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Eighty-sixth session
13-31 March 2006

VIEWS

Communication No. 1158/2003

Submitted by:	Mr. Aurel Blaga and Mrs. Lucia Blaga (represented by counsel)
Alleged victim:	The authors
State party:	Romania
Date of communication:	16 July 2002 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 5 February 2003 (not issued in document form) CCPR/C/78/D/1158/2003 — Decision on admissibility, adopted on 7 July 2003
Date of adoption of views:	30 March 2006

* Made public by decision of the Human Rights Committee.

Subject matter: Equality before the law

Procedural issues: Exhaustion of domestic remedies, admissibility *ratione temporis*

Substantive issues: Extraordinary appeal of final court judgement

Articles of the Covenant: 12, 14(1), 26

Articles of the Optional Protocol: 3, 5(2)(b)

On 30 March 2006, the Human Rights Committee adopted the annexed draft as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1158/2003. The text of the Views is appended to the present document.

[ANNEX]

ANNEX

VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

eighty-sixth session

concerning

Communication No. 1158/2003*

Submitted by:	Mr. Aurel Blaga and Mrs. Lucia Blaga (represented by counsel)
Alleged victim:	The authors
State party:	Romania
Date of communication:	16 July 2002 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 March 2006,

Having concluded its consideration of communication No. 1158/2003, submitted to the Human Rights Committee on behalf of Mr. Aurel Blaga and Mrs. Lucia Blaga the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication, dated 16 July 2002, are Aurel and Lucia Blaga, Romanian nationals born on 3 November 1930 and 2 December 1932, respectively, and residing in Bucharest. They claim to be victims of violations by Romania of articles 12, 14 and 26 of the Covenant. They are represented by counsel. The Covenant and the Optional Protocol, respectively, entered into force for Romania on 23 March 1976 and on 20 October 1993.

Factual background

2.1 In 1979, the authors acquired an apartment in Bucharest. In July 1988, they left Romania and settled abroad. As the authors did not return to Romania prior to expiry of their exit visa, the Bucharest municipality expropriated their property pursuant to its Resolution 1434/1989. The resolution was based upon Decree 223/1974, which provided that the State would gain ownership over buildings that belonged to persons who had left the country or had stayed abroad without permission. After the fall of the communist regime, Decree 223/1974 was repealed by the Statutory Order 9/1989, while property already transferred to the State remained unaffected.

2.2 On 27 May 1992, the authors applied to the Bucharest district court, seeking to quash Resolution 1434 and to order restitution of their property. On 8 July 1992 the court rejected their application and on 17 November 1992 their appeal was rejected by the Bucharest city court. On 24 January 1994, however, the Court of Appeal of Bucharest decided to order restitution of the authors' property because the expropriation ran counter to article 13 of the Universal Declaration of Human Rights on freedom of movement, and constituted "abusive regulation" rather than being for "public utility". No appeal was possible from this judgement. As a result, the Bucharest municipality entered a restitution order in the authors' favour. The authors state that on 22 May 1995 they concluded a contract with a third party for the sale of the apartment.

2.3 Following a decision by the Supreme Court in 1995 that the courts were not competent to rule on actions for recovery of expropriated buildings, the Procurator General filed appeals in the interest of law in a number of cases previously decided by the courts, including the authors' case. On 8 May 1996, the Supreme Court quashed the Court of Appeal's decision in the authors' case, holding it had exceeded its judicial competence and violated the principle of separation of powers.

2.4 As a result of this decision, the State sold the property to tenants pursuant to Act 112/1995. This statute provided that former owners of property could apply for restitution, and that if property was not restituted, it could be sold to State tenants. The authors state that they applied, pursuant to the same statute, for restitution of their property, but never received any reply to their application.

2.5 The authors state that the same matter has not been submitted for examination under any other procedure of international investigation or settlement. They argue that there is

no possibility of appeal or review of the Supreme Court's decision. They add that the judgements of the Court of Appeal as well as the Supreme Court occurred after the entry into force of the Optional Protocol for the State party. In particular, the Supreme Court's decision "reconfirmed" and lent fresh legal force in 1996 to the expropriation decided pursuant to the 1974 decree, and thus all of the issues complained of fall within the Committee's competence.

The complaint

3.1 The authors argue that the Supreme Court's decision, which restored to legal effect the expropriation resolution in the authors' case, violated articles 12 and 26 of the Covenant. Their expropriation, without compensation or justification, was designed to punish the authors for leaving the country, and thus amounted to an arbitrary and discriminatory measure, also in breach of article 26. The authors point out that the abusive nature of the expropriation measure is explicitly recognized in the preamble of the 1989 legislation abrogating the 1974 decree.

3.2 The authors claim a violation of article 14, paragraph 1. They point out that before 2003 the Procurator General could at any moment decide to take exceptional action against what was otherwise an irrevocable legal decision,[1] thus creating great legal uncertainty and depriving the authors of the fruits of their litigation. In addition, the ability of the Procurator General, not being a party to the initial case, to make such an application is an unfair intrusion into litigation that upsets the equality of arms between the parties, contrary to article 14. The authors refer to a decision of the European Court of Human Rights holding this mechanism to be contrary to article 6, paragraph 1, of the European Convention.[2]

3.3 The authors argue that when they applied to the domestic courts for resolution of the issue in question, the courts were the only bodies with competent jurisdiction to decide on these matters, which were, and remain, rights and obligations of a civil character. The Supreme Court's decision that the courts were not competent to adjudicate these disputes thus violated their right of access to court, contrary to article 14, paragraph 1. The authors point out that the European Court reached identical conclusions, in terms of the European Convention, in the case cited above.

3.4 As a result of the foregoing, the authors request the Committee to find violations of articles 12, 14 and 26 of the Covenant, to recommend to the State party to annul the Supreme Court's decision, and to allow effective restitution of their property by allowing either entry into possession, or "real and fair" compensation.

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[1] Article 330 of the Romanian Code of Civil Procedure.

[2] *Brumarescu v. Romania* (Application No. 28342/95; judgement of 28 October 1999), para. 62.

The State party's submissions on the admissibility

4.1 By submission of 7 April 2003, the State party argues that the communication is inadmissible for failure to exhaust domestic remedies as well as, for the claims under articles 12 and 26, *ratione temporis.* As to the exhaustion of domestic remedies, the State party observes that by decisions on 28 September 1998 and 20 November 2000, the Supreme Court reversed its practice. It held, in a manner binding all lower courts, that the courts were indeed competent to try actions for recovery of property expropriated by the State pursuant to the 1974 decree. Accordingly, it is open to the authors to file an action for recovery of property under article 480 of the Civil Code against the new owners of the property (being the former tenants of the apartment). The Court specifically recognized that such an action could plead inconsistency with an applicable international treaty as a ground for invalidity of the State's decision to expropriate.

4.2 The State party points out that the Supreme Court decision was not a judgement on the merits of the case, but rather determined, as a threshold question, that the courts did not have jurisdiction to rule on such issues. Accordingly, it cannot be said that the issues presented by the authors are *res judicata*, since the Supreme Court did not hand down a binding judgement on the merits of their case. In support, the State party refers to a 1954 decision of the (then) Supreme Tribunal to the effect that an adverse procedural decision is no bar to a new action addressing the merits of a case. The State party cites recent court decisions in cases identical to the authors', where this approach has been confirmed.

4.3 Under an action for recovery of property, the court analyses the competing titles of ownership to determine which party is "more characterized". Any person alleging a title can bring such an action. It is thus an effective, sufficient and available remedy, and failure to exhaust it renders the communication inadmissible.

4.4 The State party also points to a further measure in the form of Act 10/2001, which provides an administrative mechanism whereby property confiscated abusively under the former regime will either be redressed in kind, or by compensation of equivalent measure of value. Contracts by which the State disposed of the property are null and void, unless the buyer acted in good faith. The State party thus argues that even if an action for recovery of property was rejected, the administrative procedure would provide the possibility of equivalent compensation. The State party adds that the authors applied to the Bucharest municipality under this mechanism on 12 April 2001.

4.5 The State party requests the Committee to take notice of the fact that it has attempted to find various solutions for the redress of damage caused by the confiscations ordered by the communist regime.

4.6 On the *ratione temporis* issue, the State party refers to the Committee's jurisprudence that it does not have jurisdiction to consider allegations of violations occurring prior to the entry into force of the Optional Protocol for the State concerned, unless there is a continuing effect. The Committee has described the latter as "an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of the previous

violations of the State party".[3] Applying these principles, the State party observes that the 1974 decree was abrogated *ex nunc* (as to the future) by decree in 1989. *Ex tunc* (as to past effects), the courts are competent to rule on the legality of the acts in question when they occurred, and thus they are rendered devoid of any effects. As to article 12 issues, the State party's Constitution provided, at all relevant times since entry into force of the Optional Protocol for the State party, for full freedom of movement. Likewise, as to article 26, the State party points out that, contrary to the situation in other States, access to these remedies is non-discriminatory and not conditioned upon residence in, or citizenship of, the State party. As a result, the State party argues there are no continuing effects, and the claims under articles 12 and 26 are inadmissible *ratione temporis.*

Authors' comments on the State party's submissions

5.1 By letter of 6 May 2003, the authors reject the State party's reasoning on the admissibility of the communication, arguing that the fundamental issue is not whether they could bring a new action for recovery of property, but rather whether there is a remedy against the Supreme Court's decision in 1996 against which no further action lies. In any event, it would be "excessive" and contrary to the spirit of articles 2 and 5, paragraph 2, of the Optional Protocol for the authors to be required to institute fresh proceedings. Even if a further action were to be successful, the violations of their rights by the Supreme Court would not be extirpated. Further, while the State party proposes remedies for the recovery of property, the authors contend they are not addressing this issue (not being directly protected by the Covenant), but rather different issues arising under articles 12, 14 and 26. The State party has not shown how the remedies proposed would be adequate to remedy the violations of these rights suffered by them.

5.2 As to *ratione temporis* issues, the authors point out that, at a minimum, the article 14 claims are not affected by these arguments. However, in the authors' view, the Supreme Court's decision of 1996 represented a clear affirmation of the earlier expropriation, and thus itself constituted a violation of articles 12 and 26, sufficient to bring the claims within the Committee's jurisdiction. The authors point out that recent decisions of the State party's highest courts remain inconsistent as to the legal effect of expropriations carried out under the former regime. They further state that the administrative remedy under Act 10/2001 has been abolished by emergency ordinance no. 184/2002.

The Committee's admissibility decision

6.1 At its 78th session, the Committee considered the admissibility of the communication.

6.2 The Committee ascertained that the same matter was not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

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[3] *Simunek et al. v. Czech Republic, communication* No. 516/1992, Views adopted on 19 July 1995, paragraph 4.5.

6.3 As to the issue of exhaustion of domestic remedies, the Committee observed that, even assuming that the remedies proposed could offer full and effective satisfaction for the alleged violations, the authors first applied to the State party's courts in 1992 for a resolution of their claim. Given that the State party has apparently abrogated the administrative remedy which the authors had applied for in April 2001, the Committee would regard it as unreasonable to require the authors to pursue further judicial remedies, presently some eleven years after having first done so and litigating up to the hi ghest judicial instance. The Committee was thus not precluded, under article 5, paragraph 2(b) of the Optional Protocol, from considering the communication.

6.4 As to the arguments *ratione temporis* in respect of articles 12 and 26, the Committee observed that the effect of the Supreme Court's decision, in 1996, was that the expropriation of the authors' property remained legally valid. In the Committee's view, it could thus be argued that the decision confirmed and re-affirmed the validity of the earlier measures, bringing the claims within the competence of the Committee *ratione temporis.*

7. On 7 July 2003, the Human Rights Committee therefore decided that the communication was admissible.

State party's submission on the merits

8.1 On 5 January 2004 the State party reiterates that the authors' complaint refers to the non-restitution of confiscated property and is thus outside the scope of the Covenant. The State party moreover reiterates that effective remedies are available to the authors. The State party further objects to the authors' references to the jurisprudence of the European Court of Human Rights.

8.2 The State party further clarifies that the extraordinary appeal by the Procurator General was abolished in 2003 because it produced legal uncertainty. It further reiterates its objection *ratione temporis* to the authors' claims of a violation of articles 12 and 26 of the Covenant by the communist regime and states that the expropriation took place in July 1989, before the entry into force of the Optional Protocol for Romania. The State party explains that the administrative procedure allowing for compensation for expropriation was not repealed but will be applied through a special law which will establish criteria for establishing the value of the compensations.

8.3 With reference to the domestic legislation the State party asserts that the authors enjoy the right to freedom of movement. It further argues that the authors have not shown that they have been discriminated against during the process, and that all judgements have been rendered on the basis of existing evidence. The authors have at all times enjoyed access to justice, according to the procedural norms.

8.4 For the above reasons, the State party concludes that there has been no violation by Romania of articles 12, 14 and 26 of the Covenant.

Authors comments on the State party's submission

9.1 In their comments dated 3 February 2004 on the State party's submission, the authors observe that the State party is reiterating its arguments against the admissibility of the communication, without adducing any new elements. They claim that the acts of expropriation have continuing effects through the courts' decisions in their case, affirming the validity of the expropriation. As to the present status of the authors' apartment, it is said that the State has sold it to a third party at a very low price in December 1996 and that this sale was only possible because of the Supreme Court's 1996 decision.

9.2 On the merits, the authors argue that the expropriation of their property clearly was to punish them for not having returned to the country and thus in violation of the freedom of movement protected by article 12 of the Covenant, despite the fact that Romania at the time was already bound by the Covenant to which it became a party in 1976.

9.3 The authors moreover argue that since the measure of expropriation was taken only to punish those who had chosen to leave the country, it was also arbitrary and discriminatory, in violation of article 26, on ground of other status.

9.4 As far as article 14 of the Covenant is concerned, the authors argue that the power of the Procurator General at the time to bring an extraordinary appeal against the judgement restituting their property violated the right to equality before the court. By annulling an irrevocable judgement, the Supreme Court violated the principle of legal certainty and by deciding that the courts could not judge claims for expropriation, also breached their right of access to the courts. In reply to the State party's objection to the citing of the jurisprudence of the European Court of Human Rights, the authors state that they have referred to this jurisprudence since it relates to a similar case and since article 6 of the European Convention and article 14 of the Covenant are similar in nature.

Consideration of the merits

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

10.2 The authors' main claim relates to the reversal of the judgement in their case by the Supreme Court on 8 May 1996. In this respect, the Committee notes that it is undisputed that the Procurator General appealed the Court of Appeal judgement in the authors' case after it had become final and had been implemented. Following the Supreme Court's decision, the authors' property was again transferred to State ownership and subsequently sold by the State. The Committee considers that the principle of equality before the law entails that judgements, once they have become final, can no longer be appealed or reviewed, except in special circumstances when the interests of justice so require, and on a non-discriminatory basis. In the present case, no legitimate arguments have been adduced that could justify the annulment of the final judgement in the authors' case. The State party itself has acknowledged that the practice of extraordinary appeals by the Procurator

General led to legal insecurity and for these reasons has abolished the possibility of such appeals in 2003. The Committee concludes that the Procurator General's appeal in the authors' case and the subsequent 1996 judgment of the Supreme Court, which annulled the final judgement of the Court of Appeal, which had overturned the first instance judgment that discriminated against the authors on the basis of their residence abroad, constitutes a violation of the authors' rights under article 26 of the Covenant, read in conjunction with article 2, paragraph 3, of the Covenant.

10.3 In the light of the above finding, the Committee considers that it is not necessary to examine the authors' claims under articles 12 and 14 of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 26, read in conjunction with article 2, paragraph 3, of the International Covenant on Civil and Political Rights.

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including prompt restitution of their property or compensation therefor [French: … y inclus la prompte restitution de leur propriété ou une indemnisation conséquente].

13. 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 or not 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 and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]
