



International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3828/2020*, **

<i>Communication submitted by:</i>	Oly Ilunga Kalenga (represented by counsel, Kabeya Muana Kalala and Bernard Maingain)
<i>Alleged victim:</i>	The author
<i>State Party:</i>	Democratic Republic of the Congo
<i>Date of communication:</i>	13 September 2020 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State Party on 19 October 2020 (not issued in document form)
<i>Date of adoption of Views:</i>	9 July 2025
<i>Subject matter:</i>	Criminal conviction of a minister, handed down in sole instance by a court of cassation
<i>Procedural issues:</i>	Exhaustion of domestic remedies; substantiation of claims; competence <i>ratione materiae</i>
<i>Substantive issues:</i>	Access to a court; arbitrary arrest or detention; discrimination; right of appeal; rights of accused or convicted persons; effective remedy
<i>Articles of the Covenant:</i>	9, 14 (1) and (5) and 26
<i>Articles of the Optional Protocol:</i>	2, 3 and 5 (2) (b)

1. The author of the communication is Oly Ilunga Kalenga, a national of the Democratic Republic of the Congo born in 1960. He claims that the State Party has violated his rights under articles 9, 14 (1) and (5) and 26 of the Covenant. The Optional Protocol entered into force for the State Party on 1 February 1977. The author is represented by counsel.

Facts as submitted by the author

2.1 The author is a doctor in the Democratic Republic of the Congo, where he was formerly Minister of Public Health (2016–2019). After being arrested at his residence in the

* Adopted by the Committee at its 144th session (23 June–17 July 2025).

** The following members of the Committee participated in the examination of the communication: Wafaa Ashraf Moharram Bassim, Rodrigo A. Carazo, Yvonne Donders, Carlos Ramón Fernández Liesa, Laurence R. Helfer, Konstantin Korkelia, Dalia Leinarte, Bacre Waly Ndiaye, Hernán Quezada Cabrera, Akmal Saidov, Ivan Šimonović, Soh Changrok, Teraya Koji, Hélène Tigroudja and Imeru Tamerat Yigezu.



course of an investigation into misappropriation of public funds between December 2018 and June 2019, he was held in police custody from 14 to 17 September 2019 on the basis that he intended to flee to the Republic of the Congo.

2.2 On 17 September 2019, the author was placed under house arrest. He remained at home for more than seven months, until a judgment was handed down in his case (see para. 2.4 below), without having been brought before a judge.

2.3 On 19 December 2019, the author was summoned to appear before the Court of Cassation, sitting as a trial court, at a hearing scheduled for 30 December 2019.¹ The summons contained seven charges against the author. The case was referred directly to the Court of Cassation because the author had occupied the position of Minister of Public Health at the time of the events.

2.4 On 23 March 2020, the Court of Cassation, sitting as a trial court in sole instance, sentenced the author and his co-defendant to 5 years' hard labour (4 years for the misappropriation of US\$ 391,332 and 1 year for the misappropriation of US\$ 13,000). The Court also imposed a five-year suspension of their right to vote and stand for election and banned them from holding positions in the civil service or semi-public institutions.² The author, who had not appeared before the Court and had not been informed of the judgment, was incarcerated the same day.

2.5 On 25 March 2020, in a letter addressed to the chief prosecutor of the Court of Cassation, the author asked to be returned to house arrest. This request remains unanswered.

2.6 When the author attempted to appeal the judgment of the Court of Cassation, he realized that, under the legal system of the Democratic Republic of the Congo, any form of appeal was precluded. According to the third paragraph of article 153 of the Constitution, "the Court of Cassation shall try in sole instance offences committed by ... members of the Government other than the Prime Minister".

2.7 The author instructed a lawyer to lodge a cassational appeal, invoking the author's right to a second hearing and to protection against unlawful detention. On 28 April 2020, the appeal was received at the registry of the Court of Cassation. However, the following day, the author's counsel was summoned by the clerk of the Court of Cassation, who handed him the original copy of the appeal petition with the added handwritten note, "Received in error on 28 April 2020".

2.8 Following sentencing, the author was incarcerated at Kinshasa Prison and Rehabilitation Centre. He claims to have exhausted domestic remedies.

The complaint

3.1 The author claims that the State Party has violated his rights under articles 9, 14 (1) and (5) and 26 of the Covenant.

3.2 The author has not had access to any court where he might appeal against the judgement handed down in sole instance by the Court of Cassation. The lack of a second hearing constitutes a violation of article 14 (5) of the Covenant. According to the Committee, "although the legislation of the State Party provides that under some circumstances a person, by reason of his office, is to be judged by a higher tribunal than would ordinarily be the case, that circumstance cannot of itself detract from the right of an accused to have his conviction and sentence reviewed by a higher tribunal".³

3.3 With regard to articles 14 (1) and 26 of the Covenant, the impossibility for the author of appealing against his conviction has deprived him of his right to access to justice and to a fair trial without discrimination in comparison with any other person who is the subject of criminal proceedings.

¹ The author provides a copy of the summons dated 19 December 2019.

² The Court dismissed charges of misappropriation of other sums (US\$ 40,607, US\$ 175,800, US\$ 100,000, US\$ 8,794 and US\$ 5,000).

³ *Terrón v. Spain* (CCPR/C/82/D/1073/2002), para. 7.4.

3.4 Moreover, in violation of article 26 of the Covenant, the author was subjected to discriminatory treatment in that the prosecutor's office did not first refer his case to the National Assembly for a debate on lifting the immunity enjoyed by the author in the exercise of his duties as Minister of Public Health, as required by national law. All ministers enjoying immunity who are the subject of criminal proceedings and are sent for trial before the Court of Cassation should have their cases put to such a debate beforehand. Furthermore, only the author, as a minister, was deprived of his right to a second hearing and his right to lodge a cassational appeal.

3.5 The State Party also violated the author's rights under article 9 of the Covenant by subjecting him to arbitrary and unlawful detention. First, to justify his arrest and placement in custody in a criminal investigation police cell from 14 to 17 September 2019, the author was accused of wishing to flee to the Republic of the Congo, when there was no concrete evidence to substantiate this accusation. Then, from 17 September 2019, his freedom of movement was restricted and he was held under house arrest for more than six months (until 23 March 2020), without having been brought before a judge. Furthermore, on the day that the judgment was handed down, the author was taken to prison without having been notified of the judgment as required under article 28 of Organic Act No. 13/010 of 19 February 2013 concerning proceedings before the Court of Cassation, which provides that judgments of the Court of Cassation are to be notified to the parties and the chief prosecutor by the clerk of the Court. Lastly, the author's detention in prison violated the first paragraph of article 47 of the Act, which provides that the period granted for appeal and the lodging of an appeal have a suspensive effect on the execution of the decision with regard to all parties.

Lack of cooperation by the State Party

4. On 19 October 2020, 3 December 2021, 4 October 2022 and 14 February 2023, the Committee requested the State Party to submit its observations on the admissibility and merits of the communication. The Committee regrets that the State Party has failed to respond to any of these requests and to provide any information with regard to the admissibility or the merits of the author's allegations. It further observes that, by adhering to the Optional Protocol, a State Party to the Covenant recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation of any of the rights set forth in the Covenant (see Optional Protocol, preamble and art. 1). Implicit in the adherence of a State to the Optional Protocol is the undertaking to cooperate with the Committee in good faith so as to enable it to consider such communications and, after examination thereof, to forward its Views to the State Party and to the individual concerned (see Optional Protocol, art. 5 (1) and (4)).⁴ The Committee also recalls that article 4 (2) of the Optional Protocol obliges States Parties to examine in good faith all allegations brought against them and to make available to the Committee all the information at their disposal.⁵ In the absence of a reply from the State Party, due weight must be given to the author's allegations, to the extent that they have been properly substantiated.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

⁴ *Berezhnaya and Gershankova v. Belarus* (CCPR/C/140/D/3196/2018-CCPR/C/140/D/3209/2018), para. 6.3.

⁵ For example, *Nyengele et al v. Democratic Republic of the Congo* (CCPR/C/139/D/3658/2019), para. 4; and *Muteba v. Zaïre*, communication No. 124/1982, para. 11.

5.3 The Committee takes note of the author's claim that, as required by article 5 (2) (b) of the Optional Protocol, he availed himself of all effective and available domestic remedies before submitting the communication to the Committee.⁶ The Committee notes that on 25 March 2020, two days after his conviction, the author made a request to the chief prosecutor of the Court of Cassation to be returned to house arrest and claimed that he had not been notified of the Court's judgment. According to the author, the request remained unanswered.

5.4 Furthermore, the Committee notes that in April 2020 the author attempted to lodge an appeal against the conviction with the Court of Cassation. He invoked the following arguments: the right to have the decision to prosecute approved in a vote by an absolute majority of the National Assembly; the lack of reasoning of the judgment; and the failure to construe documents in accordance with their actual terms. He also invoked the right to a second hearing and the right to protection against unlawful detention. The Court of Cassation refused to accept the appeal petition and returned it to the author, stating that it had been received in error.

5.5 The Committee notes that, in its judgment, the Court of Cassation stated that it had jurisdiction to try in sole instance offences committed by members of the Government other than the Prime Minister, in accordance with article 153 (2) of the Constitution and article 93 (2) of Organic Act No. 13/011-B of 11 April 2013 on the organization, functioning and jurisdiction of the ordinary courts. The Committee notes that the author's conviction in sole instance is compliant with the aforementioned provisions, since it relates to events that occurred during his term as a member of the Government, namely Minister of Public Health. The operative part of the judgment reads as follows: "The Joint Chambers of the Court of Cassation, sitting as a trial court in sole instance ... rule that the commission by the defendants [the author and a co-defendant] of misappropriation of public funds in the sums of US\$ 40,607, US\$ 175,800, US\$ 100,000, US\$ 8,794 and US\$ 5,000 has not been established, but that the complicity of the defendants in the commission of the same offence in respect of the sums of US\$ 391,332 and US\$ 13,000 has been established."

5.6 In the absence of any cooperation from the State Party and, in particular, of information on domestic remedies that would have been effective and available in the present case, the Committee is of the view, in the light of the information contained in the preceding paragraph, that article 5 (2) (b) of the Optional Protocol does not constitute an obstacle to the admissibility of the complaint under article 14 (5) of the Covenant.⁷

5.7 On the other hand, with regard to the claim made under article 26 of the Covenant that the absence of a prior parliamentary debate on the author's ministerial immunity was discriminatory, the Committee notes that the author did not include in his appeal petition any argument based on the right to non-discrimination, nor did he attempt to raise this claim before any other body or authority. Nor, according to the information available to the Committee, did the author allege during the period of his house arrest that he was unable to appear before a judge, and he has not specified when he was notified of the judgment of the Court of Cassation. Although he mentioned the prohibition on unlawful detention in his appeal, the author did not develop this argument and did not raise the claims contained in paragraph 3.5. The Committee recalls that authors of communications must exercise due diligence in the pursuit of available remedies,⁸ that the effectiveness of a remedy does not depend upon the certainty of a favourable outcome for the author and that mere doubts about the effectiveness of a remedy do not absolve the author from the obligation to attempt to exhaust that remedy.⁹ The Committee thus finds these aspects of the communication, under articles 9 (1) and 26 of the Covenant, inadmissible pursuant to article 5 (2) (b) of the Optional Protocol.

5.8 The Committee takes note of the author's claim under article 14 (1) of the Covenant that he is the victim of a violation of his right of access to a court, for the reasons set out in paragraph 5.3 of the present Views. The Committee recalls that, according to its general

⁶ For example, *Gilberg v. Germany* (CCPR/C/87/D/1403/2005), para. 6.5.

⁷ See, for example, *Mulezi v. Democratic Republic of the Congo* (CCPR/C/81/D/962/2001), para. 4.3.

⁸ See, for example, *G.B. v. Türkiye* (CCPR/C/142/D/3592/2019), para. 9.3.

⁹ For example, *ibid.*; and *D.Č. v. Lithuania* (CCPR/C/134/D/3327/2019), para. 4.16.

comment No. 32 (2007), the right of equal access to a court, embodied in article 14 (1) of the Covenant, concerns access to first instance procedures and does not address the issue of the right to appeal or other remedies.¹⁰ Accordingly, the Committee finds that absence of a review of the facts of the case by a higher tribunal lies outside the scope of the protection of article 14 (1) of the Covenant and is therefore inadmissible *ratione materiae* under article 3 of the Optional Protocol.

5.9 The Committee is of the opinion that, for the purposes of admissibility, the author has sufficiently substantiated his other claim, under article 14 (5) of the Covenant. Accordingly, it declares the complaint admissible and proceeds with its consideration of the merits.

Consideration of the merits

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

6.2 The Committee notes that the State Party has not responded to the author's allegations and recalls its jurisprudence according to which the burden of proof should not rest solely on the author of a communication, especially given that the author and the State Party do not always have the same degree of access to evidence and that often only the State Party is in possession of the necessary information.¹¹

6.3 The Committee must determine whether the author's conviction in first instance by the Court of Cassation, with no possibility of review of the conviction and sentence, constitutes a violation of article 14 (5) of the Covenant. The Committee recalls that the aforementioned provision concerns anyone convicted of a crime and guarantees that his or her conviction and sentence will be reviewed by a higher tribunal according to law.¹² The expression "according to law" is not intended to leave the very existence of the right of review to the discretion of the States Parties.¹³

6.4 The Committee recalls that article 14 (5) of the Convention is violated not only if the decision by the court of first instance is final, but also where a conviction imposed by an appeal court or a court of final instance, following acquittal by a lower court, according to domestic law, cannot be reviewed by a higher court.¹⁴ Although the legislation of the State Party provides that under some circumstances a person, by reason of his or her office, is to be judged by a higher tribunal than would ordinarily be the case, that circumstance cannot of itself detract from the right of an accused to have his or her conviction and sentence reviewed by a higher tribunal;¹⁵ rather, such a system is incompatible with the Covenant, unless the State Party concerned has made a reservation to this effect.¹⁶ Consequently, since the author did not have the right to file an appeal against his conviction and the sentence handed down in sole instance by the Court of Cassation (see paras. 5.4 and 5.5 above), the Committee concludes that the State Party violated the author's rights under article 14 (5) of the Covenant.

7. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State Party of article 14 (5) of the Covenant.

8. Pursuant to article 2 (3) (a) of the Covenant, the State Party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. The Committee considers that, in this case, an effective remedy would consist in granting the author adequate compensation. The Committee also considers that the State Party should bring the relevant legal framework into

¹⁰ General comment No. 32 (2007), para. 12; and *X v. Latvia* (CCPR/C/136/D/3254/2018), para. 7.4.

¹¹ For example, *Nyengele et al v. Democratic Republic of the Congo*, para. 6.2.

¹² General comment No. 32 (2007), para. 45; *D.M. v. Serbia* (CCPR/C/131/D/2869/2016), para. 6.5; *Timmer v. Netherlands* (CCPR/C/111/D/2097/2011), para. 7.3; and *Terrón v. Spain*, para. 7.2.

¹³ General comment No. 32 (2007), para. 45; and *Garzón v. Spain* (CCPR/C/132/D/2844/2016), para. 5.12.

¹⁴ General comment No. 32 (2007), para. 47.

¹⁵ *Velásquez Echeverri v. Colombia* (CCPR/C/129/D/2931/2017), para. 9.4; and *Arias Leiva v. Colombia* (CCPR/C/123/D/2537/2015), para. 11.4.

¹⁶ *Garzón v. Spain*, para. 5.12.

conformity with the requirements of article 14 (5) of the Covenant. In addition, the State Party is under an obligation to prevent similar violations in the future.

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