United Nations CCPR/C/122/D/2650/2015

International Covenant on Civil and Political Rights

Distr.: General
27 March 2024

Original: English

Human Rights Committee

Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2650/2015*, **

Communication submitted by:	S.T. (represented by counsel, Robert R. Amsterdam, Inga Dorothee Mecke and Juliya Arbisman)
Alleged victim:	The author
State party:	Austria
Date of communication:	20 July 2015 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 20 May 2015 (not issued in document form)
Date of adoption of decision:	6 April 2018
Subject matter:	Principle of legality in criminal proceedings
Procedural issues:	Examination of the same matter under another procedure of international investigation; exhaustion of domestic remedies; substantiation of claims
Substantive issues:	Act that did not constitute a criminal offence at the time it was committed; right to privacy; non-discrimination
Articles of the Covenant:	15, 17 and 26
Articles of the Optional Protocol:	2 and 5 (2) (a) (b)

1.1 The author of the communication is S.T., a national of Austria and Czechia born on 7 October 1960. He claims that the State party has violated his rights under articles 15, 17 and 26 of the Covenant. The Optional Protocol entered into force for the State party on 10 March 1988. The author is represented by counsel.

1.2 On 18 September 2015, pursuant to rule 94 of its rules of procedure, the Committee, acting through its Special Rapporteurs on new communications and interim measures, decided not to request the State party to take interim measures.

* Adopted by the Committee at its 122nd session (12 March–6 April 2018).

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

Factual background

2.1 On 28 February 2001, the Federal Act on the establishment of the General Settlement Fund for Victims of National Socialism and on restitution measures was published in the Federal Law Gazette. Under this Act, the Arbitration Panel for In Rem Restitution was set up to process claims by potential heirs and their descendants for the restitution of property, belongings and money that had been taken away from their owners between 1938 and 1945 and subsequently held by the State. The author submits that this Act was passed following the signature on 23 January 2001 of an agreement between Austria and the United States of America concerning the settlement of issues of compensation and restitution for victims of national socialism, wherein the State party had agreed to provide restitution as a moral acknowledgment of the wrongs done to Jewish people and others after the Anschluss.

2.2 On unspecified dates in 2003 and 2004, descendants of the grandparents of L.F. claimed the restitution of a property (sanatorium) in Vienna that L.F. had previously owned. In its decision No. 27/2005 of 15 November 2005, the Arbitration Panel recommended that the Federal Minister of Economy, Family and Youth Affairs return the property to nine descendants of L.F.'s grandparents. The author first learned of the opportunity to submit claims for in rem restitution concerning the property in November 2005. At that time, the application period defined by the law had ended nearly a year earlier. However, on 16 November 2005, the legislature in Austria adopted an act to extend the application period, and, on 14 December 2005, the deadline was postponed to 31 December 2006. The application period was later extended a final time, to 31 December 2007.

2.3 On 24 November 2005, the author submitted an application for in rem restitution to the Arbitration Panel on behalf of his mother, who is also a descendant of L.F.'s grandparents, concerning the property in question. With the written application, the author enclosed a document containing a genealogical tree, in which he depicted his mother as her parents' only daughter. The author subsequently met with the Panel on two occasions, and he was requested to apply using the Panel's application form. On 28 December 2005, the author submitted the official application form to the Panel. The author did not provide any information under the heading "Other possible heirs" on the form.

2.4 On 23 January 2006, the Arbitration Panel issued decision No. 27a/2006 regarding the application submitted by the author, supplementing its decision No. 27/2005 of 15 November 2005, to include the author's mother among the persons eligible to file an application for in rem restitution. The Panel later issued further decisions, in 2007 and 2008, in connection with the in rem restitution proceedings concerning the property in question. In the end, the Panel had found that 39 applicants were eligible for in rem restitution. Subsequently, the Minister instructed the Federal Real Estate Corporation to transfer ownership of the property to the group of persons who were found by the Panel to be eligible. On an unspecified date, in accordance with the Panel's decisions, the Minister provided the author's mother with a one-twelfth portion of the property. The author's mother sold her portion for €1.1 million.

2.5 The author's aunt (his mother's sister) was made aware of the in rem restitution of the property only upon being informed by a third party in December 2011. The aunt submitted an application for in rem restitution on 10 January 2012. On 26 January 2012, the Arbitration Panel issued decision No. 27d/2012, in which it stated that it had first learned of the aunt's existence when she had submitted her application, that, like the author's mother, the aunt was an eligible heir and that, however, the aunt's application was to be rejected owing to the fact that it had been submitted after the deadline of 31 December 2007.

2.6 On an unspecified date, the author's aunt submitted a criminal complaint to the Vienna Public Prosecutor's Office against the author. On 3 or 13 January 2013, the author was indicted for allegedly defrauding the State party between 24 November 2005 and 28 December 2005 with the intention of unlawfully enriching himself and his mother.

2.7 On 25 April 2013, the Vienna Regional Criminal Court found the author guilty of serious fraud under sections 146 and 147 (3) of the Criminal Code and sentenced him to three years' imprisonment. The Court considered it proven that the author had deliberately concealed the existence of his aunt in his applications to the Arbitration Panel of 24 November and 28 December 2005, including in the genealogical tree submitted by him,

that, when asked by the members of the Panel during the meeting at its offices on 1 December 2005, the author had, in order to enlarge the share of the property attributed to his mother, denied that his mother had any siblings and that the author's concealment of the existence of his aunt had enriched the author and his mother, because it had meant that his mother's share came to one twelfth and not to one twenty-fourth, as would have been the case if the existence of his aunt, whose eligibility was equal to that of his mother, had been known. The Court noted that there were indications that the author was very likely concerned with generating as much revenue as possible by filing claims under the General Settlement Fund Act, given that he had, in addition to the application submitted in December 2005, submitted other applications for in rem restitution or for the reopening of a procedure in connection with the property at issue. The Court considered that those applications and the author's extensive activity related to the case contradicted his defence that he had submitted the application as quickly as possible and without any further consideration in 2005 in order to preserve his mother's claims. Against that background, the Court concluded, inter alia, that the author had deliberately deceived the Panel by falsely maintaining that there had been only one child in each generation, that it was only as a result of that that the members of the Panel had not notified the author's aunt and that the Federal Real Estate Corporation had been the first to suffer a loss, owing to the false calculation of the share attributed to the author's mother as one twelfth instead of one twenty-fourth, a difference of approximately €550,000.

2.8 On 19 July 2013, the author filed a nullity appeal and an appeal on the facts before the Supreme Court. He claimed, inter alia, that a witness had provided biased evidence because she had been present in the courtroom prior to her testimony and had been influenced by the testimony of the witness before her, as evidenced by the similarity of their statements, that he had not been afforded a proper defence, given the court's refusal to grant access to the files of other cases held by the Arbitration Panel, which he claimed would have proved that it was not standard procedure to contact other eligible heirs, and that the examination of a crucial witness, the notary who had assisted in compiling the genealogical tree had not been admitted by the Court. He also alleged that the legal elements of the offence had not been satisfied. He claimed that he did not have a legal obligation to name other eligible heirs and could not have committed the offence through a mere omission. Moreover, the relevant parties in the matter should have been his aunt and his mother.

2.9 On 22 January 2014, the Supreme Court dismissed the author's nullity appeal. However, the author's appeal against the sentence was successful, and the Supreme Court referred the matter of sentencing back to the Vienna Regional Criminal Court. The Supreme Court held that the grounds raised by the author were insufficient to establish significant issues relating to the question of guilt and that it did not deem the Criminal Court's consideration of evidence to be contradictory or incomplete. In addition, the Supreme Court noted that the author's conviction was based not merely on omissions, but also on positive actions such as providing an incorrect genealogical tree, giving false information orally and submitting an incomplete application form.

2.10 The author claims that, between 1 April 2014 and 14 November 2014, various representatives of the State party, including the Deputy Head of Mission at the Austrian Embassy in Berlin and officials from the press department of the Federal Ministry for European and International Affairs, made statements regarding the outcome of the judicial proceedings against the author. The author maintains that each of those statements was an attempt to show that he had deliberately caused suffering to his aunt.

2.11 On 6 June 2014, in accordance with the Supreme Court's decision of 22 January 2014 (see para. 2.9 above), the Vienna Regional Criminal Court amended the author's original sentence insofar as it suspended two years of the sentence subject to the imposition of a probationary period of three years.

2.12 On 27 October 2014, the author filed an application with the European Court of Human Rights claiming violations of articles 6, 7 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). On the same day, the author asked the Office of the Procurator General to reopen his case pursuant to sections 23 (1), 362 (1) and (2) and 363a of the Criminal Procedure Code. The author claimed that the decision of the Vienna Regional Criminal Court, in which he was found guilty and convicted, manifested errors of law and of fact. On 30 December 2014, the

Procurator General rejected the author's request to reopen his case. According to the author, the Procurator General stated that, according to settled case law and existing scholarly views, it was impossible to pursue such an action and that his claims of violations of his human rights had already been substantially reviewed by the Supreme Court.

2.13 On 5 January 2015, the European Court of Human Rights, sitting in a single-judge formation, declared the author's application inadmissible, given that it did not meet the requirements set out in articles 34 and 35 of the European Convention on Human Rights.

2.14 On 2 February 2015, the author responded to the rejection of the Procurator General, before the Procurator General himself, by asserting that two new and crucial facts had arisen since his conviction: (a) on 5 December 2014, the author's aunt had filed a claim against the author with the Vienna Regional Civil Court as the victim in the present matter, alleging damages in the amount of €550,000;[1] and (b) in the period from 1 April 2014 to 14 November 2014, various representatives of the State party had publicly declared that the victim was the author's aunt, and not the State party (see para. 2.10 above). The author also contested the assertion of the Procurator General that the Supreme Court had already substantially reviewed the author's allegations of violations of his human rights.

2.15 On 7 May 2015, the Procurator General again rejected the author's application, stating that the author had not sufficiently established that there had been an error in the Supreme Court's decision.

2.16 The author claims that he has exhausted all domestic remedies. He also submits that, although he filed an application with the European Court of Human Rights, the Court declared the application inadmissible without providing sufficient reasoning to allow the Committee to assess whether it had examined his application in the sense of article 5 (2) (a) of the Optional Protocol. Against this background, the author asserts that his communication meets the admissibility requirement established by that provision.

Complaint

3.1 The author claims that the State party has violated his rights under articles 15, 17 and 26 of the Covenant.

3.2 The author submits that the omission to mention his aunt in his application for restitution was not a crime in Austria and that, therefore, his right under article 15 of the Covenant has been violated, given that his actions did not constitute a criminal offence at the time of the events. According to the Criminal Code, in order to establish the crime of serious fraud, three elements must be proved: (a) that there was intent by the accused person or persons to unlawfully enrich themselves or a third party; (b) that deception was involved; and (c) that such deception has caused property damage to the accused or to another person. However, in the author's case, the intent element was not proved during the judicial proceedings. The court wrongly established that he was motivated by an intent to unlawfully enrich himself by obtaining the highest possible sum of money in connection with the in rem restitution of the property. The author submits that intent is a subjective element, which is particular to the individual concerned. Nevertheless, the court, in its assessment, relied on objective elements such as the fact that he had submitted additional applications on 26 February and 26 June 2007 for another property, disregarding his statement that he had failed to name his aunt in the application because of the approaching deadline. In addition, during the judicial proceedings, it was not demonstrated that he had deceived the Arbitration Panel, given that his conduct could not logically have misled the Panel to recommend the restitution of the property, leading to the transfer of the property to the heirs, including the author's mother, nor was it shown that the Panel's decision had caused damage to any person or entity, including the State (Federal Real Estate Corporation). In this regard, the author submits that, according to the Panel, in its decision No. 27/2005 of 15 November 2005, the property had been unlawfully seized by the State party and should therefore be returned to the rightful heirs, the court wrongly assumed that the State would have been the beneficiary of the shares of potentially eligible applicants who did not claim restitution of the property

[1] On 30 June 2015, the author was ordered by the Vienna Regional Criminal Court to pay his aunt €550,000. This decision was affirmed by the Supreme Court on 27 January 2016.

within the deadline and senior officials made public declarations stating that the State could not be considered the victim in the case.

3.3 The author submits that his rights under article 17 of the Covenant have been breached by the State party. Following the Supreme Court's decision of 22 January 2014, various representatives of the State party made statements to the public concerning the Court's decision, which the author claims amounted to attacks on his honour and reputation (see para. 2.10 above). The State representatives suggested that he had deliberately caused suffering to his aunt, even though the Court had found that the State, and not his aunt, was the victim of the offence. In the circumstances, the author submits that the statements might have influenced the sentencing decision of 6 June 2014 of the Vienna Regional Criminal Court.

3.4 The author submits that the State party violated his rights under article 26 of the Covenant, given that he was discriminated against by the State party on grounds of his religion and origin, being Jewish. He claims that his reputation as an outspoken critic of the State party's relationship with Jews and of the restitution efforts, and the fact that he is co-writer of a popular and controversial book entitled *Unser Wien: "Arisierung" auf österreichisch* (Our Vienna: "Aryanization" Austrian-style), – in which he detailed the buildings in Vienna that had been stolen and "Aryanized", were central factors in his prosecution. The Prosecutor failed to conduct a proper investigation before issuing an indictment and was unable to show that the author owed any responsibility to his aunt or the State party. In addition, the author claims that the courts' findings that his intent had been to commit fraud were based on discriminatory and stereotypical perceptions of Jewish people as supposedly greedy individuals. The author argues that the courts' repeated statements that he was trying to "make as much money for himself as possible" and the emphasis on the multiple applications that were filed raise issues of potential bias on the part of the courts.

State party's observations on admissibility and the merits

4.1 On 23 November 2015 and 14 April 2016, the State party submitted its observations on admissibility and the merits of the communication. The State party maintains that the communication should be considered inadmissible pursuant to article 5 (2) (a) and (b) of the Optional Protocol. It also submits that the author's allegations of violations of his rights under articles 15, 17 and 26 of the Covenant have not been substantiated. Any finding by the Committee that the communication was admissible would not disclose a violation of the rights established in the Covenant.

4.2 As to the facts of the case, the State party emphasizes that the author's presentation of the facts was substantively inaccurate, given that his conviction was based not merely on an omission, but also on positive actions that he took to defraud the State, namely, submitting an inaccurate genealogical tree and making inaccurate representations as to the number of children per generation within his family.

4.3 The State party provides a detailed description of the facts of the case and background information on the General Settlement Fund Act. The State party informs the Committee that, on 5 October 2015, the author began the unconditional part (one year) of the prison sentence handed down to him, that he was serving that sentence in Simmering Correctional Facility in Vienna, that he was allowed to leave the facility to pursue employment during the day and that, in accordance with the decision of the Vienna Regional Criminal Court of 16 March 2016, he would be conditionally released on 5 June 2016.

4.4 The State party recalls that it ratified the Optional Protocol with a reservation concerning article 5 (2)[2] and maintains that the present communication is inadmissible

[2] The State party's instrument of ratification contains the following reservation: "The Republic of Austria ratifies the Optional Protocol to the International Covenant on Civil and Political Rights on the understanding that, further to the provisions of article 5 (2) of the Protocol, the Committee provided for in article 28 of the Covenant shall not consider any communication from an individual unless it has been ascertained that the same matter has not been examined by the European Commission on Human Rights established by the … Convention for the Protection of Human Rights and Fundamental Freedoms."

because the same matter has already been examined by the European Court of Human Rights.[3] The communication submitted to the Committee involved the same author, the same facts and the same rights as the application previously decided upon by the Court.[4] Given that the inadmissibility decision of the Court was taken in the light of all the material in its possession and pursuant to articles 34 and 35 of the European Convention on Human Rights, it should be concluded that its examination was not solely based on procedural grounds. In this connection, the State party notes that article 35 (3) of the European Convention on Human Rights entails an examination that goes beyond purely procedural criteria of admissibility. Referring to *Achabal Puertas v. Spain*,[5] the State party maintains that its reservation to article 5 (2) of the Optional Protocol is broader than the reservation introduced by Spain to the same provision of the Optional Protocol.[6] In accordance with the State party's reservation, all decisions of the European Court of Human Rights render inadmissible any communication submitted to the Committee concerning the same matter.

4.5 The communication is inadmissible pursuant to article 5 (2) (b) of the Optional Protocol, given that the author has failed to exhaust all domestic remedies. The author had the option of submitting a motion to the Supreme Court to reopen the criminal proceedings pursuant to section 363a of the Criminal Procedure Code, article 7 of the Federal Constitutional Act and articles 6, 7 and 14 of the European Convention on Human Rights, which fully correspond to the invoked articles 15 and 26 of the Covenant. According to the case law of the Supreme Court,[7] an alleged violation of the rights enshrined in the European Convention on Human Rights and of other fundamental rights not protected by that Convention may be brought in criminal proceedings even in cases where the European Court of Human Rights has not issued a decision. Such a motion should be filed within six months of the final domestic judicial decision. The State party notes that, in *ATV Privatfernseh-GmbH v. Austria*, the European Court of Human Rights confirmed that motions to reopen criminal proceedings pursuant to section 363a of the Criminal Procedure Code constituted an effective remedy.[8] In addition, pursuant to section 212 of the Criminal Procedure Code, the author could have raised an objection to the indictment in the criminal proceedings and argued that the act of which he was accused was not punishable, but he failed to do so.

4.6 The State party submits that the author failed to assert, in particular in his nullity appeal of 19 July 2013 and in his appeal before the Supreme Court, that the act of which he was accused was not a punishable act, that the bodies involved in the criminal proceedings were biased or that such bodies should have been excluded from the proceedings owing to their prejudices on the basis of the author's religion and to their previous declarations regarding the author, in particular in relation to his religion and his publishing activities. The author, in the above-mentioned appeals, also did not refer to his allegations regarding the antisemitic attitude of the judicial authorities, the hidden motivation of the public prosecutor or the courts' attitude towards him.

4.7 Regarding the alleged violation of article 17 of the Covenant, the State party indicates that the author had access to a number of legal remedies in order to have his complaint examined, including in relation to the public statements made by representatives of the State party. He could have filed a private lawsuit and a suit for damages. He also could have demanded a public retraction or could have used the opportunity to publish a reply.

[3] The State party refers to two communications considered by the Committee: *Althammer et al. v. Austria* (CCPR/C/78/D/998/2001), para. 8.3; and *Kollar v. Austria* (CCPR/C/78/D/989/2001), para. 8.3.

[4] *Althammer et al. v. Austria*, para. 8.4.

[5] *Achabal Puertas v. Spain* (CCPR/C/107/D/1945/2010).

[6] The State party refers to the reservation of Spain, according to which it acceded to the Optional Protocol "on the understanding that the provisions of article 5 (2) of that Protocol mean that the Human Rights Committee shall not consider any communication from an individual unless it has ascertained that the same matter has not been or is not being examined under another procedure of international investigation or settlement".

[7] The State party refers to the decision of the Supreme Court in case No. 13 Os 135/06m, 1 August 2007.

[8] European Court of Human Rights, *ATV Privatfernseh-GmbH v. Austria*, application No. 58842/09, Decision, 6 October 2015, paras. 32–37.

4.8 The State party maintains that the conviction of and sentence imposed on the author by the Vienna Regional Criminal Court did not violate his rights under article 15 of the Covenant. Within the judicial proceedings, and after conducting an investigation, the Court and the Supreme Court considered proved all the elements of the crime of serious fraud established in article 146 of the Criminal Code. In this connection, the State party points out that both courts came to the conclusion that, by submitting an inaccurate genealogical tree, by explicitly denying the existence of descendants other than his mother, by failing to submit the certificate of inheritance and by deliberately omitting information on the application form, the author had acted with the intentions of deceit and enrichment. The fact that the courts, after an assessment of the evidence, did not arrive at the conclusion desired by the author does not constitute a violation of article 15 of the Covenant.

4.9 The State party points out that the author did not deny that he omitted the information about his aunt, but he argued that he could not have deceived the Arbitration Panel. Likewise, he did not deny that a loss arose for another party, owing to the larger share attributed to his mother, but asserted that the State could not be damaged as a result of his behaviour.

4.10 With regard to the author's claims under article 17 of the Covenant, the State party notes that the arguments and legal assessment of the Vienna Regional Criminal Court and the Supreme Court were based solely on the findings of essential facts in the case and their assessment with regard to the act of which the author was accused. The statements made by State officials occurred after the criminal conviction of the author had become legally enforceable. They were made in response to public statements made by the author and to media coverage of the criminal proceedings. The content of most of the statements was intended to restore clarity and accuracy in media reports and was based solely on the content of the legally enforceable criminal conviction.

4.11 The author's rights under article 26 of the Covenant were not violated by the decisions of the courts of the State party. The criminal proceedings were triggered by a criminal complaint lodged by his aunt, and the Public Prosecutor's Office was therefore obliged to investigate the complaint. There is no indication whatsoever that the courts were biased or partial in their decisions. The verdicts handed down by the Vienna Regional Criminal Court and Supreme Court contain not even the slightest indication that the author's origins or religion played a role in the courts' decisions. On the contrary, the Criminal Court informed the author about the mitigating effect of any efforts to reduce or compensate for the damage in the form of a settlement with his aunt, approved the author's request for an extension in order to prepare his plea of nullity and appeal and ultimately amended the three-year term of imprisonment to which he had been sentenced insofar as it suspended two years of the sentence subject to the imposition of a probationary period of three years.

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

5.1 On 20 January and 22 August 2016, the author submitted his comments on the State party's observations on admissibility and the merits of the communication. The author reiterates his allegations of violations of his rights under articles 15, 17 and 26 of the Covenant and submits that his communication meets the admissibility requirements under the Optional Protocol.

5.2 Regarding the admissibility requirement set out in article 5 (2) (a) of the Optional Protocol, the author reiterates that the European Court of Human Rights declared his application inadmissible without providing sufficient reasoning to allow the Committee to assess whether its examination of his application had gone beyond purely procedural matters. The State party's inference that his application was declared inadmissible by the European Court of Human Rights as manifestly ill-founded is not based on the facts. Article 35 of the European Convention on Human Rights contains more than five possible grounds for admissibility and, in the absence of more detailed reasoning by the European Court of Human Rights, it is impossible to determine whether it examined his application so as to preclude the Committee, under article 5 (2) (a) of the Optional Protocol, from considering the present communication.

5.3 The author maintains that all domestic remedies have been exhausted. He has used all effective remedies available to him under domestic criminal law, namely, his appeal to the

Vienna Regional Criminal Court based on the facts of his conviction and the extraordinary remedy of a nullity appeal to the Supreme Court against the decision of 25 April 2013 of the Vienna Regional Criminal Court. Moreover, on 27 October 2014, he tried to use the remedy provided for in section 363a of the Criminal Procedure Code (see para. 2.12 above) but the Procurator General rejected his application on 30 December 2014, stating that only "new and crucial" facts would render the application permissible. In his letter to the Procurator General dated 2 February 2015, the author added further information in order to reinforce his application to reopen the criminal proceedings, but his request was rejected for a second time in a response dated 7 May 2015, and received on 22 May 2015, indicating that it was impossible to reopen the criminal proceedings because the Supreme Court had already "substantially examined" the facts.

5.4 The author notes that a motion to reopen proceedings pursuant to section 363a of the Criminal Procedure Code is subsidiary and cannot be considered an effective remedy in his case, given that the Supreme Court had already addressed with the matter when it had examined and rejected his nullity appeal and appeal on the facts. Given that the Supreme Court does not re-examine the same matter with the same facts, a further motion to reopen criminal proceedings pursuant to section 363a would have not been effective. In this connection, his case is significantly different from *ATV Privatfernseh-GmbH v. Austria*, in which the Supreme Court had not previously examined the matter, because the law does not provide for the possibility of a plea of nullity to the Supreme Court in such cases.

5.5 Regarding the author's claim under article 17 of the Covenant and the possibility of filing a lawsuit against the persons who allegedly defamed him, the author submits that it would have been an inadequate and ineffective remedy because he would have had to bring at least 10 separate lawsuits against representatives of the State party, many of whom would have held immunity from such claims, and he would have had to do so while the court was deliberating on his sentence. According to the author, the prospect of success in such an environment would be very low.

5.6 The author submits that he was convicted on the basis of the assumption that he had caused damages by his failure to disclose the existence of his aunt, who was consequently not informed of the possibility of applying for restitution from the General Settlement Fund. He reiterates that it was not his role to do so, that the Fund did not inform all other potential heirs of the possibility of applying for restitution regarding properties transferred to the State party between 1938 and 1945, and that there was no legal obligation to mention his aunt in the application form. Moreover, in December 2015, his lawyers consulted his mother's restitution files at the Fund and found that the author had already mentioned his aunt six times in a restitution application to the International Commission on Holocaust Era Insurance Claims, which was transferred to the Fund on 28 November 2003. The Fund was therefore aware of the existence of his aunt. Despite being aware of the existence of another potential heir for the property in question, the Fund did not reach out to her. Against this background, the author claims that the main reason given for his conviction had no basis in reality, because he could not possibly have deceived the Arbitration Panel as to the existence of his aunt; her name was already in its files. This documentation also shows that he did not intend to conceal the existence of his aunt from the Fund. The verdict against him was based on incorrect evidence and false witness testimony and amounts to a manifest error and a denial of justice.

5.7 The author also argues that, in 2005, he could not have had, and did not have, any idea that by applying for restitution he would be held criminally liable for defrauding the State. Moreover, even if he had decided to attempt to prevent his aunt from learning of the opportunity by not including her, which he explicitly does not concede, it still does not follow that such action would have prevented the Arbitration Panel from being aware of her existence and thereby reaching out to her. The author further argues that two other individuals, who did hide the existence of heirs from the Panel, were not prosecuted or criminally sanctioned. The author points out that he has never confessed guilt, that the requirements of fraud have not been met and that, in any case, he should not have been found guilty of acts not constituting a criminal offence.

5.8 As to the public statements made by State officials, the author notes that, as one further example of the pattern of public falsehoods, the day before the sentencing court delivered its judgment, the General Settlement Fund broke its own rules by publishing information about

the author's case stating that there was an "obligation" to name other heirs, which the author considers to have been false, given that such an obligation is not established in legislation or case law.

5.9 The author contests the State party's observations that his allegations are not substantiated because the findings of the civil courts regarding his acts and omissions were the same as those of the criminal courts. The civil court judgments were wholly based on the criminal court judgments and took the criminal court verdict as being proven without further investigation.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The Committee observes that the author submitted an application relating to the same events to the European Court of Human Rights. He was informed that, on 5 January 2015, the Court, sitting in a single-judge formation, had declared the application inadmissible, given that, in the light of all the material in its possession and insofar as the matters concerned were within its competence, the Court had found that the admissibility criteria set out in articles 34 and 35 of the European Convention on Human Rights had not been met. The Committee recalls that, in ratifying the Optional Protocol, the State party introduced a reservation precluding the Committee from considering communications relating to matters that have previously been examined by the European Commission of Human Rights. The Committee also recalls that, for the purposes of ascertaining that the same matter is not being examined under another procedure of international investigation or settlement, the European Court of Human Rights replaced the former European Commission of Human Rights, upon the entry into force of Protocol No. 11 to the European Convention on Human Rights. Consequently, the State party's reservation applies also to communications where the same matter has previously been examined by the European Court of Human Rights.[9]

6.3 The Committee recalls its case law relating to article 5 (2) (a) of the Optional Protocol, according to which, when the European Court of Human Rights bases a declaration of inadmissibility not solely on procedural grounds but also on reasons that include a certain consideration of the merits of a case, then the same matter should be deemed to have been examined within the meaning of the respective reservations to article 5 (2) (a) of the Optional Protocol.[10] It is therefore for the Committee to decide whether, in the present case, the European Court of Human Rights went beyond an examination of the purely formal criteria of admissibility.

6.4 The Committee takes note of the State party's argument that the European Court of Human Rights did not declare the author's application inadmissible on purely procedural grounds, given that it invoked article 35 of the European Convention on Human Rights in its decision. The Committee notes, however, that the Court, in its decision, did not set forth a justification for the finding of inadmissibility or clarify the grounds for its decision (see para. 2.13 above).[11] In the light of these specific circumstances, the Committee considers that it is not possible for it to determine with certainty that the case presented by the author has already been the subject of even limited consideration of the merits.[12] Accordingly, the Committee considers that it is not precluded from considering the present communication in accordance with article 5 (2) (a) of the Optional Protocol.

[9] *Kollar v. Austria*, para. 8.2; and *Mahabir v. Austria* (CCPR/C/82/D/944/2000), para. 8.2.

[10] *Rivera Fernández v. Spain* (CCPR/C/85/D/1396/2005), para. 6.2; *Mahabir v. Austria*, para. 8.3; *Linderholm v. Croatia* (CCPR/C/66/D/744/1997), para. 4.2; and *A.M. v. Denmark*, communication No. 121/1982, para. 6.

[11] *X v. Norway* (CCPR/C/115/D/2474/2014), para. 6.2; and *A.G.S. v. Spain* (CCPR/C/115/D/2626/2015), para. 4.2.

[12] *Mahabir v. Austria*, para. 8.3.

6.5 The Committee takes note of the author's allegations that his conviction and sentencing by the State party's courts constitute a violation of his rights under article 15 of the Covenant, given that his actions related to the request, on behalf of his mother, for restitution of a property did not constitute a criminal offence at the time of the events. The Committee notes that the Vienna Regional Criminal Court found the author guilty of the crime of serious fraud under sections 146 and 147 (3) of the Criminal Code (see para. 2.7 above). The Supreme Court subsequently confirmed that decision (para. 2.9). The author did not submit, either to the Committee or during the domestic judicial proceedings, that that offence did not exist at the time of the events. Rather, he mainly focused on the acceptance and evaluation of the evidence produced during the judicial proceedings, claiming that the legal elements of the offence of serious fraud had not been satisfied (para. 2.8). The Committee recalls its jurisprudence according to which it is generally for the courts of States parties to evaluate 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.[13] The Committee has studied the materials submitted by both the author (para. 3.2) and the State party (paras. 4.2, 4.6, 4.8 and 4.9), including the translation into English of the decision of the Criminal Court of 25 April 2013. The Committee is of the opinion that the materials submitted do not indicate that the criminal proceedings against the author were flawed as alleged. The Committee therefore finds that the author has failed to substantiate sufficiently, for the purposes of admissibility, his claims under article 15 of the Covenant and concludes that they are inadmissible under article 2 of the Optional Protocol.

6.6 The Committee takes note of the author's allegations that the criminal trial against him and the public statements made by State officials constituted a violation of his rights under article 17 of the Covenant (see para. 3.3 above). The Committee observes that the State officials' statements mainly referred to the author's case, the position of the Procurator General and the judicial authorities' decision and that they were made after the Vienna Regional Criminal Court had issued its judgment whereby the author was found guilty (paras. 2.10 and 4.10). The Committee therefore considers that the author has failed to substantiate, for the purposes of admissibility, his claim that the judicial proceedings against him, including his conviction, and the statements made by State officials in that regard, constituted an arbitrary or unlawful attack on his honour or reputation. Accordingly, the author's claim under article 17 is inadmissible under article 2 of the Optional Protocol.

6.7 The Committee also takes note of the author's allegation that the State party violated his rights under article 26 of the Covenant, given that he was discriminated against by the State party on grounds of his religion and origin, being Jewish. In this connection, the author claims that his reputation as an outspoken critic of the State party's relationship with Jews was a central factor in his prosecution and that the courts' findings were based on discriminatory and stereotypical perceptions of Jewish people as supposedly greedy individuals (see para. 3.4 above). Taking into account the State party's observations (paras. 4.6 and 4.11) and having studied the material provided by the parties, the Committee considers that the author has failed to substantiate his allegations, for the purposes of admissibility, and concludes that his claim under article 26 is therefore inadmissible under article 2 of the Optional Protocol.

7. The Committee therefore decides:

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

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

[13] *Manzano et al. v. Colombia* (CCPR/C/98/D/1616/2007), para. 6.4; *L.D.L.P. v. Spain* (CCPR/C/102/D/1622/2007), para. 6.3; and *Quiroga Mendoza and Aranda Granados v. Plurinational State of Bolivia* (CCPR/C/120/D/2491/2014), para. 9.9.