 The author of the communication, which was initially submitted on 30 July 2013, is Evelio Ramón Giménez, a national of Paraguay born on 6 October 1971. He is submitting the communication on his own behalf. He claims that the State party has violated his rights under articles 14 (1), 14 (3) (a), 15 and 21 of the Covenant. He is represented by counsel. The Optional Protocol entered into force for the State party on 10 January 1995.

* Adopted by the Committee at its 123rd session (2–27 July 2018).

** The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Yuval Shany and Margo Waterval.



Factual background

2.1 The author is an agricultural worker who lives in a smallholder settlement in the District of Tava'i, Department of Caazapá. He is the founder and leader of a national organization of rural workers, the Organización de Lucha por la Tierra ("Struggle for Land" Organization), and a leader of the Convergencia Popular Socialista political party.

2.2 Since 2003, the author has actively supported a protest movement waged by social leaders and villagers in the District of Tava'i to seek the reopening of a hospital. The hospital was closed owing to the termination of an agreement between the authorities and a German foundation that was in charge of running the institution. It was the only hospital available to the residents of Tava'i and provided an essential service to the community, which, he claims, has historically been discriminated against by the authorities, as most of its members belong to the Mbya-Guaraní and Aché indigenous peoples.

2.3 After the hospital ceased operations, the administrators sold the building and the approximately 520 hectares of land on which it was located to a Paraguayan citizen, who decided to demolish the building and use the grounds to raise livestock.¹ The author then spearheaded the formation of a coordinating committee of social and grass-roots organizations with the goal of lobbying the State party to acquire and reopen the hospital. The coordinating committee held demonstrations and took a number of actions, including writing to various authorities, all to no avail. In July 2008, as the hospital building was about to be demolished, the coordinating committee decided to hold a continuous protest and set up a camp in front of the entrance to the property. The owner then applied to the Criminal Due Process Court of San Juan Nepomuceno for a writ of *amparo*, requesting that the necessary measures be taken in view of the danger posed by possible trespassers. On 23 July 2008, the Court ordered that the Ministry of the Interior and the police should be instructed to take appropriate measures to prevent trespassing on the premises and to apprehend any trespassers.

2.4 On 7 August 2008, a group of about 150 people, including the author, occupied the hospital building. The next day, the owner filed a criminal complaint of squatting on private property with the prosecutor's office.² The author indicates that the occupation lasted until 13 August 2008 and that the members of the coordinating committee left peacefully, once they had met the owner and embarked on direct talks with him, had prevented the building from being demolished and had signed an agreement with the owner, who promised to offer the building for sale to the State party. The camp was nonetheless left in place alongside the public road in front of the premises for the purpose of pursuing further actions to demand the reopening of the hospital.

2.5 On 11 August 2008, the prosecutor of Prison No. 1 of the District Prosecutor's Office of San Juan Nepomuceno issued a warrant for the author's arrest; he was arrested on 21 August 2008. On 22 August, he was informed that he stood accused of squatting on private property, and he made an initial statement. The author indicated that he, as the leader of the coordinating committee, had taken part along with some 500 other individuals in the peaceful occupation of the building in order to bring about the reopening of the hospital. The prosecutor filed criminal charges against the author under article 142 of the Criminal Code.

2.6 On 22 August 2008, the Criminal Due Process Court of San Juan Nepomuceno ordered the author's release on bail, but stipulated that he was: (a) not permitted to leave the country or change his place of residence without the judge's permission; (b) required to report to court officials within the first 10 days of each month; (c) bound by recognizance to appear for trial; and (d) not permitted to enter the premises of the former hospital.

2.7 On 9 January 2009, the author was arrested by order of the prosecutor, who accused him of having reoccupied the property. On 21 January 2009, the Criminal Due Process Court of San Juan Nepomuceno remanded the author in custody on the grounds that he had

¹ The author does not provide any further details on this subject.

² Article 142 of the Criminal Code provides that: "Any person who, either individually or in concert with others, enters the property of another by force or stealth without the owner's permission, and takes up residence thereon, shall be punishable by up to 2 years' imprisonment or a fine."

breached one of the conditions of his bail. The author's counsel sought his release, arguing that there was no risk of flight or of obstruction of justice. The author remained in custody until 24 February 2009, when the Criminal Due Process Court of San Juan Nepomuceno decided that he should spend the rest of the pretrial period under house arrest.

2.8 On 20 February 2009, the District Prosecutor's Office of San Juan Nepomuceno, Prison Unit No. 1, formally charged the author with squatting on private property and requested that the case be tried in public oral proceedings. On 7 May 2009, during the preliminary hearing, the author's counsel moved for dismissal of the case. Counsel indicated that the Public Prosecution Service had not observed the rules concerning the right to a defence, as the author had not been informed in detail, at the time of his initial statement, of the charges against him or of what evidence existed in support of the charges.³ Counsel also contended that the author had not committed the offence of squatting on private property, since the author's conduct had not reflected all the elements of that offence. Counsel noted, moreover, that the author had not entered the property by stealth or with intent to take up residence, as required under article 142 of the Criminal Code. In addition, counsel stated that the author had entered the building as part of a peaceful demonstration in exercise of his freedom of assembly and demonstration, which are protected under the Constitution.⁴

2.9 On 7 May 2009, the Criminal Due Process Court of San Juan Nepomuceno rejected the motion to dismiss. It indicated that the record of the author's initial statement showed that he was aware of the details of the charges, since he defended himself against them. With regard to the contention that the author's conduct had not reflected all the elements of the offence, the judge indicated that there were elements that implicated the author in the events under investigation and added that the author had not shown that the case met any of the three threshold requirements for a case to be dismissed: proof that the act had not taken place, that it was not an offence or that the accused had not taken part in it.

2.10 On 30 June 2009, the author filed an interlocutory appeal against the decision of 7 May 2009, reiterating the arguments set out in the motion to dismiss. He also contended that the judge's decision was not properly reasoned, since it merely enumerated the requirements for dismissal of a case. On 6 October 2009, the Collegial Trial Court of Guairá and Caazapá rejected the interlocutory appeal and, on the basis of testimony submitted by the prosecutor and the victim (the property owner), gave the author a suspended sentence of 2 years' imprisonment. The Court held the commission of the offence to have been established, noting that the author entered the premises by force, along with 100 other people whom he was "leading", and that they immediately pitched tents, thereby taking up residence on the grounds. The Court stipulated that the author was: (a) not permitted to leave the country or change his place of residence without the judge's permission; (b) not permitted to take part in assemblies of more than three persons; (c) required to report to court officials every three months; (d) not permitted to bear arms or drink alcohol; (e) required to remain at home between the hours of 8 p.m. and 6 a.m.; and (f) required to stay away from the premises of the former hospital.

2.11 On 27 October 2009, the author appealed against the judgment on the grounds that it significantly restricted his rights to freedom of assembly, demonstration and movement. He reiterated his arguments with respect to the absence of one of the elements of the offence, since he had never intended to take up residence on the property and had never done so, but had been there as part of a peaceful demonstration about which the police and the property owner had been informed. He claimed that his right to a defence had been violated, since the Court had resorted to generalities and stock phrases,⁵ had not given due weight to the evidence submitted in his defence⁶ and had not issued a duly reasoned judgment.⁷ On 10 March 2010, the Court of Appeal of Caazapá for civil, commercial, labour and criminal matters rejected the appeal and upheld the judgment at first instance. The Court found that

³ The author refers to article 86 of the Code of Criminal Procedure.

⁴ Art. 31.

⁵ In violation of article 403 of the Code of Criminal Procedure.

⁶ Ibid.

⁷ In violation of article 398 (2) of the Code of Criminal Procedure.

“staying in a particular place for more than one day, living in makeshift camps and cooking” amounts to taking up residence within the meaning of article 142 of the Criminal Code. It also found that the defence counsel’s argument that the judgment criminalized social protest was without merit because the rights of the property owner had been violated. As to the claim that evidence had not been given due weight, it held that the judge *a quo* had used sound judgment in assessing the evidence.

2.12 On 16 April 2010, the author filed an appeal in cassation before the Supreme Court, which was rejected on 19 August 2011. The Court held that the appeal was based solely on the author’s disagreement with the decision of the appellate court and that the judges of that court had explained the grounds for the decision properly.

The complaint

3.1 The author claims that the State party violated his rights under articles 14 (1), 14 (3) (a), 15 and 21 of the Covenant.

3.2 With regard to the violation of article 14 (1) of the Covenant, he claims that his rights under this article were violated by the manifestly arbitrary manner in which the evidence was weighed at his criminal trial and by the appellate courts’ failure to substantiate their decisions. The author recalls that, according to the Committee’s general comments and jurisprudence, “it is generally for the courts of States parties to the Covenant to review facts and evidence, or the application of domestic legislation, in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice, or that the court otherwise violated its obligation of independence and impartiality”.⁸ He submits that the Collegial Court of Guairá and Caazapá acted in a manifestly arbitrary manner, since it gave no reasons for its rejection of the author’s motion to dismiss an interlocutory appeal. He further states that the Court merely used “stock phrases” and failed to substantiate the decision of 6 October 2009. The author refers to a case in which the Committee found a violation of article 14 of the Covenant because a court failed to issue a reasoned written judgment, thereby violating the victim’s right to avail himself of a further legal remedy before a higher tribunal.⁹

3.3 The author also maintains that the domestic courts acted in a manifestly arbitrary manner when they found that he had committed the offence of squatting on private property, even though one of the elements of the offence, that of taking up residence on another person’s property with intent to take possession of it, had not been reflected in his case. The author states that the domestic courts ruled, without evidence, that this state of affairs could be inferred from the circumstances of the case, with no need for the prosecution to prove it. He also claims that the domestic courts’ evaluation of the evidence was manifestly arbitrary, in particular with regard to determining the credibility of witnesses. The author notes that the Court deemed the property owner to be fully credible, but provided no justification for its dismissal of the testimony of four witnesses for the defence.¹⁰

3.4 The author maintains that his rights under article 14 (3) (a) of the Covenant were violated because, when the Criminal Due Process Court ordered his arrest and brought the preliminary charge on 22 August 2008, it merely informed him that he was accused of squatting on private property, defined under article 142 of the Criminal Code, without specifying the facts underlying the charge, the terms of the complaint, the applicable law or the evidence held by the prosecution at that time. He was not given access to that information until the prosecution brought formal charges against him on 20 February 2009, six months later, in breach of the Covenant obligation to inform accused persons promptly and in detail of the charges against them.¹¹ The author submits that by the time he was so

⁸ General comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 26. The author also refers to *Rouse v. Philippines* (CCPR/C/84/D/1089/2002), para. 7.2.

⁹ See *Hamilton v. Jamaica* (CCPR/C/50/D/333/1988), para. 9.1.

¹⁰ The author indicates that the courts made unfounded, speculative claims, such as: “the members of the Court hold that the statement (by the owner) is fully credible in this case. The victim ..., in testifying before the Court, became quite upset” (judgment of 6 October 2009, p. 156).

¹¹ The author refers to general comment No. 32, para. 31; *Kurbanov v. Tajikistan* (CCPR/C/79/D/1096/2002), para. 7.3; and *Engo v. Cameroon* (CCPR/C/96/D/1397/2005), para. 7.7.

informed in detail, the investigative stage of the proceedings had already concluded. This curtailed his ability to submit exculpatory evidence in order to avoid being brought to trial.

3.5 The author maintains that he made use of the available remedies to address this situation, filing a motion to dismiss and an interlocutory appeal, but the Court rejected them without providing any justification, stating that the author was aware of the allegations against him. He refers to general comment No. 32, according to which the requirements laid down in article 14 (3) (a) “may be met by stating the charge ... in writing, provided that the information indicates both the law and the alleged general facts on which the charge is based”.¹² He also refers to the Committee’s jurisprudence with respect to this article¹³ and article 9 (2).¹⁴

3.6 The author further claims that by trying and convicting him for conduct that was not punishable under national law, the State party violated article 15 (1) of the Covenant. He notes that article 142 of the Criminal Code requires four elements: entry onto another person’s property; opposition or lack of consent by the owner; entry by force or stealth; and residence on the property. In his case, these criteria were not met: he did not enter by force or stealth, as he was taking part in a peaceful occupation carried out publicly, and he did not take up residence on the property, because his intent was not to live there in order to take possession of it. Therefore, he contends that the extension, by analogy, of the offence of squatting on private property to include the mere act of entering another person’s property in order to hold a peaceful, temporary public assembly, albeit without the owner’s permission, is a violation of article 15 (1) of the Covenant.

3.7 The author adds that, under article 15 (1) of the Covenant, there can be no offence without a law defining it as such, meaning that criminal law must be interpreted narrowly and there can be no offences by analogy.¹⁵ According to the Committee’s jurisprudence, an accused cannot be held accountable for an offence unless he or she has acted exactly as described in criminal law, with no ambiguity as to which offence has been committed. For example, in *Nicholas v. Australia*, the Committee held that evidence must be adduced at trial to demonstrate that the elements of an offence existed, and that failure to do so would violate the principle of *nullum crimen sine lege* and the principle of legal certainty, both of which are provided for in article 15.¹⁶ During the author’s criminal trial, the prosecution did not demonstrate the existence of all the elements of the offence, as it did not show that the author had taken up residence on the property, and the Court assumed, without substantiation, that that element of the offence had been established. The domestic courts merely inferred the existence of that element on the basis of bias, which is revealed by phrases such as “taking up residence in a place means staying there with intent to take possession of it [...] this state of affairs can be inferred from the circumstances of the case. [...] Staying in a particular place for more than one day, living in makeshift camps and cooking, amounts to such a situation”.¹⁷

3.8 The author maintains that the imposition of a two-year ban on his participation in assemblies of more than three persons violates his rights under article 21 of the Covenant. He contends that the domestic courts’ arbitrary sentence placed unnecessary and disproportionate restrictions on his right of peaceful assembly. He refers to the Committee’s jurisprudence according to which restrictions on the right of assembly must meet a test of lawfulness that includes determining whether they are provided for by law and are

¹² Para. 31.

¹³ See *Mbenge v. Zaire* (CCPR/C/18/D/16/1977), para. 14.1, and *Owen v. France* (CCPR/C/101/D/1620/2007), para. 9.3.

¹⁴ See *Drescher v. Uruguay* (CCPR/C/19/D/43/1979), para. 13.2; and *Grant v. Jamaica* (CCPR/C/56/D/597/1994), para. 8.1.

¹⁵ The author refers to CCPR/CO/72/PRK, para. 14 and CCPR/CO/83/ISL, para. 10.

¹⁶ See *Nicholas v. Australia* (CCPR/C/80/D/1080/2002), para. 7.5.

¹⁷ Court of Appeal of Caazapá for civil, commercial, labour and criminal matters, judgment of 10 March 2010, p. 205.

necessary in a democratic society in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.¹⁸

3.9 The author submits that, in his case, the restrictions do not meet this test because they are disproportionate and have no legal basis. The domestic criminal legislation applicable to suspended sentences does not authorize the suspension of the right of assembly. In accordance with the principles set out in the Criminal Code with regard to suspended sentences, the courts may not impair the inviolable rights of individuals or excessively restrict their social interactions.¹⁹ The author also maintains that the State party failed to explain why the restriction of his right of assembly was necessary in order to protect private property and why the restriction had to be so prolonged, given that several years had passed since the occupation of the former hospital. Therefore, the two-year ban on his participation in assemblies of more than three persons constitutes an unnecessary and disproportionate restriction. What is more, this restriction is incompatible with the object of the Covenant, since his freedom of assembly was restricted for reasons other than the one established by domestic legislation on suspended sentences, which is to provide support for convicted persons to help them avoid reoffending. Lastly, the author claims that this restriction was unnecessary because it did not relate to an urgent public need. Further, it imposed unlawful restrictions on a right that should take precedence over other rights as a key manifestation of the exercise of democracy, particularly in situations where poor and socially marginalized persons are unable to find other means of making their needs known to public authorities.

State party's observations

4.1 On 22 October 2014, the State party submitted its observations on the admissibility and the merits of the communication. With respect to admissibility, it contends that the communication is inadmissible because the author does not have proper representation and has not exhausted domestic remedies. The State party notes that, while the author signed a document giving power of attorney to the Paraguayan Human Rights Coordinating Committee (CODEHUPY), the communication was signed by four lawyers, two of whom belong to a non-governmental organization called BASE Investigaciones Sociales (BaseIS), which has no connection to CODEHUPY. The two persons who signed on behalf of CODEHUPY have not provided proof that they are affiliated with that non-governmental organization. The State party is therefore of the view that the author has not complied with rule 96 (b) of the Committee's rules of procedure.

4.2 With respect to the exhaustion of domestic remedies, the State party submits that the author failed to comply with this requirement with regard to his allegations concerning article 21 of the Covenant. Neither the brief filed to appeal against the ruling at first instance nor the one filed for the appeal in cassation contains any claim by the author that the ban on his participation in assemblies of more than three persons violated his rights under the Covenant²⁰ or harmed him in any way.²¹ The State party therefore maintains that the author has not complied with article 5 (2) (b) of the Optional Protocol. It refers to the Committee's Views in *Lassaad Aouf v. Belgium*, according to which "while complainants are not required to invoke specifically the provisions of the Covenant which they believe

¹⁸ The author refers to *Zalesskaya v. Belarus* (CCPR/C/101/D/1604/2007), para. 10.5; *Belyazeka v. Belarus* (CCPR/C/104/D/1772/2008), para. 11.7; *Govsha and others v. Belarus* (CCPR/C/105/D/1790/2008), para. 9.3; and *Chebotareva v. Russian Federation* (CCPR/C/104/D/1866/2009), para. 9.2.

¹⁹ The author refers to article 46 of the Criminal Code.

²⁰ The State party indicates that nothing prevented the author from claiming violations of the Covenant before the domestic courts, given that the Covenant became part of domestic positive law by virtue of Act No. 5 of 1992.

²¹ The State party refers to article 449 of the Code of Criminal Procedure, which provides that "judicial decisions may be appealed against ... provided that the appellant has been harmed thereby". It also refers to article 467 of the Code, which stipulates that "the remedy of appeal against a final judgment shall be available only if it is based on the disregard or incorrect application of a legal provision". If the point at issue relates to "a procedural flaw, the appeal shall be admissible only if the appellant filed a timely application for its rectification".

have been violated, they must set out in substance before the national courts the claim which they later bring before the Committee. Since the author did not raise the aforementioned complaints before the court of cassation, nor the alleged violation of article 14, paragraph 3 (b), before the trial judges, these parts of the communication are inadmissible.”²²

4.3 With regard to the alleged violation of article 14 (1), the State party submits that the claims are without merit, as the actions of the domestic courts were in no way arbitrary. It contends that all the decisions of the domestic courts were duly substantiated, including the decision issued at the preliminary hearing, when the author was informed that his objections were without merit because they were aimed at having the case dismissed; the decision of the trial court, which included an analysis of the evidence presented to it; the decision of the appellate court, which explained the reasons for its finding that the judgment at first instance was lawful; and the decision of the Supreme Court, which did not find any defects in the judicial decisions submitted to it for review. The State party further submits that the author was tried in public oral proceedings in which he enjoyed all the rights set forth in article 17 of the Constitution²³ and articles 75²⁴ and 86²⁵ of the Code of Criminal Procedure. The State party refers to the Committee’s jurisprudence and recalls that it is for the national courts to review or evaluate facts and evidence and to review the interpretation of domestic legislation.²⁶

4.4 With regard to the alleged violation of article 14 (3) (a) of the Covenant, the State party submits that the author exercised his right to a defence by making an initial statement in the presence of a public defender, who did not challenge the proceeding, request a postponement or question the statement made by his client. It further submits that the author was given to understand that he was being cited with regard to the possible commission of the offence of squatting on private property and was informed of the evidence against him that existed at the time, and of all his procedural rights.²⁷ The State party indicates that the author demonstrated full awareness, knowledge and understanding of the unlawfulness of his acts, as he acknowledged in his initial statement that he was the leader of a social movement that had not squatted on any property, but had entered it in order to assert the rights of the community, which shows that the author was aware that his conduct was subject to sanction and would have legal consequences.

4.5 The State party also indicates that the Public Prosecution Service filed formal charges against the author on 20 February 2009, providing the court with all of the available evidence that would be presented during the public oral proceedings. During the trial, the author was afforded the opportunity to have the charges read to him in Guaraní. The time frame between the date the formal charges were filed and the date of the trial was 7 months and 16 days. The author thus had more time to prepare his defence than the Public Prosecution Service had had to conduct the investigation.²⁸

4.6 With regard to the alleged violation of article 15 (1) of the Covenant, the State party maintains that the author was tried for and convicted under article 142 of the Criminal Code, which was promulgated on 26 November 1997. This provision is intended to protect private property in accordance with article 109 of the Constitution, which was adopted in 1992. Given that the act of which the author was convicted occurred on 7 August 2008, he has incorrectly interpreted this provision of the Covenant, because the offence was defined as

²² CCPR/C/86/D/1010/2001, para. 8.3.

²³ This article refers to procedural rights, including the presumption of innocence, the principle of legality and the right to a defence.

²⁴ “Rights of the accused: Accused persons shall be assured of the safeguards necessary for their defence.”

²⁵ “Preliminary note: At the start of the hearing, the competent officer recording the statement shall inform the accused in detail of the charges against him or her and shall provide a summary of the evidence in support of the charges.”

²⁶ The State party refers to *Piandiong and others v. Philippines* (CCPR/C/70/D/869/1999), para. 7.2, and *X v. Spain* (CCPR/C/93/D/1456/2006), para. 8.3.

²⁷ See para. 2.5.

²⁸ The State party refers to articles 315, 316 and 548 of the Code of Criminal Procedure.

such in national law before the act was committed. The State party concludes that the principle of legality has not been violated.

4.7 The State party is also of the view that the author acted unlawfully and maliciously by using force and stealth to enter the property, causing serious harm to its owner, with the intent to continue occupying the premises in order to take possession of the building. It further states that the conduct defined as the criminal offence of squatting on private property is instantaneous and continuous and is deemed to have been committed at the time when the means of dispossessing the owner are brought into play; therefore, the offence was committed at the time the author and the other persons entered and began to occupy the property. The State party adds that the interpretation of specific elements of the criminal offence is the responsibility of the national courts, unless there has been manifest arbitrariness. It reiterates that all decisions taken in the criminal proceedings against the author were duly substantiated and that the author is asking the Committee to act as a fourth instance.

4.8 Lastly, with regard to the allegations under article 21 of the Covenant, the State party reiterates that the author has failed to exhaust domestic remedies. It indicates that the right of association and demonstration is guaranteed by the Constitution provided that it is exercised peacefully and for lawful purposes, which is not what occurred in this case. The author used community radio broadcasts to incite villagers of the Tava'i community to enter the property by force. The domestic courts were thus obliged to restore social harmony, bearing in mind that improper, unlawful or punishable methods may not be used, even in the defence of a community's interests.

Author's comments on the State party's submission

5.1 On 30 December 2014, the author submitted comments in response to the State party's submission. He maintains that the communication meets the admissibility requirements laid down in the Optional Protocol. With regard to the State party's claim that the author failed to comply with rule 96 (b) of the Committee's rules of procedure, he argues that the executive secretary of CODEHUPY, who signed the complaint, has legal capacity to represent that organization.²⁹ He indicates that this capacity of representation has been recognized by various authorities of the State party in its interactions with the non-governmental organization. He also recalls that he gave power of attorney to CODEHUPY and that he authorized both non-governmental organizations — CODEHUPY and BaseIS — to submit the communication to the Committee on his behalf. He notes that the legal personality of these organizations has been recognized in the State party.

5.2 With reference to the State party's contention that the author has not exhausted domestic remedies with respect to his claims under article 21 of the Covenant, the author indicates that he claimed a violation of his right of assembly during the criminal proceedings, including the preliminary hearing; in the interlocutory appeal; and in the appeal against his conviction. He states that all these claims were rejected without substantiation and that he has exhausted all available remedies. With regard to the State party's argument that he should have invoked the right of assembly in his appeal in cassation, the author maintains that, under domestic law, the possibility of filing a constitutional challenge under that procedure is narrowly limited to cases involving sentences of more than 10 years, whereas his sentence was 2 years. Accordingly, he was obliged to base his defence strategy on the appeal phase of the proceedings pursuant to article 478 (3) of the Code of Criminal Procedure,³⁰ arguing that neither the conviction nor the decision to reject the appeal had been duly substantiated. He concludes that the State party cannot expect him to have exhausted a remedy that was not available to him.

5.3 The author also submits that, according to the Committee's jurisprudence, complainants are not required to invoke specifically the provisions of the Covenant which they believe have been violated; it is sufficient for them to invoke the substance of those

²⁹ The author encloses a copy of the minutes of the regular general assembly of CODEHUPY, held on 5 February 2013, at which the executive secretary was elected.

³⁰ This article provides that "The remedy of cassation shall be available ... where the judgment or order is manifestly unfounded."

provisions before the national courts.³¹ He indicates that under article 2 (3) of the Covenant, States parties are required to monitor conformity with treaties through their domestic courts and that the latter had an obligation to examine the compatibility of his allegations with the body of constitutional law, including the Covenant, but did not do so.

5.4 The author notes that the State party has made no objections to the admissibility of the communication under articles 14 (1), 14 (3) (a) or 15 (1) and has not disputed the facts as stated in the communication. He maintains that the State party merely reiterates the contradictory claims made by the domestic courts: it indicates that the author committed the offence of squatting on private property, but also acknowledges that the author entered the premises in the context of a social protest that led to a negotiation with the authorities. This shows that his actions were peaceful and transparent, in contrast to the elements specified in the definition of the offence. The State party also does not dispute the author's allegations regarding the failure to substantiate the conviction, which was based on unfounded assumptions.

5.5 Regarding his allegations under article 14 (3) (a) of the Covenant, the author submits that the State party has simply repeated what was said by the domestic courts. Regarding article 14 (1), he maintains that the State party has merely asserted that the decisions of the domestic courts were substantiated, without refuting the author's allegations concerning the arbitrary nature of those decisions. He reiterates that the domestic courts acted with manifest arbitrariness on at least three occasions: (a) when the interlocutory appeal was rejected without substantiation, in a decision that used only "stock phrases"; (b) when it was concluded, without substantiation, that the element of the offence that consisted of taking up residence on another person's property was present, even though the prosecution had not proved this to have been the case; and (c) when the evidence was weighed in an arbitrary manner, particularly with regard to the assessment of the witnesses' credibility.

5.6 The author reiterates his claims concerning the violation of article 21 of the Covenant and adds that the State party has not indicated what lawful and necessary purpose in a democratic society was served by the suspension of his right of assembly for two years, and that the suspension therefore had no legal basis. He states that domestic law does not permit the absolute suspension or cancellation of his right of assembly.³²

5.7 The author states that he seeks the following forms of redress: (a) access to a judicial remedy whereby the sentence imposed in violation of the Covenant may be reviewed; (b) full and adequate reparation; and (c) a review of criminal laws and policies to ensure that they are not applied in such a way as to restrict unduly the right of assembly enshrined in the Covenant.

State party's additional observations

6.1 On 23 April 2015, the State party submitted additional observations. With regard to rule 96 (b) of the Committee's rules of procedure, it reiterates that the author failed to provide any evidence that the persons who signed the communication represented him. It also states that the author's complaint contains no indication that he gave power of attorney to the non-governmental organization BaseIS. The fact that the author confirmed in his comments of 30 December 2014 that CODEHUPY and BaseIS represented him shows that the objection to the admissibility of the communication is valid. The State party adds that the author's assertion that the State party has recognized the executive secretary of CODEHUPY as the representative of that organization is unfounded, as the authorities do not necessarily know who is in charge of a particular non-governmental organization and cannot know whether the individuals with whom they correspond are the legal representatives of those organizations.

³¹ See *Lassaad Aouf v. Belgium*, para. 8.3.

³² The author refers to article 32 of the Constitution: "Everyone has the right to assemble and demonstrate peacefully, without weapons and for lawful purposes, without requiring authorization The law may only regulate the exercise of this right in public places and at certain times, safeguarding the rights of third parties and public order as established by law."

6.2 As to the author's allegations under article 14 (1), the State party reiterates its observations and maintains that a reading of the decisions in question is sufficient to show that they were substantiated. It also reiterates its arguments concerning the alleged violation of article 14 (3) (a), and states that the Committee's decision in *Grant v. Jamaica*, cited by the author, is unrelated to the present case. In *Grant v. Jamaica*, the Committee found that there was a violation of article 9 (2) of the Covenant because the author was not informed of the reasons for his arrest until seven days later.³³ This is not consistent with the course of events in the present case or with the author's allegations under article 14 (3) (a) of the Covenant.

6.3 The State party also indicates that the allegations under article 21 of the Covenant are unfounded, since the domestic courts held that the restriction of the author's right of assembly was appropriate, proportionate and in conformity with national law. It reiterates that the author did not exhaust domestic remedies in respect of these claims.

6.4 With regard to the redress sought by the author, the State party submits that effective remedies were available within its legal system, but the author's appeals by those means were rejected because he was in the wrong. With regard to the compensation requested, the State party indicates that, as the author has not shown that he suffered any harm, he is not entitled to any reparations. As to the author's request for the amendment of criminal laws and policies to ensure that they are not applied in such a way as to violate article 21 of the Covenant, the State party argues that this is an *ex post facto* request and that the Committee is not competent to order such amendments, as that would constitute interference in the State party's internal affairs.

Issues and proceedings before the Committee

Consideration of admissibility

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

7.2 As required under article 5 (2) (a) of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 The Committee takes note of the State party's argument that the communication is inadmissible under rule 96 (b) of the rules of procedure because the author does not have adequate representation (see paras. 4.1 and 6.1). The Committee recalls that rule 96 (b) of its rules of procedure provides that, normally, "the communication should be submitted by the individual personally or by that individual's representative". The Committee also recalls its jurisprudence to the effect that counsel acting on behalf of victims of alleged violations must show that they have real authorization from the victims (or their immediate family) to act on their behalf.³⁴ In the present case, the Committee notes the author's claims that he gave power of attorney to CODEHUPY and that its executive secretary, who signed the complaint, has the legal capacity to represent that organization. The Committee also notes the author's confirmation that he authorized CODEHUPY to submit the communication to the Committee on his behalf and that the executive secretary of that organization, together with other counsel, submitted the communication to the Committee on the author's behalf. Accordingly, the Committee concludes that the power of attorney that the author gave to CODEHUPY shows that the latter had real authorization, and finds that there is no obstacle to the admissibility of the communication under rule 96 (b) of its rules of procedure.

7.4 The Committee also notes the State party's argument that the author did not exhaust domestic remedies with regard to his allegations in relation to article 21 of the Covenant. The Committee notes that, according to the State party, the author did not allege such violations before the national courts, particularly the prohibition to participate in assemblies of more than three persons for a period of two years (paras. 4.2 and 6.3). The Committee

³³ See *Grant v. Jamaica*, para. 8.1.

³⁴ See, for example, *Y v. Australia* (CCPR/C/69/D/772/1997), para. 6.3.

also notes the author's assertion that in the criminal proceedings against him, including the preliminary hearing, the interlocutory appeal and the appeal against his conviction, he did claim a violation of his rights under article 21 of the Covenant. It further notes his statement that he was unable to claim a breach of his right of peaceful assembly through the remedy of cassation because, under national law, a constitutional challenge may be submitted only in respect of criminal sentences of more than 10 years, whereas his sentence was 2 years (para. 5.2).

7.5 The Committee observes that the author referred to his rights under article 21 of the Covenant during the preliminary hearing and in the interlocutory appeal, claiming, among other arguments, that he could not be charged with an offence in the absence of all the elements thereof, as the criterion of "taking up residence on the property" had not been met (paras. 3.6 and 3.7). In this regard, the Committee notes the author's argument that his intent was not to take up residence but to exercise his right to protest and demonstrate, which is protected under article 32 of the Constitution (see paras. 3.8, 3.9 and 5.6). The Committee also observes that in the appeal against the judgment of 6 October 2009, which prohibited his attendance at "assemblies at which more than three persons are present", the author claimed that this prohibition significantly restricted his rights of assembly and demonstration (see paras. 2.10, 2.11, 3.8 and 3.9). In view of the foregoing, the Committee concludes that the author set out in substance before the national courts the same allegations brought before the Committee.³⁵

7.6 The Committee also notes that article 478 (1) of the Code of Criminal Procedure provides that when it is alleged that a constitutional principle has been disregarded or incorrectly applied in a decision to convict, the remedy of cassation is available only against judgments imposing a custodial sentence of more than 10 years. Accordingly, the Committee holds that this remedy was not available in the present case, since the author was given a sentence of 2 years' imprisonment in the judgment of 6 October 2009. The Committee also notes that the State party's legal system does not make provision for the filing of *amparo* proceedings to challenge judgments. In the light of the information provided, and in the absence of information from the State party indicating the existence of an effective remedy or refuting the author's claims regarding the exhaustion of domestic remedies, the Committee finds that there are no obstacles to the admissibility of the communication under article 5 (2) (b) of the Optional Protocol.³⁶

7.7 The Committee takes note of the author's claims under article 14 (1) of the Covenant regarding the alleged arbitrariness of the action taken by the domestic courts. In particular, it notes the author's argument that the judicial decisions taken during the criminal proceedings were not properly substantiated, since the wording of the decision to convict used only "stock phrases" without explaining the underlying reasons. The Committee also notes the author's argument that these decisions were manifestly arbitrary because: (a) the courts found that the author had committed the offence of squatting on private property even though one of the constituent elements of that offence was absent; and (b) their assessment of the evidence, in particular regarding the credibility of witnesses, was manifestly arbitrary because only the witnesses for the prosecution were found to be credible and the statements made by the witnesses for the defence were discounted without explanation (paras. 3.2, 3.3 and 5.5).

7.8 The Committee recalls its jurisprudence to the effect that it is generally for the organs of States parties to apply domestic legislation, unless it can be shown that such application was clearly arbitrary or amounted to a manifest error or denial of justice.³⁷ In the present case, the Committee observes that the trial court, after examining the evidence, found that the author had committed the offence provided for in article 142 of the Criminal Code and that all the elements of that offence had been present, noting that the author and 100 other people had entered the property by force and immediately proceeded to pitch tents, thereby taking up residence on the premises (para. 2.10). The Committee also notes

³⁵ See *Lassaad Aouf v. Belgium*, para. 8.3.

³⁶ See, for example, *Quiroga Mendoza and Aranda Granados v. Plurinational State of Bolivia* (CCPR/C/120/D/2491/2014), para. 9.4.

³⁷ General comment No. 32, para. 26.

that the Court of Appeal upheld this decision, finding that the element of taking up residence on the property had been present, since the author spent several days in the tents. The Committee notes that the trial court heard testimony presented by both parties and analysed each such statement, and that the court of second instance, after examining the author's claim that the evaluation was arbitrary, found otherwise, and indicated that the judge *a quo* had assessed the evidence properly, in line with the rules of sound judicial discretion (paras. 2.11, 4.3 and 4.7). The Committee also observes that the information supplied by the author does not show in what respect the courts' interpretation of domestic law was arbitrary or amounted to a manifest error or denial of justice. Accordingly, the Committee finds that this claim has not been sufficiently substantiated by the author and declares it inadmissible under article 2 of the Optional Protocol.

7.9 The Committee also notes the author's claim, under article 14 (3) (a) of the Covenant, that he was not informed in detail of the charges against him at the time of his arrest, as the authorities told him only that he stood accused of squatting on private property, an offence under article 142 of the Criminal Code, without specifying the facts on which the accusation was based, the applicable legislation or the evidence in the prosecutor's possession at that time. He submits that he did not receive detailed information on the charges until six months later, when he was formally charged on 20 February 2009 (see paras. 2.8, 3.4 and 3.5). However, the Committee notes the State party's contention that when the author gave his initial statement on 22 August 2008, he was informed of the nature and cause of the charges against him and also of the evidence against him (paras. 2.5, 2.7, 2.9, 4.4 and 4.5).

7.10 The Committee recalls that, according to its jurisprudence, "the right to be informed of the charge 'promptly' requires that information be given as soon as the person concerned is formally charged with a criminal offence under domestic law, or the individual is publicly named as such"³⁸ and that, in order to meet the requirements of article 14 (3) (a), the accused must be given information both on the law and on the alleged "general facts on which the charge is based".³⁹ The Committee also recalls that article 14 (3) (a) applies only to criminal charges, not to criminal investigations.⁴⁰ The Committee takes note of the State party's assertion that the author exercised his right to a defence when he made his initial statement in the presence of a public defender, who did not object to the proceeding, request a deferral or question the statement made by his client. It further submits that the author was told that he was being cited in connection with the possible commission of the offence of unlawful occupation of private property and was informed of the evidence against him that had been gathered at that time and of his rights. The Committee also takes note of the State party's claim that the author demonstrated full knowledge and understanding of the unlawfulness of his acts, as was made evident in his initial statement, in which he acknowledged that he was the leader of a social movement that had not taken over any private property, but had entered it in order to defend the rights of the community (see para. 4.4). The Committee further notes that the State party has indicated that, on 20 February 2009, once the prosecutor had gathered the evidence against the author, he filed formal charges against him and provided the court with all of the available evidence to be presented during the oral proceedings and that, at the trial, the author was afforded the opportunity to have the charges read to him in Guaraní. In addition, the Committee takes note that the State party has indicated that 7 months and 16 days elapsed between the date when formal charges were brought and the date of the trial and that, accordingly, the author had more time to prepare his defence than the prosecutor had had to conduct the investigation (para. 4.5).

7.11 The Committee notes that when the authorities opened the investigation into the incident on 11 August 2008, the author already knew about the summons regarding the possible commission of the offence of unlawful occupation of private property and about the evidence against him, and that once he had been formally charged, he had over seven months to prepare his defence. Consequently, the Committee observes that the author has

³⁸ *Ibid.*, para. 31.

³⁹ *Ibid.*

⁴⁰ *Ibid.*; *Khachatryan v. Armenia* (CCPR/C/85/D/1056/2002), para. 6.4.

failed to substantiate his claim that the fact that he did not receive detailed information on the charges against him at the time of his arrest violated his right to raise evidence at the appropriate stage of the proceedings. Accordingly, it finds the author's claims under article 14 (3) (a) of the Covenant inadmissible pursuant to article 2 of the Optional Protocol.

7.12 The Committee notes the author's allegations concerning the violation of article 15 (1) of the Covenant, according to which, at his criminal trial, not all elements of the offence were proved, in particular the element of taking up residence on the property, and that the domestic courts merely inferred the presence of that element on the basis of bias (see paras. 3.6 and 3.7). The Committee also notes the author's contention that article 15 (1) of the Covenant requires criminal law to be interpreted narrowly and that the accused must have acted exactly as described in the law, with no ambiguity as to which offence has been committed. The Committee takes note of the State party's argument that the author was tried and convicted for violating article 142 of the Criminal Code, which was in force at the time the offence was committed, and that there was thus no violation of the principle of legality (see para. 4.6). The Committee further takes note of the State party's assertion that the law defines the offence of squatting on private property as instantaneous and continuous, and that it is for the national courts, and not for the Committee, to interpret specific elements of the criminal offence, unless there has been manifest arbitrariness (see para. 4.7). The Committee also observes that, according to the State party, all decisions taken during the criminal proceedings against the author have been duly substantiated and there are thus no grounds for concluding that they were arbitrary (see para. 4.3). The Committee notes that the allegations made under article 15 (1) of the Covenant relate essentially to the evaluation of facts and evidence by the Collegial Trial Court of Guairá and Caazapá and the Court of Appeal of Caazapá for civil, commercial, labour and criminal matters.

7.13 The Committee recalls its jurisprudence to the effect that it is incumbent on the courts of States parties to evaluate the facts and evidence in each case, or the application of domestic legislation, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice.⁴¹ The Committee has considered the information provided by the parties, in particular the decisions of the trial court, the appellate court and the Supreme Court acting as a court of cassation, and is of the opinion that these materials do not show that the criminal proceedings against the author were flawed. The Committee therefore finds that the author has failed to sufficiently substantiate his claim of a violation of article 15 (1) of the Covenant and that this claim is inadmissible under article 2 of the Optional Protocol.⁴²

7.14 With regard to the author's claim with respect to article 21 of the Covenant, the Committee finds that it has been sufficiently substantiated for the purposes of admissibility. Accordingly, it declares the communication admissible insofar as it raises issues under this article of the Covenant.

Consideration of the merits

8.1 The Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5 (1) of the Optional Protocol.

8.2 The Committee takes note of the author's claim that the imposition of a two-year ban on his participation in assemblies of more than three persons violates his rights under article 21 of the Covenant. It also takes note of his claim that the domestic courts restricted his right of peaceful assembly in an unnecessary and disproportionate manner by handing down an arbitrary conviction which does not conform to the standards set by the Committee, inasmuch as they imposed disproportionate, legally baseless restrictions upon him. The Committee notes the author's contention that the State party gave no reason why the restriction of his right of assembly was necessary in order to protect private property or why it was being imposed for such a long period of time; nor did it indicate what lawful and

⁴¹ See *Manzano and others v. Colombia* (CCPR/C/98/D/1616/2007), para. 6.4. and *L.D.L.P. v. Spain* (CCPR/C/102/D/1622/2007), para. 6.3.

⁴² See also *H.P.N. v. Spain* (CCPR/C/107/D/1943/2010), para. 7.9, and *X v. Spain* (CCPR/C/93/D/1456/2006), para. 8.3.

necessary purpose was served by suspending his right of assembly for two years (see paras. 3.8, 3.9 and 5.6). The Committee also notes the State party's contention that the right of association and demonstration is guaranteed by the Constitution provided that it is exercised peacefully and for lawful purposes, which is not what occurred in this case, and that the domestic courts were obliged to restore social harmony, bearing in mind that improper, unlawful or punishable methods may not be used, even in the defence of a community's interests (see para. 4.8). The Committee further notes the State party's claim that the domestic courts found that the restriction of the author's right of assembly was appropriate, proportionate and in conformity with national law (see paras. 4.3 and 6.3).

8.3 The Committee recalls that the right of peaceful assembly, as guaranteed under article 21 of the Covenant, is a fundamental human right that is essential for public expression of one's views and opinions and indispensable in a democratic society.⁴³ This right entails the possibility of organizing and participating in peaceful assemblies in order to express support for or disagreement with a particular cause,⁴⁴ including in enclosed premises, open areas or public or private spaces. The organizers of an assembly generally have the right to choose whom they wish to invite to participate and a location within sight and sound of their target audience, and no restriction of this right is permissible unless it is: (a) imposed in conformity with the law; and (b) necessary in a democratic society, in the interests of national security or public safety, public order, protection of public health or morals or protection of the rights and freedoms of others. When a State party imposes restrictions with the aim of reconciling an individual's right of assembly with the aforementioned interests of general concern, it should be guided by the objective of facilitating the right, rather than seeking unnecessary or disproportionate limitations to it. The State party is thus under an obligation to justify the limitation of the right protected by article 21 of the Covenant.⁴⁵

8.4 In the present case, the Committee notes that the decision of 6 October 2009 sentenced the author to a custodial term of two years and that the enforcement of the sentence in a penal institution was suspended on condition of compliance with certain restrictions, including a ban on attendance at assemblies of more than three persons for the duration of the sentence, which could be construed as a way of averting the author's imprisonment and helping to ensure that he did not reoffend. The Committee observes that the trial court held that "a social issue [...] does not warrant or justify squatting on private property" and that the act of trespassing, entering and remaining on such property constitutes a punishable offence. The Committee also observes that neither the appellate court nor the Supreme Court acting as a court of cassation expressed any view on the restriction of the author's right of peaceful assembly or on the grounds for its imposition.

8.5 The Committee likewise observes that, according to the State party, the right of assembly and demonstration is guaranteed by the Constitution but must be exercised peacefully and for lawful purposes, which was not the case in this instance, inasmuch as the author used community radio broadcasts to incite villagers of the Tava'i community to enter the property by force. The Committee also notes the State party's assertion that the domestic courts therefore had to take steps to restore peace and order. However, the Committee observes that the State party has not attempted to explain why such restrictions were necessary or to what extent they might be proportionate in relation to any of the legitimate purposes set out in the second sentence of article 21 of the Covenant, such as, for example, the protection of the property rights of the owner of the building that housed the hospital (see para. 4.8). Apart from indicating that improper, unlawful or punishable methods may not be used to exercise the right of assembly, the State party does not explain how, in practice, in the present case, the author's participation in an assembly of three or more persons could violate the rights and freedoms of others or pose a threat to the protection of public safety or public order, or public health or morals.⁴⁶ The Committee further notes, based on the material on file, that, in their decisions, the domestic authorities failed to demonstrate how the author's participation in an assembly of more than three

⁴³ See, for example, *Turchenyak v. Belarus* (CCPR/C/108/D/1948/2010), para. 7.4.

⁴⁴ See *Praded v. Belarus* (CCPR/C/112/D/2029/2011), para. 7.4.

⁴⁵ See, for example, *Turchenyak and others v. Belarus*, para. 7.4.

⁴⁶ See *Praded v. Belarus*, para. 7.8.

persons, regardless of the reason for such an assembly or the type of assembly involved, would necessarily jeopardize national security, public safety, public order or the protection of public health or morals or the rights and freedoms of others. Accordingly, the Committee finds that the State party's decision to prohibit, for two years, the author's participation in assemblies of more than three persons is unjustified and that this prohibition unduly restricts the right to freedom of assembly. In the light of the foregoing, the Committee finds that the State party has violated the author's right under article 21 of the Covenant.

9. The Committee, acting under article 5 (4) of the Optional Protocol to the Covenant, is of the view that the State party has violated the author's right under article 21 of the Covenant.

10. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including reimbursement of any legal costs incurred by the author in the context of the proceedings referred to in the present communication, together with compensation. The State party is also under an obligation to take steps to prevent similar violations in the future. In this regard, the Committee reiterates that the State party must take the necessary measures to ensure that the rights enshrined in article 21 of the Covenant may be fully enjoyed in the State party⁴⁷ and that the sentences handed down in the context of criminal proceedings do not entail a violation of the rights set out in article 21 of the Covenant.

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

⁴⁷ See, *inter alia*, *Turchenyak and others v. Belarus*, para. 9, and *Govsha, Syritsa and Mezyak v. Belarus* (CCPR/C/105/D/1790/2008), para. 11.